

ORAL PROCEDURE IN THE COMMUNITY COURTS

by

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It is a fact, insufficiently appreciated by those who come to European Community law other than through the avenue of public international law, that the Statute¹ and the Rules of Procedure² of the Court of Justice were based on those of the International Court of Justice. It is true the Community Courts' Statutes and Rules have undergone many subsequent modifications, conveniently consolidated in the modern versions of those instruments dated 18th December 2006. Among the most significant of the previous amendments are those made for the purpose of embracing new Communities, the Court of First Instance and now the Civil Service Tribunal, whose Rules of Procedure were published only in August of this year.³ Nevertheless, the influence of the International

¹ Protocol on the Statute of the Court of Justice annexed to the Treaty on European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community, in accordance with Article 7 of the Treaty of Nice, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice on 26th February 2001 (OJ 2001 C 80), as amended by Council Decision of 15 July 2003 (OJ 2003 L188/1), by Article 13(2) of the Act concerning the conditions of accession of 16 April 2003 (OJ 2003 L236/37), Council Decisions of 19th and 26th April 2004 (OJ 2004 L132/1 and 5, and OJ 2004 L194/3 (corrigendum)), Council Decision of 2nd November 2004 establishing the European Union Civil Service Tribunal (OJ 2004 L333/7), by Council Decision of 3rd October 2005 (OJ 2005 L266/ 60) and by Article 11 of the Act concerning the conditions of accession of 25th April 2005 (OJ 2005 L157/207).

² Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 (OJ 1991 L176/7, and OJ 1992 L383 as amended by Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 21st February 1995 (OJ 1995 L44/61), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 11th March 1997 (OJ 1997 L103/1, and OJ 1997 L351/72 (corrigenda)), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 16th May 2000 (OJ 2000 L122/43), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 28th November 2000 (OJ 2000 L322/ 1), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 3rd April 2001 (OJ 2001 L119/1), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 17th September 2002 (OJ 2002 L272/1, and OJ 2002 L281/24 - corrigenda), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 8th April 2003 (OJ 2003 L147/17), Amended decision of 10th June 2003 on official holidays annexed to the Rules of Procedure (OJ 2003 L172/12), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 19th April 2004 (OJ 2004 L132/ 2), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 20th April 2004 (OJ 2004 L127), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 12th July 2005 (OJ 2005 L203/19), Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 18th October 2005 (OJ 2005 L288 /12) and Amendments to the Rules of Procedure of the Court of Justice of the European Communities of 18th December 2006 (OJ 2006 L386/44).

³ OJ 2007 L225/1 (29th August 2007). The procedure of the Civil Service Tribunal ("C.S.T.") differs from that of the Community's two principal judicial organs in this respect: the Tribunal aspires to reach settlement of disputes by compromise, where possible; and the procedural rules are adjusted accordingly.

Court continues to be discernible in many of the Community Courts' procedural arrangements including the rules governing oral procedure.

Preparation for the Hearing

The form to be taken at each oral hearing of the three Community Courts is determined, in large measure, at the Court's antecedent administrative meeting. It is at such meetings that the Court decides, on the basis of a preliminary report prepared by the Judge-Rapporteur, whether any preparatory inquiries or other preparatory step should be instituted and whether the case should be submitted to a chamber. The Court as a whole, in the case of the Court of Justice, after hearing the Advocate General, decides in an administrative meeting what action is to be taken on the recommendations of the Judge-Rapporteur.⁴

The administrative meetings of the two Community courts were derived from the practice of the International Court of Justice, whose *Resolution concerning the Internal Judicial Practice* provides that after the termination of the written proceedings and before the beginning of the oral proceedings there shall be held a meeting at which the members of the Court may exchange views concerning the case and draw attention to any point in regard to which they consider it may be necessary to call for explanations during the course of the oral proceedings.⁵ Following such a meeting the Court may call upon the agents to produce any document or to supply any explanations; and may entrust any individual or organization with the task of carrying out an inquiry or giving an expert opinion.⁶

⁴. E.C.J. Rules (2007 version), Article 44.

⁵. See Resolution concerning the Internal Judicial Practice, Article 1(1).

⁶. Article 50 of the I.C.J. Statute.

The Community Courts have made greater use of the power to call upon the agents to produce documents than has the International Court; but in this respect the difference is somewhat more apparent than real. The Community Courts considers themselves free to ask for information or explanations, and for documents, from the Commission; but in regard to Member States they tend to show much the same sensitivity towards the susceptibilities of sovereign States as does the International Court of Justice. Consequently, like that Court, the two principal Community courts generally prefer to put questions to the parties only after the oral hearing has already commenced.⁷ Only in the case of the new Civil Service Tribunal (and in the special case of competition cases in the Court of First Instance) do we encounter a marked departure from the reticence shown by the International Court of Justice to make use of the power to require the production of documents in advance of the hearing. In the case of the Civil Service Tribunal, the departure can be explained by the fact that the documents in question are likely to be those of Community institutions, not States, and their production may tend to promote an amicable settlement of the case at the oral hearing. With the Court of First Instance, production of documents in competition cases can assist in resolving issue of fact that tend to be hotly contested.

⁷ Shabtai Rosenne, *The Law and Practice of the International Court*, Martinus Nijhoff, Dordrecht, 1985 p. 568. In addition the Head of the Documents department has according to Article 72 of the Instructions for the Registry to prepare in respect of each case, a chronological list, with bibliographical references, of documents relied upon in the pleadings.

In the case of the Inter-American Court of Human Rights, its Rules make provision for the taking of steps to obtain evidence, either on the application of the participants or on the Court's motion. But these procedures have led the Inter-American court to engage in pre-hearing investigations rather infrequently⁸. Much the same was true, also, of the European Court of Human Rights, prior to its reconstitution⁹. That was to be expected, since the establishment and verification of the facts was a responsibility of the Human Rights Commission.¹⁰ The present Rules of the European Court of Human Rights, however, authorise it to be more robust in calling for evidence.¹¹ Rule 42 envisages that in advance of the oral hearing, a Chamber will be established for the purpose of determining disputes as to fact. At the request of any party or third party, or on its own motion, the Chamber may

“obtain any evidence which it considers capable of providing clarification of the facts of the case. The Chamber may *inter alia*, request the parties to produce documentary evidence and decide to hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in carrying out its tasks”.

What is still lacking from the procedure of the Court of Justice, as from the International Court of Justice, is a fully-developed system for pre-trial hearings at which the parties may be present. Exceptionally such meetings are held, particularly where the oral hearing is to entail the presence of witnesses or other determination of disputed facts; but

⁸ By Article 44 of the Rules of the Inter-American Court, it may, at the request of a party or on its own motion, obtain any evidence which it considers helpful; decide to hear as a witness or expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant. The Court may also invite the parties to provide evidence. See J. S. Davidson, *The Inter-American Court of Human Rights*, Dartmouth Publishing Co., Aldershot 1992, p. 53.

⁹ By Rule 41 of the Rules of Court "A", a chamber could at the request of the participants or on its own motion obtain any evidence which it considered capable of providing clarification on the facts of the case.

¹⁰ *Stoche v. F.R.G.* A. 199 paragraph 53 (1991); *Messina v. Italy*, A 257-H paragraph 31 (1993).

¹¹ Before the oral hearing begins the parties communicate to the Registrar information regarding any evidence which it intends to produce or to obtain. The communication contains a list of details about the witnesses and experts whom the party intends to call and indicates the points to which their evidence will be directed. This communication is transmitted to the other party: I.C.J. Rules of Procedure, Article 57. No further documents may be submitted to the Court after the closure of the written pleadings, except with the consent of the other party or by leave of the Court: I.C.J. Rules of Procedure, Article 56. The power here exercised by the International Court is based on Article 49 of its Statute.

the Court of First Instance has established such a system, as has another modern tribunal, whose Rules of Procedure are fashioned on those of the world court: the International Tribunal for the Law of the Sea. In *The Saiga*, the President took the initiative of inviting the parties to attend two meetings in advance of the oral hearing, to review the evidence and to express their own views on the issues requiring determination and the most convenient means of addressing those issues at the hearing. There followed the pre-trial meeting of the judges, contemplated in the Tribunal's *Resolution on the Internal Judicial Practice* at which the judges reached their own conclusions as to the conduct of the hearing, and made use of their power under Article 76 of the Rules to "indicate any point or points which it would like the parties specially to address". This course appears to have been welcomed by all parties: it ensured that the oral hearing was not unnecessarily protracted; and that the parties' oral arguments are focused on the points which, at that stage in the litigation, were of interest to the judiciary. It is an innovation that might usefully be applied in the Court of Justice.

Date of the Hearing

Few problems in the procedure of the Community Courts are of greater significance than that of delays. One of the important aspects aspect of that problem is the body of rules governing the fixing of the dates of hearings.

The fixing of the date of the hearing depends in principle upon the progress made in the preparation for the hearing by the Court. Save where the President decides upon the fixing of a date himself, or refers the matter to the Court,¹² the order of priority of cases is determined, in principle, by the order in which any preparatory inquiries are completed.¹³ Where there are no preparatory inquiries, the order is determined by the date of completion of the preparatory report by the Judge-Rapporteur, subject to the existing commitments of the Court's calendar.

¹². In cases contemplated by Article 85 of the E.C.J. Rules (2007 version), Article 106 of the C.F.I. Rules, and Article 82 of the E.F.T.A. Court Rules.

¹³. E.C.J. Rules (2007 version), Article 55; C.F.I. Rules, Article 55.

The President enjoys a general power to order that a case be given priority "in special circumstances". However, the Statutes of the Court impose several constraints on the exercise of that power. In the case of a reference for preliminary ruling, Article 23 of the E.C. Statute¹⁴ requires the notification of the reference to the parties, to all Member States, to the Commission and (in appropriate cases) to the Council, followed by a period of two months within which the latter may lodge written observations. Account must also be taken of the time required for translation of the written observations, the holding of an administrative meeting to determine any issue of preparatory inquiries and the preparation of the Report for the Hearing. Consequently, hearings (and therefore judgments) can be much delayed even where a request is made for expedition. In Case C-213/89, *R v Secretary of State for Transport ex part Factortame*¹⁵ the House of Lords referred questions for preliminary ruling on 18th May 1989, requesting that the case be given priority. Although the President acceded to the request, oral argument was not heard until 5th April 1990; thereafter the Advocate-General's Opinion and the Court's judgement were prepared rather rapidly, judgment being delivered on 19th June 1990. Thus with expedition,

¹⁴. Article 21 of the Euratom Statute. In its revised form Article 23 of the E.C.J. Statute provides: "In the cases governed by Article 35(1) of the EU Treaty, by Article 234 of the EC Treaty and by Article 150 of the EAEC Treaty, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and also to the Council or to the European Central Bank if the act the validity or interpretation of which is in dispute originates from one of them, and to the European Parliament and the Council if the act the validity or interpretation of which is in dispute was adopted jointly by those two institutions."

