

Geneva, June 7th, 1930.

LEAGUE OF NATIONS

**Proposal of the Government of Finland to confer
on the Permanent Court of International Justice
Jurisdiction as a Tribunal of Appeal in respect
of Arbitral Tribunals established by States.**

REPORT OF THE COMMITTEE APPOINTED BY THE COUNCIL

NOTE BY THE SECRETARY-GENERAL.

At its session of January 1930, the Council considered the Assembly's resolution of September 25th, 1929, by which the Assembly requested the Council "to submit to examination the question: What should be the most appropriate procedure to be followed by States to enable the Permanent Court of International Justice to assume in a general manner, as between them, the functions of a tribunal of appeal from international tribunals in all cases where it is contended that the arbitral tribunal was without jurisdiction or exceeded its jurisdiction?"

The Council invited the representatives of Germany, Finland, France, Italy and Poland to ask their legal advisers to form a very small committee to make a preliminary study of the question as formulated in the Assembly's resolution. The Committee was to report to the Council at one of its subsequent sessions.

In execution of the Council's decision, a Committee composed of M. GAUS (Germany), M. ERICH (Finland), M. BASDEVANT (France), M. PILOTTI (Italy) and M. RUNDSTEIN (Poland) met at Geneva under the presidency of M. Basdevant from May 19th to 22nd, 1930. It drew up the report reproduced below, which the Secretary-General has the honour to submit to the Council for consideration. The present document is communicated also to all the Members of the League of Nations and the non-Member States signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice.

REPORT OF THE COMMITTEE.

The Committee's task was laid down in the resolution voted by the Assembly of the League of Nations on September 25th, 1929, in the following terms:

"The Assembly invites the Council to submit to examination the question: What would be the most appropriate procedure to be followed by States desiring to enable the Permanent Court of International Justice to assume in a general manner, as between them, the functions of a tribunal of appeal from international arbitral tribunals in all cases where it is contended that the arbitral tribunal was without jurisdiction or exceeded its jurisdiction?"

The Committee has taken into consideration Article 81 of the Convention for the Pacific Settlement of International Conflicts signed at The Hague on October 18th, 1907, the terms of which are as follows:

"The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal."

On the other hand, it has considered the difficulties and controversies which may arise on the subject of the nullity of an arbitral award.

Finally, it has examined the possibilities of judicial settlement of those difficulties which may be furnished by Article 36, paragraph 2, of the Statute of the Permanent Court of International Justice and by Article 41 of the General Act of Arbitration.

It was not the function of the Committee to determine to what extent those two articles do or do not permit the difficulties in question to be brought before the Permanent Court of International Justice after the award has been given. Its task was to investigate what procedure, apart from those two articles, would be most suitable for bringing disputes of the kind in question within the framework of the obligatory jurisdiction of the Court.

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For the purpose of determining what this procedure should be, and of settling its details, the Committee was led to examine two kinds of question. It is necessary both to decide what procedure the Assembly might adopt for the introduction of the new system and to set out in what the system is to consist.

The first question involves considering whether the Assembly will recommend the conclusion of a general agreement, which it would decide to open to signature by the States, or whether it will recommend the conclusion of bilateral agreements, or whether, finally, it will devise some other procedure. In all three events the object will be to confer on the Permanent Court of International Justice compulsory jurisdiction over claims that an arbitral award is null.

In the course of examining this first question, the Committee was led to recognise that the actual circumstances in which arbitral awards are made differ to a considerable extent.

