

RESOLUTION 1/2020

COMMITTEE ON THE PROCEDURE OF INTERNATIONAL COURTS AND TRIBUNALS

The 79th Kyoto Conference of the International Law Association, held online, 29 November - 13 December 2020:

HAVING CONSIDERED the Final Report of the Committee on the Procedure of International Courts and Tribunals;

TAKES NOTE of the Final Report and **COMMENDS** it to all concerned with the law and procedure of inter-State courts and tribunals;

ENDORSES the recommendations of the Final Report for the procedure before the International Court of Justice, the International Tribunal for the Law of the Sea, inter-State Arbitral Tribunals and World Trade Organization Dispute Settlement Panels;

PROPOSES the following reforms for the consideration of the International Court of Justice pursuant to its ongoing review of its procedures and working methods:

- (a) amendments of the Rules of Procedure with respect to case management, jurisdictional objections, and evidence, as fully explained in the report;
- (b) amendment of Article 1 of its Resolution on Internal Judicial Practice and the addition of a provision to incorporate into the Resolution its decision of September 2018 regarding external appointments as arbitrators;
- (c) discontinuance of the practice of ‘phantom experts’ by appointing such individuals as assessors;
- (d) exercise of the Article 67 power to appoint expert witnesses *proprio motu* as the regular procedure for the taking of expert evidence;
- (e) adoption in judicial practice of a general rule of holding oral hearings no more than six months after the closure of the written phase of proceedings ;
- (f) issuance of procedural orders to parties, except for those supported by the Trust Fund of the UN Secretary-General, to proportionately contribute to extraordinary expenses, such as the taking of expert evidence by the Court *proprio motu*;
- (g) adoption of a Practice Direction on evidence containing a template of best practice, such as security measures for witness identities, discouragement of the practice of ‘witness proofing’, guidance on the content and form of witness statements, detailed rules on the interrogation of witnesses and the conduct of site visits;
- (h) negotiations with the Government of the host country to create a mechanism for the sanction of perjury by witnesses in the proceedings of the Court;
- (i) piloting of the organisation of oral hearings according to a set of issues for debate identified prior to the hearings;
- (j) development through practice of rules concerning the admissibility of material allegedly obtained in violation of national law;
- (k) piloting through practice of a ‘dialogue procedure’ for the disclosure of evidence between parties, inspired by the practice of the WTO Dispute Settlement System;
- (l) application of the power to draw adverse presumption from a refusal by a party to produce evidence upon the Court’s request;
- (m) in cases of default by a party, discontinuance of equal allocations of time for written pleadings and omission of oral argument, and refusal to take note of views expressed by a defaulting party on procedural matters through irregular or ‘extra-procedural’ communication.

PROPOSES the following reforms for the consideration of the International Tribunal for the Law of the Sea:

- (a) amendments of certain provisions of the Rules of Procedure concerning case management, jurisdictional objections, and evidence, as fully explained in the report;
- (b) amendment of its Resolution on Internal Judicial Practice to prohibit Members of the Tribunal from accepting appointments in investment or commercial arbitration;
- (c) adoption of a Practice Direction on evidence containing a template of best practice for security measures for witness identities, discouragement of the practice of ‘witness proofing’, guidance on the content and form of witness statements, detailed rules on the interrogation of witnesses and the conduct of site visits;
- (d) negotiations with the Government of the host country to create a mechanism for the sanction of perjury by witnesses in their proceedings;
- (e) piloting of the organisation of oral hearings according to a set of issues for debate identified prior to the hearings;
- (f) development through practice of rules concerning the admissibility of material allegedly obtained in violation of national law;
- (g) the piloting through practice of a ‘dialogue procedure’ for the disclosure of evidence between parties, inspired by the practice of the WTO Dispute Settlement System;
- (h) application of the power to draw adverse presumption from a refusal by a party to produce evidence upon the Court’s request;
- (i) in cases of default by a party, discontinuance of equal allocations of time for written pleadings and omission of oral argument, and refusal to take note of views expressed by a defaulting party on procedural matters through irregular or ‘extra-procedural’ communication.

PROPOSES the following reforms for the consideration of the Permanent Court of Arbitration:

- (a) amendments of the Arbitration Rules 2012 regarding appointments, working procedures, bifurcation and evidence, as fully explained in the report;
- (b) amendment and publication of the ‘Sample Procedural Order No. 1’ to provide for template provisions for bifurcation of jurisdictional objections as well as modalities for expert evidence;
- (c) amendment and publication of the ‘Sample Procedural Order No. 2’ to provide for template provisions for confidential and restriction information, admissibility of evidence allegedly obtained in violation of national law and participation of non-State actors as *amicus curiae*;
- (d) amendment and publication of the ‘Sample Procedural Order No. 2’ to provide a template of best practice on evidence containing security measures for witness identities, discouragement of the practice of ‘witness proofing’, guidance on the content and form of witness statements, detailed rules on the interrogation of witnesses and the conduct of site visits;
- (e) adoption of a Model Arbitration Clause prohibiting *ex parte* communication between any party and any arbitrator on any matter relating to the proceedings, including – unless the parties agree otherwise – the appointment of the president;
- (f) review of internal security protocols to consider practical measures to strengthen the integrity of confidential evidence and judicial secrecy;
- (g) negotiations with the Host Countries to create a mechanism for the sanction of perjury by witnesses in their proceedings.