¹⁵. [1990] E.C.R. I-2433, [1990] 3 C.M.L.R. 375.

at the request of a supreme court, the Court of Justice was able to dispose of the case in a little over one year. In other cases, even with expedition, the making of a ruling has taken longer. In *R v Secretary of State for the Home Department ex parte Evans Medical Limited and Macfarlan Smith Limited*¹⁶ a request for expedition made on 9th March 1993 led to judgment given on 28th March 1995.

¹⁶. Case C-324/93, *R v Secretary of State for the Home Department ex parte Evans Medical Limited and Macfarlan Smith Limited*, [1995] E.C.R. I-563.

It should be possible to reduce the delay somewhat, by reducing the time for lodging written observations under Article 23 of the E.C. Statute and dispensing with the statutory extension of time on account of distance. In the procedures established pursuant to the World Trade Organization, time-limits are less generous; and arrangements made to ensure that they are adjusted to the circumstances of the case¹⁷. That is true not only of proceedings before Panels but also on appeal¹⁸. Greater speed in the exchange of written observations can also be secured under the arrangements established for the North American Free Trade Association¹⁹. Although it is true that distinct considerations apply to these relatively informal means of settlement of disputes, and that the tribunals involved do not have "constitutional" responsibilities, it is thought that they support the proposition that there are no insuperable obstacles to the abbreviation of time-limits for submission of

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17. Article 12(3) of D.S.U. provides that after consulting the parties the Panel shall as soon as practicable, and whenever possible within one week after agreement on its composition and terms of reference, fix the timetable. By Article 12 (1) the Panel is follow the Working Procedures in Appendix 3, which in Rule 3 lays down a tight timetable, unless it decides otherwise after consulting the parties. It provides that written submission of the parties shall be received within between five and nine weeks. The first substantive meeting takes place within one or two weeks thereafter. After another round of written rebuttals, which should be received within another two or three weeks, the second substantive meeting with the parties takes place one or two weeks thereafter. Following the issuance of the interim report, the parties have one week to request a review of that report, which might then lead within two weeks to another meeting with the parties. Rule 12 of Appendix 3 of the D.S.U. provides that additional meetings with the parties shall be scheduled if required.
18. Rule 26(1) provides that after the commencement of an appeal, the division responsible for the appeal shall draw up an appropriate working schedule in accordance with the time periods stipulated in Annex 1. The Working schedule must lay down the precise date for the oral hearing: Rule 17(2) of the Working Procedures of the Appellate Body. Rule 27(1) provides that a division shall hold an oral hearing, as a general rule, 30 days after the date of the filing of the Notice of Appeal. In cases of urgency this time may be reduced: Rule 26(3) of the Working Procedures. Where possible in the working schedule or otherwise the secretariat must notify all parties to the dispute, participants, third parties and third participants at the earliest possible date of the date for the oral hearing: Rule 27(2) of the Working Procedures. In complex cases the appellate body engages in pre-hearings. Rule 16(2) gives the participants an opportunity to request in exceptional circumstances, where strict adherence to these time periods would result in a manifest unfairness, that a division shall modify the date set out in the working schedule for the oral hearing.
19. In proceedings under Chapter 20 of that Agreement, the chair fixes the date and time of the hearing in consultation with the participating parties, the other members of the Panel and the responsible section of the Secretariat. By Rule 21 of the Model Rules, the participating parties are then informed of the date, time and location of the hearing, which will be held, consistently with Rule 22, in the capital of the Respondent. Article 2012 of the North American Free Trade Agreement ensures a right to at least one hearing before the Panel, which, by Rule 23 of the Model Rules, may convene additional hearings if the disputing parties so agree. By Rule 26 each participant, no later than five days before the date of a hearing, must deliver to the other participating parties a list of the names of those persons who will make oral arguments or presentations at the hearing on behalf of that party and of other representatives or advisers who will be attending the hearing.

written observations to the Community Courts (assuming that Member States agree to the consequential amendments of the Statutes).

That, however, would merely reduce and not resolve the difficulty. The principal impediment to speed in the scheduling of oral hearings remains the necessity for translating, to the requisite degree of accuracy, materials emanating from national courts which are sometimes technical or voluminous or both. This is one of the problems which is unlikely to be resolved until the Member States address the wider question of languages in the Community Courts. Freed from that difficulty, and with a much smaller work-load, the E.F.T.A. Court is able to proceed with greater dispatch.

It should be appreciated, however, that within the constraints imposed upon it by its Statutes, the Court of Justice is able to dispose of its cases rather more rapidly than other tribunals with which it may be compared. In the International Court of Justice, the date for the opening of the oral proceedings is fixed by the Court upon the closure of the written proceedings²⁰; but it can be postponed; and the Court seems to engage in forward planning of the case only when the case is ready for oral hearing. It has been suggested that the Court should, at least provisionally fix the dates for the oral hearing once the time-limit for the last written pleading has been fixed.²¹ However, in the International Court of Justice, as in the Court of Justice, the fixing of the date for the oral hearing depends to a good deal on the progress made in translating the written pleadings into French or English. This seems to be unavoidable since the oral hearing cannot start until the all written pleadings are translated.²² The International Court's Rules require it to have regard to the priority that a request for the indication of provisional measures shall have²³; and they

²⁰. Article 54 of the Rules of Procedure.

²¹. Report of the Study Group established by the British Institute of International and Comparative Law as a Contribution to the U.N. Decade of International Law: *The International Court of Justice, Efficiency of Procedures and Working Methods*, 45 I.C.L.Q. Supplement, January 1996, paragraph 18.

²². However there is no obligation to publish the pleadings. By Article 53 (2) of its Rules the International Court may, after ascertaining the views of the parties, decide that copies of the pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings. Copies of the pleadings and documents annexed to it shall be made available to a State entitled to appear before the Court which has asked to be furnished with such copies, if the Court, after ascertaining the views of the parties, takes that decision. Shabtai Rosenne, *Procedure in the International Court, A Commentary on the 1978 Rules of the International Court of Justice*, Martinus Nijhoff, The Hague 1983, p. 117.

²³. Articles 54 and 74 of the Rules of Procedure.

envisage priority for advisory opinions and for cases of intervention²⁴; but give it less flexibility to advance hearings than is given in the Court of Justice.

The Report for the Hearing

In proceedings before the Community Courts, the scene is set for the oral hearing in the Report for the Hearing, prepared in advance by the Judge-Rapporteur, with the assistance of his référendaires, and circulated to the parties by the Registrar. Until 1st January 1994 the Report for the Hearing, in its final version, was invariably adopted by the Court of Justice as the factual part of the account of the case in the European Court Reports. It was made available to the parties in advance of the hearing in French as well as in the language of the case. Since the translation of these reports into all official languages delayed the publication of the European Court Reports, and was costly, the Court of Justice decided to dispense with the practice. Reports for the Hearing are now made available to the parties and to interveners only in the language of the case. A French version is prepared for the convenience of members of the Court of Justice. Initially it was not distributed to parties and interveners, on the principle that the Court's official languages are of equal status, but that new policy met with objections from Member States and it has been reversed. The French version is now made available to interveners. The *Notes for the Guidance of Counsel* issued by the Court of Justice advise that the Court will endeavour to send the Report for the Hearing to counsel three weeks before the hearing.

²⁴. Articles 103 and 84, respectively, of the Rules of Procedure.

Different considerations apply in the case of the Court of First Instance, where the Report for the Hearing never formed part of the reported judgment. In the case of the Court, the Report for the Hearing has always been classified as an internal document but made available to the parties in the language of the procedure, as a working document for the purposes of the hearing. In exceptional circumstances, it has been made available to the parties by the Court of First Instance in languages other than the language of procedure (for instance, in the interests of economy of translation and with the consent of all the parties). For this reason the Court of First Instance's *Notes for the Guidance of Counsel for the Parties at the Hearing* states expressly that "the sole purpose of this document is to prepare for the hearing. The Court will not refer to it in its judgement and it will not form part of the judgement." Nevertheless, those *Notes* advise that "If the Report for the Hearing contains mistakes of fact, Counsel are requested to inform the Registry of this in writing before the hearing and to propose the necessary amendments. Similarly if the Report for the Hearing does not correctly convey a party's argument in all essential respects, Counsel may propose such amendments as they consider appropriate. If Counsel submit at the hearing oral observations on the Report for the Hearing, they should subsequently submit those observations in writing to the Registry."²⁵

The Conduct of the Hearing

In its early years the Court of Justice placed significant emphasis on oral hearings and allowed counsel considerable latitude both in respect of the length of their addresses and as regards written supplementation of points made orally. In Joined Cases 29, 31, 36, 39-47, 50 and 51/63, *Usines de la Providence v High Authority*²⁶ the Court of Justice conducted oral hearings on three separate dates, apart from those of two Advocate General's Opinions; and either permitted, requested or engaged in seven written communications during the oral stage. In recent years the Court of Justice has tended to shorten the oral hearing and place increasing weight on the written pleadings. This trend towards shorter hearings has been principally motivated by the need to save the Court's

²⁵. C.F.I. Notes for Guidance, Part III.

²⁶. [1965] E.C.R. 911 at 933-934.

time, and by the limitations of simultaneous translation. It was accentuated by the formation and enlargement of jurisdiction of the Court of First Instance, which relieved the Court of Justice of most of its duties to determine issues of fact. It is now unusual for a hearing to occupy more than a half day.

In the Court of First Instance, on the other hand, the oral stage plays a more prominent role and oral hearings tend to be longer and more exacting. In Case T-7/89, *Hercules Chemicals v Commission ("Polypropylene")*²⁷ the parties presented oral argument and answered questions from the Court - the hearing took place from 10th to 15th December 1990. In Joined Cases T-79/89, T-84-86/89, T-89/89, T-91-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89, *BASF AG and Others v Commission ("PVC")*²⁸ the Second Chamber of the Court of First Instance heard oral argument for five days before adjourning for a further day's hearing, at which attention was concentrated on a document that the Court had ordered one of the parties to produce.

The number of cases heard before the E.F.T.A. Court has not yet reached sufficient numbers to form a sound view of its *modus operandi*. For the present, however, it appears that time constraints will play less of a role in oral hearings before that Court and, in consequence, there are ample opportunities for rigorous oral examination of the parties arguments.

²⁷. [1991] E.C.R. II-1715 at 1731; [1992] 4 C.M.L.R. 84 at 258.

²⁸. [1962] E.C.R. I-315, [1992] 4 C.M.L.R. 357.

