

**INTERNATIONAL LAW ASSOCIATION**  
**PROCEDURE OF INTERNATIONAL COURTS AND TRIBUNALS**  
**FINAL REPORT**

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## I. Introduction

This is the Final Report submitted by the Committee on the Procedure of International Courts and Tribunals ('the Committee') to the 79<sup>th</sup> Biennial Conference of the International Law Association (ILA). The mandate of the Committee is twofold: 1) to identify and analyse procedural issues arising in the practice of inter-State international courts and tribunals; and 2) to formulate proposals for procedural reform for the consideration of those courts and tribunals. Three broad areas of procedure were selected for consideration: 1) case management; 2) objections to jurisdiction or admissibility; and 3) evidence. Four fora were selected: 1) the International Court of Justice ('ICJ' or 'the Court'); 2) the International Tribunal for the Law of the Sea ('ITLOS' or 'the Tribunal'); 3) inter-State arbitration, particularly under the auspices of the Permanent Court of Arbitration ('PCA'); and 4) World Trade Organization ('WTO') panel proceedings (collectively, the 'adjudicators'<sup>1</sup>).

At its first meeting, the Committee chose to publish its working documents in the interests of transparency but to apply the 'Chatham House Rule' to its deliberations and to keep confidential the summary records of its meetings in order to encourage free debate. In line with its Mandate, the Committee decided to concentrate on the ICJ and the ITLOS before shifting its focus to inter-State arbitration and WTO panel proceedings by comparatively examining common issues while sequentially tailoring proposals to each institution.

Following three meetings held in 2017 and 2018, the Committee adopted its Interim Report without prejudice to individual views on particular issues and comprising provisional proposals for procedural reform for the consideration of the ICJ and the ITLOS.<sup>2</sup> The Interim Report was debated with the participating membership of the ILA at the 78<sup>th</sup> Biennial Conference held in Sydney in August 2018. In three meetings held in 2019 and 2020, the Committee reviewed its Interim Report and considered ideas for procedural reform in inter-State arbitration and WTO panel proceedings. The Committee then adopted at second reading this Final Report together with a Resolution and duly submitted them on 1 September 2020 to the Headquarters of the ILA.

For convenience, the conclusions and proposals of the Committee contained in the Resolution are arranged by jurisdiction. This Report seeks to provide analytical underpinning to the Resolution and is structured for succinctness and coherence in accordance with the three aforementioned fields of inquiry. These are subdivided into specific topics, arranged in a loosely chronological manner according to the sequence of contentious procedure and containing brief descriptions of problems identified and the solutions proposed. For background, analysis and citation underpinning these proposals, readers are referred to the documents published on the Committee [webpage](#).

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<sup>1</sup> This term is used for shorthand only. Members of WTO panels are not judges but their mandate is akin to that of adjudicators more broadly.

<sup>2</sup> The following members actively participated in the deliberations: Professor Laurence Boisson de Chazournes, Professor Alain Pellet, Professor Hervé Ascensio, Professor Matthew Happold, Dr James Devaney, Professor Andrea Gattini, Professor Serena Forlati, Professor Lorenzo Gradoni, Dr Francisco Pascual-Vives, Professor Alfred Soons, Professor Chiara Giorgetti, Professor Jeffrey Dunoff, Professor Gabrielle Marceau, Professor Christian Tams, Professor Mariko Kawano, Ms Loretta Malintoppi, Ms Davinia Aziz, Mr Shashank Kumar, Dr Christopher Ward, Dr Enrique Hernández Sierra, Professor Makane Mbengue, Dr Illy Ousseni, Professor Paula Almeida, Professor Davorin Lapaš, Dr Joanna Gomula, Mr Stratis Georgilas, Dr Marina Trunk-Fedorova, Dr Stephan Wittich, Ms Alexia Solomou, Ms Maria Louca, Dr Noemi Gal-Or, Professor David Ruzié, Professor Stephan Schill, Professor Yuval Shany, Professor Manuel de Almeida Ribeiro, Professor Pereira Coutinho, Ms Louise Reilly, Professor Gilad Noam, Ms Etleva Haka, Professor Milenko Kreća, Mr Alvin Yap.

The proposals put forward in the Resolution and this Report concerning procedural reform for the ICJ, ITLOS and WTO panels are aimed at their rules of procedure, practice directions, resolutions, judicial practice and administrative practice. No recommendations are made with respect to their statutes, in accordance with the Committee's mandate, the rationale of which was to examine ideas for reform that institutions can achieve themselves, in contrast to statutory reform for which the political will of the States members of the respective organisations or parties to the respective conventions would be required. In light of the paralysis of the WTO Appellate Body – which ceased on 10 December 2019 to have a quorate division – amidst wider uncertainty about the scope for systemic reform at the WTO, the Committee decided in 2019 to confine the scope of its inquiry into the WTO dispute settlement mechanism to the procedure and working methods of panels. As the *Institut de Droit International* had taken up the issue of provisional measures,<sup>3</sup> the Committee decided in 2017 to omit this topic in order to avoid duplication.

Two features of inter-State arbitration distinguish it from the standing courts: 1) the power of parties to create the statute of arbitral tribunals, namely, arbitration agreements; and 2) the existence of the UNCITRAL-inspired PCA Arbitration Rules 2012 ('PCA Rules') as a template for the potential use, as modified, of arbitral tribunals. The resulting flexibility prompted the Committee to craft recommendations addressed to three audiences, namely: 1) the PCA Administrative Council when undertaking its next review of the PCA Rules and attendant documents; 2) parties to an arbitration when negotiating their arbitration agreement and consulting the tribunals; and 3) arbitral tribunals when issuing the rules of procedure, procedural orders and otherwise conducting the arbitration. The Committee considers that this approach has enabled a more nuanced set of ideas while remaining true to the pragmatic spirit of the mandate.

During the course of this project, the Committee regularly conveyed the substance of its ongoing work, including its Interim Report, to the ICJ, ITLOS, PCA and WTO by the good offices of each respective Registrar, Secretary-General or Director-General. Whilst the Committee received replies expressing interest and appreciation, no remarks were received in response to its request for comments on the substance of the work. The Committee thus developed its proposals without the benefit of formal remarks from the respective institutions, though individual members informally consulted with individual judges, arbitrators and administrative staff. The Committee has examined ideas for procedural reform in holistic terms. Proposals should thus be viewed not individually but rather as part of a 'package'; in many cases, the Committee has linked multiple suggestions to one another.

This Report proposes procedural reforms or best practices that, in the view of the Committee, are practicable and useful. Three overarching policy considerations drive these measures: 1) enhancing the 'sound administration of justice' (*la bonne administration de la justice*) as the integrity of the proceedings; 2) promoting procedural economy, as the time-efficiency of contentious procedures both for the institutions and for the parties; and 3) furthering cost-effectiveness in order to increase, and appear to increase, the value of the services provided by the institutions for the money invested in them by States.<sup>4</sup> While drawing valid and useful comparisons between the Court, the Tribunal, arbitral tribunals and WTO panels, the Committee has also acknowledged their respective institutional realities: certain approaches may well apply across them, others may not. The Committee has continuously been mindful

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<sup>3</sup> *Institut de droit international*, Third Commission (Rapporteur: Lord Collins of Mapesbury), Provisional Measures, Final Resolution (Hyderabad, 2017), Report (Hyderabad, 2017).

<sup>4</sup> The latter two aspects are less prominent in the discussion of inter-State arbitration, due to the parties' liberty to set the pace, costs, and procedure, and the lack of an over-arching concern about the adjudicator's docket.

of the fact that parties may jointly propose modifications to the rules at the outset of proceedings before permanent jurisdictions<sup>5</sup> and are expected to cooperate with arbitral tribunals and WTO panels to set the working procedures in each dispute. This margin for flexibility ensures that parties' voices shape in practice the procedure applied, and that the Committee's recommendations could be relevant in specific instances, without need or aspiration of universal endorsement or codification.

Whereas the disruption to international adjudication and arbitration arising from the COVID-19 pandemic has prompted interesting reactions from international courts and tribunals and parties, the Committee has not examined these events separately but rather as part of its broader inquiry. Hearings and case management conferences by remote videolink, for example, were an extant technique prior to the pandemic, even if the disruption has resulted in greater recourse to it and given rise to new techniques and problems. Procedural techniques applied during the pandemic are thus integrated into the Report, as opposed to a separate study. This exercise appears at a time of considerable challenge to the legitimacy of institutions across public life. In this evolving environment, practices that were once acceptable have become less so even while expectations have risen as to the performance of the institutions. To respond with conviction, institutions, including international courts and tribunals, need to adapt by demanding more of themselves in terms of both effective performance and ethical rigour. Whereas enhanced procedural efficacy and strengthened ethical standards are not necessarily a decisive factor in the decision-making process of States to participate in international dispute-settlement, they are by no means peripheral: continuous efforts to achieve effective and efficient proceedings would promote confidence amongst States in the professionalism and fairness of international adjudicators.<sup>6</sup>

## II. Case Management

Case management entails handling a diverse range of procedural matters that affect the general progress of proceedings from beginning to end. The two key principles that feature most prominently are: 1) procedural economy; and 2) procedural integrity ('the sound administration of justice'<sup>7</sup>). Though at times these two principles complement one another, at others they conflict, thus requiring prioritisation or balancing between them. In proposing the following reforms or suggestions, the Committee has considered not only the importance of prescribed rules that provide clarity but also the need for discretion to exercise judgement in response to different procedural incidents. Thus, the proposals focus not only on texts but also on other means of achieving procedural improvements, notably judicial practice.

### A. Case Management Conference

The Committee proposes the standardisation of timings for the existing practice of holding at least two case management conferences on procedural matters under the direction of the President (of ICJ and ITLOS),<sup>8</sup> the tribunal's chairperson (interstate arbitration) or the WTO panel.<sup>9</sup> Such conferences should be informal, using remote communication technology as appropriate, for speed and convenience. For ICJ and ITLOS, the Committee recommends that

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<sup>5</sup> ICJ Rules, Art 101; ITLOS Rules, Art 48.

<sup>6</sup> For statistical purposes, the period of review is the judicial year 1997-1998 to 2016-2017 with a cut-off date of 1 September 2017. The cut-off date for qualitative analysis of cases is 1 January 2020.

<sup>7</sup> For instance, see how this formula appears in the ICJ's Practice Directions.

<sup>8</sup> ICJ Rules, Arts 31, 54(1); ITLOS Rules, Art 45.

<sup>9</sup> In WTO panel proceedings, it is standard practice to have one Organization meeting with the parties. The Committee's proposal is limited to the standardisation of timing, to the extent possible, of such practice. At the end of the Organization meeting the panel adopts its working procedures, which can include special working procedures on confidential information, on the use of experts, on the rights of third-parties, and on other process and logistical matters.

the first conference be held within one month of the initiation of proceedings and that another conference be held within one month of the closure of the written phase, initial deliberations having taken place beforehand to enable the president to consult. This would not preclude additional conferences at earlier stages to address procedural matters such as joinder of proceedings or the exercise of fact-finding powers. This reform could be codified by amendment to Article 31 of the ICJ Rules and Article 45 of the ITLOS Rules. For arbitration tribunals, a conference for the adoption of a timetable and procedural rules should be held within a month of signature of the terms of appointment of the tribunal. The DSU provides that WTO panels should issue a timetable as soon as practicable and whenever possible within a week from composition.<sup>10</sup>

In line with the proposed reforms below, the first conference could deal with a range of procedural matters, as applicable to the particular forum, such as: 1) fixing of time-limits and page or word limits for written pleadings; 2) need for a jurisdiction and admissibility phase; 3) summary dismissal of application; 4) joinder of proceedings and/or parties; and/or 5) planning of the process of evidence production. The second conference could determine: 1) adoption of a list of issues, an agreed statement of facts, dates and speaking-times for the hearings; 2) applications to intervene and requests for copies of pleadings; 3) requests to produce new evidence; 4) organisation of the examination of witnesses and experts at the hearings; or 5) the exercise of autonomous fact-finding powers (i.e. – appointment of experts, inquiries, site visits). Additional conferences may be necessary to address promptly procedural issues before the second conference, particularly evidentiary matters.

## B. Summary Dismissal

Whereas Article 40(1) of the ICJ Statute vests parties with the right to file applications for summary dismissal, there is no right for applications to be admitted to the General List. After an application is entered onto the List, the Court may summarily dismiss it for manifest want of jurisdiction; this procedure has no textual basis in either the Statute or the Rules but has been invoked since the *Nuclear Tests Cases*.<sup>11</sup> A notable example of where the exercise of this power was both applied and withheld were *The Legality of the Use of Force Cases*.<sup>12</sup> The vagueness of the modalities for summary dismissal inhibits predictability.

The Committee proposes that a new Article 38(5)*bis* be considered for inclusion in the ICJ Rules to codify removal from the List of a manifestly unmeritorious application or the summary dismissal of particular claims contained in an application for manifest lack of jurisdiction.<sup>13</sup> The new provision could specify that the application or particular claims must be manifestly lacking in jurisdiction at the point of application<sup>14</sup> with a time-limit for requests to dismiss; the parties would submit brief comments at the first case management conference. The ITLOS

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<sup>10</sup> DSU Art 12(3).

<sup>11</sup> *Nuclear Tests (New Zealand v. France) (Australia v. France) (Provisional Measures) (Order of 22 June 1973)* [1973] ICJ Rep. 99, 100 (para 6); 135, 136-137 (para 7), 141-142 (paras 32-34).

<sup>12</sup> *Legality of the Use of Force (Yugoslavia v. Spain) (Provisional Measure), Order of 2 June 1999*, [1999] ICJ Rep. 761, at 768-783 (paras 19-33); *Legality of the Use of Force (Yugoslavia v. United States of America) (Provisional Measure), Order of 2 June 1999*, [1999] ICJ Rep. 916, at 923-925 (paras 19-33).

<sup>13</sup> E.g. – *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Burundi) (Order of 30 January 2001)* [2001] ICJ Rep. 3, at 4.

<sup>14</sup> E.g. – *Case Concerning Legality of the Use of Force (Serbia and Montenegro v. United Kingdom) (Preliminary Objections) (Judgment)*, [2004] ICJ Rep. 1307, at 1322 (para 34). See also, however, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Preliminary Objections) (Judgment)* [2008] ICJ Rep. 412, at 437-444 (paras 78-91); ‘Document entitled ‘Application for revision of the Judgment of 26 February 2007 in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)’, ICJ Press Release No. 2017/12 (09 March 2017).

position differs in that Article 294(1) of the UNCLOS provides for summary dismissal of abusive and/or ill-founded applications by an Article 287 body, on application or *proprio motu*. Article 96 of the ITLOS Rules specifies the procedure for the exercise of this power, providing for a time-limit of two months for *proprio motu* exercise (paragraph 3) and case-by-case fixing of deadlines by order for applications (paragraph 2), a time-limit of sixty days for written observations (paragraph 5) in addition to oral proceedings (paragraph 6).

However, inter-State arbitral tribunals (including those constituted under Annex VII UNCLOS) and WTO panels have no specific instrument to dismiss applications summarily. It is therefore important that the respondents' objections be determined as quickly as possible after the composition of the panel, as recommended below for preliminary procedural rulings.

### C. Suspension of Proceedings

Parties before the ICJ, ITLOS and WTO panels may discontinue the proceedings at any point up to the date of the promulgation of the decision or report on the merits, either by parties' agreement or upon application in the absence of objection.<sup>15</sup> Discontinuance of a case by settlement is an important function, as it can promote the satisfactory settlement of the dispute to which the contentious case contributes. In arbitration, tribunals can issue awards by consent that codify or hint to the parties' agreement to end the dispute.

To facilitate settlement negotiations, the Committee suggest that the ICJ and the ITLOS consider amendments to Articles 88 of the ICJ Rules and 105 of the ITLOS Rules to create a procedure for time-limited suspension, which may be renewed by joint agreement<sup>16</sup> – along the lines of the procedure established in Article 12.12 of the WTO DSU.<sup>17</sup> Arbitral tribunals could also propose to include such procedure in their rules of procedure.<sup>18</sup> To further this approach, courts, tribunals and panels could also consider the following measures: 1) exhorting the parties, upon the closure of the written phase, to consider resuming or starting settlement negotiations prior to the scheduling of the oral hearings; or 2) the adoption of an optional 'conciliation procedure' whereby the parties could enter into confidential negotiations upon the closure of the written phase to explore settlement, while the proceedings are suspended. As parties may wish to keep secret the fact that they are negotiating, the suspension order could also be confidential. These procedures would promote case settlement while facilitating the management of dockets; whilst extensions of the time-limit for written observation or postponement of oral hearings can create time for settlement negotiation, suspension orders achieve the same effect without disrupting the efficient management of work for adjudicators and registry officials. Improved predictability in terms of time-management also benefits parties to other pending cases by enabling them to take scheduling priority over suspended

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<sup>15</sup> ICJ Rules, Arts 88-89; ITLOS Rules, Arts 105-106; WTO DSU, Art 3(7). Under Art 12(12) of the DSU, the Panel may suspend its work at any time at the request of the complaining party.

<sup>16</sup> The practice is very common in investor-State arbitration, see for instance *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, consent award of 4 February 2020.

<sup>17</sup> No. 7 *Sustainable Conservation and Exploitation of Swordfish Stocks in the South-East Pacific (Chile v. European Community)* (Order of 16 December 2009), at paras 9-14. In *Legality of the Use of Force*, to facilitate negotiations the Court granted two twelve-month extensions to the time-limit for observations on the preliminary objections, but ultimately proceeded to judgment. Under Art 12.12 of the WTO DSU: '[i]f the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse. Note also that under Art 11 of the DSU, Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.'

<sup>18</sup> See *Duzgit Integrity*, Award on Reparation, at paras 16-19, referring to Rule 23 of the Rules of Procedure.

cases while also facilitating greater flexibility in receiving sudden and urgent applications, such as emergency provisional measures.<sup>19</sup>

#### D. Default

Following multiple high-profile inter-State arbitrations<sup>20</sup> and two ITLOS provisional measures proceedings,<sup>21</sup> the problem of default or ‘non-participation’ has again become topical.<sup>22</sup> The central issue is to what extent the procedural rights of a non-appearing party shall be safeguarded. There has been no case of non-appearance in WTO proceedings, not even when the responding party had made forceful objections to the panel’s jurisdiction.<sup>23</sup> To the extent feasible, the recommendations below are in principle valid for WTO panel proceedings.<sup>24</sup>

Though Articles 53(2) ICJ Statute and 28 ITLOS Statute preclude default judgments, the term ‘well-founded’ does not (and, in practice, cannot) oblige the Court or the Tribunal to handle the proceedings in the same way as a case in which all parties appear – least of all to determine its jurisdiction conclusively (rather than *prima facie*) at the stage of provisional measures.<sup>25</sup> Whereas parties are not obliged<sup>26</sup> to exercise their procedural rights, the Court or the Tribunal cannot do so in their stead.

The procedural approach adopted by the tribunals in the *South China Sea* and, especially, the *Arctic Sunrise* cases were successful and managed to preserve the integrity and fairness of the proceedings.<sup>27</sup> One inevitable disadvantage was that the costs of hiring the experts, whose role

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<sup>19</sup> E.g. – *LaGrand Case (Germany v. United States of America) (Provisional Measures)(Order of 3 March 1999)*, [1999] ICJ Rep. 9, at 14 (paras 19-21).

<sup>20</sup> PCA Case No. 2014-02 *The Arctic Sunrise Arbitration (The Netherlands v. Russia) (Award on Jurisdiction of 26 November 2014)*, at paras 9, 13, 19, 32; PCA Case No. 2013-19 *South China Sea Arbitration (The Philippines v. China)(Award on Jurisdiction and Admissibility of 29 October 2015)*, at paras 37-41, 112-129; PCA Case No. 2012-04 *Arbitration between Croatia and Slovenia (Croatia v. Slovenia)(Partial Award of 30 June 2016)*, at paras 37 *et seq.*

<sup>21</sup> No. 22 *The ‘Arctic Sunrise’ Case (Netherlands v. Russia) (Provisional Measures)(Order of 22 November 2013)* [2013] ITLOS Rep. 230, at 232 (paras 9 *et seq.*); *The Detention of Three Ukrainian Naval Vessels (Ukraine v. Russia)(Provisional Measures)(Order of 25 May 2019)*, para 8. See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan) (Judgment of 5 October 2016)*, at 5-6 (paras 3, 8).

<sup>22</sup> ICJ Statute, Art 53; ITLOS Statute, Art 28.

<sup>23</sup> E.g., *Russia - Measures Concerning Traffic in Transit*, WT/DS512/R/Add., Panel Report (Addendum).

<sup>24</sup> In *US – Shrimp (Ecuador)*, WT/DS335/R, Panel Report the responding party appeared before the panel but did not contest any of the claiming party’s arguments. Nonetheless, the panel noted (at para VII.28): ‘we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.’

<sup>25</sup> No. 22 *The ‘Arctic Sunrise’ Case (Netherlands v. Russia) (Provisional Measures)(Order of 22 November 2013)* [2013] ITLOS Rep. 230, Separate Opinion of Judges Wolfrum and Kelly, at 257-259.

<sup>26</sup> *Institut de Droit International*, ‘Non-Appearance before the International Court of Justice’ (Resolution, 4<sup>th</sup> Commission, 1991), Preamble.

<sup>27</sup> The *Arctic Sunrise* tribunal gleaned Russia’s position from its *notes verbales*, chose Vienna as a neutral venue of arbitration, granted a dilatory bifurcation request and scrutinised closely Netherlands’ pleadings. It also appointed experts to examine the request for damages to make sure that the quantum of compensation be adequate. In this case, the tribunal adjusted the default practice of granting to the parties equal times to exchange written submission, balancing the non-appearing party’s right to submit documents and the appearing party’s interest not to be unjustly burdened by the former’s inaction. Upon receipt of the Memorial, the non-appearing party would have 15 days to indicate ‘whether it intend[ed] to submit a Counter-Memorial,’ see Procedural Order No. 2 of 17 March 2014, Art 2.1.2. The *South China Sea* tribunal used China’s position paper as a counter-memorial on jurisdiction and, in the Rules of Procedure, introduced a specifically designed clause providing for the tribunal’s power to question the appearing party on any questions that ‘have not been canvassed, or have been inadequately canvassed, in the pleadings submitted.’ Subsequently, the tribunal appointed several experts, with respect to several factual contentious matters, and autonomously obtained documentation relating to historical survey records produced by the Royal Navy, France and the Japanese Imperial Navy. Interestingly, the tribunal based

was critical precisely because of the non-appearance, was borne by the appearing party.<sup>28</sup> While the Philippines did not ask for a costs award, Russia and the Netherlands ultimately reached a confidential settlement agreement, that included a payment of roughly half of the amounts included in the compensation award and a recognition of the legal determinations made in the award on liability.<sup>29</sup> In any event, tribunals could include in the award an order to pay costs, addressed to the absent party, which could be carried over in any subsequent settlement negotiation.

Whereas default cases remain relatively rare, they are typically high-profile and raise complex procedural problems. The Committee proposes the following measures for default cases before the ICJ and the ITLOS and in inter-State arbitration:

- 1) Acceleration of the proceedings through the disposing of equal allocations of time for written pleadings and/or the omission of oral argument;
- 2) Acknowledgement of irregular communications from the defaulting party to the panel on procedural matters<sup>30</sup> in procedural orders and judgments while refusing to give weight to views expressed therein by the defaulting party on procedural matters (e.g. – on applications to intervene by third States) in light of the waiver by the defaulting party of the exercise of its procedural rights;<sup>31</sup>
- 3) Proactive use of the fact-finding powers of the adjudicators, including through the appointment of experts.<sup>32</sup>

These proposals could be adopted through judicial and arbitral practice rather than amendments of rules, and would not preclude the typical procedure to resume in the event of the defaulting party discontinuing the default.

