

- (a) Negotiations should be conducted in good faith;
- (b) States should take due account of the importance of engaging, in an appropriate manner, in international negotiations the States whose vital interests are directly affected by the matters in question;
- (c) The purpose and object of all negotiations must be fully compatible with the principles and norms of international law, including the provisions of the Charter;
- (d) States should adhere to the mutually agreed framework for conducting negotiations;
- (e) States should endeavour to maintain a constructive atmosphere during negotiations and to refrain from any conduct which might undermine the negotiations and their progress;
- (f) States should facilitate the pursuit or conclusion of negotiations by remaining focused throughout on the main objectives of the negotiations;
- (g) States should use their best endeavours to continue to work towards a mutually acceptable and just solution in the event of an impasse in negotiations.

Institutional and procedural rules

27. MODEL RULES ON ARBITRAL PROCEDURE

Yearbook of the International Law Commission, 1958, vol. II

Preamble

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

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

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

Article 1

1. If, before the constitution of the arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration, such preliminary question shall, at the request of any of the parties and failing agreement between them upon the adoption of another procedure, be brought before the International Court of Justice for decision by means of its summary procedure.
2. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

THE COMPROMIS

Article 2

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

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

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

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

This enumeration is not intended to be exhaustive.

CONSTITUTION OF THE TRIBUNAL

Article 3

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

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

3. The appointments referred to in paragraph 2 shall, after consultation with the parties, be made in accordance with the provisions of the *compromis* or of any other instrument consequent

upon the undertaking to arbitrate. In the absence of such provisions, the composition of the tribunal shall, after consultation with the parties, be determined by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

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

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

Article 4

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

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

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

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

Article 5

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

Article 6

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

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

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

Article 7

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

POWERS OF THE TRIBUNAL AND THE PROCESS OF ARBITRATION**Article 8**

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

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

Article 9

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

Article 10

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

- (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) The general principles of law recognized by civilized nations;
- (d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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

Article 11

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

Article 12

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

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

Article 13

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

Article 14

1. The parties shall appoint agents before the tribunal to act as intermediaries between them and the tribunal.
2. They may retain counsel and advocates for the prosecution of their rights and interests before the tribunal.
3. The parties shall be entitled through their agents, counsel or advocates to submit in writing and orally to the tribunal any arguments they may deem expedient for the prosecution of their case. They shall have the right to raise objections and incidental points. The decisions of the tribunal on such matters shall be final.
4. The members of the tribunal shall have the right to put questions to agents, counsel or advocates, and to ask them for explanations. Neither the questions put nor the remarks made during the hearing are to be regarded as an expression of opinion by the tribunal or by its members.

Article 15

1. The arbitral procedure shall in general comprise two distinct phases: pleadings and hearing.
2. The pleadings shall consist in the communication by the respective agents to the members of the tribunal and to the opposite party of memorials, counter-memorials and, if necessary, of replies and rejoinders. Each party must attach all papers and documents cited by it in the case.
3. The time limits fixed by the *compromis* may be extended by mutual agreement between the parties, or by the tribunal when it deems such extension necessary to enable it to reach a just decision.
4. The hearing shall consist in the oral development of the parties' arguments before the tribunal.
5. A certified true copy of every document produced by either party shall be communicated to the other party.

Article 16

1. The hearing shall be conducted by the president. It shall be public only if the tribunal so decides with the consent of the parties.
2. Records of the hearing shall be kept and signed by the president, registrar or secretary; only those so signed shall be authentic.

Article 17

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

Article 18

1. The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it.
2. The parties shall cooperate with the tribunal in dealing with the evidence and in the other measures contemplated by paragraph 1. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

Article 19

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

Article 20

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

Article 21

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

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

Article 22

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

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

Article 23

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

Article 24

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

Article 25

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

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

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

DELIBERATIONS OF THE TRIBUNAL**Article 26**

The deliberations of the tribunal shall remain secret.

Article 27

1. All the arbitrators shall participate in the decisions.

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

THE AWARD

Article 28

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

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

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

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

Article 29

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

Article 30

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

Article 31

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

Article 32

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

INTERPRETATION OF THE AWARD

Article 33

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

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

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

Article 34

Failing a request for interpretation, or after a decision on such a request has been made, all pleadings and documents in the case shall be deposited by the president of the tribunal with the

International Bureau of the Permanent Court of Arbitration or with another depositary selected by agreement between the parties.

VALIDITY AND ANNULMENT OF THE AWARD

Article 35

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

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

Article 36

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

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

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

Article 37

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

REVISION OF THE AWARD

Article 38

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision, and that such ignorance was not due to the negligence of the party requesting revision.

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

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

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

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

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

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

28. UNITED NATIONS MODEL RULES FOR THE CONCILIATION OF DISPUTES BETWEEN STATES

General Assembly resolution 50/50 of 11 December 1995, annex

CHAPTER I. APPLICATION OF THE RULES

Article 1

1. These rules apply to the conciliation of disputes between States where those States have expressly agreed in writing to their application.

2. The States which agree to apply these rules may at any time, through mutual agreement, exclude or amend any of their provisions.

CHAPTER II. INITIATION OF THE CONCILIATION PROCEEDINGS

Article 2

1. The conciliation proceedings shall begin as soon as the States concerned (henceforth: the parties) have agreed in writing to the application of the present rules, with or without amendments, as well as on a definition of the subject of the dispute, the number and emoluments of members of the conciliation commission, its seat and the maximum duration of the proceedings, as provided in article 24. If necessary, the agreement shall contain provisions concerning the language or languages in which the proceedings are to be conducted and the linguistic services required.

2. If the States cannot reach agreement on the definition of the subject of the dispute, they may by mutual agreement request the assistance of the Secretary-General of the United Nations to resolve the difficulty. They may also by mutual agreement request his assistance to resolve any other difficulty that they may encounter in reaching an agreement on the modalities of the conciliation proceedings.

CHAPTER III. NUMBER AND APPOINTMENT OF CONCILIATORS

Article 3

There may be three conciliators or five conciliators. In either case the conciliators shall form a commission.

Article 4

If the parties have agreed that three conciliators shall be appointed, each one of them shall appoint a conciliator, who may not be of its own nationality. The parties shall appoint by mutual agreement the third conciliator, who may not be of the nationality of any of the parties or of the other conciliators. The third conciliator shall act as president of the commission. If he is not appointed within two months of the appointment of the conciliators appointed individually by the parties, the third conciliator shall be appointed by the Government of a third State chosen by agreement between the parties or, if such agreement is not obtained within two months, by the President of the International Court of Justice. If the President is a national of one of the parties, the appointment