The general rule in the Community Courts is that counsel should confine the length of their speeches to thirty minutes. In cases heard by chambers of three judges, that period is reduced to fifteen minutes.²⁹ Both courts are prepared to allow counsel to address them for a longer period in a particular case, provided that good reason is shown, upon a request made fourteen days in advance of the hearing in the case of the Court of Justice, and fifteen days in advance of the hearing, in the case of the Court of First Instance.³⁰ In the case of the Court of Justice, such dispensations are not readily granted. Indeed, counsel are commonly asked to confine the length of their speeches to periods shorter than those indicated in the *Notes for Guidance* or in the communications from the parties to the Court of Justice in which the former indicate the expected length of their addressed.³¹

Those time limits apply to the principal speech by counsel and not to the time occupied in the answering of questions.³² Indeed it is occasionally the case in the Court of Justice, and generally the case in the Court of First Instance, that the answering of questions is the most important part of the hearing.

The European Court of Human Rights has hitherto followed a practice in respect of oral hearings not wholly dissimilar from the Court of Justice. Although advocates are not required to appear robed in Strasbourg, the size of the tribunal compels a degree of formality; and although only two languages are employed, the limits imposed by simultaneous interpretation oblige advocates to moderate the speed of their delivery. The order of speeches is fixed by the President of the Chamber. Any judge may put questions to the agents, advocates or advisers of the parties; but when the chamber is large, the size

²⁹. See paragraph II.4 of both *Notes for Guidance*.

³⁰. Such a request must state in detail the reasons on which it is based and stipulate the amount of time considered necessary. It can be considered only if it reaches the Court 14 (15) days before the date of the hearing. The decision on whether to grant it will be taken by the President of the Court or Chamber before which the case is being heard, after seeking the views of the Judge Rapporteur and the Advocate General. The decision will be notified to the originator of the request at least seven days before the hearing.

³¹. Thus, where a party has indicated that it expects its representative to speak for twenty minutes, the representative may be asked to confine the speech to fifteen minutes.

³². E.C.J. and C.F.I. *Notes for Guidance of Counsel*, paragraph 5; C.S.T. *Notes for Guidance of Counsel*, paragraph 3; Article 44 of the E.F.T.A. Court Rules.

of the tribunal constrains the frequency with which members may feel that they can question counsel.³³

³³ . E.C.J. Rules (2007 version) Article 57; C.F.I. Rules, Article 58; C.S.T. Rules, Article 51. See L.J. Clements, *European Human Rights: Taking a Case under the Convention*, Sweet & Maxwell, London 1994, p. 81. For a similar rule in proceedings before the Inter-American Court of Human Rights see Article 41(1) of its Rules of Procedures.

Hearings before the European Court of Human Rights, like those in the Court of Justice, have tended to be rather short. Under the former arrangements, they lasted normally for half a day and seldom exceeded a day.³⁴ However with the coming into effect of the eleventh Protocol,³⁵ a change may have come about since the Court now has to deal more with issues of fact. In addition the case-load of that Court has increased hugely. Instead of responding to this change, as it might have done, by imitating the procedures of the Court of First Instance, European Court of Human Rights has placed increasing reliance on its staff, who winnow out cases on grounds of admissibility, without the necessity for a hearing: an unsatisfactory process for a tribunal supervising the observance of human rights in the States belonging to the Council of Europe.

The tendency to keep oral hearings rather short is found also in the Dispute Settlement Proceedings World Trade Organization; although this is attributable less to the extent of written observations and the pressures on the Panels' time than to the provisions prescribing strict adherence to a timetable. In addition, the fact that lawyers, if they are allowed to attend meetings at all, do normally not speak, is by itself a means of shortening the length of oral proceedings. However differences exist between the practice in the Panels and that followed at the appellate level.

At Panel level, the hearing begins with a first substantive meeting with the parties,³⁶ which normally lasts for no longer than two or three days. At this meeting, unless the Panel has not decided otherwise,³⁷ it asks the party which has brought the complaint to present its case; then the Respondent party is asked to present its point of view.³⁸ By Rule 6 of Appendix 3 of the D.S.U., third parties have a session during the first substantive meeting to present their views. In the *Banana* case this right was extended to the rest of the substantive meeting beyond this one session. At any time the Panel may put questions to

³⁴. L.J. Clements, *European Human Rights: Taking a Case under the Convention*, Sweet & Maxwell, London 1994, p. 80.

³⁵. Strasbourg, 11th May 1994, Misc. No 35, Cm. 2634.

³⁶. Rule 5 of Appendix 3 of the D.S.U.

³⁷. See Article 12(1) of the D.S.U.

³⁸. Rule 5 of Appendix 3 of the D.S.U.

the parties and ask them for explanations either in the course of a meeting with the parties or in writing.³⁹ Formal rebuttals are made at a second substantive meeting of the Panel, which also lasts in general for no longer than two days.⁴⁰ The Respondent party has the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the Panel. This meeting also allows to answer questions put by the Panellists in the first substantive meeting. In the *Banana* case third parties were allowed to make a brief statement at a suitable moment during the second meeting.⁴¹

At the appellate body level the oral hearing is more condensed. It lasts normally just for one day, in more complex cases longer. The presiding member may, as necessary, set time-limits for oral arguments and presentations. Therefore the participants are given twenty to thirty minutes each to present their arguments. This is normally followed by an intensive questioning by the division. The division enjoys here great power. By Rule 28 (1) the division may at any time during the appellate proceeding, including the oral hearing, address questions orally or in writing to, or request additional memoranda from, any participant or third participant, and specify the time periods by which written responses or memoranda shall be received.

³⁹. Rule 8 of Appendix 3 of the D.S.U.

⁴⁰. Appendix 3 of the D.S.U, Rule 7.

⁴¹. Article 15(2) of the D.S.U.

In the case of the North American Free Trade Agreement Dispute Settlement Panel, the order of speeches is prescribed by Rule 27 of the Model Rules⁴² which provides that in a first round the complaining party or parties shall present its arguments first, followed by the party complained against, then by the presentation of any third party. In a second round the complaining party or parties may reply, followed by a counter-reply of the party complained against. The parties are to be afforded equal time. At any time during a hearing the Panel may direct questions to any participating party.⁴³

⁴². Under Chapter 20 of the North American Free Trade Agreement.

⁴³. Rule 28 of the Model Rules.

By contrast with all of these procedures, oral hearings in the International Court of Justice are lengthy. Indeed, "the oral arguments are long by the standards of many judicial systems"⁴⁴. The public hearing in the case of *Military and Paramilitary Activities in and against Nicaragua* on jurisdiction and admissibility of the case lasted from 8th to 18th October 1984 and on the merits lasted from 12th to 20th September. The proceedings in the *Land, Island and Maritime Frontier Dispute*⁴⁵ contained no fewer than 50 public sittings, which lasted from 15th April to 14th June 1991. In this case the Court was addressed by 9 representatives of Honduras, 8 representatives of El Salvador and 3 representative by the intervening State Nicaragua. In the *East Timor*⁴⁶ case the Court held public hearings between 30th January and 16th February 1995 and was addressed by 5 representatives of Portugal and 7 representatives on behalf of Australia.

Since the number of cases on its dossier is significantly lower than that of the Court of Justice, the litigants are all sovereign States in relation to it, and the disputes are commonly politically-charged, the International Court of Justice is reluctant to make use of Article 58(2) of its Rules of Procedure which authorises it to settle the number of counsel and advocates to be heard⁴⁷. However, the Rules of Procedure stipulate in Article 60(1)

⁴⁴. Report of the Study Group established by the British Institute of International and Comparative Law as a Contribution to the U.N. Decade of International Law: *The International Court of Justice, Efficiency of Procedures and Working Methods*, 45 I.C.L.Q. Supplement, January 1996, paragraph 21.

⁴⁵. I.C.J. Rep. 1992, p.351.

⁴⁶. I.C.J. Rep. 1995, p.90.

⁴⁷. The Court's ability to control the hearing has been augmented since the 1978 Rules of Procedure came into

that oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of the party's contentions at the hearing. The Court may indicate any points or issues to which it would like the parties specially to address themselves, or on which it consider that there has been sufficient argument⁴⁸.

effect. See Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p.131.

⁴⁸. Article 61 of Rules of Procedure.

The order in which the parties present their arguments, is settled by the Court after the views of the parties have been ascertained⁴⁹. The normal order is that the Applicant presents its argument followed by the Respondent. After a short interval, this is generally followed by a second round in the same order. Although the Court, through its President, may put questions to the agents, counsel and advocates and may ask them for information⁵⁰, this facility is used infrequently.⁵¹ It is more common for individual judges to put questions to the parties.⁵² The agents, counsel and advocates may answer either immediately or within a time-limit fixed by the President. At the conclusion of the statement made by a party at the hearing, its agent, reads that party's final submissions.⁵³ A submission is "a procedural term indicating the precise statement of what a party in a case before an international tribunal is asking that tribunal to declare, that statement sometimes being preceded by a summary of the reasons in support while being distinguished from them".⁵⁴

In the International Tribunal for the Law of the Sea, the parties were allotted, in *The Saiga*, periods fixed in hours for the aggregate of their speeches and cross-examination of witnesses. Parties were free to divide the time as they chose; but the allocation was generous by the standards of the Community Courts and interventions from the 21 members of the Tribunal were kept to a minimum. In practice, therefore, the time limits did not give rise to serious difficulty.

Oral Testimony

In proceedings before the Court of Justice, the Court of First Instance and the E.F.T.A. Courts, the summoning of witnesses is within the control of the Court and not the

⁴⁹. Rules of Procedure of the I.C.J., Article 58(2).

⁵⁰. Rules of Procedure of the I.C.J., Article 61.

⁵¹. Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p.131.

⁵². Article 61(3) of the Rules of Procedure.

⁵³. Article 60(2) of the Rules of Procedure.

⁵⁴. *Dictionnaire de la Terminologie du Droit International*, cited in Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p.130.

parties. Either on application from a party, or on its own motion (and where applicable, after hearing the Advocate General) the Court may order that certain facts shall be proved by witnesses.⁵⁵ It is true that in an early case, concerning the procedure of an advisory board, the Court of Justice stated that the latter may have an obligation to hear a witness. In the words of the Court

"the Board is ... bound in the exercise of its powers to observe the fundamental provisions of the law of procedure. In accordance with those principles it could not refuse to comply with an application for the examination of witnesses, once this request clearly indicates the facts on which there is reason to hear the witness or witnesses named and the reasons which are likely to justify their examination"⁵⁶.

⁵⁵ Article 47 E.C.J. Rules (2007 version); C.F.I. Rules, Article 68 and E.F.T.A. Court Rules, Article 52 E.F.T.A.

⁵⁶ Case 35/67, *Van Eick v Commission*, [1968] E.C.R. 329 at 342.