It sometimes happens that the arbitral tribunal has been set up to deal with a whole series of cases which are not specifically named in the instrument creating the tribunal. This has been the case as regards the "mixed arbitral tribunals" and as regards the "claims commissions" which have been established at different times between different Governments. Questions of jurisdiction are often raised before such tribunals. On the other hand, their composition makes it easy to accept the notion of a kind of hierarchic relation between them and the Permanent Court of International Justice. Accordingly, a recourse to the Court against decisions of such tribunals on the ground that the tribunal had no jurisdiction to deal with the matter, or exceeded its jurisdiction, or on the ground of a fault in the procedure, can be readily accepted. One might even, as regards such tribunals, conceive—but the subject is outside the terms of reference of the Committee—that recourse to the Court might be made possible on substantive questions of law, with a view to unifying the jurisprudence of the tribunals, particularly where a number of Governments, in connection with the same events, set up arbitral tribunals which exist side by side but are juridically independent.

The position is different where an arbitral tribunal is set up by a special agreement for the arbitration of a particular case. Before such tribunals questions of jurisdiction more rarely arise. The tribunal's task is ordinarily determined with greater precision than in the preceding case.

Finally, where arbitration has to deal with a political question, recourse against the decision will often be contrary to the intention of the Governments; they are prepared to accept the solution given by persons in whom they have confidence, and judicial proceedings upon some incident of the dispute do not present themselves as a very appropriate means of reaching a final settlement.

It is this divergency of cases and the desire not to compromise the authority of arbitral awards, which make it difficult to determine the procedure which should be followed by States desirous of permitting recourse from arbitrators to the Permanent Court of International Justice.

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Two methods of procedure at once occur to the mind, based upon the methods followed for the development of arbitration by the Ninth Assembly. The first would consist in recommending the insertion of suitable provisions in those arbitration treaties which may be subsequently concluded, or in agreements supplementary thereto, and in treaties which contain an arbitration clause. Such provisions could also, to the extent deemed appropriate, find their place in the special agreements by which particular questions are submitted to arbitration. The provisions would be drafted now and recommended to the Governments. The second method would be to embody the provisions giving jurisdiction to the Permanent Court of International Justice, and the rules of such jurisdiction, in a Protocol which the Assembly would open to accession by the Members of the League of Nations and the non-Member States.

The second method would have the advantages of simplicity and uniformity. It may, however, be asked whether it would not be somewhat excessive to propose the conclusion, under the auspices of the League of Nations, of a general agreement for the settlement of disputes as to the alleged nullity of some arbitral awards when such disputes are in practice very rare. Is there not a risk that the adoption of a procedure of a general character for the settlement of such disputes would tend to increase their number?

The method of bilateral agreements (appropriate clauses to be inserted in arbitration treaties or, possibly, in agreements for the arbitration of particular questions, according to a model which would be submitted and recommended) has the advantage of being more modest. Above all, it makes it easier to do justice to the different cases to which attention is called above. On the other hand, it may be asked whether a recommendation of this kind would have practical consequences, particularly as regards treaties already in force.

Both the above methods, which, moreover, might be adopted simultaneously, would seek to establish for the future a rule of law obliging a State which contested the validity of an arbitral award to submit its claim to the Permanent Court of International Justice. Perhaps, however, it may be desired to resort to a method which would legally be less rigid but might nevertheless in practice be equally effective.

The third method would be for the Assembly, basing itself upon the progress which has been made by the notions of arbitration and international justice, to declare that a State, which disputes the obligatory character of an arbitral award on the ground that the tribunal had no jurisdiction or exceeded its jurisdiction or that there was a fault in the procedure, has the *duty* to propose to the State against which it makes such claim the conclusion of a special agreement submitting the decision of the question to the Permanent Court of International Justice. The bases of such agreement would be set out in appropriate provisions. There is obviously implied a corresponding duty of the other party to accept such proposal.

The practical effectiveness of such a declaration would flow from its connection with the provisions of the Covenant regarding the settlement of disputes and the part which the Council

has to play for the purpose of ensuring the execution of arbitral awards. In proceedings of this kind, the position of a State which had failed in the duty of proposing the conclusion of the special agreement, or which had refused to give effect to such proposal, would be extremely difficult.

