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**Commentary on the Draft Convention on Arbitral Procedure Adopted by the International
Law Commission at its Fifth Session, prepared by the Secretariat**

Topic:
Arbitral Procedure

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COMMENTARY
ON THE
DRAFT CONVENTION
ON ARBITRAL PROCEDURE

ADOPTED
BY THE INTERNATIONAL LAW COMMISSION
AT ITS FIFTH SESSION

Prepared by the Secretariat



UNITED NATIONS
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New York, 1955

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NOTE BY THE SECRETARIAT

At its fourth session, the International Law Commission prepared a "Draft on Arbitral Procedure" which, in accordance with the provisions of its Statute, was circulated to the Members of the United Nations for comment.¹ The Commission also instructed the Secretariat to submit at the following session a detailed commentary on the draft.²

In the light of the observations received from Governments the Commission at its fifth session reconsidered the draft and adopted a "Draft Convention on Arbitral Procedure" which it submitted to the General Assembly.³ The Commission stated in its report that it was greatly aided in its work by the detailed commentary (A/CN.4/L.40) prepared at its request by the Secretariat and expressed the wish that the commentary, after being duly revised and supplemented, should be published.⁴

The Secretariat accordingly revised and supplemented the commentary in the light of the decisions taken by the Commission at its fifth session. This revised commentary is published in the present volume.

In its report the Commission also stated that it would be desirable to add to the commentary a collection of more detailed and technical rules of procedure than those included in the draft convention.⁵ A systematic collection of such rules, selected from the rules of international courts and arbitral tribunals, is therefore included in this volume as an annex to the commentary.

While, in the course of the preparation of the commentary, the Secretariat had occasion to consult Professor Georges Scelle, Special Rapporteur of the Commission on the subject of arbitral procedure, and had the benefit of his advice, it should be pointed out that the Secretariat assumes entire responsibility for the document.

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

² *Ibid.*, para. 15.

³ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, chap. II.

⁴ *Ibid.*, para. 13.

⁵ *Ibid.*, para. 14.

**TABLE OF ABBREVIATIONS
AND CORRESPONDING CITATIONS**

<i>Am. J. Int. Law</i>	<i>American Journal of International Law.</i>
<i>Am. J. Int. Law, Supp.</i>	<i>American Journal of International Law, Supplement.</i>
Carlston	K. S. Carlston, <i>The Process of International Arbitration</i> (New York, 1946)
Clunet	<i>Journal du droit international</i> , fondé en 1874 par Edouard Clunet.
De Martens, <i>Recueil</i>	De Martens, <i>Recueil des principaux traités</i> (2nd edition, Goettingen, 1791-1801).
— <i>Nouveau recueil</i>	De Martens, <i>Nouveau recueil des traités</i> (Goettingen, 1817-1842).
— <i>Nouveau recueil général</i>	De Martens, <i>Nouveau recueil général de traités</i> , 1st, 2nd and 3rd series (Goettingen, 1843-1897, Leipzig, 1898-1939).
Feller	A. H. Feller, <i>The Mexican Claims Commissions 1923-1934</i> (New York, 1935).
Hague Convention of 1899	Hague Convention of 1899 for the Pacific Settlement of International Disputes, J. B. Scott, <i>The Reports to the Hague Conferences of 1899 and 1907</i> (Oxford, 1917), p. 32.
Hague Convention of 1907	Hague Convention of 1907 for the Pacific Settlement of International Disputes, J. B. Scott, <i>The Reports to the Hague Conferences of 1899 and 1907</i> (Oxford, 1917), p. 292.
Hudson, <i>International Tribunals</i>	M. O. Hudson, <i>International Tribunals, Past and Future</i> (Washington, 1944).
Hudson, <i>Permanent Court</i>	M. O. Hudson, <i>The Permanent Court of International Justice 1920-1942</i> (New York, 1943).
<i>I.C.J. Reports</i>	<i>International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.</i>
<i>I.C.J. Ser. D</i>	<i>International Court of Justice, Series D, Acts and Documents concerning the Organization of the Court, No. 1</i> (Second edition, May 1947).
La Fontaine	H. La Fontaine, <i>Pasicrisie internationale, Histoire documentaire des arbitrages internationaux</i> (Berne, 1902).
Lapradelle-Politis	A. de Lapradelle and N. Politis, <i>Recueil des arbitrages internationaux</i> , Vols. 1 (Paris, 1905) and 2 (2nd edition, Paris, 1932).

- Mérignhac A. Mérignhac, *Traité théorique et pratique de l'arbitrage international* (Paris, 1895).
- Mexican Peace Code Mexican Peace Code approved by the Seventh International Conference of American States, 23 September 1933, *The International Conferences of American States, First Supplement 1933-1940* (Washington, 1940), p. 50.
- Moore J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, 1898), Vols. 1-6.
- Pact of Bogotá, 30 April 1948 American Treaty on Pacific Settlement, Pact of Bogotá, 30 April 1948, Pan American Union, *Law and Treaty Series*, No. 24, p. 21.
- P.C.I.J., Ser. A, A/B, B, C, D* Publications of the Permanent Court of International Justice, Series A, A/B, B, C, D.
- Projet, 1875* *Projet de règlement pour la procédure arbitrale internationale, Annuaire de l'Institut de droit international* (1877), Vol. 1, p. 126.
- Ralston J. H. Ralston, *The Law and Procedure of International Tribunals* (Rev. ed., Stanford, 1926).
- Ralston, *Supp.* J. H. Ralston, *Supplement* to foregoing work (Stanford, 1936).
- R.D.I.L.C.* *Revue de droit international et de législation comparée.*
- Rec. A.D.I.* *Recueil des Cours, Académie de Droit International* (Paris, 1925).
- Rec. C.C. franco-italienne* *Recueil des décisions de la Commission de conciliation franco-italienne instituée en exécution de l'article 83 du Traité de paix avec l'Italie*, Vols. 1-3.
- Rec. T.A.M.* *Recueil des décisions des Tribunaux Arbitraux Mixtes* (Paris, 1922-1928), Vols. 1-10.
- Reports I.A.A.* United Nations, *Reports of International Arbitral Awards*, Vols. 1-5.
- Revised General Act Revised General Act for the Pacific Settlement of International Disputes, 28 April 1949, *United Nations Treaty Series*, Vol. 71, p. 102.
- Stuyt A. M. Stuyt, *Survey of International Arbitrations 1794-1938* (The Hague, 1939).
- Systematic Survey* United Nations, *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948*.
- Witenberg J. C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales* (Paris, 1937).

COMMENTARY
ON THE
DRAFT CONVENTION ON ARBITRAL PROCEDURE

INTRODUCTORY NOTE

The purpose of the draft convention on arbitral procedure, prepared by the International Law Commission, is to set forth the essential rules governing an arbitration proceeding between States, from the initial to the final step therein. As explained in its comments on the draft, the Commission "did not consider it necessary to frame detailed rules of procedure on the lines of those embodied, for instance, in the Rules of the International Court of Justice", as "such detailed rules of procedure are liable to vary according to the circumstances of each arbitration".¹ The draft therefore deals with arbitral procedure in a wider sense, namely, "provisions for safeguarding the effectiveness of arbitration engagements accepted by the parties, as well as clauses relating to the constitution and powers of the tribunal, the general rules of evidence and procedure, and the award of the arbitrators".² On the other hand, the draft does not go beyond the procedure of arbitration. As pointed out by the Chairman of the Commission in the Sixth Committee of the General Assembly, it is not a draft of an arbitration convention.³ The provisions of the draft convention presuppose the existence of an undertaking to have recourse to arbitration.⁴ The aim of the draft is not to create new obligations to submit disputes to arbitration but to provide "certain procedural safeguards for securing the effectiveness, in accordance with the original common intention of the parties, of the undertaking to arbitrate".⁵

The draft is based on the traditional concept of arbitration as a "procedure for the settlement of disputes between States by a binding award on the basis of law and as the result of an undertaking voluntarily accepted".⁶ It is in line with previous attempts to codify international arbitral procedure, such as the *Projet de règlement pour la procédure arbitrale internationale* adopted by the Institute of International Law in 1875 and the Hague conventions of 1899 and 1907 for the pacific

¹ *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 14.

² *Ibid.*

³ *Official Records of the General Assembly, Eighth Session, Sixth Committee, 383rd meeting*, para. 2.

⁴ *Ibid.*, 387th meeting, para. 23.

⁵ Quoted from the Commission's report, *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 18. See also paragraph 29.

⁶ *Ibid.*, para. 16.

settlement of international disputes. But the draft goes beyond prior codifications of international arbitral procedure in stressing the obligation to carry out the undertaking to arbitrate (art. 1, para. 3), in addition to the obligation of executing the award (art. 26). The chief significance of the draft lies in the several means which it provides for ensuring that the obligation to carry out the agreement to arbitrate shall not be frustrated at any point by a subsequent failure by one of the parties to fulfil that obligation. Means are provided at each critical point in the arbitral proceeding to assure the independence of the tribunal and to enable it to go forward with its work notwithstanding any obstructive position taken by one of the parties.

Accordingly, the draft provides that disputes as to the scope and application of an undertaking to arbitrate shall, if necessary, be settled by the International Court of Justice (art. 2), that the arbitral tribunal shall be constituted even if a party shall fail to participate in the naming of its members (art. 3), that the membership of the tribunal, except in specified cases, shall be immutable (art. 5), that in case of withdrawal of an arbitrator without the consent of the tribunal the resulting vacancy shall be filled at the request of the tribunal (art. 7), that the failure of a party to co-operate in the conclusion of a *compromis* when necessary, shall not prevent the drawing up by the tribunal itself of the *compromis* (art. 10), that a party's failure to appear or to defend its case shall not prevent the tribunal from rendering its award (art. 20), and that the tribunal shall "not bring in a finding of *non liquet* on the ground of the silence or obscurity of international law or of the *compromis*" (art. 12, para. 2).

CHAPTER I

THE UNDERTAKING TO ARBITRATE

Article 1

1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future.

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

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

Comment

Chapter I deals with the undertaking to arbitrate, the existence of which is a prerequisite for the application of the convention.

Article 1 gives expression to the fundamental principle of international law that an obligation to arbitrate (para. 3) arises from the consent of the parties.¹

The agreement to arbitrate contemplates the decision or final settlement of a dispute. A distinguishing feature of arbitration is that whereas "mediation recommends, arbitration decides".²

A dispute may be an "existing" one or "arising in the future", as stated in paragraph 1. As understood in this draft, it must, however, be a dispute between States. Compare article 37 of the Hague Convention of 1907, which provides in part:

"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."

It may be noted that no distinction is made in the draft between juridical and non-juridical disputes. In this respect, the Chairman of the Commission stated in the Sixth Committee of the General Assembly that "the introduction of the distinction in the draft would, needlessly and uselessly, have seriously impaired the practical value of the

¹ See the Commission's report, *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 17. Cf. *P.C.I.J.*, advisory opinion of 23 July 1923 (*Eastern Carelia*), *Ser. B*, No. 5, p. 27.

² J. B. Moore, *Digest of International Law* (Washington, 1906), sect. 1069.

Convention", and he added that "in procedural matters, the problems arise in the same way in either case".³

The existence of a dispute is, in the view of the International Court of Justice, "a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence".⁴ A dispute involves "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".⁵ Usually a dispute manifests itself through diplomatic negotiations and it may be necessary to prove, as a condition of recourse to arbitration or judicial settlement, that diplomatic negotiations previously have been pursued.⁶ Sometimes, proof of previous diplomatic negotiations is not, however, indispensable, and the existence of a dispute or "a difference of views" can be established in a less "formal way".⁷ A dispute will not be found to exist in the absence of proof of "a divergence of views between the parties on definite points".⁸

The language of paragraph 1 closely parallels that of the first paragraph of article 39 of the Hague Convention of 1907, which provides that:

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

International arbitration in modern times first manifested itself as a procedure for settling existing disputes between States. The modern history of arbitration is generally said to begin with the so-called Jay Treaty, concluded on 19 November 1794 between Great Britain and the United States of America, involving a then existing dispute between these States concerning the *Northeastern boundary* of the United States.⁹ Agreements to arbitrate existing disputes have since then steadily increased in number. Considerable time elapsed, however, before the arbitration of future disputes became a familiar practice. The Panama Treaty of Perpetual Union, League and Confederation, entered into in 1826 between Colombia, Central America, Peru and the United Mexican States, included in article 16 an agreement to arbitrate all

³ United Nations document A/C.6/L.320, para. 14. For further discussion of the matter, see comment on article 12, below.

⁴ *Interpretation of Peace Treaties*, Advisory Opinion, *I.C.J. Reports 1950*, p. 74.

⁵ Judgment of 30 August 1924, *The Mavrommatis Palestine Concessions*, *P.C.I.J., Ser. A*, No. 2, p. 11.

⁶ *The Mavrommatis Palestine Concessions case supra*; Judgment of 4 April 1939, *The Electricity Company of Sofia and Bulgaria*—preliminary objection, *P.C.I.J., Ser. A/B*, No. 77.

⁷ Judgment of 16 December 1927, *Interpretation of Judgments Nos. 7 and 8 The Chorzów Factory*, *P.C.I.J., Ser. A*, No. 13, pp. 10-11; see also Judgment of 25 August 1925, *Case Concerning German Interests in Polish Upper Silesia*, *P.C.I.J., Ser. A*, No. 6, pp. 13-14.

⁸ *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case*, Judgment of 27 November 1950, *I.C.J. Reports 1950*, p. 403.

⁹ De Martens, *Recueil*, Vol. 5, pp. 650-652.

future "differences".¹⁰ The treaty never came into effect as the result of the failure of the parties, other than Colombia, to ratify it. In a number of subsequent treaties between South and Central American States,¹¹ provisions were made for settlement by arbitration of disputes arising in the future. The Netherlands and Portugal were among the first European countries to conclude (and ratify) a treaty providing for the settlement by arbitration of any dispute arising between them, except those involving their independence and their "autonomie".¹² No obligation to settle disputes by arbitration, whether existing or future disputes, was brought about by the Hague Conventions of 1899 or 1907. However, agreements to arbitrate future disputes have greatly increased during the present century.¹³

It is to be noted in this connexion that the General Assembly of the United Nations adopted on 14 November 1947 a resolution in which, among other things, it was stated that the Assembly:

"2. *Draws the attention* of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice."¹⁴

In view of the seriousness of the undertaking to arbitrate and the detailed procedure provided in the draft convention for carrying out such undertaking, paragraph 2 of the present article requires that the "undertaking shall result from a written instrument, whatever the form of the instrument may be". Without entering into the theoretical question whether an oral agreement to arbitrate would be binding,¹⁵ it is believed that all international arbitrations of modern times have been undertaken pursuant to "a written instrument". Thus this paragraph may be said to be based on practice. The variety of forms of documents other than treaties (bilateral or multilateral treaties,

¹⁰ *International American Conference, Reports of Committees and Discussions thereon* (Washington, 1890), Vol. 4, Historical Appendix, p. 187.

¹¹ E.g., treaty of 12 July 1832 between Peru and Ecuador, article 7, De Martens, *Nouveau Recueil*, Vol. 13, p. 25.

¹² De Martens, *Nouveau Recueil Général*, 2nd Ser., Vol. 22, pp. 591-592.

¹³ See H. Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange* (Stuttgart, 1914), pp. 50 *et seq.*; H. M. Cory, *Compulsory Arbitration of International Disputes* (New York, 1932); J. P. A. François, *Handboek van het volkenrecht*, Vol. 2 (2nd ed., Zwolle, 1950), pp. 135-203; L. Oppenheim, *International Law*, Vol. 2 (7th ed., London, 1952), pp. 3-4, 32-35.

¹⁴ Resolution 171 (II), *United Nations, Official Records of the Second Session of the General Assembly, Resolutions 16 September-29 November 1947*, p. 104.

¹⁵ Cf. P.C.I.J., Judgment of 5 April 1933, *Legal Status of Eastern Greenland, Ser. A/B*, No. 53, p. 71, holding a verbal declaration by the Norwegian Minister for Foreign Affairs, made on behalf of his Government, as to a "question falling within his province", to be binding on his Government.

general arbitration treaties or *clauses compromissoires*) which would be embraced within the term "written instrument" will be apparent from the following evidences of agreement as revealed in an examination of A. M. Stuyt's *Survey of International Arbitrations 1794-1938*:

Exchange of notes, letters or telegrams (Nos. 70, 97, 103, 132, 136, 295, 321, 356, 374, 380, 381, 390, 396a, 408),
Verbal note (No. 72),
Legislative Act (Nos. 30, 206, 224, 382, 402),
Declarations (Nos. 38, 44, 163, 183, 194),
Arrangements (Nos. 36, 146, 166, 187),
Memorandum (Nos. 50, 67, 178, 227),
Decrees (Nos. 66, 122, 126, 305, 316),
Contracts (Nos. 211, 212, 250, 370),
Protocol of conference (Nos. 77, 85, 89),
Proposition and acceptance (No. 90),
Instructions to Commissioner (Nos. 175, 246),
Letter and legislative action (No. 177),
Verbal arrangement (Nos. 3, 137),
Public notice (Nos. 35, 36),
Resolution of League of Nations Council (No. 358),
Engagements (No. 62),
Collective note or letter (Nos. 88, 138).

The term "written instrument" does not even go so far as to require a document to which the signature of the parties is in some manner affixed. For instance, it would be sufficient for the parties concerned to accept a resolution of the Security Council recommending them to have recourse to arbitration for the settlement of a specific dispute. In such a case, the official records of the United Nations would provide the authentic text of the undertaking.

While previous attempts to codify the rules of international arbitral procedure have uniformly affirmed the duty to *execute the award*, as does the present draft convention (art. 26), the draft lays particular stress upon the obligation to *carry out the agreement to arbitrate*. Hitherto it could well be said that "there is only the rule that a State must abide by the treaties which it has contracted, whether these refer to arbitration or not".¹⁶ The obligation set forth in paragraph 3 of article 1, together with the several procedures elsewhere provided in the draft convention to make effective the obligation to arbitrate in spite of any obstructive attitude by a party, represent the most important aspect of the draft from the standpoint of the development of international law. The purposes of the draft in this connexion are to impress the existing system of *ad hoc* arbitration with a stronger *judicial* quality and to ensure

¹⁶ H. M. Cory, *op. cit.*, p. xi.

the independent status of the tribunal as a judicial body. The draft thereby responds to a longfelt need, expressed by various jurists¹⁷ and revealed in practice.

Article 2

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

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

Comment

This article is perhaps the most important in the draft convention from the standpoint of *lex ferenda*. It is intended to fill a *lacuna* in the existing rules of international law. This *lacuna* is that if the tribunal has not already been constituted, no authority exists which can decide either whether a dispute has arisen, or, if the parties agree that there is a dispute, whether the dispute is within the scope of the obligation to go to arbitration. The article is designed to ensure the effectiveness of the undertaking to arbitrate. Where the tribunal has already been constituted it follows *ex hypothesi* either that the parties have agreed that a dispute exists and is within the scope of the arbitral agreement, or that the tribunal itself will rule upon these questions. But difficulties have arisen when a disagreement on one of these points arises between the parties before they have constituted an arbitral tribunal. The article is designed to deal with the type of situation which arose in the case of the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*.¹⁸ In that case certain allegations were made by some of the Allied and Associated Powers, signatories to the Treaties of Peace with Bulgaria, Hungary and Romania, that the Governments of those countries had violated the treaties of peace in certain respects. A procedure was laid down by the treaties of peace for the appointment of a commission to settle the interpretation of these treaties. The Governments of Bulgaria, Hungary and Romania refused to appoint their representatives to the treaty commissions and maintained that no

¹⁷ L. Renault, Préface to Lapradelle-Politis, Vol. 1, p. x; N. Politis, *La justice internationale* (Paris, 1924), pp. 127-128; C. van Vollenhoven, *International Arbitration, Past and Present in Verspreide Geschriften*, Vol. 2 (Harlem, 1934), p. 635.

¹⁸ See advisory opinion in *I.C.J. Reports 1950*, p. 65.

dispute existed regarding the interpretation of the treaties of peace. The General Assembly of the United Nations on 22 October 1949 adopted resolution 294 (IV) requesting an advisory opinion from the International Court of Justice, *inter alia*, on the question whether the diplomatic correspondence between Bulgaria, Hungary and Romania, on the one hand, and certain Allied and Associated Powers, on the other, concerning the implementation of certain provisions of the peace treaties disclosed disputes subject to the provisions for pacific settlement contained in the treaties. It will be noted that this matter was referred to the Court by way of a request for an advisory opinion as no provision was contained in the peace treaties obligating the parties to submit this preliminary question to the Court. The above article of the draft convention removes the necessity for obtaining in such a situation an advisory opinion through the machinery of the United Nations and makes it possible for one of the parties to bring the question before the International Court of Justice by application.

What constitutes a dispute is discussed in the comment to article 1 of the draft.

For the purpose of the present article, however, the most important point is not the definition of a dispute but the provision made that a disagreement even *prior* to the constitution of the tribunal as to the existence of a dispute, or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, may be resolved by bringing the matter before the International Court of Justice for a decision, and a decision which is final.

It will be noted that the above provisions prevail only in the absence of agreement between the parties upon some other procedure. Such other procedure may be laid down in the *compromis*, if it is a case of a special agreement to go to arbitration, or, if it is a case of a general undertaking to settle disputes arising in the future by arbitration, in the general arbitration treaty. If no provision is contained in either of these agreements, then it is conceivable that the parties may contract out of the provisions of article 2 and make some arrangement *ad hoc* as to the matters in question.

Specific examples of "another procedure" will be found in the so-called Knox Treaties of general arbitration of 1911, signed by the United States of America with France and also with Great Britain, providing for joint high commissions of inquiry to rule upon a disagreement between the parties "as to whether or not the difference is subject to arbitration". It was further provided that "if all or all but one of the members of the commission" agreed that the dispute was subject to arbitration it should go to arbitration accordingly.¹⁹

¹⁹ See article III of the General Arbitration Treaty between the United States of America and the French Republic of 3 August 1911, and article III of the Treaty between Great Britain and the United States of the same date, *Am. J. Int. Law, Supp.* (1911), Vol. 5, pp. 251 and 255.

Owing principally to certain modifications proposed by the United States Senate, these treaties were never ratified.²⁰

Paragraph 2 of the present article empowers the Court to prescribe provisional measures. The word "prescribe" is used in order to avoid the controversy which arose concerning the interpretation of article 41 of the Statute of the Permanent Court of International Justice. The provision (which is reproduced in Article 41 of the Statute of the International Court of Justice) read in part as follows :

"The Court shall have the power to indicate . . . any provisional measures which ought to be taken to preserve the respective rights of either party."

The word "indicate" (*indiquer*) was thought in some quarters to carry the implication that the provisional measures were not imperative. Another view was stated as follows :

"The power conferred on the Court by Article 41 is to 'indicate' (Fr. *indiquer*) measures which ought to be taken. The term *indicate*, borrowed from treaties concluded by the United States with China and France on September 15, 1914, and with Sweden on October 13, 1914, possesses a diplomatic flavor, being designed to avoid offence to 'the susceptibilities of States.' It may have been due to a certain timidity of the draftsmen. Yet it is not less definite than the term *order* would have been, and it would seem to have as much effect. The use of the term does not attenuate the obligation of a party within whose power the matter lies to carry out the measures 'which ought to be taken.' An indication by the Court under Article 41 is equivalent to a declaration of obligation contained in a judgment and it ought to be regarded as carrying the same force and effect."²¹

It is not necessary to express an opinion as to which interpretation of the Statute is correct. It is thought, however, that the word "prescribe" should suffice to avoid any controversy arising concerning the interpretation of this provision of the draft convention.

The law and procedure concerning provisional measures which are contained in the Statute of the International Court of Justice and its Rules of Court will apply in any proceedings taken under paragraph 2. Such law and procedure is described in greater detail in the Comment of article 17 *infra*, with reference to the practice concerning provisional measures generally and the relevant literature.

²⁰ H. M. Cory, *op. cit.*, pp. 82-86; L. Oppenheim, *International Law*, Vol. 2 (7th ed., London, 1952), p. 31; W. C. Dennis, *The Arbitration Treaties and Senate Amendments in Am. J. Int. Law* (1912), Vol. 6, pp. 614-620.

²¹ Hudson, *Permanent Court*, pp. 425-426.

It will also be noted that the provisional measures prescribed by the International Court of Justice remain in force pending the constitution of the arbitral tribunal and, accordingly, when the tribunal has been set up, the provisional measures prescribed by the Court will cease to have effect. At that stage the arbitral tribunal itself will have power, if it considers that the circumstances so require, to prescribe provisional measures.²²

²² See article 17 *infra*.

CHAPTER II
CONSTITUTION OF THE TRIBUNAL

Article 3

1. Within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision of the International Court of Justice in pursuance of article 2, paragraph 1, the parties to an undertaking to arbitrate shall proceed to constitute the arbitral tribunal by appointing a sole arbitrator or several arbitrators in accordance with the *compromis* referred to in article 9 or with any other instrument embodying the undertaking to arbitrate.

2. If a party fails to make the necessary appointments under the preceding paragraph within three months, the appointments shall be made by the President of the International Court of Justice at the request of the other party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

3. The appointments referred to in paragraph 2 shall be made in accordance with the provisions of the *compromis* or of any other instrument embodying the undertaking to arbitrate. In the absence of such provisions the composition of the tribunal shall be determined, after consultation with the parties, by the President of the International Court of Justice or the judge acting in his place.

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

Comment

The naming of the arbitrators, as well as the drawing up of the *compromis*, requires acts by the parties. The parties may themselves directly name the arbitrators and prepare the *compromis*, they may delegate such tasks to others, or they may make a conditional delegation

of such tasks to others, the condition usually being that the parties shall have failed to carry out such tasks themselves. When a conditional delegation of the task of naming arbitrators is made, it is a common assumption that difficulties may arise in connexion with the naming of the chairman, umpire or neutral arbitrator but that a party can be relied upon to appoint its own arbitrator or arbitrators. Consequently arbitration treaties frequently provide a method for the appointment of a third arbitrator, in the absence of agreement between the parties thereon, but omit to provide a subsidiary method for the appointment of an arbitrator whom one of the parties has failed to appoint in pursuance of the terms of the treaty.¹ The failure to provide a subsidiary method for the appointment of *any* member of the tribunal, including arbitrators to be appointed by the parties, had notable consequences in connexion with the Peace Treaties with Bulgaria, Hungary and Rumania following the Second World War. The refusal of the Governments of Bulgaria, Hungary and Rumania to appoint their respective representatives upon the commissions of arbitration provided for in the peace treaties resulted in a complete failure to constitute the commissions.² Even when the *compromis* itself expressly names the arbitrators who are to decide the dispute,³ it is advisable to include provisions for the naming of substitute arbitrators in the event of the death, incapacity, withdrawal or removal of an arbitrator. In general, it may be said that whenever the appointment of any member is made dependent upon an act of a party or the tribunal, the *compromis* should specify an alternative procedure by which the naming of the arbitrator may take place notwithstanding any failure by the party in question to perform such act.

The Hague Convention of 1907 was inadequate in this regard in that acts of the parties were necessary to the naming of all the arbitrators composing the tribunal. Article 45 of the Convention provided as follows :

“When the contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the tribunal competent to decide this difference must be chosen from the general list of members of the Court.

“Failing the composition of the arbitration tribunal by agreement of the parties, the following course is pursued :

“Each party appoints two arbitrators, of whom one only can be its national or chosen from among the persons selected by it as

¹ See collection of treaty texts in *Systematic Survey*, pp. 101-102.

² See advisory opinions of the International Court of Justice of 30 March 1950 and 18 July 1950, *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania*, I.C.J. Reports 1950, pp. 65, 221.

³ E.g., case of the *Religious Properties in Portugal*, *compromis* of 31 July 1913, art. 2, Reports I.A.A., Vol. 1, p. 9.

members of the Permanent Court. These arbitrators together choose an umpire.

“If the votes are equally divided, the choice of the umpire is entrusted to a third Power, selected by the parties by common accord.

“If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

“If, within two months’ time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not nationals of either of them. Which of the candidates thus presented shall be umpire is determined by lot.”

The Mexican Peace Code provided a subsidiary method of appointment only for the fifth member of the tribunal. The pertinent provisions of article 27 of the Code read as follows :

“In case of disagreement on this fifth arbitrator, the Governing Board of the Pan-American Union shall designate him by a two-thirds majority of its members.”

The existence of the foregoing gap was remedied in article 23 of the Revised General Act, reading 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.

“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.”

A certain similarity of the above article to the present article will be readily apparent. The procedure prescribed by the latter has, however, been simplified by the elimination of recourse to third States for the constitution of the tribunal. On the other hand, the procedure has been completed by a provision for the determination of the compo-

sition of the tribunal — i.e., the number of arbitrators — when the parties have not agreed thereon. Also, a subsidiary method for the choice of a president of the tribunal has been provided, in cases where he is to be selected by the other arbitrators but they have failed to carry out this task.⁴

A much more detailed procedure for the naming of arbitrators is provided for under the Pact of Bogotá, 30 April 1948. Under article 40 of this treaty each party is to name one arbitrator and transmit that name to the Council of the Organization of American States. At the same time, each party presents to the Council a list of ten jurists chosen from the panel of the Permanent Court of Arbitration. If these lists contain three names in common, such three names, together with the two names designated by the parties, will constitute the tribunal. If there be more than three names in common, procedures are stipulated for the completion of the tribunal varying according to each particular eventuality. Article 45 provides an alternative procedure for constituting the tribunal in the event of a failure by a party to act under article 40. The exact provisions of articles 40 and 45 are set forth below :

“ Art. 40. (1) Within a period of two months after notification of the decision of the Court in the case provided for in Article 35, each party shall name one arbiter of recognized competence in questions of international law and of the highest integrity, and shall transmit the designation to the Council of the Organization. At the same time, each party shall present to the Council a list of ten jurists chosen from among those on the general panel of members of the Permanent Court of Arbitration of The Hague who do not belong to its national group and who are willing to be members of the Arbitral Tribunal.

“(2) The Council of the Organization shall, within the month following the presentation of the lists, proceed to establish the Arbitral Tribunal in the following manner :

“ a) If the lists presented by the parties contain three names in common, such persons, together with the two directly named by the parties, shall constitute the Arbitral Tribunal;

“ b) In case these lists contain more than three names in common, the three arbiters needed to complete the Tribunal shall be selected by lot;

“ c) In the circumstances envisaged in the two preceding clauses, the five arbiters designated shall choose one of their number as presiding officer;

“ d) If the lists contain only two names in common, such candidates and the two arbiters directly selected by the parties shall

⁴ See the Commission's report, *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 31.

by common agreement choose the fifth arbiter, who shall preside over the Tribunal. The choice shall devolve upon a jurist on the aforesaid general panel of the Permanent Court of Arbitration of The Hague who has not been included in the lists drawn up by the parties;

“ e) If the lists contain only one name in common, that person shall be a member of the Tribunal, and another name shall be chosen by lot from among the eighteen jurists remaining on the above-mentioned lists. The presiding officer shall be elected in accordance with the procedure established in the preceding clause;

“ f) If the lists contain no names in common, one arbiter shall be chosen by lot from each of the lists; and the fifth arbiter, who shall act as presiding officer, shall be chosen in the manner previously indicated;

“ g) If the four arbiters cannot agree upon a fifth arbiter within one month after the Council of the Organization has notified them of their appointment, each of them shall separately arrange the list of jurists in the order of their preference and, after comparison of the lists so formed, the person who first obtains a majority vote shall be declared elected.

“ . . .

“ Art. 45. If one of the parties fails to designate its arbiter and present its list of candidates within the period provided for in Article 40, the other party shall have the right to request the Council of the Organization to establish the Arbitral Tribunal. The Council shall immediately urge the delinquent party to fulfill its obligations within an additional period of fifteen days, after which time the Council itself shall establish the Tribunal in the following manner :

“ a) It shall select a name by lot from the list presented by the petitioning party.

“ b) It shall choose, by absolute majority vote, two jurists from the general panel of the Permanent Court of Arbitration of The Hague who do not belong to the national group of any of the parties.

“ c) The three persons so designated, together with the one directly chosen by the petitioning party, shall select the fifth arbiter, who shall act as presiding officer, in the manner provided for in Article 40.

“ d) Once the Tribunal is installed, the procedure established in Article 43 shall be followed.”

A summary of treaty clauses for the nomination of arbitrators, together with the texts of such clauses, will be found in *Systematic Survey*, pp. 89-107.

Article 4

1. The parties having recourse to arbitration shall constitute a tribunal which may consist of one or more arbitrators.

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

Comment

Adhering to the principle of flexibility as being of prime importance in constituting *ad hoc* international arbitral tribunals, the above article does not impose upon the parties any fixed number of arbitrators.⁵

Up to the 19th century, it was customary to refer a dispute to a sovereign, or to an ecclesiastical person, or to some existing body.⁶ In most such cases, this meant a "sole arbiter". After the Jay Treaty of 1794, a trend developed towards arbitration by a small number of persons, more or less experts, and often including members from a third State, not a party to the dispute.

A body composed of two or some other even number of members, in which an equal number act as representatives of opposing parties and through which each party accordingly has an equal voice, has been characterized to be a "joint commission".⁷ Such, for example, was the constitution of the commission which investigated and reported on the *Im Alone* case.⁸ Tribunals of two members appear to be rare in practice. In such cases provision is usually made for a procedure by which, if the two arbitrators are unable to agree, a neutral third arbitrator⁹ or three neutral additional arbitrators¹⁰ shall be named, in order to make a majority decision possible. Commissions composed of an equal number of representatives chosen by each party and one or more persons from a State not a party to the dispute, are commonly called "mixed arbitral commissions".

The parties may name the arbitrators in the *compromis*,¹¹ but it is more frequently the practice to defer the selection of the arbitrator until after the signing of the *compromis*. Thus the *compromis* will

⁵ Cf. Revised General Act, art. 22, 23, and Pact of Bogotá, 30 April 1948, art. 40, 45, Comment under article 3 *supra*.

⁶ A number of examples are given in Lapradelle-Politis, Vol. 1, pp. XXIX and XLIV, and in Witenberg, pp. 11-12.

⁷ C.C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., Boston, 1945), Vol. 2, p. 1644.

⁸ *Reports I.A.A.*, Vol. 3, p. 1611-1612.

⁹ *Systematic Survey*, paras. 18 and 19, pp. 95, 96.

¹⁰ *Ibid.*, para. 20, p. 96.

¹¹ E.g., case of the *Religious Properties in Portugal*, *compromis* of 31 July 1913, art. 2, *Reports I.A.A.*, Vol. 1, p. 9.

often specify a procedure for the later naming of the arbitrators. In some cases the parties may adopt a procedure for designating arbitrators by making a simple reference in the *compromis* to a procedure elsewhere established,¹² but more usually the *compromis* will itself indicate the procedure to be followed in the naming of arbitrators.

Perhaps the most customary method is to provide that an equal number of arbitrators shall be appointed by each of the parties and that an additional, neutral, member shall be chosen by common agreement.¹³ Various substitute procedures have been adopted to take care of the contingency of the parties failing to agree on the appointment of a neutral member. In such case this selection is sometimes left to the arbitrators appointed by the parties.¹⁴ Sometimes a neutral member may be selected by lot¹⁵; by a third Power or Powers¹⁶ or by some designated person, such as the President of the Swiss Confederation¹⁷ or the President of the Permanent Court of International Justice.¹⁸

The procedure stipulated in the concession agreement of 30 April 1925 under which the *Lena Goldfields* arbitration took place is interesting in this connexion. Paragraph 90 of the concession agreement provided for an arbitration tribunal composed of three members, one to be chosen by the Soviet Government, one by the *Lena Goldfields* Company, and the third, who was to be the super-arbitrator, to be chosen by mutual agreement. Failing such mutual agreement, procedures were provided for naming the super-arbitrator from among a list of six professors of the Freiberg Mining Academy or of the Royal Technical College of Stockholm.¹⁹

Adhering to the principle of flexibility, paragraph 2 of the present article contains no limitation as to the nationality of the arbitrators, and even the requirement that the "arbitrators should be chosen from among persons of recognized competence in international law" is qualified by the words "subject to the circumstances of the case". It must be appreciated, however, that the exception should not be so applied as to destroy the rule itself. In other words, the rule that the

¹² E.g., *Systematic Survey*, paras. 3-7, pp. 92, 93.

¹³ *Ibid.*, paras. 18, 19, 23, 24 and 28, pp. 95-98.

¹⁴ *Ibid.*, para. 34, p. 99; cf. claims convention between Peru and the United States of America, 12 January 1863, art. 2, *Stuyt* No. 71.

¹⁵ Pact of Bogotá, 30 April 1948, art. 40.

¹⁶ *Systematic Survey*, paras. 39, 49, pp. 100, 102; Hague Convention of 1907, art. 45; Revised General Act, art. 23.

¹⁷ *Systematic Survey*, paras. 40, 51 and 52, pp. 100, 103.

¹⁸ *Ibid.*, paras. 41-46 and 50, pp. 100-102.

¹⁹ *Central Concessions Committee of the USSR, Documents Concerning the Competence of the Arbitration Court Set Up in Connection with the Questions Outstanding between the Lena Goldfields Company Limited and the USSR* (Moscow, 1930), pp. 44-46.

arbitrator shall be a person of "recognized competence in international law" would appear to be the general rule to be applied in each case save only when special circumstances might justify departure from it.

The *compromis* usually leaves considerable latitude in the appointment of arbitrators. Perhaps the most frequently encountered qualification is with regard to nationality. The typical tribunal composed of three members will usually permit each of the parties to appoint one member of its own nationality. Thus some twenty-five treaties were found to contain a clause adopting the following formula: "The parties shall each nominate one member who may be chosen from among their respective nationals".²⁰ Article 22 of the Revised General Act also permits the parties each to "nominate one member, who may be chosen from among their respective nationals", the remainder to be of other nationality.

Complaint has frequently been voiced of the practice of appointing nationals as arbitrators. It is argued that such arbitrators will lack the open-mindedness necessary in a judge. It is further contended that their appointment to the tribunal is unnecessary, as each party has its own agent and counsel to advance and protect its interests before the tribunal. The net effect of the practice is said to add to the difficulties of reaching a decision. It was the conclusion of A. H. Feller in his study of the experience of the Mexican Claims Commissions that:

"It is a grave mistake to construct a tribunal out of two national members and one neutral member. Few men are capable of holding the balance between two contending national commissioners. If the governments do not object to the possibility of decision by compromise rather than by adjudication, they should provide for two national commissioners with an umpire in case of disagreement. Otherwise they should provide either for one, or better still three, neutral commissioners."²¹

In the 1920 Committee of Jurists which planned the Permanent Court of International Justice, Loder opposed the participation of national judges as "a characteristic essentially belonging to arbitration". The report of the Committee, however, accorded to national judges the right to participate in the work of the Court. The report conceded that its proposal made the Court resemble a court of arbitration but replied that: "States attach much importance to having one of their subjects on the Bench when they appear before a Court of Justice."²²

²⁰ *Systematic Survey*, para. 25, p. 97.

²¹ Feller, p. 317.

²² *Procès-verbaux of the Proceedings of the Committee of Jurists* (The Hague, 1920), pp. 531 and 722, quoted by Hudson, *Permanent Court*, p. 182.

With regard to the experience of the Permanent Court of International Justice in the matter of national judges, Hudson states :

“ This record does not justify a conclusion that national judges have merely registered and sanctioned views held by their own Governments. It is true that as a general rule they have upheld their Governments’ contentions, but in relatively few cases has the national judge been alone in his views, and there are striking instances in which national judges went against their Governments’ contentions. In spite of the general rule, it may be said that national judges have served a useful purpose in familiarizing other judges with special features of their national laws, and at times with their national psychology as affected by the particular case.”²³

The phrase “ persons of recognized competence in international law ” adopted in the text has appeared in similar language in other international documents of importance. Article 2 of the Statute of the International Court of Justice requires that judges shall be selected “ from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law ”. The Hague Convention of 1907 provides in article 44 that the members of the Court shall, among other things, be persons “ of known competency in questions of international law ”. The Pact of Bogotá, 30 April 1948, provides in article 40 (1), among other things, that “ each party shall name one arbiter of recognized competence in questions of international law and of the highest integrity ”. The requirement appearing in the foregoing texts that the judge shall be “ of high moral character ” or “ of the highest integrity ” was omitted in the present article as unnecessary in that it was considered extremely unlikely that any appointment in contravention of this principle would ever be made.

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 or sole arbitrator has made the first order concerning written or oral proceedings.

²³ *Permanent Court*, p. 359.

It is a basic purpose of the draft convention to ensure that when parties have agreed upon arbitration for the settlement of a dispute, the arbitration shall not be subject to frustration by a subsequent obstructive attitude of one of the parties or by failure to provide for foreseeable contingencies. With this aim in view, article 3, as has been seen, endeavours to provide machinery for the constitution of the arbitral tribunal even in cases where one of the parties is unwilling to co-operate. Similarly, articles 5 to 8 have the object to ensure that, when constituted, the tribunal shall not be prevented from functioning by arbitrary changes in its membership.

Paragraph 1 of article 5 lays down the principle that "once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered". This is an innovation in the law of arbitral procedure. Arbitration treaties usually provide only that vacancies which may occur as a result of death, resignation or "any other cause" shall be filled in the manner established for the original nominations.²⁴

The principle of the immutability of the arbitral tribunal is, however, not absolute. Paragraph 1 of the present article should be read conjointly with the following paragraphs 2 and 3 and also with articles 6, 7 and 8 which admit certain exceptions to the principle and provide methods for filling vacancies in the membership, whether or not such vacancies occurred in conformity with the relevant provisions of the draft.

Two exceptions to the rule of immutability are contained in paragraph 2 of the present article: (a) before the beginning of the proceedings a party may replace an arbitrator appointed by it and (b) after the beginning of the proceedings an arbitrator may be replaced by agreement between the parties. It should be noted that the paragraph deals with *replacement* of an arbitrator and that no reference is made here or elsewhere in the draft to a right of a party simply to *withdraw* an arbitrator without appointing another person in his place. As to the right of an arbitrator to withdraw, see article 7 below.

In order to avoid doubts as to when the proceedings shall be deemed to have begun, paragraph 3 of the present article contains an explicit and clear ruling on the matter.

Article 6

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

²⁴ See *Systematic Survey*, paras. 61 and 62, p. 106.

Comment

Provisions corresponding to those laid down in this article of the draft are found in previous codes of international arbitral procedure as well as in arbitration treaties, as will be evident from the following collection :

Projet, 1875, article 7 : "If an arbitrator refuses to act as such, or having accepted withdraws, or dies, or becomes insane, or is lawfully challenged for reasons of incapacity within the meaning of Article 14, the provisions of Article 5 shall apply."

The Hague Convention of 1907, article 59 : "In case of the death, retirement, or disability from any cause of one of the arbitrators, his place is filled in the same way as he was appointed."

Convention for the Establishment of an International Central American Tribunal, 7 February 1923, article 15 : "If after the Tribunal is organized any of the arbitrators should fail to appear because of death, resignation or any other cause, his successor shall be appointed in the same manner provided for in this convention . . ." ²⁵

Revised General Act, 28 April 1949, article 24 : "Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations." ²⁶

Mexican Peace Code, article 29 : "In case of decease, resignation or incapacity of one or more of the arbitrators, the vacancy shall be filled in the same way as the original designation."

There is, however, a notable difference between the provisions quoted above and article 6 of the draft convention with respect to the filling of a vacancy caused by the resignation of an arbitrator. While the former refer to all vacancies caused by resignation, article 6 is applicable only when the resignation takes place prior to the commencement of proceedings. Should an arbitrator resign after the proceedings before the tribunal have begun, article 7 of the draft would be applicable. The resignation would in that case be lawful only if it takes place with the consent of the tribunal, and only on that condition would the vacancy, as under article 6, be filled by the method laid down for the original appointment. See further the comment on article 7.

Article 7

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

²⁵ *Am. J. Int. Law, Supp.* (1923), Vol. 17, p. 89.

²⁶ The same clause is found in many bilateral treaties. See *Systematic Survey*, para. 61, p. 106.

2. Should the withdrawal take place without the consent of the tribunal, the resulting vacancy shall be filled, at the request of the tribunal, in the manner provided for in paragraph 2 of article 3.

Comment

Difficulties have sometimes arisen in the past when a member has withdrawn either on his own initiative or on the instructions of his Government. Thus, in the case of the Commission constituted under article 6 of the Jay Treaty, the American Commissioners withdrew on 19 July 1799 and most of the work of the Commission was left uncompleted.²⁷

As a second instance may be mentioned the case in which the Colombian Government and the Cauca Company, an American corporation, agreed to submit certain differences to a special commission composed of three members, one appointed by Colombia, one by the company and a third by agreement between the Secretary of State of the United States and the Colombian Minister at Washington. At the end of the hearings, when little remained to be done except for the signing of the award, the Colombian Commissioner resigned. The two remaining members thereupon rendered an award. In subsequent proceedings before the Supreme Court of the United States the Colombian Government sought to have the award set aside. The action failed, the Court declaring: "We are satisfied that an award by a majority was sufficient and effective."²⁸

The *Hungarian Optants* case may also be mentioned in this connexion. Under the Treaty of Trianon of 4 June 1920 provision was made for the creation of Mixed Arbitral Tribunals to be composed of three members, two appointed by each Government concerned, and a President to be chosen by agreement between them. In addition to provisions dealing with the failure of the parties to reach agreement on the appointment of a President, the Treaty provided (article 239) for the appointment of deputy arbitrators in case of vacancy in the membership of the tribunal which the Government concerned failed to fill within due time. A question arose before the tribunal as to its jurisdiction in certain cases and a decision was given which was unsatisfactory in the eyes of the Romanian Government. The latter announced that Romania was withdrawing its arbitrator. Hungary thereupon addressed an application to the Council of the League of Nations requesting the appointment by it of a deputy arbitrator to fill the vacancy.²⁹ Eventually the Council recommended a solution involving

²⁷ Lapradelle-Politis, Vol. 1, p. 21.

²⁸ *Colombia v. Cauca Co.*, 190 U. S. 524 (1903).

²⁹ Application by the Hungarian Government to the Council of the League of Nations of 21 May 1927, published in Deák, *The Hungarian-Romanian Land Dispute* (New York, 1928), pp. 204 *et seq.*

the complete reconstitution of the Hungarian-Romanian Mixed Arbitral Tribunal.³⁰

During the course of the French-Mexican arbitration under the convention of 25 September 1924, as extended by the convention of 12 March 1927, the Mexican Government requested that sessions of the tribunal be postponed on the ground of the inability of the Mexican Commissioner to attend. In its decision No. 22 of 3 June 1929³¹ the tribunal held that the absence of the Mexican Commissioner would not preclude the remaining members of the tribunal, constituting a majority thereof, to decide cases previously pleaded in the presence of the three commissioners. The tribunal then rendered twenty-three decisions without the further participation of the Mexican Commissioner. However, such decisions were later referred to a new commission established under the convention of 2 August 1930.³²

Finally, it may be mentioned that the German member of the United States-German Mixed Claims Commission, set up, *inter alia*, to deal with the so-called *Sabotage* cases, withdrew on 10 June 1939 after a decision by the Commission that evidence would be received as to whether its prior decision in the case of the *Lehigh Valley Railroad Co. et al. (U.S.) v. Germany* should be reopened by virtue of fraud practised on the Commission. Notification to the United States Secretary of State was also given by the German Chargé d'Affaires on the day of the withdrawal that it was considered that the Commission was without jurisdiction. The remaining commissioners nevertheless continued to act and on 30 October 1939 rendered awards.³³

It is apparent that practice is somewhat uncertain concerning the effect of withdrawal. The opinions of writers, also, indicate a lack of unanimity. Thus Witenberg asserts:

“In these different contingencies, the tribunal seems to have power to continue the proceedings in spite of the irregular absence of the national judge or judges^{35,34}”

On the other hand, Calvo³⁵ and Balasko³⁶ hold that the absence of one of the members of the tribunal bars any further proceedings. Hudson merely states that the presence of all members has been thought

³⁰ *League of Nations Official Journal*, 1928, p. 446.

³¹ *Reports I.A.A.*, Vol. 5, p. 512.

³² See Feller, pp. 69-76.

³³ Mixed Claims Commission, United States and Germany, *Administrative Decisions and Opinions of a General Nature (1926-1932)*, pp. 967, 995, 1004; *ibid.* (1933-1939), pp. 1034, 1086, 1097, 1115, 1173, 1175; Mixed Claims Commission, United States and Germany, *Opinions and Decisions in the Sabotage cases handed down 15 June 1939, and 30 October 1939*.

³⁴ Witenberg, p. 49.

³⁵ *Le droit international* (5th ed. 1896), pp. 481-482.

³⁶ *Causes de nullité de la sentence arbitrale en droit international* (Paris, 1928), pp. 117 and 124.

necessary to constitute the tribunal³⁷ and that in some cases where a member or some members have been absent the other members have been precluded from voting.³⁸ Mérignhac, however, denies that the absence of an arbitrator caused by bad faith can paralyse the action of the tribunal.³⁹ Hyde says that, after extended participation in the work of a tribunal, a member cannot, by withdrawal, render it powerless.⁴⁰ Phillimore is of the opinion that malicious abstention of an arbitrator from the deliberations need not prevent the others from proceeding, but that death of an arbitrator dissolves the tribunal.⁴¹

The present draft convention endeavours to solve the difficulties referred to above by regulating the right of an arbitrator to withdraw, and by providing a machinery for appointing a successor with the least possible delay, whether or not the withdrawal is allowed under the convention. Prior to the commencement of proceedings the resignation of an arbitrator is, according to article 6 of the draft, always permitted. After the proceedings have begun an arbitrator may, under article 7, withdraw with the consent of the tribunal. In both these cases the vacancy shall be filled by the method laid down for the original appointment. Should an arbitrator withdraw after the beginning of proceedings without the consent of the tribunal a successor shall, at the request of the tribunal, be appointed by the President of the International Court of Justice or a judge of the Court in accordance with the provisions of paragraph 2 of article 3.⁴²

The previous draft, adopted by the International Law Commission at its fourth session,⁴³ laid down in paragraph 3 of its article 7 that in the case of the withdrawal of an arbitrator, "the remaining members shall have power, upon the request of one of the parties, to continue the proceedings and render the award". This provision was excluded from the present draft as too drastic and also unnecessary in view of the fact that although the withdrawal of an arbitrator may cause some delay in the proceedings, it cannot, because of the provisions of the draft convention regarding the filling of vacancies, bring them to a permanent standstill.⁴⁴ The report of the Commission on the draft convention says in this respect:

"Undoubtedly, cases have occurred in the past in which the tribunal, after a national arbitrator has withdrawn, continued with

³⁷ *International Tribunals*, p. 115.

³⁸ *Loc. cit.*

³⁹ Mérignhac, pp. 276-277.

⁴⁰ *International Law* (2nd ed., 1945), Vol. 2, p. 1629.

⁴¹ *Commentaries upon International Law* (1857), Vol. 3, p. 4.

⁴² Cf. the report of the Commission, *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 32.

⁴³ See *Official Records of the General Assembly, Seventh Session, Supplement No. 9*, chapter II.

⁴⁴ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 32.

its work and rendered an award. This was probably unavoidable seeing that no machinery was at that time in existence for filling the vacancy created by the illicit withdrawal of an arbitrator. Once such machinery is created — as is the case in the present draft — there is no longer any reason for an incomplete tribunal to proceed with the case.”⁴⁵

Article 8

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

2. In the case of a sole arbitrator the question of disqualification shall be decided by the International Court of Justice on the application of either party.

3. The resulting vacancies shall be filled, at the request of the tribunal, in the manner provided for in paragraph 2 of article 3.

Comment

One of the leading authorities on international arbitration has commented that “in the general run of protocols and in the Hague Conventions . . . no provision whatever is made for challenging either arbitrators or umpires because of unfitness, personal prejudice, interest in the subject-matter, or otherwise”.⁴⁶ International arbitral practice has not suffered through this neglect for the reason, among others, that persons named to the office of arbitrator generally have been sensitive to their responsibilities and have refrained from accepting any such appointment in case of doubt. Thus, when President Taft was suggested as arbitrator in the claims of certain European countries on behalf of their nationals against Cuba, he declined any such nomination on the ground that there existed in favour of American citizens claims similar to those of the Europeans in question which would render it impossible for him to undertake the office.⁴⁷ The experience of the United States-Venezuela arbitration under the convention of 25 April 1866, in which the awards were attacked, *inter alia*, on the ground that the claims commission had been irregularly constituted, illustrates

⁴⁵ *Ibid.*, para. 33.

⁴⁶ *Ralston*, p. 35.

⁴⁷ G. H. Hackworth, *Digest of International Law* (Washington, 1943), Vol. 6, p. 83.

the desirability of a provision for the challenge of the qualifications of arbitrators.⁴⁸

A challenge of an arbitrator should be made promptly. Moreover, it is necessary to distinguish between grounds of disqualification which the parties knew or should be presumed to have known at the time of his appointment and which they consequently should be considered to have waived, and grounds subsequently arising, which they cannot be deemed to have waived. Article 14 of the *Projet*, 1875, states :

“The objections based upon the incapacity of the arbitrators should be raised before all others. If the parties remain silent no objection will be allowed at a later stage except for subsequent incapacity arising after the proceedings have begun.”

Acremant has made the following comments :

“When there is an objection as to the capacity of the arbitrator or some other challenge as regards him based on facts already existing to everyone's knowledge at the time the *compromis* was drawn up, there is a presumption that the parties did not wish to take these facts into account; and they are disregarded.

“In case the facts referred to above arise after the *compromis* and are found to be true the parties should meet a second time in order to proceed to the appointment of a new arbitrator.”⁴⁹

Paragraph 1 of the present article is based on the opinion that, normally, the disqualification of an arbitrator should be proposed by a party only on account of a fact arising after the constitution of the tribunal. A party challenging an arbitrator may rely on a fact prior to the constitution of the tribunal only if it can show that the appointment was made without knowledge of that fact or as a result of fraud.

The decision on the challenge of a member of the tribunal is in either case left to the other members. This power is entrusted to them even in the absence of an express grant of such power in the *compromis*.

The point has been made that the arbitrators ruling upon the challenge of disqualification should exceed in number those against whom the challenge is raised. Mérygnac states :

“The facts on which the objection to the capacity or the challenge are based are submitted to the arbitral tribunal, the allegedly incapable or challenged arbitrators not participating. The arbitral tribunal has power to decide upon the objection provided that the arbitrators taking part in the decision outnumber those against whom the objection has been raised.”⁵⁰

⁴⁸ Moore, *International Arbitrations*, Vol. 2, pp. 1660-1676.

⁴⁹ *La procédure dans les arbitrages internationaux* (Paris, 1905), p. 119.

⁵⁰ Mérygnac, p. 253.

It has not been considered advisable to include such a rule in the article. Paragraph 2, however, provides that cases concerning the disqualification of a sole arbitrator shall on the application of either party be referred to the International Court of Justice for decision.

Article 20 of the Convention for the Establishment of an International Central American Tribunal of 7 February 1923 indicates some of the grounds upon which a member of a tribunal would be barred from acting :

“Members of the Tribunal are barred from the exercise of their functions in any matters in which they may have material interest or in relation to which they may have appeared in any capacity before a national tribunal, a tribunal of arbitration or of any other character, or before a commission of inquiry. This disability shall apply also whenever said members have acted in the aforementioned matters as counsel or agents of any of the parties, or have rendered a professional opinion.”⁵¹

Paragraph 3 of the present article provides for the filling of the vacancy caused by the disqualification of an arbitrator.

⁵¹ English text furnished by the United States Department of State, and published in *Am. J. Int. Law, Supp.* (1923), Vol. 17, p. 91.

CHAPTER III
THE COMPROMIS

Article 9

Unless there are prior agreements which suffice for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify :

- (a) The subject matter of the dispute;
- (b) The method of constituting the tribunal and the number of arbitrators;
- (c) The place where the tribunal shall meet.

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

- (1) The law to be applied by the tribunal, and the power, if any, to adjudicate *ex aequo et bono*;
- (2) The power, if any, of the tribunal to make recommendations to the parties;
- (3) The procedure to be followed by the tribunal;
- (4) The number of members constituting a quorum for the conduct of the proceedings;
- (5) The majority required for the award;
- (6) The time limit within which the award shall be rendered;
- (7) The right of members of the tribunal to attach dissenting opinions to the award;
- (8) The appointment of agents and counsel;
- (9) The languages to be employed in the proceedings before the tribunal; and
- (10) The manner in which the costs and expenses shall be divided.