It is also true that the Court of Justice is itself subject to the same fundamental provisions of the law of procedure. That, however, does not relieve the Court of the power (and in some cases the duty) to determine whether the proposed evidence is relevant or whether the facts can more reliably or conveniently be established by means other than the summoning of the witness. In Case 2/65, *Ferriera Ernesto Preo e Figli v High Authority* the Applicant company sought to persuade the Court to summon certain of its employees to establish alleged facts about such matters as the period of commissioning for the company's furnaces. The Court refused to do so; apparently sharing the Advocate General's view that it was hazardous to rely on the evidence of a company's own employees about events remote in time from the hearing, where the company itself had offered no supporting evidence whatever⁵⁷. In Joined Cases T-68 and T-77-78/89, *Re Italian Flat Glass: Società Italiano Vetro SpA v Commission*,⁵⁸ an application for the summoning of a witness was withdrawn following a meeting the Judge-Rapporteur, after which the party in question appears to have concluded that an unsworn witness statement would suffice.

Once the identity of a witness has been established, the President informs him that he will be required to vouch for the truth of his evidence in the manner laid down in the Rules.⁵⁹ Those who are called to attend as expert witnesses have commonly made written statements in advance or supplied documentary material disclosing the nature of their evidence. For this reason their "main evidence" or evidence in chief tends to be brief. A different situation arises in the case of witnesses of fact, who are unlikely to have made written statements to the Court and are called to give their principal evidence orally.

Expert witnesses, if called by a party, are first invited by that party's counsel, subject to the direction of the President, to make a brief recapitulation of their evidence. If called by the Court, they are invited by the President of the Court to make an opening statement. Witnesses of fact are first invited by counsel for the party on whose behalf they are called to give evidence in chief. Witnesses of both kinds are then subject to questioning by the

⁵⁷. [1966] E.C.R. 219 at 231, 221 and 224.

⁵⁸. [1992] E.C.R. II-1403, [1992] 5 C.M.L.R. 302.

⁵⁹. E.C.J. Rules (2007 version), Article 47(5); C.F.I. Rules, Article 68(4) and E.F.T.A. Court Rules, Article 52(4).

President, the other judges and the Advocate General, if any.⁶⁰ The President may remit to the Judge-Rapporteur the principal responsibility for examining the witness. The questions put by members of the Court are not confined to elucidating replies given to questions from counsel. Subject to the control of the President, counsel for the other parties (including interveners) may put questions to the witness.

⁶⁰. E.C.J. Rules (2007 version), Article 47(4); C.F.I. Rules, Article 68(4) and E.F.T.A. Court Rules, Article 52(6).

After giving evidence the witness may be required to swear that he has spoken the truth, the whole truth and nothing but the truth.⁶¹ However, the witnesses is free to elect to be sworn in the words of the oath administered under his national law; or to make an affirmation in the words prescribed by his national law; and if that law does not prescribe an oath, the witness may elect not to swear an oath at all. In such an event the President instructs the witness to tell the truth and warns him of the criminal liability provided for by national law in the event of a breach of that duty.

The witness is supplied with minutes of the evidence given and invited to check the content of the minutes and to sign them. The minutes are then signed by the President or by the Judge-Rapporteur responsible for questioning the witness.⁶² The Instructions to the Registrar issued in the case of the Court of First Instance specify that the minutes of the witness's evidence, presented for signature by the witness, shall be in the language in which the evidence was given.

This procedure, it must be said, lacks the spontaneity found in the calling and cross-examination of witnesses in the Anglo-American tradition. Although the Court of Justice has itself drawn attention to the fact that "The immediate cross-examination of a witness after he has given evidence may sometimes bring new facts to light and may also compel a witness to explain or rectify an inadequate or erroneous statement";⁶³ and although the three Community Courts have shown themselves prepared to permit the cross-examination of witnesses, the procedures followed by the those Community courts afford far less scope for the testing of witnesses than do those of many national systems. In that respect,

⁶¹. E.C.J. Rules (2007 version), Article 47(5); C.F.I. Rules, Article 68(5) and E.F.T.A. Court Rules, Article 52(5).

⁶². E.C.J. Rules (2007 version), Article 47(6); C.F.I. Rules, Article 68(6) and E.F.T.A. Court Rules, Article 5(7).

⁶³. Case 141/84, *Henri de Compte v European Parliament*, [1985] E.C.R. 1951 at 1966, paragraph 18.

however, the procedures of the Community courts resemble the Court of Human Rights in Strasbourg, where a similar formality applied to the treatment of witnesses.

In Strasbourg, as in Luxembourg, witnesses, experts or other persons whom the Chamber or the President of the Chamber decides to hear are summoned by the Registrar and are witnesses of the Court, not of a party⁶⁴; but as in Luxembourg, a party may request the calling of a witness⁶⁵. It may hear for the purpose of information a person who cannot be heard as a witness. The President or any judge may put questions to the witnesses who may also be examined by the agents, advocates or advisers of the parties. By contrast with the position in Luxembourg, however, the witness in Strasbourg takes an oath or makes a declaration before giving evidence.

When, a witness or any other person who has been duly summoned fails to appear or refuses to give evidence without good reason, the Registrar, on being so required by the President, informs that Contracting Party to whose jurisdiction such person is subject. The same applies when a witness or expert has, in the opinion of the chamber, violated the

⁶⁴. In proceedings before the Inter-American Court witness, expert witnesses or other persons whom the Court decides to hear are summoned in the manner deemed most suitable by the Court, see Article 46, of the Rules.

⁶⁵. The chamber must decide whether costs of the appearance of the party are to be borne by the Council of Europe or awarded against an Applicant, or a third party at whose request the person summoned appeared. If they appear at the request of a party, the costs of their appearance are borne by the party unless the chamber decides otherwise. In all cases the costs are to be taxed by the President.

oath or solemn declaration⁶⁶. However factual evidence is in most cases provided by the proceedings before the Commission and in the pre-hearing phase, either by the participants or by investigation. The Court is not well equipped to adjudicate upon conflicting factual evidence: its strength lies in the more field of determining whether a given set of (largely agreed) circumstances amount to a violation of the Convention⁶⁷. In fact, the Court has heard witnesses on just one occasion⁶⁸.

⁶⁶. For a similar approach see Article 51 of the Rules of the Inter-American Court.

⁶⁷. See L.J. Clements, *European Human Rights: Taking a Case under the Convention*, Sweet & Maxwell, London 1994, p. 81.

⁶⁸. *Brozicek v. Italy*, judgment of 19.12.1989, Series A 167; see D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention of Human Rights*, Butterworths, London, 1995, p. 678.

The Statute of the International Court of Justice⁶⁹, not only authorises the Court itself to "arrange for the attendance" of a witness⁷⁰ but also makes provision for the calling, by parties, of witnesses on the list communicated to the Court⁷¹. Such witnesses are examined by the agents, counsel or advocates of the parties, under the control of the President, in an order resembling the Anglo-American procedure of examination-in-chief, cross-examination and re-examination. Questions are also put to them by the President and by the judges⁷².

⁶⁹. Article 51.

⁷⁰. I.C.J. Rules, Article 61(2).

⁷¹. In accordance with Article 57 of the Rules this list must be communicated to the Registrar in sufficient time before the opening of the oral proceedings, and must contain the names, nationalities, descriptions and places of residence of the witnesses, with indications in general terms of the points to which their evidence will be directed. If during the hearing the party wants to call a witness or expert whose name was not included in that list, it must inform the Court and the other party and has to supply the information required by Article 57 of the Rules. That witness or expert may be called either if the other party makes no objection or if the court is satisfied that his evidence seems likely to prove relevant. Article 63 of the Rules of Procedure.

⁷². E.C.J.. Rules of Procedure (2007 version) Article 65.

Although the Court heard the evidence of no fewer than fourteen witnesses and experts in the *South West Africa Cases*⁷³; and in *Ellettronica Sicula S.p.A. (ELSI)*⁷⁴ it heard two witnesses and two experts, which were extensively examined and questioned, such events are uncommon. In practice hearings of "witnesses and expert-witnesses as to facts or opinions are relatively infrequent in proceedings in the International Court"⁷⁵.

The problem of ensuring sufficient time for the examination of witnesses at an oral hearing was presented to the International Tribunal for the Law of the Sea in a rather acute form, in the first case brought to that body. The dispute concerned the seizure of an oil tanker by Guinean forces, just outside the exclusive economic zone of that country. The Tribunal was required to determine hotly contested issues of fact; but it was subject to time constraints. The President met the problem by placing reliance on Article 72 of the Tribunal's Rules. This provides in part:

"each party shall communicate to the Registrar, in sufficient time before the opening of the oral proceedings, information regarding any evidence which it intends to produce or which it intends to request the Tribunal to obtain. The communication shall contain a list of the surnames, first names, nationalities, descriptions and places of residence of the witnesses and experts whom the

⁷³. During the hearings from 18th June to 14th July 1965 and 20th September to 21st October 1965: I.C.J. Rep. 1966, p. 9.

⁷⁴. I.C.J. Pleadings, Vol. III.

⁷⁵. Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p. 130.

party intends to call, with indications of the point or points to which their evidence will be directed”.

The wording follows that of Article 37 of the Rules of Procedure of the International Court of Justice, save that the latter requires provision of “indications *in general terms* of the point or points to which their evidence will be directed”. The President of the Law of the Sea Tribunal required the parties to present in advance indications of the points to which witnesses’ evidence was to be directed, in sufficient detail to enable the parties to prepare for their cross-examination. It was also agreed, under the President’s direction, that each witness would present a written statement, immediately before his oral testimony, thereby reducing the time required for his evidence in chief.

The texts governing Dispute Settlement Proceedings under the aegis of the World Trade Organization give Panels and appellate bodies ample scope for the establishment of facts by evidence. It may yet transpire that this body will develop practices more akin to those of courts in the Anglo-American tradition and less akin to those of the Community Courts. Article 13 of the D.S.U. allows the Panel to seek information and technical advice from any individual or body which it deems appropriate. Panels may also seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With regard to a scientific or other technical matter raised by a party to a dispute, Panels may request an advisory report from an expert review group, established according to Appendix 4 of the D.S.U. Hitherto, however, oral testimony has been infrequent before such Panels; and has been observed most frequently in anti-dumping litigation.

Written Documents adduced at or after the Hearing

In principle counsel appearing in the Community Courts are not permitted to present written documents at or after the oral hearing. By Article 37 of the Rules of Procedure of the Court of Justice⁷⁶, all documents relied on by the parties must be annexed to the pleadings. Save in exceptional circumstances and with the agreement of the parties, the Court will not admit any documents produced after the close of the pleadings, except those produced at its own request; this also applies to any documents submitted at the hearing. Since all the oral arguments are recorded, the Court also does not allow notes of oral arguments to be lodged. According to paragraph III. 3 of both sets of *Notes for Guidance of*

⁷⁶. C.F.I. Rules, Article 43 and E.F.T.A. Court Rules, Article 32.