#### E. Composition of the Panel

The composition of the adjudicatory panel is governed, primarily, by the statutes of the ICJ and the ITLOS as well as the WTO DSU. In inter-State arbitration, the parties regulate the matter in the arbitration agreement: one of the reasons for parties to choose arbitration is precisely the ability to select arbitrators. Institutions play a role in the appointment of arbitral panels.<sup>33</sup>

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much of the final awards on the evidence collected autonomously or through tribunal experts, see Award, paras 978-983 and 1084-1108. See also *Duzgit Integrity*, Award on reparation, paras 37 ff.

<sup>28</sup> The *Arctic Sunrise* tribunal specified that Russia, besides compensation, would owe to the Netherlands its share of the tribunal's costs that the Netherlands had had to disburse, see *Arctic Sunrise*, Award on Compensation of 10 July 2017, para 128.

<sup>29</sup> Joint Statement of the Russian Federation and the Kingdom of the Netherlands on Scientific Cooperation in the Russian Arctic Region and the Settlement of a Dispute, <https://www.government.nl/documents/diplomatic-statements/2019/05/17/joint-statement-of-the-russian-federation-and-the-kingdom-of-the-netherlands-on-scientific-cooperation-in-the-russian-arctic-region-and-the-settlement-of-a-dispute> (17 May 2019). See <https://www.uawire.org/russia-agrees-to-pay-green-peace-2-7-million-euros-to-settle-arctic-sunrise-case>.

<sup>30</sup> With the exclusion of 'position papers' and other published accounts of that party's views on the merits.

<sup>31</sup> ICJ Statute, Art 42(1); ICJ Rules, Arts 31, 40(1); ITLOS Rules, Arts 45, 52; *South China Sea Arbitration*, *supra* note 20, at paras 13-14, 17, 42, 51, 97-104, 142; *Arctic Sunrise Arbitration*, *supra* note 20, at para 68. Should the parties settle the case in circumstances in which one party is in default, this should be recorded as unilateral discontinuance rather than by settlement – *United States Diplomatic and Consular Staff in Tehran (Order of 12 May 1981)* [1981] ICJ Rep. 45, 47.

<sup>32</sup> Section IV (B-C), *infra*.

<sup>33</sup> See the PCA submission to the UNCITRAL Working Group III, 'Mechanism for selection and appointment of presiding arbitrators or sole arbitrators' (11 May 2020).

## 1. Arbitrators

For inter-State arbitration, the Committee recommend that parties expressly designate an appointing authority in their arbitration agreements and that they name either the PCA Secretary-General<sup>34</sup> or the ICJ President as appointing authority for their expertise. This approach is preferable to the UNCITRAL model – which envisages the prior intervention of the PCA Secretary-General as *designating* authority. By identifying in advance an appointing authority the appointment process is shortened and reduces the risk of deadlock.

Moreover, a general rule should apply providing for the incompatibility between the role of appointing authorities and the role of arbitrators. Such incompatibility would promote the independence of the appointing authority and preclude all potential conflicts of interest arising from the possibility of self-appointment,<sup>35</sup> which would materialise when appointing authorities, also acting as arbitrators, are vested with the powers to decide challenges and to replace arbitrators.<sup>36</sup> Even when the appointing authority is not vested with the power to decide upon challenges or to appoint replacement arbitrators, conflicts of interest could manifest from service as arbitrator insofar as the appointing authority might be perceived to exercise the appointing power in order to influence the composition of the panel to be favourable to his/her point of view, or even to further his/her own professional interests by favouring the nominee in the expectation of reciprocal treatment elsewhere.

This approach would also preclude the increasingly commonplace phenomenon of parties appointing the appointing authority to the panel.<sup>37</sup> Whereas the likelihood of PCA Secretaries-General appointing themselves to a panel is remote,<sup>38</sup> the Committee proposes that the PCA amend Article 6(3) of the Arbitration Rules to prohibit an appointing authority from self-appointment. Moreover, an appointing authority should decline all appointments to the tribunal, even if requested by the parties, as the ability of the appointing authority to discharge

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<sup>34</sup> PCA Rules, Art 6(1); Annex ('Model Arbitration Clause for Treaties and other Agreements').

<sup>35</sup> In two UNCLOS Annex VII proceedings, the ITLOS President and Vice-president, respectively, acted as appointing authorities and appointed themselves as arbitrators for the panel – PCA Case No. 2015-28 '*Enrica Lexie*' Incident (*Italy v. India*), Request for the Prescription of Provisional Measures, Order (29 April 2016), para 14; PCA Case No. 2017-06 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine v. Russia*). In the *Gulf of Piran Arbitration*, the ICJ President appointed himself as an Arbitrator – note 20, *supra*.

<sup>36</sup> To avoid this problem, the rules applicable to the *Enrica Lexie* and *Black Sea* proceedings have a gap on challenges. These rules indicate as appointing authority the President of ITLOS (in line with Article 3 of Annex VII to UNCLOS, see Articles 5 and 6 of the Rules of Procedure of 19 January 2016 in the *Enrica Lexie* case and Articles 5 and 6 of the Rules of Procedure of 18 May 2017 in the *Coastal State Rights* case).

<sup>37</sup> A party-appointed arbitrator Judge Stephen Schwebel became, during the arbitration, President of the ICJ and, accordingly, the appointing authority – PCA Case No. 1996-04, *Sovereignty and Maritime Delimitation in the Red Sea* (*Eritrea v. Yemen*), Award on Territorial Sovereignty and Scope of the Dispute (9 October 1998), para 4. In one case, the specific rules of arbitration ruled out the possibility that the appointing authority would be in charge of replacing arbitrators – PCA Case No 2004-04 *Guyana v. Suriname*, Rules of Procedure (24 February 2004), Art 6: In *Croatia v. Slovenia*, Slovenia appointed Judge Ronny Abraham as a replacement arbitrator amidst a crisis at a late stage of the proceedings, who as President of the ICJ was ex officio the appointing authority – Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, Stockholm, 4 November 2009, in force 29 November 2010, Art 6.

<sup>38</sup> In the UNCITRAL investor-State dispute *Yukos Universal Holding v. Russia*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 8, the Claimants consulted the PCA Secretary-General as designating authority and consented to him acting as appointing authority too. This practice raises a different issue of veiled self-interest, insofar as it might encourage parties to favour or instigate the 'conversion' (from designating to appointing authority). On PCA 'conversion' see David Gaukrodger, 'Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview' (March 2018) OECD, <https://www.oecd.org/investment/investment-policy/ISDS-Appointing-Authorities-Arbitration-March-2018.pdf>, 58. Conversion would be precluded if, as recommended by this Committee, the parties always included an appointing authority in the applicable rules.

his functions free of potential conflicts of interest would be endangered by personal service on the panel. Should arbitrators become the appointing authority while serving on a tribunal (for instance, after becoming President of the ICJ or the ITLOS), they should be allowed to continue the proceedings only on condition that, for that set of proceedings, the powers normally vested in the appointing authority are delegated to another subject (e.g., the ICJ or ITLOS vice-presidents).

Parties normally constitute five-member tribunals in inter-State arbitration,<sup>39</sup> and the Committee recommend that they appoint no more than one member each to the panel, to promote its independence.<sup>40</sup> Though three-member panels risk relying disproportionately on the views of the presiding arbitrator,<sup>41</sup> parties could opt to reduce costs through a three-member panel.<sup>42</sup> In this case, the Committee consider that parties should use joint appointment or the 'list procedure', rather than individual appointments, and recommend that Article 9(1) of the PCA Rules be amended accordingly. This would promote the independence of the three-member panel by rendering the arbitrators not beholden to any one party for their appointments.

The breach of the secrecy of deliberations<sup>43</sup> in the *Croatia v. Slovenia Arbitration* raised the issue of unauthorised *ex parte* contacts with adjudicators. When party-appointed arbitrators are jointly entrusted with the appointment of the presiding arbitrator or the three remaining members, parties often agree that they may confer with their respective party-appointed arbitrators.<sup>44</sup> This practice is vulnerable to abuse, as it offers an opportunity for parties to exert pressure on the arbitrator appointed. In contrast, Article 18(1) of the WTO DSU prohibits 'ex parte communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.' Even more rigorously, the Rules of Procedure attached to the EU-Korea Free Trade Agreement forbid communication of any kind between arbitrators and parties in the absence of the other party and the other arbitrators.<sup>45</sup>

The Committee recommends that the PCA adopt a model arbitration clause forbidding communication between any party and any arbitrator in the absence of the other parties and arbitrators. This would enable party-appointed arbitrators to remain involved in the appointment process of the other arbitrator(s) if the parties want so. However, full knowledge of the other Party of the content of discussions with the party-appointed arbitrator would instil mutual confidence in the integrity of the process of appointment.

As challenges are on the rise, the Committee consider disclosure of potential conflicts of interest by potential arbitrators to be essential. While the PCA requests disclosure of

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<sup>39</sup> Five-member tribunals were appointed in nine out of the thirteen most recent inter-State cases – B Daly, E Goriatcheva and H Meighen, *A Guide to the PCA Arbitration Rules* (OUP 2014), 44: *South-China Sea; Ara Libertad; Chagos; Croatia/Slovenia; Bangladesh v. India; Straits of Johor; Guyana v. Suriname; Barbados v. Trinidad and Tobago; Enrica Lexie*. There were seven arbitrators the *Kishenganga* arbitration.

<sup>40</sup> PCA Rules, Art 9(1).

<sup>41</sup> For the same reasons, even-numbered tribunals should be avoided.

<sup>42</sup> E.g. – the Parties' decision to derogate from the default rule of Article 3(a) of UNCLOS Annex VII and appoint a three-member panel in *Duzgit Integrity (Malta v. Sao Tomé and Príncipe)*, PCA Case No. 2014-07, Award of 5 September 2016, para 9.

<sup>43</sup> A principle codified in the ICJ Statute, Art 54(3); ICJ Rules, Art 21(1); ITLOS Rules, Art 42(1).

<sup>44</sup> Andreas F Lowenfeld, 'The Party-Appointed Arbitrator in International Controversies: Some Reflections' (1995) 30(1) *Texas International Law Journal* 59-70. IBA Guidelines on Party Representation in International Arbitration, 5 May 2013: '8. It is not improper for a Party Representative to have Ex Parte Communications in the following circumstances: ... (b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.'

<sup>45</sup> Free Trade Agreement between the Republic of Korea and the United States of America 2010, Annex 14-B ('Model Rules of Procedure for Dispute Settlement'), Arts 66-68. See also the European Union-Ukraine Association Agreement, Annex XXIV, Rules 35-36.

professional commitments from individuals to gauge their availability and the scope for ‘double-hatting’,<sup>46</sup> other appointing authorities, such as the ITLOS President, do not do the same when appointing arbitrators to an Annex VII panel. To promote procedural integrity and economy, the Committee recommend that parties include in arbitration agreements a statement of impartiality and independence comparable to the PCA Model for individuals to provide information concerning their professional engagements and workloads.

When challenges to arbitrators are brought, the Committee consider that the panel should not be tasked with its resolution,<sup>47</sup> as this endangers their perceived impartiality and complicates the procedure in the case of multiple (several or joint) challenges. Instead, the Committee recommend that challenges be referred to an external body: parties could include in arbitration agreements a provision based upon Article 13 of the PCA Rules, empowering the appointing authority, rather than the panel, to decide on challenges. The rule of incompatibility stated above would make sure that challenges would not be decided by sitting arbitrators.

## 2. Chambers of the ICJ and ITLOS

Whilst there has been recurring debate concerning the desirability of *ad hoc* and standing chambers,<sup>48</sup> in practice they are infrequently used at the ICJ. Unlike *ad hoc* chambers, standing chambers based upon subject-matter have hitherto failed to take root.<sup>49</sup> Articles 26(2) of the ICJ Statute<sup>50</sup> and Section E of the ICJ Rules are silent on the composition of *ad hoc* chambers. Parties generally prefer to have influence on the composition of the panel, as evinced by the trend towards the greater use of arbitration in recent years (e.g. – per Annex VII of the UNCLOS) in spite of the greater financial expense entailed.<sup>51</sup> In the Special Agreement in the *Gulf of Maine Case*,<sup>52</sup> the Parties reserved for themselves the right to jointly nominate the members of the *ad hoc* Chamber and to discontinue the case if the Chamber were not so constituted; the Court accepted the Special Agreement and the Chamber was thus constituted.

The procedure for the selection of chamber panels is critical to parties’ perceptions of impartiality.<sup>53</sup> The Committee propose the adoption of a new Article 90*bis* to Section E of the Rules whereby the Court would ‘determine, in consultation with the parties, the members who

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<sup>46</sup> Daly *et al.*, *supra* note 39, 50-51, 237-238.

<sup>47</sup> For example, Art 58 of the ICSID Convention provides for the remaining arbitrators to make a decision. In the ongoing reform attempt, it is proposed that the remaining arbitrators should be allowed to ask the Chair of the ICSID to make the decision. Rule 23(2), ICSID Arbitration Rules, Proposals for Amendment of ICSID Rules, ICSID Working Paper #4, 2020, at [https://icsid.worldbank.org/en/Documents/WP\\_4\\_Vol\\_1\\_En.pdf](https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf).

<sup>48</sup> Calls for greater use of chambers were made in the *Counsel Survey* – Crawford and Keene, ‘Editorial’, 7(2) *Journal of International Dispute Settlement* (2016), 225-230, at 226, 229.

<sup>49</sup> ICJ Statute, Art 26(1); ITLOS Statute, Art 15. None of the three ITLOS standing chambers – whose composition is exclusively determined by the Tribunal – have been used to date: 1) Chamber for Fisheries Disputes (9 members); 2) Chamber for Marine Environment Disputes (9 members); 3) Chamber for Maritime Delimitation Disputes (11 members). The Chamber for Environmental Matters formed by the ICJ between 1993 and 2006 was likewise never utilised.

<sup>50</sup> Article 26(2) does, however, provide: ‘The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties.’

<sup>51</sup> Recent arbitral tribunals have comprised Members of both the ICJ and ITLOS.

<sup>52</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Case (Canada v. United States of America)(Merits)(Judgment)* [1984] ICJ Rep. 246, at 252 (para 3); Special Agreement – Compromis, Arts I-III. This was the first-ever use of an *ad hoc* chamber in the history of the Court.

<sup>53</sup> *Frontier Dispute (Benin v. Niger)(Order of 27 November 2002)* [2002] ICJ Rep. 613, Declaration of Judge Oda, at 615; *Land, Island and Maritime Frontier (El Salvador v. Honduras, Nicaragua Intervening)(Application for Revision)(Order of 27 November 2002)* [2002] ICJ Rep. 618, Declaration of Judge Oda, at para 5.

are to constitute the chamber'.<sup>54</sup> This approach tracks the existing approach in judicial practice, as the Court is unlikely to depart from the expressed preferences of parties. Whereas the Committee consider that a residual discretion ought to remain to overrule the parties (even if unlikely to be exercised in practice) it notes that Article 15(2) of the ITLOS Statute requires that a chamber be constituted with the 'approval' of the parties. Therefore, the Committee cannot extend, for the ITLOS, the same recommendation made with respect to the ICJ.

### 3. Appointment of judges *ad hoc*

Currently, the identity of judges *ad hoc* to the Court or the Tribunal must be communicated 'no later than two months before the time-limit fixed for the Counter-Memorial'.<sup>55</sup> This deadline is not synchronised with the revised time-limit for the filing of preliminary objections of three months after the filing of the Memorial at the Court and ninety days after the filing of the Application at the Tribunal. The Committee thus proposes that the timing for notification of the identity of judges *ad hoc* should be no earlier and no later than the time-limit for the filing of the Memorial on jurisdiction/admissibility or the merits. This adjustment would also synchronise it with the proposed time-limits for intervention.<sup>56</sup>

### 4. Nationality of judges in cases of joinder or interventions

The potential for multiple applicants or respondents before the ICJ and ITLOS, as well the right of third parties before WTO panels, can generate problems concerning the adjudicators' nationality.

Regarding the ICJ, the proposed amendment to Article 47 of the Rules on joinder of bilateral proceedings<sup>57</sup> carries important implications for the composition of the panel.<sup>58</sup> Whereas the Court has previously joined multiple States as Co-Applicants per Article 31(5) of the ICJ Statute,<sup>59</sup> it has never joined multiple States as Co-Respondents. Where joinder is ordered, the joined parties must jointly select the judge *ad hoc* to sit on the panel; Article 37 of the ICJ Rules does not address the scenario of multiple joined parties each having nationals as Members of the Court.<sup>60</sup>

Neither Article 31(5) of the ICJ Statute nor Article 36 of the ICJ Rules addresses the problem of an imbalance in the composition of the panel where joinder is *not* effected. Inequalities in

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<sup>54</sup> Two of the five contentious cases brought before the Tribunal to date have featured *ad hoc* chambers composed of five judges – *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Union)*; *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*.

<sup>55</sup> ICJ Rules, Art 35(1); ITLOS Rules, Art 19(1).

<sup>56</sup> Section II(F)(2), *infra*.

<sup>57</sup> Section II(F)(1), *infra*.

<sup>58</sup> *Contra Lockerbie*, *infra* note 137, Joint Declaration of Judges Bedjaoui, Guillaume and Ranjeva (at 40-43, para 17). See also the rather vague conclusions of the Institut de Droit International, 'Judicial and Arbitral Settlement of International Disputes Involving More Than Two States' (Resolution, Berlin, 1999), at paras 5-6.

<sup>59</sup> E.g. – *South West Africa Cases (Ethiopia v. South Africa) (Liberia v. South Africa) (Joinder of Cases and Appointment of Judge ad hoc) (Order)* [1961] ICJ Rep. 13. See also *North Sea Continental Shelf Cases (Denmark v. Germany) (Germany v. Netherlands) (Order)* [1968] ICJ Rep. 9.

<sup>60</sup> The first case before the PCIJ saw four Applicants have nationals who were Members of the Court and who sat on the panel – *Case of the S.S. 'Wimbledon' (Great Britain, France, Italy and Japan v. Germany)*, PCIJ Series A, No. 01, Judgment of 17 August 1923, at 15. This scenario had not been envisaged – PCIJ Rules of Court of 24 March 1922, PCIJ Series D, No. 01, Art 4; 'Acts and Documents Concerning the Organisation of the Court: Preparation of the Rules of Court', PCIJ Series D, No. 2, 118-119, 455.

the composition of panels of parallel proceedings arose in the *Legality of the Use of Force Cases*<sup>61</sup> and *Nuclear Disarmament Cases*.<sup>62</sup> This scenario has not yet arisen at the ITLOS.

A balanced panel is critical, notwithstanding the duty of independence of all judges.<sup>63</sup> Balancing could be obtained by 1) enlarging the panel by allowing for more judges *ad hoc*<sup>64</sup>; or 2) shrinking the panel by requiring judges to withdraw.<sup>65</sup> The problem is further complicated by the right of Members of the Court and the Tribunal of the nationality of any of the parties to sit on the panel.<sup>66</sup>

The Committee propose amendment to Articles 36 of the ICJ Rules and 20 of the ITLOS Rules to prescribe mechanisms for balancing in cases both of joinder of parties and the hearing of cases in common where the parties have multiple nationals as Members of the Court or Tribunal. Where joinder is ordered, the Members concerned would determine amongst themselves – potentially through the good offices of the President – which of them is to exercise their right to self-recuse ‘for some special reason’.<sup>67</sup> Where cases are heard in common, each Member should sit on the panel in which the State of his or her nationality appears, but not on the other panels. Through these prescribed rules, panels would be automatically balanced without the need for a special decision during cases. This process would also avoid very large panels resulting from the appointment of more judges *ad hoc*.<sup>68</sup>

In WTO proceedings, the parties can object to the nominations proposed by the Secretariat only ‘for compelling reasons’<sup>69</sup> but their objections are invariably upheld.<sup>70</sup> Under Article 8(4) of the WTO DSU, the Secretariat maintains an indicative list of governmental and non-governmental individuals, from which panelists may be appointed as appropriate.<sup>71</sup> Individuals that are not included in this list can also be appointed as panellists, and the Secretariat keeps an undisclosed database with the information about previous or potential panelists, not on the Indicative list. When called upon to appoint panelists, the Director-General of the WTO

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<sup>61</sup> *Legality of the Use of Force*, *supra* note 14, at 1314 (para 16). The Court rejected the request for joinder and ruled that the judges *ad hoc* appointed by four of the Respondents (who had already sat on the panels in the provisional measures phase) would not be permitted to sit on the preliminary objections phase without prejudice to the merits phase; the Respondents still had a seeming advantage in that the seven panels included three Members of the Court who were nationals of Respondents, as opposed to one judge *ad hoc* appointed by the Applicant.

<sup>62</sup> *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*(Judgment of 5 October 2016); *Nuclear Disarmament (Marshall Islands v. Pakistan)*, note 21, *supra*; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*(Judgment of 5 October 2016). Nationals of two of the three Respondents (India and the United Kingdom) were Members of the Court; as the proceedings were separate, the two judges sat on each of the three panels. The three Respondents opposed the same prayers for relief and raised the same jurisdictional objections. There was thus an apparent inequality between the Applicant and the Respondents; the Applications were dismissed in each case by a vote of 9-7.

<sup>63</sup> ICJ Statute Art 2; ITLOS Statute Art 2(1).

<sup>64</sup> *Legality of the Use of Force Cases*, *supra* note 14, Separate Opinion of Judge *ad hoc* Kreća, at 1439-1451 (paras 67-79), esp. 1446-1448 (paras 73-74). See, however, his distinction between ‘parties of the same interest’ and joinder at 1440-1442 (para 69).

<sup>65</sup> ICJ Statute, Art 24(3); ITLOS Statute, Art 8.

<sup>66</sup> ICJ Statute, Art 31(1); ITLOS Statute, Art 17(1).

<sup>67</sup> ICJ Statute, Art 24(1); ITLOS Statute, Art 8(2).

<sup>68</sup> See also the use of the singular case ‘a judge’ – *ibid*.

<sup>69</sup> DSU Art 8(6).

<sup>70</sup> The EU made a proposal, then codified in a draft decision presented to the Dispute Settlement Body, to remove the veto power of the parties, and operate instead a ‘single list’ system whereby the parties could provide a ranking of the names proposed by the Secretariat. See Dispute Settlement Body - Special Session - Report by the Chairman, Ambassador Coly Seck, 19 June 2019, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/TN/DS/31.pdf> (‘Coly’s report’), para 2.127.

<sup>71</sup> The indicative list is publicly available on the WTO website, with document code WT/DSB/44. The list is periodically revised and updated.

frequently relies upon the knowledge and experience of the Secretariat in proposing individuals. Normally, panelists cannot have the nationality of the disputing and third parties.

The ‘Endorsing Members’ that shared some best practices in 2017, led by Canada, proposed that the right to exclude nationals of Members which are third parties should be waived (to increase the pool of appointable individuals) and that first-timers could serve on a panel only if the panel’s collective expertise is sufficient. They also reminded all Members that the ‘compelling reasons’ requirement should not be abused by Members simply seeking to turn down a candidate for strategic reasons.<sup>72</sup> The Committee seconds these proposals, which remain subject to the Members’ discretion, to facilitate the appointment of qualified members to panels without the obstacles of cross-vetoes and excessively stringent rules on nationality.

#### F. Emergency interim measures in inter-State arbitration

The Committee took interest in the issue of interim measures sought when an inter-State tribunal is not yet constituted. Emergency arbitration is premised on the availability of an institution pre-existing the tribunal that can be seised by the applicant, and is therefore conceivable only when the parties use institutional arbitration. There is an obvious disparity between UNCLOS Annex VII cases and other inter-State cases. In the first case, Article 290(5) UNCLOS grants to the parties the possibility to request the interim measures from ITLOS, while the composition of the Annex VII tribunal is pending.<sup>73</sup> This possibility is tantamount to resort to an emergency arbitrator.