Comment

An arbitration proceeding is a specially constituted proceeding. The tribunal must be constituted, the dispute or disputes to be decided by it must be defined, the place where the tribunal shall meet must be indicated and all other matters necessary to the conduct of its proceed-

ings should be set forth. Usually these matters, or at least some of them, are provided for in a single written instrument generally referred to as the *compromis*. The *compromis d'arbitrage* has been defined by Ralston as a

“form of treaty which refers a given subject-matter of dispute to arbitrators, either especially designated or whose designation is arranged for, describes and limits the powers of the arbitrators and usually in substance the general tenor of their possible sentences, with a provision for carrying them out”.¹

A less specific definition is the one given by Witenberg :

“a treaty under which one or more States agree to confer upon an arbitrator or a previously constituted judicial body the settlement of one or more existing disputes”.²

The careful drafting of the *compromis* is of prime importance. Thus, it has been said :

“The claims convention should be drawn up with the most scrupulous clarity. Those who have participated in the drafting of treaties or legislation will know that draftsmen are often tempted to permit a difficult or controverted point to remain intentionally ambiguous. Such a temptation should never be indulged in when drafting a claims convention. Ambiguities cause conflict and delay, and may often wreck the whole structure of settlement.”³

This article in its first paragraph sets forth the obligatory elements of the *compromis* and in its second paragraph deals with several additional topics the covering of which will give a certain amount of completeness to the instrument.

Paragraph (a). The exact question or questions to be decided by the tribunal must be stated with the utmost clarity and preciseness. In the arbitration between Great Britain and the United States involving the *San Juan Channel water boundary* between the United States and Canada, the Treaty of Washington of 8 May 1871 set forth in article 34 the respective claims of each of the parties and required the arbitrators to “decide . . . which of those claims is most in accordance with the true interpretation of the treaty of June 15, 1846”. The British Government was criticized in the House of Commons for having acceded to such language, which would preclude the arbitrator from selecting any line between the boundaries claimed by each of the parties. The clear and explicit statement of the question for decision, however, led to an award which was promptly and fully accepted by the parties.⁴

¹ Ralston, p. 5.

² Witenberg, p. 6.

³ Feller, p. 318.

⁴ Moore, Vol. 1, p. 231.

On the other hand, the convention of 24 June 1910 between the United States and Mexico required a commission to decide "solely and exclusively whether the international title to the Chamizal tract is in the United States of America or Mexico".⁵ The commission, however, by majority decision divided the tract, awarding part to the United States, and part to Mexico.⁶ It may be noted that the United States refused to accept the validity of the award upon the ground, among others, that in dividing the tract the commission had decided a question not submitted by the parties.⁷

Paragraph (b). See comment under articles 3 and 4 *supra*.

Paragraph (c). The place of the meeting of the tribunal is a matter of convenience and this paragraph accordingly leaves it to the parties to fix such place. Even though article 60 of the Hague Convention of 1907 prescribed that the Permanent Court of Arbitration was to meet at the Hague, this was made subject to any provision thereon which the parties might make. The parties may delegate to the tribunal the selection of the place of its meetings.⁸ If no regulation whatever of the place of meeting is included in the *compromis*, the tribunal itself has the inherent power to fix its place of meeting.⁹

Paragraph (1). One of the questions for decision by the parties in drawing up a *compromis* involves the determination of the rules or principles on the basis of which the tribunal is to reach its decision. The *compromis* may provide such rules or principles in accordance with a wide variety of formulas. It may require the tribunal to decide according to, for instance, "the rules (principles) of international law", "the substantive rules enumerated in Article 38 of the Statute of the International Court of Justice", "the principles of law (justice) and equity", "considerations of equity", or "*ex aequo et bono*".¹⁰

The parties may also lay down special rules of law for the tribunal as in the *Alabama Claims* arbitration¹¹ and in a number of the *Mexican Claims* arbitrations.¹²

This paragraph does not enter into the question of the meaning of said formulas, save only to point out that express authorization "to

⁵ *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1910-1923, Supplement to Malloy* (Washington, 1923), Vol. 3, p. 2730.

⁶ *Papers Relating to the Foreign Relations of the United States, 1911* (Washington, 1918), pp. 586-587.

⁷ *Ibid.*, pp. 598-600, 604-605; and see comment to article 30, paragraph (a), *infra*.

⁸ E.g., convention of 8 September 1923, United States and Mexico, art. 2, *Reports I.A.A.*, Vol. 4, p. 12.

⁹ *Projet*, 1875, art. 8.

¹⁰ *Systematic Survey*, pp. 116-122.

¹¹ Treaty of Washington of 8 May 1871, art. 6, Moore, Vol. 1, pp. 549-550.

¹² E.g., convention of 10 September 1923 between the United States of America and Mexico, art. 3, *Reports I.A.A.*, Vol. 4, p. 780.

adjudicate *ex aequo et bono* " is necessary. It may be pertinent to observe, however, that the principles of equity are considered by some to be a part of international law. Hudson states that the " long and continuous association of equity with the law which is applicable by international tribunals would seem to warrant a conclusion that equity is an element of international law itself ".¹³ Mérignhac states that " international law is administered with due regard to equity ".¹⁴ On the other hand, in a case decided in 1923, it was the view of the American-British Claims Arbitration Tribunal, constituted under the convention of 10 August 1910 and authorized to decide " in accordance with treaty rights and with the principles of international law and of equity ",¹⁵ that, as far as its own activity was concerned, considerations of equity could not override a treaty or a specific rule of international law. In a case decided three years later, however, the same tribunal adopted the view that in legally anomalous situations, its decision must be based on " general considerations of justice, equity, and right dealing guided by legal analogies and by the spirit and received principles of international law ".¹⁶

It should be noted that in international adjudications the term " equity " is used in the sense of tempering specific rules of law to avoid injustice or hardship in a particular case, and not in the peculiarly Anglo-Saxon sense of a body of rules distinct from the " common law ".¹⁷ Thus, the tribunal in the *Norwegian Shipowners' Claims* case said :

" The words ' law and equity ' used in the special agreement of 1921 cannot be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence.

" The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State. " ¹⁸

A grant of power to decide *ex aequo et bono* does not give a judge complete freedom of action and authority to act arbitrarily and upon the basis of purely subjective considerations.¹⁹ In the boundary

¹³ Hudson, *Permanent Court*, p. 617; see also his individual opinion in *The Diversion of the Water from the Meuse* case, P.C.I.J., Ser. A/B, No. 70, p. 76.

¹⁴ Mérignhac, p. 295.

¹⁵ *Eastern Extension, Australasia and China Telegraph Co. (Great Britain) v. United States* (1923), *Report of Fred K. Nielsen* (Washington, 1926), p. 79.

¹⁶ *Cayuga Indians (Great Britain) v. United States* (1926), *ibid.*, pp. 314-315.

¹⁷ P. E. Corbett, *Law and Society in the Relations of States* (New York, 1951), p. 109, note 32 at p. 310.

¹⁸ Arbitration between Norway and the United States of America under the special agreement of 30 June 1921, *Reports I.A.A.*, Vol. 1, p. 331.

¹⁹ H. Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), p. 315; Hudson, *Permanent Court*, p. 620.

arbitration between Guatemala and Honduras the tribunal was given wide powers to decide "as it may seem fit" or as "it may deem just", though these grants of power were subject to certain clarifying conditions. The tribunal said that:

"The Treaty cannot be construed as authorizing the Tribunal to establish a definitive boundary according to an idealistic conception, without regard to the settlement of the territory and existing equities created by the enterprise of the respective Parties."²⁰

Thus a decision *ex aequo et bono* must be based upon objective considerations. Moreover, the decision must fit into the general framework or system of the law. The role of such a decision is to supplement the law and to fill in its gaps.²¹

If the *compromis* should fail to specify the law to be applied by the tribunal, the provisions of article 12 *infra* then come into effect.

Paragraph (2). Perhaps the most notable example of a request by parties that a tribunal make recommendations with regard to a dispute pending between them is found in the *North Atlantic Coast Fisheries* case before the Permanent Court of Arbitration. Under article 4 of the *compromis* of 7 September 1910 the tribunal was requested to

"recommend for the consideration of the high contracting Parties rules and a method of procedure under which all questions which may arise in future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award".

The tribunal carried out this request in its award, with considerable subsequent influence upon the development of international law.²²

The joint commission in the *Im Alone* case was directed to make recommendations to which, the *compromis* provided in article 4, "effect shall be given".²³

Independently of any express grant of power in the *compromis*, claims commissions have occasionally recommended payment to be made to claimants *ex gratia*.²⁴

²⁰ *Opinion and Award of the Special Boundary Tribunal between Guatemala and Honduras* (Washington, 1933), pp. 69-70.

²¹ E. Borel in *Annuaire de l'Institut de Droit International* (1934), pp. 224-225; cf. M. Habicht, *The Power of the International Judge to Give a Decision "ex aequo et bono"* (London, 1935), p. 69, and K. Strupp, *Le droit du juge international de statuer selon l'équité*, *Rec. A.D.I.* (1930), Vol. 33, pp. 462-463.

²² J. B. Scott, *The Hague Court Reports* (New York, 1916), pp. 151, 188.

²³ *Reports I.A.A.*, Vol. 3, p. 1612.

²⁴ United States-British Claims Arbitration under convention of 18 August 1910, *Home Missionary Society, William Hardman, Cadenhead and David J. Adams* cases, *Report of Fred K. Nielsen* (Washington, 1926), pp. 421, 495, 505 and 524; cf. also the *Eastern Extension, Australasia and China Telegraph Company, Ltd.* case, same *Report*, p. 79, Ralston, No. 68, and Ralston, Supp. No. 68a, and Hudson, *International Tribunals*, pp. 124-125.

Paragraph (3). It has been the experience of international tribunals that a successful outcome of their labours is often dependent upon the procedure followed. In view of the fact that the character of *ad hoc* arbitrations will vary from case to case, no attempt to formulate detailed rules of procedure is made in the draft convention. It is open to the parties to formulate such rules in the *compromis* or to leave the tribunal free to formulate its rules of procedure.²⁵

Paragraph (4). This paragraph deals with the quorum required for the conduct of the proceedings.

Hitherto, provisions concerning a quorum have rarely been found in *compromis* establishing an *ad hoc* arbitral tribunal as distinct from a permanent tribunal set up in advance by a general international agreement. In the case of the latter, provisions are customary concerning a quorum. Article VI of the Convention for the Establishment of a Central American Court of Justice provided that "the attendance of the five justices who constituted the tribunal is indispensable in order to make a legal quorum in the decisions of the Court".²⁶ Neither the Hague Convention of 1899 nor that of 1907, nor the Draft Convention of 1907 for a Court of Arbitral Justice provided for a quorum. In the case of the International Court of Justice, provision is made in the Statute (Art. 25) for a quorum of nine judges. An example of a tribunal lacking a quorum is that of the Central American Court of Justice in the case of *Costa Rica v. Nicaragua* in which the absence of Justice Navas prevented the Court from acting for one month.²⁷

The above provision is intended to encourage a definite practice on this point.

Paragraph (5). It is commonly assumed that *all* members of an arbitral tribunal will be *present at all meetings*.²⁸ The obligation, more especially, of all members to attend the *deliberations* of the tribunal has been laid down in article 19 *infra*.

On the other hand, provisions are common that *decisions* may be taken by a *majority*. This practice is codified in article 13, paragraph 1, of this draft which provides that all questions shall be decided by a majority of the tribunal.

The expression "majority" which is used both in this paragraph and in article 13, paragraph 1, should be defined by the *compromis*.

It may be noted that even if the *compromis* is silent on these matters article 13, paragraph 2, enables the tribunal to formulate its own rules of procedure, including those concerning the presence of all members

²⁵ See also *infra* comment on article 13, paragraph 2.

²⁶ *Am. J. Int. Law, Supp.* (1908), Vol. 2, p. 235.

²⁷ Hudson, *The Central American Court of Justice*, *Am. J. Int. Law* (1932), Vol. 26, p. 774.

²⁸ See, for some comments on the presence of all members of the tribunal, Witenberg, pp. 269-270, Hudson, *International Tribunals*, p. 53.

at all meetings and the majority required for decision. The Special Commission set up to decide in the case of *Colombia v. Cauca Co.*²⁹ may be cited as an instance of a commission which, under the power vested in it to determine its own procedure, resolved that all decisions should be by a majority vote.³⁰

Paragraph (6). A *compromis* may or may not specify the period within which the tribunal shall render its award and complete its labours. When provisions are included fixing the term of life of the tribunal, these may define a period beginning on a certain day, such as the date of exchange of ratifications of the *compromis*, the date of the constitution of the tribunal, the date of its first meeting, or some other fixed date.³¹

If a fixed term for such purpose is provided and the tribunal fails to complete its labours within such term, a further extension of time may be necessary. Frequently, claims commissions have been unable to dispose of the cases before them within the time fixed, rendering necessary the conclusion of additional conventions extending the life of the commission.³² However, treaties may occasionally contain provisions that notwithstanding the expiration of the treaty any arbitral proceedings then pending shall continue until their completion.³³

In the present draft convention the question of extension of the period fixed by the *compromis* is regulated by article 23.

Paragraph (7). Reference is made here to the discussion of the subject of dissenting opinions in the comment on article 25.

Paragraph (8). The Hague Convention of 1907 described the functions of agents and counsel as follows in article 62 :

“The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

“They are further authorized to commit the defence of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.”

Article 13 of the *Projet*, 1875, authorized each of the parties to designate one or several representatives before the arbitral tribunal.

Under Article 42, paragraphs 1 and 2, of the Statute of the International Court of Justice, the “parties shall be represented by agents” and they “may have the assistance of counsel or advocates before the Court”.

²⁹ See comment on article 7 *supra*.

³⁰ See further comment on article 13, paragraph 2, *infra*.

³¹ See examples collected in Witenberg, pp. 285-286.

³² E.g., General and Special Claims Commissions, United States and Mexico, under conventions of 8 and 10 September 1923, respectively, *Reports I.A.A.*, Vol. 4, pp. 3, 773.

³³ *Systematic Survey*, pp. 304-308.

The Rules of Procedure of the Mixed Arbitral Tribunals, set up after the First World War, were purely permissive as far as the representation of the parties was concerned.³⁴ On the other hand, article 5 of the Rules of the Franco-Italian Conciliation Commission constituted under article 83 of the Treaty of Peace with Italy of 10 February 1947 (and which, in fact, is not a conciliation commission but an arbitral tribunal)³⁵ requires the representation of the parties by an agent.³⁶ The difference may be explained by the fact that in the case of the latter tribunal only the two Governments concerned are admitted as parties, whereas before the Mixed Arbitral Tribunals private persons were allowed to sue.

The agent is the "official and final representative" of his government before the tribunal.³⁷ Hudson states that the agent has the "capacity to assume commitments in its behalf with reference to the litigation".³⁸

Ralston states that the "powers of counsel in International Tribunals are in a general way similar to those of counsel in private litigation before a court. Counsel are, however, subject to the control of the agent".³⁹ Feller states that "their chief function is to address arguments to the tribunal. They cannot take decisions regarding questions of procedure which will bind the government".⁴⁰ Witenberg makes the following statement: "In the exercise of his functions, the agent may be assisted by attorneys or counsel selected by his government or by himself."⁴¹

Article 62 of the Hague Convention of 1907 prohibits members of the Permanent Court of Arbitration from acting "as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court".

In the arbitration of certain claims between the United States and Russia under the protocol of 26 August 1900⁴² no mention was made of agents. The Russian Government took the position that its memoranda should be sent to the American Government through the Russian ambassador at Washington. The arbitrator was accordingly called

³⁴ See, e.g., article 8 of the Belgo-German, article 83 of the Franco-German and Franco-Bulgarian, article 81 of the Greco-German, and article 3 (g) of the Anglo-German Rules, all published in the *Rec. T.A.M.*

³⁵ See J. P. A. François, *Handboek van het volkenrecht*, Vol. 2 (2nd ed., Zwolle, 1950), p. 201, and M. Bos, *The Franco-Italian Conciliation Commission in Nordisk Tidsskrift for international Ret* (1952), Vol. 22, p. 135.

³⁶ *Rec. C.C. franco-italienne*, Vol. 1, p. 25.

³⁷ Ralston, p. 194. See to the same effect the decision of 19 October 1928 by the French-Mexican Claims Commission in the case of *Georges Pinson (France) v. United Mexican States*, *Reports I.A.A.*, Vol. 5, p. 327.

³⁸ Hudson, *International Tribunals*, p. 88.

³⁹ Ralston, p. 194.

⁴⁰ Feller, p. 284.

⁴¹ Witenberg, p. 72.

⁴² Stuyt, No. 236.

upon by the United States to decide as to the status of an agent. He ruled, *inter alia*, that the defendant must recognize the agent and counsel named by the complaining party to represent it in the arbitration "and must accept as official the communications emanating from the agent and counsel of the complainant".⁴³

Paragraph (9). While the determination of the languages may be left to the tribunal,⁴⁴ it has been found by experience preferable to regulate this question in advance.⁴⁵

Paragraph (10). The formula of article 85 of the Hague Convention of 1907 is the one customarily followed by parties in the matter of the allocation of the expenses of the arbitration, namely: "Each party pays its own expenses and an equal share of the expenses of the tribunal." Data as to costs and expenses of proceedings before international tribunals and practice in that regard will be found in Hudson, *International Tribunals*, pp. 59-66, and *Permanent Court*, p. 9, note 44, and in Feller, pp. 52-55.

Article 10

1. When the undertaking to arbitrate contains provisions which seem sufficient for the purpose of a *compromis* and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 9 to enable it to proceed with the case. In the case of an affirmative decision the tribunal shall prescribe the necessary measures for the continuation of the proceedings. In the contrary case the tribunal shall order the parties to conclude a *compromis* within such time limit as the tribunal will consider reasonable.

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

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

⁴³ Quoted by Ralston, p. 196.

⁴⁴ *Projet*, 1875, art. 9; Hague Convention of 1907, art. 61.

⁴⁵ *American and Panamanian General Claims Arbitration, Report of Bert L. Hunt*, Department of State, Arbitration Series No. 6 (Washington, 1934), p. 24.

Comment

Experience has shown that when an agreement to arbitrate future disputes moved from the realm of future possibilities to the realm of an existing specific dispute, difficulties often arose in arriving at the *compromis* and an *impasse* was often created. The first attempt to solve such difficulties was made in the Hague Convention of 1907, whereby the Permanent Court of Arbitration would draw up the *compromis*. Article 53 provides as follows :

“The Permanent Court is competent to settle the *compromis*, if the parties are agreed to have recourse to it for the purpose.

“It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of :

“1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to obligatory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question.

“2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This provision is not applicable if acceptance is subject to the condition that the *compromis* should be settled in some other way.”

Article 54 provides :

“In the case contemplated in the preceding article, the *compromis* shall be settled by a commission consisting of five members selected in the manner laid down in Article 45, paragraphs 3 to 6.

“The fifth member is *ex officio* president of the commission.”

The Revised General Act contemplates that an arbitration proceeding will be initiated as the result of two successive steps, first, the constitution of the tribunal, and, second, the drawing up of the *compromis*. Article 23 of that instrument provides means for constituting the tribunal notwithstanding a failure by the parties to make the necessary appointment of members. Article 27 of the Revised General Act provides that if the parties should fail to arrive at a *compromis*, the dispute may be submitted to the tribunal directly by an application of one of the parties, *viz.* :

“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.”

While the simplicity and expedition of this procedure is an improvement on that of the Hague Convention of 1907, it leaves unsettled questions of procedure which are desirable to be regulated in advance.

In general, practice has tended to follow one or the other of these two procedures, that is, either to establish a special tribunal to draw up the necessary *compromis*⁴⁶ or to submit the dispute in question to the arbitral tribunal by application of either party.⁴⁷ Provisions are also found in practice to the effect that if the *compromis* should not be drawn up within a certain period of time, either party would have the right to bring the dispute before the Permanent Court of International Justice by means of a simple application.⁴⁸ Still another method is used in article 43 of the Pact of Bogotá, 30 April 1948, 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.”

Paragraph 1 of the present article is based on the consideration that, although it is usually necessary to draw up a *compromis* defining the dispute and other essential elements of the arbitration, the provisions of a general arbitration agreement may already contain provisions which suffice for this purpose. In that case a separate *compromis* is unnecessary and the dispute can be submitted by application to the arbitral tribunal on the basis of the general agreement. If the parties disagree as to whether or not the undertaking to arbitrate is sufficient for the purpose of a *compromis*, this question shall be decided by the tribunal. Should the tribunal find the general undertaking insufficient, it shall order the parties to conclude a *compromis* or, according to paragraph 2, if they fail to do so, itself draw up a *compromis*. In case none of the parties claims that the general arbitration agreement is sufficient, paragraph 3 provides that the necessary *compromis* shall be drawn up by the parties or, if they fail to agree, by the tribunal.

Article 3 of the draft provides for the constitution of the arbitral tribunal even in the absence of agreement between the parties. A tribunal will therefore always be available for the preparation of the *compromis*.

⁴⁶ *Systematic Survey*, pp. 81-82.

⁴⁷ *Ibid.*, pp. 83-84.

⁴⁸ *Ibid.*, pp. 84-87.

CHAPTER IV

POWERS OF THE TRIBUNAL

Article 11

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

Comment

In the *Betsey* case before the Mixed Commission under article 7 of the Jay Treaty of 19 November 1794 between Great Britain and the United States, American Commissioner Gore expressed the opinion that, upon an objection being raised as to the jurisdiction of the Commission, it had both the power and the duty to decide whether the case were within its jurisdiction.¹ Since that time, the power of a tribunal to determine its jurisdiction has been an established principle of international law. This principle was recognized in article 14 of the *Projet*, 1875, reading in part as follows :

“ Arbitrators are obliged to decide upon objections to the jurisdiction of the Arbitral Tribunal . . .

“ 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.”

Article 73 of the Hague Convention of 1907² provided in part :

“ The tribunal is authorized to declare its competence in interpreting the *compromis* . . . ”

Article 36, paragraph 6, of the Statute of the International Court of Justice provides that “ a dispute as to whether the Court has jurisdiction . . . shall be settled by the decision of the Court ”. The principle was also recognized in the Rules of Procedure of several of the Mixed Arbitral Tribunals constituted following the First World War.³

¹ Lapradelle-Politis, Vol. 1, pp. 63 *et seq.*

² Cf. article 48 of the corresponding Convention of 1899.

³ E.g., article 3 of the Rules of the Belgo-German, Belgo-Austrian and Belgo-Bulgarian Mixed Arbitral Tribunals, *Rec. T.A.M.*, Vol. 1, pp. 33, 171 and 231; article 87 of the Rules of the French-German, French-Bulgarian and French-Austrian Mixed Arbitral Tribunals, *Rec. T.A.M.*, Vol. 1, pp. 44, 121 and 242; and article 84 of the Rules of the Greco-German Mixed Arbitral Tribunal. *Rec. T.A.M.*, Vol. 1, p. 61.

The Permanent Court of International Justice in its advisory opinion of 28 August 1928⁴ referred to "the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction". After the Second World War, the rule has been adopted by the Franco-Italian Conciliation Commission constituted under article 83 of the Treaty of Peace with Italy of 10 February 1947.⁵

With regard to the question whether a restrictive or extensive interpretation shall be adopted with respect to jurisdictional issues different opinions have been voiced. In the view of certain authors, the *compromis* is to be interpreted restrictively.⁶ In the debate concerning the *Hungarian Optants* case between Romania and Hungary, arising out of the decision in 1927 of the Romanian-Hungarian Mixed Arbitral Tribunal in *Emeric Kulin (Hungary) v. Romania*,⁷ the view was expressed that as soon as the slightest doubt concerning jurisdiction exists, the tribunal should declare itself to be without jurisdiction.⁸

This view was vigorously denied by G. Scelle as follows :

"It would be committing a denial of justice to refuse to give judgment on the pretext that the jurisdiction has been challenged."⁹

Balasko suggests that restrictive interpretation should be applied when a tribunal's jurisdiction is challenged in its entirety but that, when certain aspects only of its jurisdiction are challenged, extensive interpretation should be applied.¹⁰ Still other authors deny the existence of any rule of restrictive interpretation, laying stress upon the rule of extensive interpretation found in the practice of the Permanent Court of International Justice.¹¹

Hudson summarizes the applicable principles of law as follows :

"The jurisdiction of a tribunal must also be established with respect to the subject-matter of each particular case, in accordance

⁴ *Interpretation of the Greco-Turkish Agreement of December 1st, 1926, Final Protocol, Article IV*, P.C.I.J., Ser. B, No. 16, p. 20.

⁵ See article 2, paragraph 2, of its Rules of Procedure, *Rec. C.C. franco-italienne*, Vol. 1, p. 25.

⁶ P. Guggenheim, *Lehrbuch des Völkerrechts* (Basel, 1948), Vol. 1, p. 128; C. Rousseau, *Principes généraux du droit international public* (Paris, 1944), Vol. 1, p. 688.

⁷ *Rec. T.A.M.*, Vol. 7, p. 138.

⁸ J. Basdevant, G. Jèze and N. Politis, *Les principes juridiques sur la compétence des juridictions internationales et, en particulier, des T.A.M. organisés par les Traités de paix de Versailles, Saint-Germain, Trianon* in *Revue du droit public et de la science politique en France et à l'étranger* (1927), Vol. 44, pp. 45 et seq.

⁹ G. Scelle, *Le litige roumaino-bongrois devant le Conseil de la Société des Nations in La réforme agraire roumaine en Transylvanie devant la justice internationale et le Conseil de la Société des Nations* (Paris, 1928), p. 309.

¹⁰ A. Balasko, *Causes de nullité de la sentence arbitrale en droit international public* (Paris, 1938), pp. 137-138.

¹¹ H. Lauterpacht, *De l'interprétation des traités* in *Annuaire de l'Institut de Droit International* (1950), Vol. 1, pp. 408 et seq.

with provisions in the text of the instrument creating or controlling the tribunal. Some limitations upon the subject-matter may be thought to result from the character of the tribunal itself, from the powers with which it is invested, and from the necessity of its being guided by applicable law; but if this is so it is hardly possible to give precision to such limitations, apart from an interpretation of the relevant provisions in a controlling instrument.

“ . . .

“ nor should it be necessary to give a restrictive interpretation to provisions conferring or limiting jurisdiction.”¹²

The Permanent Court of International Justice in its judgment of 26 July 1927¹³ said :

“ It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it; consequently, the Court will, in the event of an objection — or when it has automatically to consider the question — only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court.”

It may be of interest to note that the present article confers upon the tribunal the “ *widest* powers to interpret the *compromis* ”. In fact, the report of the Commission goes even further and holds that the scope of the jurisdiction of the tribunal “ includes also the right to supplement the *compromis* in all cases in which such action is essential for ensuring the conduct of the arbitration with a view to a final settlement of the dispute ”.¹⁴

As to the problem of excess of jurisdiction, see below, chapter VII (art. 30-32) regarding annulment of the award.

¹² Hudson, *International Tribunals*, p. 71.

¹³ *Case concerning the Factory at Chorzów — Claim for Indemnity — Jurisdiction*, P.C.I.J., Ser. A, No. 9, p. 32.

¹⁴ *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 42.

Article 12

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

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*.

Comment

Paragraph 1 of this article has application when the parties shall have failed to determine the law to be applied by the tribunal.¹⁵ When, in a specific case, the parties did not indicate the law to be applied, the only reasonable solution of the problem thereby raised, consistent with the judicial character of arbitration, was, until the adoption of the provisions of article 38, paragraph 1, of the Statute of the Permanent Court of International Justice (and of the International Court of Justice), the general formula that the tribunal was to decide according to the rules of international law. Thus article 18 of the *Projet*, 1875, provides:

“The arbitral tribunal decides according to the principles of international law, unless the *compromis* prescribes different rules or leaves it to the arbitrators to decide according to their free judgment.”

Mérignhac is of similar view:

“Is the arbitrator, in such a case, subject to no rule at all, and is he at liberty to decide according to what he thinks is equitable? Since the *compromis* is silent, the arbitrator seems to be vested with absolute power of free judgment; this concept, however, would be extremely dangerous and has never prevailed in the field of arbitration . . . The international arbitrator, likewise, must seek guidance in the law governing the nations in their mutual relations, and has to act as if he had expressly been directed to apply it. This principle, according to which the arbitrator, if the *compromis* is silent, takes the law of nations for his guide, has been accepted by arbitral practice.”¹⁶

Ralston states that:

“In the absence of any specific direction in the protocol, it may be understood that international law is always to be regarded as controlling the commission. As a rule, however, the protocols specifically state either in the oath prescribed to the arbitrators or in other clauses that they shall have power to adjudge according to the rules of international law or ‘equitably and justly’ or *ex aequo et bono* or according to the decisions of other tribunals of like character.

¹⁵ Cf. art. 9, para. (1), *supra*.

¹⁶ Mérignhac, pp. 295-296.

In some instances special rules are laid down as of controlling force in the tribunal and these rules are frequently adjudged to have great force as evidential of international law."¹⁷

Since the introduction into international jurisprudence of the provisions of article 38, paragraph 1, of the Statute of the Permanent Court of International Justice, there has been a trend to adopt these provisions of the Statute as the substantive law to be applied by arbitral tribunals. The Revised General Act provided in article 18:

"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."¹⁸

Similar provisions appeared in numerous arbitration treaties.¹⁹ The above paragraph accordingly reflects current international practice.

The problem of *non liquet*, dealt with in paragraph 2, arises when a tribunal refrains from giving a decision for lack of sufficient elements of fact or of law upon which to base its decision. Perhaps the most notable instance of such action on the part of an arbitrator took place in connexion with the *Northeastern boundary* dispute between the United States of America and Canada. The King of the Netherlands sitting as arbitrator refrained from giving a decision upon the grounds of lack of proof and inability "to award either of those lines (i.e., as claimed respectively by the parties) to one of said parties, without violating the principles of law and equity with regard to the other."²⁰

The view has been held that, when an arbitral tribunal considers that the rules for decision determined by the parties are not of a sufficiently comprehensive character to furnish a legal basis for the decision, or that gaps or *lacunae* in the law of the tribunal exist, the tribunal may, in theory, take one of three possible courses of action. It may ask the parties for a clarification or modification of said rules, it may render a decision without making such a request, or it may render a *non liquet*. It will be observed that paragraph 2 of this article does not exclude the tribunal from having recourse to the first two of these procedures, but that it does prevent the tribunal from having recourse to the third.

The problem of *non liquet* is usually raised as a result of the supposed existence of gaps or *lacunae* in the rules for decision prescribed for the tribunal by the parties. Four principal methods of defining those rules can be seen to exist. First, the tribunal may be directed by the parties to decide according to the rules of international law. Second, the tribunal may be directed to decide in accordance with the provisions of

¹⁷ Ralston, pp. 53-54.

¹⁸ See also its article 28.

¹⁹ *Systematic Survey*, pp. 117-118.

²⁰ Moore, Vol. 1, p. 133.

Article 38, paragraph 1, of the Statute of the International Court of Justice. Third, the tribunal may be authorized to decide according to equity or *ex aequo et bono*. Fourth, the parties may lay down special rules of law for the tribunal.²¹

With regard to the first and fourth methods above, a considerable body of opinion exists to the effect that a tribunal may find itself lacking a sufficient basis in the elements of fact or of law on which to base its decision, and that in such event it becomes its duty to enter a *non liquet*. Thus, A. de Lapradelle and N. Politis state in a doctrinal note on the *Alabama Claims* arbitration :

“Unless the *compromis* bestows upon the arbitrators the power to decide according to equity, they must decide according to the rules of international law which they recognize to be applicable in the case. It is, however, possible that no rules of law exist or the parties do not agree about their meaning. In such a case, it is the duty of the arbitrators to refuse to render judgment. Otherwise, their decision would be vitiated by *excès de pouvoir* and might not be carried out.”²²

In a doctrinal note by T. M. C. Asser on the same arbitration a similar view is expressed :

“The arbitral tribunals have the right to enter a *non liquet* since the States which set up the arbitration are concerned only with the performance of the *compromis*. Nominated, but at the same time limited, by the *compromis*, the arbitrator's duty lies only in its application : if in the situation in which he has been placed by the *compromis* it is impossible for him to render an equitable or merely compromising judgment, he has to say so and nothing else.”²³

Politis states that :

“... Inasmuch as the arbitrator has been appointed by certain States on the occasion of a particular dispute in order to give a decision in the case, his duty is to act in accordance with the *compromis*. In the event of the considerations of fact or law submitted to him not providing adequate data upon which to base a decision, he has not only the right, but the duty to refuse to render judgment. Practice is settled in this sense and is sometimes confirmed by the *compromis*.”²⁴

²¹ Cf. comment to article 9, paragraph (1), *supra*, where used formulas and sources are being cited. As is shown there, a combination of the first and third methods has been made in practice.

²² Lapradelle-Politis, Vol. 2, p. 913.

²³ *Ibid.*, Vol. 1, p. 398.

²⁴ N. Politis, *La justice internationale* (Paris, 1924), p. 84. To similar effect see H. Lammasch, *Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzen Umfange* (Stuttgart, 1914), p. 184.

However, a substantial body of authority exists which denies the possibility of a *non liquet*. Article 19 of the *Projet*, 1875, provides :

"The arbitral tribunal cannot refuse to render judgment under the pretext that it is uncertain as to the facts or as to the legal principles it must apply."

Mérignhac states that :

"The tribunal cannot omit to decide under the pretext that it is uncertain as to the facts or as to the legal principles to be applied to the case (article 19, paragraph 1, of the Rules of the *Institut*). It, therefore, would not be able to free itself from its obligation to decide by declaring under oath like the Roman *judex* that the law is not clear (*sibi non liquere*). By his refusal to render judgment, he would have to bear the moral responsibility in particular for the war which might break out. One ought to admit, therefore, that the arbitrator having accepted his task is obliged to fulfil it entirely, just like an ordinary judge; . . ." ²⁵

Witenberg states :

"As soon as the parties have submitted a question to the arbitrator, the question must be deemed to carry the answer with it. To allow the judge not to decide under the pretext of the impossibility of giving a decision is tantamount to setting aside this assumption without reasonable ground." ²⁶

Lauterpacht contends that international law "is complete from the point of view of its adequacy to deal with any dispute brought before an international judicial tribunal", that there are no gaps in international law from the point of view of "the social purpose of the law and the requirement of unity within the law", and, consequently, that "it is axiomatic that the judge is bound to give a decision on the dispute before him" ²⁷

With regard to the second method mentioned above, namely, cases in which the tribunal is required to decide in accordance with the rules laid down in article 38, paragraph 1, of the Statute of the Permanent Court of International Justice and of the International Court of Justice, it is the view of some authors that the inclusion of the third subdivision of that paragraph, namely, "the general principles of law recognized by civilized nations", eliminated the possibility of *non liquet*. Lauterpacht states that this subdivision

". . . definitely removed the last vestige of the possibility of gaps conceived as a deadlock in the way of the settlement of a dispute. The disinclination to repeat themselves ought not to prevent inter-

²⁵ Mérignhac, pp. 283-284.

²⁶ Witenberg, pp. 314-315.

²⁷ H. Lauterpacht, *The Function of Law in the International Community* (Oxford, 1933), pp. 134-135; see also pp. 127-133.

national lawyers from drawing repeated attention to the fact that the terms of article 38 of the Statute, and in particular of its third paragraph, are broad enough to allow a legal answer to every dispute. The prohibition of *non liquet* is one of the 'general principles of law recognized by civilized nations' ".²⁸

Habicht states :

"As a consequence of point 3 of article 38, when faced with a gap in positive law, the Permanent Court of International Justice will not act otherwise than a national judge in all systems of law. If a gap occurs, the Court will fill it by 'discovering' or by 'creating' the necessary rule."²⁹

With regard to the third method referred to above, namely, cases in which the tribunal is directed to decide according to equity or *ex aequo et bono*, it would seem clear that the problem of gaps could hardly arise. The danger here is rather that, while professing to base its decision on legal reasoning and reasoning by analogy in the manner of a judge,³⁰ a tribunal might, under the cloak of a decision *ex aequo et bono*, in fact reach its decision arbitrarily and on the basis of personal views.³¹

Paragraph 2 of the present article excludes the possibility of a *non liquet* and is to be understood as being couched in mandatory terms. It flatly directs that "the silence or obscurity of international law or of the *compromis*" will not justify the tribunal in bringing in "a finding of *non liquet*".

As pointed out in the comment on article 1, the present draft convention does not make a distinction between juridical and non-juridical disputes. Article 12 would therefore be applicable to both categories of disputes. Parties to the convention which undertake to submit to arbitration disputes which they do not wish to have settled on the basis of the rules of international law referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, would consequently have to specify what other rules or principles they want the arbitral tribunal to apply. This would seem to be in conformity with already existing practice.³²

Article 13

1. All questions shall be decided by a majority of the tribunal.
2. In the absence of any agreement between the parties concerning the procedure of the tribunal, the tribunal shall be competent to formulate its rules of procedure.

²⁸ Op. cit., p. 67.

²⁹ M. Habicht, *The Power of the International Judge to Give a Decision "ex aequo et bono"* (London, 1935), p. 14.

³⁰ See comment on article 9, paragraph (1), *supra*.

³¹ Witenberg, p. 314.

³² Cf. statement by the Chairman of the International Law Commission at the 387th meeting of the Sixth Committee of the General Assembly, document A/C.6/L.320, paragraph 15.

Comment

The majority rule has been generally accepted in international arbitrations, and has usually been laid down in the *compromis*. Doubts have sometimes arisen as to the situation where the *compromis* is silent on the point. Under article 5 of the Jay Treaty of 1794 between Great Britain and the United States³³ the determination of what was the true course of the River St. Croix (the so-called *Northeastern boundary* dispute) was referred to three commissioners, one to be appointed by each Government, and the third to be chosen by the two so appointed. When the American and British Commissioners met they found that the phraseology of their commissions differed, the former being authorized to give a decision "with the other commissioners" whilst the British Commissioner's authority was to give a decision "with the other two commissioners" or by "the major part of the said three". The Attorney General of the United States advised the Secretary of State that the concurrence of all three commissioners was necessary to a decision. However, neither the Government of Great Britain nor that of the United States would accept this view. In instructions by the Secretary of State to the American Commissioner (having pointed out that the object of the arbitration was to dispose of the question at issue with finality) it was stated :

"The nature of such transactions between parties at variance confirms the justness of the opinion, that two out of three agreeing, their decision will be binding; for when each has chosen one, or an equal number, another is appointed to insure a majority on one side or the other; one very important object of such an examination of any disputed point being to bring the controversy about it to an end."³⁴

A discussion also arose in connexion with the so-called Halifax award rendered by the Halifax Commission, meeting at Halifax, Nova Scotia, under the Treaty of Washington of 8 May 1871 between Great Britain and the United States of America. This treaty, in addition to dealing with the obligations of a neutral State, also contained provisions concerning various other matters which were the subject of controversy between the two countries. Amongst these matters was a dispute as to the compensation payable to Great Britain in return for certain fishing privileges granted to United States citizens under article 18 of the treaty. Four boards of arbitration were set up by the treaty to adjudicate upon different matters. In respect of three of them it was expressly provided that a decision of the majority should suffice (art. 2, 10 and 13). In the case of the Halifax Commission, there was no such provision (art. 22-25). It was therefore suggested by the United States

³³ De Martens, *Recueil*, Vol. 5, pp. 650-652.

³⁴ Moore, *A Digest of International Law*, Vol. 7, p. 36.

that the inference must be that "it was not intended to invest a majority of the commission with power to make an award".³⁵

The British Government, in reply to this contention, cited Halleck, Bluntschli and Calvo to the effect that the decision of a majority of arbitrators binds a minority unless the contrary is expressed. Lord Salisbury "... expressed confidence that the Government of the United States would not, upon reflection, see in the considerations which it had advanced any sufficient reason for treating as a nullity the decision at which the majority of the Commission had arrived".³⁶ In the end, though under protest, the United States Government paid the amount awarded.³⁷

In his comment on this case, Moore states :

"If by general international practice, based on the authority of international law, the concurrence of a majority of a board of arbitrators is sufficient for a decision, the natural inference would be that the United States and Great Britain, in their dealings with each other or with other powers, as independent nations, intended to observe that practice unless they expressly agreed to disregard it."³⁸

It will thus be seen that, in spite of doubts that have arisen from time to time, the general rule of international practice is as stated in paragraph 1 of the above article. It is further confirmed by article 78 of the Hague Convention of 1907, article 27 of the Draft Convention of 1907 for a Court of Arbitral Justice³⁹ and article 55 of the Statute of the Permanent Court of International Justice and of the International Court of Justice. It must be noted, however, that, whereas the Statute of the Permanent Court provided that "all questions shall be decided by a majority of the judges present at the hearing", the expression "at the hearing" was omitted in Article 55 of the Statute of the International Court of Justice. It has been pointed out that "the changes in the English version of this article bring it into correspondence with the French version which is maintained as drafted in 1920".⁴⁰

Where a member of an arbitral tribunal abstains from voting, the views of writers appear to be that his abstention is to be treated as a negative vote.⁴¹ Hudson states that "abstention from voting by a member who is present ought to be recorded, and it is sometimes

³⁵ Moore, Vol. 1, p. 750.

³⁶ *Ibid.*, p. 751.

³⁷ *Ibid.*, p. 753.

³⁸ Moore, *Digest of International Law* (1906), Vol. 7, pp. 37-38.

³⁹ Scott, *The Reports of the Hague Conferences of 1899 and 1907* (Oxford, 1917), p. 230.

⁴⁰ Hudson, *The Twenty-Fourth Year of the World Court*, *Am. J. Int. Law* (1946), Vol. 40, p. 40.

⁴¹ See Witenberg, p. 281; Lammasch, *Die Rechtskraft internationaler Schiedssprüche* (Christiania, 1913), p. 88.

counted as a negative vote".⁴² See also article 51 of the Hague Convention of 1899 which provided for recording of any abstention in the minutes of the tribunal.

Paragraph 2 of the present article supplements the provisions of article 9, paragraph (3), and provides for the case where procedural rules are lacking in the *compromis* and have not otherwise been agreed upon by the parties. The paragraph is declaratory of the inherent power of arbitral tribunals to formulate their own rules of procedure, even in the absence of any express authorization in the *compromis*. The existence of such a power is recognized in prior codes of arbitral procedure⁴³ and by jurists.⁴⁴ It is essential that the various steps incidental to the pleading and argument of the case and the processes of the tribunal be regulated either by the parties or by the tribunal; without orderly procedure there can be no judicial process.

Article 14

The parties are equal in any proceedings before the tribunal.

Comment

This article expresses a fundamental norm of procedure the observance of which is essential to the proper functioning of the tribunal. Implicit in the article is the principle that the treatment of the parties during the conduct of a case before the tribunal must be fully impartial. Yet something more than the notion of impartiality is involved; there is in addition the notion that there are certain basic principles of procedure which are indispensable conditions of the exercise by the tribunal of its jurisdiction. Thus a State is entitled to rely upon certain fundamental procedural rights in any international arbitration, of which no State would consent to be deprived. The procedural rights involved must, however, be fundamental in the sense that the interests of a party are materially affected, so as to go to the very root of the award. Thus, it is an elementary rule of proper judicial procedure: *audire alteram partem*. In this connexion the words of Bluntschli may be quoted:

"The arbitrators being invested with quasi-judicial functions, should respect the fundamental principles of procedure. Their decision cannot be brought into question on account of mere defects of form. But it will be of no effect if they have manifestly violated the general principles of procedure; if they have, for example, not given an opportunity to the parties to present their case or to refute

⁴² Hudson, *International Tribunals*, p. 115.

⁴³ Hague Convention of 1907, art. 74; *Projet*, 1875, art. 12 and 15; Mexican Peace Code, art. 44.

⁴⁴ Ralston, p. 204; D. V. Sandifer, *Evidence before International Tribunals* (Chicago, 1939), pp. 28-29.

the contentions of the opposite side, the parties cannot be bound to accept such an arbitrary decision.”⁴⁵

Likewise Fauchille writes :

“ Must it be said, therefore, that the decision of an arbitrator is always and in all circumstances completely obligatory ? Not at all ; it is absolutely necessary that the decision should be in itself valid and properly given. The authors [citing Mérignac, *Traité de l'arbitrage international* (Paris, 1893), p. 306, where several other authors are cited] are generally in agreement that the decision is not binding :

“ 1. . . .

“ 2. If one of the parties has not been heard and allowed an opportunity to prove his case.”⁴⁶

The principle of the present article may be illustrated by the so-called *Umpire* cases which arose before the United States-Colombian Commission. This Commission was established under a convention of 10 February 1864 to adjudicate upon certain claims, including certain decisions of the umpire under an earlier commission, the validity of which was contested by Colombia. It was alleged by Colombia that such decisions were rendered without an opportunity for the Colombian Commissioner to consider them on their merits. They were consequently contended to be “ null and void according to the stipulations of the treaty and to the universal principle of justice that no party can be condemned before having been heard in defence ”. This contention appears to have been accepted by the umpire in the 1864 commission and four of the five cases in question were reconsidered and formally disallowed.⁴⁷

The consequences of a failure to observe the principle set forth in the above article are dealt with by article 30 (c).⁴⁸

Article 15

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

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

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

⁴⁵ Bluntschli, *Le droit international codifié* (Paris, 1886), p. 289.

⁴⁶ Fauchille, *Traité de droit international public* (Paris, 1926), Vol. 1, Part 3, p. 552.

⁴⁷ Moore, Vol. 2, pp. 1396-1409.

⁴⁸ See comment thereon *infra*.

4. At the request of either party, the tribunal may visit the scene with which the case before it is connected, provided that the requesting party offers to pay the costs.

Comment

Paragraph 1. The rule laid down in paragraph 1 that the tribunal is the judge of the admissibility and weight of the evidence before it has many precedents.⁴⁹ An international tribunal is not bound to follow the rules of evidence of municipal law, and it would be undesirable for it to lean in favour of any one particular legal system.⁵⁰ Thus, in the *William Parker* case, the United States-Mexican General Claims Commission declared :

“For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of and in the weighing of evidence before this international tribunal. There are many reasons why such technical rules have no application here, among them being that this Commission is without power to summon witnesses, or issue processes, for the taking of depositions with which municipal tribunals are usually clothed. The Commission expressly decides that municipal restrictive rules of adjective law or of evidence cannot be here introduced and given effect by clothing them in such phrases as ‘universal principles of law’ or ‘the general theory of law’, and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted.”⁵¹

Similar statements were made by other Mexican Claims Commissions.⁵²

In the *Pelletier* arbitration decided by the United States-Haiti Commission under the protocol of 26 May 1876, various papers were offered in evidence. The admissibility of some of them was questioned. The arbitrator stated that he would receive “all papers regularly introduced in the case, but would attach to them only such weight as they might seem to deserve”. He also said that “he did not think that the technical common law rules of evidence were adapted to the circum-

⁴⁹ Hague Convention of 1907, art. 74 and 75; Rules of United States-Panamanian General Claims Commission under the conventions of 28 July 1926 and 17 December 1932, art. 23; Statute of the International Court of Justice, Art. 49; see cases *infra*.

⁵⁰ See D. V. Sandifer, *Evidence before International Tribunals* (Chicago, 1939), p. 21.

⁵¹ *Reports I.A.A.*, Vol. 4, p. 39.

⁵² Feller, p. 258.

stances of the case. He would feel disposed to act upon whatever evidence satisfied his mind as to the actual facts".⁵³

In a decision given on 24 July 1930, by a tribunal constituted under the exchange of notes of 2 November 1929 between the United States and Guatemala, in the *Shufeldt Claim*, the arbitrator said:

"On the question of evidence over which there was some argument, I may point out that, in considering the cases quoted on both sides, it is clear that international courts are by no means as strict as municipal courts, and cannot be bound by municipal rules in the receipt and admission of evidence. The evidential value of any evidence produced is for the international tribunal to decide under all the circumstances."⁵⁴

Judge Van Eysinga observed, in the *Oscar Chinn* case decided by the Permanent Court of International Justice on 12 December 1934, that "the Court is not tied to any system of taking evidence" but that "its task is to co-operate in the objective ascertainment of the truth".⁵⁵

Again, the Swiss Federal Council declared, in its decision as arbitrator on the question of the boundary between French Guiana and Brazil, in connexion with France's contention that new evidence, not specifically answering allegations in the memorial and submitted by Brazil with its counter-memorial, should be excluded:

"The arbitrator holds that he is not bound to confine himself to the contentions of the parties and the sources of evidence which they invoke. In his opinion the question is not one of settling a dispute according to civil law and by the methods of civil procedure but to establish a historical fact. It is the duty of the arbitrator therefore to ascertain the truth by all means which are at his disposal."⁵⁶

Two questions are to be distinguished in paragraph 1: (1) the admissibility of the evidence and (2) the weight of the evidence, having once been admitted.

On the first question, that of admissibility, the practice of international tribunals is in conformity with paragraph 1, that is to say, tribunals have complete freedom to decide whether particular evidence should be admissible or not. International practice in the admission of evidence has tended to follow the civil law in its freedom from technical and restrictive rules, it being considered that the members of tribunals are qualified to attribute due weight to any evidence submitted. Since most of the rules of Anglo-American law concerning the competence,

⁵³ Moore, Vol. 2, pp. 1752, 1753; see also Mérignhac, p. 269.

⁵⁴ Department of State, *Arbitration Series* No. 3 (Washington, 1932), p. 852.

⁵⁵ *P.C.I.J.*, Ser. A/B, No. 63, p. 146.

⁵⁶ Opinion of the Swiss Federal Council on the question of the frontiers of French Guiana and Brazil, 1900, La Fontaine, p. 570.

relevance and materiality of evidence have been built up around the jury system, such rules are not necessary in the case of international tribunals where a jury is not used.

In other words, the *raison d'être* of the technical rules of evidence which exist in Anglo-American law is that in both criminal and civil cases the practice for many centuries has been to have issues of fact tried by a jury consisting of laymen. Such laymen are unversed in assessing the weight and value of evidence submitted. Consequently, a body of technical rules of evidence has been built up to prevent the jury from attaching undue weight to certain types of evidence, or any weight at all to other types of evidence, such as hearsay, etc. Since, however, international tribunals frequently are asked to decide not only questions of law but also questions of fact, and are usually composed of jurists duly qualified to assess the value of evidence, the necessity for technical rules to govern them in the handling of evidence does not exist. Governments have been willing to trust arbitrators to admit, for what it is worth, all evidence which the parties see fit to submit. In addition, there is another factor to be taken into account, namely, the difficulty, in many cases, of providing the tribunal with adequate evidence according to the stricter standards which prevail under municipal systems of law. For example, as a result of the principle of territorial sovereignty of States, it is not possible for one State to enter into the territory of another for the purpose of collecting evidence required to support its case before an international tribunal, at least not without that other State's consent.⁵⁷ It has been declared by the International Court of Justice that the fact of

“... this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.”⁵⁸

The second question is that of the evaluation of evidence. It may be said that, in the evaluation of evidence, international tribunals exercise the same complete freedom as in the matter of admissibility. The *Projet*, 1875, provides that, in the absence of any provision to the contrary in the *compromis*, the tribunal should have the power

“... to decide according to its unfettered discretion on the interpretation of the documents produced and generally on the merits of the evidence presented by the parties”.

The same principle concerning the evaluation of evidence has been applied by the Permanent Court of International Justice, although it

⁵⁷ See in this connexion, the *Corfu Channel* case (Merits), *I.C.J. Reports* 1949, p. 34.

⁵⁸ *Ibid.*, p. 18.

was not set forth either in its Statute or in its Rules. Judge Huber said, in his memorandum of 31 December 1925 on the subject of the revision of the Rules of Court, that while the parties "may present any proof that they judge useful, the Court is entirely free to take the evidence into account to the extent that it deems pertinent".⁵⁹ The Court itself, in the *Case Concerning Certain German Interests in Polish Upper Silesia* (The Merits), declared, in its judgment of 25 May 1926, that it was "entirely free to estimate the value of statements made by the parties".⁶⁰

Complete freedom as to the evaluation of evidence submitted was also granted to the Mixed Arbitral Tribunals⁶¹ and to the Franco-Italian Conciliation Commission under article 14, paragraph 1, of its Rules of Procedure.⁶²

Under the so-called "best evidence" rule in Anglo-American law, there is normally an insistence on the production of original documents. Before an international tribunal, however, it is a general practice to accept a duly certified copy as satisfactory proof of the contents of the original. See, for example, the following provision in the protocol of 24 April 1934 between the United States and Mexico relative to claims presented to the General Claims Commission established by the convention of 8 September 1923:

"It shall not be necessary to present original evidence but all documents hereafter submitted shall be certified as true and complete copies of the original if they be such. In the event that any particular document filed is not a true and complete copy of the original, that fact shall be so stated in the certificate."⁶³

The controlling factor in the evaluation of evidence must necessarily be the judicial good sense of the tribunal itself. As Commissioner Nielsen declared in his concurring opinion in the *Mallen* case, which was decided in 1926 by the United States-Mexican General Claims Commission, the tribunal

"... can and must give application to well-recognized principles underlying rules of evidence and of course it must employ common

⁵⁹ *P.C.I.J., Ser. D*, No. 2 (add.), pp. 249-250.

⁶⁰ *P.C.I.J., Ser. A*, No. 7, p. 73.

⁶¹ See, e.g., article 88 of the Rules of Procedure of the Franco-German Mixed Arbitral Tribunal, *Rec. T.A.M.*, Vol. 1, p. 56.

⁶² *Rec. C.C. franco-italienne*, Vol. 1, p. 28.

⁶³ Malloy, *Treaties, Conventions, International Acts, etc., between the United States and other Powers*, Vol. 4 (1923-1937), p. 4494; see also United States-British Mixed Claims Commission of 1871, Rules, art. 9, *Hale's Report* (1874), pp. 171, 179; United States-Venezuelan Mixed Claims Commission of 1903, Rules, art. VIII, *Ralston's Report* (1904), p. 7; United States-Chilean Mixed Claims Commission of 1892, Rules, art. XVI, *Minutes of Proceedings* (1894), p. 24; United States-German Mixed Claims Commission of 1922, Rules, art. V(a), *Bonyng's Report* (1934), p. 261; Tripartite Claims Commission (United States v. Austria and Hungary) 12 December 1925, Rules, art. VIII(c), *Bonyng's Report* (1930), pp. 47-52.

sense reasoning in considering the evidential value of the things which have been submitted to it as evidence".⁶⁴

Paragraph 2. The principle set forth in paragraph 2 of the present article was clearly recognized by article 75 of the Hague Convention of 1907, which provided as follows :

"The parties undertake to supply the tribunal, as fully as they consider possible, with all the information required for deciding the dispute."

The principle is to be understood in the light of the fact that, as the parties are sovereign States, international tribunals do not, in general, possess the power to compel the attendance of witnesses or the production of documentary evidence. Accordingly, Article 49 of the Statute of the International Court of Justice merely enables the Court to "call upon" the parties "to produce any document", etc. The text of the article is as follows :

"The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal."

International tribunals are, therefore, peculiarly dependent upon the industry and fairness of the parties for the production of such evidence as is required in order to enable them to determine the issues before them. For this reason there is a greater need that States parties to an international litigation should produce evidence within their control than is the case with litigants in municipal courts.

In the *Kalkjoseb* case decided in 1928 by the United States-Mexican General Claims Commission, it was held that, in a claim for wrongful treatment, as there had been no rebuttal of evidence accompanying the memorial, such evidence must be accepted. The allegation by the Mexican Government that certain official records would, if available, disprove the claim, but that, owing to the revolutionary troubles, such records had been destroyed, was "not a satisfactory explanation of the absence of evidence of this kind".⁶⁵

It was also ruled by the same Commission that, where a *prima facie* case had been made out by a claimant government, the case of that government should not suffer from non-production of evidence by the respondent government.⁶⁶

The principle of co-operation in the matter of evidence has also received recognition in several treaty stipulations, for example in the

⁶⁴ Reports I.A.A., Vol. 4, p. 182; see also, generally, Laive, *Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice* in *Schweizerisches Jahrbuch für internationales Recht*, Vol. 7, 1950, pp. 77-103.

⁶⁵ Reports I.A.A., Vol. 4, p. 414.