Counsel, departures from this rule are made only "in exceptional circumstances and with the agreement of the parties".

In Case 53/72, *Guillot v Commission*⁷⁷ the Court of Justice annulled a Commission decision rejecting the complaint made by a scientific officer at the Euratom Joint Research Centre at Ispra who sought the withdrawal of the accusation, made by his immediate superior, that he had falsified the result of scientific experiments. The Commission then instructed a Belgian organization to carry out an inquiry into the Applicant's experiments. This reported in part that the results of certain of the Applicant's measurements had been altered. In subsequent proceedings before the Court of Justice⁷⁸ the Applicant requested *inter alia* the withdrawal from his personal file of a document containing the allegation of falsification of results. The second chamber opened the oral procedure without a preparatory inquiry; but in view of the technical nature of the submissions made by counsel for the Applicant, it invited him to submit a short written version of his oral argument, explaining the disparity between the results obtained by the Belgian organization and those contained in the Applicant's reports. The President of the chamber adjourned the hearing to permit the Commission to submit written observations on the technical argument advanced on behalf of the Applicant.

It must be observed that the rules of the Court on this issue are not explicit. It is therefore suggested that in the interest of legal clarity the Court in amending its rules should introduce provisions which deal more expressly with the matter. In doing so the Court could take account of the rules laid down by international courts and tribunals.

Article 56 of the Rules of Procedure of the International Court of Justice provides that after the closure of the written proceedings, no further documents may be submitted to the Court by either party. This gives effect to Article 52 of the Statute which provides that after the Court has received the proofs and evidence within the time specified for the

⁷⁷. [1947] E.C.R. 791; [1975] 1 C.M.L.R. 160.

⁷⁸. Case 43/74, *Guillot v Commission*, [1977] E.C.R. 1309.

purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

However Article 56 of the Rules of Procedure also lay down exceptions to that rule. Documents may be submitted with the consent of the other party, which is held to have given its consent if it does not lodge an objection to the production of the document. In the absence of such consent, the Court, after hearing the parties, may authorize the production of documents, if it considers it necessary.⁷⁹ However if the court permits a new document to be admitted, it gives the other party an opportunity of commenting upon it and of submitting documents in support of its comments.⁸⁰ In the *Nottebohm* case⁸¹ the Court permitted the production of the documents submitted by Guatemala after the closure of the written procedure without the consent of Liechtenstein, which was given the right of comment and submission of documents for that purpose.

The Rules provide in Article 56(4) that no reference may be made during the oral proceedings to the contents of a document that has not been or could not be produced. However this provision should be read together with Article 49 of the Statute⁸², which provides that the Court may, even before the hearing, call upon the agents to produce any document or to supply any explanations.

⁷⁹. In *Land, Island and Maritime Frontier Dispute*, I.C.J. Rep. 1992, p. 351 the Court by applying Article 56(1) *mutatis mutandis* rejected the admission of further documents submitted by El Salvador after the closure of the oral proceedings after Honduras had objected to their admission.

⁸⁰. Article 56(3) of the Rules of Procedure.

⁸¹. I.C.J. Rep. 1955, p. 6.

⁸². To which Articles 61 and 62 of the Rules of Procedure give effect.

The Court may at any time prior to or during the hearing indicate any point or issues which it would like the parties specially to address⁸³. The parties are given an opportunity to reply in writing to questions put forward by the Court or by individual judges. The Court may also call upon the parties to produce evidence or give explanations as the Court may consider to be necessary, in which case the parties have another possibility to respond in writing. Also in case the Court considers it necessary to arrange for an enquiry for an expert opinion in accordance with Article 67 of the Rules, the parties are given the opportunity to comment upon it, also, in writing.

⁸³. I.C.J. Rules, Article 61(1).

By Article 72 of the Rules when written statements are given, the parties may hand them in even after the closure of oral proceedings, in which case they are communicated to the other party, which is afforded an opportunity of commenting upon them. At the conclusion of the last statement made by a party at the hearing, its agent reads the final submissions. A copy of the written text of these submissions is then communicated to the Court and transmitted to the other party.⁸⁴ Although Article 72 does not include documents relating to submissions made at the end of the hearing, "any fundamental change"⁸⁵ in the circumstance that existed at the end of the hearing may justify formal amendment of those final submissions. If relevant material come into existence after the closure of the oral proceedings, such materials should be given to the Court.⁸⁶

The International Court of Justice has developed a set of explicit rules dealing with the question when documents can be introduced after the closure of the written proceedings. The common features, which are similar to the practice in the European Court of Justice, are that parties can do so on their own motion only in exceptional circumstances. The situation is however different when documents are requested by the Court. In any event the other party is always given the right to comment upon these documents.

⁸⁴. I.C.J. Rules, Article 60(2).

⁸⁵. Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p. 132.

⁸⁶. *Ibid.*

Similar rules apply in proceedings before the European Court of Human Rights and the Inter-American Court of Human Rights. By Rule 38 of the former's Rules of Court, no written observations or other documents may be filed after the expiry of the time-limit laid down by the President. However, the past practice was for the President to permit the limited presentation of materials even after the oral hearing where this tended to promote the ascertainment of the true facts and did not place one party at an undue disadvantage⁸⁷. Presumably that practice will continue. The Rules of the Inter-American Court of Human Rights provide in Article 43 that evidence submitted by the parties shall be admissible only if its is indicated in the application and in the reply thereto and, where appropriate, in the communication setting out the preliminary objections and in the answer thereto. The court may, in exceptional circumstances, admit a piece of evidence if any of the parties plead *force majeure*, a serious impediment or that events occurred at a time other than those previously indicated, provided that the other party shall have the right of defence.

In World Trade Organization Dispute Settlement Proceedings differences appear between the Panel level and the appellate level. At Panel level the parties to the dispute and any third party invited to present its views must make available to the Panel a written version of their oral statements.⁸⁸ This stands in marked contrast to the practice of the Court of Justice. In the *Banana* case third parties were expected not to submit additional written material in the second substantial meeting beyond responses to questions already posed during the first meeting.

After the two substantive meetings the parties can comment in writing on the descriptive part of the report of the Panel.⁸⁹ Parties are also allowed to comment on the interim report of the Panel in writing and to request a further meeting. Finally parties have a right to explain in writing their objections about the final Panel report to the DSB for circulation prior to the DSB meeting.⁹⁰ It is however doubtful, whether parties can at that stage introduce new documents. It might be suggested that this is only possible if the other

⁸⁷. D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention of Human Rights*, Butterworths, London, 1995, p. 658.

⁸⁸ Rule 9 of Appendix 3 of the D.S.U.

⁸⁹. Article 15 of the D.S.U.

⁹⁰. Article 16(2) of the D.S.U.

party consents and is given the right to comment on those documents. In addition it should be required that the submission of these documents is necessary and can be objectively justified.

The different rules on Panel level have their cause in the different structure of the proceedings. Since there is no sharp separation between the written and oral phase of the proceedings, parties can always submit observations. However limits would have to be established for the parties submitting documents presenting new facts. It might be suggested that the limit seems here to be the closure of the second substantive meeting, always provided that the other party has a chance of commenting on those documents.

In Appellate proceedings documents may be filed on request of the division⁹¹ or as a response to a document produced on such a request⁹². In the *Gasoline* decision of the Appellate Body⁹³ the participants and third participants were invited under Rule 28(1) to provide, and did provide, the Appellate Body and each other with final written statements of their respective positions. Therefore it can be assumed that participants can submit documents on request of the division. Rule 19 however would require the division to forward the other participants with the documents and to give them the possibility to comment on these documents.

Rule 28 has to be read in conjunction with Rule 18(1) which points out that no document is considered to be filed with the Appellate Body unless the document is received by the Secretariat within the time period set out for filing. Upon authorisation by the division, a participant or a third participant may correct clerical errors in any of its submissions. Such corrections however have to be made within 3 days of the filing of the original submission.⁹⁴

⁹¹. Rule 28(1) of the Working Procedures.

⁹². Rule 28(2) of the Working Procedures.

⁹³. United States - Standards for Reformulated and Conventional Gasoline, AB-1996-1, WT/DS2/AB/R.

⁹⁴. Rule 18(5) of the Working Procedures.

At the appellate level the rules correspond more to those of other international courts and the practice of the Court of Justice

In proceedings under Chapter 20 of the North American Free Trade Agreement, each party may deliver within 10 days after the date of the hearing to its section of the Secretariat a supplementary written submission responding to any matter that arose during the hearing.⁹⁵ Thus, in North American Free Trade Agreement proceedings parties have more possibilities of presenting written submissions than in the international courts and tribunals mentioned above with the exception of Panel proceedings under World Trade Organization.

Exclusion of the Public

⁹⁵. Rule 32 of the Model Rules.

The Community Courts enjoy a broadly-defined authority to conduct hearings *in camera*. However, both Community courts apply some reserve in the exercise of that authority. In Case 35/67, *Van Eick v Commission*, the Court of Justice refrained from annulling the decision of a Disciplinary Board, where the Applicant complained that the Board had heard a witness *in camera*; but in giving its reasons the Court stated that in fact the Board's inquiry at the relevant point involved consideration of documents disclosed to the Applicant. If the Court had concluded that the witness had in reality been heard *in camera*, to the prejudice of the Applicant, it would presumably have annulled the decision.⁹⁶

Since, the Court of First Instance is more commonly engaged in the determination of points of fact, it confronts issues of a confidential nature more commonly than the Court of Justice and may be led by this consideration to sit *in camera* more frequently. In Joined Cases T-121/89 and 13/90, *X v Commission*⁹⁷ the Court of First Instance sat *in camera* but on appeal the Court of Justice declined to do so, apparently reasoning that in view of the nature of the issues arising on appeal, the requirements of confidentiality were sufficiently met by non-disclosure of the appellant's name.

The power to sit *in camera* applies either to the whole of the proceedings or to part. Where therefore only considerations of confidentiality require the exclusion of the public from only one element in the procedure (such as disclosure of statistical data in a competition case) the Court will remain in public session for all but the confidential stage in the procedure.

The principal categories of cases in which are courts have sat *in camera* are those involving confidential consideration of commercial information,⁹⁸ and those involving medical information of an intimate nature.⁹⁹ In Case T-549/93R, *D v Commission*¹⁰⁰ the

⁹⁶. [1968] E.C.R. 329 at 343.

⁹⁷. [1992] E.C.R. II-2195.

⁹⁸. See Case 2/54, *Italy v High Authority*, [1954] E.C.R. 37 at 55.

⁹⁹. See for example Case 206/89 R, *S v Commission*, [1989] E.C.R. 2841 at 2843; Case T-121/89, *X v Commission*, [1992] E.C.R. II-2195.

¹⁰⁰. [1993] E.C.R. II-1347.