The availability of emergency measures is equally desirable in other proceedings before the PCA or other non-institutional tribunals.<sup>74</sup> The issue cannot form the object of a recommendation to the tribunals or the parties drafting the arbitration agreement, because its realisation depends on institutional arrangements. For a reform to happen, the emergency system should be introduced as an option in the applicable rules of procedure (UNCITRAL or PCA) and the parties should opt-in. Ideally, countries could mirror the functioning of Article 290 UNCLOS in their arbitration clauses of future treaties or a dedicated convention, conferring on a designated body (for instance, a standing Chamber of the ICJ) the competence to indicate provisional measures while the composition of an arbitral tribunal is pending. The Committee recommends that parties consider this option in future drafting efforts, and invites the PCA to explore the possibility of establishing a procedure capable of identifying an emergency arbitrator to whom parties could resort.

#### G. Participation of Third Parties

Over the past thirty years, applications by third parties, whether States or other entities, to participate in proceedings have become increasingly frequent. The regulation of such applications varies according to the statutory rules of each inter-State court, tribunal or panel. Whereas the rules of the inter-State courts are more restrictive, inter-State arbitration theoretically allows for greater flexibility even though it has not traditionally featured third-party participation. WTO panels have faced the most intensive use of third-party participation, and there might be margin for further developments.

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<sup>72</sup> JOB/DSB/1/Add.7 of 10 July 2017, ‘Additional practices and procedures in the conduct of WTO disputes panel composition.’

<sup>73</sup> See *Enrica Lexie*, the *Ara Libertad*, the *Southern Bluefin Tuna*, the *MOX Plant* and *Land Reclamation* cases.

<sup>74</sup> In the ongoing ICSID Rules reform process, it is decided not to propose emergency arbitration mechanism on the ground that ‘[t]he tight schedule required for emergency arbitration could raise due process issues in cases involving States’. ICSID Secretariat, *Proposals for Amendment of the ICSID Rules – Working Paper*, 2018, at <https://icsid.worldbank.org/en/amendments/Pages/Proposals/Working-Paper.aspx>, p. 226. However, the Committee does not find this observation entirely convincing given Article 290(5) UNCLOS.

## 1. Joinder of Parties

Before the ICJ, intervention entails the entry by a third State into pending proceedings without becoming party to them.<sup>75</sup> There are two forms of intervention: 1) interventions by application on the basis of a ‘legal interest’ in the case;<sup>76</sup> and 2) intervention by right of a party to a treaty.<sup>77</sup> Whereas the first type of intervenor ‘does not acquire the rights, or become subject to the obligations, which attach to the status of a party’,<sup>78</sup> the latter kind of intervenor is bound by the construction of the treaty given by the judgment.

Joinder of parties, as distinct from joinder of proceedings, arises when a State applies to join a case as a new party. The ICJ has treated joinder applications as a form of Article 62 intervention (‘intervention as party’).<sup>79</sup> Intervention as party is subject to the consent of the (other) parties.<sup>80</sup> In the *Land and Maritime Dispute Case*, Honduras made two applications to intervene, as party and alternatively as non-party; the Court held that intervention as party requires both a jurisdictional basis at point of application and an engaged ‘right’ whereas intervention as non-party wants only a ‘legal interest’.<sup>81</sup>

The distinction between joinder of a new party and intervention is that the former is premised upon rights or claims of the third State that are central to the proceedings,<sup>82</sup> whereas the latter enables the participation of third States whose legal interests are ancillary to them.<sup>83</sup> In particular cases, a third State applying for joinder would be *entitled* to join the proceedings as party, and the case could not be heard without its consent.<sup>84</sup> In any event, joinder as party should not be equated to intervention as non-party under Article 62. The approach of Honduras in the *Land and Maritime Dispute Case* is understandable from the perspective of litigation

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<sup>75</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application by Honduras for Permission to Intervene) (Judgment)* [2011] ICJ Rep. 420, at 436 (para 46).

<sup>76</sup> ICJ Statute Art 62; ICJ Rules Art 81; ITLOS Statute Art 31; ITLOS Rules Art 99.

<sup>77</sup> ICJ Statute Art 63; ICJ Rules Art 82; ITLOS Statute Art 32; ITLOS Rules Art 100.

<sup>78</sup> *Land Island and Maritime Frontier Dispute (El Salvador v. Honduras)(Application by Nicaragua for Permission to Intervene)(Judgment)* [1990] ICJ Rep. 92, at 136 (para 102) cited in *Nicaragua v. Colombia (Application by Honduras for Permission to Intervene)*, *supra* note 75, at 432 (para 29).

<sup>79</sup> In the *Land, Island and Maritime Frontier Dispute Case*, Nicaragua applied under Article 62 to intervene as a party, citing the indispensable third-party principle in support. The Chamber granted the application to intervene as non-party while rejecting the argument of Nicaragua that its legal interest formed part of the ‘very subject matter of the decision’ – *supra* note 78, at 122 (para 73), 135 (para 99).

<sup>80</sup> *El Salvador v. Honduras (Application by Nicaragua for Permission to Intervene)*, *supra* note 78, at 134-135 (para 99); *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application of Honduras for Permission to Intervene) (Judgment)* [2011] ICJ Rep. 420, at 432 (para 28).

<sup>81</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application of Honduras for Permission to Intervene) (Judgment)* [2011] ICJ Rep. 420, at 430-438 (paras 20-48). See also the Dissenting Opinion of Judge Donoghue (at 484-485, paras 34-38). See also *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application of Costa Rica for Permission to Intervene) (Judgment)* [2011] ICJ Rep. 348.

<sup>82</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America) (Preliminary Objections) (Judgment)* [1954] ICJ Rep. 19, at 32. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Merits)* [2002] ICJ Rep. 303, at 421 (para 238).

<sup>83</sup> E.g. – *Pulau Ligitan and Pulau Sipidan (Intervention)*, *infra* note 119, Separate Opinion of Judge *ad hoc* Weeramantry, at 643-647 (paras 24– 29). See also *Jurisdictional Immunities of the State (Germany v. Italy) (Application of Greece for Permission to Intervene) (Order of 4 July 2011)* [2011] ICJ Rep. 494, at 501-502 (paras 24-26).

<sup>84</sup> IDI Resolution, *supra* note 58, at paras 19-21. See further *Military and Paramilitary Activities in and around Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility) (Judgment)* [1984] ICJ Rep. 392, at 430-431; *East Timor (Portugal v. Australia) (Preliminary Objections)* [1995] ICJ Rep. 90, at 102.

strategy, yet conflates two discrete concepts: joinder as party, occasionally based on the indispensable party principle, and a *legal interest* in intervening as non-party.<sup>85</sup>

The Committee recommends that the ICJ amend the relevant rules<sup>86</sup> to clarify the distinction between joinder as party and intervention. The rule on joinder could provide that a State may invoke a right or possibility to join proceedings subject to two criteria: 1) a jurisdictional basis; and 2) an engaged legal right or claim. Should its application be granted, the State would acquire the status of a party, including the right to introduce new claims and to appoint a judge *ad hoc*, while being bound by the judgment. Conversely, intervention would require only that the State demonstrate the existence of a legal interest in the case and that the intervenor is not entitled to the procedural rights of a party<sup>87</sup>; the intervenor would also not be bound by the judgment. New parties should also contribute to costs as required, whereas intervenors should not. Third States would thus have a bifurcated choice: 1) to join as a *party*; or 2) to intervene as a *non-party*.

Due to the jurisdictional implications of joinder of new parties, Article 47 of the ICJ could stipulate a time-limit (e.g. – 60-90 days from the filing of application) for applications to join as new party. This would reflect the reality that a State applying to join is potentially raising a jurisdictional objection to the proceedings without their participation. Should the application be granted, the time-limit for the appointment of a judge *ad hoc* (if applicable) by the new party would accord with that for the other parties. Should the application be contested, it would be addressed as a jurisdiction/admissibility proceeding;<sup>88</sup> this approach would further sharpen the distinction between the rationales of intervention and joinder as new party.

Since Article 31(3) of the ITLOS Statute renders judgments binding upon intervenors, it is not possible to distinguish between joinder and intervention in the ITLOS Rules. Nonetheless, the Committee suggests that the Tribunal amend Article 103(3) of its Rules to afford intervenors the right to appoint judges *ad hoc* and to object to discontinuance, as the existing position makes intervention unattractive.<sup>89</sup>

## 2. Alternative methods of participation for State and non-State actors

The Committee examined alternative modes of participation of non-disputing States in contentious proceedings, and favoured proposals aimed at granting participatory rights to States, based on systemic interests, while refraining from encouraging the admission of unsolicited brief from non-State actors.

The Committee considers there to be persuasive policy grounds for enabling third States to submit their views on the ‘general development of the law’ (e.g. – a customary rule at issue in the case) before the ICJ and ITLOS. However, the Committee considers that such a mechanism should be limited to keep the proceedings orderly and efficient. The Committee makes two proposals, either 1) lowering the threshold of ‘legal interest’ for the purpose of intervention, or 2) creating a new mechanism (e.g. – ‘*amicus curiae*’) distinct from intervention.

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<sup>85</sup> The definition of ‘interest of a legal nature’ in *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application by Costa Rica for Permission to Intervene) (Judgment of 4 May 2011)* [2011] ICJ Rep. 348, at 358 (para 36).

<sup>86</sup> Arts 47 and 81 of the ICJ Rules.

<sup>87</sup> *Territorial and Maritime Dispute (Intervention)(Judgment)*, *supra* note 81, at 432 (para 29), 434 (para 37).

<sup>88</sup> The party applying to join should have the right to appoint a judge *ad hoc* in the jurisdiction/admissibility proceedings, as the judgment concerns an asserted right.

<sup>89</sup> See, however, the requests by Benin and Togo for copies of the pleadings in the *Atlantic Ocean Case*, *infra* note 183, at paras 42, 46.

The first proposal could be enacted through judicial practice<sup>90</sup> in the application of Article 81(2)(a) of the ICJ Rules. A useful amendment to Articles 85(3) of the ICJ Rules and 103(3) of the ITLOS Rules would render participation of intervenors in the oral hearings subject to the decision of the judges rather than automatic. On this approach, the degree of participation of third States could be tailored to the intensity of the ‘legal interest’ that they assert: for example, a third State seeking to make its views known on relatively narrow and/or minor issues could obtain the right to intervene in writing only, and possibly subject to a word limit.

Whereas Article 17(5) of the PCA Rules provides for the joinder of a third party to an arbitration, it does not address the possibility of intervention. In *South China Sea*, Viet Nam, *inter alia*, reserved ‘the right to seek to intervene ... in accordance with the principles and rules of international law’.<sup>91</sup> The arbitral tribunal stated that it would address the possibility of intervention ‘only in the event that Viet Nam in fact [make] a formal application for such intervention’,<sup>92</sup> which did not occur.

The arbitral tribunal declined the Philippines’ request that the hearings be public but agreed to publish the corrected transcript and provided for ‘interested States’ to attend the hearing ‘upon receipt of a written request.’<sup>93</sup> It accordingly granted leave to attend the hearings on jurisdiction to several requesting States, all located in the general vicinity of the South China Sea.<sup>94</sup> Whilst the arbitral tribunal granted leave to Australia and the United Kingdom to attend the hearings as ‘neutral observers’, it rejected an application from the United States on the ground that it was not party to the UNCLOS.<sup>95</sup> Though the status of observers arguably implied that the third States did not have the right to address the proceedings, Malaysia submitted a written *note verbale* to which the Philippines objected.<sup>96</sup>

To provide clarity for the modalities of future requests to intervene or to participate as ‘observers’, the Committee propose that the PCA add a provision to Article 17(5) of the PCA Rules to provide for the possibility of third State participation: 1) by intervention; or 2) as observer. In both cases, participation could be by authorisation of the arbitral tribunal in consultation with the Parties: whereas intervenors could be entitled to submit written or oral observations, observers could be permitted to attend hearings without the right to comment.<sup>97</sup> As intervenors would not join as party, they would not be bound by the award.<sup>98</sup>

The Committee recommends tribunals to admit unsolicited written briefs by third States claiming that the decision could affect their rights, and possibly regulate their participation in the proceedings similarly to that of non-disputing parties of multilateral treaties, subject to a preliminary scrutiny of relevance. The possibility of proper intervention by third countries as

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<sup>90</sup> The case-law of the Court is not clear-cut on the point, yet seems to suggest that ‘legal interest’ requires a link to a concrete and existent claim that is indirectly connected to the case – *Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application by Honduras for Permission to Intervene) (Judgment)* [2011] ICJ Rep. 420, at 434 (para 37).

<sup>91</sup> *South China Sea*, *supra* note 20, Award (12 July 2016), para 36.

<sup>92</sup> *Ibid.*, para 43.

<sup>93</sup> *Ibid.*, Award on Jurisdiction on and Admissibility (29 October 2015), para 73.

<sup>94</sup> *Ibid.*, Award (12 July 2016), para 50.

<sup>95</sup> *Ibid.*, paras 65-68.

<sup>96</sup> Whilst Malaysia ‘request[ed] that the [Arbitral] Tribunal show due regard to the rights of Malaysia’, she ‘emphasised that [she] was not seeking to intervene in the proceedings’; nonetheless, the Philippines considered Malaysia’s communication to be, *inter alia*, ‘untimely, in light of the fact that Malaysia had been an observer since 10 June 2015 and...made no effort to raise [her] concerns’ – *ibid.*, para 105. The Arbitral Tribunal ‘acknowledged to Malaysia that it had received and taken note of its Communication.’

<sup>97</sup> E.g. – DSU Art 10(2); UNCITRAL Rules on Transparency in Investor-State Arbitration 2014, Art 5. The rule in WTO procedure is distinguished by the fact that only WTO Members may apply to intervene.

<sup>98</sup> Convention for the Pacific Settlement of International Disputes 1907, Art 84.

disputing parties, instead, does not warrant specific analysis and is neither discouraged nor encouraged. The recommended model would resemble that of third parties in WTO proceedings and that available to the Contracting Parties to the London Convention on Marine Pollution seeking to intervene in an arbitration procedure, claiming a legal interest that ‘may be affected by the decision in the case.’<sup>99</sup> Intervening States have the right ‘to present evidence, briefs and oral argument on the matters giving rise to [their] intervention.’<sup>100</sup>

The second proposal – which could apply also to ITLOS proceedings – would introduce a new category of participation, which could be legislated through a new Article (86*bis* in the ICJ Rules; 104*bis* of the ITLOS Rules) and could be granted also in arbitration proceedings. Third States wishing to submit brief views on ‘the development of the law’ could do so by right in writing only, filing their brief by the closure of the written phase. Though adjudicators would not be bound to take their briefs into account, this would be an alternative mechanism for third States to participate in the event that they fail to meet the time-limit for applications to intervene, as proposed below, or lack intervention rights altogether (in arbitration). Like interveners, *amici curiae* States would be able to apply for copies of the pleadings. A new Article 104*bis* to the ITLOS Rules would be particularly welcome to facilitate participation by third States (e.g. – to express views on particular provisions of the UNCLOS and/or custom), in a setting where intervention is unprecedented and unlikely.

The practice of third parties in WTO panel proceedings straddles intervention and participation by reason of an interest in the development of the law. Under the DSU, third parties have limited rights to submit views, access documents, and participate in a special session within the first substantive meeting.<sup>101</sup> According to several WTO Members, third parties’ rights should be enhanced by default to include the right to attend the entire first substantive meeting (and sometimes the second one) and receive all documents submitted in the dispute.<sup>102</sup> Further enhanced rights could include the right to submit a written statement after the first substantive meeting (rather than before).<sup>103</sup> Occasionally, third parties might even request the right to ask questions to parties and other third parties during the substantive meetings.<sup>104</sup> Enhanced third party rights are granted only exceptionally,<sup>105</sup> typically with the disputing parties’ agreement and never when both parties object.<sup>106</sup> In practice, many third parties provide written submissions and make oral statements during the first panel meeting.

The Committee supports, as most Members have done, the proposal by the Chair of the Dispute Settlement Body (DSB) Special Session, codifying certain aspects of the practice,<sup>107</sup> that third

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<sup>99</sup> Art 6, Annex III.

<sup>100</sup> Ibid.

<sup>101</sup> DSU Art 10.2 and 10.3. Reto Marco Malacrida and Gabrielle Marceau, ‘The WTO Adjudicating Bodies’, in Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein and MQ Zhang (eds), *The Legitimacy of International Trade Courts and Tribunals* (CUP 2018), see also the template Working Procedures, Annex 3 to the DSU, Art 6.

<sup>102</sup> Coly’s 2019 report (n 70) para 2.28, speaking of a ‘general convergence’ within the WTO membership.

<sup>103</sup> Ibid, referring to proposals advanced by a group of States, led by Canada.

<sup>104</sup> *EC – Bananas III*, WT/DS27/R, Panel Reports, para 7.9; *EU – Poultry (China)*, WT/DS492/R, Panel Report, para 7.49. In one case, third parties were allowed to make statements and question the parties. This arrangement occurred in the framework of a case where hearings were open to the public, see *US – COOL*, WT/DS384/R, Panel Report, Annex F, para 3.

<sup>105</sup> A typical case is when co-complainants run parallel disputes against the same measures, and act as third parties in the parallel disputes. Sometimes, the third party appeared to have an economic interest that was directly implicated by the measure challenged. See Graham Cook, ‘Confidentiality and Transparency in the WTO’s Party-Centric Dispute Settlement System’, forthcoming in Molina and Huerta Goldman (eds), *Practical Aspects of WTO Litigation* (Kluwer 2020) for a gallery of cases.

<sup>106</sup> E.g. – *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, Annex B-1 to Panel Report, para 1.8.

<sup>107</sup> Coly report *supra* note 70, 15, para 2.31.

parties adopt an active role (oral and written submissions, questioning by the panels, full access to documents including parties' answers to panel's question) at least until the first substantive meeting and a passive role afterwards (attendance and reception of submissions). In light of the very tight procedural framework, it would be reasonable to reserve the second meeting for the disputing parties, which would be able to focus on the panels' questions and instructions, without further input from the third parties.<sup>108</sup> Specific rules adopted to handle the submissions of confidential information (see below) require, in specific cases, that written submissions be redacted before they are shared with third parties, and/or that the latter might be excluded from a portion of the substantive meeting.

An issue can arise with respect to the incidental steps of the proceedings made necessary to address preliminary or procedural questions. The participation of third parties in these incidental phases is determined *ad hoc* by WTO panels, after consultation with the disputing parties.<sup>109</sup> When a procedural incident arises in the first written submission or thereafter, third parties in principle are precluded from expressing their views. The Committee recommends, in furtherance of basic procedural fairness, that panels should adhere to the uniform practice of securing the participation of third parties for all preliminary questions that may be raised by the main litigants

Whilst several individuals expressed interest in expanding participation for non-State actors in the *Counsel Survey*,<sup>110</sup> recent practice indicates that there has been no appetite for this even at the ITLOS<sup>111</sup> or in inter-State arbitration,<sup>112</sup> which are not subject to statutory constraint. Whereas the Committee proposes below that the Court call witnesses more pro-actively as a means of including non-State actors, it has decided not to endorse their participation as *amicus curiae* due to the debate concerning Article 34 of the ICJ Statute. The Committee does not advocate a liberal approach to participation by non-State actors due to the cost implications, but rather recommend that the ITLOS, arbitral tribunals and WTO panels prescribe modalities in the rules of procedure for such participation when authorised, using detailed rules, such as those found in the CAFTA-DR agreement or in the proposed DSB decision for standard procedures on the filing of *amicus curiae* briefs,<sup>113</sup> as a template.<sup>114</sup>

### 3. Time-limits

The time-limits applications to intervene are the closure of the written phase at the Court (Article 62)<sup>115</sup> and thirty days after the Counter-Memorial becomes available at the Tribunal.<sup>116</sup>

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<sup>108</sup> Even the so-called 'Friends of Third Parties,' a group of States advocating the extension of third party rights, recognise the need for balance, see Coly report (n 70), 79: 'The proponents are mindful of the need to maintain a distinction between the role of the Parties to a dispute and that of the third parties; as well as the need to avoid any interference with the efficiency of the Panel's proceedings. In this regard, the Proponents are of the view that a balance should be achieved between efficiency of the proceedings on the one hand; and a meaningful participation of third parties on the other hand.'

<sup>109</sup> E.g. – *US – Countervailing Measures (China)*, WT/DS437/4, Communication from the Panel, para 1.3.

<sup>110</sup> Crawford and Keene, *supra* note 48, at 229. See also ICSID Arbitration Rules 2006, Art 37(2); UNCITRAL Transparency Rules 2014, Art 4; ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules', Working Paper #3 (August 2019), 66-67 (Arbitration Rule 66).

<sup>111</sup> See further, e.g. – No. 22 *The 'Arctic Sunrise' Case (Netherlands v. Russia)(Provisional Measures)(Order of 22 November 2013)* [2013] ITLOS Rep. 230, at 234 (paras 15-18).

<sup>112</sup> E.g. – *Arctic Sunrise Arbitration*, *supra* note 20, at paras 35-40.

<sup>113</sup> See Coly's report *supra* note 70, 36 (based on an earlier proposal, see JOB/DS/14) and also para 2.95.

<sup>114</sup> *Infra* note 255, Art 20.10(1)(d); Model Rules of Procedure, Rule 53. See also the European Union-Korea Free Trade Agreement, Annex 14-B (Art 11); European Union-Ukraine Association Agreement, Annex XXIV (Rules 37-39). See also Rule 37 of the ICSID Rules on Arbitration; Art 4 of the UNCITRAL Transparency Rules.

<sup>115</sup> ICJ Rules Art 81(1).

<sup>116</sup> ITLOS Rules Art 67(1).

The position differs at the ICJ for Article 63 interventions, made by declaration,<sup>117</sup> which must be filed by the date fixed for the opening of the oral proceedings.<sup>118</sup> The Court has never rejected an application for tardiness.<sup>119</sup> The laxity of this deadline prolongs the merits proceedings by interjecting a deadline for the *commencement* of incidental proceedings at a juncture wherefrom the merits cannot proceed to the oral phase, creating an unwelcome interruption.

The Committee suggest that Article 81(1) of the ICJ Rules could be amended to require applications to intervene to be filed in accordance with the time-limit for the filing of the Memorial, unless they are motivated by putative counter-claims. In the event that the Application is vague or incomplete, the Court could demand the Applicant to amend and clarify it. Since applications and orders fixing time-limits for written pleadings are published by the Court through its website, putative intervenors would have at least six months to consider their position. Should the application to intervene be granted, the time-limit for the filing of written observations could be fixed at six months to coincide with the filing of the Counter-Memorial. Alternatively, the third State could file a short brief as *amicus curiae*.

Should a party object to an Article 62 application, the Court could decide the matter concurrently with the progression of the case on the merits, omitting oral argument.<sup>120</sup> For example, the Court could fix a time-limit of two months for the filing of written pleadings and render its decision by the end of the following four months, synchronising with the filing of the Counter-Memorial. Should the application be granted, the intervenor could be provided with a short time-limit (e.g. – two months) in which to file its written observations and the parties could comment on them at the hearings. Were counter-claims to be filed, then the time-limit for applications to intervene could be two months thereafter; where the admissibility of the counter-claims and/or applications to intervene are contested, these could be decided by written argument in order to coincide with the filing of the Counter-Memorial.

If the Court dismisses the application as a result of upholding a preliminary objection, requests to intervene would no longer need to be decided. Otherwise, the application to intervene could still be decided by the time-limit for the filing of the Counter-Memorial on the merits. The time-limit for the filing of Article 63 declarations could also be aligned with the Counter-Memorial rather than the start of the hearings,<sup>121</sup> thereby providing more time to parties to incorporate the pleadings of Article 63 intervenors into their oral pleadings. Due to the differing rules on intervention at the Tribunal, the Committee sees no need to revise their time-limits.