⁶⁶ See *Pomeroy's El Paso Transfer Co.*, op. cit., p. 555, and *Lillie S. Kling*, op. cit., p. 582.

following provision in article 4, paragraph 3, of the treaty of 8 May 1871 submitting the *Alabama Claims* to arbitration :

“If in the case submitted to the Arbitrators either Party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such Party shall be bound, if the other Party thinks proper to apply for it, to furnish that Party with a copy thereof; and either Party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence giving in each instance such reasonable notice as the Arbitrators may require.”⁶⁷

Similar detailed provisions, embodying this principle, may be found in article 7 of the arbitration agreement of 7 September 1910 in the *North Atlantic Fisheries* case⁶⁸ and article 25 of the rules of procedure of the American-Panamanian General Claims Commission.⁶⁹

A co-operation by the parties in connexion with the proof of national rules of law, was mentioned by the Permanent Court of International Justice in its judgment of 12 July 1929 in the *Case Concerning the Payment in Gold of the Brazilian Federal Loans Issued in France*, where the Court said :

“Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries. All that can be said in this respect is that the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken.”⁷⁰

The provision in the last sentence of paragraph 2 of the present article that the tribunal shall “take note of the failure of any party to comply with the obligations under this paragraph” is related to the expression in Article 49 of the Statute of the International Court of Justice which states in the final sentence : “Formal note shall be taken of any refusal.” This expression was also contained in article 49 of the Statute of the Permanent Court of International Justice. Originally, it was derived from article 69 of the Hague Convention of 1907 which states :

“The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.”

⁶⁷ Moore, Vol. 1, p. 549.

⁶⁸ J. B. Scott, *The Hague Court Reports*, p. 152.

⁶⁹ *American and Panamanian General Claims Arbitrations under Conventions of 28 July 1926 17 December 1932*, Report of Bert L. Hunt, p. 849.

⁷⁰ P.C.I.J., Ser. A, No. 21, p. 124.

Not many examples of refusals to produce documents exist. No case arose in which the Permanent Court of International Justice exercised its power to take note of a refusal to produce a document. However, in the *Corfu Channel* case (Merits), the International Court of Justice referred to Article 49 of its Statute and declared as follows :

“In accordance with Article 49 of the Statute of the Court and Article 54 of its Rules, the Court requested the United Kingdom Agent to produce the documents referred to as XCU for the use of the Court. Those documents were not produced, the Agent pleading naval secrecy; and the United Kingdom witnesses declined to answer questions relating to them. It is not therefore possible to know the real content of these naval orders. The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise. The United Kingdom Agent stated that the instructions in these orders related solely to the contingency of shots being fired from the coast — which did not happen.”⁷¹

Paragraph 3. The power accorded the tribunal, under paragraph 3 of the present article, to call for evidence has as a precedent article 39 of the Mexican Peace Code which reads as follows :

“The tribunal may further require from the agents of the Parties the presentation of any kind of evidence and ask for all necessary explanations. In the case of a negative answer the tribunal shall so record it.”

See also Article 49 of the Statute of the International Court of Justice, quoted above in comment on paragraph 2.

Examples of the exercise of such power by the Mixed Arbitral Tribunals are as follows. In the case of *Henry v. Etat allemand*, decided by the Franco-German Mixed Arbitral on 22 September 1922, the tribunal ordered an inquiry to take evidence from witnesses as to certain facts which were in dispute.⁷² In the case of *Victor Geormaneanu v. Etat allemand* decided by the German-Romanian Mixed Arbitral Tribunal on 11 January 1929, the tribunal held that it could not decide the case merely on the basis of written proceedings and addressed a number of questions to the claimant with a view to establishing material facts.⁷³ Provision was made in the Rules of Procedure of the Mixed Arbitral Tribunals authorizing them to order such inquiries and also to appoint experts.⁷⁴

⁷¹ *I.C.J. Reports*, 1949, p. 32.

⁷² *Rec. T.A.M.*, Vol. 3, p. 67.

⁷³ *Rec. T.A.M.*, Vol. 8, p. 914.

⁷⁴ See, for example, article 56 of the rules of procedure of the German-Belgian Mixed Arbitral Tribunal, *Rec. T.A.M.*, Vol. 1, p. 40.

Provisions to the same effect may be found in article 11, paragraph 3, and article 14, paragraphs 3 and 4, of the Rules of Procedure of the Franco-Italian Conciliation Commission.⁷⁶ Acting under article 11, paragraph 3, the Commission on a number of occasions directed the production of documents by one of the parties. In its decision of 18 November 1948 in the case of *Dervillé v. Figaia*, for instance, the Commission called for the dossier of an Italian Court concerning a previous law suit by Miss Dervillé.⁷⁶ In the same case, the production of a dossier of the Italian Ministry of the Interior was ordered by the Commission in its decision of 15 January 1949.⁷⁷

Article 48 of the Statute of the International Court of Justice authorizes the Court to make any arrangements connected with the taking of evidence. Thus, in the *Corfu Channel* case, it appointed experts who made an "enquiry on the spot".⁷⁸

Paragraph 4. There are several precedents for the provision, in paragraph 4 of the present article, regarding visits by tribunals to the scene with which the case is connected. For example, in the *Meerauge* arbitration between Austria and Hungary as to the line the boundary should follow between Galicia and Hungary near the lake of Meerauge, the tribunal made an extensive trip on the lake and the surrounding countryside.⁷⁹ Another example was the tour of the region in dispute made by the Norwegian-Swedish Tribunal of the Permanent Court of Arbitration, set up to determine the maritime frontier between Norway and Sweden.⁸⁰ Again the arbitrator in the arbitration between Great Britain and Belgium in the *Ben Tillet* case made a visit to Antwerp and to the prison there, where Tillet was detained, in order to acquaint himself more fully with the facts.⁸¹

The Statute and Rules of the International Court of Justice do not expressly refer to a visit by the Court to the scene to which a case relates (*descente sur les lieux*). Article 44, paragraph 2, does, however, refer to procuring "evidence on the spot". The Permanent Court of International Justice has had recourse to this method of obtaining evidence. In the *Meuse* case, after the Netherlands agent had completed his first oral argument, the Belgian agent suggested that the Court should make a *descente sur les lieux* to enable the judges to see the canals, waterways

⁷⁶ *Rec. C.C. franco-italienne*, Vol. 1, pp. 27 and 28.

⁷⁶ *Ibid.*, p. 41.

⁷⁷ *Ibid.*, p. 46.

⁷⁸ *Corfu Channel* case, Order of 17 December 1948, *I.C.J. Reports 1948*, p. 124; Decision of the Court, 17 January 1949, *I.C.J. Reports, 1949*, p. 151; *The Corfu Channel Case Documents*, Vol. 6, Part 6 (Correspondence), pp. 257-274.

⁷⁹ The award was made on 13 September 1902, see De Martens, *Nouveau Recueil Général* (3rd Series), Vol. III, p. 71.

⁸⁰ The award was made on 23 October 1909, see De Martens, *ibid.*, p. 85.

⁸¹ Great Britain-Belgium, Arbitral Tribunal, 1898. *British Parliamentary Papers*, C. 7235 (1899).

and installations involved in the proceedings. The Netherlands agent did not object and at the Court's request the two agents proposed an itinerary. The visit was carried out on 14 and 15 May 1937.⁸²

Among the Mixed Arbitral Tribunals, the rules of the Franco-German Mixed Arbitral Tribunal, for instance, made possible a *descente sur les lieux*.⁸³

According to article 14, paragraph 4, of its Rules of Procedure, the Franco-Italian Conciliation Commission may decide to visit the place concerned in the proceedings.⁸⁴

See generally M. O. Hudson, *Visits by International Tribunals to Places concerned in Proceedings*, *Am. J. Int. Law*, Vol. 31 (1937), p. 696.

Article 16

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

Comment

Incidental or additional claims have a technical connotation in certain systems of civil procedure. Thus in Dalloz, *Nouveau Répertoire de droit* (Paris, 1948), Vol. 2, pp. 778-779, a rubric is devoted to the *Incident* (referred to also in the text, p. 778, as *Demande Additionnelle*). See also *ibid.*, pp. 17-19, and Dalloz, *Nouveau répertoire de droit, mise à jour 1952* (Paris, 1952), p. 140, under the rubric *Demande Nouvelle* as regards additional claims. Further see, in connexion with incidental claims, the French *Code de procédure civile*, articles 337 and 338, and, in connexion with additional claims, articles 464 and 465.

Although in Anglo-American systems of procedure there is generally no special technical expression known as an "incidental" or "additional" claim, in practice a similar (but not quite identical) idea is, in those systems, represented by what is described as "amending the pleadings". In the following passage by A. H. Feller, the practice of the civil law and common law systems has been assimilated under the general heading of "amendment of conclusions" (perhaps the nearest equivalent to "*demandes nouvelles*").

"It has been shown that no provision in regard to amendment is contained in the Statute or rules [i.e. of the Permanent Court of International Justice], and it seems difficult to argue that this omission necessitates a strict limit on amendment. During the preparation

⁸² See *P.C.I.J., Ser. C*, No. 81, pp. 553-554; *ibid.*, pp. 222-223.

⁸³ Article 61 of its Rules of Procedure, *Rec. T.A.M.*, Vol. 1, p. 52.

⁸⁴ *Rec. C.C.franco-italienne*, Vol. 1, p. 28.

of the rules, Judge Altamira presented a draft which contained the provision :

‘ In the Reply the statements of fact and law contained in the Application and also the provisional conclusions may be modified.’

“ This was said to be based on the Spanish system permitting the right to modify the conclusions and arguments upon which the counter-case and the Reply are based . . .

“ The practice of international tribunals yields only slight aid. A number of claims commissions have adopted rules permitting amendments of the pleadings usually at any time before final submission, subject to leave of the commission. A particularly liberal provision is to be found in the rules of the Anglo-German Mixed Arbitral Tribunal [citing rule 45, *Rec. T.A.M.*, Vol. 1, p. 118] Mérygnac states that additional demands cannot be admitted before an arbitral tribunal without the consent of both parties and the tribunal, unless a connection exists between them and the original demand. There is little evidence of this distinction in international practice, though claims commissions have at times formulated rules barring amendments introducing a new or different cause of action.”⁸⁵

Feller concludes by saying :⁸⁶

“ Amendments of conclusions contained in the application may be made as of right in the case. All other amendments may be taken only by leave of court.”

The last sentence appears to imply the existence of some principle excluding entirely novel claims by which a respondent might be taken by surprise. Another writer states :

“ An amendment must not allege a new, or change an existing, cause of action. An amendment may, however, properly reform the statements of the original and same cause of action. This question was argued before the Spanish Treaty Claims Commission of 1901 in a case where the amendment merely increased the amount of damages claimed.”⁸⁷

In spite of a similarity between the idea of amendments and that of *demandes additionnelles* it must be admitted that there exists in Anglo-American procedure no precise equivalent to *demandes additionnelles*; in fact, that procedure would appear to be less technical than French

⁸⁵ Feller, *Conclusions of the Parties in the Procedure of the Permanent Court of International Justice*, *Am. J. Int. Law* (1931), Vol. 25, p. 501, and see, generally, pp. 500-502; see also Feller, *The Mexican Claims Commissions 1923-1934* (1935), pp. 238-241.

⁸⁶ *Ibid.*, *Am. J. Int. Law*, Vol. 25, p. 502.

⁸⁷ C. M. Bishop, *International Arbitral Procedure* (1930), p. 187, citing thereafter many illuminating examples, pp. 187-191.

civil procedure. Thus the Rules of the English Supreme Court of Judicature provide :

"The Court or judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just and all such amendments as may be necessary for the purpose of determining the real questions in controversy between the parties."⁸⁸

Witenberg, however, states :

"In point of form, an additional claim is presented by way of conclusions [citing the *Kunkel* case, *Rec. T.A.M.*, Vol. 6, p. 974], or by amendments to the pleadings. From this point of view additional demands present themselves as amendments to the pleadings."⁸⁹

Though the above explanations seem necessary in order that the English text may be understood it is nevertheless also clear that, stripped of its technicalities, the conception underlying *demandes additionnelles* exists in all principal systems of law.

Precedents concerning additional claims in international law are as follows. Whereas the Rules of Procedure of several Mixed Arbitral Tribunals expressly prohibited additional claims, the Rules of other Mixed Arbitral Tribunals permitted the presentation of such claims.⁹⁰ A limited right to present additional claims was granted by the Rules of the Mixed Arbitral Tribunals set up between Italy on the one side, Germany, Austria, Bulgaria and Hungary on the other.⁹¹

The Statute and Rules of the Permanent Court of International Justice and the International Court of Justice are silent in this respect.⁹² In practice, additional claims have been admitted by the former of these two Courts. Thus, in the case of *The S.S. "Wimbledon"* the applicant States in their Reply added to their original submissions that the amount claimed should be remitted by the Government of the German Empire

⁸⁸ Rules of the Supreme Court of Judicature Order 28 *Annual Practice* (1952), p. 453, and see also Federal Equity Rule 19 of the United States; cf. the German *Zivilprozessordnung*, section 264, which provides : « When during the course of pending proceedings an amendment of the pleadings is sought, this can only be permitted if the opposite party agrees or if the Court deems that thereby the ends of justice would be served », see *Zivilprozessordnung, Kommentar von Hans Meyer und Richard Zöller* (1948), p. 211.

⁸⁹ Witenberg, p. 192; see, however, the same writer at p. 188 from which the lack of exact equivalence emerges.

⁹⁰ Among the former are the Franco-German, Greco-German, Franco-Bulgarian, Siamese-German, Greco-Bulgarian, Franco-Austrian, Greco-Austrian, Franco-Hungarian, Greco-Hungarian, Hungaro-Romanian, Czechoslovak-Hungarian, Franco-Turkish and Belgo-Turkish Mixed Arbitral Tribunals, amongst the latter the Rules of the Belgo-German, Belgo-Austrian, Belgo-Bulgarian, Czechoslovak-German, Yugoslav-Hungarian, Yugoslav-Austrian, Yugoslav-German, Yugoslav-Bulgarian, Greco-Turkish, Turco-Romanian, Anglo-German, Anglo-Austrian, Anglo-Bulgarian and Anglo-Hungarian Mixed Arbitral Tribunals. All the relevant texts are published in the *Rec. T.A.M.*

⁹¹ Equally published in the *Rec. T.A.M.*

⁹² Cf. Feller, quoted *supra*.

to the Government of the French Republic within one month from the date on which judgment would be given, and that, otherwise, the German Government should pay a certain interest on the sum due from the expiration of said time-limit of one month.⁹³ See also the additional claims made by the Czechoslovak Government in the case of the *Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal — The Peter Pázmány University v. The State of Czechoslovakia*.⁹⁴ In the *Case Concerning the Payment of Various Serbian Loans Issued in France*, the Court put on record that neither the French, nor the Serb-Croat-Slovene Government had availed themselves of the right accorded by the Special Agreement to formulate additional submissions.⁹⁵

See further on additional claims Mérignhac, p. 263, Witenberg⁶ pp. 191-192.

Questions concerning counter-claims do not often arise before international tribunals. Several examples exist, however, of counter-claims being allowed by agreement, e.g., the case of *Marion A. Cheek* between the United States and Siam,⁹⁶ and the *Bezault* case between France and Guatemala.⁹⁷ In addition, by an exchange of notes and telegrams, the Mexican-Venezuelan Claims Commission sitting in Caracas in 1903 was authorized to take jurisdiction, as against any single private claim presented by Mexico, of any counter-claim presented by Venezuela.⁹⁸ Practice before the Mixed Arbitral Tribunals was not uniform. According to the Rules of Procedure of the German-Belgian Mixed Arbitral Tribunal counter-claims were not allowed, and any claim against the defendant had to take the form of a fresh suit.⁹⁹ The same was true of the Anglo-German Mixed Arbitral Tribunal¹⁰⁰ and the German-Polish Tribunal.¹⁰¹ On the other hand, counter-claims were allowed before the Franco-German Tribunal.¹⁰²

Counter-claims were not provided for by the Hague Conventions of 1899 and 1907, nor by the Statute of the Permanent Court of International Justice, nor by the Convention of 1907 for the Establishment of a Central American Court of Justice,¹⁰³ nor by the Convention of 7 February 1923 for the Establishment of an International Central

⁹³ P.C.I.J., Ser. A, No. 1, p. 17.

⁹⁴ P.C.I.J., Ser. A/B, No. 61, p. 211.

⁹⁵ P.C.I.J., Ser. A, No. 20, pp. 9-10.

⁹⁶ La Fontaine, p. 579.

⁹⁷ De Clercq, *Recueil des Traités de la France*, Vol. 22, p. 556, art. 3(2) of the Protocol of Arbitration.

⁹⁸ Ralston, p. 211.

⁹⁹ See article 29 of the Rules, *Rec. T.A.M.*, Vol. 1, p. 36.

¹⁰⁰ Art. 13 of the Rules, *ibid.*, p. 111.

¹⁰¹ Art. 28 of the Rules, *ibid.*, p. 691.

¹⁰² See Witenberg, p. 194.

¹⁰³ See *Am. J. Int. Law, Supp.* (1908), Vol. 2, p. 238.

American Tribunal.¹⁰⁴ However, in spite of the silence of the Statute of the Permanent Court of International Justice on the subject, article 63 of the 1936 Rules of Court expressly allowed counter-claims.¹⁰⁵ Similarly, article 63 of the Rules of Court of the International Court of Justice provides :

“When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject-matter of the application and that it comes within the jurisdiction of the Court. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application, the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.”

It would appear, however, from the wording of the quoted article that counter-claims can only be presented to the Court where proceedings have been instituted by means of an application. It is not certain whether the article applies where cases are brought by special agreement. It was stated in the Report of the Third Committee of the Permanent Court of International Justice dated 14 March 1936 (set up amongst the judges to reconsider the Rules of Court) that detailed study of the question of counter-claims had led the Committee to the conclusion that it would be preferable to leave the development of this procedure to the jurisprudence of the Court.¹⁰⁶ As to the attitude of the Court itself, there was a detailed discussion on this question by the judges on 28 May 1934.¹⁰⁷ The question of the exact interpretation of article 63 of the Rules of Court of the International Court of Justice must be regarded as controversial.¹⁰⁸

In one of the cases decided by the Permanent Court — the *Chorzów Factory* case decided on 12 September 1928 — the Court said :

“The Court also observes that the counter-claim is based on article 256 of the Versailles Treaty, which article is the basis of the objection raised by the Respondent, and that, consequently, it is juridically connected with the principal claim.

“Again, Article 40 of the Rules of Court [meaning, in this connexion, the 1922 and 1926 text; see Hudson, *Permanent Court*, p. 722] which has been cited by the German Government, lays down amongst other things that counter-cases shall contain :

¹⁰⁴ *Am. J. Int. Law., Supp.* (1923), Vol. 17, p. 83.

¹⁰⁵ *P.C.I.J., Ser. D*, No. 1, 4th ed., p. 53.

¹⁰⁶ See *Elaboration of the Rules of Court, P.C.I.J., Ser. D, No. 2, 3rd Addendum*, p. 781, and *ibid.*, pp. 848 and 871.

¹⁰⁷ See *P.C.I.J., Ser. D, No. 2, 4th Addendum*, pp. 261-268.

¹⁰⁸ See Hambro, *Rec. A.D.I.*, 1950, Vol. 1, p. 151; also Hudson, *Permanent Court*, p. 430.

' 40 ... conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Court.'

"The claim having been formulated in the counter-case, the formal conditions required by the Rules as regards counter-claims are fulfilled in this case, as well as the material conditions.

"As regards the relationship existing between the German claims and the Polish submission in question, the Court thinks it well to add the following: Although in form a counter-claim, since its object is to obtain judgment, in reality, having regard to the arguments on which it is based, the submission constitutes an objection to the German claim designed to obtain from Poland an indemnity the amount of which is to be calculated, amongst other things, on the basis of the damage suffered by the Oberschlesische. It is in fact a question of eliminating from the amount of this indemnity a sum corresponding to the value of the rights and interests which the Reich possessed in the enterprise under the contract of December 24th, 1919, which value, according to the Polish Government, does not constitute a loss to the Oberschlesische because these rights and interests are said to belong to the Polish Government itself under Article 256 of the Treaty of Versailles. The Court, having by Judgment No. 8 accepted jurisdiction, under Article 23 of the Geneva Convention, to decide as to the reparation due for the damage caused to the two Companies by the attitude of the Polish Government towards them, cannot dispense with an examination of the objections the aim of which is to show either that no such damage exists or that it is not so great as it is alleged to be by the Applicant. This being so, it seems natural on the same grounds also to accept jurisdiction to pass judgment on the submissions which Poland has made with a view to obtaining the reduction of the indemnity to an amount corresponding to the damage actually sustained."¹⁰⁹

It has been said by Anzilotti, in his comment on this judgment:

"From these observations of the Court, there clearly emerges the idea of a *nexus* between the two claims of such a kind that it would be neither expedient nor just to pass judgment upon the German Claim without at the same time adjudicating upon the claim of Poland."¹¹⁰

It will be seen that many of the examples cited above relate, in some form or another, to cases where the parties, expressly or by implication, have agreed to allow counter-claims. The question has been raised

¹⁰⁹ P.C.I.J., Ser. A, No. 17, p. 38.

¹¹⁰ Anzilotti, *La demande reconventionnelle en procédure internationale*, *Clunet*, 1930, p. 872; see also *Diversion of Water from the River Meuse*, Judgment of 28 June 1937, P.C.I.J., Ser. A/B, No. 70, p. 28, and *Panevezys-Saldutiskis Railway* case, Judgment of 28 February 1939, P.C.I.J., Ser. A/B, No. 76, pp. 7-9.

whether, independently of such agreement, a counter-claim is admissible in international law. Opinion is divided on the subject.¹¹¹ Hudson, writing with reference to the Permanent Court of International Justice, states :

“The Statute makes no reference to counter-claims, but it would seem that where the Court has jurisdiction over the subject-matter of a pending proceeding, it should also have jurisdiction over any counter-claim directly connected with it.”¹¹²

Another question is that of the definition of a counter-claim. It will be seen that article 63 of the Rules of the International Court of Justice does not define the term. It has been pointed out however, by Anzilotti¹¹³ that there exists a common element in the idea of a counter-claim in all legislation in which counter-claims are recognized, even though the concrete rules on the subject may differ. This common element lies in the fact that in a counter-claim the defendant aims at obtaining in the same proceedings as those instituted by the plaintiff something more than a mere rejection of the plaintiff's claim, and more than a mere statement of the legal grounds upon which such a rejection is based.

In article 1 of the Harvard Draft Convention on “Competence of Courts in regard to Foreign States” the following definitions are given :

“A counter-claim is a claim by a respondent against a claimant. A direct counter-claim is a counter-claim arising out of the facts or transactions upon which a complainant's claim is based.”¹¹⁴

In the comment on article 5 of the Harvard draft it is said :

“A counter-claim may be allowed on the theory that if a complainant should owe a sum of money to respondent, then respondent should not be required to pay complainant before the accounts are balanced. On the other hand, a counter-claim may be allowed on the theory that it is in reality a defense to the complainant's action. A third theory on which counter-claims have been allowed is that multiplicity of suits will thereby be avoided. The second of these theories seems the most appropriate one to follow when the complainant is a State.”¹¹⁵

Regarding the connexion between the original claim and the counter-claim, see also the International Law Commission's comments on the present article of the draft.¹¹⁶

¹¹¹ Mérignac in the affirmative, pp. 265-266; *contra* : *Projet*, 1875, article 17.

¹¹² Hudson, *Permanent Court*, p. 430.

¹¹³ *Clunet*, 1930, p. 867.

¹¹⁴ *Am. J. Int. Law, Supp.* (1932), Vol. 26, p. 490.

¹¹⁵ *Ibid.*, p. 509.

¹¹⁶ *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 36.

Article 17

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

Comment

This article is substantially the same as Article 41 of the Statute of the International Court of Justice and of the corresponding Statute of its predecessor. The history of provisional measures is comparatively brief; an early example of them is contained in article XVIII of the Convention of 1907 for the Establishment of a Central American Court of Justice. This provided as follows:

“From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the parties fix the situation in which the contending parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *status quo* pending a final decision.”¹¹⁷

The idea of preserving the *status quo* was taken up by the Committee of Jurists who, in 1920, drafted the Statute of the Permanent Court of International Justice. They included article 41 of the Statute which appears unaltered in the Statute of the International Court of Justice and reads (in part) as follows:

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

Article 19 of the arbitration convention between Germany and France initialled at Locarno on 16 October 1925 and signed in London on 1 December 1925 contained a similar provision.¹¹⁸

Article 33 of the General Act of 1928 and article 33 of the Revised General Act of 1949 contain a provision concerning interim measures in relation both to the Court and to arbitral tribunals.¹¹⁹

Examples of how interim protection has worked in practice are as follows:

In an application to the Permanent Court of International Justice on 25 November 1926, Belgium, in addition to requesting the Court

¹¹⁷ *Am. J. Int. Law, Supp.*, Vol. 2 (1908), p. 238.

¹¹⁸ *League of Nations Treaty Series*, Vol. 54, p. 305.

¹¹⁹ *League of Nations Treaty Series*, Vol. 93, p. 357, and *United Nations Treaty Series*, Vol. 71, p. 119, respectively.

to give judgment to the effect that China was not entitled unilaterally to denounce a treaty concerning extraterritorial jurisdiction concluded on 2 November 1865 between the two countries, asked the Court "to indicate, pending judgment, any provisional measures to be taken for the preservation of rights which may subsequently be recognized as belonging to Belgium or her nationals". On 8 January 1927 the President of the Court issued an Order indicating provisionally, pending the final decision, rights enjoyed by Belgium "as regards nationals", "as regards property and shipping", and "as regards judicial safeguards".¹²⁰ Later, the Belgian Agent requested the Court to remove the case from its list of cases, which it did.¹²¹

On the other hand, in the *South-Eastern Territory of Greenland* case Norway requested the Court "to order the Danish Government, as an interim measure of protection, to abstain in the said territory from any coercive measure directed against Norwegian nationals". In an Order issued on 3 August 1932 the Court, in declining the Norwegian request, held that "no Norwegian rights, the protection of which might require the indication of such measures, are in issue".¹²²

See also *Ellerman v. Etat polonais*, 29 July 1924;¹²³ *Case concerning the Factory at Chorzów* of 21 November 1927;¹²⁴ *Case concerning the Administration of the Prince von Pless*, 11 May 1933;¹²⁵ and the case of the *Electricity Company of Sofia and Bulgaria*, 5 December 1939.¹²⁶

In the *Anglo-Iranian Oil Company Case*, the Government of the United Kingdom on 22 June 1951 made a request to the International Court of Justice for the indication of interim measures of protection. In this request, the United Kingdom referred to its application of 26 May 1951 in which it asked that the Court should declare that the Iranian Government were under a duty to submit the dispute between themselves and the Anglo-Iranian Oil Company to arbitration. It asserted that without indication of interim measures of protection there was strong ground for considering that if the Court should decide in favour of the claims of the United Kingdom, its decision could not be executed owing to certain actions of the Iranian Government. It stated that amongst such actions were certain measures being taken by the Iranian Government involving or threatening to involve the loss of skilled personnel, interference with the management, or the disruption of the enterprise operated by the company. Other matters to which

¹²⁰ *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium*, P.C.I.J., Ser. A, No. 8, pp. 7-8.

¹²¹ Same case, P.C.I.J., Ser. A, No. 18, pp. 5-8; cf. comment on art. 21, *infra*.

¹²² P.C.I.J., Ser. A/B, No. 48, p. 285.

¹²³ *Rec. T.A.M.*, Vol. 5, p. 457.

¹²⁴ P.C.I.J., Ser. A, No. 12, pp. 9-11.

¹²⁵ P.C.I.J., Ser. A/B, No. 54, p. 150.

¹²⁶ P.C.I.J., Ser. A/B, No. 79, p. 199.

it referred were certain speeches alleged to be inflammatory and broadcasts and articles of a similar type. The Iranian Government objected to the interim measures on the grounds principally that the United Kingdom lacked competence to refer the dispute, which had arisen between the Iranian Government and the company, to the Court, and that the dispute pertained to matters within the domestic jurisdiction of Iran. The Court in an Order of 5 July 1951 ruled that it could not accept that a claim based on an alleged violation of international law and a denial of justice was not within its jurisdiction, for the purpose of granting interim measures of protection, and consequently the Court held that there were sufficient grounds to entertain the request. It said that the object of such measures was to preserve the respective rights of the parties pending the decision of the Court, and that the existing state of affairs justified an order to that effect. It thereupon indicated certain provisional measures, *inter alia*, that the two Governments should ensure that no action of any kind should be taken which might aggravate or extend the dispute. In the meantime, the company's operations were to continue under the direction of its existing management under the control of a board of supervision composed of two members appointed by each of the two Governments and a fifth member who should be chosen by agreement between them.¹²⁷

In its Judgment of 22 July 1952, the Court pronounced upon the question of its competence to adjudicate upon the merits of the dispute, the Iranian Government having again objected to the jurisdiction of the Court. The Court declared:

"In its above-mentioned Order of July 5th, 1951, the Court stated that the provisional measures were indicated 'pending its final decision in the proceedings instituted on May 26th, 1951, by the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran'. It follows that this Order ceases to be operative upon the delivery of this Judgment and that the provisional measures lapse at the same time."¹²⁸

For some studies of the subject, see Dumbauld, *Interim Measures of Protection in International Controversies* (The Hague, 1932), mainly from the standpoint of comparing national legislation, also P. Guggenheim, *Les mesures conservatoires de procédure internationale et leur influence sur le développement du droit des gens* (Paris, 1931) and P. Guggenheim, *Les mesures conservatoires dans la procédure arbitrale et judiciaire*, in *Rec. A.D.I.*, 1932, Vol. 40, pp. 649-761. For extracts from the judgments of the Permanent Court of International Justice and judgments of the International Court of Justice bearing on the subject, see Hambro, *The Case Law of the International Court* (Leyden, 1952), pp. 347-355.

¹²⁷ See *Anglo-Iranian Oil Company Case*, Order of 5 July 1951, *I.C.J. Reports*, 1951, p. 89.

¹²⁸ *Anglo-Iranian Oil Company Case* (jurisdiction), Judgment of 22 July 1952, *I.C.J. Reports*, 1952, p. 93.

Article 18

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

Comment

This article is based upon Article 54, paragraph 1, of the Statute of the International Court of Justice and article 77 of the Hague Convention of 1907. The former provides :

“When, subject to the control of the Court, the agents, counsel and advocates have completed their presentation of the case, the President shall declare the hearing closed.”

The latter provides :

“When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case the President declares the discussion closed.”

Again article X, paragraph 6, of the Rules of Procedure of the United States-Mexican General Claims Commission provides :

“When a case has been heard in pursuance of the foregoing provisions, the proceedings before the Commission shall be deemed closed unless otherwise ordered by the Commission.”¹²⁹

A similar provision is contained in article 43 of the Rules of Procedure of the British-Mexican Claims Commission.¹³⁰

Motions are sometimes made before tribunals to reopen the case before the award is made, on the ground of fresh evidence, etc. Such occasions can but rarely arise inasmuch as ample opportunity generally exists for the discovery and production of evidence not only before the case comes to trial but also during the course of the proceedings, and tribunals are liberal in granting additional time for the production and presentation of evidence. It has been said, however :

“The conclusion seems warranted that, in the absence of a specific provision to the contrary, a tribunal has jurisdiction to grant a rehearing upon the basis of newly discovered evidence of a decisive character at any time before its final adjournment.”¹³¹

Following are some decisions on reopening. The decision of 22 January 1932 in the *Santa Isabel Claims* case, rendered by the British-Mexican Claims Commission may, owing to its brevity, be cited in full :

“1. The Mexican Agent refers to a question asked by the Chairman of the Commission in the meeting of the 3rd August, 1931,

¹²⁹ Feller, p. 381.

¹³⁰ Feller, p. 497.

¹³¹ Sandifer, *Evidence before International Tribunals* (Chicago, 1939), p. 299.

whether in any letters, notes or telegrams exchanged shortly after the events, there was any declaration by the Mexican Government in regard to the authorities at Chihuahua having warned Mr. Watson that it was not advisable that he should enter the region where the attack took place.

“The Mexican Agent states that he has not found a declaration to that effect, but, that Messrs. Rafael Calderón, Jr., and Gonzalo N. Santos are able to give evidence on the subject and with respect to other points connected with it, and that they are ready to appear before the Commission.

“The Agent requests the Commission to reopen the case, so that the testimony of Messrs. Calderón and Santos may be received.

“2. The Commission, considering articles 28, 41 and 43 of the Rules of Procedure, are of opinion that they are not entitled to hear new witnesses after the pleadings were closed on the 3rd August, and that a reopening can only tend to hear again the Agents on any points they, the Commission, may deem necessary.

“They have no objection against taking cognizance of a new document produced by the Mexican Agent, and in which may be protocolized the evidence to be given by Messrs. Calderón and Santos before a Mexican authority. Neither will they object to a discussion on this new evidence, as far as it relates to the question asked by the Chairman in the meeting of the 3rd August, 1931.

“3. The Commission rule that the case is reopened in order that the Agents may present oral arguments which must be strictly confined to the document described in section 2, and which may not exceed the scope of the question asked by the Chairman in the meeting of the 3rd August, 1931.”¹³²

Article 28 of the Rules of Procedure dealt with witnesses and article 41 with time limits. Article 43 read as follows :

“When a case is submitted in pursuance of the foregoing provisions, the proceedings before the Commission in that case shall be deemed closed. Notwithstanding this order, the Commission may again hear the Agents on any points it may deem necessary.”¹³³

In another case before the same Commission, *Vera Cruz Telephone Construction Syndicate (Great Britain) v. United Mexican States*, a motion to reopen a case was granted and limited to the presentation of oral arguments by Agents on new evidence submitted to the tribunal.¹³⁴ In *The Mexican Tramways Company (Great Britain) v. United Mexican States* a motion to reopen the case to argue the issue of lack of jurisdiction

¹³² Reports I.A.A., Vol. 5, pp. 302-303.

¹³³ Feller, p. 497.

¹³⁴ Reports I.A.A., Vol. 5, p. 303.

on two grounds, one of which had been debated between the Agents prior to the closing of the pleadings, was partly granted, in that the Commission allowed discussion by the Agents of that one of the grounds which had not theretofore been pressed.¹³⁵

Article 19

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

Comment

The principle that the deliberations of a tribunal shall remain secret is generally recognized in the judicial systems of all countries and hardly calls for elaborate comment. The precedents are: the Statute of the International Court of Justice, Article 54, paragraph 3, its Rules of Court, article 30, paragraph 2; the Hague Convention of 1907, article 78; the Mexican Peace Code, article 48. See also Order of 19 August 1929 by the Permanent Court of International Justice in the case of the *Free Zones of Upper Savoy and the District of Gex*.¹³⁶

The rule that the deliberations of the tribunal should be attended by all the members is recognized by article 10 of the *Projet*, 1875, which provided in part: "The arbitral tribunal deliberates with all its members present." This is a matter of sound judicial practice. A failure to observe this rule may not only affect the weight of the award,¹³⁷ but may also provoke a dissenting opinion which otherwise might not have occurred. Thus, in the case of the *Santa Isabel Claims*, decided by the United States-Mexican Special Claims Commission, the dissenting American commissioner stated:

"Because of ill-health, or otherwise, the Presiding Commissioner did not meet in conference with his associates to discuss the case. Because of continued ill-health he went to Cuba where he wrote his final decision, one of the Commissioners being at his home in Mexico and the other in the United States. If there could have been just one conference, if there could have been just one opportunity to present and have answered one question, perhaps it would have been unnecessary to write this dissenting opinion."¹³⁸

Concerning the absence or withdrawal of an arbitrator, see articles 6 and 7 *supra* and comment thereunder. See also comment under article 9, paragraph (5).

¹³⁵ *Ibid.*, p. 304.

¹³⁶ *P.C.I.J.*, Ser. A, No. 22, p. 12.

¹³⁷ See Mérignhac, p. 276, Witenberg, p. 269.

¹³⁸ *Reports I.A.A.*, Vol. 4, p. 796.

Article 20

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

2. In such case, the tribunal may render an award if it is satisfied that it has jurisdiction and that the claim is well-founded in fact and in law.

Comment

The provision made in this article for procedure in default of appearance has several precedents. In the *Croft* arbitration between Great Britain and Portugal provision was made in the *compromis* of 14 May 1855 authorizing the Senate of Hamburg to give a decision by default if either party should fail to present its case.¹³⁹ Similar provision was made in the arbitration agreement of 1861 signed by the same States in the case of *Yuille Shortridge and Co.*,¹⁴⁰ and in the agreement of 1858 in the case of *The Macedonian* between Chile and the United States.¹⁴¹ Article 15 of the Convention for the Establishment of a Central American Court of Justice of 20 December 1907 provided that if an answer to a complaint should not have been filed within the time allotted, the complaining party should substantiate its case and the tribunal should decide on the evidence available.¹⁴² Article 40 of the Hague Convention of 1907 relative to the creation of an International Prize Court contained a similar provision. Article 53 of the Statute of the International Court of Justice, on which the present article is based, provides as follows:

“1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

“2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.”

In some form or another, provision was made for procedure in default of appearance in the Rules of Procedure of most of the Mixed Arbitral Tribunals. Thus, article 58 of the Rules of Procedure of the Italian-German Mixed Arbitral Tribunal is as follows:

“The failure of a party to appear at a hearing shall not interrupt the course of the proceedings. The tribunal may order a postponement or render a judgment on the basis of the evidence in the case.”¹⁴³

¹³⁹ La Fontaine, p. 372.

¹⁴⁰ *Ibid.*, p. 378.

¹⁴¹ *Treaties and Conventions between the United States and Other Powers* (Washington, 1889), p. 143.

¹⁴² *Am. J. Int. Law, Supp.* (1908), Vol 2, p. 237.

¹⁴³ *Rec. T.A.M.*, Vol. 1, p. 807.

For examples of cases where judgment was given by default, see the following decisions of the Franco-German Mixed Arbitral Tribunal: *Peffner v. Grands Magasins du Printemps*, *Beck v. Guyot*, *Schreider v. Metenett*.¹⁴⁴

In the *Lena Goldfields Arbitration* between the Lena Goldfields Company and the Soviet Government, the latter, having concurred in fixing the date for the first meeting of the arbitration tribunal, failed to put in a defence, and contended that owing to the company having ceased to finance the undertaking, the arbitration was "cancelled". The tribunal held that its jurisdiction was unaffected. It cited paragraph 12 of the concession agreement between the Government and the company which provided that each party undertook:

"to present to the Court in manner and period in accordance with its instructions, all the information necessary respecting the matter in dispute, which it is able and which it is in a position to produce, bearing in mind considerations of State importance."

Commenting on this, the tribunal said:

"This information, by reason of the premises, the Court was not able to obtain direct from the Government, and, in order to ascertain the truth on the issue before it, the Court was thus compelled to admit the best evidence available of various facts and documents, upon which Lena was unable to produce primary evidence by reason of the documents or witnesses being in Russia and not available at the trial."¹⁴⁵

The case of *Felipe Molina Larios v. Honduras* appears to have been decided by the Central American Court of Justice without Honduras having been represented before the Court. A decision was given by the same court in the case of *Costa Rica v. Nicaragua* without an appearance having been made on behalf of Nicaragua.¹⁴⁶

In the case of the *Corfu Channel* (Compensation) the Albanian Government (defendant in that case) failed to appear to argue the question of the amount of compensation payable by Albania to the United Kingdom in respect of the damage to ships and loss of life of British officers and men caused by mines in the Corfu Channel. In a judgment of 15 December 1949, the International Court of Justice said:

"The position adopted by the Albanian Government brings into operation Article 53 of the Statute, which applies to procedure in default of appearance. This article entitles the United Kingdom Government to call upon the Court to decide in favour of its claim, and, on the other hand, obliges the Court to satisfy itself that the claim

¹⁴⁴ *Rec. T.A.M.*, Vol. 2, pp. 332-336.

¹⁴⁵ *Annual Digest of Public International Law Cases 1929-1930*, Case No. 258.

¹⁴⁶ Hudson, *The Central American Court of Justice in Am. J. Int. Law* (1932), Vol. 26, pp. 772, 775.

is well founded in fact and law. While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded."¹⁴⁷

Article 21

1. Discontinuance of proceedings by the claimant party may not be accepted by the tribunal without the consent of the respondent.
2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

Comment

When proceedings have once been instituted it is a general practice in municipal law to impose limitations on their discontinuance by a single party. Thus, in French civil procedure¹⁴⁸ *désistement* is described as being fundamentally a contract between the plaintiff and the defendant.¹⁴⁹ In other words there must be an element of consent to justify discontinuance. A plaintiff having launched an action and put the other party to expense cannot, at his own whim, discontinue the proceedings. The position in English law has been stated as follows :

"The plaintiff may without leave wholly discontinue his action, against all or any of the defendants, or withdraw any part or parts of his alleged cause of complaint by giving notice in writing at any time before the receipt of the defence, or afterwards, before the plaintiff takes any other proceedings except an interlocutory application. Except as aforesaid, a plaintiff cannot withdraw the record or discontinue the action without leave of the Court or a judge; nor can a defendant withdraw his defence or part of it without such leave."¹⁵⁰

Order 26, rule 2 of the Rules of the English Supreme Court of Judicature provides :

"When a cause has been entered for trial, it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing, signed by the parties."¹⁵¹

Article 277 of the Dutch Code of Civil Procedure provides as follows :

"Subject to payment of costs the plaintiff may, at any time before receipt of the defence, discontinue the proceedings. After receipt

¹⁴⁷ *I.C.J. Reports*, 1949, p. 248.

¹⁴⁸ Art. 402 and 403, Code of Civil Procedure.

¹⁴⁹ Dalloz, *Nouveau dictionnaire pratique de droit*, 1933, Vol. 1, p. 416.

¹⁵⁰ *Halsbury's Laws of England* (2nd ed., 1937), Vol. 26, p. 76.

¹⁵¹ See, generally, *Annual Practice* (1952), pp. 429-434.

of the defence the plaintiff may only discontinue the proceedings with the consent of the other party.”

Article 271, paragraph 1, of the German *Zivilprozessordnung*¹⁵² reads as follows :

“Without the consent of the defendant the claim can only be withdrawn before the commencement of the oral arguments of the defendant on the merits.”

Paragraph 3 of the same article reads (in part) :

“The claimant must pay the costs of the action (in the event of discontinuance) in so far as a decision as to costs has not yet been taken and such decision is not *res judicata*.”

Although the technical details may vary under different systems of law, it will be seen that the same general principle (of consent between the plaintiff and defendant as a condition of discontinuance) exists, and that the discontinuance, in most cases, becomes a matter of record by the court.

The Rules of Procedure of the Mixed Arbitral Tribunals generally made provision for discontinuance. Article 69 of the Rules of the Belgian-German Mixed Arbitral Tribunal provided that until the answer of the respondent was filed, and thereafter if the respondent consented, the claimant could discontinue the proceedings. In the event, however, of an objection by the respondent the proceedings continued.¹⁵³ The same provision is contained in article 65 of the Rules of the Franco-German Mixed Arbitral Tribunal.¹⁵⁴

Examples of requests that the proceedings be discontinued may be found in the decision of the Franco-Bulgarian Mixed Arbitral Tribunal in the case of *de Majo et Frère v. Boni et Cie*,¹⁵⁵ and of the Franco-German Mixed Arbitral Tribunal in the case of *Office français de vérification et de compensation v. la Société Orosdi-Back*.¹⁵⁶

In the course of the preparation by the judges of the Rules of the Permanent Court of International Justice, the question was raised whether the parties could withdraw from the Court proceedings which they had instituted. There was some difference of opinion as to whether the Rules should state that a suit could be withdrawn only with the consent of the Court. It was ultimately agreed, however, that the parties should have the right to withdraw, by common consent, a suit which they had brought before the Court.¹⁵⁷ Accordingly, article 68

¹⁵² See *Kommentar* by Hans Meyer and Richard Zoller, 1948, p. 216.

¹⁵³ See *Rec. T.A.M.*, Vol. 1, p. 42.

¹⁵⁴ *Ibid.*, p. 53.

¹⁵⁵ *Rec. T.A.M.*, Vol. 3, p. 434.

¹⁵⁶ *Rec. T.A.M.*, Vol. 1, p. 914.

¹⁵⁷ *P.C.I.J., Ser. D*, No. 2, pp. 83-84.

of the 1936 Rules provided that where the parties informed the Court of their consent the Court would record the discontinuance or settlement in an order and prescribe the removal of the case from the list. This happened in the *Chorzów* case¹⁵⁸ and similar agreements were recorded in the *Castellorizo* case,¹⁵⁹ *Losinger* case¹⁶⁰ and the *Borchgrave* case.¹⁶¹ It has been stated that "where a proceeding is begun by the notification of a special agreement it cannot be discontinued by a single party".¹⁶² The practice of the Permanent Court, continued by the International Court of Justice, was that if "in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings", the discontinuance will be recorded in an order directing the removal of the case from the list.¹⁶³ In the case concerning the *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium* the agent of the Belgian Government requested that the action be removed from the list of the Permanent Court. The Court noted that such a request has been duly communicated to the Chinese Government and that the latter had acknowledged receipt thereof and that it had never taken any step in any proceeding before the Court. In the circumstances the Court decided that the case should be removed from the list on the unilateral withdrawal by the Belgian Government.¹⁶⁴

The present article, in paragraph 1, requires the tribunal to refuse to give effect to a unilateral discontinuance and, in paragraph 2, requires that the tribunal shall take note of a discontinuance resulting from an agreement between the parties.

Article 22

The tribunal may take note of a settlement reached by the parties. At the request of the parties, it may embody the settlement in an award.

Comment

Provisions for the direct settlement of disputes by the parties are a common feature of the rules of procedure of international tribunals.¹⁶⁵ The Rules of Procedure of the Franco-German Mixed Arbitral Tribunal

¹⁵⁸ *P.C.I.J., Ser. A*, No. 19, p. 13.

¹⁵⁹ *P.C.I.J., Ser. A/B*, No. 51, p. 6.

¹⁶⁰ *P.C.I.J., Ser. A/B*, No. 69, p. 101.

¹⁶¹ *P.C.I.J., Ser. A/B*, No. 73, p. 5.

¹⁶² Hudson, *Permanent Court*, p. 546.

¹⁶³ See article 69 of the Rules of Court, *I.C.J.*, p. 78.

¹⁶⁴ *P.C.I.J., Ser. A*, No. 18, p. 5.

¹⁶⁵ See on the subject generally Witenberg, pp. 343-346.

provided for a *transaction* whereby both parties would renounce part of their claims or make reciprocal concessions, and for a *passé-expédient* whereby one party would agree to the conclusions of the other party. Upon a declaration to such effect being filed, no objection having been made by the agents of the Governments, the declaration was then confirmed by the tribunal and became *res judicata*.¹⁶⁶ The Rules of the Anglo-German Mixed Arbitral Tribunal provided for the submission of cases to the tribunal on the basis of agreed statements of fact.¹⁶⁷

A. H. Feller notes that the Rules of most of the Mexican Mixed Claims Commissions provided that "in the event that the agents of the two governments should stipulate any award, or the disposition of any claim, such stipulation shall be presented to the Commission for confirmation and award in accordance therewith or other proper order thereon".¹⁶⁸ The Rules of the French-Mexican Claims Commission expressly reserved to the Commission the power in such case to render the decision it might find proper.¹⁶⁹ The Rules of the British-Mexican Claims Commission stated that, prior to the hearing of any claim, the two agents might confer as often as they might think necessary with a view to reaching some agreement concerning its disposition, and that any offers or concessions made in the course of such discussions would not later be used against the agent making them, should no satisfactory settlement be reached.¹⁷⁰ A number of cases were so settled.¹⁷¹

The Rules of the United States-Panama General Claims Commission under the convention of 28 July 1926 provided for the direct settlement of claims between the agents, subject to confirmation by the tribunal.¹⁷² A definite course of practice developed in the German-American Mixed Claims Commission and the Tripartite Claims Commission in the settlement of claims through agreed statements.¹⁷³

Article 68 of the Rules of Court of the International Court of Justice provides in part that :

"If at any time before the judgment has been delivered, the parties conclude an agreement as to the settlement of the dispute

¹⁶⁶ Art. 62, 63 and 64, *Rec. T.A.M.*, Vol. 1, pp. 52-53; see also the Rules of Procedure of the Belgian-German Mixed Arbitral Tribunal, art. 68, *ibid.*, pp. 41-42.

¹⁶⁷ Art. 38, *ibid.*, p. 117.

¹⁶⁸ Feller, pp. 287-288.

¹⁶⁹ Art. 45, *ibid.*, p. 439.

¹⁷⁰ Art. 33, 34, *ibid.*, p. 494.

¹⁷¹ *Ibid.*, p. 80; e.g., *C. E. McFadden (Great Britain) v. Mexico* (1930), *Decisions and Opinions of the Commissioners in accordance with the convention of November 19, 1926, between Great Britain and the United Mexican States, October 5, 1929, to February 15, 1930* (London, 1931), p. 155.

¹⁷² Art. 33, Department of State, *Arbitration Series No. 6*, Washington, 1934, p. 850.

¹⁷³ K. S. Carlston, *Procedural Problems in International Arbitration in Am. J. Int. Law*, 1945 (Vol. 39), p. 449.

and so inform the Court in writing . . . , the Court . . . shall make an order officially recording the conclusion of the settlement."¹⁷⁴

In the *Case Concerning the Factory at Chorzów* (Indemnities) an agreement was reached between the parties with regard to the settlement of the dispute; an authoritative text thereof was communicated to the Permanent Court, which placed it on record and declared the proceedings in the case terminated.¹⁷⁵

The present article recognizes the possibility that in the course of the proceedings before the tribunal the parties may settle their dispute by direct agreement and authorizes the tribunal to "take note" of any such agreement. However, a request by both parties is necessary in order that the tribunal may embody the settlement in the award and even then the tribunal is accorded a certain discretionary power, in that it is authorized, not directed, to do so.¹⁷⁶ Once it has been incorporated in the award, the settlement acquires the force of a decision of the tribunal.

The reasons for the settlement adopted by the parties are not binding upon the tribunal in future cases according to the opinion of the Franco-German Mixed Arbitral Tribunal in its decision of 24 January 1928 in the case of *Société métallurgique de Pont-à-Vendin v. 1^o Office allemand, 2^o Société Junkerather Gewerkschaft*.¹⁷⁷ This is the more so, when the tribunal made express reservations concerning the correctness of those reasons: see the decision of the French-Mexican Claims Commission of 20 June 1929 in *Estate of J. S. C. Esclangon (France) v. United Mexican States*.¹⁷⁸

¹⁷⁴ *I.C.J., Ser. D*, p. 77.

¹⁷⁵ Order of 25 May 1929, *P.C.I.J., Ser. A*, No. 19.

¹⁷⁶ Cf. the Commission's report, *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 44.

¹⁷⁷ *Rec. T.A.M.*, Vol. 8, p. 108.

¹⁷⁸ *Reports I.A.A.*, Vol. 5, p. 549.

CHAPTER V

THE AWARD

Article 23

The award shall be rendered within the period fixed by the *compromis* unless the tribunal, with the consent of either party, decides to extend the period fixed in the *compromis*.

Comment

It frequently happens that, when a fixed term for the life of the tribunal is provided in the *compromis*, the tribunal is unable to complete its task within such time. In such case, the parties usually enter into an agreement extending the term of the tribunal. Such extensions took place with respect to a number of the Mexican Claims Commissions.¹

A discussion of the experience of international tribunals in this connexion and a suggestion for dealing with the problem of fixing the term of the tribunal were included in the report of Agent B. L. Hunt on the United States-Panama General Claims Arbitration under the convention of 28 July 1926 as extended by the convention of 17 December 1932. Referring to article VI, paragraph 2 of the convention, which provided that "the Commission shall be bound to hear, examine and decide, within one year from the date of its first meeting, all the claims filed", Hunt stated:

"Some provision limiting the time allowed the Commission for the completion of its work, such as the second paragraph of article VI of the present convention, is probably necessary. Those used in the past, however, have been among the most unsatisfactory provisions of the conventions. Without a provision limiting the time allowed the Commission, arbitrations might in some instances continue an unreasonable length of time. In practically every arbitration, however, the time allowed by the conventions has proved inadequate and great inconvenience has resulted from the necessity of negotiating extension conventions. The unforeseeable contingencies which

¹ See various supplementary conventions set out in Feller, *Appendix*, e.g., pp. 333, 422.

developed in the present instance, as above described, constitute one evidence of the impracticability of such a provision as this. It apparently would not be particularly inaccurate to state that much of this difficulty in other instances in the past has arisen from the fact that the respective conventions were not drafted in the light of careful surveys showing the number and nature of the claims which would be likely to come before the respective commissions for adjudication, or with full regard to the average time required for the adjudication of claims of the character involved. The present instance, in which an extension convention was found necessary in spite of the fact that a large proportion of the claims were eliminated without submission to the Commission and another large number were combined for the purpose of pleading and adjudication, is a practical example of the impracticability of including this character of provision in the arbitral convention. Moreover, the lapse of time between signature and exchange of ratifications of the convention may take it entirely impossible to determine in advance how many claims may come before the commission.

“The following would probably be a more practical provision:

‘The Commission shall be bound to hear, examine and decide all claims over which it has jurisdiction within a period of months corresponding in number to one fourth of the number of claims properly filed with it.’

“The term ‘one fourth’ might be changed to ‘one third’, ‘one half’, *et cetera*, depending upon the general character of the claims to be adjudicated, thus providing a time allowable for adjudication proportioned to the work to be done and not arbitrarily fixed in disregard of unforeseeable contingencies.”²

The present article authorizes the tribunal, with the consent of one of the parties, to extend the period fixed in the *compromis*.³

Article 24

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 the members of the tribunal who have voted for it.
2. The award shall state the reasons on which it is based.
3. The award is rendered by being read in open court, the agents of the parties being present or duly summoned to appear.
4. The award shall immediately be communicated to the parties.

² Department of State, *Arbitration Series No. 6* (Washington, 1934), pp. 24-26.

³ Cf. the Commission's report, *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 37.

It seems to be the invariable practice of tribunals to put their conclusions into writing; no purely oral awards are known to have been rendered in modern times. Article 23 of the *Projet*, 1875, provided:

“The award should be drawn up in writing . . . unless otherwise provided by the *compromis*.”

The authentication of the award through signature of the arbitrators is in general accomplished by one or the other of two procedures. Under the earlier procedure the award was signed by each member of the tribunal. This was the method specified under article 23 of the *Projet* of 1875. It was also laid down by article 52 of the Hague Convention of 1899. A somewhat recent example of this method may be found in article 32 of the Rules of Procedure of the United States-Panama General Claims Commission, which provided that the award “must be signed by the members of the Commission who agree upon it”.⁴ Under the Hague Convention of 1907 and the Statute of the Permanent Court of International Justice and that of the International Court of Justice, however, another procedure was adopted. This is the system according to which the award is authenticated by the signature of the president and the registrar or secretary of the tribunal. Article 56 of the Statute of the International Court of Justice requires that the judgment “shall contain the names of the judges who have taken part in the decision” but, under Article 58, it need only “be signed by the President and by the Registrar”. Article 79 of the Hague Convention of 1907 provides that the award “is signed by the president and by the registrar or the secretary acting as registrar”. To the same effect is article 49 of the Mexican Peace Code. Under the second system, as stated by Hudson:

“The signature by the President does not indicate his approval of the judgment; he must sign a judgment though he votes against its adoption, and though he expresses a dissenting opinion.”⁵

The procedure adopted by article 24 of this draft may be described as a compromise between the two traditional methods. From the first one it borrows the requirement that the award be signed by those members of the tribunal “who have voted for it”. It has in common with the second the requirement that the president should sign the award, whether or not he agrees with it.

According to the present article, the award shall contain the names of the arbitrators. At times, more detailed rules are laid down concern-

⁴ Department of State, *Arbitration Series No. 6* (Washington, 1934); see also United States-Mexican General Claims Commission, Rules of Procedure, article XI, paragraph 2, requiring, in the case of a three-member tribunal, that the award “shall be signed by at least two members of the Commission”, Feller, p. 368.

⁵ Hudson, *Permanent Court*, p. 587.

ing the contents of the award. A most explicit statement in this respect will be found in article 74, paragraph 1, of the Rules of Court of the International Court of Justice, reading as follows :

“ The judgment shall contain :

“ a statement whether it has been delivered by the Court or by a Chamber;

“ the date on which it is delivered;

“ the names of the judges participating;

“ the names of the parties;

“ the names of the agents of the parties;

“ a summary of the proceedings;

“ the submissions of the parties;

“ a statement of the facts;

“ the reasons in point of law;

“ the operative provisions of the judgment;

“ the decision, if any, in regard to costs;

“ the number of the judges constituting the majority.”⁶

The *compromis* usually requires a statement of reasons for the award.⁷ Cases have, however, arisen in which no statement of reasons was given. This was so in the *Portendick* arbitration between France and Great Britain in 1843 in which the King of Prussia was the arbitrator. This course of action was criticized by Fauchille.⁸ Likewise in 1897 President Cleveland failed to give reasons for his decision in the *Cerruti* arbitration between Colombia and Italy. This was criticized by Darras.⁹

The modern practice is expressed in article 79 of the Hague Convention of 1907 which provided : “ The award must state the reasons on which it is based.” Similar provisions are found in article 28 of the draft Convention of 1907 Relative to the Creation of a Court of Arbitral Justice and Article 56 of the Statute of the International Court of Justice.