Court of First Instance has sat *in camera* in a case involving an allegation of a improper conduct on the part of a Commission official. The Court appears to have considered that a public hearing might expose the official to irreparable loss even (or especially) if the allegation were to prove unsubstantiated.

Experience has shown that a measure of inquiry, in the form of a report submitted by experts, may fail to provide a means of resolving all of the factual questions before the Court; and may on occasions provoke further disputes on points of fact. When this occurs, the Court may be driven to reopen the measure of inquiry.

In Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, *A. Ahlstrom Osakeyhto and Others v Commission*, the Applicants sought the annulment of a decision whereby the Commission found that forty wood pulp producers and three of their trade associations had infringed Article 85(1) of the E.C. Treaty by concerted pricing. In its judgment dated 27th September 1988 the Court of Justice rejected the submission that the Commission's decision was incompatible with public international law but annulled the decision in so far as it concerned an American trade association and assigned the case to the fifth chamber for consideration of other submissions. By its Order of 25th November 1988 the fifth chamber decided to appoint experts who were then asked whether the documents on which the Commission relied warranted its deductions on parallel prices. The experts reported on 10th April 1990. By a further Order dated 25th October 1990, confirmed and clarified by another Order dated 14th March 1991, the Court decided to reopen the inquiry. The experts were asked *inter alia* whether the characteristics of the relevant market in the period covered by the decision were such that its normal functioning could lead to a uniform structure of prices. The experts delivered their second report on 11th April 1991. The fifth chamber gave judgment on 31st March 1993.

Hearings in the International Court of Justice are public, unless the Court decides otherwise, or unless the parties demand that the public be not admitted.¹⁰¹ By Article 59 of the Rules of Procedure such a decision or demand may concern either the whole or part of the hearing, and may be made at any time. However hearings are only in exceptional circumstances not public.¹⁰² In *South West Africa*¹⁰³ and *Namibia*¹⁰⁴ the Court held parts of

¹⁰¹. Article 46 of the Statute

¹⁰². Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, pp.128 *et seq.*

hearings in closed sessions. Both cases concerned the composition of the Court.¹⁰⁵ Other cases of closed hearings concerned viewing a film.¹⁰⁶

Hearings before the European Court of Human Rights are public unless the Court decides in exceptional circumstances otherwise. In practice oral hearings *in camera* are rare.¹⁰⁷ The same wording is used in Article 14(1) of the Statute of the Inter-American Court. It is argued that such exceptional circumstances might be occasions, where the lives of witnesses are at risk or where the matter touches on issues of national security.¹⁰⁸

Thus in the Court of Justice, the International Court of Justice and the European and Inter-American Courts of Human Rights public hearings are the general rule. The rules in the World Trade Organization and North American Free Trade Agreement dispute settlement proceedings are however fundamentally different.

¹⁰³. I.C.J. Rep. 1971, p.12.

¹⁰⁴. I.C.J. Rep. 1971, p. 12.

¹⁰⁵. Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p. 129.

¹⁰⁶. Ibid.

¹⁰⁷. For an oral hearing *in camera* to protect the interests of children, see cases of *O, H, E, B and R v United Kingdom*, A 120 and 121 (1989).

¹⁰⁸. J. S. Davidson, *The Inter-American Court of Human Rights*, Dartmouth Publishing Co., Aldershot 1992, p. 46.

Rule 2 of Appendix 3 of the D.S.U. provides that the Panel in World Trade Organization dispute settlement proceedings shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the Panel or appear before it. Also in proceedings before the Appellate Body Article 17 X of the D.S.U. states that proceedings before this body shall be confidential. Also in proceedings under Chapter 20 of the North American Free Trade Agreement parties have to maintain the confidentiality of the Panel's hearings.¹⁰⁹

¹⁰⁹. Rule 35 of the Model Rules.

This approach has been severely criticised on the grounds that "dispute settlement is not conciliation. It is, for all practical purposes, a lawsuit and the appeal of the results of a lawsuit. These should be public affairs."¹¹⁰ It has to be observed that it might be argued for Panel proceedings with their different structure of proceedings that hearings shall be confidential. There seems to be however no good reason why hearings on the appellate level have to be confidential. Firstly, on appellate level only questions of law are discussed. Therefore the appellate review body acts like a real court of appeal. Secondly, World Trade Organization law is part of international law.¹¹¹ The rules and practice of the above mentioned courts clearly show that hearings are as a general rule public and only in exceptional circumstances to be held *in camera*. Therefore "the World Trade Organization procedures should reflect that status by being open and transparent".¹¹²

Reopening of the Oral Procedure

¹¹⁰. David Palmeter, "The Need for Due Process in W.T.O. Proceedings", 31 *Journal of World Trade*, February 1997, p. 53. at p.55.

¹¹¹. This was confirmed by the Appellate Body in its Gasoline decision, United States-Standards for reformulated and conventional gasoline, AB-1996-1, WT/DS2/AB/R, 29th April 1996.

¹¹². David Palmeter, "The Need for Due Process in W.T.O. Proceedings", 31 *Journal of World Trade*, February 1997, p. 53. at p. 55.

The Court of Justice of the European Communities may reopen the oral procedure either on its own initiative or at the instance of any party or intervener. It may do so more than once in the same case. The discretion of the Court in this matter is large. Commonly the Court will reopen the oral procedure where a case is first heard by a chamber, which takes the view at the first hearing that the importance of the point of principle involved merits the convening of the full Court. This was the procedure followed in Joined Cases C-267 and C-268/91, *Bernard Keck and Daniel Mithouard*.¹¹³ That case was originally heard before the Second Chamber. After the first hearing the Advocate General expressed the opinion, consistent with the well-known judgment in Case 8/74, *Procureur du Roi v Dassonville*,¹¹⁴ that a national prohibition on the resale of goods at a loss is not compatible with Article 30 of the E.C. Treaty. The chamber referred¹¹⁵ the matter for a fresh hearing to the full Court, which ruled that the provisions of the Treaty relating to the free movement of goods have no bearing on a general national prohibition of resale at of goods at a loss: a national provision concerned with the marketing of goods. In view of the established precedent, such a ruling could not appropriately have been given by a chamber.

This possibility was also envisaged under the Rules of the European Court of Human Rights. Under the former Rules, where a case pending before a it raised one or more serious questions affecting the interpretation of the Convention, a chamber could at any time during the proceedings, relinquish jurisdiction in favour of a Grand Chamber. Under the new Rules a chamber may, at any time before giving judgment, relinquish jurisdiction in favour of the Grand Chamber, unless any party objects to this course.

The Court of Justice also reopened the oral procedure in Case 155/79, *A.M. and S. Europe Ltd v Commission*.¹¹⁶ The case presented novel issues involving legal professional privilege. After the first oral hearing an opinion was given by Advocate General Warner, who retired from the Court immediately thereafter and was replaced by Advocate General Sir Gordon Slynn. In these circumstances the Court decided to reopen the oral hearing

¹¹³. [1995] 1 C.M.L.R. 101.

¹¹⁴. [1974] E.C.R. 837, [1974] 2 C.M.L.R. 436.

¹¹⁵. [1982] E.C.R. 1575 at 1603, [1982] 2 C.M.L.R. 264.

¹¹⁶. [1982] E.C.R. 1575 at 1603, [1982] 2 C.M.L.R. 264.

"noting that for fortuitous reasons the composition of the Court... was not the same as it had been at the commencement of the proceedings and for the oral procedure".

In Case 170/78, *Commission v United Kingdom ("Wine and Beer")* oral argument was presented at the Court of Justice in October 1979. The Advocate General presented his first Opinion in the case in November. The following February, the Court delivered an interlocutory judgment¹¹⁷ in the operative part of which it ordered the parties "to re-examine the subject-matter of the dispute in the light of the legal considerations set out in this judgment and to report". The Court of Justice then decided to re-open the oral procedure. At the subsequent hearing the Court determined that it still did not have sufficient information. By Order dated 15th July 1982 it ordered the United Kingdom and the Commission to set out certain data in tables. On hearing the report of the Judge-Rapporteur, it then decided to re-open the oral procedure more than once in the same case.

¹¹⁷ [1983] E.C.R. 2265, [1983] 3 C.M.L.R. 512.

The Rules of Procedure of the International Court of Justice provide in Article 72 for re-opening of the oral procedure. By Article 72 of the Rules this might happen in case the Court receives a written reply by a party to a question put under Article 61 of the Rules or any evidence or explanation supplied by a party under Article 62 of the Rules. The oral proceedings might also be re-opened in case a party amends its final submissions given under Article 60(2) of the Rules (see above) or submits relevant materials which came into existence after the closure of the oral proceedings.¹¹⁸ *In Nuclear Tests* the Court pointed out that "it would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings".¹¹⁹

Under the World Trade Organization dispute settlement proceedings Article 15 of the D.S.U. provide the parties with the possibility of requesting the Panel to hold a further meeting on the issues identified in the written comments on the interim review. In practice however the interim review stage is used for the "winning" party to supply the Panel report with arguments, whereas the "losing" party restricts itself to clarify its factual and legal position.

In addition Rule 12 of appendix 3 provides for the possibility of scheduling additional meetings if required. This will be presumably be the case, when a party submits documents at the stage of the second substantive meeting or thereafter.

Records of Hearings

In the case of the Court of Justice, the minutes are brief and formal. They state the names of those present and the time of the hearing. In cases heard by the Court of First Instance, the minutes are slightly fuller. In particular, the minutes of the Court of First Instance contain, where this is considered appropriate, a summary of any important new

¹¹⁸. Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p. 132.

¹¹⁹. I.C.J. Rep. 1974, p. 457.

elements disclosed at the oral hearing or of the abandonment at that hearing of any submission advanced in writing: precautions which are judged proper in case it might be necessary to determine on appeal whether a particular element was known, or an argument advanced below.

The procedure of the E.F.T.A. Court in respect of minutes¹²⁰ is insufficiently established to warrant a certain account of the form that such minutes will take. In principle, however, a procedure analogous to that of the Court of Justice would appear appropriate for this Court, bearing in mind that its judgments are not subject to appeal.

In the Court of Justice, the Court of First Instance and the E.F.T.A. Court tape-recordings are made of oral hearings (and of any simultaneous translations). Transcripts of those tape recordings are made available for members of those courts only. The Community courts permit parties to make private arrangements for the recording of the proceedings by shorthand. The principle on which this policy is based appears to be that oral hearings are inherently transitory and transcripts are apt to give rise to disputes as to their accuracy.

Parties are not provided with transcripts of the oral hearing nor given an opportunity to check them. This is at variance with the procedure in other comparable tribunals; and the practice requires reconsideration. That is particularly the case in view of the fact that simultaneous interpretation presents special difficulties. The parties cannot correct every mistranslation as it happens and should, it is submitted, be given an opportunity to do so after the hearing.