#### 4. Access to Pleadings

Successful intervenors have the automatic right to view all pleadings per Article 85(1) of the ICJ Rules and 103 of the ITLOS Rules. Though there is ‘no inextricable link’ between the two

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<sup>117</sup> Declarations of intervention may nonetheless be ruled inadmissible. See, e.g. – *Military and Paramilitary Activities in and around Nicaragua (Declaration of Intervention by El Salvador) (Order of 4 October 1984)* [1984] ICJ Rep. 215, at 216.

<sup>118</sup> Rules Art 82(1). *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening) (Declaration of Intervention by New Zealand)* [2013] ICJ Rep. 3, at 4 (declaration filed 20 November 2013, closure of written phase 9 March 2013).

<sup>119</sup> E.g. – *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia v. Malaysia) (Intervention) (Judgment of 23 October 2001)* [2001] ICJ Rep. 575, at 583-586 (paras 19-26), esp. 585-586 (paras 21-23).

<sup>120</sup> In the period under quantitative review, intervention proceedings generated a mean average of 103 pages of written pleadings (as opposed to 292 pages in preliminary objections cases and 1912 pages in merits cases) and a mean average of 7 hours of oral argument (versus 12 hours and 26 hours, respectively).

<sup>121</sup> ICJ Rules Art 82(1).

procedures,<sup>122</sup> a potential intervenor may apply to be furnished with the written pleadings and documents filed by the parties. Whereas the clause ‘to a State entitled to appear before it’ in Article 53 of the ICJ Rules and Article 67 of the ITLOS Rules suggests that pleadings should be provided *after* intervention is granted,<sup>123</sup> in practice the Court grants access to the pleadings beforehand unless one of the parties objects.<sup>124</sup> In light of the proposed change to the time-limit for applications to intervene, the Committee suggests that third States decide whether to intervene by reference to the Application. In the event that an Application is vague concerning the essence of the case (e.g. – the prayer for relief) the Court or Tribunal could demand clarification or further detail to enable all concerned, including third States, to grasp the case and to take their decisions accordingly. Should an applicant request an extension to the time-limit for the filing of the Memorial in response to such a demand, then the Court or Tribunal could grant the extension within the range proposed below.

In WTO proceedings, third parties receive the parties’ submissions up to the first substantive meeting.<sup>125</sup> The Committee recommends that as a rule third parties be also given access to other written submissions – and not only the first set of submissions – not covered by confidentiality, for instance those exchanged in the context of an incidental issue (preliminary or procedural) in which they have an interest.<sup>126</sup>

## 5. Transparency of proceedings

While ICJ and ITLOS proceedings are largely public and it is possible to access the pleadings when the hearings start,<sup>127</sup> the publicity of arbitration and WTO panel proceedings is largely for the parties to determine. In the case of arbitration, the parties normally opt to open the proceedings to public scrutiny, and in any event are free to choose otherwise.

The confidentiality of WTO panel proceedings is required by the DSU and the Rules of Conduct,<sup>128</sup> which also impose a duty of confidentiality on all the subjects involved in the proceedings, even after they are concluded.<sup>129</sup> The template Working Procedures attached to the DSU provide for a comprehensive regime of confidentiality for the proceedings (relating to the hearings and all documents).<sup>130</sup> Hearings have been opened on occasion by agreement of the parties. In any event, any Member can waive the confidentiality of its own submissions and pleadings at the hearings. Moreover, parties must always provide to a requesting Member a non-confidential summary of its submissions.<sup>131</sup>

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<sup>122</sup> *Pulau Litigan (Intervention)*, *supra* note 119, at 585 (para 22).

<sup>123</sup> By contrast, see ITLOS Rules Art 104(1).

<sup>124</sup> E.g. – *Territorial and Maritime Dispute (Application of Costa Rica to Intervene)*, *infra* note 81, at 354 (paras 7, 10, 12). See also *South China Sea Arbitration*, *supra* note 20, at paras 46-48.

<sup>125</sup> DSU Art 10(3).

<sup>126</sup> In certain cases it is doubtful that such interest exists, or that the involvement of third parties is expedient. For instance, when the panel selects experts in SPS disputes, certain preparatory activities (gathering CVs, parties’ comments on areas of concern) can be carried out before the first meeting to save time, and normally third parties are not involved. In *US – Large Civil Aircraft (second complaint) (Article 21.5-EU)*, WT/DS353/RW, Communication regarding third party rights, dated 25 January 2013, Panel Report, Annex E-4, the panel granted the third parties’ request to be informed of objections to jurisdiction or admissibility issues and panel’s information requests to the parties under Art 13 DSU.

<sup>127</sup> ICJ Rules Art 53(2); ITLOS Rules Art 67(2).

<sup>128</sup> See Arts I to III.

<sup>129</sup> *Ibid.*, Art VII(2).

<sup>130</sup> See Arts 2 and 3 of the Working Procedures in Appendix 3 of the DSU. See also Art 18.2 DSU. For a recent panel report discussing the scope of the confidentiality obligation in DSU Art 18 (2), see Panel Report, *Russia-Traffic in Transit*, Confidentiality Ruling (Annex B-2) paras 5.9-5.16.

<sup>131</sup> DSU Art 18 (2).

Calls for enhanced transparency by default have so far been rejected, and when hearings have been held openly attendance has been generally poor.<sup>132</sup> Further efforts could be made open hearings more accessible, for instance using a broadcasting system.<sup>133</sup> Given the reasonable logistical effort of organising streaming (as the ICJ does), the Committee recommends that parties and panelists consider, when hearings are not confidential, to organise a streaming service. Given that by far the most interesting part of the meeting is the Q&A sessions, it should also be ensured that, when the meeting is open, its publicity is not limited to the opening statements but extends to the parties' responses to the panel's questions.

In WTO panel proceedings, the confidentiality of proceedings can affect even the transparency of the applicable rules. Working procedures are adopted by the panels in each case, with the input of the Secretariat and in consultation with the disputing parties. Normally, they are publicly available only when the report is published. In recent cases, due to some parties' willingness to make documents publicly available sooner, some panels' working procedure and other procedural rulings or documents have been made available before the publication of the report.<sup>134</sup> The Committee recommends the parties to agree to the prompt publication of these orders, to facilitate their gradual consolidation in good practices and open-access templates that the panelists and parties can consider and modify.<sup>135</sup>

#### H. Joinder of Proceedings

Whereas joinder entails the formal merger of multiple proceedings, the Court and the Tribunal may also direct that the written or oral proceedings, including the calling of witnesses, be conducted in common without ordering joinder.<sup>136</sup> Joinder of proceedings may also be effected with joinder of parties where one or more applicants bring claims against one or more respondents.<sup>137</sup> In theory, joinder of proceedings promotes both procedural economy and the equality of parties; the directing of common procedural action, however, does not promote equality due to the possibility of differing procedures (e.g. – composition of the panel) and outcomes in proceedings conducted in parallel on substantively similar subject-matter.<sup>138</sup>

##### 1. Joinder of Bilateral Proceedings

Joinder of bilateral proceedings arises where the substantive issues of two cases featuring the same two parties are connected. After the problems encountered in the *Certain Activities/Construction of a Road Cases* in which joinder was ultimately ordered while the

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<sup>132</sup> Gabrielle Marceau, Mikella Hurley, 'Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms' (2012) 4(1) Trade L. & Dev. 19-44, 38; Cook (n 105).

<sup>133</sup> See [https://trade.ec.europa.eu/doclib/docs/2005/october/tradoc\\_125546.pdf](https://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_125546.pdf), answer to Question 1.

<sup>134</sup> See for instance the panel's Preliminary Ruling in *Canada - Measures Concerning Trade in Commercial Aircraft*, WT/DS522/12, Communication from the Panel.

<sup>135</sup> Marisa Goldstein, 'Legal Basis and Procedures for Consulting with Experts and International Organizations in WTO Dispute Settlement' (2018) 9(3) Journal of International Dispute Settlement (referring to the practice of appointing experts) 431: 'the lack of at least a minimum set procedure means that parties still face some uncertainty as to how these issues will be dealt with by individual panels and a potential for disparities in treatment.'

<sup>136</sup> ICJ Rules Art 47; ITLOS Rules Art 47.

<sup>137</sup> E.g. – *South West Africa Cases*; *Legality of the Use of Force Cases*; *Nuclear Disarmament Cases*; Cases Nos 3 and 4 *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures) (Order of 27 August 1999)*, at paras 2, 5, 9-14. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Preliminary Objections) (Judgment)* [1998] ICJ Rep. 9, Joint Declaration of Judges Bedjaoui, Guillaume and Ranjeva, at 32-34 (paras 1-7), 44-45 (para 21).

<sup>138</sup> In the *Fisheries Jurisdiction Cases*, the Court decided 9-5 not to join the proceedings due to the objections of the Applicants (Germany and the United Kingdom) – *Fisheries Jurisdiction (Germany v. Iceland) (Merits) (Judgment)* [1974] ICJ Rep.175, at 177 (para 8).

counterclaims were ruled inadmissible,<sup>139</sup> a welcome turn in recent practice was the prompt joinder of the *Maritime Delimitation/Land Boundary Cases*.<sup>140</sup> As the rationalisation of the modalities of joinder of bilateral proceedings in relation to counter-claims would be a valuable reform, the Committee proposes the amendment of Articles 47 of the ICJ Rules and ITLOS Rules for this purpose.

In light of the proposed reform to counter-claims below, the Committee suggests that the test for joinder of bilateral proceedings be harmonised with the test for counter-claims. On this approach, a respondent wishing to introduce claims that have general links (e.g. – a shared factual matrix) but not a ‘direct connection’ to ongoing proceedings would be able to apply to do so through joinder, subject to jurisdiction and admissibility. This test would warrant the joinder of two or more proceedings, ordered *proprio motu* or upon application, subject to the same criteria of ‘connectivity’ and time-limit as for counter-claims. In aligning the procedures for joinder in bilateral proceedings and counter-claims, the incentive for the indirect introduction of counter-claims via new application would be removed.

## 2. Joinder of Multilateral Proceedings

Joinder of multilateral proceedings entails the merger of multiple, similar applications by multiple applicants and/or against multiple respondents. Whilst the Committee opines that this change would benefit procedural economy and equality, it would require a solution to the problem of the composition of the panel, as proposed above. An additional problem arising in cases of joinder involving multiple parties is access to pleadings.<sup>141</sup> In the view of the Committee, the principle of equality demands automatic right of access of each party to pleadings in the joinder of proceedings. For example, in a situation where State A is the Applicant and States B, C and D are the Respondents, State A has automatic access to pleadings submitted by States B, C and D and is thus able to take into account the pleadings of States C and D when preparing its arguments in its case against State B. States B, C and D would thus be in a disadvantageous situation if they have no access to the pleadings submitted by the other Respondents. Where joinder is not effected, this should as a matter of principle be due to substantive differences between the applications, not the reluctance of a party.

The approach of the WTO dispute settlement to parallel claims<sup>142</sup> is to run them in parallel with identically composed panels that usually follow the same timetables. In the *EC – Hormones* cases Canada and the US each acted as third party with enhanced rights in the other dispute, and the panels organised a joint meeting with the scientific experts for ‘economy of effort.’ The Appellate Body validated this approach and cited due process and fairness as justification for the enhanced rights of the third parties in each case.<sup>143</sup> The *Continued Suspension* cases,<sup>144</sup>

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<sup>139</sup> Section II(H), *infra*.

<sup>140</sup> *Maritime Delimitation in the Caribbean Sea (Costa Rica v. Nicaragua)/Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua) (Order of 2 February 2017)*. The Application in the first case was introduced by Costa Rica on 25 February 2014, the written phase closed and Court-appointed expert opinions in progress when the second Application was filed by Costa Rica on 25 January 2017 with a request for joinder and short time-limits of six weeks; Nicaragua requested a time-limit of six months and the prior release of the expert opinions. The Court promptly joined the two proceedings and fixed time-limits of six weeks without the prior release of the opinions; this enabled the oral phase for the joined proceedings to be held from 3 to 13 July 2017.

<sup>141</sup> E.g. – *Nuclear Disarmament (Marshall Islands v. Pakistan)*, *supra* note 21, at para 6.

<sup>142</sup> Unless the claimants agree to establish a single panel under DSU Art 9 (-1), see recently in *US – COOL* (Canada and Mexico complainants), WT/DS384 and WTO/DS386; *Horticultural Products* (New Zealand and US), WT/DS477 and WT/DS478.

<sup>143</sup> *EC – Hormones*, WT/DS26/AB/R, Appellate Body Report, paras 153-154, explaining the rationale of the third parties’ participation in the second substantive meeting.

<sup>144</sup> *US – Continued Suspension*, WT/DS320/R; *Canada – Continued Suspension* WT/DS321/R, Panel Report, para 1.7 (explaining the joint meeting with the experts).

the *Hormones* claimants turned into parallel respondents with respect to related (but not identical) claims by the original respondent (the EU). The procedure of Article 9 DSU was followed by analogy, with the same panelists on both panels and a coordinated timetable. Granting enhanced third-party rights by default or *ad hoc* (see above) would considerably reduce the practical disadvantage of non-joined parallel cases.

### I. Counter-claims

Due to the increasing frequency of counter-claims and problems arising in practice, the Committee considers rationalisation of this area to be a valuable potential reform at the ICJ. The scarcity of practice at the ITLOS and inter-State arbitration, and their absence in WTO panel proceedings, renders this comparison across the board less pressing.<sup>145</sup>

Counter-claims concern the filing by the respondent of claims that are ‘directly connected’ to the subject-matter of the claims brought by the other party.<sup>146</sup> Although there has been rise in counter-claims in the period under review, recent experience has shown that the procedure can unduly prolong proceedings.<sup>147</sup> In the *Certain Activities/Construction of a Road Cases*,<sup>148</sup> incidental proceedings (including an additional round of written pleadings on the merits authorised by the Court) concerning the admissibility of counter-claims added 42 months and 5444 pages of written pleadings to the case. The Court joined the two cases as they were based upon similar facts<sup>149</sup> and rejected the admissibility of the counter-claims for failing the test of ‘direct connection’ to the original Application.<sup>150</sup>

The directness of the link between the counter-claims and the application was also problematic in earlier cases.<sup>151</sup> Even though the direct connection test did not need to be applied in the *Jurisdictional Immunities Case (Germany v. Italy)*, the sequential nature of the procedure added 7 months to the case.<sup>152</sup> Most recently, the Court admitted two and rejected two of the

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<sup>145</sup> DSU Art 3.10 generally states that ‘complaints and counter-complaints in regard to distinct matters should not be linked.’ The issue may be relevant in compliance proceedings involving competing claims original complainant and the original respondent, respectively. E.g. – *EC and certain Member States – Large Civil Aircraft (Article 21.5)*, WT/DS316/AB/RW, Appellate Body Report, paras 5.2, 5.6, 5.8, and 5.11.

<sup>146</sup> ICJ Rules Art 80(1); ITLOS Rules Art 98. See also, e.g. – *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))(Counter-Claims)* [1997] ICJ Rep. 243, at 256 (para 27).

<sup>147</sup> E.g. – *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Merits) (Judgment)* [2005] ICJ Rep. 168, at 176-177 (paras 5-10).

<sup>148</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)/Construction of a Road along the San Juan River (Nicaragua v. Costa Rica) (Merits) (Judgment)* [2015] ICJ Rep. 665.

<sup>149</sup> *Certain Activities (Joinder of Proceedings) (Order of 17 April 2013)* [2013] ICJ Rep. 166, at 170-171 (paras 19-24).

<sup>150</sup> *Certain Activities/Construction of a Road (Counter-Claims) (Order of 18 April 2013)* [2013] ICJ Rep. 200, at 209 (para 24), 211-215 (paras 30-38). See also the Declaration of Judge *ad hoc* Guillaume, *ibidem*, at 220-221 (paras 15-17).

<sup>151</sup> *Oil Platforms (Iran v. United States of America) (Counter-Claim) (Order)* [1998] ICJ Rep. 190, at 203-205 (paras 33-39); *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Counter-Claims) (Order)* [2001] ICJ Rep. at 678-682 (paras 35-45); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Counter-Claims) (Order)* [1997] ICJ Rep. 243, at 258-259 (paras 33-36).

<sup>152</sup> *Jurisdictional Immunities of a State (Germany v. Italy) (Counter-Claim) (Order of 6 July 2010)* [2010] ICJ Rep. 310, at 311-313 (paras 3-6), 316 (para 16), 320-321 (para 30); Dissenting Opinion of Judge Cançado Trindade, *ibidem*, at 332-342 (paras 4-40).

counter-claims presented in the *Sovereign Rights and Maritime Spaces in the Caribbean Sea Case*, though each of the claims related to the same factual matrix.<sup>153</sup>

The Committee proposes amendment to Article 80(1) of the ICJ Rules and Article 98(1) of the ITLOS Rules to delete the word ‘directly’ from the requirement of connection to the original claim: by relaxing this criterion, counter-claims such as those brought in the *Construction of a Road Case* and the *Sovereign Rights and Maritime Spaces in the Caribbean Sea Case* would be more easily accommodated, thus narrowing the scope for objection and delay.<sup>154</sup>

In addition, the Committee proposes that Article 80(2) of the ICJ Rules be amended to align the time-limit for the filing of counter-claims with the time-limit for the filing of the Memorial (on jurisdiction/admissibility or the merits, as the case may be).<sup>155</sup> These measures would eliminate the incentive to introduce counter-claims via new application, constrain the deployment of counter-claims as a tactic to gain a time advantage for the preparation of pleadings and compress the incidental proceedings by disposing of them concurrent with the progression of the merits. This would also synchronise with the proposed timings for intervention.

Whilst counterclaims are not commonplace in inter-State arbitration, they have arisen in practice<sup>156</sup> and are foreseen in Article 21(3) of the PCA Rules.<sup>157</sup> There is no requirement of connectivity, and arbitral tribunals have adopted different approaches to the matter. Recently, the Annex VII tribunal in *Enrica Lexie* stated that the ‘direct connection’ requirement is a ‘general principle of procedural law.’<sup>158</sup>

Since the rationale of admitting counter-claims is identical to that discussed in relation to the ICJ and the ITLOS, the Committee advises the PCA to amend Article 21(3) to include a test of simple ‘connection’<sup>159</sup> between the claims, and a time-limit for the filing of counter-claims synchronised with that for the filing of the memorial on jurisdiction and admissibility or on the merits. The Committee also recommends that arbitral tribunals include this provision in their first procedural orders.

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<sup>153</sup> The decision in each case was based upon whether the counter-claims were of the same character of ‘sovereign rights’ as the claims, see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Order of 15 November 2017,

<sup>154</sup> This would also remove the otiose discretion of the Court – never exercised – to reject otherwise admissible counter-claims – Murphy, ‘Counter-Claims’ in Zimmerman, *supra* note 15, 1000-1025, at 1005.

<sup>155</sup> This would also preclude the introduction of counter-claims in a second round of pleadings, the admissibility of which remains an open question – *Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Merits) (Judgment)* [2010] ICJ Rep. 14, at 105 (paras 279-280).

<sup>156</sup> E.g. – *The Carthage (France v. Italy)*, PCA, Award (6 May 1913), 2; *The Manouba (France v. Italy)*, PCA, Award (6 May 1913), 3; Case No. B 1 *Islamic Republic of Iran v. United States of America (Counterclaim)*, Iran-US Claims Tribunal, Interlocutory Award (9 September 200) 4, Award No. ITL 83-B1-FT, 2004 WL 2210709; PCA Case No. 2004-02 *Barbados and the Republic of Trinidad and Tobago*, Award (11 April 2006), para 214, Rules of Procedure (16 February 2004), Art 9(2)(c); *Guyana and Suriname*, *supra* note 37, Award (17 September 2007), para 410; *Enrica Lexie*, *supra* note 35, Procedural Order No. 3 (1 June 2017), Rules of Procedure (19 January 2016), Art 9(2); *Coastal State Rights*, *supra* note 35, Rules of Procedure of 18 May 2017, Art 11(1).

<sup>157</sup> Reading: ‘In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.’

<sup>158</sup> *Enrica Lexie*, *supra* note 35, Award (21 May 2020), para 256.

<sup>159</sup> A requirement of ‘close connection’ might be ultimately excessive and counterproductive, but the plain ‘connection’ requirement, arising from the factual matrix of the dispute, would prevent the grouping of unrelated disputes within the same proceedings (for instance through raising any UNCLOS-based counterclaim in an Annex VII arbitration, counting on the extent of the tribunal’s competence over any UNCLOS-based claims, E.g. – *Detention of Ukrainian Vessels*, *supra* note 256, Rules of Procedure, Art 12.1).

## J. Costs Orders

The default position in international litigation is that the parties shall bear their own (party) costs, although it is possible to hypothesise cost orders in special circumstances.<sup>160</sup> The Statutes and the Rules of the ICJ and the ITLOS are silent on the question of the recoupage from the parties of actual costs incurred by the Court or by the Tribunal,<sup>161</sup> which is the default scenario in arbitration. Costs orders could serve a useful function in financing extraordinary expenses that are impossible to predict. WTO panels have no power to order the payment of any costs to the parties.

On occasion, the Court has ordered parties to bear actual costs. Most notably, in *Gabčíkovo-Nagymaros Project*, the parties proposed to jointly bear the costs of the site visit (principally travel and accommodation) undertaken by the Court.<sup>162</sup> Whereas this was done at a time of prodigious financial strain amidst the UN budgetary crises, this precedent could catalyse the greater use of fact-finding powers by diminishing the need to apply to the General Assembly for funds. The experience of arbitration indicates that an increased use of fact-finding powers is well-received by parties,<sup>163</sup> showing that parties are willing to fund an arbitral tribunal, even at greater expense, when its effectiveness is enhanced.

The Committee proposes amendments to Articles 97 of the ICJ Rules and 125 of the ITLOS Rules) to stipulate that the Court and Tribunal may at any time order the parties to bear extraordinary costs of proceedings (e.g. – site visits, expert opinions, inquiries) incurred on a case-by-case basis. Special consideration may be given to parties relying upon the UN Secretary-General's Trust Fund, the ITLOS Trust Fund, the PCA Trust Fund and the WTO Advisory Centre. Tribunal's costs that incurred when a party is not appearing, in interstate arbitration, inevitably weigh on the appearing party.

## K. Written Phase of Pleadings

During the written phase, written submissions, exhibits and legal authorities are typically voluminous. The timeframes for adjudicators and parties can also slow down the proceedings unnecessarily. In this section, the Committee chose not to make recommendations regarding arbitration proceedings – beyond a general call to moderation in the interest of efficiency – in light of the parties' power to shape the procedure. With respect to WTO panel proceedings, the procedural timeframe is very tight and in no need of acceleration.<sup>164</sup>

### 1. Time-limits

Time-limits for the filing of the first round of pleadings are generally fixed by the Court and Tribunal at the first case management conference. Likewise, arbitral tribunals set the

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<sup>160</sup> ICJ Statute Art 64; ICJ Rules Art 97; ITLOS Statute Art 34; ITLOS Rules Art 125. Whereas Article 294 UNCLOS does not specify the consequences of a finding of an 'abuse of legal process', a costs order may be considered to be one logical outcome.

<sup>161</sup> Art 33 of the ICJ Statute provides that the expenses of the Court shall be borne by the by the United Nations, but this does not proscribe the generation of income from other sources, which are credited to the budget of the Court, though UN rules require any year-end surplus to be credited to the UN general budget rather than rolled over – Espósito, 'Article 33' in Zimmerman, *supra* note 15, 563-570, at 569-570.

<sup>162</sup> *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) (Order of 5 February 1997)* [1997] ICJ Rep. 3, at 5. For a site visit example from inter-State arbitration, see further, e.g. – PCA Case No. 2010-16 *Maritime Delimitation in the Bay of Bengal (Bangladesh v. India) (Award of 7 July 2014)* at paras 18-26.