In conformity with this trend, the present draft convention requires a statement of reasons. It also provides, in article 30, that an award without reasons is open to challenge by either party.

It has become customary to make the award known by reading it at a public sitting of the tribunal, due notice thereof having been given to the agents of the parties. (Hague Convention of 1907, art. 80; Statute of the International Court of Justice, Art. 58; International Central American Tribunal, Rules of Procedure, art. 80¹⁰; Mexican

⁶ *I.C.J., Ser. D*, p. 80.

⁷ Witenberg, p. 292, citing a list of treaties.

⁸ See his doctrinal note in Lapradelle-Politis, Vol. 1, pp. 543-544.

⁹ In *Revue générale de droit international public* (1899), Vol. 6, p. 547. See also, generally, Ralston, pp. 107-109.

¹⁰ *Am. J. Int. Law, Supp.* (1923), Vol. 17, p. 95.

Peace Code, art. 50; United States-Mexican General Claims Commission, Rules of Procedure, art. XI, para. 1¹¹; Rules of Procedure, art. 32, of the United States-Panama General Claims Commission¹²).

The provision in the texts cited above that the award should be read at a public sitting of the tribunal is based upon the principle that international justice should be openly administered. For example the secrecy surrounding the *Chevreau* case decided by a "special tribunal" of the Permanent Court of Arbitration on 9 June 1931¹³ was most unusual. The sessions of the tribunal were not open to the public and it has been stated¹⁴ that the parties agreed that the award should remain secret for a period of three months after it was rendered, and was thereafter to be available only to accredited enquiries and those who practised at the Peace Palace. The award became available for general publication, however, a year later, the ban on publication being raised in June 1932. In view of the apparent connexion¹⁵ of the tribunal with the Permanent Court of Arbitration, the question has been raised whether such secrecy was "consistent with the purpose and spirit of the Hague Convention".¹⁶

In addition to the general practice of publicity in the rendering of the award, the texts of awards have generally been made available for study by interested scholars and even for publication either by the governments themselves or by private individuals (e.g., La Fontaine) and international institutions (e.g., Reports published by the United Nations).

The rendering of the award produces important legal consequences. It thereby becomes binding upon the parties.¹⁷

A further legal consequence is that with the rendering of the award the tribunal becomes *functus officio* though this principle is subject under the present draft to the provisions of articles 27, 28 and 29 *infra*.

The *Projet*, 1875, required in its article 24 that each party be notified of the award by the delivery of a copy. Pursuant to article 54 of the Hague Convention of 1899 and article 81 of the Hague Convention of 1907, the award was to be notified to the agents of the parties. Article 75, paragraph 1, of the Rules of Court of the Permanent Court of International Justice, identical with the same article, same paragraph, in the Rules of the International Court of Justice, required that a copy

¹¹ Feller, p. 368.

¹² Department of State, *Arbitration Series No. 6* (Washington, 1934), p. 850.

¹³ *Reports I.A.A.*, Vol. 2, p. 1115.

¹⁴ Hudson, *The Chevreau Claim between France and Great Britain in Am. J. Int. Law* (1932), Vol. 26, p. 807.

¹⁵ See, however, Hudson, *ibid.*, p. 806.

¹⁶ Hudson, *ibid.*, p. 807.

¹⁷ See article 26 *infra*.

of the judgment be forwarded to each of the parties. The principle underlying these provisions has been adopted in the present article of this draft.

Article 25

Subject to any contrary provision in the *compromis*, any member of the tribunal may attach to the award his separate or dissenting opinion.

Comment

There has been considerable discussion in the past of the wisdom of recording or publishing dissenting opinions.¹⁸ The general practice, however, has been to allow them. *Compromis* have sometimes contained provisions for dissenting opinions; more frequently, however, the tribunal itself, having been given authority to decide upon its own rules of procedure, has adopted a rule permitting dissenting opinions; and, even in the absence of any such rule, the statement of dissent has been allowed in practice. In the *Alabama Claims Arbitration* the *compromis* provided (article VII) that the decision should be signed by the arbitrators assenting to it.¹⁹ There was, in fact, a lengthy dissenting opinion by the British arbitrator which was mentioned in the final protocol of the tribunal,²⁰ but not annexed to it. That dissenting opinion was published separately later; this course was the subject of some discussion at the time.²¹

The Hague Convention of 1907 made no provision regarding dissenting opinions, although article 52 of the Hague Convention of 1899 had provided for a "record of dissent", but not for a statement of reasons. The rules adopted by the Central American Court of Justice permitted dissenting opinions to be filed.²²

The Statute of the Permanent Court of International Justice allowed, as the Statute of the International Court of Justice (Art. 57) allows, any dissenting judge to deliver a separate opinion.²³ The 1920 Committee of Jurists was opposed to the idea that reasons for dissent might be stated.²⁴ This was thought to be particularly undesirable in the case of judges *ad hoc*.²⁵ The Committee's minutes said:

"An opinion was vainly put forward, according to which a judge should have the right to give the reasons for his dissent, in accordance

¹⁸ See Witenberg, pp. 276-279, Hudson, *International Tribunals*, pp. 116-118.

¹⁹ Moore, Vol. 1, p. 550.

²⁰ *Ibid.*, p. 658.

²¹ *Ibid.*, p. 659.

²² Hudson, *International Tribunals*, p. 117.

²³ See also article 74, paragraph 2, of the Rules of Court.

²⁴ Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920* (The Hague, 1920), pp. 591, 742-743.

²⁵ *Ibid.*, p. 531.

with a custom which has grown up lately in the jurisprudence of arbitration; however this proposal was not favourably received. It seemed inadvisable to allow a judge of the same nationality as one of the parties to write long statements in favour of that State after it had lost its case. It followed that, as national judges were not to be given the right to give the reasons for their dissent, it was not thought desirable that other judges should have a right not possessed by national judges.”²⁶

Nevertheless, following the precedent of the Hague Convention of 1899, the Committee recommended that dissenting judges should “be entitled to have the fact of their dissent or reservations mentioned” in the judgment, though the reasons should not be expressed.²⁷ When the Committee’s draft came before the Council of the League of Nations, M. Bourgeois (France) proposed an amendment to ensure that “the play of the different judicial lines of thought would appear clearly”.²⁸ The Council of the League approved a provision that

“if the judgment does not express wholly or partially the unanimous opinion of the judges, those dissenting have the right to add to it a statement of their individual opinion”.²⁹

As far as the Mixed Arbitral Tribunals are concerned it may be stated that dissenting opinions were only provided for in the Rules of Procedure of the Yugoslav-Hungarian Mixed Arbitral Tribunal.³⁰ Other Mixed Arbitral Tribunals, however, have in fact allowed dissenting judges to attach their separate opinions to the award.³¹

The Franco-Italian Conciliation Commission in article 22, last paragraph, of its Rules of Procedure provided that the opinions of the individual members of the Commission might be recorded.³²

It will be noted that, although the general practice has been to allow the recording or publication of dissenting opinions, the phraseology adopted in the present article makes it possible to specify in the *compromis* that the publication of dissenting opinions will not be permitted.

Article 26

The award is binding upon the parties when it is rendered. It must be carried out in good faith.

²⁶ *Ibid.*, p. 742.

²⁷ See draft article 56, *ibid.*, p. 743.

²⁸ *Records of First Assembly, Committees*, Vol. 1, p. 478.

²⁹ *Minutes of the Council*, 10th session, p. 161.

³⁰ Art. 51, para. 2, *Rec. T.A.M.*, Vol. 4 p. 556.

³¹ See Blühdorn, *Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes créés par les Traités de Paix*; *Rec. A.D.I.* (1932), Vol. 41, pp. 179-180.

³² *Rec. C.C.franco-italienne*, Vol. 1, p. 30.

This article distinguishes arbitration, under which a legal obligation exists to carry out an award, from conciliation or mediation under which the parties have no legal obligation to adopt the proposals for a settlement which are suggested to them.

As stated in article 37 of the Hague Convention of 1907, "recourse to arbitration implies an engagement to submit in good faith to the award".³³

It is a striking fact that States have seldom refused to carry out or abide by the decision of international tribunals. As Lapradelle has remarked: "It is but very rarely that one finds in the long history of arbitration, and only as odd cases, decisions which are not carried out."³⁴ In some cases the decision has required no positive action by the parties. Nevertheless, in the vast majority of those cases where positive action has been required, execution has followed as a matter of course. Even in cases where the losing party claimed to be greatly aggrieved by the decision it has, generally speaking, been willing to comply with that decision — upholding thereby its respect for the rule of the law. For example, in 1923 the Government of the United States paid to the Norwegian Government a considerable sum in satisfaction of an arbitral award, stating that this was in acknowledgment of "its devotion to the principle of arbitral settlement even in the face of a decision proclaiming certain theories of law which it cannot accept".³⁵ The history of judgments given by the Permanent Court of International Justice is of interest in this connexion. In no case did a State refuse to carry out a judgment of the Court.³⁶

It must be noted, of course, that the award is binding *only* upon the parties.

The requirement of good faith is stated in article 13, paragraph 4, of the Covenant of the League of Nations, which provided as follows:

"The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered."³⁷

³³ See, to the same effect, Th. Funck-Brentano and A. Borel, *Précis du droit des gens* (3rd ed., 1900), p. 459; Mérignhac, p. 298; Limburg, *L'Autorité de chose jugée des décisions des juridictions internationales* in *Rec. A.D.I.* (1929), Vol. 30, pp. 537-538. Morelli states: "The effect of the award is to obligate the parties to regard the decision as a definitive ruling on the matters in dispute", see Morelli, *La théorie générale du procès international*, in *Rec. A.D.I.* (1937), Vol. 61, p. 318.

³⁴ *De l'exécution des décisions de la justice internationale* in *Revue de droit international* (1934), Vol. 14, p. 225.

³⁵ *Norwegian Shipowners' Claims*, Reports I.A.A., Vol. 1, p. 344.

³⁶ Hudson, *Permanent Court*, p. 596.

³⁷ See Hambro, *L'Exécution des sentences internationales* (Liège, 1936), pp. 60-61.

Article 94 of the Charter of the United Nations states even more categorically :

“(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

“(2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

It will be noticed, however, that the text of Article 94 of the Charter refers only to the judgments of the International Court of Justice, the principal judicial organ of the United Nations, and that, in contrast to the comprehensive provision contained in article 13 of the Covenant of the League of Nations (“arbitration or judicial settlement”), it does not apply to arbitration as such.

It may be repeated that only a few exceptional and minor instances of refusals to carry out an award have occurred; accordingly, the proposition laid down in the above article of the present draft convention conforms with international practice.

As to the moment at which an award becomes binding, the first part of this article makes it clear that the parties become bound at the time when it is rendered. According to article 24, paragraph 3, of the present draft, the award is read in open court and is thereby rendered. The parties shall be summoned to be represented at the event, but failure of any agent to appear will not invalidate the rendering of the award.

It may be noted that it is provided in article 76 of the Rules of Court of the International Court of Justice that “the judgment shall become binding on the parties on the day on which it is read in open court”.

Article 27

Within a 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, shall be entitled to rectify any clerical, typographical or arithmetical error or errors of the same nature apparent on the face of the award.

Comment

Once rendered, the award of the tribunal becomes *res judicata* and may not thereafter be modified by the tribunal, subject to the provisions of article 29 *infra*. The power of revising an award expressly accorded by the latter article is, however, to be distinguished from the mere rectification of “clerical, typographical or arithmetical errors or errors of the same nature apparent on the face of the award”. Such rectific-

ation merely supplements or completes the award and does not involve its modification.

The rules of procedure of many arbitral tribunals contain some such provisions as are set out in the present article 27, for example, article 75 of the Rules of Procedure of the German-Belgian Mixed Arbitral Tribunal, and article 40 of the Rules of the Anglo-German Tribunal.³⁸ In each of these cases power was given to the tribunal to explain or correct a decision which was obscure, incomplete or contradictory or which contained an error in writing or calculation. This power was exercised in a number of cases; see two decisions of the Anglo-German Mixed Arbitral Tribunal, i.e. *Dewhurst and others v. Germany* (1924),³⁹ and *Byng v. Der Anker Gesellschaft für Lebens- und Rentenversicherungen* (1924)⁴⁰; see also article 46 of the Rules of Procedure of the French-Mexican Commission,⁴¹ article XI (6) of the Rules of the United States-Mexican General Claims Commission⁴² and chapter XII, paragraph 48, of the Rules of the British-Mexican General Claims Commission.⁴³

The *Projet*, 1875, provided that the arbitrator had the right, so long as the time limit set in the *compromis* had not expired, to rectify mere typographical errors or mistakes in calculation in the award. Mérignhac in commenting on this provision notes that the power thereby conferred should be exercised most carefully so as not to enter upon the merits of the case or to modify the award in any respect.⁴⁴

In the arbitration between the United States and Spain in 1871 concerning certain claims made by citizens of the former, the umpire Count Lewenhaupt (the arbitrators having differed in opinion) declared as follows :

“The umpire is of opinion that the rule generally adopted by courts of arbitration is, that the umpire has not discretionary power to set aside his own decisions; that he has a right to correct clerical errors so long as the decision has not been satisfied, but that an error of judgment cannot be corrected after due notification of the decision; except, if the case be submitted again through the authorized channel.”⁴⁵

In the case of *Thadeus Amat and others*, decided by the United States-Mexican Claims Commission which was set up under a *compromis* of 8 July 1868, the Mexican agent alleged that there was an arithmetical

³⁸ *Rec. T.A.M.*, Vol. 1, pp. 43 and 118, respectively.

³⁹ *Ibid.*, Vol. 4, p. 1.

⁴⁰ *Ibid.*, p. 297.

⁴¹ Feller, p. 439.

⁴² *Ibid.*, pp. 381-382.

⁴³ *Ibid.*, pp. 497-498.

⁴⁴ Mérignhac, p. 282.

⁴⁵ Moore, Vol. 3, p. 2192.

error in the umpire's award. The umpire thereupon re-examined the award, corrected the error and awarded the proper amount.⁴⁶

It may be noted that according to article 27 of this draft, the power to correct the award may be exercised by the tribunal only "within a month after the award has been rendered and communicated to the parties". This limitation would not, however, prevent the parties themselves from acknowledging and correcting a manifest error after the expiration of said time-limit.

Article 28

1. Any dispute between the parties as to the meaning and scope of the award may, 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 impossible to submit the dispute to the tribunal which rendered the award, and if the parties have not agreed otherwise within three months, the dispute may be referred to the International Court of Justice at the request of either party.

Comment

This article follows article 82 of the Hague Convention of 1907 by providing that, in general, disputes as to the interpretation of an award shall be submitted to the tribunal which rendered such award. The latter article provides that :

"Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the decision of the tribunal which pronounced it."

Article 60 of the Statute of the International Court of Justice also provides that it is for the Court to construe its judgment, in the event of any dispute as to its meaning and scope. *Eius est interpretari cuius est condere.*

It is important that, to the extent possible consistent with the interests of the international community, no step be taken which would derogate from the authority and independence of a tribunal or would needlessly tend to create a hierarchy of international tribunals. The present article avoids any such step by reserving for decision by the original tribunal the determination of disputes as to the interpretation of its award. On the other hand, this article preserves the interests of the

⁴⁶ *Ibid.*, Vol. 2, p. 1358.

parties and the interests of the international community in the judicial order by providing in paragraph 2 that if it should be "impossible to submit the dispute to the tribunal which rendered the award, and if the parties have not agreed otherwise within three months, the dispute may be referred to the International Court of Justice at the request of either party".

In its judgment of 16 December 1927 the Permanent Court of International Justice was faced with a request of the German Government that the Court interpret its judgments Nos. 7 and 8 in the *Chorzów Factory* case. Since the Polish Government, the other party, contended that the necessary conditions were lacking for complying with the request for interpretation, the opinion of the Court entered into the question of the meaning of the term "interpretation". The Court first laid down the two requirements that "there must be a dispute as to the meaning and scope of a judgment" and that "the request should have for its object an interpretation of the judgment". The Court elaborated the meaning of the second requirement by saying that "the expression 'to construe' must be understood as meaning to give a precise definition of the meaning and scope which the Court intended to give to the judgment in question".⁴⁷ A dispute as to the meaning and scope of a judgment, it said, must relate to "those points in the judgment in question which have been decided with binding force", including disputes "as to whether a particular point has or has not been decided with binding force".⁴⁸ The dispute, in other words, must relate to points of substance involved in the judgment.⁴⁹

The effect of a judgment of interpretation was described by the Court as follows: "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." The Court "confines itself to explaining, by an interpretation, that upon which it has already passed judgment".⁵⁰

In considering the request for interpretation, the Court refrained from any examination of facts other than those which it had considered in the judgment under interpretation and held that subsequent facts consequently would not be considered.⁵¹ The interpretation cannot go beyond the limits of the judgment under interpretation.⁵² An inter-

⁴⁷ *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, P.C.I.J., Ser. A, No. 13, p. 10.

⁴⁸ *Ibid.*, pp. 11-12.

⁴⁹ See also *ibid.*, p. 14.

⁵⁰ *Ibid.*, p. 21.

⁵¹ *Ibid.*, p. 21.

⁵² *Interpretation of Judgment re Treaty of Neuilly*, Art. 179, Annex, para. 4, Judgment of 26 March 1925, P.C.I.J., Ser. A, No. 4, p. 7.

pretation cannot be a means "to reopen the discussion of that which has been definitely decided".⁵³

The *Fouchet* case, from which the last quotation was taken, was submitted to the Franco-Austrian Mixed Arbitral Tribunal under article 78 of the Rules of Procedure reading as follows :

"The Tribunal may interpret or rectify a judgment of which the operative part is obscure, incomplete or contradictory, or which contains a typographical error or a mistake in calculation in the award.

"The request for interpretation must be filed with the Tribunal through an Agent and within one month from the notification of the judgment.

"The Tribunal decides in private session after having invited the other party to furnish explanations."⁵⁴

The procedure for obtaining an interpretation of a judgment before the International Court of Justice is governed by article 79 of its Rules of Court, reading as follows :

"1. A request to the Court to interpret a judgment which it has given may be made either by the notification of a special agreement between the parties or by an application by one or more of the parties.

"2. The special agreement or application shall state the judgment of which an interpretation is requested and shall specify the precise point or points in dispute.

"3. If the request for interpretation is made by means of an application, the Registrar shall communicate the application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

"4. Whether the request be made by special agreement or by application, the Court may invite the parties to furnish further written or oral explanations."⁵⁵

The two requirements for the admissibility of a request for interpretation set forth by the Permanent Court in its judgment of 16 December 1927 referred to above, were restated by the International Court in its judgment of 27 November 1950 regarding the *Request for Interpretation of the Judgment of November 20, 1950, in the Asylum Case*.⁵⁶ The Court, dwelling upon the requirement "that there should exist a dispute as

⁵³ *Fouchet (France) v. Austria*, Franco-Austrian Mixed Arbitral Tribunal (1929), *Rec. T.A.M.*, Vol. 9, p. 283.

⁵⁴ *Rec. T.A.M.*, Vol. 1, p. 251.

⁵⁵ *I.C.J., Ser. D.*, p. 81.

⁵⁶ *I.C.J. Reports*, 1950, p. 395.

to the meaning or scope of the judgment ”⁵⁷ termed it impossible to treat as a dispute in the sense of Article 60 of its Statute “ the mere fact that one Party finds the judgment obscure when the other considers it to be perfectly clear. A dispute requires a divergence of views between the parties on definite points ”.⁵⁸ According to the Court, the existence of such a dispute not only had not been brought to its attention, “ but the very date of the Colombian Government’s request for interpretation [the request had been filed on the day the Court rendered the judgment] showed that such a dispute could not possibly have arisen in any way whatever ”.⁵⁹

⁵⁷ *Ibid.*, p. 402.

⁵⁸ *Ibid.*, p. 403.

⁵⁹ *Ibid.* See on the existence of a dispute generally, comment on article 1, *supra*.

CHAPTER VI

REVISION

Article 29

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to have a decisive influence on the award, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision and that such ignorance was not due to the negligence of the party requesting revision.

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

3. In the proceedings for revision the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application. If the tribunal finds the application admissible it shall then decide on the merits of the dispute.

4. The application for revision shall be made to the tribunal which rendered the award. If, for any reason, it is not possible to make the application to that tribunal, the application may, unless the parties agree otherwise, be made to the International Court of Justice, by either party.

Comment

The term "revision" appears first to have been introduced in the practice of international arbitration in article 13 of the Permanent Treaty of Arbitration between Italy and the Argentine Republic of 23 July 1898, reading in part as follows :

"The judgment is final and its fulfilment is entrusted to the honour of the States signatories of this treaty.

"Nevertheless the right to revision is recognized before the same tribunal as pronounced that judgment, provided that the judgment has not yet been carried out : (1) if the tribunal has based its decision on a document which is falsified or incorrect; (2) if the judgment, either in whole or in part, is the result of a mistake of fact, whether

in the positive or negative sense, resulting from the pleadings or the documents produced in the proceedings.”¹

The possibility of revision of an arbitral award was recognized in article 55 of the Hague Convention of 1899 and the corresponding article 83 of the Hague Convention of 1907. These articles were of a permissive character and authorized the parties to reserve in the *compromis* the right of revision. Article 83 read as follows :

“The parties can reserve in the *compromis* the right to demand the revision of the award.

“In this case and unless there be a stipulation to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact which is of a nature to exercise a decisive influence upon the award and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision.

“Proceedings for revision can only be instituted by a decision of the tribunal expressly recording the existence of the new fact, recognizing in it the character described in the preceding paragraph, and declaring the demand admissible on this ground.

“The *compromis* fixes the period within which the demand for revision must be made.”

A clause for the revision of the award was included in article 13 of the *compromis* of 22 May 1902 in the *Pious Fund of the Californias* case, reading as follows :

“Revision shall be permitted as provided in Article LV of the Hague Convention, demand for revision being made within eight days after announcement of the award. Proofs upon such demand shall be submitted within ten days after revision be allowed (revision only being granted, if at all, within five days after demand therefor) and counterproofs within the following ten days, unless further time be granted by the Court. Arguments shall be submitted within ten days after the presentation of all proofs, and a judgment or award given within ten days thereafter. All provisions applicable to the original judgment or award shall apply as far as possible to the judgment or award on revision. Provided that all proceedings on revision shall be in the French language.”²

A clause covering revision of the award appears in article 10 of the *compromis* of 27 January 1909 in the *North Atlantic Coast Fisheries* case, reading as follows :

“Each Party reserves to itself the right to demand a revision of the award. Such demand shall contain a statement of the grounds

¹ De Martens, *Nouveau recueil général*, 2nd series, Vol. 29, p. 139.

² *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers 1776-1909*, Malloy (Washington, 1910), Vol. 1, p. 1198.

on which it is made and shall be made within five days of the promulgation of the award, and shall be heard by the Tribunal within ten days thereafter. The Party making the demands shall serve a copy of the same on the opposite Party, and both Parties shall be heard in argument by the Tribunal on said demand. The demand can only be made on the discovery of some new fact or circumstance calculated to exercise a decisive influence upon the award and which was unknown to the Tribunal and to the Party demanding the revision at the time the discussion was closed, or upon the ground that the said award does not fully and sufficiently, within the meaning of this Agreement, determine any question or questions submitted. If the Tribunal shall allow the demand for a revision, it shall afford such opportunity for further hearings and arguments as it shall deem necessary.”³

Revision is characterized as the procedure for reopening a case upon the ground of the discovery of new facts, that is, facts previously unknown. Since the discovery of new facts may take place at any time, a conflict arises between the interest in the finality of the award and the interest in achieving justice. At the Hague Conference of 1899, the issue was very vigorously debated. The view expressed by the American delegate, Holls, in the often-quoted words that “nothing is settled until it is settled right”, eventually prevailed. The solution was reached that the parties could reserve the right of revision in the *compromis*, if they so wished.⁴

The provisions of the Hague Conventions of 1899 and 1907 contained no time-limit for the exercise of the right of revision. In other words, the parties were left free to provide for revision, and to put such limitations upon its exercise as they might wish. In the *Pious Fund of the Californias* and the *North Atlantic Coast Fisheries* cases, the period in which revision might be resorted to was very short—namely, eight and five days from the announcement or promulgation of the award, respectively. Under article 52 of the Mexican Peace Code, the period was limited to fifteen days from the date of the award. Under article 48 of the Pact of Bogotá, 30 April 1948, the award shall be subject to revision for a period of one year after its notification. Under Article 61, paragraph 5, of the Statute of the International Court of Justice, it is provided that “no application for revision may be made after the lapse of ten years from the date of the judgment”.

The present article also adopts the view that there should be an absolute time-limit of ten years for the right of parties to apply for revision of an award. In addition, it prescribes, as does Article 61, paragraph 4, of the Statute of the International Court of Justice, a

³ *Ibid.*, p. 840.

⁴ See summary of debate in Sandifer, *Evidence before International Tribunals* (Chicago, 1939), pp. 315-319, and Carlston, pp. 233-235.

relative time-limit: the application for revision must be made within six months of the discovery of the new fact.

The present article further establishes the principle that the right of revision should be considered to be at all times such a part of the system of arbitration that no express reservation of the right in the *compromis* would be necessary, as required by article 83 of the Hague Convention of 1907, and by the Permanent Court of International Justice in its advisory opinion of 6 December 1923 in the question of *Jaworzina*.⁵

The meaning of the term "revision" has been considered in a number of cases. The so-called "new fact" justifying revision does not embrace facts occurring subsequently to the award. The fact must be one which had occurred but which was unknown at the time of the award.⁶ Revision may not be justified by an allegation of a material error of law.⁷ Revision is not a form of rehearing permitting the parties to question the legal reasoning upon which the award was based.⁸ The task of the tribunal in a proceeding of revision is to place the newly discovered fact in conjunction with the facts previously made the basis of decision and to determine whether such new fact materially modified their significance and the conclusions drawn from them.⁹

During the Hague Peace Conference of 1899 the question arose whether the discovery of fraud was embraced within the concept of a "new fact".¹⁰ It has been said that "the discovery of the falsity of the documents relied on in an arbitration is one of a new fact and that that fact is certainly of such a nature as profoundly to influence the decision of the tribunal".¹¹ In his opinion of 15 December 1933 in the *Sabotage* cases, Umpire Justice Roberts said:

"The Commission is not *functus officio*. It still sits as a court . . . If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion."¹²

⁵ P.C.I.J., Ser. B, No. 8, p. 38.

⁶ *Créange (France) v. Busch (Germany)*, Franco-German Mixed Arbitral Tribunal (1924), *Rec. T.A.M.*, Vol. 5, p. 114; *Krichel v. France and Germany*, Franco-German Mixed Arbitral Tribunal (1928), *ibid.*, Vol. 8, p. 764.

⁷ *Trail Smelter* award of 11 March 1941 in arbitration between United States and Canada under convention of 15 April 1935, *Am. J. Int. Law* (1941), Vol. 35, pp. 704-707.

⁸ *Epoque Ventense (Germany) v. Yugoslavia*, Yugoslav-German Mixed Arbitral Tribunal (1923), *Rec. T.A.M.*, Vol. 7, p. 79.

⁹ *Baron de Neuflize (France) v. Diskontogesellschaft et al. (Germany)*, Franco-German Mixed Arbitral Tribunal (1927), *ibid.*, p. 629.

¹⁰ *Proceedings of the Hague Peace Conferences, The Conference of 1899* (Carnegie trans., New York, 1920), p. 753.

¹¹ Carlston, pp. 237-238; Sandifer, *op. cit.*, r.p. 317-318.

¹² Mixed Claims Commission United States and Germany, *Opinions and Decisions from January 1, 1933 to October 30, 1939* (Washington), pp. 1127-1128.

Paragraph 1 of the present article sets forth the requirements for an "application for the revision of the award". These are (1) that "some fact of such a nature as to have a decisive influence on the award" has been discovered; (2) that "when the award was rendered that fact was unknown to the tribunal and to the party requesting revision;" and (3) that "such ignorance was not due to the negligence of the party requesting revision".

The first requirement quoted above follows closely the language of a number of analogous texts. Article 61 of the Statute of the International Court of Justice refers to a "fact of such a nature as to be a decisive factor". Article 48 of the Pact of Bogotá, 30 April 1948, refers to a fact which "might have a decisive influence upon the award". Article 79 of the Rules of Procedure of the Franco-German Mixed Arbitral Tribunal, which may be said to be typical of the practice of the Mixed Arbitral Tribunals in this connexion, refers to "a new fact which might have exerted a decisive influence upon the award."¹³

The second requirement is obligatory in all cases.

The third requirement, namely, that ignorance of the fact relied upon was not due to the negligence of the party claiming revision represents a compromise between the two extremes of not opening the door to the revision of the award in any circumstances and permitting the revision of the award simply upon the discovery of a new fact without regard to the question of the negligence of the party requesting revision. The requirement of absence of negligence is uniformly found in practice, and is justified in theory since it avoids putting a premium on negligence. As Sandifer points out:

"Parties to proceedings before claims commissions, in which most such petitions for rehearing would arise, have been careless enough in the production of evidence without being further encouraged by the possibility of recourse to rehearing to remedy their negligence."¹⁴

The essential elements of the procedure of revision are set forth in the present article as follows: (1) The proceeding is begun by an application by either party, setting forth the elements of fact outlined above (para. 1); (2) Such an application "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" (para. 2); (3) The application is to be addressed, if possible, "to the tribunal which rendered the award" (para. 4); (4) A preliminary decision of the tribunal is required concerning "the existence of the alleged new fact" and "the admissibility of the application" (para. 3); (5) "If the tribunal finds the application admissible it shall then decide on the merits of the dispute" (para. 3).

¹³ *Rev. T.A.M.*, Vol. 1, p. 55.

¹⁴ Sandifer, *op. cit.*, p. 297.

A preliminary decision by the tribunal concerning the admissibility of the application for revision was also required by article 55 of the Hague Convention of 1899 and article 83 of the Hague Convention of 1907. The same requirement is found in Article 61 of the Statute of the International Court of Justice. Article 52 of the Mexican Peace Code similarly prescribes a preliminary "declaration that the demand for revision is admissible". Article 80 of the Rules of Procedure of the Franco-German Mixed Arbitral Tribunal requires a preliminary decision that the necessary conditions for admitting the demand for revision are satisfied.¹⁵

The proceedings are available whenever a new fact is discovered and the conditions of paragraph 1 are satisfied, provided the application is made within six months of the discovery of the fact and within ten years of the rendering of the award. Thus, it is possible that a considerable lapse of time may follow the dissolution of the tribunal before the new fact is discovered and the proceedings for revision are duly begun. In such a case, as a result of the death of a member or other unforeseen circumstances, it may be impossible to reconstitute the original tribunal for the purpose of hearing and deciding upon the application for revision. Paragraph 4 accordingly provides that :

"If, for any reason, it is not possible to make the application to that tribunal, the application may, unless the parties agree otherwise, be made to the International Court of Justice, by either party."

¹⁵ *Rec. T.A.M.*, Vol. 1, p. 55.

CHAPTER VII
ANNULMENT OF THE AWARD

Article 30

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

- (a) That the tribunal has exceeded its powers;
- (b) That there was corruption on the part of a member of the tribunal;
- (c) That there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.

Comment

An international tribunal is not a court of general jurisdiction nor is it a court free from the established rules of law governing any judicial proceeding. The jurisdiction of the tribunal is determined by the agreement of the parties; it may decide only the questions submitted to it. The tribunal must decide under the rules of law applicable to it. It must conduct its proceedings in a judicial manner and with due observance of the fundamental rules of procedure.

Such is the classic theory of the process of international arbitration. It is in the context of that theory that the principle of *res judicata* is to be considered. It is not the fact alone that the *compromis* may provide that the award is binding on the parties which makes it so binding. The view of States that international law makes an arbitration award binding,¹ the circumstance that the tribunal faithfully has adhered to the fundamental principles of law governing its proceedings, these are the ultimate sources of the binding authority of an international arbitral award. States are required to take all necessary measures to carry into effect an award so rendered.²

The converse of the foregoing is that an award rendered in violation of such fundamental principles is not binding upon the parties. Theory and practice abundantly demonstrate that when one or more of the

¹ Mérignhac, p. 299; Carlston, p. 211.

² Witenberg, pp. 352-353; J. Limburg, *L'Autorité de chose jugée des décisions des juridictions internationales* in *Rec. A.D.I.* (1929), Vol. 30, p. 566.

fundamental conditions for the validity of an award are lacking, the State concerned is not bound to carry it into effect. Among the earliest of authorities who have affirmed this principle is Pufendorf, who said :

“ But the statement that one has to abide by the decision of the arbitrator, whether it be just or not, must be taken with a grain of salt. For just as we cannot refuse to stand by the decision which has been made against us, even though we had entertained higher hopes for our case, so his decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted further to pose as an arbitrator.”³

Some two centuries later the *Projet*, 1875, stated in article 27 :

“ The arbitral award is void when the *compromis* is void, or when the Tribunal has exceeded its jurisdiction, or in case of proved corruption of one of the arbitrators, or in case of essential error.”

Bluntschli set forth the applicable principles as follows :

“ The decision of the arbitral tribunal can be considered void :

“ (a) To the extent that the arbitral tribunal has exceeded its jurisdiction;

“ (b) In case of lack of devotion to duty and denial of justice on the part of the arbitrators;

“ (c) If the arbitrators have refused to hear the parties or have violated any other fundamental principle of procedure;

“ (d) If the arbitral award is contrary to international law.

“ But the decision of the arbitrators cannot be attacked on the ground that it is wrong or unjust. Errors in calculation are excepted from this statement.”⁴

Finally the views of Hall may be quoted :

“ An arbitral decision may be disregarded in the following cases : *viz.* when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal.”⁵

See generally the collection of authorities and precedents in A. Balasko *Causes de nullité de la sentence arbitrale en droit international public* (Paris, 1938), and Carlston.

³ S. Pufendorf, *De Jure Naturae et Gentium*, Oldfather Translation, 1688 edition (Oxford, 1934), Vol. II, book V, chap. XIII, sect. 4, p. 829.

⁴ Bluntschli, *Le droit international codifié* (Paris, 1886), sect. 495, p. 289.

⁵ W. E. Hall, *A Treatise on International Law*, 8th ed. (Oxford, 1924), p. 420.

The classification of the various grounds upon which an award may be contended to be null has been essayed by numerous writers, whose studies will be found analysed in the works of Balasko and Carlston *supra*. The problem for the jurist is to determine those grounds which theory and practice will clearly and abundantly demonstrate are valid grounds for attacking an arbitral award as being null. The problem of the present draft convention would, however, appear to be a twofold one, first, to base itself on the established principles of international law applicable to this question, and second, to adopt a regulation of the problem which would be consistent with such law and yet best serve the interests of the development of international law and the international community.

An examination of views of writers upon the subject of the nullity of arbitral awards will reveal that these range, on the one hand, from Fiore,⁶ who finds some nine grounds for nullity, to which he adds three of other authors, and Goldschmidt,⁷ who lists eleven grounds for nullity, to such authors as Hall *supra*, on the other hand, whose list of grounds for nullity is brief. It is interesting to note that the *Institut de Droit International* in its *Projet*, 1875, article 27, reduced Goldschmidt's eleven grounds for nullity to only four. It is not surprising, therefore, that Balasko vigorously attacks efforts to set forth long lists of causes of nullity of an award.⁸

The present draft convention adopts the point of view that only a limited number of grounds for nullity should be recognized. However, the meaning and scope of each of the grounds listed is left open for practice to determine.

Paragraph (a). The first ground for annulment listed in the article is that "the tribunal has exceeded its powers". This is perhaps the oldest and most universally recognized ground for nullity. The maxim of Roman law *arbiter nihil extra compromissum facere potest* has been adopted in international law.⁹ Vattel is amongst the earliest authors to refer to the example of "arbitrators exceeding their power and deciding upon that which was not in fact submitted to them".¹⁰ One of the first instances in which the validity of an arbitral award was attacked, namely, the *Northeastern Boundary* dispute between the United States and Canada, raised this issue. In this case, the King of the Netherlands was asked to choose as an arbiter between two boundary lines as claimed respectively by the parties. Instead, refraining from giving a

⁶ P. Fiore, *Le droit international codifié et sa sanction juridique* (Paris, 1911), pp. 619-620.

⁷ L. Goldschmidt, *Projet de règlement pour tribunaux arbitraux internationaux*, art. 32, in *R.D.I.L.C.* (1874), Vol. 6, pp. 446-447.

⁸ *Op. cit.*, p. 98.

⁹ See W. Schätzel, *Rechtskraft und Anfechtung von Entscheidungen internationaler Gerichte* (Leipzig, 1928), p. 56; D. Guermanoff, *L'excès de pouvoir de l'arbitre* (Paris, 1929), pp. 40-44.

¹⁰ E. de Vattel, *Le droit des gens*, 1758 ed. (Carnegie, Washington, 1916), Vol. 1, sect. 329, p. 520.

decision,¹¹ he recommended by award of 10 January 1931 a third line.¹² Two more examples may be cited here. In the *Aves Island* case, decided on 30 June 1865 by the Queen of Spain, the question was raised whether an arbitrator charged with the decision of "the question of the right of dominion and of sovereignty over the Island of Aves" as between the parties to the dispute could enter into the collateral question of the existence of a servitude.¹³ The award rendered on 15 June 1911 in the case of the *Chamizal tract*¹⁴ was protested because it divided the tract instead of deciding title to the entire tract.¹⁵

The question of excess of power or jurisdiction is, in essence, a question of treaty interpretation. It is a question which is to be answered by a careful comparison of the award or other contested action by the tribunal with the relevant provisions of the *compromis*. A departure from the terms of submission or excess of jurisdiction should be clear and substantial and not doubtful and frivolous.¹⁶

The relation between excess of jurisdiction and the tribunal's traditional power to decide itself upon its own competence¹⁷ has been studied by Verdross.¹⁸ In his opinion, no charge of nullity can be raised on the ground of *excès de pouvoir* in case the tribunal has explicitly decided upon its competence and has based its decision on the interpretation of the treaty or treaties constituting the tribunal. This, Verdross holds, flows directly from article 73 of the Hague Convention of 1907 authorizing the tribunal to declare its competence "in interpreting the *compromis*, as well as the other papers and documents which may be invoked".¹⁹ According to Castberg²⁰ it is a general principle of international adjudication that any decision of an international tribunal upon its competence is binding and leaves no room for objections concerning the validity of the award from a standpoint of *excès de pouvoir*, unless otherwise agreed upon by the parties. Balasko²¹ on the other hand, takes the view that nullity on the ground of *excès de pouvoir* is excluded only when the parties expressly agreed upon the

¹¹ See comment on article 12, *supra*.

¹² Lapradelle-Politis, Vol. 1, p. 371.

¹³ *Ibid.*, Vol. 2, p. 412.

¹⁴ *Am. J. Int. Law*, 1911, Vol. 5, p. 785; *Papers Relating to the Foreign Relations of the United States 1911* (Washington, 1918), pp. 586-587.

¹⁵ See comment on article 9, paragraph (a), *supra*, quotation from the United States-Mexican Convention of 24 June 1910.

¹⁶ Carlston, pp. 85-86.

¹⁷ See article 11 *supra* and comment.

¹⁸ *Die Verbindlichkeit der Entscheidungen internationaler Schiedsgerichte und Gerichte über ihre Zuständigkeit in Zeitschrift für Öffentliches Recht*, Vol. 7 (1928), p. 439 *et seq.*

¹⁹ *Ibid.*, p. 444; to the same effect see Schätzel, *op. cit.*, p. 86 *et seq.*

²⁰ *L'excès de pouvoir dans la justice internationale*, *Rec. A. D. I.* (1931), Vol. 35, p. 431.

²¹ *Op. cit.*, pp. 188-189.

binding force of the tribunal's decision with regard to its own powers.

Distinctions between lack of jurisdiction (*incompétence*) and excess of jurisdiction (*excès de pouvoir*) have occupied a number of authors.²² It has been observed, however, that little juridical purpose is served by transferring such distinctions from the field of domestic law into the international sphere.²³ As R. Erich states: "A precise and practical distinction between the two terms is not easy to establish."²⁴

Paragraph (b). Among the recognized principles of law is the principle that an award vitiated by fraud or corruption may be challenged in appropriate proceedings.²⁵ Such fraud or corruption may lie in the tribunal itself,²⁶ or it may lie in fraudulent practices of the parties.²⁷ Paragraph (b) lists only "corruption on the part of a member of the tribunal" as a ground of annulment. In the case of fraud by one of the parties, the discovery of the fraud would be considered as a new fact affording a ground for application for the revision of the award. This case is dealt with in the Comment to article 29 *supra*.

Paragraph (c). This paragraph affirms the principle that the tribunal must function in the manner of a judicial body and with respect for the fundamental rules governing the proceedings of any judicial body. The paragraph is concerned with *error in procedendo*, not with the *error in iudicando*.²⁸ It is, further, concerned with serious departures from fundamental procedural rules rather than minor departures.²⁹

It is clear that not all failures to observe procedural stipulations contained in the *compromis* will lead to nullity of the award. Carlston³⁰ advances the view that:

"The legal effect of such a failure is not to be judged upon the purely abstract basis of whether it constitutes a departure from the

²² E.g., F. Castberg, *La compétence des tribunaux internationaux* in R.D.I.L.C. (1925, 3d ser.), Vol. 6, pp. 342-343, and *L'excès de pouvoir dans la justice internationale*, cited *supra*, pp. 360-361; N. Politis, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux* in Rec. A.D.I. (1925), Vol. 6, p. 84 (distinction between excess of jurisdiction (*excès de pouvoir*) and usurpation of jurisdiction (*usurpation de pouvoir*); R. Erich, *Le projet de conférer à la Cour Permanente de Justice Internationale des fonctions à une instance de recours* in R.D.I.L.C. (1931, 3d ser.), Vol. 12, p. 276.

²³ Carlston, pp. 84-85.

²⁴ R. Erich, *op. cit.*, p. 276.

²⁵ See Carlston, sect. 9 and 66.

²⁶ United States-Venezuelan Claims Commission under the convention of 25 April 1866, see Moore, Vol. 2, pp. 1660-1687.

²⁷ *Weil* and *La Abra* cases, Carlston, sect. 19, and *Mannesmann* case, P. Fauchille, *Traité de droit international public* (Paris, 1926), Vol. 1, part III, p. 567.

²⁸ S. Rundstein, *La Cour permanente de Justice internationale comme instance de recours* in Rec. A.D.I. (1933), Vol. 43, p. 91.

²⁹ Borel, *Les voies de recours contre les sentences arbitrales* in Rec. A.D.I. (1935), Vol. 52, pp. 98-99; Witenberg, p. 368.

³⁰ Citing Schätzel, *op. cit.*, p. 68.

terms of submission. The question is rather: Does the departure constitute a deprivation of a fundamental right so as to cause the arbitration and the resulting award to lose its judicial character? Unless its effect is to prejudice materially the interests of a party, the charge of nullity should not be open to a party."³¹

Among the fundamental procedural rights of parties to an international arbitration, denial of which will lead to the nullity of any award rendered therein, are following:

(1) Right to a judgment accompanied by a statement of reasons. Fiore states that an award will be null "if it is totally lacking in reasons both as to fact and as to law".³² Numerous authorities are in accord.³³ This view has been adopted by the present draft which, in order to exclude every possible doubt, explicitly refers to "failure to state the reasons for the award" as a ground of nullity.³⁴

(2) The right to be heard, including due opportunity to present proofs and arguments. Heffter refers to the case where "one or both of the parties have not been heard".³⁵ Goldschmidt mentions the instance where "the tribunal has decided without giving the party any hearing whatever".³⁶ Carnazza-Amari speaks of the case where "the arbitrators have refused to hear the parties".³⁷ Bluntschli states that the award is null "if the arbitrators have refused to hear the parties or have violated any other fundamental principle of procedure".³⁸ Fauchille states that authorities are generally in accord that an award is not binding "if one of the parties has not been heard and allowed an opportunity to prove his case".³⁹

(3) Right of parties to equal and impartial treatment. This fundamental principle has been dealt with in comment on article 14 above.

Article 31

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

2. In cases covered by paragraphs (a) and (c) of article 30, the application must be made within sixty days of the rendering of

³¹ Carlston, pp. 38-39.

³² Op. cit., p. 619.

³³ See collection in Carlston, pp. 50-51.

³⁴ Cf. art. 24, para. 2, of this draft and comment thereon.

³⁵ A. G. Heffter, *Le droit international de l'Europe*, 3rd Fr. ed. (Paris, 1873), p. 210

³⁶ Op. cit. in *R.D.I.L.C.* (1874), Vol. 6, p. 447.

³⁷ G. Carnazza-Amari, *Traité de droit international public* (Paris, 1882), Vol. 2, p. 564.

³⁸ Op. cit., p. 289.

³⁹ Op. cit., p. 552.

the award and in the case covered by paragraph (b) within six months.

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

Comment

This article is motivated by the following considerations: (1) The existing stage of the development of international law, which provides no procedure by which a party's charges of nullity may be tested through judicial means, save only when both parties consent thereto, is, in this respect, anarchic;⁴⁰ (2) The judicial body authorized to rule upon charges of nullity should be the International Court of Justice.⁴¹ If a dispute arises between the parties as to the validity of an award, it may under this article be brought before the Court by means of a simple application by either party.

The authority of the Court to review arbitral awards is limited under this article in two principal respects: First, its power is in the nature of *cassation* in that it is authorized only "to declare the nullity of the award" and it may not thereafter proceed to adjudicate the case *de novo* on the merits, and, second, such power to declare an award void is limited to nullity arising from "any of the grounds set out in the preceding article".⁴² Moreover, the privilege of a party to attack an award granted by this article is one that may not be exercised indefinitely but "must be made within sixty days of the rendering of the award" in cases covered by paragraphs (a) and (c) of article 30, and "within six months" in the case covered by paragraph (b).

In providing in article 31 a judicial means for resolving disputes as to the nullity of an award, the draft convention is meeting a long-felt need in international arbitration. Thus in its meeting of 1929 the *Institut de Droit International* formally expressed its recommendation

"that States, in their conventions on arbitration, as well as in the *clauses compromissoires* signed by them, agree to submit to the Permanent Court of International Justice for decision all disputes between them relating to either the competence of the arbitral tribunal, or to an *excès de pouvoir* by the latter alleged by one of the Parties".⁴³

In adopting the procedure of *cassation* rather than revision for dealing with charges of nullity, the draft follows prior proposals to confer upon the Permanent Court of International Justice jurisdiction to review the

⁴⁰ J. W. Garner, *Appeal in Cases of Alleged Invalid Arbitral Awards* in *Am. J. Int. Law* (1932), Vol. 26, p. 132; R. Erich, *Le projet de conférer à la Cour permanente de Justice internationale des fonctions d'une instance de recours* in *R.D.I.L.C.* (1931, 3rd ser.), Vol. 12, pp. 269-270.

⁴¹ H. Lauterpacht, *The Legal Remedy in Case of Excess of Jurisdiction in The British Year Book of International Law*, 1928, pp. 117-120; Erich, *op. cit.*

⁴² *Viz.*, art. 30.

⁴³ *Annuaire de l'Institut de droit international* (Brussels, 1929), Vol. 2, p. 304.

decisions of *ad hoc* arbitral tribunals. The first such proposal was made by S. Rundstein in his capacity as the Polish member of a committee appointed by the Council of the League of Nations, under the resolutions of 13 and 14 December 1928, to study the revision of the Statute of the Court. Rundstein, in a memorandum submitted to the committee and included in its final report transmitted to the Secretary-General on 20 March 1929, put forward a draft declaration for adoption by States which would provide for submission to the Court of questions regarding excess of jurisdiction or violations of a rule of international law by arbitral tribunals. After decision by the Court on such a question, the case was to be remanded to the original tribunal for the necessary modification and revision.⁴⁴

A more concrete formulation of a system of procedure for review of arbitral awards by the Court was the outcome of a proposal by Finland made in 1929.⁴⁵ The Assembly referred the matter to the Council, which appointed a committee of jurists, which in turn submitted a report to the Council on 8 September 1930. Among other things, the report proposed a draft protocol whereby the signatories thereto would be obliged to submit to the Court disputes concerning the validity of awards. The relevant provisions of the draft protocol read as follows :

“ Article 3.

“ A High Contracting Party who disputes the obligatory character of an arbitral award on the ground that the award is null because the tribunal had no jurisdiction, or exceeded its jurisdiction, or on the ground of a fundamental fault in the procedure, shall be bound to submit such claim to the Permanent Court of International Justice.

“ The application to the Permanent Court of International Justice must be lodged with the Registrar within sixty days from the notification of the award or, if notification is not obligatory, from its publication.

“ Even where it has been possible for individuals to be parties to the previous proceedings, such application cannot be made except by a State or a Member of the League of Nations.

“ Article 4.

“ The Permanent Court of International Justice shall declare the award which is impeached to be null, in whole or in part, if it recognizes the application to be well founded. By such annulment,

⁴⁴ *League of Nations Official Journal* (1929), 10th year, No. 7, pp. 1113, 1125.

⁴⁵ *Ibid.*, *Records of the Tenth Ordinary Session of the Assembly, Minutes of the First Committee* (1929), Special Supplement No. 76, pp. 82, 83; cf. Erich, *op. cit.*

the parties to the dispute shall be replaced in the legal position in which they stood before the commencement of the proceedings which gave rise to the award which has been impeached.

“ At the same time as it annuls the award, the Court may order appropriate provisional measures.

“ Article 5.

“ The decision of the Permanent Court of International Justice shall be binding upon the parties. By the present provisions, those parties agree that such decision shall operate, in the same manner as a special agreement for arbitration, as a basis for any arbitration proceedings which may eventually be taken for the settlement of the case.”⁴⁶

The report of the committee of the Council was thereafter considered by the First Committee, which referred the matter to a subcommittee for report. The latter submitted a report on 22 September 1931, to which a draft protocol for adoption by States was appended. The provisions thereof quoted below will indicate the respects in which further consideration of this problem led to refinements and modifications of the earlier draft protocol of 1930 :

“ Article 1.

“ A party to a dispute that has been submitted to arbitration, which claims that the award made is vitiated by a defect rendering it invalid, must submit such claim to the Permanent Court of International Justice. The matter may also be brought before the Court by an application by the other party.

“ Article 2.

“ The application must be filed with the Registry of the Permanent Court of International Justice within sixty days after the receipt of the award or the discovery of a new fact. The parties bind themselves to notify the arbitral tribunal without delay of the receipt of the award. Failing such notification, the period shall begin with the date of despatch of the award by the arbitral tribunal.

“ The operation of the award shall not be suspended during the period provided for above. After an application to the Court has been filed, the Court may suspend the operation of the award and may order other interim measures of protection.

“ Article 3.

“ The Court shall decide whether, and in what measure, the award is vitiated by defects affecting its validity alleged by a party.

⁴⁶ *League of Nations, Official Journal* (1930), 11th year, No. 11, pp. 1363-1364.

“ If the Court declares the existence of a defect affecting, in whole or in part, the validity of the award, the parties shall treat the award as not binding in the measure in which its validity has been declared to be affected by such defect. If within three months from the publication of the judgment the parties have not agreed upon a submission to arbitration, either party may file an application bringing the substance of the case before the Court for decision ”.⁴⁷

The procedure of review before the International Court of Justice is regulated by article 67 of the Rules of Court, reading as follows :

“ 1. When an appeal is made to the Court against a decision given by some other tribunal, the proceedings before the Court shall be governed by the provisions of the Statute and of these Rules.

“ 2. If the document instituting the appeal must be filed within a certain limit of time, the date of the receipt of this document in the Registry will be taken by the Court as the material date.

“ 3. The document instituting the appeal shall contain a precise statement of the grounds of the objections to the decision complained of, and these constitute the subject of the dispute referred to the Court.

“ 4. A certified copy of the decision complained of shall be attached to the document instituting the appeal.

“ 5. It is incumbent upon the parties to produce before the Court any useful and relevant material upon which the decision complained of was rendered ”.⁴⁸

In adopting the principle of *cassation* as the basis for the procedure for review set forth in article 31, the draft follows not only the proposals made before the League of Nations as noted *supra* but also follows relevant practice. Thus articles 19 and 20 of the Treaty of Conciliation, Arbitration and Judicial Settlement between Luxembourg and Norway, 12 February 1932, provide as follows :

“ Article 19.

“ If, after proceedings before an arbitral tribunal, one of the Parties claims that the arbitrators' award is void, such Party may, failing agreement between the Parties and within forty days of the date of the award claimed to be void, submit this fresh dispute to the Permanent Court of International Justice whose judgment shall be obtained and delivered in accordance with the ordinary rules of the procedure in force before the Court.

⁴⁷ *League of Nations Official Journal, Records of the 12th Ordinary Session of the Assembly, Special Supplement No. 94, 1931, p. 142, see also p. 59.*

⁴⁸ *I.C.J., Ser. D, p. 77.*

“ Article 20.

“ 1. The Court, or any other tribunal seized of the matter, shall decide if and to what extent the disputed decision suffers from a defect affecting its validity and to what extent it is void of binding force.

“ 2. The point to be referred back for arbitration or judicial proceedings with a view to a decision on their merits shall also be determined. It may be decided that in view of the partial nullity of an award, the whole of the two Parties' claims will have to be referred back for judgment on the merits of the case.

“ 3. If, within three months of the publication of the judgment in the nullity proceedings, the Parties have failed to conclude a new special agreement, either of them shall be entitled to submit the substance of the question, by means of an application, to the Permanent Court of International Justice ”.⁴⁹

The establishment of any system of judicial review for decisions of *ad hoc* international tribunals has been criticized on the grounds that it would, first, impair or destroy the independence of such tribunals, and, second, establish a hierarchy of international courts. The first objection overlooks the circumstances that such tribunals are tribunals of limited jurisdiction and that it is better to have a judicial determination of charges of nullity than to leave such charges to the uncontrolled power of the parties. However, the force of both objections is largely reduced if the principle of *cassation* be adopted, as it is in articles 31 and 32. Under the draft, after the Court has pointed out the defects in the contested award, the entire matter is referred back for determination by an *ad hoc* tribunal, provided in article 32, below.

Article 32

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

Comment

Ordinarily, once an award of a tribunal is declared invalid by another judicial body, the parties, in carrying out the obligation to arbitrate the original dispute, may do so either by reconstituting the original tribunal or by creating a tribunal with a different membership. The present article leaves the parties wide freedom to proceed as they may determine, subject, however, to the requirement that they must submit the dispute to arbitration anew. If they cannot agree on a tribunal for such purpose the tribunal will be constituted in accordance with the provisions of article 3 of the draft convention.

⁴⁹ *League of Nations Treaty Series*, Vol. 142, No. 3277, pp. 37, 39; see also *Systematic Survey*, p. 127.

Annex

**COLLECTION OF DETAILED RULES
OF ARBITRAL PROCEDURE**

**Prepared by the Secretariat
at the request of the International Law Commission**

INTRODUCTORY NOTE

As pointed out in the commentary, the International Law Commission did not intend the draft convention to contain a complete set of rules on international arbitral procedure. Its purpose was to lay down certain essential provisions necessary to guarantee that an undertaking to arbitrate would be effectively carried out. The Commission, therefore, did not consider it necessary to include in the draft all the detailed and technical rules which might be helpful in the course of an arbitral proceeding. As appears from the wording of articles 9 and 13, paragraph 2, of the draft the Commission expected that the parties to an arbitration would formulate such detailed rules in the *compromis* or, if they failed to do so, that the arbitral tribunal itself would prepare its rules of procedure. The Commission was aware, however, that the framers of such rules might "find it useful in some cases to have before them a collection of rules of arbitral procedure in the more limited and technical sense of the term". Accordingly the Commission expressed the wish that the commentary to be prepared by the Secretariat should "contain as an annex a collection of rules of arbitral procedure in the sense just mentioned".¹

The present collection of procedural rules was prepared by the Codification Division of the Secretariat to meet the wish of the International Law Commission. The texts were mainly assembled from statutes and rules of international courts and international arbitral tribunals, from arbitration agreements and *compromis*.² In the selection of texts preference was given to regulations of practical importance and rules of mere historical interest were not included. Rules of procedure of permanent international courts were cited, when considered adaptable to international arbitral procedure. As, in the words of the Commission, "detailed rules of procedure are liable to vary according to the circumstances of each arbitration", alternative texts were, whenever possible, inserted.

The texts were arranged according to subjects. Each text was reproduced only once and, in case a text dealt with several subjects, cross-references were inserted to indicate the page where the text was cited.

¹ See *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 14.

² See Bibliography of Texts, pp. 121-126 *infra*.

In some instances where similar texts were found in several of the sources used, only one of these texts was reproduced, while a reference was made, within brackets, to the other texts.