It will perhaps be objected that the guarantees for the efficacy of this method are sought in the political field rather than in the field of law. The method, however, appears to a greater extent than the other two methods to take account of the exceptional character of disputes as to the validity of arbitral awards.

The Committee has not felt it to be its duty to pronounce between the three methods which it has contemplated. Under the terms of the Assembly's resolution, the results of its work are to be communicated to the Governments; it has felt that their opinion will be a decisive factor in the choice between the three methods.

Accordingly, the Committee has given to the results of its work the form not of a single draft but of three drafts, each of which corresponds to one of the methods above described, namely:

I. A draft recommendation in favour of the insertion in arbitration treaties, arbitration clauses and special arbitration agreements of provisions of which a model is set out;

II. A draft resolution inviting States and Members of the League of Nations to sign a Protocol which is annexed to the resolution;

III. A draft resolution declaring it to be the duty of a State, contesting the validity of an arbitral award, to propose the conclusion of a special submission to arbitration, which would be drawn up on certain stated bases and have the object of submitting such claim to decision by the Permanent Court of International Justice.

In thus presenting three drafts, the Committee does not fear that it has unduly complicated its report. The provisions which accompany the drafts and relate to determination of the Court's jurisdiction, the method by which the case is referred to the Court and the function of the Court, are in all three cases very similar and for the most part identical.

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The provisions just referred to would establish in what the new system is to consist. The Committee has contemplated that the basis of the system should be as follows:

In the first place, the tribunal competent to hear and determine disputes as to the validity of arbitral awards would be the Permanent Court of International Justice. This is already settled in the Assembly's resolution which fixed the Committee's terms of reference. Under the first two drafts, the case would be one of obligatory jurisdiction; under the third, the Court's jurisdiction would be founded on a special submission, concluded after the dispute arose, in execution of the duty which the Assembly had declared to exist.

The recourse which is contemplated does not, however, apply to all arbitral awards. The Committee has felt that it is desirable in principle to deal only with awards in disputes with regard to which the parties are in conflict as to their respective rights. It would seem more difficult to make a general recommendation in favour of recourse to a judicial body against arbitral awards dealing with conflicts of interests. It is from this point of view that the method of bilateral agreements is more supple than that of establishment of uniform rules. The Committee proposes, however, that the possibility of extending or restricting by special agreement the application of the principle as to what are the awards against which the recourse exists, should be reserved. This may make it possible to satisfy both those who would desire to extend the procedure to awards dealing with conflicts of interests and those who would feel some hesitation in admitting recourse to the Court where the arbitral award has been made under a special agreement for the arbitration of a particular case.

The Assembly's resolution did not contemplate that arbitral awards might be brought before the Permanent Court of International Justice on any legal point whatsoever. It favours such recourse only as regards claims that the tribunal had no jurisdiction or exceeded its jurisdiction. The Committee has felt able to add the case of a fundamental fault in the procedure. It has not, on the other hand, felt it should define what is meant by a tribunal having no jurisdiction or exceeding its jurisdiction or by a fundamental fault in the procedure. It has thought it best to rely upon the Court, whose decisions will establish, with the necessary precision, the meaning of these conceptions.

On the other hand, the Committee had not to deal with awards in which an arbitral tribunal declares itself not to have jurisdiction, and it has not been felt that the difficulties which may arise in this connection are sufficiently grave to justify establishing provisions with regard to them.

An arbitral award is in principle deemed to be regular and binding. A State which disputes its validity introduces a new factor into the case. It is therefore for it to take the initiative and to bear the consequences resulting therefrom. It follows that such State ought to submit its claim to the Court. Procedure by application to the Court is the appropriate method of bringing the matter before it, if the case has to be considered as a case of compulsory jurisdiction. A complication, however, arises if the system is adopted under which the State contesting the validity of the award would merely have the duty to propose to the other party the conclusion of a special agreement for bringing the matter to the Court. It has seemed desirable to state that, notwithstanding that this is the form in which proceedings are started, the State contesting the validity of the award shall be considered as the plaintiff. This involves certain particularities of procedure which are provided for in Article 3 of draft III.