<sup>163</sup> Section IV, *infra*.

<sup>164</sup> In fact, the timeframe is normally so tight (see para 12 of Appendix 3, which grants 3-6 weeks to the complaining parties and 2-3 weeks for the respondents) that, in the proposal by the Chair of the DSB in Special Session and recent practice, the respondent is granted a longer time than is granted to the complaining party. See Coly's report *supra* note 70, para 2.7.3 and Timetable in case *Canada – Measures Concerning Trade in Commercial Aircraft*, WT/DS522/12.

procedural timetable in consultation with the parties when they adopt the rules of procedure. WTO panels adopt the working procedures (including for confidential information and the use of experts when relevant) and timetable after consultations with the parties at the organisational meeting.<sup>165</sup>

For the Court, there is no standard time-limit;<sup>166</sup> during the period under review, the mean averages of time-limits fixed were, respectively, 11 months in 34 merits cases and 6 months in 16 preliminary objections/jurisdiction cases.<sup>167</sup>

In comparison, the Tribunal took the ‘six-month rule’ proposed at the fiftieth anniversary ICJ colloquium more seriously.<sup>168</sup> Time-limits are usually calculated from the date of the order, not from the date of the initiation of proceedings. In the period under review, the six-month rule has been respected by parties and the Tribunal not only in the fixing of time-limits but also in the granting of extensions.<sup>169</sup> Consequently, this innovation may be judged a success.

There are compelling arguments for the adoption of the ‘six-month rule’ by the Court, while preserving some flexibility, as there may be logistical difficulties (e.g. – obtaining documentary evidence) justifying limited extensions. The Committee accordingly suggests the amendment of Article 44(1) of the Rules to establish a range of standardised time-limits, which could include an exception under the control of the Court. Practice suggests that ranges of 4-6 months for jurisdiction and admissibility and 6-9 months for the merits pleadings are appropriate. The Committee also suggests the amendment of Articles 44 of the ICJ Rules and 59(1) of the ITLOS Rules to clarify that time runs from the date of application, not from the date of the Order setting the time-limits, to reflect the fact that applicants can work on the Memorial from the point of application, if not beforehand.

Whilst the Court can reject requests for extensions, it invariably grants them in practice.<sup>170</sup> Extensions produces a mean average of 13 months for merits cases and 11 months for preliminary objections cases. Whereas no great harm is done by short extensions (e.g. – 1 month<sup>171</sup>), repeated and lengthy extensions<sup>172</sup> are inefficient. It is noteworthy that the ITLOS has taken a strict line in including extensions within the ‘six-month rule.’ The Committee suggests a more moderate approach through the amendment of Article 44 of the ICJ Rules to introduce a cap upon extensions; a length of three months appears to be appropriate. Parties wishing to explore settlement negotiations should do so through the mechanism of suspension (whether by a published or *in camera* order) rather than time-limit extensions.

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<sup>165</sup> It should be noted that Annex 3 to the DSU, providing a template for the panels’ timetable, is no longer a reliable representation of the typical timetable.

<sup>166</sup> ICJ Rules Arts 44(1); 48.

<sup>167</sup> The norm of 4 months envisaged by Practice Direction V has been realised in recent practice.

<sup>168</sup> ITLOS Rules Art 59(1).

<sup>169</sup> This has applied even to the more complex delimitation cases of *Bay of Bengal* and *Atlantic Ocean*. The only exception was the *Swordfish Case* in which proceedings were suspended to facilitate settlement negotiations.

<sup>170</sup> In the period of review, extensions were granted in 9 merits cases with a cumulative total of 130 months (ranging from 1 to 36 months) and in 4 preliminary objections/jurisdiction proceedings with a cumulative total of 42 months (ranging from 3 to 24 months).

<sup>171</sup> E.g. – *Avena (Mexico v. United States of America)*; *Black Sea Coastal State Rights (Romania v. Ukraine)*.

<sup>172</sup> E.g. – *Legality of the Use of Force Cases*; *Arrest Warrant (DRC v. Belgium)*; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*.

## 2. Length of Written Pleadings

The filing of verbose written pleadings is endemic to international litigation. The Court took notice and tried to steer parties away from wordiness.<sup>173</sup> Statistical analysis of the period under review shows calls for their reduction to be well-founded.<sup>174</sup>

The record of proceedings over the past fifteen years proves that the Court's Practice Directions have not led to greater succinctness. Costs and delay in the written phase should be contained. To curb the length of pleadings, the Committee proposes that Articles 44 of the ICJ Rules and 63 of the ITLOS Rules be amended to provide for the fixing of *word* limits on a case-by-case basis (including annexes) to be fixed following consultation with the parties at the first case management conference. Based on the statistical data in the period under review, as an indication, the ranges could be 100-150 pages (converted to words) for jurisdiction and admissibility and 250-350 pages for the merits (including annexes). WTO panels and arbitral tribunals could consider giving a recommendation, in the working procedures, of the adequate length of written submissions, after noting the parties' views.<sup>175</sup> A WTO arbitration, 'to facilitate the efficient conduct' of the proceedings, imposed a 125-page restriction on parties' submissions, subject to the possibility of granting extensions.<sup>176</sup> The inflation of submissions' length, while often unnecessary, is probably an important cause of stress upon the capacity of the ICJ and WTO panels to work properly and, especially in the case of WTO panels, comply with the deadlines established in the DSU.

## 3. Simultaneous Filing

Simultaneous filing of pleadings, a peculiar feature of special agreement cases, continues in ICJ and ITLOS proceedings.<sup>177</sup> Each of three cases introduced after the adoption of Practice Direction I has featured simultaneous filing with three rounds of pleadings in the first two cases and two rounds in the third (which also envisaged the possibility of a third round).<sup>178</sup> As the practice of simultaneous filing is inefficient, the Committee calls for its abolition through amendment of Article 46(1) of the ICJ Rules and Article 61 of the ITLOS Rules to prescribe that the order of pleadings in cases brought by special agreement be determined by the parties or, in the absence of agreement between the parties, by lot. The party to plead first in the written phase would be the party to plead first in the oral phase, unless the parties agree otherwise.<sup>179</sup>

## 4. Number of Pleadings

Whereas the Court announced in 2002 that one round was thereafter to be considered the norm per Article 45(1) of the Rules, it has authorised additional rounds in 21 cases in the period

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<sup>173</sup> ICJ Rules Arts 49(3), 60; ICJ Practice Directions I, III.

<sup>174</sup> The mean average length of a representative sampling of memorials was 121 pages in 11 preliminary objections cases and 473 pages in 24 merits cases; the total mass of pleadings was a mean average of 311 pages in 11 preliminary objections cases and 1995 pages in 24 merits cases.

<sup>175</sup> Appellate Body in 2017 noted a 'significant increase' in the length of written submissions, invited WTO Members to consider the possibility of word-limits and finally dropped the idea, see Appellate Body, WT/AB/27, Annex 2, pp. 100-101.

<sup>176</sup> *EC and certain member States – Large Civil Aircraft (Article 22.6)*, WT/316/ARB/Add.1, Annex A-1, para 3(2)(a).

<sup>177</sup> ICJ Rules Art 46(1); ITLOS Rules Art 61.

<sup>178</sup> *Frontier Dispute (Benin v. Niger)*, filed on 3 May 2002; *Pedra Blanca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, filed on 24 July 2003; *Frontier Dispute (Burkina Faso v. Niger)*, filed on 21 July 2010. See also *Sustainable Conservation and Exploitation of Swordfish Stocks in the South-East Pacific (Chile v. European Community) (Order of 20 December 2000)*, at para 2.

<sup>179</sup> Whereas the parties may not impose simultaneity upon the Court, they may jointly propose to displace the proposed rule in favour of simultaneity, subject to the approval of the Court or Tribunal – ICJ Rules Art 101; ITLOS Rules Art 48.

under review. In spite of the terms of Article 60(2) of the ITLOS Rules, two rounds of equal length have featured in each of the 5 contentious cases at the Tribunal. In precluding further delay (e.g. – extensions) a single round yields efficiency benefits by reducing the mass of pleadings and accelerating the closure of the written phase.<sup>180</sup> The Committee accordingly suggests that Articles 45(2) of the ICJ Rules and 60(2) of the ITLOS Rules be redacted so as to abolish multiple rounds, apart from incidental proceedings (e.g. – intervention, counterclaims). If either party considers a second round to be necessary, they may request it to the Court or the Tribunal,<sup>181</sup> which should, when granting such requests, provide instructions relating to the issues on which the parties should focus and the expected maximum length of the written submissions, especially if no word-limit had been set for the first round of written pleadings. Likewise, parties and tribunals are recommended to allow a single round of proceedings in inter-State arbitration, and so are WTO panels setting the calendar for incidental proceedings (e.g., procedural objections).

## 5. Closure

The ICJ Rules do not regulate closure, though a number of procedural events (e.g. – submission of documents; initial deliberations; applications to intervene) depends on it. In practice, closure occurs *either* with the filing of the final written pleading or the expiration of its time-limit, *or* by a decision of the Court where it has ‘reserved the subsequent procedure for further decision’ or a Special Agreement envisages for the possibility of a further round of pleadings upon decision of the Court. To provide clarity for the parties, the Committee suggests that Articles 54(1) of the ICJ Rules and 60 of the ITLOS Rules be amended to define closure as coinciding with the expiry of the time-limit for the filing of the counter-memorial (or the last written submission, as the case may be).

## 6. Late Filing of Documents

Since the adoption in 2002 of Practice Direction IX by the ICJ, problems concerning the filing of documents between the closure of the written phase and the opening of the oral phase have arisen in 8 cases.<sup>182</sup> It has also occurred at the Tribunal.<sup>183</sup> Late filing could be due to genuine logistical difficulties, such as the coordination of government ministries to locate historical documents in archives or solicitation of third States to identify and secure documents in their possession. Nevertheless, the Committee proposes the amendment of Articles 56(2) of the ICJ Rules and 71(2) of the ITLOS Rules and the inclusion of provisions in arbitral procedural rules to prescribe indicative criteria for authorisation of late filing. Without the consent of the opposing party, such criteria might be that the document was discovered or retrieved *after* the

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<sup>180</sup> E.g. – *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (Order of 16 November 2010) [2010] ICJ Rep. 635, at 636-637; *Whaling in the Antarctic (Australia v. Japan, New Zealand Intervening) (Merits) (Judgment)* [2014] ICJ Rep. 226, at 235 (para 6); Separate Opinion of Judge Greenwood, at 418 (para 36); Dissenting Opinion of Judge Owada (at 301, para 3).

<sup>181</sup> ICJ Rules Art 101; ITLOS Rules Art 48.

<sup>182</sup> *Croatia Genocide (Croatia v. Serbia) (Preliminary Objections); Territorial and Maritime Frontier (Cameroon v. Nigeria, Equatorial Guinea Intervening); Croatia Genocide (Croatia v. Serbia) (Merits); Territorial and Maritime Dispute (Nicaragua v. Honduras) (Merits); Frontier Dispute (Benin v. Niger) (Merits); Avena (Mexico v. United States of America) (Merits); Pedra Blanca/Pulau Batu Puteh (Malaysia v. Singapore) (Merits); Coastal State Rights (Romania v. Ukraine)*.

<sup>183</sup> No. 2 *The M/V Saiga (No. 2) (St Vincent and the Grenadines v. Guinea) (Merits) (Judgment of 1 July 1999)*, at para 20; No. 18 *The M/V Louisa Case (St Vincent and the Grenadines v. Spain) (Merits) (Judgment of 28 May 2013)*, at paras 22-26; No. 19 *The M/V ‘Virginia G’ Case (Panama v. Guinea-Bissau) (Merits)* [2014] ITLOS Rep. 4, at 17 (para 41); Case No. 8 *The ‘Grand Prince’ Case (Belize v. France) (Prompt Release) (Judgment of 20 April 2001)* at paras 28-29; *Affaire No. 23 Différend relatif à la délimitation de la frontière maritime entre le Ghana et la Côte d’Ivoire dans l’Océan Atlantique (Ghana c. Côte d’Ivoire) (mesures conservatoires)*, *Compte-rendu* (30 mars 2015, après-midi), pages 4 (lignes 24-40) et 6, lignes 45-50.

closure of the written phase, or that it supported a rebuttal made necessary by the last written submission; the document must also be material to the proceedings, though its weight would remain to be assessed at a later stage.<sup>184</sup> In WTO proceedings, panels often use two criteria (rebuttals/answers and other good cause),<sup>185</sup> which could work as minimum template for the codifying recommendation made above for the Court, the Tribunal and arbitral tribunals.

Another problem is tactical withholding in an attempt to wrong-foot the other side. Debate concerning the meaning of ‘publication readily available’,<sup>186</sup> the surreptitious insertion of undeclared documents in judges’ folders<sup>187</sup> as noted in Practice Direction *IXter* and the posting of documents on websites shortly before the start of the oral hearings<sup>188</sup> suggest intent. The policy problem is to balance the avoidance of prejudice to the parties and the deterrence of tactics. Articles 56(4) of the ICJ Rules and 71(5) of the ITLOS Rules should be amended to clarify that documents must be publicly available at the time of closure of the written phase.

## 7. Data Security

The importance of data security is growing in parallel with the sophistication of data interception techniques. The fact that adjudicators and assisting staff may work on case materials remotely from various points in the world, including public wi-fi networks, exacerbates the risk of data interception. The Committee recommends that security protocols be reviewed to fortify the control of the adjudicators and the supporting institutions over judicial secrecy, particularly in relation to cybersecurity. Confidential information could be transmitted in digital form by encrypted data stick or printed in limited copies and held in vaults in a secured room to be consulted by time-limited signature or exclusively in the room itself. Electronic and telephone communication could be encrypted while deliberations concerning cases could be restricted to secure locations as a counter to electronic surveillance.<sup>189</sup>

### L. Oral Phase of Pleadings

The point between the closure of the written phase and the opening of the oral phase is an important bottleneck. By enabling the ‘back-to-back hearing of cases’ and ‘forward planning’, the ICJ cleared its backlog in 2010.<sup>190</sup> In the period under review, the mean average duration of the oral phase has been 19 months (versus 12 months for the written phase and 6 months for deliberations) in jurisdictional proceedings and 11 months (versus 31 months for the written phase and 6 months for deliberations) in merits proceedings.

The experience of the ITLOS suggests that the ‘six-month rule’ of scheduling oral hearings to take place within six months of the closure of the written phase is a viable one. Though six months may be considered to be insufficiently ambitious timeframe, the Committee propose

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<sup>184</sup> The 2012 UNCITRAL Notes on Organizing Arbitral Proceedings are vague: ‘49. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.’

<sup>185</sup> E.g., *Russia – Transit*, Working Procedures, Annex A-1 to the report, see para 1.7: ‘Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.’

<sup>186</sup> ICJ Rules Art 56(4); ICJ Practice Direction *IXbis*. See, e.g. – *Pulp Mills*, *supra* note 155, at 27 (paras 18-19).

<sup>187</sup> ICJ Practice Direction *IXter*.

<sup>188</sup> See the *Atlantic Ocean Case*, *supra* note 183.

<sup>189</sup> WTO is moving to a secure database for e-filing purposes to move away from email.

<sup>190</sup> *ICJ Report (2009-2010)*, UN Doc. A/65/4 (1 August 2010), at 6 (para 22).

the adoption of this rule through amendment to Article 54. As delay and cost can arise and the usefulness of hearings has been criticised,<sup>191</sup> the Committee considers reform in this area to be important.

WTO panels operate on a compressed timeframe, and the scheduling of the substantive meetings is not unnecessarily delayed. On the contrary, the first substantive meeting occurs very early in the proceedings, and makes the holding of a second one appropriate. In arbitration, scheduling is subject to the parties' wishes; the Committee, however, draws attention to the disruption on scheduling caused by arbitrators serving on many cases in parallel.

## 1. Scheduling

Scheduling may be disrupted by congestion or sudden developments (e.g. – incidental proceedings). The adoption of the proposals made elsewhere in this Report, such as tighter time-limits in the written phase, standardisation of protocols on evidence and the identification on the key issues on which the parties should concentrate their efforts, would enable expeditious organisation of the oral phase by case management conference upon the closure of the written phase. As the calendar of the ITLOS and ICJ (e.g. – vacation periods) would inform the General Assembly and the public about their workings, the Committee recommends that they be published as general administrative practice.

Conflicts between the diaries of judges and arbitrators and proposed dates for hearings can occur in practice. Scheduling conflicts on the part of counsel and/or agents may also cause delay, though the modern reality of large legal teams enables substitution of agents and/or advocates whose diaries precludes attendance.<sup>192</sup> Diary clashes should not be allowed to delay proceedings for more than one month, as a guide. The Committee suggests a strict general rule of six months for the organisation of the oral hearings in the ICJ and ITLOS, as proposed above, as well as publication of the reasons for delay to the fixing of hearings in press releases, orders and judgments for transparency. WTO panelists serve part-time, so by definition they have to divide themselves across jobs. Rapid scheduling might at least alleviate the difficulty of finding convenient dates for the meetings.

## 2. Duration and Utility

The ICJ and ITLOS Rules stipulate that oral statements shall be 'succinct' and 'directed to the issues that still divide the parties'.<sup>193</sup> In the period under review, the duration of oral hearings has been a mean average of 12 hours in preliminary objections/jurisdiction cases and 26 hours in merits cases; at the Tribunal, the duration has averaged 34 hours per case – a striking difference, as there have been only 4 merits cases as opposed to 22 cases at the Court. Oral argument may usefully be forgone in certain cases, particularly for incidental proceedings (e.g. – applications to intervene).

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<sup>191</sup> E.g. – Peck and Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1997), at 128, 142 (Highet), 148 (Crawford); United Nations Institute for Training and Research, *A Dialogue at the Court/Un dialogue à la Cour* (2006), at 20-25; Miron, 'Working Methods of the Court', 7 *Journal of International Dispute Settlement* (2016), 371-394; Cot, 'The bar' in Bannelier *et al.*, *The ICJ and the Evolution of International Law: The enduring impact of the Corfu Channel case* (2012), 21-38; Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (2014), at 359; Shaw, *Rosenne's Law and Practice of the International Court 1920-2015* (2016)(Vol. III), at 1325-1328; Oda, 'The International Court of Justice Viewed from the Bench', 244 *Recueil des cours* (1993), online at: <[http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/\\*-ej.9789041100870.009\\_190](http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*-ej.9789041100870.009_190)>, at 119; Pellet, 'Remarques sur l'(in)efficacité de la Cour internationale de justice et d'autres juridictions [sic.] internationales' in Badinter *et al.*, *Liber amicorum Jean-Pierre Cot* (2009), 193-213, at 208.

<sup>192</sup> E.g. – ICJ Practice Direction X.

<sup>193</sup> ICJ Rules Art 60. Also ICJ Practice Direction VI. See also Art 75 of the ITLOS Rules.

The *Counsel Survey* shows broad support for more dynamism in the oral hearings and greater use of Article 61 of the Rules to indicate issues to counsel prior to and/or during the course of hearings.<sup>194</sup> The effectiveness of this measure depends on the ability of the Court to compose a list of precise topics; while the communication of questions after initial deliberations by the Tribunal has informed the presentations of the parties, it has been of marginal value as it has not framed the debate in the hearings. One reason is timing: the initial deliberations are held shortly before the hearings, by which time the parties' presentations are already prepared.

To improve the utility of the hearings, the Committee proposes that Article 1 of the Resolution on Internal Judicial Practice be amended to specify that the initial deliberations be held within a certain period, e.g. no later than four weeks, after the termination of the written phase; Article 1(1) should also be amended to specify that 'a deliberation' should be held within a certain period, e.g. two weeks after the termination of the written proceedings. The President, duly informed, would then hold the case management conference within the stipulated period, in which he/she would consult the parties regarding a list of issues.

Thereafter, the ICJ would decide by order the list of issues and speaking-times alongside other procedural matters: rather than present independently-prepared, holistic sets of submissions delegation-by-delegation in the current two-round structure, counsel would plead sequentially and issue-by-issue. Legal teams could be provided with 'reserved time' for the presentation of arguments (e.g. – rebuttals) developed during the course of the hearings. This approach would inculcate focus and conversation in pleading, particularly sensible agreements and concessions. This restructuring of the hearings would also enable the interrogation of witnesses at the outset of the hearings.<sup>195</sup>

The Committee proposes that this method of organisation of the oral hearings be piloted in judicial practice in order to determine its usefulness relative to the traditional approach. Since this is a matter to be decided in judicial practice, the Court may hold traditional holistic sets of pleadings where it finds that the circumstances of the case so require. It is also to be reminded that the parties may jointly so propose to the Court.<sup>196</sup> The part-time character of the Tribunal calls for a stronger formal role for the President, as the sole full-time judge.

The Committee accordingly recommends that Article 75(1) of the Rules be amended to empower the President, following consultation with the Tribunal (e.g. – conference call) in the initial deliberations, to order a common structure of issues for the hearings. Article 68 of the Rules should also be amended to enact a time-limit, e.g. four weeks, following the closure of the written phase for the deliberations.<sup>197</sup>

### 3. Virtual Hearings

Whereas the conduct of case management conferences and deliberations using virtual technology has been a regular practice, virtual hearings in place of face-to-face hearings have been rare outside of investor-State arbitration.<sup>198</sup> In consequence of the disruption to travel and face-to-face working practices caused by the COVID-19 pandemic, certain international courts and tribunals have resorted to enable cases to proceed. There have hitherto been three novel aspects of virtual hearings: 1) most of the participants in the hearings, as opposed to some,

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<sup>194</sup> Crawford and Keene, *supra* note 48, at 226, 228.

<sup>195</sup> Section II(L)(2), *infra*.

<sup>196</sup> ICJ Rules Art 101; ITLOS Rules Art 48.

<sup>197</sup> Paragraph 2(1) of the Resolution on Internal Judicial Practice would also need to be amended to bring forward the current deadline of five weeks for judicial notes (e.g. – to two weeks).

<sup>198</sup> In 2019, sixty percent of the two hundred hearings and sessions organised by ICSID were held by video-conference – ICSID News Release, 'A Brief Guide to Online Hearings at ICSID' (24 March 2020), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>.

participate virtually; 2) restrictions upon international travel constraining the ability of teams to collaborate face-to-face under control measures; 3) the virtual taking of testimonial evidence.

Whilst virtual hearings do not in themselves raise procedural issues that are unique, they amplify the importance of certain issues in virtue of the working methods necessarily employed. To ensure procedural fairness in pandemic conditions, a consideration may be the equality of arms, such as the ability of one team relatively concentrated in a single jurisdiction or time zone to be able effectively to prepare and to collaborate as opposed to another team that is dispersed. In deciding whether to opt for a virtual hearing, a consideration is the number and category of participants; for example, three versus fifteen members of a panel, the number of counsel or interrogation of expert versus lay witnesses.

In April 2020, a three-day virtual hearing was held in a pending ICSID arbitration in which every participant was in a separate location. In a webinar held with the arbitrators, legal teams and Secretariat lawyers the following month, the participants concluded that ‘video hearings work but they require various adjustments in approach in terms of preparation, pleadings, examinations, team communications, and so forth.’<sup>199</sup> A decision to hold hearings virtually may be taken over the objections of a party, which may include: difficulty in organising hearings due to time zone spreads; unavailability of necessary technology; unreliable nature of technology; difficulty in taking instructions remotely; difficulty in working with an electronic bundle of documents; cybersecurity risk; COVID-19 social distancing requirements for witnesses requiring special assistance; ensuring that witnesses are not influenced in their testimony. Tribunals may proceed over such objections through a reasoned procedural order in which they are severally addressed, rather than opt for a long delay until some form of face-to-face hearing become practicable.