The texts are generally reproduced in the original language or one of them, if there were several such languages. Only exceptionally were translations used, such as those published in J. Brown Scott, *The Hague Court Reports, First Series*, New York, 1916.

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² At the time of preparation of this Annex, no English text of the Rules or Additional Rules was available to the Secretariat.

³ The text of the Rules as published by Feller, pp. 432 *et seq.*, being at variance with the text as deposited at the Library of the Peace Palace, The Hague, by Professor Verzijl, President of the Commission, the latter text has been used in this collection.

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Pious Fund of the Californias Case, Protocol

Russian Indemnity Case, *Compromis*

Projet, 1875

Special Tribunal. Guatemala and Honduras (Honduras Borders Case), Treaty

Tribunal, United States and Great Britain (Trail Smelter Case), Convention

United States—Mexican General Claims Commission, Convention

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CHAPTER I

THE ARBITRATOR, ARBITRAL COMMISSION, TRIBUNAL, COURT

Section 1. Seat

Franco-German Mixed Arbitral Tribunal, Rules :

Article 1

Le siège du tribunal arbitral est fixé à Paris, 146, avenue Malakoff.

Cette disposition ne déroge en rien au paragraphe 9 de l'annexe de l'article 304 du traité¹ qui confère aux présidents le soin de déterminer, dans chaque cas particulier, le lieu des audiences, qui peuvent se tenir en France, en Allemagne ou ailleurs.

Mixed Claims Commission, United States and Germany, Rules :

Rule II

The Commission shall sit at Washington, where its principal office shall be maintained and its records kept and preserved.

Hearings may be held at other places, as may from time to time be determined by the Commission.

The time and place of hearings shall, from time to time, be designated by the Commission.

International Court of Justice, Statute :

Article 22

1. The seat of the Court shall be established at The Hague. This, however, shall not prevent the Court from sitting and exercising its functions elsewhere whenever the Court considers it desirable.

2. The President and the Registrar shall reside at the seat of the Court.

Section 2. Membership

a. Term of office

International Court of Justice, Rules :

Article 1

The term of office of members of the Court elected in February 1946, begins to run on the date of their election. In the case of members of the Court elected later, the term of office shall begin to run on the date of the

¹ The Treaty referred to is the Peace Treaty signed in Versailles on 28 June 1919.

expiry of the term of their predecessors. Nevertheless, in the case of a member elected to fill an occasional vacancy, the term of office shall begin to run on the date of the election.

Court of the European Coal and Steel Community, Rules :

Article 1

La période de fonctions d'un juge commence à courir à la date fixée à cet effet dans l'acte constatant sa nomination. Si l'acte constatant la nomination ne fixe pas de date, la période commence à courir à la date de cet acte.

b. Declaration

Mixed Claims Commission United States and Peru, Convention :

Article III

The Commissioners appointed as aforesaid shall meet in Lima within three months after the exchange of the ratifications of this convention; and each one of the Commissioners, before proceeding to any business, shall take an oath, made and subscribed before the most Excellent Supreme Court, that they will carefully examine and impartially decide, according to the principles of justice and equity, the principles of international law and treaty stipulations, upon all the claims laid before them under the provisions of this convention, and in accordance with the evidence submitted on the part of either Government. A similar oath shall be taken and subscribed by the person selected by the Commissioners as arbitrator or umpire, and said oaths shall be entered upon the record of the proceedings of said commission.

International Court of Justice, Rules :

Article 5

1. The declaration to be made by every judge in accordance with Article 20 of the Statute shall be as follows :

“I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”

2. This declaration shall be made at the first public sitting of the Court at which the judge is present after his election or after being chosen under Article 31 of the Statute.

Court of the European Coal and Steel Community, Rules :

Article 2

1. Avant d'exercer ses fonctions, tout juge doit prêter, à la première séance publique de la Cour à laquelle il assiste après sa nomination, le serment suivant :

“Je jure d'exercer mes fonctions en pleine impartialité et en toute conscience; je jure de ne rien divulguer du secret des délibérations.”

2. Le serment peut être prêté suivant les modalités prévues par la législation nationale du juge.

Section 3. Presidency

Projet, 1875 :

Article 9, para. 1

Le tribunal arbitral, s'il est composé de plusieurs membres, nomme un président, pris dans son sein, et s'adjoit un ou plusieurs secrétaires.

Permanent Court of Arbitration, Hague Convention 1907 :

Article 57

The umpire² is *ex officio* president of the tribunal.

When the tribunal does not include an umpire, it appoints its own president.

Article 66, para. 1

The discussions are under the direction of the president.

Tribunal, United States and Great Britain (Trail Smelter Case), Convention :

Article IX

The Chairman shall preside at all hearings and other meetings of the Tribunal and shall rule upon all questions of evidence and procedure.

Franco-Italian Conciliation Commission, Rules :

Article 20, para. 2

Le tiers membre³ assume les fonctions de Président de la Commission de Conciliation.

Section 4. Session, meetings

a. Session

French-Mexican Claims Commission, Rules :

Article 1

La Commission... fixera la date de ses sessions et la date et le lieu de ses audiences.

International Court of Justice, Statute :

Article 23, para. 1

The Court shall remain permanently in session, except during the judicial vacations, the dates and duration of which shall be fixed by the Court.

² Art. 45 of the Hague Convention, 1907 : " Each party appoints two arbitrators, of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators together choose an umpire."

³ Art. 83, para. 1, of the Peace Treaty signed in Paris on 10 January 1947 : " Any disputes which may arise in giving effect to Articles 75 and 78 and Annexes XIV, XV, XVI and XVII, part B, of the present Treaty shall be referred to a Conciliation Commission consisting of one representative of the Government of the United Nations concerned and one representative of the Government of Italy, having equal status. If within three months after the dispute has been referred to the Conciliation Commission no agreement has been reached, either Government may ask for the addition to the Commission of a third member selected by mutual agreement of the two Governments from nationals of a third country. . . ."

b. Date, hour and place of meetings

Permanent Court of Arbitration (Japanese House Tax Case), Protocol :

Article 7

The tribunal shall meet at a place to be designated later by the parties as soon as practicable, but not earlier than two months nor later than three months after the delivery of the counter-cases as provided in section 3 of this Protocol, and shall proceed impartially and carefully to examine and decide the question at issue . . .

Permanent Court of Arbitration (Muscat Dhows Case), Agreement :

Article 3, para. 1

The tribunal will meet at The Hague within a fortnight of the delivery of the arguments.

Permanent Court of Arbitration (Grisbadarna Case), Convention :

Article 6

The president of the tribunal of arbitration shall appoint the time and place for the first meeting of the tribunal and shall summon the other members to it.

Time and place for further meetings shall be decided by the tribunal of arbitration.

Permanent Court of Arbitration (Casablanca Case), *Compromis* :

Article 5, para. 1

The tribunal shall meet at The Hague on May 1, 1909, and shall proceed immediately to the investigation of the dispute.

Permanent Court of Arbitration (North Atlantic Coast Fisheries Case), Special Agreement :

Article 8, para. 1

The tribunal shall meet within six months after the expiration of the period above fixed for the delivery to the agents of the case . . .

Permanent Court of Arbitration (Russian Indemnity Case), *Compromis* :

Article 4

The arbitral tribunal, as soon as it is constituted, shall meet at The Hague at a date to be determined by the arbitrators and within one month from the appointment of the umpire. After settling, in conformity with the letter and the spirit of the Hague Convention of 1907, all questions of procedure which may arise and which are not provided for in the present *compromis*, the said tribunal shall determine the date of its next meeting.

However, it is agreed that the tribunal cannot open the arguments on the questions in dispute, either before the expiration of two months or after the expiration of three months from the filing of the countercase or the counter-reply provided for by Article 6 and later, by the arrangements set forth in Article 8.

Arbitral Commission, United States and Peru (Landreau Claim), Protocol :

Article IV

The Commission shall, with the consent of the respective Government, meet at the residence place of the President of the Commission, within sixty days after the case is ready for consideration, according to the 2nd paragraph of article X of this protocol, and shall hold all of its sessions in the same place.

Arbitrator, Great Britain and Spain (British Claims in Spanish Morocco), Agreement :

Article 5, para. 1

Mr. shall sit in Morocco at such times and such places as may be agreed upon by him and the representatives of the two Governments . . .

International Court of Justice, Rules :

Article 28, para. 1

The date and hour of sittings of the Court shall be fixed by the President.

c. Attendance, quorum

International Court of Justice, Statute :

Article 24

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.

3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

Article 25

1. The full Court shall sit except when it is expressly provided otherwise in the present Statute.

2. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of the Court may provide for allowing one or more judges, according to circumstances and in rotation, to be dispensed from sitting.

3. A quorum of nine judges shall suffice to constitute the Court.

Idem, Rules :

Article 27

Members of the Court who are prevented by illness or other serious reasons from attending a sitting of the Court to which they have been summoned by the President, shall notify the President who will inform the Court.

[Cf. Court of the European Coal and Steel Community, Rules, art. 26.]

Article 29

If a sitting of the Court has been convened and it is found that there is no quorum, the President shall adjourn the sitting until a quorum has been obtained. Judges chosen under article 31 of the Statute [i.e., *ad hoc* judges] shall not be taken into account for the calculation of the quorum.

[Cf. Court of the European Coal and Steel Community, Rules, art. 24.]

Section 5. Questions to third States

Franco-German Mixed Arbitral Tribunal, Rules :

Article 91

Toutes les fois que le tribunal aura à adresser une demande à une tierce puissance, il priera les gouvernements français et allemand de la faire parvenir au gouvernement de cette tierce puissance par une démarche simultanée.

CHAPTER II

THE OFFICE, SECRETARIAT, REGISTRY

Section 1. General

Mixed British and Portuguese Commission, Instructions :

Article XX

The Office of the Commission shall be separate from the residence of either Commissioner . . .

Permanent Court of Arbitration, Hague Convention 1907 :

Article 43

. . .

2. An International Bureau serves as registry for the Court. It is the channel for communications relative to the meetings of the Court; it has the custody of the archives and conducts all the administrative business.

3. The contracting Powers undertake to communicate to the Bureau, as soon as possible, a duly certified copy of any conditions of arbitration arrived at between them and of any award concerning them delivered by a special tribunal.

4. They likewise undertake to communicate to the Bureau the laws, regulations, and documents eventually showing the execution of the awards given by the Court.

Mixed Claims Commission, United States and Germany, Rules :

Rule II, para. 1

See p. 127 *supra*.

United States-Mexican General Claims Commission, Rules :

Rule I, para. 1

The Office of the Commission shall be maintained at the City of Washington, where its records shall be kept.

Special Tribunal, Guatemala and Honduras (Honduras Borders Case), Treaty :

Article XIII

. . . The Parties also authorise the Tribunal to organise its secretariat as it deems best. To this end the Parties undertake to place all the necessary facilities at the Tribunal's disposal.

General Claims Commission, United States and Panama, Rules :

Article 1

The Office of the Commission shall, until it is otherwise ordered, be established and maintained in Washington, where its records shall be kept.

Section 2. Personnel

a. Secretary, Registrar, Deputy

Mixed Board, United States and Mexico, Convention :

Article II

The said board shall have two secretaries, versed in the English and Spanish languages; one to be appointed by the President of the United States, by and with the advice and consent of the Senate thereof, and the other by the President of the Mexican Republic. And the said secretaries shall be sworn faithfully to discharge their duty in that capacity.

Arbitral Commission, United States and Peru (Landreau Claim), Protocol :

Article VII

The Commission shall keep a record of all its proceedings. For this purpose the President of the Commission shall appoint a Secretary who shall be of his own nationality.

General Claims Commission, United States and Panama, Convention :

Article IV

The Commission shall keep an accurate record of the claims and cases submitted, and minutes of its proceedings with the dates thereof. To this end, each Government may appoint a Secretary; those Secretaries shall act as joint Secretaries of the Commission and shall be subject to its instructions. Each Government may also appoint and employ any necessary assistant secretaries and such other assistants as may be deemed necessary. The Commission may also appoint and employ any other persons necessary to assist in the performance of its duties.

[Cf. Mixed Claims Commission, United States and Germany, Agreement, art. IV; and Arbitral Tribunal, United States and Great Britain, Special Agreement, art. 5, para. 3.]

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 10

The Tribunal shall keep a record of its proceedings. The two Governments shall assign to the Tribunal such amanuenses, interpreters and employees as may be necessary.

International Court of Justice, Rules :

Article 14

1. The Court shall select its Registrar from amongst candidates proposed by members of the Court. The members of the Court shall receive

adequate notice of the date on which the list of candidates will be closed so as to enable nominations and information concerning the nationals of distant countries to be received in sufficient time.

2. Nominations must give the necessary particulars regarding the candidates' age, nationality, university qualifications and linguistic attainments, their present occupation, their practical legal experience and their experience in diplomacy and in the work of international organizations.

3. The election shall be by secret ballot and by an absolute majority of votes.

4. The Registrar shall be elected for a term of seven years. He may be re-elected.

5. If the Registrar should cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Such election shall be for a term of seven years.

6. The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence and, in the event of his ceasing to hold the office, to perform the duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed under the same conditions and in the same way as the Registrar.

[Cf. Court of the European Coal and Steel Community, Rules, art. 10, paras. 1-4 and 6-8.]

Franco-Italian Conciliation Commission, Rules :

Article 6

Un secrétariat mixte, français-italien, est créé près de la Commission.

Court of the European Coal and Steel Community, Rules :

Article 10, para. 5

Le greffier ne peut être relevé de ses fonctions que s'il ne répond plus aux conditions requises; la Cour décide après avoir entendu les avocats généraux et permis au greffier de présenter ses observations.

b. Declaration by Secretary, Registrar, Deputy

Mixed Board, United States and Mexico, Convention :

Article II

See p. 134 *supra*.

International Court of Justice, Rules :

Article 15

1. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the Court :

"I solemnly declare that I will perform the duties incumbent upon me as Registrar of the International Court of Justice in all loyalty, discretion and good conscience."

2. The Deputy-Registrar shall make a similar declaration in the same circumstances.

Court of the European Coal and Steel Community, Rules :

Article 11, para. 1

Les dispositions de l'article 2 du présent règlement¹ sont applicables au greffier et aux greffiers adjoints.

c. Other personnel

Mixed Claims Commission, United States and Germany, Agreement :

Article IV, para. 2

The Commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

General Claims Commission, United States and Panama, Convention :

Article IV

See p. 134 *supra*.

United States-Mexican General Claims Commission, Rules :

Rule XII, para. 2

Persons employed in making translations for the Commission, and interpreters and reporters of testimony employed at the hearings before the Commission, shall be placed under the exclusive control and direction of the Joint Secretaries, subject to the direction of the Commission.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 10

See p. 134 *supra*.

International Court of Justice, Rules :

Article 17, para. 1

The officials of the Registry, other than the Deputy-Registrar, shall be appointed by the Court on proposals submitted by the Registrar.

Court of the European Coal and Steel Community, Rules :

Article 12, para. 1

Les fonctionnaires et employés sont nommés par la Cour. Le personnel auxiliaire est nommé par le greffier, avec l'autorisation du Président.

d. Declaration by other personnel

International Court of Justice, Rules :

Article 17, para. 2

Before taking up his duties, each official shall make the following declaration before the President, the Registrar being present :

¹ See p. 128 *supra*.

"I solemnly declare that I will perform the duties incumbent upon me as an official of the International Court of Justice in all loyalty, discretion and good conscience."

[Cf. Court of the European Coal and Steel Community, Rules, art. 12.]

e. Substitute for Registrar

International Court of Justice, Rules :

Article 19

If neither the Registrar nor the Deputy-Registrar can be present or if both these offices are vacant at the same time, the President shall appoint an official of the Registry to act as a substitute for the Registrar for such time as may be necessary.

[Cf. Court of the European Coal and Steel Community, Rules, art. 10, para. 8.]

Section 3. Organization

Special Tribunal, Guatemala and Honduras (Honduras Borders Case), Treaty :

Article XIII

See p. 133 *supra*.

International Court of Justice, Rules :

Article 18, para. 1

The Court shall prescribe and, when necessary, modify the plan of the organization of the Registry and for this purpose shall request the Registrar to make proposals.

[Cf. Court of the European Coal and Steel Community, Rules, art. 13, para. 1.]

Section 4. Directions, instructions

Mixed Claims Commission, United States and Peru, Convention :

Article VII

For the purpose of facilitating the labors of the mixed commission, each Government shall appoint a secretary to assist in the transaction of their business and to keep a record of their proceedings, and for the conduct of their business said commissioners are authorized to make all necessary rules.

United States-Mexican General Claims Commission, Rules :

Rule XII, para. 1

The Joint Secretaries shall —

(a) Be subject to the directions of the Commission . . .

[Cf. General Claims Commission, United States and Panama, Rules, art. 35(a); Mixed Claims Commission, United States and Germany, Rules, art. IV; and Arbitral Tribunal, United States and Great Britain, Special Agreement, art. 5, para. 3.]

International Court of Justice, Rules :

Article 23, para. 3

Instructions for the Registry shall be drawn up by the Registrar and approved by the President.

Court of the European Coal and Steel Community, Rules :

Article 17, para. 3

Des instructions déterminant le détail des attributions du greffe sont fixées par le Président.

Section 5. Records

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 1

The record of claims and proceedings provided for in Article 5 of the Special Agreement shall consist of a register, a minute book, and such other books as the Tribunal may from time to time order.

Rule 2

The titles of claims appearing in the schedule shall be entered in the Register in the order in which the first pleading in respect of each of such claims is filed.

Rule 3

The claims shall be separately numbered in the order in which the claims are entered, and this designation by number shall be retained throughout the proceedings.

Rule 4

In the space in the Register allotted to each claim shall be recorded all the proceedings had in relation thereto.

Rule 5

The Minute Book shall contain a chronological record of all the proceedings of the Arbitration, including the filing of all pleadings, filing of original documents, agreements of the agents, notices, interlocutory applications and decisions thereon, hearings before the Tribunal, and awards.

Rule 6

The Minute Book shall, at each sitting of the Tribunal, be signed by the President of the Tribunal, and countersigned by the Secretaries.

Rule 7

The Register, the Minute Book, and the other books, if any, shall be kept by the Secretaries of the Tribunal in duplicate.

Rule 8

On the conclusion of the Arbitration one set shall be handed to each of the Agents. Documents filed with the Secretaries of the Tribunal

under Rule 25² shall, on the conclusion of the Arbitration, be returned to the party by whom they have been filed, and one copy of the pleadings and of the awards filed in the Office of the Tribunal shall be handed to each of the Agents.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 11, paras. 2-3

See p. 141 *infra*.

General Claims Commission, United States and Panama, Rules :

Article 3

Duplicate Books of Registry shall be kept, one by each Secretary, in Spanish and English, respectively, in which there shall be promptly entered, on the formal filing of a claim with the Commission, the name of each claimant and the amount claimed, a separate page being provided for each claim, whereon there shall be recorded all the proceedings with respect to each claim as they occur.

Article 4

Each claim filed shall constitute a separate case before the Commission and will be recorded as such. All claims will be numbered consecutively, beginning with the one first filed as No. 1.

Article 5

In the same way there shall be kept two Minute Books, one by each Secretary, in Spanish and English, respectively, which shall be identical, and in which there shall be entered a chronological record of all proceedings of the Commission. The Commissioners and the Secretaries shall sign all Minutes.

Article 6

The Secretaries shall also keep Duplicate Award Books in English and Spanish, in which shall be entered all awards, opinions, decisions and orders of the Commission. Each such entry shall be signed by the Commissioners and by the Secretaries.

Article 7

The Secretaries shall keep such additional records as are required by these rules or as may be ordered by the Commission.

[Cf. United States-Mexican General Claims Commission, Rules, Rule II, para. 1, and Rules X and XII; French-Mexican Claims Commission, Rules, art. 2-3, 5 and 51; and Mixed Claims Commission, United States and Germany, Rules, rule III.]

International Court of Justice, Rules :

Article 20

1. The General List of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases

² See p. 204 *infra*.

shall be entered in the list and numbered successively according to the date of the receipt of the document bringing the case before the Court.

2. The General List shall contain the following headings :

- I. Number in list.
- II. Short title.
- III. Date of registration.
- IV. Registration number.
- V. File number in the archives.
- VI. Class of case (contentious procedure or advisory opinion).
- VII. Parties.
- VIII. Interventions.
- IX. Method of submission.
- X. Date of document instituting proceedings.
- XI. Time-limits for filing pleadings.
- XII. Prolongation, if any, of time-limits.
- XIII. Date of closure of the written proceedings.
- XIV. Postponements.
- XV. Date of the beginning of the hearing (date of the first public sitting).
- XVI. Observations.
- XVII. References to earlier or subsequent cases.
- XVIII. Result (nature and date).
- XIX. Removal from the list (cause and date).
- XX. References to publications of the Court relating to the case.

3. The General List shall also contain a space for notes, if any, and spaces for the inscription, above the initials of the President and of the Registrar, of the dates of the entry of the case, of its result, or of its removal from the list, as the case may be.

Court of the European Coal and Steel Community, Rules :

Article 14

1. Il est tenu au greffe, sous la responsabilité du greffier, un registre, paraphé par le Président, sur lequel sont inscrites à la suite sans blancs, toutes les causes, les actes de procédure y afférant et les pièces déposées à leur appui dans l'ordre de leur présentation.

Dans le registre il ne sera rien écrit par abréviation et aucune date ne sera inscrite en chiffres.

2. Mention de l'inscription au registre sera faite par le greffier sur les originaux et à la demande des parties sur les copies qu'elles présenteront à cet effet.

3. Les inscriptions au registre et les mentions prévues au para. 2 ont force d'actes authentiques.

4. Les modalités suivant lesquelles le registre est tenu sont déterminées dans les instructions du Président au greffe visées à l'article 17 § 3 du présent règlement.³

³ See p. 138 *supra*.

Mixed Claims Commission, United States and Germany, Rules :

Rule VII

The Secretaries shall :

...

(e) Make and keep, in the English language, in books provided for that purpose, duplicate minutes of all proceedings of each session of the Commission, which minutes shall be read at the next session and, after corrections if any are made, shall be approved and signed by the Commissioners and countersigned by the Secretaries.

(f) Keep a notice book in which entries may be made by either the American or German Agent, and when so made shall be notice to the other Agent and all others concerned.

(g) Provide duplicate books, in which shall be recorded all awards and decisions of the Commission signed by the Commissioners, or in case of their disagreement, by the Umpire, and countersigned by the Secretaries.

...

*Section 6. Duties*⁴

a. Administrative duties, communications

Permanent Court of Arbitration, Hague Convention 1907 :

Article 43, para. 2

See p. 133 *supra*.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 11

Le secrétariat du tribunal atteste sur la requête la date de sa réception et en délivre un reçu au requérant ou à son mandataire.

En outre, à cette même date, le secrétariat fait mention, sur un registre spécial (A), tenu sur papier libre, coté et paraphé par un président du tribunal du dépôt des requêtes, ainsi que des pièces qui les accompagnent. Tous actes ou documents ultérieurs sont aussi mentionnés sur ce registre au fur et à mesure de leur réception.

Les pièces concernant une même affaire porteront, sur le registre, un même numéro d'inscription et recevront, en outre, chacune un numéro d'ordre suivant la date de leur entrée.

Article 77

La sentence est inscrite à sa date par les soins du secrétariat sur le registre B de la section qui l'a rendue.

Article 92

Le secrétariat constituera, pour chaque requête, un dossier aux noms du demandeur et du défendeur. Ce dossier portera le numéro d'inscription au registre et comprendra toute la procédure et tous les documents, lettres,

⁴ See also section 5, *Records*, p. 138 *et seq.*

mémoires, actes, titres et pièces quelconques, classés par ordre chronologique.

Les dossiers seront classés dans les archives du secrétariat d'après l'ordre numérique d'inscription.

Article 93

Le secrétariat tiendra à jour :

a) Un fichier alphabétique des noms des demandeurs et défendeurs, avec les références aux numéros d'inscription et d'ordre portés sur le registre;

b) Des fichiers de contrôle renvoyant à ce fichier alphabétique avec l'indication :

1^o des matières faisant l'objet des litiges;

2^o des lieux où ceux-ci ont pris naissance.

Article 94

Le secrétariat tiendra, en outre, pour chaque section du tribunal un registre (B) contenant le texte des décisions et sentences du tribunal.

Article 95

Pour toutes pièces déposées et tout dépôt consigné au secrétariat, celui-ci délivre un récipissé.

Article 96

Toutes les notifications, communications et convocations du tribunal, dans tout état de la procédure, sont faites par lettres recommandées et accompagnées d'un avis de réception.

Mention en est faite par le secrétariat sur le registre (B) de la section que cela concerne.

French-Mexican Claims Commission, Rules :

Article 7

Dès que les Secrétaires recevront le memorandum ou déclaration dont il est question au paragraphe (a) de l'article précédent ou le mémoire prévu au paragraphe (b) du même article,⁵ ils y porteront la date de sa remise, mention qui devra être signée par eux; ensuite ils enregistreront la réclamation sous le numéro qui lui revient.

Article 51

Les Secrétaires devront :

...

(e) Délivrer sans retard à la partie adverse des expéditions des pièces fondamentales, conclusions et autres documents remis par l'une des parties;

...

United States-Mexican General Claims Commission, Rules :

Rule VI

... The agents shall be required to take notice of all orders of the Commission, and copies of each of such orders, certified by the Joint

⁵ See p 150 *infra*.

Secretaries, shall be furnished to the Agents on the day on which it is made or the following day.

[Cf. General Claims Commission, United States and Panama, Rules, art. 22.]

Rule XII, para. 1

The joint Secretaries shall—

...

(d) Indorse on each document presented to the Commission the date of filing, and enter a minute thereof in the Docket.

[Cf. Mixed Claims Commission, United States and Germany, Rules, art. VII (d); and General Claims Commission, United States and Panama, Rules, art. 35 (d), adding the words : ‘ and if the Government filing the document shall so request, endorse on one copy, provided by it, a record of the filing with the date thereof ’.]

(e) Enter in the Notice Book in Spanish and English all notices required by these rules to be filed by the respective Agents with the Joint Secretaries; and promptly give notice thereof to the Agent required to be notified thereby. Entry shall also be made in said Notice Book of the date on which said notice is given, and all proceedings in respect and in pursuance of said notice.

(f) Furnish to each Agent on the day of filing or the following day copies of all pleadings, notices, and other papers filed with the Joint Secretaries by the other Agent, and make due record thereof.

[Cf. General Claims Commission, United States and Panama, Rules, art. 35 (e).]

(g) ...

International Court of Justice, Rules :

Article 21

1. The Registrar shall be the regular channel for communications to and from the Court.

2. The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may be readily verified. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender.

3. The Registrar shall, subject to the obligations of secrecy attaching to his official duties, reply to all enquiries concerning the work of the Court, including enquiries from the Press.

4. The Registrar shall publish in the Press all necessary information as to the date and hour fixed for public sittings.

5. The Registrar shall communicate to the government of the country in which the Court, or a Chamber dealing with a case, is sitting, the names, first names and description of the agents, counsel and advocates appointed by each of the parties for the purposes of the case.

Article 23, para. 1

The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. The Registrar or his substitute shall be present at all sittings of the Court and at sittings of the Chambers. The Registrar shall be responsible for drawing up the minutes of the meetings.

Court of the European Coal and Steel Community, Rules :

Article 15

1. Sous l'autorité du Président, le greffier est chargé de la réception et de la transmission de tous documents, ainsi que des significations que comporte l'application des règlements de la Cour.

2. Le greffier assiste la Cour, les Chambres, le Président et les juges dans tous les actes et procès-verbaux de leur ministère.

Article 16

Le greffier porte à la connaissance du gouvernement de l'Etat où siègent la Cour ou les Chambres les nom, prénoms, profession et domicile des agents et des avocats désignés par les parties.

Article 17, para. 1

Sous réserve des dispositions de l'article 25 du présent règlement⁶ le greffier assiste aux séances de la Cour et des Chambres.

Article 39

1. Les témoins et les experts sont cités par les soins du greffier.

2. Copie certifiée conforme de la dénonciation des témoins ou experts est transmise par le greffier à la Chambre, à l'avocat général et aux autres parties.

La liste des témoins et experts dont l'audition a été demandée par l'avocat général ou par les parties dont l'offre de preuve a été admise ou de ceux que la Chambre a cités d'office, est transmise au greffe dans un délai fixé par la Chambre. Elle doit contenir les nom, prénoms, profession et domicile des témoins ou experts avec l'énonciation des faits ou points sur lesquels doivent porter les dépositions.

3. La citation doit contenir :

- les nom, prénoms, profession et domicile des parties en cause;
- les faits ou points sur lesquels les témoins ou les experts seront entendus;
- éventuellement la mention des dispositions prises par la Cour pour le remboursement des frais encourus par les témoins et experts et des peines applicables aux témoins défaillants.

Article 83

1. Toutes les significations prévues au présent règlement sont faites par l'envoi recommandé d'une copie de l'acte à signifier. La lettre est adressée au domicile élu du destinataire et l'enveloppe munie du sceau du greffe.

⁶ See p. 243 *infra*, note at International Court of Justice, Rules, art. 30.

Les copies de l'original à signifier sont dressées et certifiées conformes par le greffier, sauf le cas où elles émanent de parties elles-mêmes, conformément à l'article 33, para. 2 du présent règlement.⁷

2. La recommandation à la poste est faite avec demande d'avis de réception. Le récépissé de dépôt et l'avis de réception sont annexés à l'original de la pièce à laquelle ils se rapportent.

b. Archives, accounts

Permanent Court of Arbitration, Hague Convention 1907 :

Article 43

See p. 133 *supra*.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 30, para. 2

Aucun acte, pièce ou document versé au dossier d'une cause ne peut sortir du secrétariat, sauf pour les besoins du tribunal.

Articles 92 and 93

See pp. 141-42 *supra*.

French-Mexican Claims Commission, Rules :

Article 51

Les Secrétaires devront :

(a) Assurer la garde de tous les documents et registres de la Commission, lesquels devront être rangés et conservés dans des armoires de sûreté. Ils devront donner toutes les facilités raisonnables aux Agents français et mexicain et à leurs avocats respectifs pour leur permettre d'examiner les documents et registres et d'en prendre des extraits; toutefois, les documents et registres ne devront pas être retirés des archives, sauf sur décision, dûment enregistrée, de la Commission;

...

United States-Mexican General Claims Commission, Rules :

Rule I, para. 1

See p. 133 *supra*.

Rule XII, para. 1

The Joint Secretaries shall :

...

(b) Be the custodians of all documents and records of the Commission, and keep them systematically arranged in safe files. While affording every reasonable facility to the Agents and their respective counsel to inspect and make excerpts therefrom, no documents or records shall be withdrawn from the files of the Commission save by its order duly entered of record.

...

⁷ See p. 171 *infra*.

[Cf. General Claims Commission, United States and Panama, Rules, art. 35 (b); and Mixed Claims Commission, United States and Germany, Rules, rule VII (b).]

International Court of Justice, Rules :

Article 23, para. 1

See p. 144 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 17, para. 2

Le greffier a la responsabilité des archives et des publications de la Cour. Il a la garde des sceaux.

c. Publications

International Court of Justice, Rules :

Article 22

A collection of the judgments and advisory opinions of the Court, and also of such orders as the Court may decide to include therein, shall be printed and published under the responsibility of the Registrar.

Court of the European Coal and Steel Community, Rules :

Article 17, para. 2

See p. 146 *supra*.

Article 59

Un recueil imprimé de la jurisprudence de la Cour est publié par les soins du greffier.

d. Other duties

General Claims Commission, United States and Panama, Rules :

Article 35

The Secretaries, who shall act jointly in the performance of the powers and duties assigned to them in these rules, shall :

...

(f) Perform such other duties as may from time to time be prescribed by the Commission.

[Cf. United States-Mexican General Claims Commission, Rules, rule XII, para. 1 (g); and Mixed Claims Commission, United States and Germany, Rules, rule VII (b).]

CHAPTER III

PROCEDURE BEFORE ARBITRATOR, COMMISSION, TRIBUNAL, COURT

Section 1. Institution of proceedings

a. Time-limit

Mixed British and Portuguese Commission, General Rules :

Article XXIV

Periods for reception of Claims — The claims of persons residing in London must be sent in within two months from the 10th of July, 1841; those of persons resident elsewhere in the United Kingdom, within four months from the same date; those of persons resident in any other part of Europe, within eight months; and those of persons resident in any other part of the world, within twelve months from the above-specified date.

Article XXV

Agents — No agent will be allowed to present more than ten claims for registration on any one day; but, at the end of each of the respective periods of 2, 4, 8 and 12 months, severally assigned in the next preceding Article (XXIV), a grace of ten additional days will be allowed for the reception of all claims, not previously registered, of parties residing within the limits to which each of such prescribed periods applies.

Article XXVI

Final Limitation of such Periods — When the periods defined in Article XXIV, and the ten additional days mentioned in Article XXV, shall respectively have elapsed, no additional claims of persons residing within those limits will be registered for adjudication by the Commission.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 5

Les requêtes présentées après l'expiration des délais visés à l'article 3 seront, sur la demande de la partie adverse, déclarées irrecevables. Toutefois, le tribunal pourra les admettre si, en raison des circonstances spéciales, il le juge équitable.

La partie qui entend se prévaloir de la tardivité de la requête doit soulever cette exception dans sa première pièce de procédure en réponse à cette requête.

Le président décidera si la question de recevabilité de la requête sera examinée dans une audience spéciale du tribunal ou à l'audience principale.

United States-Mexican General Claims Commission, Rules :

Rule III

5. Any claim loss for or damage accruing prior to September 8, 1923, shall be filed with the Commission either in the manner mentioned in clause (a) or in clause (b) of section 2¹ hereof, before the 30th day of August, 1925, unless in any case reasons for the delay satisfactory to the majority of the Commissioners shall be established, and in such case the period for filing may be extended by the Commission to any date prior to February 28, 1926.

6. Any claim for loss or damage accruing on or after September 8, 1923, shall be filed in a similar manner before the 30th day of August 1927.

[Cf. French-Mexican Claims Commission Rules, art. 8 and 9.]

General Claims Commission, United States and Panama, Convention :

Article VI, para. 1

Every such claim for loss or damage accruing prior to the signing of this Convention, shall be filed with the Commission within four months from the date of its first meeting, unless in any case reasons for the delay, satisfactory to the majority of the Commissioners, shall be established, and in any such case the period for filing the claim may be extended not to exceed two additional months.

General Claims Commission, United States and Panama, Rules :

Article 10

In view of the special circumstances of this arbitration and the limited time allowed for the development of the pleadings, each Government in order to facilitate the work of the other Government, shall file with the Commission on or before May 15, 1932, a formal notice of all claims intended to be presented by it to the Commission, which notice shall contain the names of the claimants, a brief statement of the nature of each claim, and the amount thereof.

Article 11

All Memorials of claims shall be filed with the Commission on or before August 22, 1932.

b. Filing of claim

Franco-German Mixed Arbitral Tribunal, Rules :

Article 2

L'instance est introduite auprès du tribunal par une requête adressée à son siège.

Franco-Bulgarian Mixed Arbitral Tribunal, Rules :

Article 3

Dans un délai de trois mois, à dater de la publication du règlement de procédure ou à dater du fait qui doit donner lieu à la requête, si ce fait

¹ See p. 150 *infra*.

est postérieur à la publication du règlement de procédure, le demandeur fera connaître par une requête dite prémonitoire qu'il est dans l'intention de déposer une requête définitive au tribunal.

La requête prémonitoire contiendra les indications prévues aux lettres a) et b) de l'article 6 du présent règlement² et l'indication approximative de la date à laquelle la requête définitive pourra être présentée.

La requête prémonitoire est rédigée en un seul exemplaire. Les agents des gouvernements peuvent en prendre connaissance au secrétariat.

Le dépôt de la requête prémonitoire ne comporte aucun frais.

Le requérant peut toujours faire savoir au tribunal qu'il renonce à déposer une requête définitive.

Les requêtes définitives doivent être présentées dans un délai d'un an à dater de la publication du règlement de procédure.

Si le fait qui donne lieu à la requête est postérieur à l'expiration du délai susvisé, la requête doit être déposée dans un délai de trois mois à dater du jour où le fait dont il s'agit s'est produit.

Le tribunal, après un examen des circonstances, peut admettre les requêtes qui n'auront pas été précédées de requêtes prémonitoires, comme il est prévu ci-dessus.

Mixed Claims Commission, United States and Germany, Rules :

Rule IV (a)

A claim shall be treated as formally filed with the Commission, upon there being presented to the Secretaries a memorial, petition, or written statement containing a clear and concise statement of the facts upon which the claim is based, the amount thereof, the nationality of the claimant, and a full disclosure of the nature and extent of the interest of claimant, and all others therein, accompanied by copies of all documents and other proofs in support of such claim then in the possession of the American Agent; which memorial, petition, or written statement shall be signed or endorsed by the American Agent, and an endorsement of filing, with the date thereof, made thereon and signed by the Secretaries.

French-Mexican Claims Commission, Rules :

Article 6

Une réclamation sera considérée comme formellement présentée à la Commission :

(a) par la remise aux Secrétaires d'un memorandum ou déclaration, établi en deux originaux signés par l'Agent français ou par une autre personne dûment désignée par celui-ci pour signer en ses lieu et place, et contenant le nom du demandeur, l'exposition sommaire de la réclamation et le montant de cette dernière. Toutefois, l'Agent mexicain ne sera pas tenu de répondre, et la Commission n'examinera aucune réclamation ainsi présentée par voie de memorandum, jusqu'à ce qu'ait été remis le mémoire prévu par le présent règlement.

² See p. 172 *infra*, note at Franco-German Mixed Arbitral Tribunal, Rules, art. 6.

(b) lorsque, sans mémorandum ou déclaration préliminaire, l'Agent français remettra aux Secrétaires un mémoire en deux originaux, accompagné des documents à l'appui de la réclamation, qui, en ce moment, seront entre les mains dudit Agent.

United States-Mexican General Claims Commission, Rules :

Rule III, para. 1

All claims must be filed by the respective Governments through or in the name of the Agents thereof.

[Cf. General Claims Commission, United States and Panama, Rules, art. 8.]

Rule III, para. 2

A claim shall be deemed to have been formally filed with the Commission :

(a) Upon there being presented to the Joint Secretaries a memorandum or statement, in duplicate, one in English and one in Spanish, setting forth as to the claim asserted in said memorandum or statement the name of the claimant, a brief statement of the nature of the claim and the amount thereof; or

(b) Upon there being presented to the Joint Secretaries a memorial in duplicate, one in English and one in Spanish, complying with the provisions of Rule IV, Section 2.³

[Para. 2 (b) : cf. General Claims Commission, United States and Panama, Rules, art. 9.]

International Court of Justice, Statute :

Article 40, para. 1

Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar . . .

Idem, Rules :

Article 32

1. When a case is brought before the Court by means of a special agreement, Article 40, paragraph 1, of the Statute shall apply.

2. When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the subject of the dispute. It must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise nature of the claim and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed in the Memorial, to which the evidence will be annexed.

...

³ See p. 174 *infra*, note at French-Mexican Claims Commission Rules, art. 11.

Franco-Italian Conciliation Commission, Rules :

Article 8, para. 1

L'action débute, devant la Commission de Conciliation, par une requête introductive déposée au Secrétariat par l'Agent du Gouvernement intéressé et signée de lui.

Court of the European Coal and Steel Community, Rules :

Article 29, para. 1

Toute demande tendant à soumettre une affaire à la Cour doit revêtir la forme d'une requête présentée par écrit et signée par le requérant ou par la personne qui le représente ou, le cas échéant, qui l'assiste, conformément aux articles 20 et 22 du Statut.⁴

c. Appointment of representative

Franco-German Mixed Arbitral Tribunal, Rules :

Article 6

La requête contient :

(a) Les nom, prénoms, profession et domicile des parties, ainsi que, le cas échéant, la désignation et le domicile du mandataire du requérant;

...

International Court of Justice, Rules :

Article 35

1. When a case is brought before the Court by means of a special agreement, the appointment of the agent or agents of the party or parties filing the special agreement shall be notified at the same time as the special agreement is filed. If the special agreement is filed by one only of the parties, the other party shall, when acknowledging receipt of the notification of the filing of the special agreement or failing this, as soon as possible, inform the Court of the name of its agent.

2. When a case is brought before the Court by means of an application, the application, or the covering letter, shall state the name of the agent of the applicant government.

3. The party against whom the application is made and to whom it is notified shall, when acknowledging receipt of the notification, or failing this, as soon as possible, inform the Court of the name of its agent.

4. Applications to intervene under Article 64 of these Rules⁵, interventions under Article 66⁶ and requests under Article 78⁷ for the revision, or under Article 79⁸ for the interpretation, of a judgment, shall similarly be accompanied by the appointment of an agent.

...

⁴ See p. 157 and p. 175 *infra*.

⁵ See p. 229 *infra*.

⁶ See p. 233 *infra*.

⁷ See p. 256 *infra*.

⁸ See p. 256 *infra*.

d. Statement of address for service

Franco-German Mixed Arbitral Tribunal, Rules :

Article 6

La requête contient :

...

(b) L'indication d'un domicile élu au siège du tribunal ou au bureau de l'office des biens et intérêts privés de l'Etat dont le requérant est ressortissant;

...

International Court of Justice, Rules :

Article 35, para. 5

The appointment of an agent must be accompanied by a statement of an address for service at the seat of the Court to which all communications relating to the case should be sent.

Court of the European Coal and Steel Community, Rules :

Article 29, para. 2

La requête doit contenir élection de domicile au siège de la Cour aux fins de la requête et de ses suites.

e. Notification of defendant

Mixed Claims Commission, United States and Germany, Rules :

Rule IV (b)

The docketing of a claim so filed⁹ shall be notice to Germany of its filing.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 12

Dès sa réception de la requête, le secrétariat fait l'expédition des copies mentionnées à l'article 9.¹⁰

La communication à la partie adverse se fait par lettre recommandée, avec un avis de réception.

Lorsqu'il résulte d'une constatation d'un agent que le domicile ou la résidence du défendeur est inconnu, ou qu'une lettre recommandée n'a pu lui être remise, le président requiert l'agent de l'Etat dont le défendeur est ressortissant de faire la notification conformément au mode de la loi du lieu où elle doit être faite.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 5

Each party shall deliver to the other party a textual copy of its statements, allegations and proofs when the originals thereof are submitted to the Arbitrator.

⁹ See Rule IV (a), p. 149 *supra*.

¹⁰ See p. 170 *infra*.

General Claims Commission, United States and Panama, Rules :

Article 22

The filing with the Secretaries of any of the above pleadings, shall constitute notice thereof to the opposite party and shall be deemed a compliance with these rules as to any notice required to be given hereunder.

[Cf. United States-Mexican General Claims Commission, Rules, rule VI; and French-Mexican Claims Commission, Rules, art. 50.]

International Court of Justice, Rules :

Article 33

1. When a case is brought before the Court by means of an application, the Registrar shall forthwith transmit to the party against whom the claim is made a copy of the application certified as correct.

2. When a case is brought before the Court by means of a special agreement filed by one only of the parties, the Registrar shall forthwith notify the other party that it has been so filed.

[Cf. Court of the European Coal and Steel Community Rules, art. 33, para. 2; and Arbitral Tribunal, United States and Great Britain, Rules, rules 23-24.]

Franco-Italian Conciliation Commission, Rules ;

Article 10

Le Secrétariat de la Commission, immédiatement :

...

3. Communiquer sous trois jours un exemplaire de la requête et du bordereau susdits, à l'Agent du Gouvernement défendeur.

...

f. Notification of others

International Court of Justice, Rules :

Article 34

1. The Registrar shall forthwith transmit to all the members of the Court copies of special agreements or applications submitting a case to the Court.

2. He shall also transmit copies : (a) to Members of the United Nations through the Secretary-General and (b), by means of special arrangements made for this purpose between them and the Registrar, to any other States entitled to appear before the Court.

g. Advance of costs ¹¹

Franco-German Mixed Arbitral Tribunal, Rules :

Article 97

En dehors des parties dont les agents reconnaîtraient l'insolvabilité et soutiendraient l'instance, le demandeur consigne au secrétariat une somme forfaitaire pour assurer les frais du tribunal et de la procédure engagée.

¹¹ Cf. p. 246, *infra*.

Cette somme est, au minimum, de cent francs et au maximum de dix mille francs. Son montant est déterminé, en tenant compte de l'importance du litige, par le président, qui fixe au demandeur le délai dans lequel la consignation doit être faite.

Si, au cours de l'instruction, la somme fixée apparaît insuffisante, le président peut, d'office ou sur requête, l'augmenter, sans être lié par le maximum ci-dessus.

Ces dispositions sont applicables au défendeur qui prend des conclusions reconventionnelles et au tiers qui intervient au procès.

La consignation peut aussi être faite à la Banque de France et à la Reichsbank allemande, au compte du Tribunal Arbitral Mixte franco-allemand.

Les montants à consigner en marks allemands seront calculés au taux moyen du franc français coté à la Bourse de Genève durant le mois qui a précédé la date de la consignation.

Les dispositions de cet article ne dérogent en rien au paragraphe 20, alinéa 2, de l'annexe de l'article 296 du Traité de Versailles.¹²

Permanent Court of Arbitration (Island of Palmas Case), Special Agreement :

Article VI

Immediately after the exchange of ratification of this special agreement, each party shall place in the hands of the Arbitrator the sum of one hundred pounds sterling by way of advance of costs.

[Cf. Permanent Court of Arbitration (Religious Properties Case), *Compromis*, art. 11, para. 2; *idem* (Island of Timor Case), *Compromis*, art. 8; *idem* (Manouba Case), *Compromis*, art. 4; *idem* (Carthage Case), *Compromis*, art. 4; *idem* (Casablanca Case), *Compromis*, art. 4.]¹³

Section 2. Representation of Parties

Projet, 1875 :

Article 13

Chacune des parties pourra constituer un ou plusieurs représentants auprès du tribunal arbitral.

¹² Article 296 of the Peace Treaty of Versailles, Annex, para. 20, sect. 1-2 : "Where one of the parties concerned appeals against the joint decision of the two Clearing Offices he shall make a deposit against the costs, which deposit shall only be refunded when the first judgment is modified in favour of the appellant and in proportion to the success he may attain, his opponent in case of such a refund being required to pay an equivalent proportion of the costs and expenses. Security accepted by the Tribunal may be substituted for a deposit."

"A fee of 5 per cent of the amount in dispute shall be charged in respect of all cases brought before the Tribunal. This fee shall, unless the Tribunal directs otherwise, be borne by the unsuccessful party. Such fee shall be added to the deposit referred to. It is also independent of the security."

¹³ See also Hague Convention 1907, art. 52, para. 1 : "The Powers which have recourse to arbitration sign a *compromis*, in which are defined . . . the amount of the sum which each party must deposit in advance to defray the expenses."

Arbitral Tribunal, Chile and France, Convention 1894 :

Article 4

Chaque Gouvernement pourra constituer un agent qui veille aux intérêts de ses commettants et en prenne la défense; qui présente des pétitions, documents, interrogatoires; qui pose des conclusions ou y réponde; qui appuie ses affirmations et réfute les affirmations contraires, qui en fournisse les preuves, et qui, devant le tribunal, par lui-même ou par l'organe d'un homme de loi, verbalement ou par écrit, conformément aux règles de procédure et aux voies que le tribunal lui-même arrêtera en commençant ses fonctions, expose les doctrines, principes légaux ou précédents qui conviennent à sa cause.

[Cf. Arbitral Tribunal, Chile and France, Convention 1882, art. 5.]

Permanent Court of Arbitration, Hague Convention 1907 :

Article 62

The parties are entitled to appoint special agents to attend the tribunal to act as intermediaries between themselves and the tribunal.

They are further authorized to commit the defence of their rights and interests before the tribunal to counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel or advocates except on behalf of the Power which appointed them members of the Court.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 83

Les parties peuvent se faire représenter devant le tribunal par des mandataires et se faire assister de conseils. Les mandataires reçoivent valablement toutes notifications, communications et convocations du tribunal.

Le président peut exiger la comparution personnelle.

Article 84

Les mandataires et conseils des parties ne peuvent être choisis que dans les catégories suivantes :

- 1^o Les avocats aux barreaux des cours ou tribunaux français ou allemands;
- 2^o Les avoués près les cours ou tribunaux français;
- 3^o Les professeurs ou agrégés des facultés de droit de l'Etat français ou des Etats allemands;
- 4^o Les membres ou associés de l'Institut de droit international.

Les mandataires et conseils peuvent, avec l'autorisation du tribunal, se faire assister d'avocats près le « Patentamt » allemand (« Patentanwälte ») et d'ingénieurs-conseils, dans le cas où l'affaire présente des questions techniques.

Arbitrator, Great Britain and Spain (British Claims, Spanish Morocco) Agreement :

Article 4

Each Party to this agreement shall have one representative, who may be a lawyer, to state and argue the cases before Mr. _____, present

documents and examine witnesses. This representative may be assisted by as many experts as each Party desires to name.

General Claims Commission, United States and Panama, Convention :

Article III, para. 2

Each Government may nominate agents or counsel who will be authorized to present to the Commission orally or in writing, all the arguments deemed expedient in favor of or against any claim. The agents or counsel, of either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim and shall have the right to examine witnesses under oath or affirmation before the Commission, in accordance with such rules of procedure as the Commission shall adopt.

[Cf. United States-Mexican General Claims Commission, Convention, art. III, para. 2; and as far as the first sentence only is concerned, cf. French-Mexican Claims Commission, Convention, art. IV, para. 2; and Mixed Claims Commission, United States and Germany, Agreement, art. VI, para. 1.]

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 2

Each Government shall appoint one or more representatives who shall have the authority necessary to appear before the Arbitrator and to represent it.

Article 3

The first day of February 1930 is fixed as the day on which the representatives of the parties shall present their credentials to the Arbitrator either in person or through their respective consular officers. If they be in good and due form, the Arbitrator shall declare the proceedings open.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 3

The two Governments shall within fourteen days of the date of the signature of the present agreement each appoint an agent for the purposes of the arbitration and shall each communicate the name and address of their respective agents to each other and to the arbitrator.

International Court of Justice, Statute :

Article 17, para. 1

No member of the Court may act as agent, counsel or advocate in any case.

Article 42

1. The parties shall be represented by agents.
2. They may have the assistance of counsel or advocates before the Court.

3. The agents, counsel and advocates of parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.

Franco-Italian Conciliation Commission, Rules :

Article 5

Chacun des deux Gouvernements est représenté devant la Commission par un Agent qui peut tant se faire suppléer que se faire assister de personnes idoines.

Ledit Agent est l'intermédiaire obligé entre la Commission et le Gouvernement qu'il représente, notamment pour l'application de l'article 83, paragraphe 5.¹⁴

Court of the European Coal and Steel Community, Code :

Article 20

The States and the different institutions of the Community shall be represented before the Court by representatives appointed for each case; the representative may be assisted by an advocate admitted to the bar of one of the member States.

Enterprises and all other individuals or legal entities must be represented by an advocate admitted to the bar of one of the member States.

The representatives and advocates appearing before the Court shall have the rights and guarantees necessary for the independent performance of their duties, under the conditions fixed in rules to be established by the Court and submitted to the approval of the Council.

The Court shall have, with respect to the advocates who appear before it, the powers normally recognized in this regard to courts and tribunals, under the conditions fixed by the same rules.

Professors of the member States whose national law allows them to plead shall have the same rights before the Court as are recognized to advocates by the present Article.

Idem, Additional Rules :

Article premier

1. Dans une affaire soumise à la Cour de Justice, les agents représentant un Etat ou une Institution de la Communauté, ainsi que les avocats qui se présentent devant elle ou devant une autorité judiciaire commise par elle en vertu d'une commission rogatoire jouissent de l'immunité de juridiction pour les paroles prononcées et les écrits produits par eux dans l'exercice de leurs fonctions.

2. Les agents et avocats jouissent en outre des facilités suivantes :

a) Inviolabilité des documents.

Tous papiers et documents relatifs à la procédure dans laquelle ils assistent ou représentent les parties sont exempts de fouille et saisie.

¹⁴ Treaty of Peace with Italy, signed on 10 January 1947, art. 83, para. 5 : "The parties undertake that their authorities shall furnish directly to the Conciliation Commission all assistance which may be within their power."

En cas de contestation, les organes de la douane ou de la police peuvent sceller les papiers et documents en question qui sont alors transmis sans délai à la Cour, pour qu'ils soient vérifiés en présence du Greffier de la Cour et de l'intéressé.

b) Attribution de devises.

Les agents et avocats ont droit à l'attribution des devises nécessaires à l'accomplissement de leur tâche.

c) Liberté de déplacement.

Les agents et avocats jouissent de la liberté de déplacement pour autant que le déplacement est nécessaire à l'accomplissement de leur tâche.

3. Les mêmes règles s'appliquent aux professeurs jouissant du droit de plaider devant la Cour.

Article 2

Pour bénéficier des privilèges, immunités et facilités mentionnés à l'article premier, doivent justifier préalablement de leur qualité :

a) Les agents, par un document officiel délivré par l'Etat ou l'Institution qu'ils représentent; copie de ce document est immédiatement notifiée au Greffier de la Cour par l'Etat ou l'Institution;

b) Les avocats et les Professeurs, par une pièce de légitimation signée par le Greffier de la Cour. Copie de cette pièce est adressée par le Greffier aux Gouvernements des Etats membres, conformément à l'article 16 du Règlement de la Cour. Sa validité, limitée à un terme fixe, peut toutefois être étendue ou restreinte selon la durée de la procédure.

Article 3

1. Les privilèges, immunités et facilités sont accordés aux agents, aux avocats, ainsi qu'aux professeurs jouissant du droit de plaider devant la Cour exclusivement dans l'intérêt de l'instance.

2. La Cour peut lever l'immunité lorsqu'elle estime que la levée de cette immunité n'est pas contraire aux intérêts de l'instance.

Section 3. Consultation with Parties on procedure

International Court of Justice, Rules :

Article 37, para. 1

In every case submitted to the Court, the President will ascertain the views of the parties with regard to questions of procedure; for this purpose he may summon the agents to meet him as soon as they have been appointed.

Section 4. Written proceedings

a. Pleadings : number, order, time-limit, place of delivery

Permanent Court of Arbitration, Hague Convention 1907 :

Article 63

...

The written pleadings consist in the communication by the respective agents to the members of the tribunal and the opposite party of cases,

counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents relied on in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the *compromis*.

The time fixed by the *compromis* may be extended by mutual agreement by the parties, or by the tribunal when the latter considers it necessary for the purpose of reaching a just decision.

...

Article 67

After the close of the pleadings, the tribunal is entitled to refuse discussion of all new papers or documents which one of the parties may wish to submit to it without the consent of the other party.

Article 68

The tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the tribunal has the right to require the production of these papers or documents, but is obliged to make them known to the opposite party.

Article 69

The tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal the tribunal takes note of it.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 9

The pleadings shall, in respect of each claim, consist of a Memorial and an Answer. The claimant Government shall also be entitled to file a Reply if it thinks necessary.

Rule 10

The pleadings on either shall be prepared with all dispatch and filed as soon as may be reasonably possible after the making of these rules.

Rule 20

There shall be no written pleadings other than the Memorial, the Answer, and the Reply except by agreement between the Agents or by order of the tribunal.

Rule 23

Twenty-eight copies of all pleadings, and of further evidence under Rule 19,¹⁵ if any, shall be delivered at the Office of the Tribunal.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 13

Dans le délai de deux mois dès la réception par le défendeur de la requête introductive d'instance, celui-ci déposera sa réponse au secrétariat.

¹⁵ See p. 201 *infra*.

Article 26, para. 1

Dans le délai d'un mois dès la réception de la réponse, le demandeur peut déposer au secrétariat une réplique.

Article 28, para. 1

Dans le délai d'un mois dès la réception de la réplique, le défendeur peut déposer au secrétariat une duplique . . .

Arbitral Commission, United States and Peru (Landreau Claim), Protocol :

Article X, para. 1

The case of the United States and supporting evidence shall be presented to the Government of Peru through its duly accredited representative at Washington as soon as possible, and, at the latest, within four months from the date when this agreement becomes effective. The Government of Peru shall submit in like manner, through its representatives at Washington, its full answer to such case within five months from the date of the presentation of the case of the United States. The Government of the United States shall present in like manner its reply to the answer of the Peruvian Government, which reply shall contain only matters in reply to the case of the Government of Peru, within three months from the date of the filing of the Peruvian answer, and Peru may, in like manner, within four months, present a reply to the reply of the Government of the United States. The allegations and documents of each party shall be presented at least in quintuplicate.