Whatever be the method of starting the proceedings, it appears indispensable to allow the recourse to the Court during only a very brief period. Nothing, on the other hand, has been said regarding the possibility of considering execution of an award as an acceptance of the award which would render irreceivable any subsequent claim to dispute its validity. It has been felt that this point should be left to the appreciation of the Court, which will take account of the circumstances of the case.

As international arbitral proceedings are sometimes open to individuals, it appears desirable to call attention to the provisions of the Court's Statute (Article 34), under which only States or Members of the League of Nations can be parties in cases before the Court.

The function of the Court will consist in declaring the arbitral award to be null if it recognises that the claim of nullity is well founded. The Committee has considered whether in such case the Court should have the task of giving judgment upon the merits. It has not thought that a general rule could be established which would thus transfer the dispute from the field of arbitration to that of international jurisdiction by a permanent tribunal; a provision of this kind could, however, be inserted in a particular treaty dealing with a single dispute or a well-determined class of dispute. In a provision of a general character, it is impossible to go beyond the conception that, if the Court pronounces an arbitral award to be null, the parties will be replaced in the legal position in which they found themselves before the commencement of the proceedings which have led to the award. If, for example, they were bound under an arbitration treaty to arbitrate the dispute by way of conclusion of a special agreement submitting it to arbitration, they would be obliged to conclude a new special agreement for this purpose, their obligation not having been entirely executed by the signature of the old agreement, since this has led only to an award having no legal validity.

Although the Court has thus only to pronounce upon the validity of the award, and not upon the merits of the case, it nevertheless appears necessary to empower it to order appropriate provisional measures.

The Court's judgment will be binding upon the parties. It seems desirable to add that they must accept the judgment as the basis of any further arbitral proceedings which may be taken for the settlement of the case in the same manner as if the substance of the judgment were set out in a submission to arbitration. The new arbitrator will thus be bound by the Court's judgment and be unable to disregard it without exceeding his jurisdiction.

I. DRAFT RECOMMENDATION.

The Assembly,

With a view to rendering more complete the provisions in force for the settlement of international disputes by arbitration or judicial settlement, and to ensure the solution by legal means of certain difficulties which may arise exceptionally on the subject of the validity of arbitral awards:

Recommends the Members of the League of Nations:

1. To recognise as between themselves a compulsory jurisdiction of the Permanent Court of International Justice to annul arbitral awards which are vitiated by absence of jurisdiction in the tribunal, the fact that the tribunal has exceeded its jurisdiction, or a fundamental fault in the procedure;

2. To insert in their arbitration treaties, arbitration clauses or agreements supplementary thereto, and, where appropriate, in special agreements for the arbitration of particular questions, subject to any modifications which they may deem suited to the special circumstances of the agreement, the following provisions, namely:

Article 1.

Without prejudice to any agreements allowing recourse to the Permanent Court of International Justice in cases not provided for by the present provisions, the High Contracting Parties recognise the Permanent Court of International Justice as having compulsory jurisdiction, under the conditions hereafter laid down, to annul awards given by an arbitral tribunal.

Article 2.

The present provisions apply to awards in disputes with regard to which the parties were in conflict as to their respective rights.

The High Contracting Parties may, by special agreements to that effect, either extend the application of the present provisions to other arbitral awards or exclude particular awards from the application thereof.

Article 3.

A High Contracting Party who disputes the obligatory character of an arbitral award on the ground that the award is null because the tribunal had no jurisdiction, or exceeded its jurisdiction, or on the ground of a fundamental fault in the procedure, shall be bound to submit such claim to the Permanent Court of International Justice.

The application to the Permanent Court of International Justice must be lodged with the Registrar within sixty days from the notification of the award or, if notification is not obligatory, from its publication.