The central role of virtual technology required not only adequate technological resources (e.g. – audio-visual rooms) and expertise (latent participant knowledge; internet technology support) for the institution and access to the requisite technology for the participants but also investment in time to familiarise each of the participants with the selected tools in preparation for the hearing (e.g. – practice sessions). The ease and convenience of the platform interface as well as its capacity to accommodate participant numbers, share documents and the strength of participants’ internet connexions are important factors. A platform feature that is important for international adjudication and arbitration is simultaneous interpretation. Security is a consideration, such as the provision of end-to-end encryption by the virtual platform. Due to the pandemic disruption, the dissemination of documents by electronic means rather than printed copies or USB key by courier necessitated encryption measures.

Preparation by arbitrators and counsel included not only familiarisation with the virtual platforms to be used but also provision and proficiency with necessary equipment, such as headphones, adequate internet connexion (e.g. – by ethernet cable) and microphone. The use of screens was a consideration with three screens recommended as an optimal solution, one for the video, one for the documents and one for the transcript. Scheduling necessitated sensitivity to the time zones of the various participants (in that case, a seven-hour range) and compromise by individuals in terms of personal inconvenience. For example, a six-hour working day commencing at 0700 hours for the GMT-5 time zone and concluding at 2000 hours for the GMT+2 time zone.

The ICJ announced on 23 April 2020 that it had arranged for the use of virtual meetings and other adjustments to working methods to enable remote working during the pandemic,

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<sup>199</sup> ‘Webinar: The Art and Science of a Virtual Hearing’ (5 May 2020), <https://www.youtube.com/watch?v=Xroz4e8Ctv0&feature=youtu.be> at 2:30 (McGill).

including its first virtual plenary meeting,<sup>200</sup> On 25 June, the Court amended Articles 59 and 94 of its Rules of Procedure to clarify that the Court may decide for health, security or other compelling reasons to hold a hearing or to deliver a judgment partly or entirely by video link.<sup>201</sup> On 30 June, the Court held its first virtual hearings in the *Arbitral Award of 3 October 1899 Case (Guyana v. Venezuela)* which was a mixed format featuring the majority of the Members of the Court and Court personnel convening in person under control measures at the Peace Palace, certain Members and the judge *ad hoc* as well as the legal teams participated remotely by videolink.<sup>202</sup> At the WTO, parties have thus far resisted virtual hearing, preferring to postpone or to opt for a written exchange; however, panellists have deliberated virtually. In certain cases, it may be an option to dispense with oral hearings or to deliberate in writing.<sup>203</sup>

In light of the nascent character of the practice of virtual hearings, the Committee neither adopts a view concerning its merits or demerits nor proposes any measures with respect to it. Rather, the Committee acknowledges the importance and complexity of this emerging practice, which impacts upon a potentially broad range of procedural issues. While parties to disputes, legal teams and international courts and tribunals continue to adapt to the changed environment, the opportunity arises to experiment with new working methods.

#### M. External Professional Activities of Judges

A practice that has given rise to controversy in recent years has been the acceptance by Members of the ICJ of appointments as investment arbitrators.<sup>204</sup> The Committee opines that appointments as arbitrator, alongside other forms of work whether gainful or not such as academic lectures, constitute a ‘professional activity’ per Article 16 of the ICJ Statute. In October 2018, the President of the ICJ announced that Court Members will normally not accept arbitration appointments, with an exceptional possibility to take on one interstate arbitration case upon authorization.<sup>205</sup> For the reasons given in its Interim Report, the Committee commends this resolution, and recommends its codification in the Resolution on Internal Judicial Practice.

These considerations do not apply in the same way to ITLOS judges, save for the President, as they are part-time and not subject to the same statutory restrictions upon professional activity. Nonetheless, the Committee advocates that ITLOS judges not undertake investment or commercial arbitration appointments. By contrast, participation by ITLOS judges in inter-State arbitrations may be allowed for the same reason and under the same terms as indicated above with respect to ICJ judges. In particular, limited participation by ITLOS judges in UNCLOS Annex VII arbitrations should be allowed, as it constitutes part of the UNCLOS dispute settlement system. Scheduling conflicts, which have already occurred in at least one

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<sup>200</sup> ICJ Press Release No. 2020/11 (‘The Court adopts measures to ensure the continued fulfilment of its mandate during the COVID-19 pandemic’).

<sup>201</sup> ICJ Press Release No. 2020/16 (‘Rules of Court regarding hearings and reading of Judgments by video link’).

<sup>202</sup> *Arbitral Award of 3 October 1899 (Guyana v. Venezuela) – Public hearing on the question of the jurisdiction of the Court (by video link)* (30 June 2020), <https://icj-cij.org/en/multimedia/5efb0f63045e586fcd737cea>.

<sup>203</sup> E.g. – ECHR Press Release 111 (2020) (‘The functioning of the Court during the period of confinement’); Request no. P16-2019-001, *Advisory Opinion Requested by the Armenian Constitutional Court* (Grand Chamber, 29 May 2020), para 10.

<sup>204</sup> E.g. – Bernasconi-Osterwalder and Brauch, ‘Is ‘Moonlighting’ a Problem? The role of ICJ judges in ISDS’, International Institute for Sustainable Development (November 2017), <https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf>. The net annual salary of ICJ judges (omitting ancillary benefits) for the 2015 calendar year was 205,435€ or \$228,687. Arbitrator fees can be \$3000 per day in ICSID arbitration or 500-700€ per hour in inter-State arbitration

<sup>205</sup> ‘Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly’ (25 October 2018), <https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf>, 11-12.

occasion,<sup>206</sup> should be avoided, by limiting the number of arbitrations on which an ITLOS judge could sit to one arbitration at any one time to reduce the risk of disruption to the duties of the ITLOS (e.g. – applications for provisional measures and prompt release) from Members being unavailable due to service on an arbitration.

### III. Objections to Jurisdiction or Admissibility

Objections to jurisdiction or admissibility are commonplace in international legal proceedings, and there is ample practice before the ICJ, ITLOS and arbitral tribunals, upon which the Committee can draw to make its recommendations. While not expressly regulated, they are common in WTO panel proceedings; in this respect, the Committee has explored the potential of adopting procedures developed in other *fora*.

Whereas the scope for objections to jurisdiction or admissibility in inter-State arbitration is theoretically reduced when parties arbitrate by special agreement, the possibility nonetheless remains,<sup>207</sup> particularly with respect to the admissibility of claims. Arbitration initiated by application pursuant to a compromissory clause, such as Article 286 UNCLOS, also features full scope for objections to jurisdiction or admissibility and bifurcation requests, including by applicants.<sup>208</sup>

#### A. Objections to Jurisdiction or Admissibility in WTO Panel Proceedings

In WTO panel proceedings, parties often raise preliminary objections to the panel's jurisdiction and other issues of preliminary character, especially alleging the inclusion of claims or measures that were not the subject of consultations and the lack of clarity regarding the challenged measures. The DSU does not regulate this contingency.<sup>209</sup> The panels' *ad hoc* regulation of preliminary objections, sometimes included in the working procedures, can raise concerns 'related to the content of the claims put forward, the timing of addressing the preliminary rulings, the level of transparency, and third-party rights. Moreover, the usage of preliminary ruling procedures in the absence of any guidance can have systemic implications, such as harming the efficiency of panel proceedings, limiting the third-party rights and transparency for systemic issues.'<sup>210</sup>

Panels' working procedures, when they govern the issue, are open-ended: normally they do not determine what the panel must do or cannot do, only what it may decide – for instance bifurcating the proceedings or adjusting the chronology of submissions and meetings.<sup>211</sup>

The available practice is sufficient to extract some general guidelines for the procedure (a single round of written submissions, no right to a dedicated hearing) that could be routinely embedded in the working procedures, unless the parties opt for something different. The working procedures often allow panels to issue preliminary rulings as early as possible, but

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<sup>206</sup> It appears that the ITLOS postponed the hearings for the provisional measures in the *San Padre Pio* case, to allow a judge to sit in the hearings of the Annex VII tribunal in *Coastal State Rights* case.

<sup>207</sup> E.g. – the parties might agree to bifurcate the proceedings in the Arbitration Agreement – *Eritrea v. Yemen*, *supra* note 37, Award in the First Stage (9 October 1998), para 7.

<sup>208</sup> E.g. – *Arctic Sunrise* (n 20) Award on Jurisdiction (26 November 2014), para 41.

<sup>209</sup> This regulatory gap has been noted by the membership, DDG Jara and the adjudicators. See Minutes of Meeting, Dispute Settlement Body, WT/DSB/M/328 (28 January 2013); Enhancing the efficiency of the panel process at the WTO? A progress report on informal consultations – chapter 2', 26 September 2013, available at [https://www.wto.org/english/news\\_e/news13\\_e/ddg\\_26sep13\\_e.htm](https://www.wto.org/english/news_e/news13_e/ddg_26sep13_e.htm); *Colombia – Ports of Entry*, WT/DS366/R, Panel Report, para 7.13; *Argentina – Import Measures*, WT/DS438/R, WT/DS444/R, WT/DS445/R, Annex D-2 to Panel Report, para 3.14.

<sup>210</sup> Malacrida Marceau (n 101) 66

<sup>211</sup> *Canada - Measures Concerning Trade in Commercial Aircraft*, WT/DS522/14, Working Procedures of 8 March 2018, Art 4.1.

provide the reasoning at a later stage, e.g., as part of the Interim Report. This might contribute to overall efficiency and guidance for future cases, but the succumbing party is left without reasons until the end of the proceedings. Procedural deadlines, publicity,<sup>212</sup> the rights afforded to third parties,<sup>213</sup> the content of the request: the parties and panels could regulate these contingencies in advance before a preliminary question is raised in the proceedings.

A further specific problem may occur in cases involving the alleged violation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Annex V to the SCM Agreement provides for a special procedure, aimed at gathering information concerning the requirement of ‘serious prejudice’ caused by a subsidy. This fact-gathering exercise is carried out by a ‘facilitator’ in advance of the panel’s establishment, and must be concluded in 60 days.<sup>214</sup> If the responding party does not cooperate with the facilitator, the panel ‘should draw adverse inferences’ from its conduct.<sup>215</sup> However, the responding party might have objections to the panel’s jurisdiction and, therefore, refuse to cooperate with the facilitator for that reason. In turn, the facilitator would have to close its mandate without having obtained any information.<sup>216</sup> The Committee recommends panels to explore and establish special procedures allowing for the suspension or postponement of the Annex V procedure, to coordinate with the lodging of objections to jurisdiction or admissibility.<sup>217</sup>

## B. Bifurcation

Bifurcation is granted as a matter of course in ICJ and ITLOS proceedings. In inter-state arbitral proceedings too, in principle the tribunal could order that jurisdiction and merits be pleaded together. However, in practice the application of the objecting party to have the issue of jurisdiction or admissibility examined preliminarily insofar as possible is typically granted. The Committee reviewed the opportunity of this trend, and made recommendations on the procedural timeframe of proceedings in which procedural objections are raised.

On 21 October 2019, the ICJ amended with immediate effect, *inter alia*, Article 79 of the Rules of Procedure ‘as part of the ongoing review of its procedures and working methods’.<sup>218</sup> Article 79 has been rearranged into three provisions ‘in order to distinguish provisions relating to

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<sup>212</sup> See Canada’s proposal on behalf of the ‘endorsing WTO members’ that share the best practices, JOB/DSB/1/Add.10 of 10 July 2017, ‘Publication of working procedures, timetables, working schedules, and preliminary or procedural rulings.’

<sup>213</sup> *US – Large Civil Aircraft (second complaint) (Article 21.5-EU)*, Communication regarding third party rights *supra* note 126.

<sup>214</sup> See Annex V to the SCM, para 5: ‘The information-gathering process ... shall be completed within 60 days of the date on which the matter has been referred to the DSB.’

<sup>215</sup> *Ibid.*, para 7.

<sup>216</sup> *Canada – Measures Concerning Trade in Commercial Aircraft*, WT/DS522/11, Communication from the Annex V Facilitator: ‘It should be noted that the Panel was only composed on 6 February 2018, i.e. more than three months after the designation of the Facilitator and the launch of the Annex V procedures and more time will be needed for the Panel to issue its preliminary ruling. By suspending the information-gathering process, I would have compromised the ‘timely development of the information’ required by Paragraph 4 of Annex V. On the other hand, if I decline to grant the request and the respondent maintains its position, the result contemplated in paragraph 4 cannot be achieved either, because a crucial part of the information ‘necessary to facilitate expeditious subsequent multilateral review of the dispute’ will be missing.’

<sup>217</sup> E.g. – *US – Large Civil Aircraft (second complaint) (Article 21.5-EU)*, WT/DS353, Preliminary Rulings and Decision regarding information-gathering under Article 13 of the DSU, dated 26 November 2012, Annex E-1 where the compliance panel ruled that an Annex V procedure had been initiated in the compliance proceedings, but in light of the complainant’s request and with the agreement of the respondent, the panel instead initiated an information-gathering process under Article 13 of the DSU that would seek to replicate, as far as possible, the Annex V process that would have been applicable.

<sup>218</sup> ICJ Press Release No. 2019/42 (‘Amendments to the Rules of Court’).

‘preliminary questions’ identified by the Court from those relating to ‘preliminary objections’ filed by a party to the case.’<sup>219</sup> The new Article 79(1) provides:

‘Following the submission of the application and after the President has met and consulted with the parties, the Court may decide, if the circumstances so warrant, that questions concerning its jurisdiction or the admissibility of the application shall be determined separately.’

The new Article 79bis(1) states:

‘When the Court has not taken any decision under Article 79, an objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of that party’s first pleading.’

Article 79bis(4) requires the Court to ‘give effect to any agreement between the parties that an objection submitted under paragraph 1 be heard and determined within the framework of the merits.’ Under Article 79bis(3) and 79ter(2), upon receipt of a preliminary objection, the other party submits a written statement of its observations following which any further proceedings is oral unless otherwise decided by the Court. By Article 79ter(4), the Court retains the options to uphold, reject or declare that an objection does not have exclusively preliminary character.

The Committee welcomes the decision to codify the practice of considering the question of bifurcation at the first case management conference. However, the retention of the existing time-limit of three months after delivery of the Memorial is regrettable. To realise the key benefit of bifurcation – namely, economy of time – the Committee recommends that the ICJ amend Article 79bis(1) to adopt the ITLOS time-limit of ninety days from the filing of the application. To address the potential anxiety of respondents that the content of the application may not be sufficiently developed to enable them to grasp the essence of the case, the President of the Court could address this matter in the first case management conference and order applicants to provide information or clarification as necessary.

Whereas the Committee supports the retention of the traditional sequence of filing of pleadings for preliminary objections of respondents followed by applicants, the sequence could also be usefully specified in Article 79(2) for preliminary questions. While this order could be the requesting State followed by the other State when requested unilaterally, in cases of agreement to bifurcate, the sequence could be decided by the drawing of lots when the Parties disagree. The presumption in Article 79ter(2) that a single round of written pleadings will be followed by oral hearings is a useful one, though the Committee would prefer the deletion of the clause ‘unless otherwise decided by the Court’. This is because it could be used to invert the presumption of a single round of written pleadings to revert to two rounds, as has occurred to frustrate previous reforms in 1972 and 2001 intended to improve procedural economy.

The Committee proposes that Articles 79ter of the ICJ Rules and 97 of the ITLOS Rules be amended to codify the practice of ‘pleas in bar’<sup>220</sup> which could serve as a backstop option for

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<sup>219</sup> Ibid.

<sup>220</sup> E.g. – *Avena and other Mexican Nationals (Mexico v. United States of America) (Merits) (Judgment)* [2004] ICJ Rep. 12, at 28-29 (paras 22-24), Separate Opinion of Judge *ad hoc* Sepúlveda (at 100-101). See also *Application of the Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) (Judgment)* [2007] ICJ Rep. 43, at 84-85 (paras 101-102), 94-

respondents to raise objections to jurisdiction or admissibility in response to events arising after the preliminary objections phase.<sup>221</sup> In such cases, objections to jurisdiction or admissibility could be raised after the expiry of the time-limit for preliminary objections no later than the counter-memorial on the merits; these would automatically be joined to the merits, thus precluding unnecessary delay.

In inter-state arbitration, the time-limit and criteria for bifurcation have been obscure in practice;<sup>222</sup> the Committee therefore recommends that the PCA amend Article 23 of the Arbitration Rules as well as Sample Procedural Order No. 1 to specify that requests to bifurcate be submitted no later than ninety days from the constitution of the arbitral tribunal with bifurcated proceedings on jurisdiction and admissibility to feature a single round of written pleadings followed by oral argument, if necessary. The Committee also suggests that arbitral tribunals include such a provision in their first procedural orders containing the rules of procedure. Moreover, the Committee recommends that, unless the parties decide otherwise, the decision on bifurcation be handed down before the deadline for the submission of the respondent's counter-memorial on the merits. An instance of this good practice is the procedure designed by the *Coastal State Rights* tribunal,<sup>223</sup> which suspended the proceedings on the merits and provided for a quick succession of procedural deadlines for the exchange of submissions on jurisdiction.<sup>224</sup>

In WTO panel proceedings, the rules provide no guidance on bifurcation when the parties fail to agree.<sup>225</sup> Only rarely do panels grant a dedicated hearing for the discussion of preliminary issues, even if the most common objections (on the panel's mandate and the inclusion of claims in the terms of reference) lend themselves to preliminary resolution.<sup>226</sup> Panels have noted that 'there is no established jurisprudence nor is there any established practice as to whether a panel needs to rule on the scope of its terms of reference on a preliminary basis, i.e. before the issuance of its Report to the parties.'<sup>227</sup> Panels, of course, have occasionally provided reasons of efficiency to support the decision to rule on a jurisdictional matter preliminarily<sup>228</sup> or not.<sup>229</sup> Occasionally, panels refuse to rule on objections to jurisdiction or admissibility preliminarily, not because the decision is better made after reviewing the full case, but because the hearing on the merits might elucidate the terms of reference.<sup>230</sup> This approach is objectionable in that it appears to grant the possibility to cure retroactively a jurisdictional defect.<sup>231</sup> Instead, the planning of a round of submissions and possibly a hearing dedicated to the discussion of the objections to jurisdiction or admissibility could be preferable. The Committee recommends

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97 (paras 124-129); *Application of the Interim Accord of 13 September 1992 (The Former Yugoslav Republic of Macedonia v. Greece)* (Order of 12 March 2010) [2010] ICJ Rep. 11, at 12.

<sup>221</sup> E.g. – the adoption of a UN Security Council resolution, as in the *Lockerbie Cases*, note 137, *supra*.

<sup>222</sup> E.g. – *Detention of the Ukrainian Vessel*, *infra* note 256, Procedural Order No. 1 (22 November 2019), Art 5.

<sup>223</sup> *Coastal State Rights*, Rules of Procedure of 18 May 2017, Art 10, in particular paras 5 and 6.

<sup>224</sup> In particular, the applicant would have three months to respond to the preliminary objections, then respondent and applicant would have two months each, successively, for further submissions.

<sup>225</sup> Conversely, in case *Canada - Commercial Aircraft*, WT/DS522/12, Brazil did not object to Canada's request that its preliminary questions be answered before the filing of the written submissions.

<sup>226</sup> *Canada - Aircraft* above, WT/DS522/R, Panel Report, para 9.33 (referring to *EC - Bananas III* and *EC - Computer Equipment*).

<sup>227</sup> *China - Raw Materials*, WT/DS394/9; WT/DS395/9; WT/DS398/8, Communication of 18 May 2010, fn 45.

<sup>228</sup> *Mexico - Soft Drinks*, WT/DS308/R, Panel Report, para 7.2; *China - Electronic Payment Services*, WT/DS413/4, Preliminary Ruling.

<sup>229</sup> *EC - Bed Linen (Article 21.5 - India)*, WT/DS141/RW, Panel Report, para 6.8.

<sup>230</sup> *Colombia - Ports of Entry*, WT/DS366/R, Panel Report, para 7.14

<sup>231</sup> The concern was raised also by the Appellate Body in *China - Raw Materials*, WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R, Appellate Body Report, para 233.

panels to evaluate in each case whether bifurcation should be granted, with a suspension or an extension of the timetable for the pleadings on the main case.<sup>232</sup>

#### IV. Evidence

Evidentiary matters, which attracted the most responses in the *Counsel Survey*,<sup>233</sup> feature a high degree of commonality across the jurisdictions, as far as the practicalities are concerned. Inter-State courts and tribunals have developed various techniques to address these problems, and comparison between them is facilitated by the relative similarity of their statutory texts and the lack of documents codifying the law on evidence at the international level.<sup>234</sup> This section addresses the working practices for the *handling* of evidence rather than the *evaluation* of fact (e.g. – burden of proof; standard of proof), thus sees less differentiation in the recommendations of the Committee for the respective courts and tribunals.

##### A. Documentary Evidence

###### 1. Requests for Evidence

Though documents are the principal category of evidence, they are not defined in the statutes of any inter-State court or tribunal. There is no process of ‘discovery’ or of document production before international jurisdictions; the only way for a party to request a document is an ‘indirect discovery’, i.e. lodging a request to the adjudicator, a method piloted by Italy in the *ELSI Case* before the ICJ.<sup>235</sup> This system and its regulation are the object of debate.<sup>236</sup>

The Committee proposes the adoption of an ‘indirect discovery’ procedure through amendment of the relevant ICJ and ITLOS Rules<sup>237</sup> and drafting of the rules of procedure for each arbitration dispute,<sup>238</sup> whereby parties could submit requests for documents to the Court or Tribunal, to be filtered and transmitted by the Court or the Tribunal. Criteria could accordingly be specified<sup>239</sup> to direct the legal teams to keep requests brief, coherent and relevant. Requests for documents should be presented shortly after the submission of the Counter-Memorial. The same mechanism could be adopted in Article 27(3) of the PCA Rules and could be explored and incorporated in the working procedures by WTO panels.

The governing principle in the evaluation of document requests should be the ‘premise of co-operation of the litigating parties’ in the provision of evidence.<sup>240</sup> As so-called ‘fishing expeditions’ must be avoided, parties could be encouraged to submit to one another and to the

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<sup>232</sup> *Dominican Republic – Safeguard Measures*, WT/DS415/R; WT/DS416/R; WT/DS417/R; WT/DS418/R, Panel Report, para 1.11.

<sup>233</sup> Crawford and Keene, *supra* note 48, at 226.

<sup>234</sup> International Law Commission, *Report on the work of the sixty-ninth session (2017)*, document A/72/10, see report of Aniruddha Rajput on *Evidence before international courts and tribunals*, 242 ff.

<sup>235</sup> ICJ Statute Art 49; ICJ Rules Art 62; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) (Judgment)* [1989] ICJ Rep. 15, at 26 (para 19). See also ITLOS Rules Art 77(1); *The M/V Louisa Case*, *supra* note 183, at paras 36-37 for an instance of documents requested by the Tribunal *ex proprio motu*.

<sup>236</sup> E.g. – *Bosnia Genocide Case*, *supra* note 220, at 129 (para 206); Dissenting Opinions of Judge al-Khasawneh (at 254-255) and Judge *ad hoc* Mathiou (at 415-421); *Avena*, *supra* note 220, at 41-42 (para 57).

<sup>237</sup> Art 62 of the ICJ Rules and Art 77 of the ITLOS Rules.

<sup>238</sup> For instance, see *Coastal State Rights*, Rules of Procedure, Art 15.4.

<sup>239</sup> E.g. – International Bar Association Rules on the Taking of Evidence in International Arbitration (29 May 2010), Art 3(3). In *Russia – Commercial Vehicles*, WT/DS479/AB/R, Appellate Body Report, paras 5.131-5.134, the WTO Appellate Body confirmed that ‘it could “conceive of circumstances in which a party [could not] reasonably be expected to meet [the] burden [of adducing evidence in support of its claims or defences] by adducing all relevant evidence required to make out its case, most notably when that information is in the exclusive possession of the opposing or a third party.’ In such circumstances, a panel may have to seek out that information in order to make an objective assessment of the matter under Article 11 of the DSU.’