French-Mexican Claims Commission, Rules :

Article 10

Les pièces fondamentales seront le mémoire, le contre-mémoire, les pièces relatives aux exceptions, la réplique et la duplique, si les Agents désirent présenter ces deux dernières, les modifications à ces diverses pièces, et les conclusions. D'autres pièces pourront cependant être présentées, si les Agents en conviennent, ou si la Commission en décide ainsi. Chaque partie aura le droit de répondre sur faits nouveaux.

Article 14, para. 1

Le contre-mémoire sera remis aux Secrétaires en deux originaux, dans les soixante jours de la remise du mémoire, à moins que ce délai n'ait été prorogé par accord des Agents, signifié aux Secrétaires, ou par décision de la Commission, sur conclusions dûment signifiées.

Article 15, para. 1

Lorsque le demandeur désirera répliquer, il remettra aux Secrétaires sa réplique, en deux originaux, dans les trente jours comptés à partir du jour où a été remis le contre-mémoire, à moins que ce délai ne soit prorogé par accord des Agents, dûment signifié aux Secrétaires, ou par décision de la Commission, sur conclusions dûment signifiées.

Article 16

Lorsque l'Agent mexicain désirera dupliquer, il remettra aux Secrétaires sa duplique, en deux originaux, dans les quinze jours comptés à partir du

jour où a été remise la réplique, à moins que ce délai ne soit prorogé par accord des Agents, dûment signifié aux Secrétaires, ou par décision de la Commission, sur conclusions dûment signifiées. La duplique sera soumise aux mêmes règles que la réplique.

Article 48

A la requête de l'un des Agents, dûment signifiée à l'autre, celui-ci sera tenu de fournir dans un délai raisonnable la traduction complète ou partielle d'une pièce ou d'un document remis par lui; en attendant la remise de cette traduction, les délais fixés par le présent règlement seront suspendus. La Commission pourra ordonner, d'office, la traduction complète ou partielle d'une pièce ou d'un document.

United States-Mexican General Claims Commission, Rules :

Rule IV, para. 1

The written pleadings shall consist of the Memorial, the Answer and the Reply, if desired, unless by agreement between the Agents, confirmed by the Commission, or by order of the Commission, other pleadings are allowed. The pleadings shall be accompanied by copies of all documents and other proofs upon which either Government relies in support or in defense of a claim. All statements concerning and discussion of matters of law shall be confined to such briefs as may be filed or oral arguments as may be made in support or in defense of a claim.

Rule IV, para. 3

The answer.

(a) The answer in each case shall be filed with the Joint Secretaries within sixty (60) days from the date on which the memorial is filed, unless prior to the termination of that period the time be extended by stipulation between the Agents, duly filed with the Joint Secretaries and confirmed by the Commission. Where an extension is desired by either Agent, and the Agents fail to enter into a stipulation with regard thereto, the Commission may, after due notice and hearing, order an extension for good cause shown on motion made prior to the termination of the aforesaid period of sixty (60) days.

(b) . . .

Rule IV, para. 4

The reply.

(a) Where a reply is deemed necessary in any case, it may be filed with the Joint Secretaries within thirty (30) days from the date on which the Answer is filed, unless prior to the termination of that period the time be extended by stipulation between the Agents, duly filed with the Joint Secretaries and confirmed by the Commission. Where an extension is desired by either Agent, and the Agents fail to enter into a stipulation with regard thereto, the Commission may, after due notice and hearing, order an extension for good cause shown on motion made prior to the termination of the aforesaid period of thirty (30) days.

(b) . . .

Rule VII, para. 1

A motion to dismiss a claim may be made at any time after the docketing thereof and before final submission to the Commission for good cause shown in the motion, and apparent on the face of the record, going to the jurisdiction of the Commission or the merits of the claim. In all cases in which one of the parties has made a motion to dismiss a claim filed by the other, the running of the periods of time provided in the rules for the filing of the Answer to the Memorial or to any other pleadings relative to the claim concerned and which may have been presented prior to the date of the motion, shall be suspended.

Rule VII, para. 5

A motion to dismiss a claim once filed may be withdrawn only by leave of the Commission first had and obtained. In its order (1) granting such leave, or (2) denying a motion to withdraw and overruling the motion to dismiss, the Commission will prescribe such terms as it may see fit, including the time within which an Answer may be filed and the time within which the case will be heard on its merits, any provision in these rules to the contrary notwithstanding.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 4

The representatives of the parties shall submit to the arbitrator a written statement which shall comprise their respective points of view in the relation of the facts, the statements of the juridic point upon which their cause is based and all the proofs which they may wish to present as basis for their claims. They may be set forth in English or in Spanish. The term, within which the statement of their cause must be presented by the parties, is that of thirty days counted from the time when the Arbitrator declares the proceedings open.

Article 6

Within sixty days counted from the day on which the last of the parties presented the statement of its cause, in conformity with article 4, each party shall have the right to present a written reply to the allegations of the other party. A copy of that reply shall be delivered to the other at the time of being presented to the Arbitrator.

Article 7

Within thirty days following the termination of the sixty days' period mentioned in article 6, the parties may present oral or written arguments to the Arbitrator, summarizing the proofs and arguments produced in the statements, but no additional evidence shall be presented except at the request of the Arbitrator.

General Claims Commission, United States and Panama, Rules :

Article 12

The written pleadings shall consist of the Memorial and the Answer, and if the parties so desire, a Brief and a Reply Brief, respectively . . .

Article 14 (a)

The Answer in each case shall be filed with the Secretaries within two calendar months from the date on which the Memorial is filed.

Article 15 (a)

If claimant Government desires to file a Brief in support of a claim, such Brief must be filed with the Joint Secretariat within two calendar months from the date of the filing of the Answer.

Article 16

Where an Agent deems it necessary to answer a Brief, he may do so by presenting a Reply Brief within two calendar months from the date on which the Brief was filed. The Reply Brief shall contain the respondent Government's full written arguments.

Article 17

In view of the special circumstances of this arbitration and the existing agreements between the two Governments, no opportunity shall be afforded for dilatory proceedings of any kind, including amendments to the four pleadings provided for above.

Article 20

Documents not filed in accordance with these rules shall be rejected by the Commission.

Arbitrator, Finland and Great Britain (Finnish Shipowners Case),
Agreement :

Article 4

Memorials and counter-memorials shall be transmitted to the Arbitrator at his ordinary residence.

Tribunal, United States and Great Britain (Trail Smelter Case),
Convention :

Article V

The procedure in this adjudication shall be as follows :

1. Within nine months from the date of the exchange of ratification of this agreement, the Agent for the Government of the United States shall present to the Agent for the Government of Canada a statement of the facts, together with the supporting evidence, on which the Government of the United States rests its complaint and petition.

2. Within a like period of nine months from the date on which this agreement becomes effective, as aforesaid, the Agent for the Government of Canada shall present to the Agent for the Government of the United States a statement of the facts, together with the supporting evidence, relied upon by the Government of Canada.

3. Within six months from the date on which the exchange of statements and evidence provided for in paragraphs 1 and 2 of this article has been completed, each Agent shall present in the manner prescribed by paragraphs 1 and 2 an answer to the statement of the other with any additional evidence and such argument as he may desire to submit.

Article VI

When the development of the record is completed in accordance with Article V hereof the Governments shall forthwith cause to be forwarded to each member of the Tribunal a complete set of the statements, answers, evidence and arguments presented by their respective Agents to each other.

[Cf. Arbitrator, Sweden and United States (*Kronprins Gustaf Adolf Case*), Special Agreement of 17 December 1930, art. IV.]

International Court of Justice, Rules :

Article 37

1. [See p. 158 *supra*.]

2. In the light of the information obtained by the President, the Court will make the necessary orders to determine *inter alia* the number and the order of filing of the pleadings and the time-limits within which they must be filed.

3. So far as possible, in making an order under paragraph 2 of this Article, any agreement between the parties shall be taken into account.

4. The Court may extend any time-limit which has been fixed. It may also, in special circumstances and after giving the agent of the opposing party an opportunity of stating his views, decide that any step taken after the expiration of a time-limit shall be considered as valid.

5. If the Court is not sitting, its powers under this Article shall be exercised by the President but without prejudice to any subsequent decision of the Court.

Article 38

Time-limits shall be fixed by assigning definite dates for the completion of the various steps in the proceedings.

Article 41

1. If proceedings are instituted by means of a special agreement, the pleadings shall, subject to Article 37 of these Rules, be presented in the order stated below :

- a Memorial, by each party within the same time-limit;
- a Counter-Memorial, by each party within the same time-limit;
- a Reply, by each party within the same time-limit.

2. If proceedings are instituted by means of an application, the pleadings shall, subject to Article 37 of these Rules, be presented in the order stated below :

- the Memorial by the applicant;
- the Counter-Memorial by the respondent;
- the Reply by the applicant;
- the Rejoinder by the respondent.

Article 57, para. 5

In the circumstances contemplated by Article 34, paragraph 3, of the Statute,¹⁶ the Registrar, on the instructions of the Court, or of the President

¹⁶ Art. 34, para. 3, of the Statute : " Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted there under is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings."

if the Court is not sitting, shall proceed as prescribed in that paragraph. The Court, or the President if the Court is not sitting, shall as from the date on which the Registrar has communicated copies of the written proceedings, fix a time-limit within which the public international organization concerned may submit to the Court its observations in writing. These observations shall be communicated to the parties and may be discussed by them and by the representative of the said organization during the oral proceedings.

Franco-Italian Conciliation Commission, Rules :

Article 8, para. 1

See p. 151 *supra*.

Article 11

La Commission saisie de la requête, comme ci-dessus :

1) Fixe les délais pour la présentation des mémoires en réponse, des mémoires éventuels en réplique et des documents du Gouvernement défendeur.

...

Article 15, b)

Les personnes intéressées au litige peuvent présenter des mémoires sans conclusions et être entendues par la Commission. Elles ne prêtent pas serment.

Court of the European Coal and Steel Community, Rules :

Article 29, para. 1

See p. 151 *supra*.

Article 31, para. 1

Dans le mois qui suit la signification de la requête, la partie défenderesse doit fournir un mémoire en défense contenant la reconnaissance ou la contestation de l'exposé de la partie requérante, ainsi que les moyens de fait et de droit que la partie défenderesse fait valoir. Elle doit aussi articuler ses offres de preuve, ainsi que ses conclusions.

...

Article 32

1. La requête et le mémoire en défense peuvent être complétés par une réplique de la partie requérante et par une duplique de la partie défenderesse.

2. Le président fixe, par voie d'ordonnance, les dates auxquelles ces actes de procédure doivent être produits.

Article 85

1. ...

Le délai d'un mois visé à l'article 31, par. 1, du présent règlement commence à courir le lendemain du jour où la partie défenderesse a reçu notification de la requête à elle signifiée.

2. Les délais visés à l'Article 33 du Traité et à l'Article 31, para. 1, du présent règlement sont augmentés comme suit, à raison de la distance :

- Pour les pays appartenant à la Communauté,
- un jour pour ceux des intéressés demeurant en Belgique,
- trois jours pour ceux demeurant en Allemagne, en France métropolitaine et aux Pays-Bas,
- cinq jours pour ceux demeurant en Italie.
- Pour les autres pays :
- un mois pour ceux des intéressés demeurant en Europe,
- deux mois pour ceux demeurant dans les autres contrées.

b. Language, translation

Projet, 1875 :

Article 9, para. 2

Le tribunal arbitral décide en quelle langue ou quelles langues devront avoir lieu ses délibérations et les débats des parties, et devront être présentés les actes et les autres moyens de preuve. Il tient procès-verbal de ses délibérations.

Permanent Court of Arbitration, Hague Convention 1907 :

Article 61

If the question as to what languages are to be used has not been settled by the *compromis*, it shall be decided by the tribunal.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 10

La requête est rédigée en langue française.

Les pièces annexes, ainsi que tous les documents fournis au tribunal par les parties ou émanant du tribunal en tout état de la procédure, sont aussi rédigés en langue française ou accompagnés d'une traduction française.

La partie qui produit une pièce ou un document peut demander que la traduction française soit faite, à ses frais, par les soins du secrétariat du tribunal.

Le président peut autoriser les parties, au cas où des pièces volumineuses seraient présentées, à en faire traduire en français des extraits, sauf décision du tribunal sur opposition de la partie adverse.

[Article 10 is applicable also to *réponse*, *réplique* and *dupliqués*.]

Arbitrator, Great Britain and Spain (British Claims in Spanish Morocco), Agreement :

Article 5, para. 1

... The proceedings before Mr. _____ may be conducted in the Spanish, English or French languages.

Arbitrator, Germany and *Commissaire aux revenus gais*, *Compromis* :

Article 6

Les documents écrits peuvent être rédigés en anglais, en français ou en allemand; s'ils sont rédigés en anglais ou en allemand, une traduction française sera remise le plus rapidement possible...

Arbitral Tribunal, United States and Egypt (Salem Case), Agreement :

Article 8

All written proceedings in connection with this arbitration shall be in both the French and English languages . . .

International Court of Justice, Rules :

Article 39

1. If the parties agree that the proceedings shall be conducted wholly in French, or wholly in English, the pleadings shall be submitted only in the language adopted by the parties.

2. In the absence of an agreement with regard to the language to be used, the pleadings shall be submitted either in French or in English.

3. If in pursuance of Article 39, paragraph 3, of the Statute¹⁷ a language other than French or English is used, a translation into French or English shall be attached to the original of each document submitted.

4. The Registrar is under no obligation to make translations of the pleadings or any documents annexed thereto.

Article 43, para. 2

Every pleading and every document annexed which is in a language other than French or English, must be accompanied by a translation into one of the official languages of the Court. Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, subject, however, to any subsequent decision by the Court, or, if it is not sitting, by the President.

[Cf. French Mexican Claims Commission, Rules, art. 47 (see p. 169 *infra*) and 48 (see p. 161 *supra*); Arbitrator, United States and Guatemala, Exchange of Notes, art. 4 (see p. 162 *supra*); and General Claims Commission, United States and Panama, Rules, art. 21.]

Court of the European Coal and Steel Community, Rules :

Article 27

1. Les langues officielles de la Cour sont : français, allemand, italien, néerlandais.

2. La langue parlée et écrite en usage devant la Cour est déterminée comme suit :

— dans les litiges entre la Communauté ou ses institutions d'une part, et un Etat membre, une entreprise ou une personne ressortissant d'un Etat membre d'autre part, la langue de procédure est la langue nationale de cet Etat;

— dans les litiges entre Etats membres, la langue de procédure est la langue nationale de la partie défenderesse;

¹⁷ Art. 39, para. 3, of the Statute of the I. C. J. : "The Court shall, at the request of any party, authorize a language other than French or English to be used by that party."

— la langue de procédure s'entend notamment de la langue des requêtes mémoires en défense, observations, documents, procès-verbaux, plaidoiries, arrêts et toutes autres décisions de la Cour.

. . . ; si les parties au litige sont d'accord sur l'emploi d'une autre langue officielle, la Cour peut autoriser l'emploi de cette langue comme langue de procédure; . . .

.....

4. En ce qui concerne les Etats membres où, en vertu de la Constitution, existent plusieurs langues officielles, l'usage de la langue sera, à la demande de l'Etat intéressé, déterminé suivant les règles générales découlant de la législation de cet Etat.

Article 28, para. 1

Le greffier veille à ce que soit effectuée, sur la demande d'un des juges, de l'avocat général ou d'une des parties, la traduction, dans les langues officielles de leur choix, de tout ce qui est écrit ou dit pendant les deux phases de la procédure devant la Cour ou les Chambres.

Article 33, para. 6

Toute pièce et tout document produits en annexe et rédigés en une langue autre que la langue de procédure doivent être accompagnés d'une traduction dans la langue de procédure.

Toutefois, dans le cas de pièces et documents volumineux, des traductions en extrait peuvent être présentées. A tout moment la Cour peut exiger une traduction plus complète ou intégrale soit d'office soit à la demande des parties.

c. Date

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 24

Of these copies,¹⁸ two shall be filed in the Office of the Tribunal and twenty shall be forwarded forthwith to the Agent of the other party, with a note specifying the date on which the document was filed, and two shall be at the disposal of each member of the Tribunal.

International Court of Justice, Rules :

Article 40, para. 3

All pleadings shall be dated. When a pleading has to be filed by a certain date, it is the date of the receipt of the pleading in the Registry which will be regarded by the Court as the material date.

[Cf. Court of the European Coal and Steel Community, Rules, art. 23, para. 3.]

d. Signature

French-Mexican Claims Commission, Rules :

Article 11

Le mémoire devra être signé par le demandeur ou par son mandataire et par l'Agent français...

¹⁸ See same Tribunal, Rule 23, p. 159 *supra*.

Article 47

Les pièces et documents remis par les Agents devront être rédigés en français ou en espagnol. Les pièces seront établies en deux originaux signés, accompagnés de quatre copies, et les autres documents, en un seul original signé, accompagné de quatre copies.

General Claims Commission, United States and Panama, Rules :

Article 12

... All pleadings... shall be subscribed or countersigned by the respective Agent...

[Cf. Mixed Claims Commission, United States and Germany, Rules, rule IV (a) (see p. 149 *supra*).]

International Court of Justice, Rules :

Article 32, para. 3

The original of an application shall be signed either by the agent of the party submitting it or by the diplomatic representative of that party at the seat of the Court or by a duly authorized person. If the document bears the signature of a person other than the diplomatic representative of that party at the seat of the Court, the signature must be legalized by this diplomatic representative or by the competent authority of the government concerned.

Franco-Italian Conciliation Commission, Rules :

Article 8, para. 1

See p. 151 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 33, para. 1

L'original de tout acte de procédure doit être signé par la partie ou la personne qui la représente ou, le cas échéant, qui l'assiste.

e. Printing

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 22

Pleadings and further evidence, if any, shall be printed by the parties on paper of the size of 9 1/8 inches by 5 7/8 inches, when folded.

United States-Mexican General Claims Commission, Rules :

Rule V, para. 3

Papers filed by either Agent with the Joint Secretaries may be typewritten or printed in quarto form in the discretion of the Agent filing them; but the Commission may in its discretion direct that they be printed.

International Court of Justice, Rules :

Article 40, para. 4

If the Registrar at the request of the agent of a party arranges for the printing, at the cost of that party, of a pleading which it is intended to file

with the Court, the text must be sent to the Registry in sufficient time to enable the printed pleading to be filed before the expiry of any time-limit which may apply to it. The printing is done under the responsibility of the party in question.

f. Original and copies

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 23

See p. 159 *supra*.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 9

La requête originale est accompagnée de copies déclarées conformes :

- a) en trois exemplaires pour les arbitres;
- b) en autant d'exemplaires qu'il y a de défendeurs distincts;
- c) en deux exemplaires pour les agents des gouvernements.

Il n'est pas fourni copie des annexes volumineuses.

[Article 9 is applicable also to *réponse*, *réplique* and *duplicque*.]

Article 30

Les actes, pièces et documents qui n'ont pas été communiqués aux parties peuvent être consultés par celles-ci ou leurs mandataires, et par les agents, en tout état de cause, au secrétariat.

...

Le secrétariat délivre des copies ou même des photographies, sur la demande d'une partie ou d'un agent, aux frais du requérant.

Arbitral Commission, United States and Peru (Landreau Claim), Protocol :

Article X, para. 1

See p. 160 *supra*.

French-Mexican Claims Commission, Rules :

Article 47

See p. 169 *supra*.

United States-Mexican General Claims Commission, Rules :

Rule V, para. 1

At the time of filing Memorials and other pleadings, the Agent filing them shall file with the Joint Secretaries five (5) additional copies thereof in English and five (5) additional copies thereof in Spanish for the use of the Commission and Agents.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 4

Within one month of the date of the signature of the present agreement, the agent of the Government of the United Kingdom of Great Britain and

Northern Ireland shall file with the arbitrator a memorial in support of their contentions, of which there shall be delivered a certified true copy at the same time to the Portuguese Legation at Brussels, failing which it will be of no effect . . .

[See also art. 5 (counter-memorial), 6 (reply to the counter-memorial) and 7 (rejoinder to the reply).]

General Claims Commission, United States and Panama, Rules :

Article 21

All pleadings shall be filed in duplicate originals and shall be accompanied by five copies thereof, including copies of all evidence attached to the duplicate originals, for distribution as follows :

Originals to the Secretaries	2
One to each Commissioner	3
Two to the Opposing Agent	2
...	

International Court of Justice, Rules :

Article 40

1. The original of every pleading shall be signed by the agent and filed in the Registry. It shall be accompanied by a number of printed copies fixed by the President but without prejudice to an increase in that number should the need arise later.

2. When communicating a copy of a pleading to a party in pursuance of Article 43 of the Statute, the Registrar shall certify that it is a correct copy of the original filed in the Registry.

...

Article 44

1. The Registrar shall transmit to the judges and to the parties copies of the pleadings and documents annexed in the case, as and when he receives them.

2. The Court, or the President if the Court is not sitting, may after obtaining the views of the parties, decide that the Registrar shall in a particular case make the pleadings and annexed documents available to the government of any Member of the United Nations or of any State which is entitled to appear before the Court.

3. The Court, or the President if the Court is not sitting, may, with the consent of the parties, authorize the pleadings and annexed documents in regard to a particular case to be made accessible to the public before the termination of the case.

Court of the European Coal and Steel Community, Rules :

Article 33, para. 2

Il [l'original de tout acte de procédure] doit être déposé au greffe avec deux copies pour la Cour et autant de copies qu'il y a de parties ayant un intérêt distinct. Le greffier en assure immédiatement la signification à l'autre partie. Ces copies doivent être certifiées conformes par la partie qui les dépose.

g. Corrections

Arbitral Tribunal, Chile and France, Rules :

Article 17

Le tribunal se réserve la faculté de ... permettre la rectification de toute erreur de fait que les parties auraient pu commettre de bonne foi.

United States-Mexican General Claims Commission, Rules :

Rule IV, para. 7

On motion of either Agent, or on its own motion, the Commission, after hearing the Agents, may, in its discretion, order the consolidation of claims, the separation of claims or the rectification of the names of claimants and of other obvious errors in the wording of claims.

International Court of Justice, Rules :

Article 40, para. 5

The correction of a slip or error in any document which has been filed can be made at any time with the consent of the other party, or by leave of the President.

h. Contents

(aa) Memorial

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 11

The Memorial shall contain a succinct statement of the facts out of which the claim arises, of the grounds upon which it is put forward, and of the relief claimed.

Rule 13

In the case of claims put forward on behalf of private individuals, corporations, or societies, other than claims arising out of treaties with Indian tribes or nations, the Memorial shall set out the name and nationality of the claimant, or, where the claimant is dead, of his present representatives, with the evidence in support of such nationality.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 6

La requête contient :

- a) Les nom, prénoms, profession et domicile des parties, ainsi que, le cas échéant, la désignation et le domicile du mandataire du requérant;
 - b) L'indication d'un domicile élu au siège du tribunal ou au bureau de l'office des biens et intérêts privés de l'Etat dont le requérant est ressortissant;
 - c) L'exposé articulé des faits qui motivent la requête. Ces faits sont rangés sous des numéros d'ordre;
 - d) Un exposé de droit;
 - e) Les conclusions (soit dispositif des conclusions);
 - f) Le bordereau des actes, titres, pièces et documents joints à la requête.
- [Cf. Franco-Bulgarian Mixed Arbitral Tribunal, Rules, art. 6.]

Mixed Claims Commission, United States and Germany, Rules :

Rule IV (a)

See p. 149 *supra*.

French-Mexican Claims Commission, Rules :

Article 11

Le mémoire devra être signé par le demandeur ou par son mandataire et par l'Agent français. Il contiendra une relation claire et concise des faits sur lesquels la réclamation est fondée et l'exposition, aussi détaillée que possible, des points ci-après énumérés, sauf en cas d'omission de l'un d'entre eux, à donner les motifs de cette omission :

a) La nationalité en raison de laquelle le demandeur s'estime en droit de se prévaloir personnellement des dispositions de la Convention. Si, dans la série de titres invoqués à propos d'une réclamation donnée, il se trouve des droits ou intérêts appartenant à une personne ou compagnie de nationalité distincte de celle du demandeur, il y aura lieu d'exposer complètement les faits concernant ces droits ou intérêts;

b) Si le demandeur invoque, comme fondement de sa réclamation, la perte ou les dommages subis par une société, compagnie, association ou autre groupe d'intérêts, dans lesquels lui ou la personne au nom de qui la réclamation est présentée, a ou a eu un intérêt supérieur à cinquante pour cent du capital total de ladite société ou association, le mémoire devra indiquer la nature et l'importance de cet intérêt ainsi que tous faits et considérations relatifs à cette réclamation ou l'appuyant;

c) Les faits prouvant que la perte ou les dommages, fondement de la réclamation, procèdent de l'une ou de plusieurs des causes définies à l'article III de la Convention conclue entre la République française et les Etats-Unis du Mexique le 25 septembre 1924 et entrée en vigueur par l'échange des ratifications le 29 décembre 1924, et que la perte ou les dommages en question sont survenus au cours de la période comprise entre le 20 novembre 1910 et le 31 mai 1920 inclus;

d) Le montant de la réclamation, la date et le lieu où se sont produits les faits sur lesquels elle se fonde; la nature, l'importance et la valeur de la propriété perdue ou endommagée, exposées de façon aussi détaillée que possible; les dommages à la personne et les pertes et dommages qui en sont résultés; les faits et autres circonstances concomitantes des dommages à la personne ou bien de la perte de ou des dommages à la propriété.

e) Par qui et au nom de qui la réclamation est présentée; et, si la personne qui la présente agit à titre de mandataire, la preuve de sa qualité;

f) Si le droit à la réclamation appartient actuellement et appartenait au moment où il a pris naissance, uniquement et totalement au demandeur, ou si une autre personne est ou a été intéressée, pour une part quelconque, dans cette réclamation; dans ce dernier cas, quelle est cette autre personne et quelles ont été la nature et l'importance de son intérêt; comment et quand ont été transférés ces droits ou intérêts.

g) Si le demandeur, ou bien toute autre personne qui, à un moment donné, a eu droit à la somme réclamée ou à une part de celle-ci, a reçu une somme d'argent ou une compensation équivalente, et, dans l'affirmative,

quelle somme ou quelle compensation, quelle qu'en ait été la forme; et s'il en est ainsi, quand et de qui cette somme ou compensation a été reçue;

h) Si la réclamation a été déjà présentée, ou si une requête y relative a été déjà présentée au Gouvernement mexicain ou à l'un de ses fonctionnaires, ayant agi, l'un ou l'autre, *de jure* ou *de facto*, ou bien au Gouvernement de la République française ou à l'un de ses fonctionnaires, et, dans l'affirmative, tout ce qui concerne cette présentation.

[Cf. General Claims Commission, United States and Panama, Rules, art. 13; and United States-Mexican General Claims Commission, Rules, rule IV, para. 2.]

Article 12

Les réclamations présentées au nom d'une personne décédée, soit pour dommages à la personne, soit pour perte de ou dommages à la propriété, devront être présentées par celui-ci ou ceux qui ont qualité pour représenter la succession et le mémoire exposera, quant au *de cuius* et à celui qui le représente, les faits qui, conformément au présent règlement, seraient exigés du premier, s'il était en vie et présentait lui-même sa réclamation à la Commission; enfin, la réclamation sera accompagnée de la preuve que celui ou ceux qui présentent la réclamation au nom du défunt, ont qualité pour représenter la succession.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 4

See p. 162 *supra*.

International Court of Justice, Rules :

Article 42, para. 1

A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions.¹⁹

Franco-Italian Conciliation Commission, Rules :

Article 8, para. 2

Cette requête, rédigée en cinq exemplaires sur papier libre, doit contenir :

1. a) pour les personnes physiques :

L'indication de la personne ou des personnes dans l'intérêt de qui est formulée la requête, le domicile ou la résidence, ainsi que la nationalité.

b) pour les personnes morales :

La dénomination ou raison sociale, le siège, la nationalité, la forme juridique, sous laquelle elle est constituée, le nom, le domicile et la nationalité du représentant légal.

c) pour les associations de fait :

La liste, le domicile et la nationalité des associés.

2. L'objet de la requête.

¹⁹ Cf. art. 32, para. 2, of the Rules of the same Court, p. 150 *supra*.

3. Les faits matériels et les motifs de droit sur lesquels se fonde la requête.

4. L'indication des documents présentés, de ceux que ledit Agent se réserve de produire, et des preuves susceptibles d'être présentées ou requises au cours de l'instruction.

5. L'indication des témoins et experts techniques dont l'audition est demandée, avec leur identité, domicile et nationalité.

Court of the European Coal and Steel Community, Code :

Article 22, para. 1

Matters shall be referred to the Court by a petition addressed to the clerk. The petition must contain the name and the domicile of the party and the capacity of the signer, the subject-matter of the dispute, the arguments and a short summary of the grounds on which the petition is based.

Idem, Rules :

Article 29, para. 2

See p. 152 *supra*.

Article 29, para. 3

La requête doit contenir, outre les mentions prévues à l'article 22 du Statut, les nom et domicile de la partie contre laquelle la requête est formée, les faits et moyens et les conclusions de la partie requérante, ainsi que les offres de preuve présentées à l'appui de la demande.

(bb) Counter-Memorial

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 15

The Answer shall set out the grounds upon which the claim is resisted by the respondent Government, and shall in so doing indicate clearly the attitude of the respondent Government toward the several allegations contained in the Memorial.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 14

La réponse contient :

a) Les nom, prénoms, profession et domicile des parties, ainsi que, le cas échéant, la désignation et le domicile du mandataire du défendeur;

b) La détermination précise du défendeur sur chacun des faits articulés dans la requête,

Si ces faits sont personnels au défendeur, celui-ci doit ou les admettre ou les contester. S'ils ne lui sont pas personnels, le défendeur peut aussi déclarer les ignorer. Cette déclaration équivaut à une négation;

c) L'exposé articulé des faits sur lesquels le défendeur prétend fonder ses conclusions. Ces faits sont rangés sous des numéros d'ordre en continuant la numérotation des faits de la requête;

d) Un exposé de droit, avec indication des exceptions et moyens que le défendeur entend soulever;

e) Les conclusions, qui peuvent être soit libératoires de tout ou partie des conclusions de la requête, soit reconventionnelles. L'article 7 est applicable aux conclusions de la réponse;

f) Le bordereau des actes, titres, pièces et documents joints à la réponse.

General Claims Commission, United States and Panama, Rules :

Article 14 (b)

The Answer shall be directly responsive to each of the allegations of the Memorial and shall clearly announce the attitude of the respondent Government with respect to each and every allegation of fact and of law set forth in the Memorial. It may in addition thereto contain any new matter which the respondent Government may desire to assert within the scope of the convention . . .

[Cf. United States-Mexican General Claims Commission, Rules, Rule IV, para. 3 (b); and French-Mexican Claims Commission, Rules, art. 14, para. 2.]

International Court of Justice, Rules :

Article 42, para. 2

A Counter-Memorial shall contain an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial; a statement of law in answer thereto; and the submissions.

Franco-Italian Conciliation Commission, Rules :

Article 12, para. 2

Les mémoires en réponse contiennent l'indication des documents et des preuves présentés ou que l'Agent se réserve de produire . . .

Court of the European Coal and Steel Community, Rules :

Article 31, para. 1

See p. 165 *supra*.

Article 31, para. 2

Le mémoire en défense doit contenir l'élection de domicile au siège de la Cour, ainsi que les nom et domicile des personnes qui représentent la partie défenderesse ou qui l'assistent.

(cc) Reply

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 17

Where a Reply is considered necessary by the claimant Government, it shall deal with allegations in the Answer, which present facts or contentions not adequately met or dealt with in the Memorial.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 26, para. 2

Celle-ci [la réplique] contient :

a) La détermination du demandeur sur chacun des faits articulés dans la réponse;

- b) Les nouveaux faits que le demandeur aurait à articuler, rangés sous numéros d'ordre en continuant la numérotation de la réponse;
- c) Un exposé de droit, facultatif;
- d) Si le défendeur a pris des conclusions reconventionnelles, la détermination du demandeur sur ces conclusions;
- e) Le bordereau des pièces jointes à la réplique.

United-States-Mexican General Claims Commission, Rules :

Rule IV, para. 4 (b)

The Reply, if any be filed, shall deal only with matters contained in the Answer.

[Cf. French-Mexican Claims Commission, Rules, art. 15, 15, para. 2.]

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 6, para. 1

... The reply shall, however, be confined to dealing with the issues raised in the counter-memorial and shall not introduce new facts or documents except so far as is necessary for this purpose.

Arbitral Tribunal, United States and Egypt (Salem Case), Agreement :

Article 4, para. 3

... Such replies if made shall be limited to the treatment of questions already developed in the cases and counter-cases and no new issues shall be raised or treated of therein.

General Claims Commission, United States and Panama, Rules :

Article 15 (b)

Such Brief shall consist of claimant Government's full written arguments, and shall be accompanied by copies of any evidence which it may desire to submit in rebuttal to evidence or allegations developed in the Answer.

Franco-Italian Conciliation Commission, Rules :

Article 12, para. 2

... Les mémoires en réplique peuvent contenir l'indication des autres documents et moyens de preuve que le mémoire en réponse rendrait éventuellement nécessaires.

(dd) Rejoinder

Franco-German Mixed Arbitral Tribunal, Rules :

Article 28

Dans le délai d'un mois dès la réception de la réplique, le défendeur peut déposer au secrétariat une duplique, contenant :

- a) La détermination du défendeur sur les nouveaux faits articulés par le demandeur;
- b) Les nouveaux faits que le défendeur aurait à articuler, rangés sous numéros d'ordre en continuant la numérotation de la réplique;
- c) Un exposé de droit, facultatif;
- d) Le bordereau des pièces jointes à la duplique.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 7, para. 1

... The rejoinder shall, however, be confined to dealing with the issues raised in the reply, and shall not introduce new facts or documents except so far as is necessary for this purpose.

i. Amendments

Franco-German Mixed Arbitral Tribunal, Rules :

Article 7

Les conclusions doivent être claires et précises. Jusqu'à la clôture des débats, elles peuvent être restreintes ou modifiées, mais sans que la nature en soit changée.

En aucun cas elles ne peuvent être augmentées.

Mixed Claims Commission, United States and Germany, Rules :

Rule IV (c)

A petition, memorial, or written statement, or any answer thereto, may, upon leave granted by the Commission, be amended at any time before final submission of the case to the Commission.

French-Mexican Claims Commission, Rules :

Article 17

Les pièces fondamentales pourront être modifiées en tout état de cause avant la sentence définitive, soit par accord des Agents, signifié aux Secrétaires, comme s'il s'agissait des pièces fondamentales elles-mêmes, soit par décision de la Commission, sur conclusions dûment signifiées à la partie adverse; la décision annoncera les modifications à apporter.

Les conclusions aux fins de modifications des pièces fondamentales seront remises, en deux originaux, aux Secrétaires et indiqueront les modifications désirées et les raisons pour cela.

Les modifications aux pièces fondamentales seront accompagnées des documents jugés utiles, autres que ceux qui auront déjà été joints aux pièces fondamentales, dont la modification est demandée.

Il pourra être répondu aux pièces modifiées, en la même forme que s'il s'agissait des pièces primitives, dans le délai convenu entre les Agents, ou fixé par la Commission, si c'est cette dernière qui a autorisé la modification.

[Cf. United States-Mexican General Claims Commission, Rule IV, para. 5, adding : No amendment shall be made to any Memorial, Answer or Reply filed on or after October 25, 1926.]

La Commission ne prendra en considération, quant à la demande ou à la défense, que les points contenus dans les pièces fondamentales ou dans les modifications à celles-ci. Toutefois, la Commission pourra, d'office et en tout état de cause avant la sentence définitive, ordonner des modifications aux pièces fondamentales, lorsqu'elle l'estimera indispensable, pour qu'il soit dûment procédé à l'examen d'une réclamation donnée, ou bien dans l'intérêt de la justice.

United States-Mexican General Claims Commission, Rules :

Rule VII, para. 1

See p. 162 *supra*.

Rule VII, para. 2

See p. 228 *infra*.

Rule VII, para. 3

In any decision rendered by the Commission sustaining a motion filed in pursuance of either of the two preceding sections it will prescribe what, if any, amendment to a pleading may be filed by the party against which such motion is directed and the conditions upon which such amendment, if any, may be filed.

General Claims Commission, United States and Panama, Rules :

Article 17

See p. 163 *supra*.

j. Notification of other Party

Permanent Court of Arbitration, Hague Convention 1907 :

Article 63

See p. 158 *supra*.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 24

See p. 168 *supra*.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 12

See p. 152 *supra*.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 5

See p. 152 *supra*.

International Court of Justice, Rules :

Article 33

See p. 153 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 10, para. 3

See p. 153 *supra*.

Article 12, para. 4

Ils [les documents annexés] sont enregistrés, reçus et communiqués, conformément aux dispositions de l'article 10.

Court of the European Coal and Steel Community, Rules :

Article 33, para. 2

See p. 171 *supra*.

k. Separation of claims

Franco-German Mixed Arbitral Tribunal, Rules :

Article 16

Si le demandeur a réuni indûment dans la même cause plusieurs défendeurs ou différents objets, la division de cause peut être demandée par chaque défendeur.

Cette demande est déposée au secrétariat dans le délai fixé pour la réponse. Le président fixe un délai équitable au demandeur pour se déterminer.

Un nouveau délai de deux mois dès la décision du tribunal sur la division de cause est accordé au défendeur pour déposer la réponse (art. 14).²⁰

Belgo-German Mixed Arbitral Tribunal, Rules :

Article 44

Le Tribunal a toujours le droit d'ordonner la jonction ou la disjonction des causes, soit d'office, soit sur la demande d'une partie ou d'un agent.

Avant de statuer, le Tribunal fixe aux parties un délai pour s'expliquer.

Après clôture de l'incident, il pourra prolonger le délai au cours duquel l'incident s'est produit.

[Cf. General Claims Commission, United States and Panama, Rules, art. 19; United States-Mexican General Claims Commission, Rules, rule IV, para. 7 (p. 172 *supra*); and French-Mexican Claims Commission, Rules, art. 20.]

l. Consolidation of claims

Belgo-German Mixed Arbitral Tribunal, Rules :

Article 29

Les demandes reconventionnelles ne sont pas admises. Toute demande du défendeur contre le demandeur doit être formée par une requête introductive d'instance.

Le Tribunal pourra ordonner que les causes soient jointes ou qu'elles soient plaidées dans la même audience.

Article 44

See p. 180 *supra*.

French-Mexican Claims Commission, Rules :

Article 13

Lorsque plusieurs réclamations seront fondées sur un même ensemble de faits, elles pourront, toutes ou quelques-unes d'entre elles, faire l'objet d'un seul mémoire.

[Cf. Arbitral Tribunal, United States and Great Britain, Rules, rule 14.]

²⁰ See p. 175 *supra*.

m. Closure

Permanent Court of Arbitration, Hague Convention 1907 :

Article 65

Unless special circumstances arise, the tribunal does not meet until the pleadings are closed.

Article 67

See p. 159 *supra*.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 6, para. 2

If no reply is filed the written proceedings shall be deemed to be closed at the expiry of the period of four months aforesaid.²¹

Article 7, para. 2

If a reply is filed the written proceedings shall be deemed to be closed at the expiry of the period of five months aforesaid.²²

International Court of Justice, Rules :

Article 45

Upon the closure of the written proceedings, the case is ready for hearing.

Article 48

See p. 202 *infra*.

Section 5. Preliminary hearing

Franco-German Mixed Arbitral Tribunal, Rules :

Article 37

Après le dépôt de la réponse ou de la duplique, ou à l'expiration du délai fixé pour ce dépôt, le président peut assigner les parties à son audience pour procéder à l'épuration des faits et à l'indication des moyens de preuve.

Le secrétariat en avise les agents.

Article 38

Les parties ou leurs mandataires comparissant, le président les invite à s'expliquer verbalement sur les faits allégués dans la requête et la réponse (éventuellement dans la réplique et la duplique). Il constate l'accord sur chacun des faits allégués.

Article 39

Le secrétaire inscrit au procès-verbal de l'audience :

1. Les faits articulés en procédure ou à l'audience sur lesquels les parties sont d'accord.

2. Les faits sur lesquels les parties sont en désaccord.

Les faits articulés en procédure peuvent être indiqués simplement par leur numéro d'ordre.

²¹ I.e., four months from the date of the signature of the Agreement.

²² I.e., five months from the date of the signature of the Agreement.

Article 40

Si le défendeur n'a pas déposé de réponse (éventuellement de duplique), il doit se déterminer à l'audience sur les allégués de la requête (éventuellement de la réplique). Il doit, en outre, déposer ses conclusions qui, dans ce cas, ne peuvent pas être reconventionnelles.

Article 41

Si à l'audience du président, une partie, en alléguant un fait nouveau ou en produisant un document, rend nécessaires des recherches, le président peut accorder un délai. Les frais de ce renvoi sont mis à la charge de la partie qui l'a occasionné par une négligence.

Article 42

L'épuration des faits terminés, le demandeur, puis le défendeur, indiquent leurs moyens de preuve pour chacun des allégués sur lesquels ils sont en désaccord.

Il en est fait inscription par le secrétaire au procès-verbal qui est lu avant la clôture de l'audience préliminaire.

Article 43

Autant que possible, les parties produisent immédiatement les actes ou documents annoncés, en les accompagnant d'un bordereau transcrit au procès-verbal.

Anglo-Austrian Mixed Arbitral Tribunal, Rules :

Article 59

After the delivery of a Replication to the Answer or a notice that the Claimant does not intend to deliver one, or the expiration of the period allowed for its delivery, the Tribunal will give notice to the parties and the Government Agents of the time and place of the Preliminary Hearing of the cause.

Article 60

At this hearing the Tribunal will as far as practicable give all directions which may appear to be necessary for the further progress and final determination of all the questions which are in dispute between the parties and may make any order which the Tribunal thinks calculated to promote a speedy and just decision of the cause.

Article 61

In particular, the Tribunal will, if and so far as may appear necessary, give directions as to :

The addition, substitution, or striking out, of parties.

The division of the cause.

The consolidation of the cause with any other cause.

The discontinuance of the Claim in whole or in part against all or any of the Defendants.

The staying of the proceedings in, or dismissal of the Claim on the ground that it is frivolous or vexatious.

Amendment of any pleading or further particulars of any allegations therein.

Additions to the Annexes.

Admissions by any party of documents or facts.

The delivery by either party of written questions to the other for his examination upon any matter in question in the cause and the answer thereof on oath or otherwise.

The discovery on oath or otherwise of the documents which are or have been in the possession or power of a party relating to any matter or question in the cause.

The production and inspection by the parties of documents or other things before, or at, the Trial, and the making of copies of, or extracts from, any documents.

The taking of any account, the mode in which it is to be taken or vouched, and the place where vouchers are to be produced.

The making of reports by experts or others agreed upon by the parties or selected by the Tribunal.

The taking of evidence before the Trial and the conditions upon which the same may be read at the Trial.

The inspection by the Tribunal itself, where it is deemed fitting and necessary, of any premises, locality or object.

The method of proof of any matter in dispute and whether oral evidence is to be heard at the Trial.

The summoning of witnesses and provision for their expenses.

The presentation of arguments in writing, if any.

Any matters preliminary or incidental to the Trial.

The place and time of Trial.

The preservation or interim custody of the subject-matter of the litigation upon such terms and subject to such conditions as the Tribunal thinks just.

Article 62

It will be the duty of each party to ask at the Preliminary Hearing for any directions or order which may [be] necessary or expedient before the Trial so far as the necessity or expediency of the same is then apparent or may reasonably be foreseen.

Article 63

By the consent of the parties, and subject to the approval of the Tribunal, the Preliminary Hearing may be treated for all purposes as the Trial of the cause and judgment may be given accordingly.

Article 64

If before the Preliminary Hearing the parties concur in a written request to the Tribunal for certain specified directions as to the Trial and that the Preliminary Hearing may be dispensed with, the Tribunal will give such directions or make such other order as it deems necessary and dispense with the Preliminary Hearing accordingly.

The Tribunal may also in any case in which it appears to be expedient give any necessary directions as to the Trial without any Preliminary Hearing and dispense with such Hearing accordingly.

[Cf. Anglo-Bulgarian Mixed Arbitral Tribunal, Rules, art. 59-64; and Anglo-Hungarian Mixed Arbitral Tribunal, Rules, art. 59-64.]

Tribunal, United States and Great Britain (Trail Smelter Case), Convention :

Article VII

After the delivery of the record to the members of the Tribunal in accordance with Article VI²³, the Tribunal shall convene at a time and place to be agreed upon by the two Governments for the purpose of deciding upon such further procedure as it may be deemed necessary to take. In determining upon such further procedure and arranging subsequent meetings, the Tribunal will consider the individual or joint requests of the Agents of the two Governments.

Section 6. Investigation of case

Special Tribunal, Guatemala and Honduras (Honduras Borders Case), Treaty :

Article XIII

The High Contracting Parties authorize the Tribunal to appoint commissions of enquiry, to employ the services of experts and to use any other means of information it may deem necessary to elucidate the facts . . .

Tribunal, United States and Great Britain (Trail Smelter Case), Convention :

Article VIII

. . . The Tribunal shall have authority to make such investigations as it may deem necessary and expedient, consistent with other provisions of this convention.

Article X, para. 2

Investigators, whether appointed by or on behalf of the Governments, either jointly or severally, or the Tribunal, shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the properties upon which damage is claimed to have occurred or to be occurring, and their reports may, either jointly or severally, be submitted to and received by the Tribunal for the purpose of enabling the Tribunal to decide upon any of the Questions.

International Court of Justice, Statute :

Article 50

The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

²³ See p. 164 *supra*.

Article 57

1. If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after duly hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, and stating the number and mode of appointment of the persons to hold the enquiry or of the experts and the procedure to be followed.

2. Every report or record of an enquiry and every expert opinion shall be communicated to the parties.

...

Court of the European Coal and Steel Community, Rules :

Article 34

Après le dépôt de la duplique prévue à l'article 32, paragraphe 1,²⁴ du présent règlement ou après l'expiration du délai prévu à l'article 32, paragraphe 2,²⁵ pour le dépôt de cette duplique, la procédure écrite est terminée et le dossier est transmis par le greffier au président qui désigne le juge rapporteur et fixe la date à laquelle celui-ci établira le rapport préalable visé à l'alinéa suivant.

Le juge rapporteur, sans faire rapport sur le fond, établit un rapport préalable sur la question de savoir si l'affaire a ou n'a pas besoin d'être instruite.

Dans le premier cas, le juge rapporteur transmet le dossier au président de la Chambre²⁶ qui fixe la date à laquelle commence l'instruction.

Dans le second cas, le juge rapporteur transmet le dossier, avec son rapport préalable, au président de la Cour qui fixe la date à laquelle la Cour, l'avocat général entendu, décidera soit d'ouvrir, sans instruction de l'affaire, la procédure orale, soit de la renvoyer, aux fins d'instruction, à la Chambre dont fait partie le juge rapporteur.

Article 35

1. Sur le rapport du juge rapporteur, l'avocat général entendu, la Chambre décide des mesures d'instruction qu'elle juge nécessaires.

2. Sans préjudice des dispositions de l'article 24 du Statut,²⁷ la Chambre peut d'office et à tout moment ordonner que les parties fournissent des renseignements; elle peut même ordonner la comparution personnelle des parties.

En cas de refus, la Chambre en prend acte et y donne la suite qu'elle estime justifiée.

3. La preuve contraire et l'ampliation des offres de preuve restent réservées.

²⁴ See p. 165 *supra*.

²⁵ See p. 165 *supra*.

²⁶ Cf. art. 21, para. 1 : "La Cour, par application de l'article 18 du Statut, constitue en son sein deux Chambres de trois juges, chargées de procéder à l'instruction des affaires qui leur sont dévolues."

²⁷ See p. 225 *infra*.

Article 36

La Chambre peut, soit à la demande des parties, soit d'office, délivrer des commissions rogatoires pour l'audition de témoins ou d'experts, conformément aux dispositions prévues au règlement additionnel de la Cour.

Article 37

1. La Chambre ordonne les mesures qu'elle juge convenir par voie d'ordonnance qui n'est pas motivée mais qui articule les faits à prouver.
2. Les ordonnances des Chambres sont prononcées en audience publique, les parties convoquées.
3. Ces ordonnances sont signifiées aux parties par le greffier.

Article 38

La Chambre procède aux mesures d'instruction qu'elle ordonne ou, sauf opposition d'une des parties, en charge le juge rapporteur.

Article 39

See p. 144 *supra*.

Article 40

La Chambre peut subordonner la citation des témoins et experts produits par les parties, au dépôt à la caisse de la Cour d'une provision garantissant la couverture des frais et honoraires taxés; elle en fixe le montant.

Quant aux témoins ou experts cités d'office, la caisse de la Cour avance les fonds nécessaires.

Article 41

1. Après vérification de l'identité des témoins et experts, le président de la Chambre ou le juge rapporteur les informe qu'ils auront à certifier sous serment leurs déclarations.

2. Après sa déposition devant la Chambre ou le juge rapporteur, chaque témoin prête serment selon la formule suivante :

« Je jure d'avoir dit la vérité, toute la vérité, rien que la vérité ».

Le serment peut être prêté suivant les modalités prévues par la législation nationale du témoin.

3. Le greffier dresse procès-verbal de chaque déposition des témoins; après lecture, ce procès-verbal est signé par le déposant, le président de la Chambre et le greffier. Il constitue un acte authentique.

4. Chaque expert prête, avant ou après sa déposition, le serment suivant :

« Je jure que mon exposé correspond à ma conviction sincère ».

Le serment peut être prêté suivant les modalités prévues par la législation nationale de l'expert.

Les experts peuvent être dispensés du serment, avec le consentement des parties.

5. Si l'une des parties récusé un témoin ou un expert pour incapacité, indignité ou toute autre cause, ou si un témoin ou un expert refuse de déposer, la Chambre statue.

6. Une partie peut renoncer à l'audition d'un témoin ou expert cité à sa requête.

Toutefois, la Chambre peut ordonner son audition, soit d'office, soit à la demande de l'avocat général ou de la partie adverse.

7. La Chambre ou le juge rapporteur prend, à l'égard des témoins défaillants les mesures dévolues à sa compétence par le règlement additionnel prévu à l'article 28, cinquième alinéa du Statut.²⁸

Article 42

Les témoins et experts peuvent être interrogés par les agents ou les avocats des parties sur autorisation du président de la Chambre ou du juge rapporteur.

Article 43

1. Il est dressé de chaque audience de la Chambre, sous la responsabilité du greffier, un procès-verbal qui est signé par le président de la Chambre et par le greffier. Ce procès-verbal constitue un acte authentique.

2. Les parties et les avocats généraux peuvent prendre connaissance au greffe de tout procès-verbal ou rapport et en obtenir copie.

Article 45

1. Lorsque l'instruction est terminée, la Chambre fixe un nouveau délai aux parties pour la présentation de leurs conclusions écrites définitives.

2. A l'expiration de ce délai, le dossier est transmis à l'avocat général, puis au Président de la Cour qui fixe l'audience où se déroulera la procédure orale devant la Cour.

Article 51, para. 1

La Cour peut, à tout moment, soit ordonner le renouvellement et l'ampliation devant elle-même de tout acte d'instruction accompli par la Chambre, soit charger celle-ci d'y procéder.

Section 7. Oral proceedings

a. Case ready for hearing, briefs, order of hearings

Arbitral Tribunal, Chile and France, Rules :

Article 12

Dès que la dernière notification prévue par l'article 10²⁹ aura été faite ou que les enquêtes seront terminées, soit qu'on y ait procédé ou que les parties intéressées aient négligé de le faire dans les délais fixés, les secrétaires inscriront la réclamation au rôle destiné à recevoir les affaires qui sont en état d'être portées devant le tribunal arbitral.

Le tribunal fixera l'audience dans laquelle les parties seront entendues ...

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 34

The order in which claims shall come on for hearing before the Tribunal shall be arranged between the Agents.

²⁸ Art. 28, para. 5 of the Code : "The Court shall have, with respect to defaulting witnesses, the powers which are generally recognized in this regard to courts and tribunals, under the conditions fixed by rules established by the Court and submitted to the approval of the Council."

²⁹ I. e., the last notification concerning the pleadings.

Arbitral Commission, United States and Peru (Landreau Claim),
Protocol :

Article X, para. 1

See p. 160 *supra*.

Article X, para. 2

The case shall then be ready for consideration by the Commission which shall hear arguments by the Agents of the respective Governments . . .

United States-Mexican General Claims Commission, Rules :

Rule X, para. 3

When a Case is Ready for Hearing.

Upon the listing of cases as provided in section 2 hereof, the respondent Government shall have twenty (20) days in which to file a brief, or reply brief, as the case may be. The claimant Government shall have ten (10) days from the filing of such brief or reply brief in which to file a counter-brief with the Joint Secretaries. Upon the filing of the counter-brief, or at the expiration of the time for filing that brief or any earlier brief, if such earlier brief is not filed on the due date, the case shall be ready for hearing.

Rule X, para. 4

Order of Hearings.

The order in which cases shall come up for hearing shall be determined by their position in numerical sequence on the trial calendar, unless the Agents by stipulation made before or during any hearing and confirmed by the Commission, change the order. The Joint Secretaries shall make the necessary entries, recording any change in the numerical order.

In the event that there are no cases ready for hearing on the trial calendar, cases may be listed on the calendar by order of the Commission. Such action may be taken only after the Commission has consulted the Agents with respect to the cases which may be so listed on the calendar and with respect to the procedure to be followed in trying them. An order by the Commission listing cases may be made not less than twenty (20) days (1) after the expiration of the time within which an Answer may be filed or (2) in cases where an Answer shall be filed then after the filing of a Reply or the expiration of the time within which a Reply may be filed.

Arbitral Tribunal, United States and Egypt (Salem Case), Agreement :

Article 5, para 1.

The two Governments shall have the right to submit to the Tribunal both orally and in writing such arguments as they may desire but briefs of all written arguments shall be filed with the Tribunal and with the agent of the other Government not less than ten days before the time set for oral argument.

General Claims Commission, United States and Panama, Rules :

Article 29

The order in which cases shall come on for argument before the Commission shall be that in which they are matured by the completion of the pleadings provided for in these rules unless, for good cause shown, the Commission shall order otherwise.

International Court of Justice, Rules :

Article 45

See p. 181 *supra*.

Article 46

1. Subject to the priority provided for by Article 61 of these Rules,³⁰ cases submitted to the Court will be taken in the order in which they become ready for hearing. When several cases are ready for hearing, the order in which they will be taken is determined by the position which they occupy in the General List.

2. Nevertheless, the Court may, in special circumstances, decide to take a case in priority to other cases which are ready for hearing and which precede it in the General List.

3. If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing and which follow it in the General List, the President may grant such a postponement; if the parties are not in agreement, the President shall decide whether or not to submit the question to the Court.

French-Mexican Claims Commission, Rules :

Article 36

La Commission fixera l'ordre dans lequel les affaires seront portées devant elle, soit en tenant compte des accords intervenus entre les Agents, soit en décidant elle-même de son propre chef.

Article 37

Lorsque l'Agent français sera prêt à soumettre une affaire à la Commission, il le notifiera aux Secrétaires; il pourra en même temps déposer des conclusions accompagnées des documents qu'il désire produire en plus de ceux qu'il aura déjà remis. Dans les vingt jours qui suivront le dépôt des conclusions, l'Agent mexicain pourra, de son côté, déposer ses conclusions accompagnées des documents qu'il désire produire, en plus de ceux qu'il aura déjà remis. Dans les dix jours, l'Agent français pourra répliquer par de nouvelles conclusions, avec preuves supplémentaires à l'appui. L'Agent mexicain pourra, dans les cinq jours, répondre sur tous les faits nouveaux contenus dans les conclusions de réplique.

Court of the European Coal and Steel Community, Rules :

Article 46

1. Sous réserve de la priorité des décisions prévue à l'article 66 du présent règlement,³¹ la Cour connaît des affaires dont elle est saisie dans l'ordre selon lequel leur instruction est terminée. Entre plusieurs affaires dont l'instruction est simultanément terminée, l'ordre est déterminé par le rang qu'elles occupent au registre.

2. Toutefois, la Cour peut, en raison de circonstances particulières, décider de traiter une affaire par priorité.

³⁰ Art. 61, para. 2 : see p. 235 *infra*.

³¹ I. e., decision in Summary Procedure.

3. Si les parties à une affaire dont l'instruction est terminée demandent, d'un commun accord, le renvoi de cette affaire à la suite d'autres affaires, le Président peut accorder ce renvoi. A défaut d'accord entre les parties, le Président décide s'il y a lieu de consulter la Cour.

b. Date and place

Franco-German Mixed Arbitral Tribunal, Rules :

Article 44

Dès que la procédure écrite est terminée, le président fixe le jour et le lieu de l'audience du tribunal.