Even where it has been possible for individuals to be parties to the previous proceedings, such application cannot be made except by a State or a Member of the League of Nations.

Article 4.

The Permanent Court of International Justice shall declare the award which is impeached to be null, in whole or part, if it recognises the application to be well founded. By such annulment the parties to the dispute shall be replaced in the legal position in which they stood before the commencement of the proceedings which gave rise to the award which has been impeached.

At the same time as it annuls the award, the Court may order appropriate provisional measures.

Article 5.

The decision of the Permanent Court of International Justice shall be binding upon the parties. By the present provisions, those parties agree that such decision shall operate, in the same manner as a special agreement for arbitration, as a basis for any arbitration proceedings which may eventually be taken for the settlement of the case.

II. DRAFT RESOLUTION.

The Assembly,

With a view to rendering more complete the provisions in force for the settlement of international disputes by arbitration or judicial settlement, and to ensure the solution by legal means of certain difficulties which may arise exceptionally on the subject of the validity of arbitral awards:

1. Recommends the Members of the League of Nations to recognise as between themselves a compulsory jurisdiction of the Permanent Court of International Justice to annul arbitral awards which are vitiated by absence of jurisdiction in the tribunal, the fact that the tribunal has exceeded its jurisdiction, or by a fundamental fault in the procedure;

2. Invites all States, whether Members of the League of Nations or not, in so far as the agreements which they have already concluded are not already sufficient, to accept obligations giving effect to the purposes above mentioned by becoming parties to the Protocol annexed hereto;

3. Decides to communicate the annexed Protocol to all the Members of the League of Nations and to such States not Members of the League as shall be indicated by the Council.

Annex.

PROTOCOL.

Article 1.

Without prejudice to any agreements allowing recourse to the Permanent Court of International Justice in cases not provided for by the present provisions, the High Contracting Parties recognise the Permanent Court of International Justice as having compulsory jurisdiction, under the conditions hereafter laid down, to annul awards given by an arbitral tribunal.

Article 2.

The present provisions apply to awards in disputes with regard to which the parties were in conflict as to their respective rights.

The High Contracting Parties may, by special agreements to that effect, either extend the application of the present provisions to other arbitral awards or exclude particular awards from the application thereof.

Article 3.

A High Contracting Party who disputes the obligatory character of an arbitral award on the ground that the award is null because the tribunal had no jurisdiction, or exceeded its jurisdiction, or on the ground of a fundamental fault in the procedure, shall be bound to submit such claim to the Permanent Court of International Justice.

The application to the Permanent Court of International Justice must be lodged with the Registrar within sixty days from the notification of the award or, if notification is not obligatory, from its publication.

Even where it has been possible for individuals to be parties to the previous proceedings, such application cannot be made except by a State or a Member of the League of Nations.

Article 4.

The Permanent Court of International Justice shall declare the award which is impeached to be null, in whole or part, if it recognises the application to be well founded. By such annulment, the parties to the dispute shall be replaced in the legal position in which they stood before the commencement of the proceedings which gave rise to the award which has been impeached.

At the same time as it annuls the award, the Court may order appropriate provisional measures.

Article 5.

The decision of the Permanent Court of International Justice shall be binding upon the parties. By the present provisions, those parties agree that such decision shall operate, in the same manner as a special agreement for arbitration, as a basis for any arbitration proceedings which may eventually be taken for the settlement of the case.

Article 6.

The present Protocol, of which the French and English texts shall both be authoritative, shall bear the date of

Article 7.

The present Protocol shall be open to accession by all heads of States or other competent authorities of the Members of the League of Nations and the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose.

The instruments of accession shall be transmitted to the Secretary-General of the League of Nations, who shall notify their receipt to all the Members of the League and to the non-Member States referred to in the preceding paragraph.

Article 8.