PROPOSES the following reforms for the consideration of appointing authorities:

- (a) to refrain from appointing themselves as arbitrators, even when invited by the parties;
- (b) to decline appointments as arbitrators, even when appointed by the designated authority;

- (c) to decline to exercise the powers vested in the appointing authority with respect to the specific set of proceedings, when designated as appointing authority while serving as arbitrator.

PROPOSES the following reforms for the consideration of Parties to an arbitration:

- (a) to include in arbitration agreements provisions designating an appointing authority;
- (b) to refrain from appointing as arbitrator an appointing authority;
- (c) to include in arbitration agreements a conflicts disclosure requirement for potential arbitrators based on the PCA Model Statements of Impartiality and Independence.

PROPOSES the following options for the consideration of Arbitral Tribunals for the conduct of inter-State arbitration:

- (a) prescription in the rules of procedure of a mechanism for Parties to cooperate in the request and production of documents;
- (b) provision in the rules of procedure of modalities for the appointment of expert witnesses by the Arbitral Tribunal, particularly timing, terms of reference, consultation with the parties, duty of cooperation and opportunity for comment, and site visits;
- (c) inclusion in the rules of procedure of admissibility requirements for counterclaims and the applicable time-limits;
- (d) the piloting of the organisation of oral hearings according to a set of issues for debate;
- (e) development through practice of rules concerning the admissibility of material allegedly obtained in violation of national law;
- (f) prescription of modalities in the rules of procedure for the potential involvement of State or non-State actors;
- (g) the application of the power to draw adverse presumption from a refusal by a Party to produce evidence upon the Tribunal's request;
- (h) in cases of default by a party, discontinuance of equal allocations of time for written pleadings and omission of oral argument, and refusal to take note of views expressed by a defaulting Party on procedural matters through irregular or 'extra-procedural' communication.

PROPOSES the following reforms for the consideration of World Trade Organization panels:

- (a) to endeavour to publish the procedural timetable within a week from composition, and the working procedures within a month therefrom;
- (b) to enlarge the set of procedural rights granted by default to third parties, to include the right to make oral and written submissions and be questioned by the panels, until the first substantive meeting, and to attend meetings and receive submissions subsequently;
- (c) to consider the interests of third parties in all procedural incidents, occurring at any stage of the proceedings;
- (d) to include in the working procedures dedicated provisions for the handling and admissibility of evidence, better standardised rules on the management of business and confidential information, the admissibility and use of unsolicited *amicus curiae* briefs;
- (e) to include in the Working Procedures dedicated provisions on the timetable and the procedure relating to incidental procedural questions, whether preliminary or otherwise and before they are raised, and in particular the coordination of preliminary objections with the procedure of Annex V of the Agreement on Subsidies and Countervailing Measures and the assessment of bifurcation requests.

PROPOSES the following reforms for the consideration of Parties to dispute settlement proceedings at the WTO:

- (a) to waive the rule preventing the appointment of panellists of the nationality of third parties in the proceedings;
- (b) to reserve the right to oppose proposed panellists for “compelling reasons” to exceptional situations regarding conflicts of interest and other serious doubts on the impartiality of the candidate;
- (c) to agree to the publication of all procedural decisions upon their adoption, rather than after the publication of the final panel report;
- (d) to agree to arrange a public streaming of meetings that are not confidential, including the segment with the questioning from the panels to the Parties.

PROPOSES the following reforms for the consideration of the WTO Secretariat:

- (a) publication of a set of template working procedures that would update the Appendix 3 to the DSU;
- (b) publication of a model text to provide template provisions for bifurcation of jurisdictional objections and modalities for expert evidence.

RECOMMENDS the International Court of Justice, the International Tribunal for the Law of the Sea, the Permanent Court of Arbitration, inter-State Arbitral Tribunals and World Trade Organization Dispute Settlement Panels to consider the recommendations set out in the Final Report;

FURTHER RECOMMENDS parties to inter-State adjudication and arbitration to consider the recommendations set out in the Final Report in their practice;

FURTHER RECOMMENDS the United Nations General Assembly and the States Parties of the United Nations Convention for the Law of the Sea to debate the recommendations set out in the Final Report in order to identify reforms intended to improve procedural integrity, procedural economy and the sound administration of justice;

REQUESTS the Secretary-General of the Association to transmit this Resolution together with the Final Report to the President of the International Court of Justice, the President of the International Tribunal for the Law of the Sea, the Secretary-General of the Permanent Court of Arbitration, the Director-General of the World Trade Organization and the Secretary-General of the United Nations for further distribution;

RECOMMENDS to the Executive Council that the Committee, having completed its mandate, be dissolved.