Article 45

Le secrétariat avise les agents et parties de la décision du président ...

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 7

See p. 162 *supra*.

Arbitrator, France and Great Britain (Chevreau Case), *Compromis* :

Article V

L'arbitre tiendra une session à une époque et à un lieu décidés d'accord entre les deux Parties, en vue d'entendre tous témoignages et arguments présentés en faveur de l'une ou l'autre partie et d'examiner les plaidoiries écrites . . .

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 8

1. If the agent of either Government shall within one month of the close of the written proceedings make an application to the arbitrator to this effect the arbitrator shall appoint a date and place for the hearing of oral arguments or the submission of the oral evidence of witnesses. Copies of any application by either agent for an oral hearing shall be transmitted within the same period to the other agent.

2. Without prejudice to the powers of the arbitrator under Article 13,³² unless the agents of both Governments express their consent to the contrary, the hearing shall take place not later than two months from the date of the close of the written proceedings and shall be held in Belgium.

Arbitrator, Sweden and United States (*Kronprins Gustaf Adolf Case*), Special Agreement :

Article V

Within thirty days from the delivery of the record to the Arbitrator or Arbitrators in accordance with Article IV,³³ the Tribunal shall convene at Washington for the purpose of hearing oral arguments by Agents or Counsel, or both, for each Government.

³² Art. 13, para. 1 : "The arbitrator shall have power, if he deems necessary, to extend any of the time-limits laid down in the preceding articles."

³³ See p. 164 *supra*, note at Tribunal, United States and Great Britain (Trail Smelter Case), Convention, art. VI.

Arbitrator, Finland and Great Britain (Finnish Shipowners Case), Agreement :

Article 5

Within one month from the date of the expiry of the period for the delivery of counter-memorials either Government may notify the Arbitrator of its desire to submit oral arguments. A copy of any such notification shall be sent simultaneously to the other Government. Without prejudice to the provisions of Article 7,³⁴ if no demand for an oral hearing is made, the pleadings shall be deemed to be closed at the expiry of the said period of one month.

Article 6

If a demand for oral hearing is made, the date of the hearing shall be fixed by the Arbitrator in consultation with the two Governments. The hearing shall take place in London and the pleadings shall be deemed to be closed at the end of the oral hearing.

Arbitrator, Belgium and France (*Différend concernant l'Accord Tardieu-Jaspar*), Arrangement :

Article 4

Lorsque la procédure écrite sera close, M. fixera, dans un délai qui ne pourra être inférieur à un mois et supérieur à deux mois, la date à laquelle commenceront les débats oraux et l'endroit où ils auront lieu. Au cours de ces débats les parties pourront déposer des conclusions écrites.

International Court of Justice, Rules :

Article 47, para. 1

When a case is ready for hearing, the date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting.

Court of the European Coal and Steel Community, Rules :

Article 45, para. 2

See p. 187 *supra*.

c. Postponement

International Court of Justice, Rules :

Article 47, para. 2

If occasion should arise, the Court or the President, if the Court is not sitting, may decide that the commencement or continuance of the hearings shall be postponed.

d. Consultation of file

Franco-German Mixed Arbitral Tribunal, Rules :

Article 44

See p. 190 *supra*.

³⁴ Art. 7 : see p. 225 *infra*.

Article 45

Le secrétariat avise les agents et parties de la décision du président. Il prévient les parties que le dossier peut être consulté par elles au secrétariat pendant quinze jours. Le dossier est mis ensuite à la disposition des agents des deux gouvernements au siège du tribunal, respectivement pendant quinze jours, en commençant par l'agent du pays du défendeur. Il est visé par ces agents.

e. Language, translation

Arbitrator, Great Britain and Spain (British Claims in Spanish Morocco), Agreement :

Article 5, para. 1

See p. 166 *supra*.

Arbitrator, Germany and *Commissaire aux revenus gagés, Compromis :*

Article 6

... Les débats oraux pourront, le cas échéant, avoir lieu en français, en anglais ou en allemand, sous réserve du droit, pour chacune des parties et pour l'arbitre, d'en demander une traduction.

Arbitrator, France and Great Britain (Chevreau Case), *Compromis :*

Article V

... Les explications orales en faveur de chaque partie seront données dans le langage de cette partie.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 2, para 2

The oral proceedings may be conducted in English, Portuguese or French, interpreters being employed if necessary.

Arbitral Tribunal, United States and Egypt (Salem Case), Agreement :

Article 8

... The oral arguments before the arbitral commission may be made in either English or French but a translation thereof shall be submitted to the Tribunal and to the agent of the other Government at the end of each argument.

International Court of Justice, Rules :

Article 58

1. In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same rule shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.

2. Whenever, in accordance with Article 39, paragraph 3, of the Statute,³⁵ a language other than French or English is used, the necessary arrangements for translation into one of the two official languages shall be made by the party concerned: the evidence of witnesses and the statements of experts shall, however, be translated under the supervision of the Court. In the case of witnesses or experts who appear at the instance of the Court, arrangements for translation shall be made by the Registry.

3. The persons making the translations referred to in the preceding paragraph shall make the following declaration in Court:

"I solemnly declare upon my honour and conscience that my translation will be a complete and faithful rendering of what I am called upon to translate."

Court of the European Coal and Steel Community, Rules:

Article 28, para. 1

See p. 168 *supra*

Article 28, para. 2

La Cour peut autoriser d'office l'emploi d'une autre langue officielle que la langue de procédure pour l'audition des témoins ou experts.

Article 28, para. 3

Cette faculté est attribuée également au Président pour la direction des débats, aux juges et aux avocats généraux lorsqu'ils posent des questions et à ces derniers pour leurs conclusions.

Article 28, para. 4

Lorsque les témoins ou experts déclarent qu'ils ne savent s'exprimer convenablement dans une des langues officielles, la Cour les autorise à formuler leurs déclarations dans une autre langue; dans ce cas, seule la traduction dans la langue de procédure fait foi.

Article 28, para. 5

En cas de doute, le texte rédigé dans la langue de procédure, ou le cas échéant, dans l'une des autres langues officielles autorisées par la Cour en vertu du paragraphe 2 fait foi.

f. Counsel

Arbitral Tribunal, Chile and France, Convention:

Article 4

See p. 155 *supra*.

Permanent Court of Arbitration, Hague Convention 1907:

Article 62

See p. 155 *supra*.

Franco-German Mixed Arbitral Tribunal, Rules:

Articles 83 and 84

See p. 155 *supra*.

³⁵ See p. 167, footnote 17, *supra*.

Arbitrator, Great Britain and Spain (British Claims in Spanish Morocco), Agreement :

Article 4

See p. 155 *supra*.

General Claims Commission, United States and Panama, Convention :

Article III, para. 2

See p. 156 *supra*.

Idem, Rules :

Article 30

The argument of the cases before the Commission shall be made by the Agent or such Counsel as the respective Government may designate for that purpose, who shall be allowed to make such oral arguments as are deemed expedient, but only on the issues developed by the written pleadings.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 8, para. 3

The agent of either Government may, if he so desires, be represented by counsel at the oral hearing.

Arbitrator, Sweden and United States (*Kronprins Gustaf Adolf Case*), Special Agreement :

Article V

See p. 190 *supra*.

International Court of Justice, Statute :

Article 42

See p. 156 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 5

See p. 157 *supra*.

Court of the European Coal and Steel Community, Code :

Article 20

See p. 157 *supra*.

g. Arguments

Permanent Court of Arbitration, Hague Convention 1907 :

Article 70

The agents and the counsel of the parties are authorized to present orally to the tribunal all the arguments they may consider expedient in defence of their case.

Article 71

They are entitled to raise objections and points. The decisions of the tribunal on these points are final and cannot form the subject of any subsequent discussion.

Article 72

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points.

Neither the questions put, nor the remarks made by members of the tribunal in the course of the discussions, can be regarded as an expression of opinion by the tribunal in general or by its members in particular.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 37

Where, under the terms of submission or by agreement between the Agents, any question is to be dealt with at the hearing and decided as a preliminary question the arguments of Counsel at the hearing shall be addressed to that question; but they shall be entitled to enter into the facts of the case as far as they may deem necessary.

Rule 38

If the decision of the Tribunal upon such preliminary question does not dispose of the claim, a second hearing shall take place for its further argument.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 47

Au jour fixé, la cause étant introduite, la parole est donnée aux conseils des parties.

Exceptionnellement, le tribunal peut autoriser une partie à présenter elle-même ses observations.

Les agents des gouvernements intéressés présentent leurs observations et déposent leurs conclusions.

Le tribunal peut autoriser les parties à répliquer. Les agents ont toujours la parole les derniers.

Article 48

Le tribunal peut écarter du débat tous actes et documents qui n'auraient pas été produits à l'instruction écrite.

Article 49

Les débats sont dirigés par le président qui assure la police de l'audience et, en cas d'infraction, en dresse procès-verbal.

Les secrétaires tiennent le procès-verbal de l'audience.

[Cf. Court of the European Coal and Steel Community, Rules, art. 47.]

Article 50

Après les plaidoiries, les débats sont déclarés clos. Il est donné lecture du procès-verbal de l'audience. Celui-ci est signé par le président et les secrétaires.

Avant la mise en délibéré, chaque partie indique le montant de ses frais et débours.

Mixed Claims Commission, United States and Germany, Rules :

Rule VI (c)

When a case comes on for submission in pursuance of orders entered from time to time by the Commission, it may, in its discretion, hear oral arguments by the American and German Agents or their respective counsel, limited as to time as the Commission may direct. The American Agent or his counsel shall have the right to open each case and the German Agent or his counsel may reply, in which event further argument may in the discretion of the Commission be heard.

French-Mexican Claims Commission, Rules :

Article 38

La Commission entendra les Agents ou leurs avocats respectifs sur les affaires qui lui seront soumises; mais de nouvelles preuves pourront être produites au cours des audiences, et à dater de leur transmission, la partie adverse aura un délai de 10 jours pour présenter les conclusions qui conviendraient à ses droits. L'Agent de la République française ou son avocat ouvrira la discussion et l'Agent mexicain ou son avocat pourra répondre; il appartiendra à la Commission d'apprécier s'il y a lieu de poursuivre les débats.

Article 40

Les Agents pourront renoncer à assister aux audiences.

United States-Mexican General Claims Commission, Rules :

Rule X, para. 5

Conduct of Hearings.

When a case comes on for hearing before the Commission, the Agents or counsel shall be heard on either side. The Agent or counsel of the claimant Government shall open the case, and the Agent or counsel of the respondent Government may reply. The right to close the case rests with the claimant Government. The time allowed for oral argument shall be fixed by the Commission.

[Cf. Arbitral Tribunal, United States and Great Britain, Rules, rule 35.]

Arbitrator, United States and Guatemala (Shufeldt Case), Exchange of Notes :

Article 7

See p. 162 *supra*.

Arbitral Tribunal, United States and Egypt (Salem Case), Agreement :

Article 5, para. 1

See p. 188 *supra*.

Article 5, para. 2

Ample time shall be allowed to the representatives of both Governments to make oral arguments of the case before the Tribunal . . .

General Claims Commission, United States and Panama, Rules :

Article 30

See p. 194 *supra*.

Arbitrator, Belgium and France (*Différend concernant l'Accord Tardieu-Jaspar*), *Arrangement* :

Article 4

... Au cours de ces débats les parties pourront déposer des conclusions écrites.

International Court of Justice, Statute :

Article 45

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.

Idem, Rules :

Article 50

The Court shall determine whether the parties should present their arguments before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

Article 51

The order in which the agents, counsel or advocates shall be called upon to speak shall be determined by the Court, unless there is an agreement between the parties on the subject.

Article 52

1. The Court may, during the hearing, put questions to the agents, counsel and advocates, and may ask them for explanations.

2. Each judge has a similar right to put questions, but before exercising it he should make his intention known to the President, who is made responsible by Article 45 of the Statute for the control of the hearing.

3. The agents, counsel and advocates shall be at liberty to answer immediately or at later date.

[Cf. Court of the European Coal and Steel Community, Rules, art. 48.]

Court of the European Coal and Steel Community, Rules :

Article 49

Les parties ne peuvent plaider que par l'organe de leur représentant ou de leur avocat.

h. Evidence

[See section 8, *Evidence*, c, d, and e, p. 209 *et seq.*, *infra*.]

i. Minutes

Franco-German Mixed Arbitral Tribunal, Rules :

Articles 49, para. 2, and 50, para. 1

See p. 195 *supra*.

International Court of Justice, Statute :

Article 47

1. Minutes shall be made at each hearing and signed by the Registrar and the President.

2. These minutes alone shall be authentic.

[Cf. Permanent Court of Arbitration, Hague Convention 1907, art. 66, para. 3; and Court of the European Coal and Steel Community, Rules, art. 53, para. 1.]

Idem, Rules :

Article 59

1. The minutes mentioned in Article 47 of the Statute shall include :
the names of the judges present;
the names of the agents, counsel or advocates present;
the surnames, first names, description and residence of witnesses and experts heard;

a brief record of the evidence produced at the hearing;
declarations made on behalf of the parties;
a brief record of questions put to the parties by the President or by the judges;
any decisions delivered or announced by the Court during the hearing.

2. The minutes of public sittings shall be printed and published.

Article 60, para.1

At each hearing held by the Court, a shorthand note shall be made under the supervision of the Registrar of the oral proceedings, including the evidence taken, and shall be appended to the minutes referred to in Article 59 of the present Rules. This note, unless it is otherwise decided by the Court, shall contain any interpretations from one official language into the other made in Court by the interpreters.

[Cf. Court of the European Coal and Steel Community, Rules, art. 53, para. 2.]

j. Transcripts

International Court of Justice, Rules :

Article 60, para. 3

A transcript of speeches or declarations made by agents, counsel or advocates shall be made available to them for correction or revision, under the supervision of the Court.

Court of the European Coal and Steel Community, Rules :

Article 53, para. 3

Les parties peuvent prendre connaissance au greffe de tout procès-verbal et en obtenir copie.

k. Admission of public

Arbitral Tribunal, Chile and France, Rules :

Article 13

Les agents, ainsi que les secrétaires, rapporteurs et jurisconsultes nommés par les agents en conformité des articles 4 et 5 de la Convention, pourront seuls assister aux audiences du tribunal. Personne ne pourra, en aucun cas, assister aux délibérations du tribunal.

Permanent Court of Arbitration, Hague Convention 1907 :

Article 66, para. 2

They [i.e., the discussions] are only public if it be so decided by the tribunal, with the assent of the parties.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 43

The sessions of the Tribunal for the purpose of hearing the arguments of Counsel or for the delivery of awards shall be open to the public.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 46

L'audience du tribunal est publique. Toutefois, le tribunal peut, d'office ou sur réquisition, ordonner le huis clos.

French-Mexican Claims Commission, Rules :

Article 41

Les personnes étrangères à la Commission ne pourront assister aux audiences qu'avec l'assentiment du Président.

International Court of Justice, Statute :

Article 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

Court of the European Coal and Steel Community, Code :

Article 26

The hearings shall be public, unless the Court, for substantial reasons, shall decide otherwise.

l. Closure

Permanent Court of Arbitration, Hague Convention 1907 :

Article 77

When the agents and counsel of the parties have submitted all the explanations and evidence in support of their case, the president declares the discussion closed.

International Court of Justice, Statute :

Article 54, para. 1

When, subject to the control of the Court, the agents, counsel and advocates have completed their presentation of the case, the President shall declare the hearing closed.

Court of the European Coal and Steel Community, Rules :

Article 50, para. 2

Après la lecture des conclusions de l'avocat général, le Président prononce la clôture de la procédure orale.

Section 8. Evidence

a. General

General Claims Commission, United States and Panama, Rules :

Article 23

The Commission will receive and consider all written statements, documents, affidavits, interrogatories, or other evidence which may be presented to it by either Government within the terms provided in these rules, either in support of or against any claim, and will give such weight thereto as in its judgment such evidence merits. No such statement, documents, or other evidence shall be received or considered by the Commission if presented through any other channel, or in any other manner.

[Cf. United States-Mexican General Claims Commission, Rules, rule VIII, para. 1; and Mixed Claims Commission, United States and Germany, Rules, rule V (b).]

Tribunal, United States and Great Britain (Trail Smelter Case), Convention :

Article VIII

The Tribunal shall hear such representations and shall receive and consider such evidence, oral or documentary, as may be presented by the Governments or by interested parties, and for that purpose shall have power to administer oaths . . .

Article IX

See p. 129 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 14, para. 1

La Commission est, dans tous les cas, libre d'apprécier les preuves présentées par les parties.

b. Documents

(aa) General

French-Mexican Claims Commission, Rules :

Article 25

La Commission examinera les documents qui seront produits par les Agents.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 8

Each Government shall have the right to exhibit all documents pertaining to the subject-matter of the arbitration, and the original documents or copies certified by a notary or public officials, whatever may be their character, and to request the production of such documents by the other party.

Franco-Italian Conciliation Commission, Rules :

Article 14, para. 2

Lorsqu'il est produit une preuve écrite préexistante, celle-ci, en principe, prévaut sur les autres moyens de preuve.

(bb) Submission

Permanent Court of Arbitration, Hague Convention 1907 :

Articles 63, paras. 2-3, 67 and 68

See pp. 158-159 *supra*.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 12

The Memorial shall be accompanied by copies of the documents and other proofs upon which the claimant Government relies.

Rule 16

The Answer shall be accompanied by the documents and proofs upon which the respondent Government relies.

Rule 18

The Reply shall be accompanied by such documents and proofs as may be required for the purposes thereof.

Rule 19

If the respondent Government considers it necessary to file further evidence for the purpose of answering the statements contained in the Reply, such further evidence may be filed without a written pleading, but accompanied by a short explanatory summary.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 6 f)

See p. 172 *supra*.

Article 14

See p. 175 *supra*.

Article 26, para. 2

See p. 176 *supra*.

Article 28

See p. 177 *supra*.

French-Mexican Claims Commission, Rules :

Article 6 (b)

See p. 150 *supra*.

Article 14, para. 3

Le contre-mémoire sera accompagné des documents que l'Agent mexicain jugera utile de produire à l'appui de ses assertions.

Article 15, para. 3

La réplique sera accompagnée des documents que le demandeur jugera utile de produire à l'appel de sa réclamation et qu'il n'aura pas pu remettre en même temps que le mémoire.

Article 16

See p. 160 *supra*.

United States-Mexican General Claims Commission, Rules :

Rule IV, para. 1

See p. 161 *supra*.

Rule IV, para. 8

Each Memorial, Answer and Reply must be accompanied, at the time of filing, by copies of all the proof on which the party presenting it intends to reply. Proof presented at a later date will be rejected by the Commission. The Agents may by stipulation, confirmed by the Commission, agree upon the admission of further evidence at any time after the filing of pleadings.

International Court of Justice, Rules :

Article 43, para. 1

There must be annexed to every Memorial and Counter-Memorial and other pleading, copies of all the relevant documents, a list of which shall be given after the submissions. If, on account of the length of a document, extracts only are attached, the document itself or a complete copy of it must, if possible, unless the document has been published and is available to the public, be communicated to the Registrar for the use of the Court and of the other party.

Article 48

1. After the closure of the written proceedings no further documents may be submitted to the Court by either party except with the consent of the other party or as provided in paragraph 2 of this Article. The party desiring to produce a new document shall file the original or a certified copy thereof in the Registry, which will be responsible for communicating it to the other party and will inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.

2. Should the other party decline to consent to the production of a new document, the Court, after hearing the parties, may either permit or refuse to permit its production. If the Court grants permission, the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.

Franco-Italian Conciliation Commission, Rules :

Article 11

La Commission saisie de la requête, comme ci-dessus :

1. Fixe les délais pour la présentation des mémoires en réponse, des mémoires éventuels en réplique et des documents du Gouvernement défendeur.

2. Fixe le délai pour la présentation des documents dont la production a été réservée.

...

(cc) Obligation to submit³⁶

Arbitrator, Sweden and United States (*Kronprinz Gustaf Adolf Case*),
Special Agreement :

Article VI

When the Agent for either Government has reason to believe that the other Government possesses or could obtain any document or documents which are relevant to the claim but which have not been incorporated in the record, such document or documents shall be submitted to the Tribunal at the request of the Agent for the other Government and shall be available for inspection by the demanding Agent . . .

Mixed Board, United States and Mexico, Convention :

Article IV

All documents which now are in, or hereafter, during the continuance of the commission constituted by this convention, may come into the possession of the Department of State of the United States, in relation to the aforesaid claims, shall be delivered to the board. The Mexican Government shall furnish all such documents and explanations as may be in their possession, for the adjustment of the said claims according to the principles of justice, the law of nations, and the stipulations of the treaty of amity and commerce between the United States and Mexico of the 5th of April 1831; the said documents to be specified when demanded at the instance of the said commissioners.

Permanent Court of Arbitration (The Pious Fund of the Californias Case), Protocol :

Article III

All pleadings, testimony, proofs, arguments of counsel and findings or awards of commissioners or umpire, filed before or arrived at by the Mixed Commission above referred to, are to be placed in evidence before the Court herein before provided for, together with all correspondence between the two countries relating to the subject matter involved in this arbitration; originals or copies thereof duly certified by the Departments of State of the High Contracting Parties being presented to said new tribunal . . .

³⁶ Cf. in this section (*dd*) original and copies, p. 204 *infra*, request by party for discovery of fact or document, p. 224 *infra*, and request by arbitrator, etc., for further evidence, p. 224 *infra*.

(*dd*) Original and copies

Arbitrators, Great Britain and United States (Alabama Claims), Treaty :

Article IV, para. 3

If in the case submitted to the Arbitrators either party shall have specified or alluded to any report or document in its own exclusive possession without annexing a copy, such party shall be bound, if the other party thinks proper to apply for it, to furnish that party with a copy thereof; and either party may call upon the other, through the Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance such reasonable notice as the Arbitrators may require.

Permanent Court of Arbitration (The Pious Fund of the Californias Case), Protocol :

Article III

See p. 203 *supra*.

Article IV

Either party may demand from the other the discovery of any fact or of any document deemed to be or to contain material evidence for the party asking it; the document desired to be described with sufficient accuracy for identification, and the demanded discovery shall be made by delivering a statement of the fact or by depositing a copy of such document (certified by its lawful custodian, if it be a public document, and verified as such by the possessor, if a private one), and the opposite party shall be given the opportunity to examine the original in the City of Washington at the Department of State, or at the office of the Mexican Ambassador, as the case may be. If notice of the desired discovery be given too late to be answered ten days before the tribunal herein provided for shall sit for hearing, then the answer desired thereto shall be filed with or documents produced before the Court herein provided for as speedily as possible.

[Cf. Arbitral Commission, United States and Peru (Landreau Claim), Protocol, art. IX.]

Permanent Court of Arbitration, Hague Convention 1907 :

Article 64

Every document produced by one party must be communicated to the other party in the form of a duly certified copy.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 25

The originals of all documents and other proofs brought forward in support of or in answer to a claim shall, so far as possible, be filed in the Office of the Tribunal, in order that they may be open to the inspection of the members of the Tribunal and of the other party.

Rule 26

Where the originals are not in existence, or can not be traced, copies authenticated in the best available manner shall be filed instead of the originals.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 30

See p. 170 *supra*.

Arbitrator, Great Britain and Costa Rica (Aguilar-Amory and Royal Bank of Canada Claims), Convention :

Article 5

The Costa Rica Government undertake to give without delay or any cost whatever the certifications of documents, laws or acts existing in the Public Offices, which may be requested through the Ministry for Foreign Affairs by the Government of His Britannic Majesty, by the Royal Bank of Canada or by the Central Costa Rica Petroleum Company; and such certifications shall be held as authentic in the arbitration. Those documents which may appear published in "La Gaceta", the Official Journal of the Costa Rica Government, shall be held without question as authentic and admissible.

United States-Mexican General Claims Commission, Rules :

Rule V, para. 2

As to documents and other proof filed in support of or in opposition to claims, and in connection with pleadings herein provided for, only such portions thereof as shall be relied upon need be copied, with such explanatory note as may enable the Commission or Agents to understand them: *Provided*, however, that on the request of the opposing Agent the complete document or a certified copy thereof shall be made available in the office of the Commission. Except it is otherwise stipulated by the Agents and confirmed by the Commission, five (5) copies of all documents and other proof presented in support of the pleadings shall be filed with the Joint Secretaries for the use of the Commission and Agents, subject to the provisions of Rule VIII, section 6.³⁷

Rule VIII, para. 3

When an original paper on file in the archives of the United States or Mexico can not be conveniently withdrawn, duly certified copies, with the English or Spanish translation thereof, if requested, may be received in evidence in lieu thereof.

[Cf. General Claims Commission, United States and Panama, rules, art. 24; French-Mexican Claims Commission, Rules, art. 26; and Mixed Claims Commission, United States and Germany, Rules, rule V (a).]

Rule VIII, para. 4

Where the original of any document or other proof is filed at any Government office on either side, and can not be conveniently withdrawn, and no copy of such document is in the possession of the Agent of the Government desiring to present the same to the Commission in support of the allegations set out in his pleadings, he shall notify the other Agent in writing of his desire to inspect such document. Should such inspection

³⁷ See p. 208 *infra*.

be refused, then the action taken in response to the request to inspect, together with such reasons as may be assigned for the action taken, shall be reported to the Commission, and the Commission will take note thereof.

[Cf. General Claims Commission, United States and Panama, Rules, art. 25; French-Mexican Claims Commission, Rules, art. 27; and Arbitral Tribunal, United States and Great Britain, Rules, rules 27 and 29.]

Rule VIII, para. 5

The right to inspect the original of such document when granted shall extend to the whole of the document of which part only is brought forward in support of or in answer to a claim, but shall not extend to any enclosures therein, or annexes thereto, or minutes, or endorsements thereon, if such enclosures, annexes, minutes or endorsements are not adduced as evidence or specifically referred to in the pleadings.

[Cf. General Claims Commission, United States and Panama, Rules, art. 26; French-Mexican Claims Commission, Rules, art. 28; and Arbitral Tribunal, United States and Great Britain, Rules, rule 30.]

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 8

See p. 201 *supra*.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 11, para. 1

The arbitrator may, if he thinks fit, upon the application of either agent or otherwise, order the production before him of the originals of any documents relied upon by either Government in their arguments.

General Claims Commission, United States and Panama, Rules :

Article 21

See p. 171 *supra*.

International Court of Justice, Rules :

Articles 43, para. 1 and 48, para. 1

See p. 202 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 9

Les documents produits à l'appui de la requête, soit en original, soit en copie certifiée conforme par l'Agent requérant, sont remis sous dossier.

Le dossier est accompagné d'un bordereau signé dudit Agent, établi en 5 exemplaires.

Article 12, para. 3

Les documents annexés³⁸ sont déposés dans les formes fixées à l'article 9.

³⁸ I. e., annexed to counter-memorial and reply.

Article 13

Chacun des Agents des Gouvernements intéressés a la faculté de prendre connaissance au secrétariat de la Commission des documents produits par l'autre partie, et de se faire délivrer, à ses frais, le cas échéant, des extraits et copies certifiés conformes.

Court of the European Coal and Steel Community, Rules :

Article 33, para. 4

La requête et le mémoire en défense, ainsi que les actes de procédure subséquente, doivent contenir en annexe, le cas échéant, copie des pièces ou documents invoqués à l'appui. Un bordereau de ces pièces doit figurer à la suite de chacun de ces actes de procédure,

Article 33, para. 7

Si l'authenticité d'une pièce ou d'un document est contestée, la Cour statue conformément à l'Article 70 du présent règlement.³⁹ La Cour peut, d'office ou à la demande de l'avocat général ou des parties, ordonner telle vérification qu'elle juge utile; elle prescrit les formes et délais régissant ces mesures.

(ee) Language, translations

See pp. 166-68 *supra*.

United States-Mexican General Claims Commission, Rules :

Rule IV, para. 9

Documents or the copies thereof and other proofs submitted in support of or in opposition to any claim may be filed in the language of the party submitting them subject to the further orders of the Commission, but copies of all documents and other proofs so submitted must be filed as hereinafter provided.

(ff) Voluminous documents

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 21

... Where either party desires to make use in its pleadings of any voluminous reports or documents, not contained in any of the publications above named, such reports or documents need not be printed as part of the pleadings, but seven copies thereof shall accompany and be delivered with the pleadings. Of these seven copies, two shall be filed in the Office of the Tribunal, one shall be sent by the Secretaries to each member of the Tribunal, and two to the Agent of the other party. This rule shall not be held to preclude the party from printing in or with his written pleading extracts from such report or document.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 9

See p. 170 *supra*.

³⁹ See p. 236 *infra*.

Article 10

See p. 166 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 33, para. 5

Si, en raison du volume d'une pièce ou d'un document, il n'en est annexé que des extraits, le document entier ou une copie complète doit être déposé au greffe, à moins que le document n'ait été publié.

(*gg*) Published materials

Permanent Court of Arbitration (The Pious Fund of the Californias Case), Protocol :

Article III

... Where printed books are referred to in evidence by either party, the party offering the same shall specify volume, edition and page of the portion desired to be read, and shall furnish the Court in print the extracts relied upon; their accuracy being attested by affidavit. If the original work is not already on file as a portion of the record of the former Mixed Commission, the book itself shall be placed at the disposal of the opposite party in the respective offices of the Secretary of State or of the Mexican Ambassador in Washington, as the case may be, thirty days before the meeting of the tribunal herein provided for.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 21

Either party may make use in its pleadings of any of the "American State Papers", "Foreign Relations of the United States", British "States Papers", British "Blue Books" and British Colonial "Parliamentary Papers", and of any treaties, conventions, statutes, and reports of judicial decisions, which have been published officially either in the United States, or in the British Empire, without filing copies thereof, provided that the party making use of the same shall, if required to do so by the Agent of the other party, supply one copy of such publication or document for the use of the Tribunal and one copy for each Agent...

Rule 28

It shall not be necessary to file copies of any legislative act or judicial decision which has been published officially and of which copies can be obtained by the public.

United States-Mexican General Claims Commission, Rules :

Rule VIII, para. 6

Printed or published copies of any public documents, reports, and evidence taken in connection therewith, and printed or published under or by authority of either Government may be filed with the Commission and referred to from time to time by either Agent in support of or defense to claims without being copied into the record, printed, or otherwise proved, where the portion thereof so relied upon is properly identified in

the pleadings or briefs. Matter so filed and referred to will be given such weight as the Commission may deem proper in the circumstances of each case. Copies of all such printed or published documents, when filed with the Commission, shall also be furnished or made available to the opposing Agent for his use. Official publications of law, statutes and judicial decisions and published works of recognized authority on subjects within the cognizance of the Commission may be referred to without being formally proven.

[Cf. General Claims Commission, United States and Panama, Rules, art. 27.]

c. Witnesses

(ca) General

Permanent Court of Arbitration (The Pious Fund of the Californias Case), Protocol :

Article V

Any oral testimony additional to that in the record of the former arbitration may be taken by either party before any Judge, or Clerk of Court of Record, or any Notary Public, in the manner and with the precautions and conditions prescribed for that purpose in the rules of the Joint Commission of the United States of America, and the Republic of Mexico, as ordered and adopted by that tribunal August 10, 1869, and so far as the same may be applicable. The testimony when reduced to writing, signed by the witness, and authenticated by the officer before whom the same is taken, shall be sealed up, addressed to the court constituted hereby, and deposited so sealed up in the Department of State of the United States, or in the Department of Foreign Relations of Mexico to be delivered to the Court herein provided for when the same shall convene.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 36

There shall be no oral evidence at the hearing of a claim, except by agreement between the Agents or by order of the Tribunal. If oral evidence be given at the hearing on behalf of one party, Counsel, for the other party shall have a right to cross-examine the witness.

General Claims Commission, United States and Panama, Rules :

Article 28

No oral evidence will be heard by the Commission save in exceptional cases for good cause shown, and under such rules as the Commission may prescribe, but if oral evidence be introduced on behalf of one Government, the Agent or Counsel for the opposing Government shall have the right of cross-examination.

[Cf. Mixed Claims Commission United States and Germany, Rules, rule V (c).]

French-Mexican Claims Commission, Rules :

Article 29

Chaque Agent aura le droit, en exécution d'une décision de la Commission, dûment signifiée à la partie adverse, de produire des témoins à la Commission et de les interroger sous serment devant elle; dans ce cas, chaque témoin produit par une des parties pourra être également interrogé par l'Agent de la partie adverse ou par l'avocat de cet Agent.

United States-Mexican General Claims Commission, Rules :

Rule VIII, para. 2

Either Agent shall have the right, after due notice given within the time and in the manner prescribed in these rules, to produce witnesses and examine them under oath or affirmation before the Commission, and in such event any witness introduced on behalf of either Government shall be subject to cross-examination by the other Government.

(bb) Notice, application

Arbitral Tribunal, Chile and France, Rules :

Article 1, para. 2

Quand elle [toute partie réclamante] jugera utile d'administrer la preuve testimoniale, elle devra indiquer dans le mémoire ou dans une pièce annexée, les faits qu'elle se propose d'établir ainsi que les nom, prénoms, profession, nationalité et résidence des témoins. Le tribunal aura toujours le droit d'autoriser, dans le cours de la procédure la preuve de faits nouveaux et l'audition de nouveaux témoins.

Article 11, para. 1

Chaque fois qu'il y aura lieu d'administrer la preuve testimoniale, la partie qui l'offrira devra préciser les faits qu'elle se propose d'établir et indiquer les nom, profession et nationalité des témoins qu'elle veut faire entendre; elle devra toujours renseigner la résidence exacte des témoins.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 51

1. Si le tribunal constate que les parties ne sont pas d'accord sur des faits pertinents, il peut ordonner une enquête.

2. Dans ce cas, le tribunal fixe une date à laquelle cette enquête aura lieu devant lui, ainsi que le délai dans lequel les nom et domicile des témoins devront être indiqués au secrétariat et notifiés à la partie adverse et aux agents.

United States-Mexican General Claims Commission, Rules :

Rule IX, para. 1

Should either Agent desire to take oral testimony before the Commission in any case he shall, within fifteen (15) days from the expiration of the time for filing the reply of the claimant in such case, give notice to that effect by filing such notice in writing with the Joint Secretaries, as in these rules provided, stating the number and the names and addresses of the witnesses

whom he desires to examine and the date on which application will be made to the Commission to fix a time and place to hear such oral testimony. No oral testimony will be heard in any case, except in pursuance of notice given within the time and in the manner herein stated, unless it be allowed by the Commission in its discretion for good cause shown.

[Cf. French-Mexican Claims Commission, Rules, art. 30.]

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 9

If no oral hearing is demanded under the preceding article, the arbitrator may intimate his desire to hear oral evidence and extend the time-limit so as to enable the agent concerned to comply with his intimation by making an application to this effect, but he shall have no power to order the attendance of witnesses.

International Court of Justice, Rules :

Article 49

Without prejudice to the provisions of the Rules concerning the production of documents, each party shall communicate to the Registry, in sufficient time before the commencement of the oral proceedings, information regarding the evidence which it intends to produce or which it intends to request the Court to obtain. This communication shall contain a list of the surnames, first names, descriptions and places of residence of the witnesses and experts whom the party intends to call, with indications in general terms of the point or points to which their evidence will be directed.

Franco-Italian Conciliation Commission, Rules :

Article 8, para. 2, n° 5

See p. 175 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 39

See p. 144 *supra*.

(cc) Request by Arbitrator, etc.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 51

See p. 210 *supra*.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 9

See p. 211 *supra*.

International Court of Justice, Rules :

Article 54

The Court may request the parties to call witnesses or experts, or may call for the production of any other evidence on points of fact in regard

to which the parties are not in agreement. If need be, the Court shall apply the provisions of Article 44 of the Statute.⁴⁰

(dd) Date and place

Franco-German Mixed Arbitral Tribunal, Rules :

Article 51, para. 2

See p. 210 *supra*.

French-Mexican Claims Commission, Rules :

Article 32

Les Agents pourront établir un questionnaire conformément auquel les témoins devront être interrogés par la Commission. Dans ce cas, l'audition aura lieu après la remise de la dernière pièce fondamentale, et la Commission fixera un délai raisonnable pour la comparution du témoin, lequel sera assigné par les soins de l'Agent qui invoque son témoignage.

United States-Mexican General Claims Commission, Rules :

Rule IX, para. 1

See p. 210 *supra*.

(ee) Summons

Franco-German Mixed Arbitral Tribunal, Rules :

Article 52

Les témoins sont cités par l'intermédiaire des agents, conformément à la loi du territoire de leur domicile ou résidence, quinze jours au moins avant leur audition.

French-Mexican Claims Commission, Rules :

Article 32

See p. 212 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 39

See p. 144 *supra*.

(ff) Challenge

Court of the European Coal and Steel Community, Rules :

Article 41, para. 5

See p. 186 *supra*.

⁴⁰ Article 44 of the Statute : "1. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served. 2. The same provision shall apply whenever steps are to be taken to procure evidence on the spot."

(gg) Oar¹: affirmation

Arbitral Tribunal, Chile and France, Rules :

Article 11, para. 4

Le témoin déposera sous serment ou après avoir fait une déclaration solennelle et il devra préalablement déclarer s'il a quelque intérêt dans la réclamation, s'il est parent, créancier ou associé de la partie réclamante ou employé par le Gouvernement chilien, soit actuellement, soit à l'époque où se sont passés les faits donnant lieu à la réclamation . . .

Franco-German Mixed Arbitral Tribunal, Rules :

Article 53

Les commissions rogatoires ayant pour objet l'audition des témoins sont adressées par l'intermédiaire des agents à l'autorité judiciaire compétente du lieu du domicile ou de la résidence du témoin. Dans ce cas, le témoin est entendu et assermenté dans les formes prévues par la loi locale.

Article 55

1. Le président invite les témoins avant ou après leur déposition à prêter le serment de dire toute la vérité et rien que la vérité.

2. Les mineurs de quinze ans ainsi que les parents en ligne ascendante ou descendante et le conjoint, même divorcé, d'une partie ne sont pas assermentés. Dans tous les autres cas, le tribunal décidera si un témoin sera assermenté.

3. Le tribunal peut toujours dispenser du serment lorsque les circonstances lui paraissent l'exiger.

International Court of Justice, Rules :

Article 53, para. 2

Each witness shall make the following declaration before giving his evidence in Court :

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

Franco-Italian Conciliation Commission, Rules :

Article 15

(a) Les témoins, avant de déposer, prêtent serment suivant les formes établies par la loi du lieu.

...

Court of the European Coal and Steel Community, Rules :

Article 41, paras. 1-2

See p. 186 *supra*.

(bb) Language, translation

United States-Mexican General Claims Commission, Rules :

Rule IX, para. 3

A witness may testify either in English or Spanish, or, if necessary, in any other language; but in any case the language used shall be that best adapted to the understanding of the witness. Oral testimony shall be translated under the direction of the Commission into Spanish, English, or both languages.

International Court of Justice, Rules :

Article 58, para. 2

See p. 193 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 28, para. 2

See p. 193 *supra*.

Article 28, para. 4

See p. 193 *supra*.

(ii) Examination

Arbitral Tribunal, Chile and France, Rules :

Article 11, para. 2

Le tribunal décidera dans chaque cas séparé comment se feront les interrogatoires des témoins et, le cas échéant, quels seront les fonctionnaires propres à recevoir les témoignages. Toutefois, chaque fois que les circonstances le permettront, l'interrogatoire des témoins se fera devant le tribunal même.

Article 11, para. 3

Les agents ou leurs délégués pourront interroger et contre-interroger les témoins.

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 36

See p. 209 *supra*.

French-Mexican Claims Commission, Rules :

Article 29

See p. 210 *supra*.

Article 31

La Commission fixera la procédure suivant laquelle aura lieu l'audition des témoins . . .

Article 32

See p. 212 *supra*.

United States-Mexican General Claims Commission, Rules :

Rule VIII, para. 2

See p. 210 *supra*.

Rule IX, para. 2

The examination of witnesses shall be within the control and discretion of the Commission. Any member of the Commission may, in his discretion and in the interest of justice, question any witness at any point in the giving of his testimony . . .

General Claims Commission, United States and Panama, Rules :

Article 28

See p. 209 *supra*.

International Court of Justice, Rules :

Article 53, para. 1

Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges.

Court of the European Coal and Steel Community, Rules :

Article 42

See p. 187 *supra*.

(jj) Report, transcript

Franco-German Mixed Arbitral Tribunal, Rules :

Article 55, para. 4

Le tribunal peut d'office ou sur réquisition ordonner que la déposition d'un témoin soit transcrite au procès-verbal de l'audience et signée par le témoin.

French-Mexican Claims Commission, Rules :

Article 31

. . . Les dépositions seront consignées sur le procès-verbal et il en sera remis copie à chacun des Agents.

United States-Mexican General Claims Commission, Rules :

Rule IX, para. 2

. . . Where oral testimony is taken before the Commission, it shall be reported verbatim in writing by a stenographer appointed by the Commission, or otherwise as it may direct. Such report or a transcript in both English and Spanish shall be made a part of the record and copies in English and Spanish furnished to the respective Agents.

International Court of Justice, Rules :

Article 60, para. 2

A transcript of the evidence of each witness or expert shall be made available to him in order that mistakes may be corrected under the supervision of the Court.

Court of the European Coal and Steel Community, Rules :

Article 41, para. 3

See p. 186 *supra*.

(kk) Expenses

Franco-German Mixed Arbitral Tribunal, Rules :

Article 51

...

3. En même temps,⁴¹ le tribunal fixe aux parties un délai pour déposer au secrétariat la somme des frais présumée nécessaire pour indemniser les témoins dont elles requièrent l'audition.

4. La partie qui n'effectue pas le dépôt dans le délai assigné est déchue de son droit à la preuve par témoins.

Article 54

Les indemnités dues aux témoins sont arrêtées par le tribunal.

International Court of Justice, Rules :

Article 55

Witnesses or experts who appear at the instance of the Court shall be paid out of the funds of the Court.

Court of the European Coal and Steel Community, Rules :

Article 40

See p. 186 *supra*.

(ll) Perjury

Court of the European Coal and Steel Community, Code :

Article 28, para. 4

When it is established that a witness or an expert has concealed or falsified the truth as to the facts on which he has testified or has been examined by the Court, the Court shall be empowered to refer such misfeasance to the Minister of Justice of the State of such witness or expert, for the application of the appropriate sanctions provided by the national law.

(mm) Refusal to testify

Court of the European Coal and Steel Community, Rules :

Article 41, para. 5

See p. 186 *supra*.

(nn) Default

Court of the European Coal and Steel Community, Code :

Article 28, para. 5

See p. 187 footnote 28 *supra*.

⁴¹ See art. 51, para. 1-2, p. 210 *supra*.

Idem, Rules :

Article 41, para. 7

See p. 187 *supra*.

Idem, Additional Rules :

Article 8

Les témoins régulièrement cités conformément aux dispositions de l'article 39 du Règlement de la Cour,⁴² sont tenus de déférer à la citation et de se présenter à l'audience.

Article 9

1. Lorsqu'un témoin dûment cité ne se présente pas devant la Chambre ou lorsque, tout en se présentant à l'audience, il refuse sans motif légitime de déposer ou de prêter serment, la Chambre peut lui appliquer les dispositions concernant les témoins défaillants, prévues en procédure civile par la loi de l'Etat où le témoin a son domicile ou, à défaut de domicile, sa résidence au moment de la citation. Toutefois, la contrainte par corps est exclue.

2. Les dispositions qui précèdent sont appliquées par la Cour lorsque le témoin a été cité à comparaître devant elle. Les mêmes dispositions sont appliquées par le Juge Rapporteur lorsque le témoin a été cité à comparaître devant lui.

3. L'exécution forcée des sanctions ou mesures prononcées par le Juge Rapporteur, la Chambre ou la Cour en vertu du présent article est poursuivie conformément aux dispositions combinées des articles 44 et 92 du Traité.⁴³

(oo) Waiver

Court of the European Coal and Steel Community, Rules :

Article 41, para. 6

See p. 186 *supra*.

(pp) Rogatory letters

Franco-German Mixed Arbitral Tribunal, Rules :

Article 53

See p. 213 *supra*.

⁴² See p. 144 *supra*.

⁴³ Article 44 of the Treaty Instituting the European Coal and Steel Community, signed in Paris on 18 April 1951 : "The judgments of the Court shall be executory on the territory of the member States under the terms of Article 92 below." Article 92 of the same Treaty :

"The decisions of the High Authority imposing financial obligations on enterprises are executory.

"They shall be enforced on the territory of member States through the legal procedures in effect in each of these States, after the writ of execution in use in the State on the territory of which the decision is to be carried out has been placed upon them; this shall be done with no other formality than the certification of the authenticity of such decisions. The execution of these formalities shall be the responsibility of a Minister which each of the governments shall designate for this purpose.

"Enforcement of such decisions can be suspended only by a decision of the Court."

French-Mexican Claims Commission, Rules :

Article 35

Si un témoin ou le demandeur ne peut pas comparaître devant la Commission, il pourra être entendu par l'autorité judiciaire compétente de sa résidence, sur commission rogatoire adressée à cette autorité par la voie des Agents. La déposition sera reçue suivant les formes prescrites par la loi du lieu.

International Court of Justice, Rules :

Article 56

The Court, or the President if the Court is not sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses or experts otherwise than before the Court itself.

Franco-Italian Conciliation Commission, Rules :

Article 14, para. 6

Le Commission si elle l'estime nécessaire peut demander aux Agents des Gouvernements de saisir les autorités qualifiées pour l'exécution de commissions rogatoires. Les autorités consulaires françaises ou italiennes sont convoquées à ces opérations et leurs observations, s'il y a lieu, inscrites au procès-verbal.

Court of the European Coal and Steel community, Rules :

Article 36

See p. 186 *supra*.

Idem, Additional Rules :

Article 10

1. La Cour peut ordonner qu'un témoin ou un expert sera entendu par l'autorité judiciaire de son domicile.

2. Cette ordonnance est adressée, pour exécution, à l'autorité judiciaire compétente, dans les conditions convenues entre la Cour et chaque Etat membre. Les pièces résultant de l'exécution de la commission rogatoire sont adressées à la Cour dans les mêmes conditions.

d. Experts

(aa) General

Arbitrator, Great Britain and Spain (British Claims in Spanish Morocco), Agreement :

Article 4

See p. 155 *supra*.

(bb) Notice, application

International Court of Justice, Rules :

Article 49

See p. 211 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 8, para. 2, n° 5

See p. 175 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 39, para. 2

See p. 144 *supra*.

(cc) Request, nomination by Arbitrator, etc.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 57, para. 1

Le tribunal peut ordonner des expertises par une ou plusieurs personnes qu'il désignera, sauf accord entre les parties.

French-Mexican Claims Commission, Rules :

Article 34

Après la remise de la dernière pièce fondamentale, et en tout état de cause avant la sentence définitive, la Commission pourra décider de prendre l'avis d'un ou de plusieurs experts sur les matières qui exigent des connaissances spéciales, et elle pourra ordonner également des descentes sur les lieux.

Court of Arbitrators, Great Britain and Ethiopia (Maharao of Kutch Case), Agreement :

Article 6

If it is found necessary to make an estimate of the missing goods, the Court of Arbitrators shall have the right to choose experts for the purpose. The estimate made by the majority of the experts shall be accepted. The number of the experts must necessarily be three. They must give their decision within one month after judgment has been given.

International Court of Justice, Rules :

Article 57, para. 1

See p. 185 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 14

...

3. Les expertises faites à la demande des parties peuvent être contrôlées d'office par des techniciens commis à cet effet.

4. La Commission peut décider de se transporter sur les lieux, et faire procéder devant elle à toutes expertises d'office avec le concours de tous techniciens, interprètes ou traducteurs nécessaires.

5. Les Agents des Gouvernements ou leurs suppléants sont invités à assister aux transports et aux expertises d'office, lorsque la Commission décidera de se rendre sur les lieux.

Court of the European Coal and Steel Community, Code :

Article 25

The Court may at any time charge any person, body, office, commission or organ of its own choice with the duty of making a formal inquiry or expert study; to this effect, the Court may draw up a list of persons or organizations qualified to serve as experts.

(dd) Summons

Court of the European Coal and Steel Community, Rules :

Article 39

See p. 144 *supra*.

(ee) Challenge

Court of the European Coal and Steel Community, Rules :

Article 41, para. 5

See p. 186 *supra*.

(ff) Oath, affirmation

Franco-German Arbitral Tribunal, Rules :

Article 57, para. 2

Sur la requête de l'une d'elles,⁴⁴ l'expert est assermenté.

International Court of Justice, Rules :

Article 53, para. 3

Each expert shall make the following declaration before making his statement in Court :

“ I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.”

Court of the European Coal and Steel Community, Rules :

Article 41, paras. 1 and 4

See p. 186 *supra*.

(gg) Language, translation

Franco-German Mixed Arbitral Tribunal, Rules :

Article 59, para. 1

Les rapports d'expertise, rédigés en langue française ou accompagnés d'une traduction française, sont déposés au secrétariat, qui en avise les parties.

⁴⁴ I.e., of either party, see art. 57, para. 1, p. 219 *supra*.

International Court of Justice, Rules :

Article 58, para. 2

See p. 193 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 28, para. 2

See p. 193 *supra*.

Article 28, paras. 4 and 5

See p. 193 *supra*.

(*hb*) Examination

International Court of Justice, Rules :

Article 53, para. 1

See p. 215 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 42

See p. 187 *supra*.

(*ii*) Report, transcript

Franco-German Mixed Arbitral Tribunal, Rules :

Article 59, para. 1

See p. 220 *supra*.

Article 59, para. 2

Celles-ci peuvent en prendre connaissance au secrétariat ou s'en faire délivrer une copie à leurs frais

Article 60

Dans le mois qui suit l'avis donné aux parties du dépôt du rapport d'expertise, celles-ci peuvent requérir un complément d'expertises ou une seconde expertise. Les articles 57 à 58⁴⁵ sont applicables.

International Court of Justice, Rules :

Article 57, para. 2

See p. 185 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 28, para. 5

See p. 193 *supra*.

⁴⁵ Art. 57, para. 1 : see p. 219 *supra*; art. 57, para. 2 : see p. 220 *supra*; art. 58, see p. 222 *infra*.

(jj) Expenses

Franco-German Mixed Arbitral Tribunal, Rules :

Article 58

Le tribunal fixe à la partie instante à la preuve un délai pour déposer au secrétariat la somme des frais présumés de l'expertise.

Si la partie n'effectue pas le dépôt dans le délai fixé, elle est déchue de son droit à l'expertise.

International Court of Justice, Rules :

Article 55

See p. 216 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 40

See p. 186 *supra*.

(kk) Refusal to answer

Court of the European Coal and Steel Community, Rules :

Article 41, para. 5

See p. 186 *supra*.

(ll) Waiver

Court of the European Coal and Steel Community, Rules :

Article 41, para. 6

See p. 186 *supra*.

e. Claimant, interested party

Franco-German Mixed Arbitral Tribunal, Rules :

Article 56

Le tribunal peut exceptionnellement entendre les parties ou leurs représentants légaux comme témoins et les assermenter.

French-Mexican Claims Commission, Rules :

Article 33

Le demandeur pourra, à la requête des Agents ou de l'un d'eux, ou bien d'office, être cité à comparaître devant la Commission; il sera entendu suivant la procédure prévue à l'article précédent.⁴⁶

Article 35

See p. 218 *supra*.

⁴⁶ Art. 32 : see p. 219 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 15, b)

See p. 165 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 35, para. 2

See p. 185 *supra*.

f. International organizations

International Court of Justice, Rules :

Article 57

...

3. At any stage in the proceedings before the termination of the hearing the Court may, either *proprio motu*, or at the request of one of the parties communicated as provided in Article 49⁴⁷ of these Rules, request a public international organization, pursuant to Article 34⁴⁸ of the Statute, to furnish information relevant to a case before it. The Court shall decide whether such information shall be presented to it orally or in writing.

4. When a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings. The Court shall retain the right to require such information to be supplemented either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also to authorize the parties to comment in writing on the information thus furnished.

g. Evidence on the spot

Permanent Court of Arbitration, Hague Convention 1907 :

Article 76

For all notifications which the tribunal has to make in the territory of a third contracting Power, the tribunal shall apply direct to the Government of that Power. The same rule shall apply in the case of steps being taken to procure evidence on the spot.

The requests for this purpose are to be executed in accordance with the means at the disposal of the requested Power under its municipal law. They cannot be rejected unless this Power considers them of a nature to impair its sovereign rights or its safety.

The tribunal will also be always entitled to act through the Power in whose territory it sits.

⁴⁷ See p. 211 *supra*.

⁴⁸ Art. 34, para. 2 : "The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative."

Franco-German Mixed Arbitral Tribunal, Rules :

Article 61

Le tribunal pourra prescrire une descente sur les lieux.

French-Mexican Claims Commission, Rules :

Article 34

See p. 219 *supra*.

Franco-Italian Conciliation Commission, Rules :

Article 14, paras. 4-5

See p. 219 *supra*.

h. Request by Party for discovery of fact or document

Permanent Court of Arbitration (The Pious Fund of the Californias Case), Protocol :

Article IV

See p. 204 *supra*.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 8

See p. 201 *supra*.

i. Request by Arbitrator, etc., for further evidence ⁴⁹

Arbitral Tribunal, Chile and France, Rules :

Article 12, para. 3

Le tribunal, après avoir entendu le plaidoyer des parties, pourra prononcer la sentence s'il juge qu'il n'a pas besoin d'autres éclaircissements que ceux qui ont été présentés; au cas contraire, il pourra ordonner, d'office ou à la demande d'un des agents des deux Gouvernements, qu'il soit procédé à toutes les nouvelles diligences qu'il jugera nécessaires, fixant la forme et le lieu de leur exécution.

Permanent Court of Arbitration, Hague Convention 1907 :

Articles 68 and 69

See p. 159 *supra*.

Arbitral Commission, United States and Peru (Landreau Claim), Protocol :

Article X, para. 2

The case shall then be ready for consideration by the Commission which shall hear arguments by the Agents of the respective Governments, and, in its discretion, may, after convening, call for further documents, evidence

⁴⁹ Cf. also sect. 9, *Closure and Reopening of Proceedings*, p. 225 *et seq.*, *infra*.

or correspondence from either Government; and such further documents, evidence or correspondence, shall if possible be furnished within sixty days from the date of the call. If not so furnished within the time specified, a decision in the case may be given without the use of said documents, evidence or correspondence.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 11, para. 2

The arbitrator may also, if he thinks fit, address a request for further information to either agent and allow a period of fourteen days for the delivery of such information. Either agent complying with any such request shall send a certified copy of the information supplied to the other agent, who shall be allowed fourteen days to transmit observations in writing thereon if he so desires to the arbitrator. Certified copies of any such observations shall be transmitted concurrently to the other agent.

Arbitrator, Finland the Great Britain (Finnish Shipowners Case), Agreement :

Article 7

The Arbitrator shall have power at any time after the expiry of the period for the delivery of counter-memorials to indicate by communications addressed to both parties any points, upon which he desires further information and to make such orders as are necessary with regard to the manner and the time-limits in which the parties may present to the Arbitrator their observations upon any points so indicated by him.

International Court of Justice, Statute :

Article 49

The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

Court of the European Coal and Steel Community, Code :

Article 24

The Court may ask the parties, their representatives or officials and employees, as well as the governments of the member States, to produce all documents and furnish all information, which the Court deems desirable. In case of refusal, the Court shall take judicial notice thereof.

Section 9. Closure and reopening of proceedings

Franco-German Mixed Arbitral Tribunal, Rules :

Article 50, para. 1

See p. 195 *supra*.

Article 98

See p. 258 *infra*.

French-Mexican Claims Commission, Rules :

Article 39

Quand un cas aura été soumis d'accord avec les dispositions précédentes, la procédure sera considérée comme terminée et la Commission déclarera les débats clos. Nonobstant cette décision, la Commission pourra rouvrir les débats et poursuivre l'examen de la cause, en tenant compte de toutes les preuves et documents nouveaux qui auront été produits.

United States-Mexican General Claims Commission, Rules :

Rule X, para. 6

When a case has been heard in pursuance of the foregoing provisions, the proceedings before the Commission shall be deemed closed unless otherwise ordered by the Commission.

Arbitrator, Great Britain and Portugal (Campbell Case), Agreement :

Article 10

Subject to the provisions of Article 11,⁵⁰ the proceedings shall be considered as closed as soon as the oral hearing, if any, is concluded, or, if no oral hearing is demanded, at the expiry of the time within which such oral hearing might have been demanded.

Article 11, para. 3

If a request for further information is made, the close of the proceedings shall be deemed to be the expiry of the above-mentioned periods of fourteen or twenty-eight days (as the case may be) from the date of the request.