¹²⁰. See Article 48 and 59 of the Rules of Procedure of the E.F.T.A. Court.

By Article 47 of the Statute of the International Court of Justice minutes are made at each hearing and signed by the Registrar and the President. This means that a verbatim record is made by the Registrar of every hearing in the official language of the court which has been used. When speeches or statements are made in a language which is not one of the official languages of the Court the party concerned supplies to the Registry in advance a text thereof in one of the official languages, and this text shall constitute the relevant part of the verbatim record.¹²¹ The transcript of the record is preceded by the names of the judges present, and those of the agents, counsel and advocates of the parties.¹²² Therefore at the evening of each day of a hearing the Registry circulates a provisional record together with an unofficial translation to the judges and parties.¹²³ The latter may, under the supervision of the Court, correct the transcripts of speeches and statements made on their behalf, but in no case may such corrections affect the sense and bearing. The judges are also allowed to make corrections in the transcript of anything they may have said.¹²⁴ Also witnesses and experts are shown that part of the transcript which relates to the evidence they have given and may correct them in the same way as parties are allowed to correct their statements.

One certified copy of the eventual corrected transcript, signed by the President and the Registrar, constitutes the authentic minutes of the sitting. The minutes of public hearings are printed and published by the Court in the series of 'Pleadings, Oral Arguments and Documents'.¹²⁵ In addition to that, electronic recordings are kept of statements made in open court.¹²⁶

Before the European Court of Human Rights, the Registrar is responsible for making verbatim records of each hearing. This record includes the composition of the chamber at

¹²¹. Article 71(2) of the Rules of Procedure.

¹²². Article 71(3) III of the Rules of Procedure.

¹²³. Article 71 of the Rules of Procedure; see also Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p. 130.

¹²⁴. Article 71(5) of the Rules of Procedure.

¹²⁵. Article 71(6) of the Rules of Procedure.

¹²⁶. Shabtai Rosenne, *The World Court, What it is and How it Works*, Martinus Nijhoff, Dordrecht 1995, p. 146.

the hearing, a list of all persons appearing before the Court, the names and addresses of each witness, expert or other person heard, the text of the statements made and the questions put as well as the replies given, finally the text of every decisions delivered by the chamber during the hearing.¹²⁷

The agents, advocates and advisers of the parties, the delegates of the Commission, the Applicant and the witnesses, experts and other persons receive the verbatim record of their arguments, statements or evidence. This is done so that they may make corrections, which must not, of course, affect the substance of what was said. The Registrar, in accordance with the instructions of the President, fixes the time-limits granted for this purpose. The verbatim record in its corrected form is signed by the President and the Registrar and then constitutes certified matters of record.¹²⁸

In World Trade Organization dispute settlement proceedings, there is no specific mention of a record. At the Panel level in practice no record is taken of the meeting. The parties themselves are responsible for providing the relevant transcripts. According to Rule 9 of Appendix 3 the parties have to make available to the Panel a written version of their oral statements. However all speeches in the meetings that take place are recorded.

By Article 15(1) of the D.S.U., the Panel issues the descriptive (factual and argument) sections of its draft report to the parties. The Panel can then set a time-limit for written comments. In order to examine the accuracy of the descriptive section of the draft Panel report Rule 10 of Appendix 3 of the D.S.U. provides that the presentations, rebuttals

¹²⁷. Rules of Court, 4th November 1998, Article 70. For a similar rule in proceedings before the Inter-American Court see Article 42(1) of the Rules.

¹²⁸. For the Inter-American Court see Article 42(3) of the Rules.

and statements shall be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the Panel, are made available to the other party. At the appellate level two court reports establish a verbatim record, which however is for internal use only.

In proceedings under Chapter 20 of the North American Free Trade Agreement the Secretariat arranges for a transcript of each hearing to be prepared and delivers a copy to the participating parties, the other sections of the Secretariat and the Panel.¹²⁹ The responsible section of the Secretariat retains indefinitely a copy of the complete record of the Panel proceedings.¹³⁰

Dispensing with Oral Hearings

¹²⁹ . Rule 29 of the Model Rules.

¹³⁰ . Rule 61(d) of the Model Rules.

The Statutes of the Community Courts state that their procedure is to consist of two parts, one of them oral¹³¹; but since 15th May 1991¹³², this has not been taken to mean that there must be an oral stage in every case. By the amendment of the Rules of Procedure of the Court of Justice, made on that date, the Court of Justice was authorised to dispense with an oral hearing in direct actions¹³³ as well as in references for preliminary rulings¹³⁴ and in appeals from the Court of First Instance.¹³⁵

Save in the case of references for preliminary ruling, the power to dispense with the oral procedure is contingent upon the consent of the parties. No such consent is required in the case of the reference for preliminary ruling of a question which is "manifestly identical to a question on which the Court has already ruled". In such a case the Court of Justice can dispense with the oral procedure after "informing" the referring Court and "hearing" the parties and the other persons entitled to submit observations. The duty to "hear" the parties and other persons, in such cases, does not of course signify an obligation to hear them orally. The words "after hearing" in the English version are the equivalent of the word "entendu" in the French.

¹³¹. Articles 18 of the EC, Euratom and E.F.T.A. Statutes.

¹³². OJ 1991 L176/1.

¹³³. Article 44a. Article 41(2) of the E.F.T.A. Court Rules, also provide the power to dispense with the oral part, "acting on a report from the Judge-Rapporteur, with the express consent of the parties".

¹³⁴. Article 104(3) and (4).

¹³⁵. Article 120.

The Statutes also provide that the oral procedure is to consist of four elements:

- (i) the reading of the report presented by the Judge-Rapporteur;
- (ii) the hearing by the Court of agents, advisers and lawyers entitled to practise before a court of a Member State;
- (iii) the hearing of experts and witnesses, if any (EC, Euratom and E.F.T.A. Statutes only); and
- (iv) the giving of the Advocate General's opinion (not applicable to the E.F.T.A. Court)¹³⁶.

¹³⁶. Articles 18 of EC, Euratom and E.F.T.A. Statutes.

Read literally, that language appears to invest the Court of Justice with power to dispense with the report of the Judge-Rapporteur or the giving of the Advocate General's Opinion or both. However, it is not the current practice of the Court of Justice to dispense with either the Judge-Rapporteur's Report of the Advocate General's Opinion, in cases in which it dispenses with the other elements of the oral hearing. Where the decision is taken (in one of the Court's administrative meetings) to apply Article 44a, Article 104(3) and (4) or Article 120 of the Rules, a date is fixed for the hearing of the Advocate General's Opinion. A report from the Judge-Rapporteur is then obtained and circulated to the parties¹³⁷. The Advocate General's Opinion is then given in the usual manner, his Opinion often assumes a special importance in such cases. For instance in Case C-59/92, *Hauptzollamt Hamburg St Annen v Ebbe Sönnichsen GmbH*¹³⁸ the Court exercised its power to dispense with the oral hearing and then gave judgment simply stating that this was done "for the reasons given in the Opinion of the Advocate General".

No necessity for an oral stage in the procedure arises in respect of matters, such as applications to intervene, capable of being resolved by Order. In particular, there is no such necessity where the Court is requested to declare a direct action inadmissible or beyond the Court's jurisdiction, or where the Court itself takes the initiative to make such a declaration. These matters are unaffected by the amendment dated 15th May 1991. Article 92 of the Rules of Procedure of the Court of Justice has long authorised that Court to decide by reasoned Order that it has no jurisdiction or that an action is manifestly

¹³⁷. It is designated as the Judge Rapporteur's "Report", not as a "Report for the Hearing".

¹³⁸. [1993] E.C.R. I-2193.

admissible. Such an Order is made after hearing the Advocate General but "without taking any further steps in the proceedings" and more especially without the necessity of an oral hearing.¹³⁹

¹³⁹ . Article 111 of the C.F.I. Rules and Article 88 E.F.T.A. Court Rules are expressed in identical terms.

The power to declare actions inadmissible, without an oral hearing, is not reserved for cases presenting neither difficulty nor interest. In its Order dated 4th July 1990 in Case C-50/90, *Sunzest (Europe) BV and Sunzest (Netherlands) v Commission*¹⁴⁰ the Court of Justice determined, without a hearing, that an application for the annulment of a communication from the Commission was inadmissible, since the communication had no legal force and therefore did not constitute a "decision". The Court of Justice was thereby spared the necessity of determining an application to intervene made on behalf of the Turkish Republic of Northern Cyprus. In its three Orders dated 12th July 1993 in Cases 128/91, *Gibraltar Development Corporation and Government of Gibraltar v Council*, Case 336/90, *Gibraltar Development Corporation v Council* and Case 397/92, *Gibraltar Development Corporation and Government of Gibraltar v Council*, the Court of Justice dismissed the applications as inadmissible, without oral hearing but following its decision on admissibility (given after a hearing) in an related case.¹⁴¹ The cases raised the issue, among others, whether a Directive is susceptible of annulment under Article 173 of the E.C. Treaty.

Moreover in the case of references for preliminary ruling, it was open to the Court of Justice prior to the making of the amendments to its Rules of Procedure on 15th May 1991 to write to the referring Court, drawing attention to a ruling of the Court of Justice which appeared to dispose of the issued referred. The referring Court or tribunal could thereupon withdraw the reference¹⁴² or part thereof.¹⁴³ The amendments made in May 1991 do not diminish the inherent capacity of the Court of Justice to communicate with referring courts and tribunals. Indeed, that power is employed regularly.

The possibility of dispensing with oral procedure in direct actions is expressed to be "without prejudice to any special conditions laid down in these Rules". The special

¹⁴⁰. [1991] E.C.R. I-2917.

¹⁴¹. Case 298/89, *Government of Gibraltar v Council*, [1993] E.C.R. I-2605, [1994] 3 C.M.L.R. 425.

¹⁴². See e.g. Case C-233/89, *Clarke v Cray Precision Engineers* (Order of 20th March 1991, OJ 1991 C125/12) following the Court's judgment in Case 262/88, *Barber v Guardian Royal Exchange*, [1990] E.C.R. 1889, [1990] 2 C.M.L.R. 513).

¹⁴³. See Case C-171/95, *Tetik v Land Berlin*, judgment of 23rd January 1997, at paras. 13 and 14, where the referring court withdrew its first question following the judgment in Case C-434/93, *Bozkurt v Staatssecretaris van Justitie*, [1995] E.C.R. I-1475.

conditions contemplated in this context are certain of the "special forms of procedure" governed by Title III of the Court of Justice Rules, including suspension of operation or enforcement and other interim measures, preliminary issues, intervention, default judgments, exceptional review procedure, appeals against decisions of the arbitration committee, interpretation and the rules governing costs.