<sup>240</sup> E.g. – *Argentina – Textiles and Apparel*, WT/DS56/R, Panel Report, paras 6.40, 6.58: ‘parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession.’

adjudicators lists containing specific requests for documents believed to be in the possession of the other party.

## 2. Confidentiality

Parties have invoked relevance, national secrecy or legal professional privilege as grounds to not disclose or supply documents.<sup>241</sup> Recent arbitral practice has featured differing approaches to the problem – entrusting with an expert, the panel, or the President alone the scrutiny of embargoed documents.<sup>242</sup> The practice in WTO panel proceedings has also produced pertinent practice.<sup>243</sup>

The Committee proposes the adoption (in the Articles 62 of the ICJ Rules and 77 of the ITLOS Rules, or in the applicable procedural rules for arbitral tribunals or WTO panels) of a procedure for the evaluation of requests by parties not to disclose or supply documents. Each of the approaches taken by the different tribunals in recent inter-State arbitrations offers advantages and disadvantages, and the Committee suggests bearing them in mind while approaching requests on a case-by-case basis.

A related, though distinct, issue is the handling of sensitive documents by the adjudicators when the party supplies them. Arbitral tribunals and WTO panels<sup>244</sup> have used both internal and external security protocols, such as access restrictions and expurgated versions, to control such documents. For example, the arbitral tribunal in the *Coastal State Rights Arbitration* issued a procedural order that included a precise definition of confidential information<sup>245</sup> as well as a process whereby a party might designate information as confidential, subject to potential challenge by another party.

Detailed provision was also made concerning accessibility to confidential information, hearing transcripts as well as awards and orders.<sup>246</sup> Confidentiality extends to use outside of the

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<sup>241</sup> A party's designation of some information as confidential might entail the need to hold an entire section of the hearing *in camera*. Recently, this arrangement was used before the ITLOS – Case No. 24 *The 'Enrica Lexie' Incident (Italy v. India)*, Provisional Measures, ITLOS/PV.15/C24/2/Rev.1 (10 August 2015). See further the approach of the Arbitral Tribunal in PCA Case No. 2015-28 *The 'Enrica Lexie' Incident (Italy v. India)*, Rules of Procedure (19 January 2016), Art 23.3; Procedural Order No. 7 (16 May 2019), Art 23.5.

<sup>242</sup> *Guyana v. Suriname*, *supra* note 37, Award (17 September 2007), paras 16-20, 24-36, 44-47; PCA Case No. 2011-03 *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award (18 March 2015), at paras 35-49; PCA Case No. 2011-01 *Indus Waters Kishenanga (Pakistan v. India)*, Partial Award (18 February 2013), paras 89-104; PCA Case No. 2017-16 *Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. Russia)*, Procedural Order No. 2 Regarding Confidentiality (18 January 2018). See also ITLOS Case No. 23 *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire)*, Judgment of 23 September 2017, paras 21-23.

<sup>243</sup> *US – Large Civil Aircraft (second complaint) (Article 21.5 – EU)*, Decision regarding requests for certain information, dated 23 October 2013, Annex F-1 to Panel Report, para 2.18: 'a panel should exercise its authority to request such information with some degree of circumspection, taking due account of domestic laws restricting or preventing its production as part of its assessment of the difficulty faced by a Member.'

<sup>244</sup> *EC – Large Civil Aircraft*, WT/DS316, Additional Working Procedures for the Protection of Business Confidential Information and Highly Sensitive Business Information, Annex E to the Panel Report. These procedures restrict access to BCI and HSBI information to panel members, specified Secretariat staff, and specified persons designated by the parties (representatives and outside advisors) and third parties (for BCI only). The panel decides on contested designations. See also *US – Large Civil Aircraft (second complaint)*, WT/DS353, Additional Working Procedures for the Protection of BCI and HSBI, Annex D-2.

<sup>245</sup> *Coastal State Rights* (n 242), Procedural Order No. 2, Rule A(1): 'Confidential Information' is defined as information that either party considers confidential on one of the following grounds': (a) commercial or technical confidentiality; (b) special political or institutional sensitivity (including information that has been classified as secret by a government or a public international institution); (c) information in relation to which a Party owes an obligation of confidence to a third party; (d) personal data.' This definition differed from the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, Art 7(2).

<sup>246</sup> *Ibid.*, Rules A.3-A.4.

proceedings, such as in other dispute settlement fora.<sup>247</sup> The Tribunal also introduced the category of ‘Restricted Information,’ the disclosure of which ‘seriously affect[s] a Party’s national interests’ giving rise to ‘a real risk of material prejudice’ thereto.<sup>248</sup> Treatment of such information in the written phase and the hearings, as well as its disclosure to the Tribunal and the other party, are regulated strictly according to the modalities decided by the Tribunal in each instance.<sup>249</sup>

In the WTO, the panel in *Canada – Commercial Aircraft* agreed to the parties’ request that it establish additional working procedures on BCI and Highly Sensitive Business Information (HSBI).<sup>250</sup> The system provided for special procedures to access BCI and HSBI information,<sup>251</sup> and for a list of information that, alternatively, was deemed either BCI or HSBI, or neither.

The regulation of business confidential and secret information, especially in cases involving trade remedies, is usually the subject of *ad hoc* working procedures adopted by the panels.<sup>252</sup> In the course of work at the DSB special session, the DSB produced a draft decision requiring the Secretariat to publish all decisions relating to the protection of ‘strictly confidential information’ (SCI).<sup>253</sup>

More in general, BCI has been the subject of a specific multilateral effort. It is important to grant ‘assurance to individuals or entities providing BCI that their information will be used by those authorized to access the information (i.e. the panel, the Appellate Body, the arbitrator, the WTO Secretariat, the parties and the third parties) only for the purposes of the proceedings in which the information has been submitted or forms part of the record.’<sup>254</sup> The membership did not agree on a specific recommended text. For this reason, the proposed DSB decision to publish all past working procedures relating to the confidentiality of information was designed to offer to parties and individuals and panelists the full range of possible safeguards, from which to draw the specific provisions most adequate to each specific case. Critically, the DSB Special Session Chair proposed an amendment to Article 18.3 DSU, which would make it a requirement for the panel to adopt special procedures for the protection of SCI, upon request by a party. In practice most panels using working procedures for confidential information follow the same provisions.

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<sup>247</sup> Ibid., Rule A.5. In WTO panel proceedings, third parties obtain the first written submissions of the parties – DSU Art 10(3). Panels may extend their rights of participation in individual cases. See above in section II.E.4.

<sup>248</sup> Rule B.1.

<sup>249</sup> Rule B.2: ‘Following receipt of a pleading containing information that is designated as Restricted Information, the Arbitral Tribunal, after ascertaining the views of the Parties, shall decide the modalities of treating such Restricted Information, including the extent to which it shall be made available to the Arbitral Tribunal or the other Party. In the event that either Party intends to rely on Restricted Information at the hearing, that Party shall notify the Arbitral Tribunal and the other Party at least 30 days prior to the hearing. The Arbitral Tribunal, after ascertaining the views of the Parties, shall decide the modalities for the use and protection of such Restricted Information at the hearing.’

<sup>250</sup> *Canada – Commercial Aircraft*, WT/DS522/12, Procedures for the Protection of BCI and HSBI. Information can be designated as BCI or HSBI when, respectively, its disclosure might cause harm or exceptional harm to the originators. In that dispute, the special regime covered also the information provided by the businesses to the Facilitator appointed under Annex V of the SCM Agreement.

<sup>251</sup> Including the designation of special sites where the information is stored, special persons entitled to access it, special rules of redaction referring to written or oral information, the use of stand-alone computers (unconnected) or even sealed computers, etc.

<sup>252</sup> For an extensive discussion on the topic, Cook *supra* note 105.

<sup>253</sup> See draft decision in Coly’s report *supra* note 70 para 1.23-1.24.

<sup>254</sup> Coly’s report *supra* note 70 para 2.51.

The CAFTA-DR trade agreement also contains innovative provisions regarding the treatment of confidential information.<sup>255</sup> These rules operate in the framework of public proceedings, with open hearings<sup>256</sup> and public party submissions.<sup>257</sup> They are designed to temper the openness of the proceedings to public scrutiny rather than to enable the Parties to withhold information. Each Party must appoint ‘approved persons’ who are authorised to view confidential information.<sup>258</sup> The Parties and the Tribunal may not refer to the confidential information in their submissions and decisions but may state conclusions and positions drawn from that information while each Party must destroy, return or keep secret for ten years the information.<sup>259</sup>

In this context of innovative and effective arbitral practice, the Committee recommends the adoption of provisions governing the submission and control of confidential information. The Committee acknowledges the importance of flexible rules to address the particular sensitivities of each case. The adoption of a template for confidentiality and restricted information akin to the Sample Procedural Order No. 2 of the PCA<sup>260</sup> would assist parties and arbitrators to develop rules to suit their circumstances. Likewise, dissemination of panels’ working procedures on these matters would foster consistency. The rules used in the *Coastal State Rights Arbitration*, those of recent WTO panel proceedings and of the CAFTA-DR Trade Agreement could offer a range of effective options enabling parties to provide confidential information with reassurance.

In light of the ubiquitous use of internet technology for the communication of information and the concordant risk to data security,<sup>261</sup> the Committee suggest the adoption by the ICJ, ITLOS, PCA and WTO panels of administrative safeguards. These might include: encryption protocols; provision to adjudicators of configured equipment with enhanced security (e.g. – fingerprint or retina-based unlocking; pre-loaded documents); secure servers for the storage of electronic documents; printed copies of documents stored in secured rooms with security protocols.<sup>262</sup>

### 3. Provenance

There are no pre-determined rules establishing the inadmissibility of evidence on grounds of the irregularity or illegality of its origin, not of allegedly false documents.<sup>263</sup> The admissibility of published material has gained recent prominence in light of the Wikileaks phenomenon, as

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<sup>255</sup> Dominican Republic-Central America Free Trade Agreement 2012, Annex 1 (‘Rules of Procedure for Chapter Twenty’), Rule 15. The Model Procedural Rules defines it as ‘any sensitive factual information that is not available in the public domain’ and for which one party has requested confidential treatment (Rule 15).

<sup>256</sup> *Ibid.*, Rule 40. *Contra* PCA Case no. 2019-28 *Dispute Concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v. Russia)*, Rules of Procedure (22 November 2019), Art 28.

<sup>257</sup> Dominican Republic-Central America Free Trade Agreement 2012, Annex 1, Rule 13.

<sup>258</sup> *Ibid.*, Appendix 1.

<sup>259</sup> *Ibid.*, Appendix 2, Rules 4, 6-7.

<sup>260</sup> Daly *et al.*, *supra* note 39, 254.

<sup>261</sup> Section II(J)(7), *supra*. The WTO is piloting a secure e-filing system which could serve as model for other institutions.

<sup>262</sup> See, e.g. – International Chamber of Commerce Commission Report, *Managing E-Document Production* (2012), at <https://www.iccwbo.be/wp-content/uploads/2012/03/20120516-Managing-e-document-Report.pdf>,

<sup>263</sup> *Maritime and Territorial Questions (Qatar v. Bahrain)*, ‘Interim Report Submitted by the State of Qatar’ (30 September 1998), at para 14; (*Merits*) (*Judgment*) [2001] ICJ Rep. 40, Separate Opinion of Judge *ad hoc* Fortier, at 432 (para 6); *Rights of Passage over Indian Territory (Portugal v. India)*, CR 23 September 1959 (Morning) in Oral Arguments and Documents, Vol. V, at 358; *Lehigh Valley Railroad Company Case (No 3)* [1932] 8 UNRIAA at 121; *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua) (Pleadings)* (Vol. II) [1960] ICJ Rep. 1, at 164-165; *The M/V Louisa Case*, *supra* note 183, at paras 36-37, Separate Opinion of Judge Cot, at paras 67-79.

in the *Chagos Islands Arbitration*.<sup>264</sup> In the *Seizure of Certain Documents and Data Case*, the ICJ was faced not with admission into evidence of documents allegedly obtained in breach of national or international law, but with an application for their return on grounds of title and/or breach of legal confidentiality.<sup>265</sup> The underlying issue is competing policies to sanction unlawful conduct, to make pragmatic use of documents already published and to verify the provenance of such documents.

In the *Mauritius v. UK* arbitration at the PCA, Mauritius furnished as evidence a diplomatic cable leaked through WikiLeaks.<sup>266</sup> The tribunal pointed out that it did not consider it ‘appropriate to place weight on a record of such provenance.’<sup>267</sup> In so doing, the tribunal used the criterion of relevance (‘weight’) rather than admissibility, but clarified at the same time that a document of illicit provenance under national or international law is *tamquam non esset*: as good as nonexistent. The reluctance to consider *prima facie* inadmissible evidence obtained illegally is endemic in international adjudication.<sup>268</sup> The approach, in these and other cases, has been to ignore rather than engage with the potentially unlawful nature of leaked documents.<sup>269</sup>

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<sup>264</sup> *Chagos Islands supra* note 242, Memorial of Mauritius at 72-73; Oral Hearing (23 April 2014), at 191, 1165; Award, at para 542. See also *ConocoPhillips v Venezuela* (ICSID Case No. ARB/07/30), Decision on Respondent’s Request for Reconsideration, 10 March 2014, at paras 3, 9; Dissenting Opinion of Georges Abi-Saab, at para 64; PCA Case No. AA 226 *Hulley Enterprises Limited v. Russia*, Award (18 July 2014), at paras 1185-1186; *Caratube International Oil Company and Mr Devincci Saleh Hourani v Kazakhstan* (ICSID Case No. ARB/13/13), Award (27 September 2017), para 150; *OPIC Karimum Corporation v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/14), Decision on The Proposal to Disqualify Professor Philippe Sands (5 March 2011), paras 11 and 23; *ilç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* (ICSID Case No ARB/10/1), Award (2 July 2013), paras 4.1.1 and 4.3.16.

<sup>265</sup> *Seizure and Detention of Certain Documents and Data (Provisional Measures) (Order)* [2014] ICJ Rep. 147, at 148 (para 2), 152 (para 24).

<sup>266</sup> See Annex 2 to the Notice of Arbitration and Annex 146 to the Memorial. The document purported to show that the marine protected area had been envisaged to prevent the islanders’ resettlement to the Chagos islands. If proven, this circumstance could have amounted to a breach of Art 300 UNCLOS. A similar scenario occurred in the investment arbitration cases between Yukos shareholders and the Russian Federation, and in a case between Conoco and Venezuela. In the former case, the claimant mentioned several leaked cables, which stated that an audit firm was put under pressure by the government to revise previous audits. The Tribunal did include the leaked cables among the means of evidence, and relied heavily on them to characterise the treatment of PricewaterhouseCoopers en route to the award of damages. *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 227), Final Award of 18 July 2014, para 1223. In another case, Venezuela sought to introduce in the proceedings a leaked cable that detailed a discussion between the Claimant and US diplomats, which would allegedly prove the Respondent’s good faith in negotiations, and required a reconsideration of the tribunal’s decision on grounds of decisive factual error. The majority rejected Venezuela’s request on procedural grounds. *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Letter to Tribunal Regarding Decision on Jurisdiction and Merits of 8 September 2013. Abi Saab dissented, noting that any doubt regarding the admissibility (and relevance) of the new evidence should have been put to the tribunal. Abi Saab, Dissenting Opinion, para 29.

<sup>267</sup> Award, para 542.

<sup>268</sup> This apparent conflation emerges also in the speech addressed by then President Tomka on 31 October 2014 to the UN General Assembly’s Sixth Committee (<http://www.icj-cij.org/presscom/files/8/18398.pdf>, p. 3), juxtaposing two seemingly contradictory statements: ‘Among limited exceptions of inadmissible evidence before the Court, unlawfully obtained proof may obviously be excluded from the purview of what is acceptable, as was emphasized by the Court in its Corfu Channel Judgment. The Court does not use any preliminary evidentiary filter to weed out inadmissible evidence at the outset; rather, the Court possesses a wide margin of appreciation in ascribing different weight to different evidentiary elements originating from varied sources’. It is recognised that the distinction between admissibility and relevance is often blurred, see Kenneth J Keith, ‘The International Court of Justice and Criminal Justice’ (2010) 59(4) *International and Comparative Law Quarterly* 895-910, at 905.

<sup>269</sup> Jessica O Ireton, ‘The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence’ (2015) 30(1) *ICSID Review* 231-242, referring in particular to *OPIC Karimum Corporation*

Doubts remain regarding materials obtained illegally by third parties, and published widely.<sup>270</sup> In this case, there should be a procedure available to regulate States' attempt to use leaked materials as 'information in the public domain,' possibly producing them at a later stage of the proceedings.<sup>271</sup> Whereas there is no explicit basis for the practice, the ICJ has often taken judicial note of publicly available information as a matter of weight.<sup>272</sup> Though prominent in default cases,<sup>273</sup> this practice is by no means not confined to them.

On how to handle illegal evidence, a helpful model to inform the practice or to draft a new rule – could be Article 9(2) of the IBA Rules on the Taking of Evidence. This provision empowers the tribunal to 'exclude from evidence or production' any illegal or privileged material, or material classified as secret.<sup>274</sup> When there is unimpeachable information about the irregular provenance of some documents, tribunals should expressly refer to it to motivate their exclusion or irrelevance. However, the Committee suggests the prescription of criteria for the determination of admissibility in Articles 62 of the ICJ Rules, 77 of the ITLOS Rules and Sample Procedural Order No. 2 of the PCA Rules. This could distinguish challenges based upon *authenticity* from those grounded in *illegality* in terms of time-limits: the former could be brought 'promptly' – immediately upon becoming aware of the potential falsehood of the documents in question – whereas the latter could be subject to a time-limit (e.g. – one month) after the communication of the document. Whereas the Court directed the parties in the *Qatar v. Bahrain Case* to address the issues of authenticity in their pleadings on the merits, it would be more efficacious for the parties to file concise submissions focused on admissibility of the relevant piece of evidence within a time-limit of one-two months while the case concurrently progresses.

For instance, the tribunal could instruct the parties to refrain from submitting evidence obtained in other proceedings which are covered by a confidentiality agreement, unless the third party with which the agreement was stipulated has consented and indicated the confidentiality regime it wishes the documents to observe.<sup>275</sup> The Committee opines that this needs development through judicial and arbitral practice rather than legislation in the rules at this stage.

#### 4. Refusals to Produce Evidence

Tribunals ordering a party to provide evidence, *proprio motu* or upon request, might face the party's refusal to do so.

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*v Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/14), Decision on The Proposal to Disqualify Professor Philippe Sands (5 March 2011) paras 11 and 23; *ılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* (ICSID Case No ARB/10/1), Award of 2 July 2013, paras 4.1.1 and 4.3.16.

<sup>270</sup> As in the example of the cables published on WikiLeaks, or the hacking of Kazakhstan's systems that resulted in the use of leaked documents in investment arbitration *Caratube International Oil Company and Mr Devincchi Saleh Hourani v Kazakhstan* (ICSID Case No. ARB/13/13).

<sup>271</sup> See for instance Art 56(4) of the ICJ Statute and Practice Direction IX*bis*, paragraph 2, letters i and ii.

<sup>272</sup> Art ICJ Statute, Arts 30, 48; ITLOS Rules, Art 77(1). See also in *EC – Seals*, WT/DS400/, Communication of 5 February 2013 on the removal of exhibits. The EU's request that two exhibits be removed from the record, since they were internal confidential acts. The complainants agreed to withdraw them, sparing the panel from deciding whether their provenance made them inadmissible (para 3.1). The US had observed that there was no basis in the DSU to reject the evidence (para 2.6).

<sup>273</sup> E.g. – *Tehran Hostages Case*, *supra* note 31, at 10 (para 13).

<sup>274</sup> See letters b) and f).

<sup>275</sup> For instance, a WTO panel decided to 'not consider' a preliminary ruling submitted by the claimant, which had been issued by another panel in an ongoing case and, therefore, was confidential. See panel *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS400/9, Communication from the panel of 18 May 2010, para 42-44.

Article 49(2) of the ICJ Statute provides that ‘formal note shall be taken of any refusal’ to produce evidence upon the Court’s request.<sup>276</sup> The rules applicable in ITLOS proceedings are silent. Likewise, while Article 27(3) of the PCA Rules stipulates that the arbitral tribunal may ‘require’ the parties to produce documents, no consequence of a refusal is specified. Rules and tribunals in specific disputes occasionally mention the possibility of adverse inferences, but are rarely applied to this effect.<sup>277</sup> The natural, though optional, consequence of a formal note of refusal is the drawing of (rebuttable) presumptions of fact or (conclusive) adverse inferences against the refusing party. The ICJ has rarely exercised its Article 49 power<sup>278</sup> and the current framework is opaque in that parties cannot predict the consequences of a refusal; the Iran-US Claims Tribunal and WTO panels and Appellate Body have drawn adverse inferences, if persuaded that the documents are material and in the possession of the party.<sup>279</sup>

The Committee suggests the greater use in judicial and arbitral practice of formal notes of refusals to produce evidence, as a logical consequence of the abovementioned call for the greater use of requests for evidence. The Committee proposes the codification of rebuttable presumptions of fact in Articles 62 of the ICJ Rules, 77 of the ITLOS Rules and 27 of the PCA Rules and panel working procedures, in the event of refusals to produce requested evidence. Unlike an adverse inference conclusively establishing a fact, the inference would be *presumptive* and *evidentiary*: it could be displaced by rebutting evidence. Courts, tribunals and panels would not be bound to ultimately uphold it, though they would explain their reasons for departing from it. This would provide predictability to the mechanism and increase the incentive to comply with sufficiently specific requests.<sup>280</sup> Should a party produce a requested document after the time-limit, the presumption would be removed.

## B. Testimonial Evidence

Though testimonial evidence has historically not played a major role in inter-State adjudication and arbitration, it has become increasingly prominent in the procedure of the ICJ and ITLOS.<sup>281</sup> Procedural modalities have had to be crafted on an *ad hoc* basis, prompting extensive correspondence and negotiation,<sup>282</sup> which delay the opening of the oral phase and add to the litigation costs. Regularisation of best practices by the Court and the Tribunal on testimonial evidence would facilitate expeditious handling by prescribing templates and foreclosing

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<sup>276</sup> Obscurely, Art 77 of the ITLOS Rules does not replicate this sentence.

<sup>277</sup> *Abyei* arbitration, Letter of 11 April 2009, quoted at para 61 of the Award of 22 July 2009.

<sup>278</sup> E.g. – *Corfu Channel Case (United Kingdom v. Albania)* [1949] ICJ Rep. 4, at 32; Dissenting Opinions of Judge Krylov (at 75) and Eçer (at 129). See also *Vienna Convention on Consular Relations Case (Paraguay v. United States of America)*, ICJ Pleadings, at 85-88 cited in Quintana, *supra* note 191, at 417; PCA Case No. 6 *Lighthouses Arbitration (France v. Greece)* 23 I.L.R. 677.

<sup>279</sup> See for instance *Abyei Arbitration (Government of Sudan v. Sudan People’s Liberation Army)* (PCA Case No. 2008-07), Award (22 July 2009), para 61; *Argentina – Import Measures*, WT/DS438/R, Panel Report, paras 6.32-6.36. *Contra*, see how the Appellate Body rejected Brazil’s grounds of appeal claiming that the panel had erroneously failed to draw adverse inference from Canada’s failure to provide evidence, *Canada – Aircraft*, WT/DS70/AB/R, Appellate Body Report, paras 202-203 and 205. The WTO SCM Agreement specifically provides (Annex V:7) that a panel should draw adverse inferences from parties’ non-cooperation in the special information-gathering process established by the agreement. More generally, parties refusing to provide information based on security reasons (under GATT Art XXI(a)) might stifle the panel’s power to draw adverse inferences, see Panel Report, *Russia – Traffic in Transit*, para 7.129.