Arbitrator, Finland and Great Britain (Finnish Shipowners Case), Agreement :

Articles 5 and 6

See p. 191 *supra*.

Tribunal, United States and Great Britain (Trail Smelter Case), Convention :

Article XI, para. 1

The Tribunal shall report to the Governments its final decisions, together with the reasons on which they are based, as soon as it has reached its conclusions in respect to the Questions, and within a period of three months after the conclusion of proceedings. Proceedings shall be deemed to have been concluded when the Agents of the two Governments jointly inform the Tribunal that they have nothing additional to present. Such period may be extended by agreement of the two Governments.

Court of the European Coal and Steel Community, Rules :

Article 52

La Cour peut ordonner la réouverture des débats.

⁵⁰ Art. 11, para. 1 : see p. 206 *supra*; art. 11, para. 2 : see p. 225 *supra*.

Section 10. Motions to dismiss or reject

Franco-German Mixed Arbitral Tribunal, Rules :

Article 5, paras. 2 and 3

See p. 147 *supra*.

Article 23

L'exception qu'oppose le défendeur pour ne pas entrer en matière sur le fond du procès peut être présentée soit dans une demande exceptionnelle avant toute défense au fond et dans le délai fixé pour le dépôt de la réponse, soit dans la réponse au fond, au choix du défendeur.

S'il y a plusieurs exceptions de cette nature, elles doivent être présentées conjointement.

Article 24

Si l'exception prévue à l'article précédent est présentée dans une demande exceptionnelle, la cause au fond est suspendue et les dispositions de l'article 6⁵¹ sont applicables à cette demande exceptionnelle.

Le tribunal statue, après instruction, sur le mérite de l'exception.

Si celle-ci est écartée, la cause principale est reprise et un délai d'un mois est assigné au défendeur pour déposer sa réponse.

Article 25

Toute autre exception doit être présentée dans la réponse.

French-Mexican Claims Commission, Rules :

Article 18

Lorsque l'Agent mexicain désirera proposer une exception ou une fin de non-recevoir tendant à ce qu'une affaire ne soit pas discutée au fond, il pourra proposer le déclinatoire à cet effet, soit préalablement à toute défense relative au fond et dans le délai fixé pour la remise du contre-mémoire, soit au moment de répondre sur le fond. S'il y a plusieurs exceptions ou fins de non-recevoir de cette nature, elles seront proposées conjointement. Toute autre exception, ou fin de non-recevoir, sera proposée dans le contre-mémoire.

Article 19

Si les exceptions ou fins de non-recevoir, auxquelles se rapporte l'article précédent, sont proposées par voie déclinatoire, la procédure relative au fond sera suspendue. Dans ce cas, il n'y aura pas d'autres pièces fondamentales que le mémoire, le déclinatoire et la réplique à celui-ci. Si le déclinatoire est rejeté, l'Agent mexicain sera tenu de remettre le contre-mémoire dans les trente jours de la décision du rejet.

Article 21

Les conclusions tendant au rejet d'une réclamation pourront être déposées en tout état de cause avant la sentence définitive; elles devront être fondées sur un ou des motifs tirés des actes de procédure relatifs à ladite réclamation.

⁵¹ See pp. 151 and 152 *supra*.

Article 22

Les conclusions tendant au rejet d'une pièce fondamentale pourront être déposées en tout état de cause avant la sentence définitive; elles devront être fondées sur un ou des motifs tirés de ladite pièce fondamentale.

Article 23

En cas d'approbation d'une partie ou de l'ensemble de ces conclusions, la Commission pourra, à sa discrétion, prescrire les modifications nécessaires, afin qu'elle puisse, dans les limites de sa compétence, statuer dûment sur chaque réclamation.

Article 24

Toutes les conclusions seront écrites et exposeront d'une manière concise les points sur lesquels elles se fondent. Elles seront remises aux Secrétaires en la même forme que les pièces fondamentales et seront promptement soumises à l'examen de la Commission.

United States-Mexican General Claims Commission, Rules :

Rule VII, para. 1

See p. 162 *supra*.

Rule VII, para. 2

A motion to reject or strike out any pleading may be made at any time after the filing thereof and before submission of the claim to the Commission for any cause apparent on the face of the pleading.

Rule VII, para. 3

See p. 179 *supra*.

Rule VII, para. 4

All motions shall be in writing and shall set forth concisely the grounds of the motion. They shall be filed with the Joint Secretaries as in the case of original pleadings, and shall be promptly brought on for hearing before the Commission at such time as it may prescribe.

Rule VII, para. 5

See p. 162 *supra*.

Rule VII, para. 6

On and after October 25, 1926, no motion shall be made by one Government to dismiss a claim or to reject or strike out a pleading submitted by the other,

International Court of Justice, Rules :

Article 62

1. A preliminary objection must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading.

2. The preliminary objection shall set out the facts and the law on which the objection is based, the submission and a list of the documents in support; these documents shall be attached; it shall mention any evidence which the party may desire to produce.

3. Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended and the Court,

or the President if the Court is not sitting, shall fix the time-limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

4. Unless otherwise decided by the Court, the further proceedings shall be oral.

5. After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.

[Cf. Court of the European Coal and Steel Community, Rules, art. 69, paras. 2-6.]

Court of the European Coal and Steel Community, Rules :

Article 69, para. 1

La Cour est compétente pour statuer sur toutes les exceptions soulevées par les parties.

Section 11. Counter-claims

Belgo-German Mixed Arbitral Tribunal, Rules :

Article 29

See p. 180 *supra*.

International Court of Justice, Rules :

Article 63

When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject-matter of the application and that it comes within the jurisdiction of the Court. In the event of doubt as to the connection between the question presented by way of counter-claim and the subject-matter of the application the Court shall, after due examination, direct whether or not the question thus presented shall be joined to the original proceedings.

*Section 12. Intervention*⁵²

a. Interest of a legal nature

(aa) Time-limit

International Court of Justice, Rules :

Article 64, para. 1

An application for permission to intervene under the terms of Article 62 of the Statute⁵³ shall be filed in the Registry at latest before the commencement of the oral proceedings.

⁵² See on intervention generally : *Systematic Survey of Treaties for the Pacific Settlement of International Disputes 1928-1948*, Lake Success (1948), pp. 296-297 (para. VI) and p. 298 (para. XII).

⁵³ Art. 62 of the Statute : " 1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request."

Court of the European Coal and Steel Community, Rules :

Article 71, para. 1

Toute requête tendant à une intervention conforme aux dispositions de l'article 34 du Statut⁵⁴ doit être déposée au greffe au plus tard avant la clôture de la procédure écrite.

(bb) Application

Franco-German Mixed Arbitral Tribunal, Rules :

Article 20

Toute personne qui prétend faire valoir un intérêt légitime dans une instance peut intervenir au procès au cours de la procédure en présentant une requête contenant :

- a) La désignation des parties et de l'affaire;
- b) Les nom, prénoms, profession et domicile de l'intervenant, ainsi que l'indication d'un domicile élu selon l'article 6, litt. b,⁵⁵ et, s'il y a lieu, la désignation et le domicile de son mandataire;
- c) Les faits justifiant l'intérêt de l'intervenant;
- d) La déclaration d'intervention;
- e) Les conclusions;
- f) Le bordereau des pièces produites.

International Court of Justice, Rules :

Article 64, para. 1

See p. 229 *supra*.

Article 64, para. 2

The application shall contain :

- a description of the case;
- a statement of law and of fact justifying intervention;
- and
- a list of the documents in support of the application; these documents shall be attached.

Court of the European Coal and Steel Community, Rules :

Article 71, para. 1

See p. 230 *supra*.

Article 71, para. 2

La requête doit contenir :

- l'indication des parties en litige;
- l'indication de l'affaire;

⁵⁴ Art. 34 of the Code : " Individuals or legal entities establishing an interest in the outcome of a dispute pending before the Court may intervene in such dispute. The arguments in favour of a petition for intervention may be directed only to the affirmation or dismissal of the arguments of a party."

⁵⁵ See p. 172 *supra*.

- les nom, prénoms, profession et domicile de la partie intervenante;
- le nom de l'agent qui la représente ou, le cas échéant, de l'avocat qui l'assiste;
- l'exposé des raisons justifiant l'intérêt de la partie intervenante dans la solution du litige;
- les conclusions tendant au soutien ou au rejet de celles d'une ou plusieurs des parties en cause;
- le bordereau des pièces annexées venant à l'appui de la requête;
- l'élection de domicile de la partie intervenante au siège de la Cour.

(cc) Notification of Parties

Franco-German Mixed Arbitral Tribunal, Rules :

Article 21, para. 1

L'intervention est communiquée aux parties et aux agents.

International Court of Justice, Rules :

Article 64, para. 3

The application shall be communicated to the parties, who shall send to the Registry their observations in writing within a time-limit to be fixed by the Court, or by the President, if the Court is not sitting.

[Cf. Court of the European Coal and Steel Community, Rules, art. 71, para. 3.]

(dd) Notification of others

International Court of Justice, Rules :

Article 64, para. 4

The Registrar shall also transmit copies of the application for permission to intervene; (a) to Members of the United Nations through the Secretary-General and (b) by means of special arrangements made for this purpose between them and the Registrar, to any other States entitled to appear before the Court.

(ee) Written observations by Parties

International Court of Justice, Rules :

Article 64, para. 3

See p. 231 *supra*.

(ff) Hearing

International Court of Justice Rules :

Article 64, para. 5

The application to intervene shall be placed on the agenda for a hearing, the date and hour of which shall be notified to all concerned. Nevertheless, if the parties have not, in their written observations, opposed the

application to intervene, the Court may decide that there shall be no oral argument.

[Cf. Court of the European Coal and Steel Community, Rules, art. 71, para. 5.]

(gg) Decision

Franco-German Mixed Arbitral Tribunal, Rules :

Article 22

En cas d'opposition, le tribunal juge de l'admission de l'intervention, qui ne pourra retarder le jugement de la cause principale quand elle sera en état. Le tribunal statue sur les frais et dépens de l'intervention.

International Court of Justice, Rules :

Article 64, para. 6

The Court will give its decision on the application in the form of a judgment.

Court of the European Coal and Steel Community, Rules :

Article 71, para. 5

La Cour statue sur la requête par voie d'ordonnance.

(hb) Copies of written proceedings for intervening Party

Court of the European Coal and Steel Community, Rules :

Article 71, para. 6

La partie intervenante reçoit copie de tous les actes de procédure transmis aux parties.

(ii) Memorial of intervening Party, counter-memorials, etc.

International Court of Justice, Rules :

Article 65

1. If the Court admits the intervention and if the party intervening expresses a desire to file a Memorial on the merits, the Court shall fix the time-limits within which the Memorial shall be filed and within which the other parties may reply by Counter-Memorials; the same course shall be followed in regard to the Reply and the Rejoinder. If the Court is not sitting, the time-limits shall be fixed by the President.

2. If the Court has not yet given its decision upon the intervention and the application to intervene is not opposed, the President, if the Court is not sitting, may, without prejudice to the decision of the Court on the question whether the application should be granted, fix the time-limits within which the intervening party may file a Memorial on the merits and the other parties may reply by Counter-Memorials.

3. In the cases referred to in the two preceding paragraphs, the time-limits shall, so far as possible, coincide with those already fixed in the case.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 21, para. 2

Si elle [l'intervention] ne rencontre pas d'opposition, le président fixe, s'il y a lieu, les délais qui lui paraissent nécessaires pour permettre aux parties de se déterminer sur les faits allégués par l'intervenant et sur ses moyens de droit.

b. Construction of a Multilateral Convention

(aa) Declaration

International Court of Justice, Rules :

Article 66, para. 1

A State which desires to avail itself of the right conferred upon it by Article 63 of the Statute⁶⁶ shall file in the Registry a declaration to that effect. This declaration may be filed by a State even though it has not received the notification referred to in that Article.

(bb) Notification of Parties

International Court of Justice, Rules :

Article 66, para. 2

Such declarations shall be communicated to the parties . . .

(cc) Notification of others

International Court of Justice, Rules :

Article 66, para. 3

The Registrar shall also transmit copies of the declarations: (a) to Members of the United Nations through the Secretary-General and (b) by means of special arrangements made for this purpose between them and the Registrar, to any other States entitled to appear before the Court.

(dd) Decision

International Court of Justice, Rules :

Article 66, para. 2

. . . If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute⁶⁷ the decision shall rest with the Court.

⁶⁶ Art. 63 of the Statute : " 1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith. 2. Every State so notified has the right to intervene in the proceedings, but if it uses this right, the construction given by the judgment will be equally binding upon it."

⁶⁷ Art. 63 of the Statute : see footnote 56 *supra*.

(ee) Written observations by intervening Party, oral proceedings
International Court of Justice, Rules :

Article 66

...

4. The Registrar shall take the necessary steps to enable the intervening party to inspect the documents in the case in so far as they relate to the interpretation of the convention in question, and to submit his written observations, thereon to the Court within a time-limit to be fixed by the Court or by the President if the Court is not sitting.

5. These observations shall be communicated to the other parties and may be discussed by them in the course of the oral proceedings; in these proceedings the intervening party shall take part.

Section 13. Evocation en garantie

Franco-German Mixed Arbitral Tribunal, Rules :

Article 17

Le défendeur qui estime avoir le droit d'appeler un tiers comme garant, pour soutenir le procès à sa place, doit le faire avant toute réponse au fond, dans le délai fixé pour le dépôt de celle-ci.

L'évocation indique les nom, prénoms, profession et domicile du tiers évoqué et les motifs de l'évocation. Le président fixe un délai au demandeur pour se déterminer sur l'évocation.

Article 18

Si le demandeur fait opposition à l'évocation en garantie, le tribunal en décide.

Si l'évocation en garantie est admise par le demandeur ou par le tribunal, le défendeur, dans le délai de quinze jours, invite le garant à prendre sa place au procès. Un délai de quinze jours est accordé au garant pour accepter ou refuser l'évocation.

Si le garant accepte l'évocation, avis en est donné aux parties et un délai de deux mois est accordé au garant pour déposer la réponse.

Section 14. Third Party proceedings (Appel en Cause)

Franco-German Mixed Arbitral Tribunal, Rules :

Article 19

Le défendeur qui estime avoir le droit d'exiger d'un tiers qu'il soutienne le procès conjointement avec lui doit le faire avant toute réponse au fond, dans le délai fixé pour le dépôt de celle-ci.

L'appel en cause est soumis aux mêmes règles que l'évocation en garantie.

Section 15. Interim protection

Franco-German Mixed Arbitral Tribunal, Rules :

Article 31

A la requête d'une partie ou d'un agent, le tribunal peut ordonner, en dehors des mesures conservatoires déjà prévues par le traité, toute mesure conservatoire ou provisoire qui lui paraît équitable et nécessaire pour garantir les droits des parties.

Article 32

Les mesures conservatoires peuvent être demandées et ordonnées en tout état de cause, même avant le dépôt de la requête introductive de l'instance. Dans ce dernier cas, l'instance doit être introduite dans le plus bref délai possible.

Article 33

La partie contre laquelle des mesures conservatoires sont requises doit être entendue, si possible.

La partie qui n'a pas pu être entendue peut demander au tribunal de revenir sur sa décision. Cette demande n'est pas suspensive.

Article 34

Dans tous les cas où les mesures conservatoires seraient de nature à porter préjudice au droit d'un tiers, celui-ci aura la faculté d'y faire opposition au moyen d'une requête présentée au tribunal.

Les dispositions de la procédure ordinaire sont applicables à l'instruction et au jugement de cette requête.

Celle-ci n'est pas suspensive.

Article 35

La partie requérante peut être tenue de fournir une caution ou de faire un dépôt pour garantir les dommages qui peuvent résulter des mesures conservatoires.

Article 36

La décision de mesures conservatoires détermine leur étendue et leurs conditions. Elle est notifiée aux parties et a la même force exécutoire qu'une sentence du tribunal.

Le tribunal peut requérir l'agent compétent de faire exécuter cette décision, avant même toute notification, celle-ci devant être faite dans les huit jours qui suivent l'exécution.

International Court of Justice, Rules :

Article 61

1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures of which the indication is proposed.

2. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

3. If the Court is not sitting, the members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision.

4. The Court may indicate interim measures of protection other than those proposed in the request.

5. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts.

6. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene the members in order to submit to the Court the question whether it is expedient to indicate such measures.

7. The Court may at any time by reason of a change in the situation revoke or modify its decision indicating interim measures of protection.

8. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies a decision indicating such measures.

Section 16. Interim decision

Court of the European Coal and Steel Community, Rules :

Article 70

1. A tout moment, chacune des parties peut, sans préjudice des dispositions qui précèdent, demander à la Cour par voie de requête de statuer sur un point pertinent de fait ou de droit avant la continuation de la procédure.

2. La Cour donne suite à cette demande si elle le juge opportun.

3. Lorsque la Cour a statué sur la demande, la procédure se poursuit; la Cour fixe à cet effet des délais pour la suite de l'instance.

Section 17. Suspension

Franco-German Mixed Arbitral Tribunal, Rules :

Article 66

Sur la demande commune des parties, le président, après avoir pris l'avis des agents, peut suspendre le cours du procès pour un temps déterminé.

Article 67

Lorsqu'une partie perd la capacité d'agir civilement ou lorsque ses droits passent à autrui par mort, insolvabilité ou toute autre circonstance, un délai est accordé, par le tribunal, au tuteur, aux héritiers, créanciers, etc., pour déclarer s'ils veulent continuer le procès, passer expédient ou se désister.

Section 18. Settlement

Franco-German Mixed Arbitral Tribunal, Rules :

Article 62

Les contestations sur des droits dont les parties ont la libre disposition peuvent être abandonnées par elles au moyen d'une transaction.

La transaction n'est valable qu'autant qu'elle est faite par écrit et signée par les parties ou par leurs mandataires munis à cet effet d'une procuration spéciale.

La transaction est déposée au secrétariat, qui en avise les agents des gouvernements.

Elle peut aussi intervenir à l'audience du tribunal.

Si, dans le délai de huit jours dès l'avis, un agent fait opposition à la transaction, le procès suit son cours.

Si aucune opposition n'est faite dans ce délai, la transaction devient définitive. Elle est homologuée par le tribunal et a dès lors force de chose jugée. L'original reste au secrétariat. Chaque partie en reçoit une copie attestée conforme sous le sceau du tribunal.

Les frais judiciaires sont supportés en commun par les deux parties, sauf stipulation contraire dans la transaction.

Article 63

Le passé-expédient est l'acte par lequel une partie adhère aux conclusions de son adversaire.

S'il embrasse la totalité des conclusions, la partie qui passe expédient est tenue à tous les frais et dépens.

S'il n'est relatif qu'à une partie des conclusions, le juge prend en considération ce passé-expédient dans le jugement sur les frais de la cause qui lui reste soumise.

Article 64

Le passé-expédient a lieu sous la forme d'une déclaration écrite, signée par la partie ou par son mandataire, muni à cet effet d'une procuration spéciale.

Il est déposé au secrétariat, qui en avise la partie adverse et les agents des gouvernements.

Il peut aussi intervenir à l'audience du tribunal.

Si, dans le délai de huit jours dès l'avis, un agent fait opposition au passé-expédient, le procès suit son cours. Si aucune opposition n'est faite dans ce délai, le passé-expédient devient définitif. Il est homologué par le tribunal et a force de chose jugée. L'original reste au secrétariat; une copie attestée conforme sous le sceau du tribunal est délivrée aux parties.

French-Mexican Claims Commission, Rules :

Article 45

Lorsque les Agents seront d'accord, soit sur un point de procédure, soit sur le fond, leur proposition conjointe sera soumise à l'homologation de la Commission, qui, toutefois, restera libre de prendre telle décision qui lui paraîtra convenable.

United States-Mexican General Claims Commission, Rules :

Rule XI, para. 3

In the event that the Agents enter into a stipulation with respect to any adjustment of a claim, such stipulation shall be presented to the Commission with an application for an award in accordance with the stipulation.

[Cf. General Claims Commission, United States and Panama, Rules, art. 33.]

International Court of Justice, Rules :

Article 68

If at any time before judgment has been delivered, the parties conclude an agreement as to the settlement of the dispute and so inform the Court in writing, or by mutual agreement inform the Court in writing that they are not going on with the proceedings, the Court, or the President if the Court is not sitting, shall make an order officially recording the conclusion of the settlement or the discontinuance of the proceedings; in either case the order shall direct the removal of the case from the list.

Court of the European Coal and Steel Community, Rules :

Article 80

Si avant que la Cour n'ait statué, les parties s'accordent sur la solution à donner au litige et informent la Cour qu'elles renoncent à toute prétention réciproque, la Cour leur donne acte de leur accord, et de leur désistement; elle ordonne la radiation de l'affaire du registre . . .

Section 19. Discontinuance

Franco-German Mixed Arbitral Tribunal, Rules :

Article 65

Jusqu'à production de la réponse du défendeur, le demandeur peut se désister de ses conclusions.

Le désistement a lieu sous la forme d'une déclaration écrite, signée par la partie ou son mandataire, muni à cet effet d'une procuration spéciale.

Il est déposé au secrétariat qui en avise la partie adverse et les agents.

Si un agent fait opposition au désistement, le procès suit son cours.

Si aucune opposition n'est faite, le désistement devient définitif.

L'original reste au secrétariat, qui en délivre aux parties une copie attestée conforme, sous le sceau du tribunal.

Les frais et dépens sont à la charge de la partie qui se désiste. Ils sont fixés par le président, qui en ordonne le dépôt au secrétariat avant de constater le désistement.

Article 68

L'instance dans laquelle les parties se sont abstenues de tout acte de procédure pendant une année à partir de la dernière opération peut, par décision du tribunal, être annulée comme périmée lorsque l'une ou l'autre des parties fait valoir cette péremption.

La partie qui veut se prévaloir de la péremption doit, sous peine de déchéance, l'opposer en réponse au premier acte tendant à reprendre ou à continuer l'instance.

Article 69

Tous les actes de l'instance périmée sont annulés et considérés comme n'ayant pas existé.

Chaque partie supporte les frais qu'elle a faits.

La péremption de l'instance n'invalide pas le droit litigieux.

International Court of Justice, Rules :

Article 69

1. If, in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the Court, or the president if the Court is not sitting, will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court, or the President if the Court is not sitting, shall fix a time-limit within which the respondent must state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court, or the President if the Court is not sitting, will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue.

Section 20. Default of appearance

Franco-German Mixed Arbitral Tribunal, Rules :

Article 73

Le fait qu'une partie dûment convoquée ne présente ni défense écrite ni défense orale n'est pas un obstacle à ce qu'il soit procédé aux débats et à la sentence.

L'agent du gouvernement intéressé peut intervenir soit pour prendre la place de son ressortissant, soit pour demander la remise de l'affaire à une date ultérieure où elle sera définitivement jugée.

[Cf. Belgo-German Mixed Arbitral Tribunal, Rules, art. 70.]

International Court of Justice, Statute :

Article 53

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

Court of the European Coal and Steel Community, Rules :

Article 72

1. Indépendamment de l'hypothèse prévue à l'article 35 du Statut⁵⁸ et sauf dérogations prévues au présent règlement, lorsqu'une des parties

⁵⁸ Art. 35 of the Code : "When, in an appeal to the Court's general jurisdiction, the defendant is duly summoned and fails to file written arguments, default judgment shall be rendered against him. This judgment may be contested within a month from the date of the notification of the judgment. Such proceeding shall not suspend the execution of the default judgment, unless otherwise decided by the Court."

s'abstient de faire valoir ses moyens dans un délai fixé ou lorsque, dûment prévenue, elle ne se présente pas aux débats oraux; l'autre partie peut demander à la Cour de lui adjuger ses conclusions.

2. La Cour, avant de rendre l'arrêt par défaut, vérifie non seulement sa compétence au regard du Traité, mais encore examine si ces conclusions paraissent fondées.

3. La Cour peut ordonner l'exécution provisoire de son arrêt nonobstant opposition.

4. L'opposition doit être faite dans les délais prévus à l'article 35 du Statut,⁵⁹ elle doit être présentée dans les formes prescrites à l'article 29 du présent règlement.⁶⁰

5. Nul arrêt déboutant d'une opposition n'est susceptible d'opposition.

⁵⁹ See footnote 58 on previous page.

⁶⁰ Art. 29, para. 1 : see p. 151 *supra*; Art. 29, para. 2 : see p. 152 *supra*; Art. 29, para. 3 : see p. 175 *supra*.

CHAPTER IV
JUDGMENT

Section 1. Time-limit

Arbitral Commission, United States and Peru (Landreau Claim), Protocol :

Article XI

The decision of the Commission shall be rendered within four months from the date of its first meeting, unless the Commission, for reasons which shall be communicated to both Governments, shall find it imperatively necessary to extend the time.

Arbitrator, Great Britain and Costa Rica (Aguilar-Amory and Royal Bank of Canada Claims), Convention :

Article 4, para. 4

On the expiry of this second period,¹ a further period of ninety days shall commence, within which the Arbitrator shall pronounce his Award.

[Cf. Arbitrator, Colombia and Venezuela (*Affaire des frontières colombo-vénézuéliennes*), Convention, art. 5.]

Arbitral Tribunal, United States and Egypt (Salem Case), Agreement :

Article 7

The decision of the Tribunal shall be given within two months from the date of the conclusion of the oral arguments . . .

[Cf. Court of Arbitrators, Great Britain and Ethiopia (Maharao of Kutch Case), Agreement, art. 4; and Arbitrator, Great Britain and Portugal (Campbell Case,) Agreement, art. 12, para. 2.]

Special Tribunal, Guatemala and Honduras (Honduras Borders Case), Treaty :

Article XIV

The Tribunal shall render its award as soon as possible . . .

[Cf. Arbitral Tribunal, United States and Great Britain, Rules, Rule 39; and Arbitrator, France and Great Britain (Chevreau Case), *Compromis*, art. VII.]

¹ I.e., the period within which the parties may present counter-arguments or rectifications.

Arbitrator, Sweden and United States (*Kronprins Gustaf Adolf Case*),
Special Agreement :

Article VII, para. 1

The decision of the Tribunal shall be made within two months from the date on which the arguments close, unless on the request of the Tribunal the Parties shall agree to extend the period.

Section 2. Place

Permanent Court of Arbitration (*Island of Timor Case*), *Compromis* :

Article 5

The arbitrator shall render his decision in a place to be designated by him.

Section 3. Deliberations, voting

Arbitral Tribunal, Chile and France, Rules :

Article 13

See p. 199 *supra*.

Permanent Court of Arbitration, Hague Convention 1907 :

Article 78

The deliberations of the tribunal take place in private and remain secret. All questions are decided by a majority of its members.

French-Mexican Claims Commission, Rules :

Article 44

La Commission se réserve toute liberté pour la procédure à suivre pour la préparation et rédaction de ses sentences.

Tribunal, United States and Great Britain (*Trail Smelter Case*),
Convention :

Article IX

... In reaching a final determination of each or any of the Questions, the Chairman and the two members shall each have one vote, and, in the event of difference, the opinion of the majority shall prevail, and the dissent of the Chairman or member, as the case may be, shall be recorded. In the event that no two members of the Tribunal agree on a question, the Chairman shall make the decision.

International Court of Justice, Statute :

Article 17

...

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

Article 24

See p. 131 *supra*.

Article 54, para. 3

The deliberations of the Court shall take place in private and remain secret.

Article 55

1. All questions shall be decided by a majority of the judges present.
2. In the event of an equality of votes, the President or the judge who acts in his place shall have a casting vote.

Idem, Rules :

Article 30

1. The Court shall sit in private to deliberate upon disputes which are submitted to it and upon advisory opinions which it is asked to give.

2. Only the judges and the assessors, if any, shall take part in the deliberations. The Registrar or his substitute shall be present. No other person shall be admitted except in pursuance of a special decision taken by the Court.

3. Every judge who is present at the deliberations shall state his opinion together with the reasons on which it is based.

4. Any judge may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. Effect shall be given to any such request.

5. The decision of the Court shall be based upon the conclusions concurred in after final discussion by a majority of the judges. The judges shall vote in the order inverse to the order laid down by Article 2 of these Rules.²

6. No detailed minutes shall be prepared of the private meetings of the Court for deliberation upon judgments or advisory opinions; the minutes of these meetings are to be considered as confidential and shall record only the subject of the debates, the votes taken, the names of those voting for and against a motion and statements expressly made for insertion in the minutes.

7. Unless otherwise decided by the Court, paragraphs 2, 4 and 5 of this Article shall apply to deliberations by the Court in private upon any administrative matter.

[Cf. Court of the European Coal and Steel Community, Rules, art. 25.]

² Art. 2, para. 1 of the Rules of the International Court of Justice : "Members of the Court elected during the same session of the General Assembly of the United Nations shall take precedence according to seniority of age. Members elected during an earlier session shall take precedence over members elected at a subsequent session. A member of the Court who is re-elected without interval, shall retain his former precedence. Judges chosen under Article 31 of the Statute from outside the Court shall take precedence after the other judges in order of seniority of age."

Section 4. Form and contents

a. Written judgment

Arbitrator, Sweden and United States (*Kronprins Gustaf Adolf Case*),
Special Agreement :

Article VII, para. 1

... The decision shall be in writing.

[Cf. Arbitrator, Great Britain and Portugal (*Campbell Case*), *Comp. omis*, art. 12, para. 1; and Arbitrator, Finland and Great Britain (*Finnish Shipowners Case*), Agreement, art. 9.]

b. Language

French-Mexican Claims Commission, Rules :

Article 49

Les décisions et sentences de la Commission seront rédigées en français et en espagnol. La Commission indiquera dans chaque sentence celui des deux textes qui fera foi. Elle se réserve la liberté de ne publier d'abord qu'un seul des textes.

Arbitrator, Finland and Great Britain (*Finnish Shipowners Case*),
Agreement :

Article 10

... the decision of the Arbitrator shall be in English.

[Cf. Arbitrator, Belgium and France (*Différend concernant l'Accord Tardieu-Jaspar*), *Arrangement*, art. 5.]

International Court of Justice, Statute :

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and in English. In this case, the Court shall at the same time determine which of the two texts shall be considered as authoritative.

c. Basis, contents, date and signature

Permanent Court of Arbitration, Hague Convention 1907 :

Article 79

The award rendered by a majority vote must state the reasons on which it is based. It contains the names of the arbitrators; it is signed by the president and by the registrar or the secretary acting as registrar.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 72

La rédaction de la sentence est approuvée par le tribunal. Elle est immédiatement datée. Dans la règle, la sentence est signée par le président, les arbitres et les secrétaires. Exceptionnellement, elle peut être signée par le président au nom d'un arbitre ou par les deux arbitres au nom du président.

Mixed Claims Commission, United States and Germany, Rules :

Rule VIII, para. 2

If the two Commissioners agree the decision need not state the grounds upon which it is based.

United States-Mexican General Claims Commission, Rules :

Rule XI, para. 2

The award or other decision shall set out fully the grounds on which it is based, and shall be signed by at least two members of the Commission.

General Claims Commission, United States and Panama, Rules :

Article 32

The award shall set out fully all the grounds on which it is based, and it must be signed by the members of the Commission who agree upon it . . .

[Cf. Arbitral Tribunal, United States and Great Britain, Rules, rule 40; and French-Mexican Claims Commission, Rules, art. 43.]

International Court of Justice, Statute :

Article 58

The judgment shall be signed by the President and by the Registrar . . .

Idem, Rules :

Article 30, para. 5

The decision of the Court shall be based upon the conclusions concurred in after final discussion by a majority of the judges . . .

[Cf. Court of the European Coal and Steel Community, Rules, art. 25, para. 5.]

Article 74, para. 1

The judgment shall contain :

- a statement whether it has been delivered by the Court or by a Chamber;
- the date on which it is delivered;
- the names of the judges participating;
- the names of the parties;
- the names of the agents of the parties;
- a summary of the proceedings;
- the submissions of the parties;
- a statement of the facts;
- the reasons in point of law;

the operative provisions of the judgment;
the decision, if any, in regard to costs;
the number of the judges constituting the majority.

[Cf. Franco-German Mixed Arbitral Tribunal, Rules, art. 71; Franco-Italian Conciliation Commission, Rules, art. 18, para. 1 (see also *infra*); and Court of the European Coal and Steel Community, Rules, art. 54.]

Franco-Italian Conciliation Commission, Rules :

Article 18, para. 1

La décision de la Commission contient :

1)—7) . . .

8) L'empreinte du sceau de la Commission.

Article 22

See p. 248 *infra*.

Court of the European Coal and Steel Community, Rules :

Article 55, para. 2

L'original de l'arrêt signé par le président, les juges ayant pris part au délibéré et le greffier, est scellé et déposé au greffe de la Cour et copie certifiée conforme est signifiée à chacune des parties.

Section 5. Costs³

Franco-German Mixed Arbitral Tribunal, Rules :

Article 75

Les frais et débours alloués par le tribunal sont payés dans la monnaie de la partie gagnante, calculée au taux moyen coté à la bourse de Genève durant le mois qui a précédé le jour de la sentence.

International Court of Justice, Statute :

Article 64

Unless otherwise decided by the Court, each party shall bear its own costs.

***Idem*, Rules :**

Article 77

The party in whose favour an order for the payment of the costs has been made shall present his bill of costs within ten days after the judgment has been delivered. The Court shall decide any dispute concerning the bill.

Arbitral Tribunal, United States and Great Britain, Special Agreement :

Article 9

Each Government shall bear its own expenses. The expenses of the tribunal shall be defrayed by a ratable deduction on the amount of the sums awarded by it, at a rate of 5 per cent, on such sums, or at such lower rate as may be agreed upon between the two Governments; the deficiency, if any, shall be defrayed in equal moieties by the two Governments.

³ Cf. p. 153 *supra*.

Section 6. Decision by umpire, full commission

Mixed Claims Commission, United States and Germany, Rules :

Rule VIII, para. 1

Should the two Commissioners be unable to agree on the disposition of any case or upon any point that may arise in the course of the Commission's proceedings, they shall certify to the Umpire (1) the exact point or points of disagreement, and (2) the point or points, if any, upon which they are in agreement, together with a complete but concise statement of the facts of the case or the proceedings in connection with which the difference shall arise. Each Commissioner shall prepare and submit to the Umpire his opinion in writing with respect to each point of disagreement certified to the Umpire. Such statements and opinions shall be deemed a case stated, upon which the Umpire may make his decision. He shall have the right to the complete record in the case, including the briefs of counsel, and in his discretion to hear additional oral argument upon any difference certified to him for decision. The decisions in writing (1) of the two Commissioners, where they are in agreement, otherwise (2) of the Umpire, shall be final.

Franco-Italian Conciliation Commission, Rules :

Article 19

Dans le cas où les membres de la Commission ne sont pas parvenus à s'entendre, un procès-verbal est dressé, qui constate le désaccord.

Il doit contenir les indications visées à l'article précédent⁴ sous les nos 1, 2, 3, 4, 7 ainsi que l'indication précise sous forme de questions, des points sur lesquels l'accord a été réalisé et de ceux sur lesquels il y a eu désaccord.

Les points sur lesquels l'accord a été réalisé sont considérés comme jugés définitivement.

Le procès-verbal est déposé au secrétariat et communiqué comme il est dit à l'article précédent.⁵

Article 20

Les Agents transmettent le procès-verbal de désaccord à leurs Gouvernements. La procédure prévue à l'article 83 du Traité⁶ pour la nomination du tiers membre est ensuite engagée à l'initiative de l'un des Gouvernements.

Le tiers membre assume les fonctions de Président de la Commission de Conciliation.

Article 21

Les règles de procédure fixées par le présent règlement demeurent applicables. Les actes de procédure restent acquis.

L'administration de nouvelles preuves ne peut être admise qu'en vertu d'une ordonnance motivée rendue par la Commission.

⁴ Art. 18, para. 1 : see note under International Court of Justice, Rules, art. 74, para. 1, p. 245 *supra*.

⁵ Art. 18, para. 2 : see p. 250 *infra*.

⁶ Art. 83, para. 1, Of the Peace Treaty of Paris : see p. 129 footnote 3 *supra*.

Article 22

La Commission délibère à la majorité des voix sur chacun des points restant en litige. L'ordre des questions est proposé par le Président. Le membre le plus jeune vote le premier, le Président le dernier.

La décision est rédigée conformément aux règles fixées à l'article 13.⁷

La décision précise les points sur lesquels un accord avait été précédemment acquis et ceux sur lesquels la décision est rendue sous la présidence du tiers membre.

Les opinions soutenues par les membres de la Commission peuvent, le cas échéant, être consignées dans un procès-verbal.

Section 7. Individual opinions

French-Mexican Claims Commission, Rules :

Article 43

... Tout membre de la Commission qui n'approuvera pas une sentence, établira et signera une déclaration de non-conformité où il pourra exposer et motiver la solution qui, à son avis, aurait dû être adoptée.

United States-Mexican General Claims Commission, Rules :

Rule XI, para. 4

Any member of the Commission may render a dissenting opinion.

General Claims Commission, United States and Panama, Rules :

Article 32

... Any member of the Commission who is not agreed upon an award shall make and sign a dissenting opinion, giving his reasons and the decision which in his opinion should have been rendered.

[Cf. Arbitral Tribunal, United States and Great Britain, Rules, rule 41.]

Tribunal, United States and Great Britain (Trail Smelter Case),
Convention :

Article IX

See p. 242 *supra*.

International Court of Justice, Rules :

Article 74, para. 2

Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not, or a bare statement of his dissent.

Section 8. Rendering, communication, original, copies, registration

Arbitral Tribunal, United States and Great Britain, Rules :

Rule 42

Two signed copies of the award and of a dissenting report, if any, shall be filed in the Office of the Tribunal, and twenty printed copies shall be given to each of the Agents.

⁷ See p. 246 *supra*.

Rule 43

See p. 199 *supra*.

Franco-German Mixed Arbitral Tribunal, Rules :

Article 70

Pour rendre sa sentence le tribunal doit être au complet...

Article 73, para. 1

See p. 239 *supra*.

Article 74

Le dispositif de la sentence est notifié aux parties. Des expéditions des sentences sont délivrées aux parties par le secrétariat moyennant paiement des frais.

Article 76

Le tribunal requiert les agents des gouvernements d'assurer l'exécution de ses sentences conformément à la lettre g de l'article 304 du Traité de Versailles.⁸

Dans ce but, le secrétariat délivre aux agents une expédition, déclarée conforme par le président et les secrétaires, de la sentence du tribunal.

Article 77

See p. 141 *supra*.

United States-Mexican General Claims Commission, Rules :

Rule XI, para. 1

The award or any other judicial decision of the Commission in respect of each claim shall be rendered at a public sitting of the Commission.

Rule XI, para. 5

The Joint Secretaries shall furnish to each of the Agents four (4) typewritten copies, (two (2) in English and two (2) in Spanish), or in cases where the Commission orders them printed, ten (10) copies (five (5) in English and five (5) in Spanish), of each award or other decision and of each dissenting opinion.

Rule XI, para. 7

Two (2) copies, one (1) in English and one (1) in Spanish, of each award or other decision rendered by the Commission and of each dissenting opinion shall be entered in a book entitled "Register of Awards and Decisions."

Rule XI, para. 8

The Joint Secretaries shall forward two (2) printed copies of both texts of all printed awards and other decisions and dissenting opinions to the International Bureau of the Permanent Court of Arbitration at The Hague.

⁸ Article 304 (g) of the Treaty of Versailles : " The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals."

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 11

. . . The decision, when made, shall be forthwith communicated to the Governments at Guatemala and Washington . . .

[Cf. Arbitral Commission, United States and Peru (Landreau Claim), Protocol, art. XI.]

International Court of Justice, Statute :

Article 58

. . . It [i.e. the judgment] shall be read in open Court, due notice having been given to the agents.

[Cf. Court of the European Coal and Steel Community, Rules, art. 55, para. 1.]

Idem, Rules :

Article 75

1. When the judgment has been read in public, one original copy, duly signed and sealed, shall be placed in the Archives of the Court and another shall be forwarded to each of the parties.

2. A copy of the judgment shall be sent by the Registrar to Members of the United Nations and to States entitled to appear before the Court.

[Cf. Court of the European Coal and Steel Community, Rules, art. 55, para. 2 (see p. 246 *supra*).]

Franco-Italian Conciliation Commission, Rules :

Article 18, para. 2

La décision est déposée en original au secrétariat où elle est immédiatement enregistrée sur un registre ad hoc. Elle est notifiée sans aucun délai aux Agents des Gouvernements intéressés, par copie certifiée conforme.

Article 24, para. 2

Le sceau de la Commission apposé sur les décisions est également utilisé pour affirmer l'authenticité des copies desdites décisions ou des documents annexes.

Section 9. Res judicata

Projet, 1875 :

Article 25

La sentence dûment prononcée décide, dans les limites de sa portée, la contestation entre les parties.

Permanent Court of Arbitration, Hague Convention 1907 :

Article 81

The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.

General Claims Commission, United States and Panama, Convention :

Article VII, para. 1

The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the present Convention. And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission, shall from and after the conclusion of the proceedings of the Commission, be considered and treated as fully settled, barred, and thenceforth inadmissible, provided in the case of the claims filed with the Commission that such claims have been heard and decided.

[Cf. United States-Mexican General Claims Commission, Convention, art. VIII; and French-Mexican Claims Commission, Convention, art. VIII.]

International Court of Justice, Statute :

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Article 60

The judgment is final and without appeal . . .

Idem, Rules :

Article 76

The judgment shall become binding on the parties on the day on which it is read in open Court.

[Cf. Court of the European Coal and Steel Community, Rules, art. 56.]

Franco-Italian Conciliation Commission, Rules :

Article 18, para. 3

La décision est définitive et obligatoire pour les parties conformément à l'article 83, paragraphe 6 du Traité.⁹

Section 10. Execution

Permanent Court of Arbitration, Hague Convention 1907 :

Article 43, para. 4

See p. 133 *supra*.

Article 82

Any dispute arising between the parties as to the interpretation and execution of the award shall, in the absence of an agreement to the contrary, be submitted to the decision of the tribunal which pronounced it.

⁹ Art. 83, para. 6 of the Peace Treaty of Paris of 10 January 1947 : "The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

Arbitral Tribunal, United States and Great Britain, Special Agreement :

Article 8

All sums of money which may be awarded by the tribunal on account of any claim shall be paid by the one Government to the other, as the case may be, within eighteen months after the date of the final award, without interest and without deduction, save as specified in the next article.¹⁰

Franco-German Mixed Arbitral Tribunal, Rules :

Article 76

See p. 249 *supra*.

Article 82

La demande en revision ne suspend pas l'exécution de la sentence, à moins que le tribunal n'en ordonne autrement en admettant la revision.

Arbitrator, Great Britain and Costa Rica (Aguilar-Amory and Royal Bank of Canada Claims), Convention :

Article 2

Both Governments solemnly undertake to conform to the decision of the Arbitrator, whatever it may be; and to comply with it without delay, as final and beyond appeal, pledging to this effect, the national honour; and they shall take such measures as may be requisite to carry out the arbitral award. The Government of Costa Rica undertake to obtain the adhesion of the International Bank of Costa Rica in so far as it may be necessary for the execution of the award, and undertake to faithfully comply with the resolutions of the Arbitrator in so far as they may affect the official Credit Institution in question.

Arbitrator, France and Spain (*Affaire de l'impôt sur les bénéfices de guerre*),
Compromis :

...

Attendu que les parties ont convenu que la sentence revêtira sa pleine force exécutoire de par la seule signature de l'arbitre, au bas d'un exemplaire envoyé à chacun des gouvernements, sans qu'elle ait besoin d'être homologuée par le tribunal.

United States-Mexican General Claims Commission, Convention :

Article IX

The total amount awarded to claimants shall be paid in gold coin or its equivalent by the Mexican Government to the Government of the United States at Washington.

[Cf. French-Mexican Claims Commission, Convention, art. IX.]

General Claims Commission, United States and Panama, Convention :

Article VIII

The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country, and the balance shall be paid at the City of

¹⁰ See p. 246 *supra*.

Panama or at Washington, in gold coin or its equivalent within one year from the date of the final meeting of the Commission, to the Government of the country in favor of whose citizens the greater amount may have been awarded.

Arbitrator, United States and Guatemala (Shufeldt Claim), Exchange of Notes :

Article 13

The amount granted by the award, if any, shall be payable in gold coin of the United States at the Department of State, Washington, within one year after the rendition of the decision by the Tribunal, with interest at six per centum per annum, beginning to run one month after the rendition of the decision.

Special Tribunal, Guatemala and Honduras (Honduras Borders Case), Treaty :

Article XII

The High Contracting Parties shall invest the Tribunal with the necessary power to settle by itself any dispute that may arise as to the interpretation or execution of the present Treaty or of the decisions of the said Tribunal.

Article XV

The High Contracting Parties are agreed that the actual work of frontier demarcation shall be carried out by a Technical Commission in conformity with the Additional Convention to the present Treaty signed on the same date.¹¹

Arbitrator, Belgium and France (*Différend concernant l'Accord Tardieu-Jaspar*), *Arrangement* :

Article 6

Les Gouvernements signataires déclarent accepter, pour ce qui les concerne, l'interprétation qui sera donnée par M. _____ à la disposition litigieuse. Dans le cas où l'avis de M. _____ comporterait des mesures d'exécution exigeant, d'après les lois constitutionnelles de la France, l'approbation du Parlement français, le Gouvernement de la République proposera à celui-ci de donner effet à la dite interprétation, ce Gouvernement se réservant toutefois les droits constitutionnels du Parlement. Le Gouvernement belge donne acte au Gouvernement français de cette réserve, sans toutefois renoncer, en ce faisant, à la faculté pour lui de faire valoir intégralement tous les droits qu'il estime tenir de l'accord du 12 janvier 1930 par telle voie qui lui serait régulièrement ouverte, dans le cas où le Parlement français ne donnerait pas l'approbation prévue ci-dessus.

Arbitrators, Bolivia and Paraguay (Chaco Case), Treaty of Peace :

Article 5

Une fois la décision formulée et notifiée aux parties, celles-ci nommeront immédiatement une Commission mixte composée de cinq membres désignés

¹¹ Additional Convention : See *Reports I. A. A.*, Vol. II, pp. 1313 *et seq.*

à raison de deux par Partie, le cinquième étant désigné d'un commun accord par les six gouvernements médiateurs. Cette Commission sera chargée de reporter sur le terrain la ligne frontière indiquée par la décision arbitrale et de procéder à son abornement.

Article 6

Dans les trente jours qui suivront la date à laquelle la décision aura été formulée, les Gouvernements du Paraguay et de la Bolivie accrédi-teront leurs représentants diplomatiques respectifs à La Paz et à Asunción et, dans les quatre-vingt dix jours, ils exécuteront les principales dispositions de la décision sous le contrôle de la Conférence de la Paix à laquelle les Parties reconnaissent la faculté de résoudre définitivement les questions d'ordre pratique qui pourront se poser à ce sujet.

Section 11. Completion, rectification, clarification, interpretation, revision

Franco-German Mixed Arbitral Tribunal, Rules :

Article 78

Le tribunal peut interpréter ou rectifier une sentence dont le dispositif paraîtrait obscur, incomplet ou contradictoire, ou qui contiendrait une erreur d'écriture ou de calcul.

La demande d'interprétation doit être adressée au tribunal par l'intermédiaire d'un agent, dans le délai d'un mois à partir de la notification de la sentence.

Le tribunal statue en chambre de conseil après avoir provoqué les explications de la partie adverse.

Article 79

La demande de revision doit être adressée au tribunal. Elle doit être motivée exclusivement par la découverte d'un fait nouveau qui eût été de nature à exercer une influence décisive sur la sentence et qui, lors de la clôture des débats, était inconnu du tribunal lui-même et de la partie qui demande la revision

Article 80

La procédure de revision ne peut être ouverte que par une décision du tribunal constatant expressément l'existence du fait nouveau et lui reconnaissant les caractères prévus par l'article précédent et déclarant à ce titre la demande recevable.

Aucune demande de revision ne peut être présentée plus d'un an après le jour où la sentence a été rendue.

Article 81

Si la demande de revision est admise, la procédure de revision est réglée par le tribunal.

Article 82

See p. 252 *supra*.

French-Mexican Claims Commission, Rules :

Article 46

La Commission pourra, d'office ou bien à la requête des Agents ou de l'un d'eux, éclaircir ou rectifier une sentence, dont le texte serait obscur, incomplet ou contradictoire, ou bien contiendrait une erreur matérielle. Si l'éclaircissement ou la rectification est requis par l'un des Agents, la requête à cet effet, laquelle devra être soumise à la Commission dans les quinze jours de la signification de la sentence, sera communiquée à l'autre Agent, qui aura quinze jours pour y répondre.

United States-Mexican General Claims Commission, Rules :

Rule XI, para. 6

Upon the application of either Agent made within sixty (60) days after the Joint Secretaries have furnished the Agents copies of the awards or other decisions, and after giving the other Agent an opportunity to be heard, the Commission may interpret or rectify a decision which is obscure or incomplete or contradictory or which contains any error in expression or calculation or in which the two texts do not correspond.

International Court of Justice, Statute :

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Article 61

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court, expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

[Cf. Court of the European Coal and Steel Community, Code, art. 38, para. 1-2.]

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

[Cf. Court of the European Coal and Steel Community, Rules, art. 74 (dans un délai de trois mois après la découverte du fait nouveau).]

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

[Cf. Court of the European Coal and Steel Community, Code, art. 38, para. 3.]

Article 78

1. A request for the revision of a judgment shall be made by an application.

The application shall state the judgment of which the revision is desired, and shall contain the particulars necessary to show that the conditions laid down by Article 61 of the Statute are fulfilled, and a list of the documents in support; these documents shall be attached to the application.

[Cf. Court of the European Coal and Steel Community, Rules, art. 75.]

2. The request for revision shall be communicated by the Registrar to the other parties. The latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

3. If the Court admits the application for a revision, it will determine the procedure, required for examining the merits of the application.

4. If the Court makes the admission of the application conditional upon previous compliance with the judgment to be revised, this condition shall be communicated forthwith to the applicant by the Registrar and proceedings in revision shall be stayed pending receipt by the Court of proof of compliance with the judgment.

Article 79

1. A request to the Court to interpret a judgment which it has given may be made either by the notification of a special agreement between the parties of by an application by one or more of the parties.

2. The special agreement or application shall state the judgment of which an interpretation is requested and shall specify the precise point or points in dispute.

3. If the request for interpretation is made by means of an application, the Registrar shall communicate the application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

4. Whether the request be made by special agreement or by application the Court may invite the parties to furnish further written or oral explanations.

Article 80

If the judgment to be revised or to be interpreted was given by the Court, the request for its revision or interpretation shall be dealt with by the Court. If the judgment was given by one of the Chambers mentioned in Articles 26 or 29 of the Statute, the request for its revision or interpretation shall be dealt with by the same Chamber.

Article 81

The decision of the Court on requests for revision or interpretation shall be given in the form of a judgment.

Court of the European Coal and Steel Community, Code :

Article 37

In case of difficulty as to the meaning or scope of a judgment, such judgment shall be interpreted by the Court upon the request of any party or any institution of the Community establishing an interest therein.

Article 57

1. Sans préjudice des dispositions régissant l'interprétation des arrêts, les erreurs de plume ou de calcul, ou les inexactitudes similaires évidentes peuvent être redressées par la Cour, soit d'office, soit sur requête d'une partie, dans un délai de quinze jours.

2. La Cour décide en chambre du conseil.

3. L'avocat général et les parties dûment avertis par le greffier peuvent présenter des observations écrites dans un délai qui sera fixé dans la signification.

4. En cas de rectification du texte, l'original de l'ordonnance qui l'a prescrite est annexé à l'original de l'arrêt rectifié; mention en est faite en marge de l'original.

Article 58

1. Si la Cour a omis de statuer, soit sur un point isolé des conclusions, soit sur les dépens, la partie qui entend se plaindre de cette omission doit saisir la Cour dans le mois à compter du jour de la signification de l'arrêt, par une requête déposée au greffe. Le greffier la signifie aux parties en cause.

2. La Cour statue sur la recevabilité en même temps que sur le bien-fondé de la demande après un seul échange de mémoires.

Article 76

1. Sans préjuger le fond, la Cour statue, l'avocat général entendu, au vu des conclusions écrites des parties, par voie d'ordonnance rendue en chambre du conseil, sur la recevabilité de la requête.¹²

2. Cette ordonnance n'est susceptible d'aucun recours.

3. Toutes autres règles de procédure prévues au présent règlement sont applicables à la revision.

Article 77

La demande en interprétation d'un arrêt prévue à l'article 37 du Statut est présentée à la Cour par une requête. Celle-ci doit être conforme aux règles prescrites pour les requêtes et préciser les points sur lesquels l'interprétation est demandée. L'arrêt visé doit figurer en annexe.

Article 78

La Cour statue sur la demande d'interprétation par voie d'arrêt et ordonne que l'original de cet arrêt soit annexé dans les archives à l'original de l'arrêt interprété. Mention de l'arrêt interprétatif est faite en marge de l'arrêt interprété.

¹² *La requête*, i.e., the application for revision. For articles 74 and 75 of the Rules, cf. notes at articles 61, para. 4 of the Statute, and 78, para. 1 of the Rules of the International Court of Justice, pp. 255-256 *supra*.

CHAPTER V

MISCELLANEOUS SUBJECTS

Section 1. Computation of time

Franco-German Mixed Arbitral, Rules :

Article 4

Pour le calcul des délais ci-dessus, les mois sont comptés conformément au calendrier de quantième à quantième.

French-Mexican Claims Commission, Rules :

Article 52

Pour le calcul des délais fixés par le présent règlement, le jour à partir duquel le délai court, sera compté, mais non celui où il expire. Les dimanches et jours fériés officiels seront déduits.

United States-Mexican General Claims Commission, Rules :

Rule XIII

Wherever in these rules a period of days is mentioned for the doing of any act, the date from which the period begins to run shall not be counted and the last day of the period shall be counted, and Sundays shall be excluded.

Court of the European Coal and Steel Community, Rules :

Article 84

Tous les délais prévus dans le présent règlement sont calculés en excluant le jour de l'acte qui en constitue le point de départ.

Article 85

See p. 165 *supra*.

Section 2. Amendments to, interpretation and silence of rules

Franco-German Mixed Arbitral Tribunal, Rules :

Article 98

Le tribunal peut déroger aux règles fixées par le présent règlement, lorsqu'il estime que, dans les circonstances spéciales de la cause, cela est équitable ou nécessaire pour la connaissance complète et l'appréciation exacte des faits. Il peut même admettre des productions nouvelles et une procédure nouvelle.

Article 99

Pour tous les cas qui ne sont prévus ni dans le traité, ni dans le présent règlement, le tribunal s'inspirera des principes de justice et d'équité. Il prendra toutes mesures et dispositions qu'il jugera utiles à la découverte de la vérité et à une saine application des principes du droit.

General Claims Commission, United States and Panama, Rules :

Article 57

The respective Agents shall be heard on any proposed amendment to these rules before action is taken thereon by the Commission.

[Cf. French-Mexican Claims Commission, Rules, art. 53, and United States-Mexican General Claims Commission, Rules, rule XIV.]

Article 38

With regard to any matter as to which express provision is not made in these rules, the Commission shall proceed as international law, justice and equity require.

[Cf. United States-Mexican General Claims Commission, Rules, rule XV.]

Section 3. Reference to Hague Conventions

Arbitrator Germany and *Commissaire aux revenus gagés, Compromis* :

Article 7

La procédure du présent arbitrage sera conforme aux dispositions du titre III de la Convention de La Haye du 18 octobre 1907, sauf dans la mesure où ces dispositions se trouvent modifiées par le présent arrangement...

Arbitrator France and Great Britain (Chevreau Case), *Compromis* :

Article VI

En toute matière non visée par les termes du présent compromis, l'arbitre appliquera la procédure déterminée par le Chapitre III de la Convention pour le règlement pacifique des différends internationaux, signée à La Haye, le 29 juillet 1899.

Section 4. Publication of decisions, documents, minutes

Arbitral Tribunal, Chile and France, Rules :

Article 15, para. 2

Le tribunal se réserve le droit d'ordonner ou d'autoriser la publication des documents déposés au secrétariat.

French-Mexican Claims Commission, Rules :

Article 49

See p. 244 *supra*.

International Court of Justice, Rules :

Article 22

See p. 146 *supra*.

Article 59, para. 2

See p. 198 *supra*.

Court of the European Coal and Steel Community, Rules :

Article 17, para. 2

See p. 146 *supra*.

Article 27, para. 3

Les publications prévues à l'article 17 du présent règlement se font dans les quatre langues officielles.¹

Article 59

See p. 146 *supra*.

¹ Cf. same Court, art. 27, para. 1, p. 167 *supra*.

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