The present Protocol shall enter into force on the ninetieth day following receipt by the Secretary-General of the League of Nations of the accession of not less than two contracting parties.

Accessions received after the entry into force of the present Protocol, in accordance with the previous paragraph, shall become effective as from the ninetieth day following the date of receipt by the Secretary-General of the League of Nations.

Article 9.

The present Protocol shall be concluded for a period of five years, dating from its entry into force.

It shall remain in force for further successive periods of five years in the case of contracting parties who do not denounce it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the League of Nations, who shall notify all the Members of the League and the non-Member States referred to in Article 7.

Notwithstanding denunciation by one of the contracting parties, recourse may be had to the Permanent Court of International Justice, within the period provided in Article 3, against any award given before the date at which a party's obligations under the present Protocol expire.

Article 10.

A copy of the present Protocol, signed by the President of the Assembly and by the Secretary-General of the League of Nations, shall be deposited in the archives of the Secretariat; a certified true copy shall be delivered by the Secretary-General to all the Members of the League of Nations and to the non-Member States indicated by the Council of the League of Nations.

Article 11.

The present Protocol shall be registered by the Secretary-General of the League of Nations on the date of its entry into force.

III. DRAFT RESOLUTION.

The Assembly,

With a view to rendering more complete the provisions in force for the settlement of international disputes by arbitration or judicial settlement, and to ensure the solution by legal means of certain difficulties which may arise exceptionally on the subject of the validity of arbitral awards:

Declares that any Member of the League of Nations which disputes the obligatory character of an arbitral award on the ground that the award is null because the tribunal had no jurisdiction, or exceeded its jurisdiction, or on the ground of a fundamental fault in the procedure, has the duty to propose to the other party the conclusion of a special agreement for the submission of this question to the Permanent Court of International Justice, within the framework of the following provisions:

Article I.

Without prejudice to any agreements allowing recourse to the Permanent Court of International Justice in cases not provided for by the present provisions, the parties shall, under the conditions hereafter laid down, give the Permanent Court of International Justice jurisdiction to annul the arbitral award.

Article 2.

The present provisions apply to awards in disputes with regard to which the parties were in conflict as to their respective rights.

The parties may, by special agreements to that effect, either extend the application of the present provisions to other arbitral awards or exclude particular awards from the application thereof.

Article 3.

The party which disputes the obligatory character of the arbitral award on the ground that the award is null because the tribunal had no jurisdiction, or exceeded its jurisdiction, or on the ground of a fundamental fault in the procedure, shall be bound to make the proposal for the conclusion of the special agreement within sixty days from the notification of the award or, if notification is not obligatory, from its publication. The special agreement, when duly concluded, shall be validly notified to the Court by whichever party first takes this action.

Even where it has been possible for individuals to be parties to the previous proceedings, the special agreement may not be concluded except by States or Members of the League of Nations.

Notwithstanding that the proceedings before the Court must be commenced by way of a special agreement for submission of the matter to the Court, the party contesting the validity of the arbitral award shall be deemed to be the plaintiff and, in consequence, the order in which the documents comprised in the written proceedings are to be presented shall be determined in the same manner as in proceedings commenced by a written application (Article 39 of the Rules of Court); and the same principle shall be followed in determining the order in which agents, advocates or counsel of the parties shall be called on to speak.

Article 4.

The Permanent Court of International Justice shall declare the award which is impeached to be null, in whole or part, if it recognises the claim for annulment to be well founded. By such annulment, the parties to the dispute shall be replaced in the legal position in which they stood before the commencement of the proceedings which gave rise to the award which has been impeached.

At the same time as it annuls the award, the Court may order appropriate provisional measures.

Article 5.

The decision of the Permanent Court of International Justice shall be binding upon the parties. By the conclusion of the special agreement, those parties agree that such decision shall operate, in the same manner as a special agreement for arbitration, as a basis for any arbitration proceedings which may eventually be taken for the settlement of the case.