<sup>280</sup> The WTO Appellate Body reversed the panel’s finding that the respondent had failed to prove a fact (the precise publication date of online press releases, which mattered for its transparency obligations), because it had not requested it with sufficient specificity. See *Korea – Radionuclides*, WT/DS495/AB/R, Appellate Body Report, para 5.186: ‘to the extent the Panel considered it was necessary for it to have such evidence, it should have sought it from both parties to the dispute and should only then have drawn appropriate inferences.’

<sup>281</sup> ICJ Statute Arts 43(5), 51; ICJ Rules Arts 57-58, 62-65; ITLOS Statute Art 27; ITLOS Rules Arts 78-80.

<sup>282</sup> E.g. – *Croatia Genocide Case*, *supra* note 14, at 17-23 (paras 17-44).

problems. Though the Committee has made recommendations for inter-State arbitration in light of the fact that testimonial evidence has featured in recent practice, it has omitted proposals for the WTO in light of its rarity in WTO proceedings.<sup>283</sup>

### 1. Witnesses of Fact

Witnesses are normally called by parties. In light of the fact that individuals, companies and non-governmental organisations are not able to submit *amicus* briefs, the Committee suggests that the Court and Tribunal consider in judicial practice the exercise of their autonomous power to summon witnesses where appropriate to enable such entities to provide evidence.<sup>284</sup> Additional procedural measures for consideration include: 1) witness security; 2) pre-testimonial communication between counsel and witnesses; and 3) the lack of a perjury mechanism.

In the *Croatia Genocide Case*, the Court adopted a number of useful security measures to conceal witness identities;<sup>285</sup> in some cases, it may be necessary to adopt even stronger measures (e.g. – anonymised video-link in a separate chamber). The Committee recommend that this template be codified by Practice Direction.

The US and Canadian practice of ‘witness proofing’, whereby counsel engage in model question-and-answer sessions in order to optimise the witnesses’ efficiency under questioning, is sometimes practised by legal teams. The difficulty is the risk that counsel may, accidentally or intentionally, contaminate the natural presentation of evidence. The Committee suggests that its explicit discouragement by the ICJ and the ITLOS in the form of a Practice Direction, as well as by the PCA through amendment of Sample Procedural Order No. 2, would be useful. Legal teams using proofing in spite of this discouragement would run the risk of the weight of the testimony being adversely affected; for example, the ICJ, ITLOS or arbitral tribunals could ask witnesses at the outset of the interrogation whether they have conducted question-and-answer sessions with counsel as general practice.<sup>286</sup> In virtual hearings, this issue is exacerbated by the prospect of pre-hearing practice sessions by counsel to familiarise witnesses with the technology and format as well as the possibility of extemporaneous, private communication between counsel and witnesses during the course of testimony.<sup>287</sup>

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<sup>283</sup> In fact, the absence of any examination of witnesses in WTO proceedings is probably partly due to the lack of regulation. See Isabelle Van Damme, ‘Eight Annual WTO Conference – an Overview’ (2009) 12(1) *Journal of International Economic Law*, 175, 183: ‘[d]ue to the lack of clear disciplines on evidence and the under-developed rules on fact witnesses in the DSU and Working Procedures—including on the protection of business confidential information—panels often remain reluctant to engage with fact witnesses, at least if it is possible to avoid hearing them. In none of the proceedings has a panel called its own fact witnesses.’ See also Cherise Valles, ‘Different Forms of Expert Involvement in WTO Dispute Settlement Proceedings’ (2018) 9(2) *Journal of International Dispute Settlement* 367. WTO panels have so far limited in-person testimonial evidence to SPS cases, with scientific experts engaged by the panel or representatives of international organizations intervening in a special session. Their testimony, usually, is for clarification rather than for direct fact-finding.

<sup>284</sup> E.g. – *Arctic Sunrise Arbitration*, *supra* note 20, at paras 58-60.

<sup>285</sup> *Croatia Genocide Case*, *supra* note 14, at 22 (para 39).

<sup>286</sup> For admonitions on contacts with witnesses that ‘could compromise their independence or breach the terms of their solemn declaratin’, see *Croatia Genocide Case*, *ibidem*, at 20 (para 33). See also *The M/V Saiga (No. 2) Case*, *supra* note 183, PV.99/9 (12 March 1999, 10 a.m.), at 11 (lines 10-14, 23-45), 12 (lines 12-32, 45-49), 13 (1-49), 14 (1-7); PV.99/10 (12 March 1999, 2 p.m.), at 15 (lines 1-34), 29 (5-37).

<sup>287</sup> Potential techniques could include the use of multiple cameras in the room or devices, such as ‘Meeting Owl’, that enable a 360° view of the room – *The Art and Science of a Virtual Hearing*, note 199, *supra*.

As stated in the *Counsel Survey*, prescription of guidance in the Practice Direction on the content and form of witness statements would assist.<sup>288</sup> Clarification of the modalities of affidavits (including the consequences of acceptance of their authenticity) would be valuable.<sup>289</sup> As the ICJ, ITLOS and arbitral tribunals at present lack the ability to compel witnesses, the Committee also propose that they instigate negotiation with the respective host country to create a perjury mechanism.<sup>290</sup> In turn, it is acknowledged that any such mechanism might suffer from the risk of partiality (actual or perceived) if a party to the dispute is the host State, that should supervise to its operation, of another State that has with it a close relationship.

## 2. Expert Witnesses and Assessors

The use of experts by adjudicators has increased and attracted interest in recent years.<sup>291</sup> ICJ Judges Simma and Al-Kwasawneh in their Dissenting Opinion in the case *Pulp Mills* pointed to the WTO practice in SPS disputes<sup>292</sup> as a model for ‘readily consulting outside sources in order better to evaluate the evidence.’<sup>293</sup> Autonomous and efficient fact-finding can assist adjudicators.

There have hitherto been three methods by which experts may appear before the ICJ: 1) as ‘technical’ or ‘scientific’ counsel in the parties’ legal teams; 2) as a witness called by the parties pursuant to Article 63 of the Rules; or 3) as an expert appointed by the Court pursuant to Article 67 of the Rules. The same classification holds true for ITLOS.<sup>294</sup>

As there is professional consensus welcoming the discouragement by the Court in the *Pulp Mills Case* of the appointment of experts as counsel by the parties,<sup>295</sup> a logical extension is to codify this.

Moreover, the Committee opines that the practice of *experts fantômes* should not continue, as the fact that the parties are unaware of their use contravenes the procedures set out in the Statute and Rules. The Committee suggests that the Court and Tribunal consider appointing experts as assessors, who do not have the right to vote, to assist in the deliberations.<sup>296</sup> Terms of reference could be agreed with the assessors, which may or may not include entry into the deliberations room (i.e. – advice to the panel sitting collectively) and/or availability for consultation individually by panel members. Whilst the identity and terms of reference of the assessors could be published, the Court and Tribunal could decide the scope of the experts’ involvement

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<sup>288</sup> Crawford and Keene, *supra* note 15, at 228. See also *Croatia Genocide*, Declaration of Judge Donoghue, at paras 3-5; *The M/V Saiga (No 2) Case*, *supra* note 183, PV.99/3 (9 March 1999, 10 a.m.), at 5 (lines 1-17); PV.99/4 (9 March 1999, 2 p.m.), at 7-8 (lines 23-48, 1-35); *The M/V Louisa Case*, *supra* note 183, PV.12/C18/4/Rev.1 (5 October 2012, 3 p.m.), at 3-9.

<sup>289</sup> This has been a problem at the Iran-US Claims Tribunal – *W. Jack Bukamier Case* cited in Amerasinghe, *Evidence in International Litigation* (2005), at 390-394.

<sup>290</sup> This would require a waiver by the ICJ and the Tribunal of immunity for witnesses – UNGA Resn 90(I), 11 December 1946, para 5(b); Agreement between the International Tribunal for the Law of the Sea and the Federal Republic of Germany Regarding the Headquarters of the Tribunal, Art 24(2).

<sup>291</sup> See for instance the professional comments and calls for reform in the *Counsel Survey*, Crawford and Keene, *supra* note 15, at 229.

<sup>292</sup> SPS Art 11, calling for panels to appoint experts in disputes involving ‘scientific or technical issues.’

<sup>293</sup> *Pulp Mills*, *supra* note 155, Joint Dissenting Opinion of Judges Simma and Al-Kwasawneh at 105, para 16. See also, Declaration of Judge Yusuf, para 1; Separate Opinion of Judge Caçado Trindade, para 151; Dissenting Opinion of Judge *ad hoc* Vinuesa, para 1.

<sup>294</sup> Philippe Gautier, ‘Experts before ITLOS: An Overview of the Tribunal’s Practice’ (2018) 9(3) *Journal of International Dispute Settlement* 433-439.

<sup>295</sup> *Pulp Mills*, *supra* note 155, at 72 (para 167). The Tribunal has not taken this up – *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh v. Myanmar) (Judgment)* [2012] ITLOS Rep. 4, at 8, 115 (para 444).

<sup>296</sup> ICJ Rules Art 21(2); UNCLOS Art 289. This was arguably done in the *Gulf of Maine Case*.

without comment by the parties, who could not comment upon the appointment procedure of these experts, which falls under the adjudicators' prerogative powers concerning deliberations.

There is a distinction between this form of assistance and the *evaluation* by an expert of factual issues (e.g. – through a report). In the latter case, the parties have the right to be consulted on the appointment process and raise objections if they believe the appointment is unlawful – for instance because the expert is not impartial.<sup>297</sup> In the *Maritime Delimitation in the Caribbean Sea Case*, the Court exercised for the third time<sup>298</sup> its Article 67 power to appoint experts *proprio motu* in consultation with the parties. This successful exercise of the power accords with the consensus view in the profession concerning the best method of appointment. The Committee accordingly recommends that this become the regular procedure for the taking of expert evidence. To encourage celerity, Articles 66-67 of the ICJ Rules as well as 80 and 82 of the ITLOS Rules could be amended to provide that requests for experts, inquiries and site visits be received by the time-limit for the filing of the Memorial.

Such evidence should be called only if truly necessary in light of the financial cost. In *Maritime Delimitation in the Caribbean Sea*, the General Assembly approved a reduced request of the Court for extraordinary expenses.<sup>299</sup> While the typical cost of experts is a relatively minor expense for the parties, it is a significant one for the Court due to its small allowance for unforeseen expenses; moreover, the triennial nature of the UN budgetary process inhibits predictability. The Committee accordingly reiterates the proposal that parties be ordered to contribute to such extraordinary costs, save for those who are supported by the Trust Fund.

On solicitation of experts (e.g. – by contacting professional associations in search of nominees) a measure of flexibility in the consultations between the adjudicators and the parties is necessary. The modalities could be prescribed in general terms in the ICJ and ITLOS Rules as well as the PCA Sample Procedural Order No. 1 and special working procedures for WTO panels<sup>300</sup>: timing, terms of reference,<sup>301</sup> consultation of the parties, duty of cooperation and opportunity for comment. In general, the question of appointment of expert witnesses could be addressed in the first case management conference and the first procedural order in order to allow time for logistics.<sup>302</sup> The experience of the *Caribbean Delimitation Case* and others suggests that an early time-limit (e.g. – the filing of the Memorial) for parties to request court/tribunal-appointed experts is feasible. Though the *voir dire* procedure has been applied on rare occasions,<sup>303</sup> objections may be addressed in the Article 50 procedure.

Arbitral practice has demonstrated the advantage of relying on experts in proceedings with a non-appearing party.<sup>304</sup> For instance, the *South China Sea* tribunal made liberal use of experts

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<sup>297</sup> *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, Appellate Body Report, para 484.

<sup>298</sup> *Maritime Delimitation in the Caribbean Sea Case (Costa Rica v. Nicaragua) (Order of 16 June 2016)*, at 33-34. The Tribunal has yet to exercise its equivalent power under Art 82(1) of the Rules.

<sup>299</sup> UNGA Resn 71/272 (23 December 2016), at VIII.

<sup>300</sup> *Korea — Radionuclides*, WT/DS495/R/Add.1, Panel Working Procedures for Consultations with Experts, Annex A-2 to Panel Report. See also *US - Animals*, WT/DS447/R/Add.1, Annex A-2 to Panel Report; *India - Agricultural Products*, WT/DS430/R/Add.1, Annex A-1 to Panel Report; *Russia — Pigs (EU)*, WT/DS475/R/Add.1, Annex A-3 to Panel Report.

<sup>301</sup> E.g. — *Arctic Sunrise*, *supra* note 20, Award on Compensation (10 July 2017), paras 44-46.

<sup>302</sup> E.g. — *Abyei Arbitration*, *supra* note 279, Award (22 July 2009), para 74.

<sup>303</sup> E.g. — Cases Nos 3 and 4 *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan) (Provisional Measures) (Order of 27 August 1999)*, PV.99/20/Rev.2 (18 August 1999, 10 a.m.), at 35-41, esp. 38.

<sup>304</sup> See above Section II.C.

to ensure that the case of the Philippines was ‘well founded in fact and law.’<sup>305</sup> In the *Duzgit Integrity* case, the tribunal appointed an expert to assist with the evaluation of damage and consulted the parties both on the individual appointed and the terms of reference.<sup>306</sup> While the issue of costs should not be overlooked, the Committee encourages adjudicators to explore the use of experts especially in cases of default.

### 3. Examination of Witnesses

Whilst judicial practice in the period under review has led to a degree of regularisation of procedures for the interrogation of witnesses,<sup>307</sup> problems nonetheless arise and there is demand for further clarification.<sup>308</sup>

The propriety of expert witnesses not only reading (and potentially informing) written pleadings but also observing the oral arguments of counsel<sup>309</sup> is dubious. Expert witnesses, whether Court-appointed or party-appointed, could be directed not to participate in the preparation of pleadings or to observe their presentation; conversely, counsel could be directed not to communicate with witnesses who are subject to recall, especially on the case.<sup>310</sup> Where their evidence is cited in the interrogation of other witnesses, they could be provided with the relevant extracts if recalled.

Though the procedure of the ICJ on witness interrogation broadly follows the English model, clarity is lacking on matters of detail. Whereas the rule on open and leading questions has been adopted,<sup>311</sup> it is not evident that the rule is always comprehensible to counsel. The resulting scope for misunderstanding thus militates in favour of prescriptiveness through Practice Direction on the detail of the procedure, such as contacts with witnesses under interrogation, reference to personal knowledge, impeachment of the credibility of a witness and scope for re-examination.<sup>312</sup> Restructuring the oral phase, as proposed above, whereby testimonial evidence

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<sup>305</sup> Before the hearings on the merits, the tribunal appointed a hydrographer, after inviting the parties’ view on the utility and timing of the appointment, and the desirable qualifications of the appointee. After the hearings on the merits, it decided that it would benefit from appointing two further experts to facilitate the deliberation: one expert on navigational safety issues and one on coral reef issues (who would address the environmental impact of Chinese operations). Shortly after the appointment on the latter, the tribunal decided to appoint two additional experts ‘to collaborate’ with him. The three experts prepared a joint report, which was submitted to the parties for comments, see *South China Sea* arbitration, Award of 12 July 2016, para 95.

<sup>306</sup> *Duzgit Integrity*, Award on reparation, paras 37ff.

<sup>307</sup> E.g. – *Whaling Case*, *supra* note 180, CR 2013/9 (27 June 2013, 10 a.m.), at 38; *Certain Activities/Construction of a Road*, *supra* note 148, CR 2015/3 (14 April 2015, 3p.m.), at 20-21; *Coastal State Rights*, Rules of Procedure, Article 15.5; Article 16.1 of the Rules of Procedure of the case *The Atlanto-Scandinavian Herring Arbitration* (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union) 2013-30: ‘Each written witness statement tendered in accordance with Article 14(1) shall stand as the witness’s evidence-in-chief.’ See also *ibid.*, Article 16.4: ‘In general, the direct-examination of witnesses shall be restricted to a brief introduction of the witness to the Arbitral Tribunal, and the notification of any minor corrections or updates to the witness’s statement.’ See also *Enrica Lexie*, Rules of Procedure of 19 January 2016 and *Arctic Sunrise*, Rules of Procedure of 17 March 2014.

<sup>308</sup> Crawford and Keene, *supra* note 15, at 228.

<sup>309</sup> E.g. – *Whaling Case*, *supra* note 180, at 53; at 20-21. Witnesses of fact, by contrast, are directed at both the Court and the Tribunal to remain outside of the chamber until called.

<sup>310</sup> *Certain Activities/Construction of a Road Cases*, *supra* note 148, Verbatim Record, CR 2015/12 (24 April 2015, 10 a.m.), at 20-21; *The M/V Louisa Case*, *supra* note 183, PV.12/C18/2/Rev.1 (4 October 2012, 3 p.m.), at 1 (lines 12-13); *Arctic Sunrise Arbitration*, *supra* note 20, Transcript (10 February 2015), at 2 (lines 23-25), 3 (lines 1-4); *The M/V Virginia Case*, *supra* note 183, P/V.13/C19/4/Rev.1 (4 September 2013, 10 a.m.), at 31 (lines 18-48).

<sup>311</sup> E.g. – *Croatia Genocide*, *supra* note 14, CR 2014/11 (6 March 2014, 3 p.m.), at 33.

<sup>312</sup> E.g. – *The M/V Saiga (No. 2)*, *supra* note 183, PV.99/9 (12 March 1999, 10 a.m.), at 11-13; *The M/V Louisa Case*, *supra* note 183, PV.12/C18/2/Rev.1 (4 October 2012, 3 p.m.), at 17-18. See also *Detention of Ukrainian Vessels*, *supra* note 256, Rules of Procedure (Art 18.5).

could be taken at the outset, would help to insulate witnesses from undue exposure to the arguments. The prescription of such guidance by the PCA in its Sample Procedural Order No. 2 would also assist arbitral tribunals to address the matter in their procedural orders. Arbitral Tribunals could also explore the possibility of arranging for testimony by videoconferencing, which is a technique still in its infancy, but has been regulated expressly in arbitration.<sup>313</sup>

### C. Site Visits

Tribunal's site visits entail an inspection by the judges or arbitrators of a locality (as distinct from site visits performed by expert witnesses, whether appointed by the parties or the court or tribunal). Though the ICJ is empowered to order a site visit *proprio motu*,<sup>314</sup> the sole site visit in the *Gabčíkovo-Nagymaros Project Case* was done with the agreement and financing of the parties.<sup>315</sup> The experience of *Gabčíkovo-Nagymaros Project* suggests that a time-limit coincidental with the closure of the written phase for the consideration of a potential site visit is viable. Two successful site visits were conducted with the cooperation and support of the parties in the recent *Indus Waters Arbitration*.<sup>316</sup> A site visit was also executed in the *Bay of Bengal Arbitration*.<sup>317</sup> The Committee recommend that these templates of best practice be codified by the ICJ and the ITLOS in Practice Directions and by the PCA in its Sample Procedural Order No. 2 for further development in judicial and arbitral practice.

### V. Concluding Remarks

The Committee includes its recommendations in the Resolution attached, and in the following Annex it wishes to highlight certain topics on which debate would be necessary, but on which it did not made specific recommendations.

### VI. Annex

For wider debate in the professional community, the Committee sets out the ideas below, on which it decided not to make recommendations.

1. **Implicit Claims:** the Committee considered whether the Court and the Tribunal ought to adopt a new Rule to define 'implicit claims', which would provide a legal test for admissibility. Whereas this has been a problem in recent practice, the Committee considered that such a Rule could intrude into the substance of the claims.
2. **Default:** the Committee debated the possibility of amendment to Articles 91 of the ICJ Rules and 108 of the ITLOS Rules to empower the Court and the Tribunal to assign a default case to the standing Chamber of Summary Procedure upon application by the participating party in the absence of an objection, tendered by a duly appointed agent, by the defaulting party. The Committee decided not to adopt this idea at this time, as it may be perceived to conflict with the duty of international courts and tribunals to ensure that their judgments are 'well founded in fact and law'.
3. **Composition of the Panel:** the Committee discussed the possibility of adopting a formal procedure for parties to challenge individual judges. The Committee did not form a concrete proposal.
4. **Judges *ad hoc*:** the Committee discussed the *Whaling* case situation, where one of the parties and a third State publicly agreed that the latter would participate as an Article 63 intervenor rather than as a party so that the *ad hoc* judge appointed by the party would

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<sup>313</sup> E.g. – *Indus Waters Kishenganga*, note 242, *supra*.

<sup>314</sup> ICJ Statute Art 44(2); ICJ Rules Art 66; ITLOS Rules Art 81.

<sup>315</sup> *Supra* note 162. Cost was a key factor in the rejection of requests for site visits in *South West Africa Cases*, *Gulf of Maine Case*, and *Land, Island and Maritime Frontier Dispute Case*.

<sup>316</sup> *Supra* note 242, at paras 33-40, 77-88.

<sup>317</sup> *Bay of Bengal*, *supra* note 162.

remain notwithstanding the fact that one of the Members of the ICJ had the nationality of the intervenor. The Committee did not form a concrete proposal.

5. **Language:** the Committee considered the potential promotion of *ad hoc* chambers to hear cases in English only or French only where one of those languages is shared by the parties as an official language. The Committee did not adopt this proposal, as concerns were expressed that it may detract from the diversity of the panel. The Committee also considered the potential use of the Spanish language in an *ad hoc* Chamber where three Members of the ICJ are Spanish-speakers, taking into account Article 39 of the ICJ Statute; the Committee explored but did not endorse the proposal that WTO panels circulate the report in the original language before circulating its translated versions.
6. **Chambers:** there have been calls in the *Counsel Survey* and elsewhere for the greater use of chambers. Whilst certain members felt that greater use of *ad hoc* chambers would detract from the jurisprudence of the full Court, others opined that chambers can be more free to adopt useful innovations. The Committee did not arrive at a consensus.
7. **Written Notes:** the Committee investigated options for deliberation, such as a judge rapporteur system or a cap on written notes. The Committee did not adopt a proposal, as some members felt that the institutions were best-placed to evaluate the different methods;
8. **Individual Opinions:** the Committee considered a cap on the length of individual opinions. Whereas some members felt that this would set a moral example and that it would save costs on lengthy opinions (e.g. – by judges *ad hoc*), others considered this to intrude into the judicial function. In the absence of consensus, a proposal was not adopted.
9. **Joinder of Objections:** whereas some members favoured the abolition of joinder of objections to the merits, others felt that this may intrude into matters of substance rather than procedure. In the absence of consensus, the proposal was not adopted.
10. **Inquiries:** the Committee considered the potential expansion of the use of inquiries, such as in cases of alleged violations of provisional measures. The Committee did not arrive at a concrete proposal.
11. **Limitations to hearings and written pleadings in arbitration:** contrary to the Committee's conclusions relating to ITLOS and ICJ, there was no consensus that arbitration necessitates strong efficiency-enhancing adjustments. Curtailing oral hearings, limiting the page-count of the written submissions or the attachments, limiting the rounds of written submissions – especially when simultaneous submissions are warranted: these and other approaches were discussed. While each of them might be desirable in specific scenarios, none garnered sufficient support to figure in a general recommendation.
12. **Role of supporting staff in the drafting of arbitral awards:** the role of tribunals' or chairpersons' assistants in the deliberation and the drafting of the award may vary. The Committee discussed whether clearer guidelines would be desirable, to avert contestation, in light of the recent objections raised by the losing party regarding the authorship of the *Yukos* award. While several documents exist that could be used to illustrate the best practices (issued by the ICC, LCIA, HKIAC, UNCITRAL, AAA), the Committee preferred not to adopt a specific recommendation. Likewise, the Committee decided to avoid pronouncing on the role of the Secretariat in the preparation of WTO panel reports.