A decision to dispense with an oral hearing in a direct action can be taken only after the lodging of the rejoinder, following a preliminary Report from the Judge-Rapporteur and on hearing the Advocate General. It is now the practice of the Court of Justice to write to the parties automatically, following the closure of the written stage to enquire whether they consent to dispensing with the oral procedure in the case of uncontested direct actions against Member States for failure to fulfil their obligations. In other direct actions, the Court of Justice decides in the light of the circumstances of the particular case whether it should seek the parties' consent to dispensing with the oral stage. The decision to seek that consent is taken by the Court of Justice at an administrative meeting, upon consideration of the Judge-Rapporteur's preliminary Report and the views of the Advocate General.

The Court of Justice has frequently dispensed with an oral hearing in actions brought by the Commission against Member States pursuant to Article 169 of the E.C. Treaty. It has a powerful incentive to dispense with the oral procedure in such cases, since the Rules of Procedure requires the Court of Justice to sit in plenary session when dealing with them¹⁴⁴. In several of the cases instituted under Article 169 of the E.C. Treaty, in which the Court has dispensed with the oral procedure, the Member State either offered no defence or advanced only a meagre defence. In others the Commission's application was seriously resisted but the Court appears to have taken the view that the written procedure provided it with sufficient material to reach judgment.

In other direct actions (excluding appeals in staff cases) the Court of Justice has hitherto made only limited use of its power to dispense with the oral hearing. The Court did so, however, in Case C-142/91, *Cebag BV v Commission*¹⁴⁵ where the dispute was a technical one concerning the withholding of a payment in relation to food aid.

¹⁴⁴. Article 95.

¹⁴⁵. [1993] E.C.R. I-553.

In the case of references for preliminary ruling, two distinct circumstances may occur. The first is the case where the referred question is manifestly identical to one on which the Court of Justice has already ruled. The second is the case where the decision is to be taken other than on the ground that the referred question is "manifestly identical to a question on which the Court has already ruled".

The former case is governed by Article 104(3) of the Rules of Procedure of the Court of Justice. This authorises the Court to dispense with the oral hearing even if the parties do not consent. It merely requires that the Court should inform the referring Court and hear the (written) observations of the persons entitled to submit observations. Article 104(3) differs from Article 44a and from Article 104(4) in failing to establish an express presumption in favour of the oral part of the procedure. The Court of Justice has hitherto shown a preference for the use of Article 104(4), instead of Article 104(3), even in those cases in which there appears to have been ample existing case-law to support the eventual judgment. It appears unlikely that Article 104(3) will be much used in the face of objections from any party or person entitled to be heard. For if such a party or person contends (other than on specious grounds) that the case raises issues distinguishable from those in the alleged precedent, the Court of Justice could not properly conclude that the question before it is manifestly identical to one on which it has already ruled. Moreover the application of Article 104(3) in the face of the objection of a party or person entitled to be heard raises questions of compatibility with Article 18 of the Statute.

In other cases, the Court of Justice is authorised by Article 104(4) of its Rules of Procedure to dispense with the persons referred to in Article 20 of the E.C. Statute, Article 21 of the Euratom Statute and Article 103(3) of the Rules of Procedure. Those persons are not only the parties to the proceedings before the referring Court, including any interveners in that Court, but also the Member States, the Commission and (where the interpretation or validity of a Council act is in issue) the Council. In particular, a Member State or institution which did not participate in the proceedings before the referring Court may require an oral hearing on the reference. Its right to do so is not contingent upon its having submitted written observations. Indeed, the right to require an oral hearing may be of particular importance to a Member State which decides to participate in the proceedings only on reading the written observations of a party or of the Commission, raising an issue of concern to that State. At the stage at which it learns of such observations, the time for the Member State to submit its own observations in writing may well have expired.

The power to dispense with oral hearings pursuant to Article 104(4) of the Rules of Procedure has been employed principally in cases of a technical nature. In particular it has been used in cases turning on the interpretation of agricultural legislation¹⁴⁶. Article 104(4) has also been much employed in customs cases¹⁴⁷ and in references on the interpretation of involving social security legislation.¹⁴⁸

Provided that the conditions set out in Article 104(4) are met, however, the Court's discretion is large. On the basis of that Article the Court of Justice dispensed with the oral procedure when dealing with difficult issues on the interpretation of Articles 59 and 60 of the E.C. Treaty, on a reference for preliminary ruling from the Spanish Tribunal Supremo in Case C-17/92, *Federación de distribuidores cinematográficos v Estado Español & Union de Productores de Cine y Television*.¹⁴⁹ It did likewise in Case C-120/92 *Friedrich Schultz v Hauptzollamt Heilbronn*,¹⁵⁰ and in an important decision on the principles to be applied to post-clearance recovery of customs duties in Case C-292/91, *Gebr. Weis v Hauptzollamt Würzburg*.¹⁵¹

¹⁴⁶. Such as: Case 79/91, *Walter Knufer and Direktor der Landwirtschaftskammer Rheinland v Walter Buchmann*, [1992] E.C.R. I-6895, [1993] 1 C.M.L.R. 692; Case C-283/91, *Prefetto di Ravenna v Attilio Containi*, [1992] E.C.R. I-6359; Case C-84/91, *Belgian State v Suiker Import*, [1992] E.C.R. I-5473; Case C-285/91, *Firma E. Merck v Hauptzollamt Hamburg-Jonas*, [1993] E.C.R. I-729; Case 8/92, *General Milk Products GmbH v Hauptzollamt Hamburg-Jonas*, [1993] E.C.R. I-779; Case C-120/92, *Friedrich Schultz v Hauptzollamt Heilbronn*, [1993] E.C.R. I-6885; Case C-365/92, *Henrik Schumacher v Bezirksregierung Hannover*, [1993] E.C.R. I-6071 and Case C-81/92. *H. Dinter GmbH v Hauptzollamt Bad Reichenhall*, [1993] E.C.R. I-4601. The same power appears to have been used in a further agricultural case, Case C-189/92, *Bernard Le Nan v Cooperative Laitière de Ploudaniel*; but as the judgment in that case was given after 1st January 1994, when reports for the hearing ceased to be published, the basis on which the Court dispensed with the oral hearing is not reported.

¹⁴⁷. Including Case C-191/91, *Abbott GmbH v Oberfinanzdirektion Köln*, [1993] E.C.R. I-867; Case 108/92, *Astro Med GmbH v Oberfinanzdirektion Berlin*, [1993] E.C.R. I-3797 and Case 111/92, *Wilfried Lange v Finanzamt Fürstenfeldbruck*, [1994] 1 C.M.L.R. 573.

¹⁴⁸. Such as Case C-243/91, *Belgian State v Noushin Taghavi*, [1992] E.C.R. I-4401 (although Article 104(4) is not mentioned in the report, the basis for the procedure appears clear from the context). See also Case-297/92, *Istituto Nazionale della Previdenze Sociale (INPS) v Corradine Baglieri*, [1993] E.C.R. I-5211.

¹⁴⁹. [1993] E.C.R. I-2239.

¹⁵⁰. [1993] E.C.R. I-6885.

¹⁵¹. [1993] E.C.R. I-2219.

The Court of Justice can dispense with the oral hearing in cases on the interpretation of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters¹⁵² as in other cases.¹⁵³

It is the practice of the Court of Justice to write to the parties and to the persons entitled to submit observations automatically, in the case of every reference for a preliminary ruling, to enquire whether they wish to present oral argument. The letter containing this enquiry is sent after the closure of the written stage.

Article 120 of the Rules of Procedure of the Court of Justice confers on the Court a general power to dispense with oral hearings in appeals from the Court of First Instance "unless one of the parties objects on the ground that the written procedure did not enable that party fully to defend his point of view". There is no express presumption in favour of an oral hearing.

It is the practice of the Court of Justice to write to the parties automatically, enquiring whether they require an oral hearing, in the case of appeals in staff cases. In other cases, the Court of Justice decides in the light of the circumstances of the particular case whether to write to the parties enquiring whether they object to dispensing with the oral stage. That decision is taken in an administrative meeting, on the basis of the preliminary Report of the Judge-Rapporteur and after hearing the Advocate General.

¹⁵². 27th September 1968, as amended at San Sebastian on 26th May 1989, OJ 1989 L285/1.

¹⁵³. E.g. Case C-125/92, *Mulos IBC Limited v Hendrick Geels*, [1993] E.C.R. I-4075.

The reference to "parties" in Article 120 of the Rules of Procedure of the Court of Justice must be taken to mean parties in the strict sense, to the exclusion of interveners. Thus, an intervener before the Court of First Instance cannot require an oral hearing even though the intervener will be heard automatically if such a hearing takes place. Where however the Court of Justice contemplates dispensing with an oral hearing on an appeal from the Court of First Instance, it will take account of the views of any intervener before the lower Court; for such an intervener may itself appeal to the Court of Justice where it satisfies the conditions set out in the Statutes¹⁵⁴.

¹⁵⁴. Second paragraph of Article 49 of the E.C. Statute or Article 50 of the Euratom Statute.

Although appeals from the Court of First Instance in staff cases may be heard by chambers of the Court of Justice, they are commonly considered suitable for disposal without oral argument. The parties will invariably have had an opportunity to present such argument in the Court of First Instance; and at least where the Community institution is appellant, the issue before the Court of Justice tends to be a pure point of law, suitable for resolution on the basis of written submissions.¹⁵⁵ In certain appeals brought by staff members the Court of Justice has thought it right to dispense with the oral procedure. In Case C-354/92-P, *Franz Eppe v Commission*¹⁵⁶ the point at issue was an exercise of redeployment in the interests of the service; and in Case C-18/91-P, *V v Parliament*¹⁵⁷ the dispute concerned the conditions for retirement on grounds of invalidity. It is possible that in those cases the decision to dispense with the oral procedure, although based primarily on grounds of economy, was influenced by considerations of confidentiality.

The European Parliament has proposed that the power to dispense with an oral hearing in the event of an appeal should be enlarged further. By a Resolution dated 16th September, 1993¹⁵⁸ on the Role of the Court of Justice in the Development of the European Community's Constitutional System, the Parliament proposed that the Court of Justice should have the option of rejecting as clearly unfounded appeals against judgments of the Court of First Instance, without an oral procedure or explanatory statement, by unanimous decision.

Article 41(2) of the E.F.T.A. Court's Rules of Procedure permits that Court to dispense with the oral procedure only with the express consent of the parties. It is thought that this requirement does not apply in cases governed by Article 97(3) of the same Rules, which authorises that Court to give a decision by reasoned Order in any case in which a

¹⁵⁵. Case C-185/91-P, *Commission v Walter Gill*, [1991] E.C.R. I-4779 (See further Case C-185/90 P-Rev, *Walter Gill v Commission*, Order of President dated 25th February 1992, not reported); Case C-242/90-P, *Commission v Alessandro Albani and Others*, [1993] E.C.R. I-3839 (see further Case C-242/90-P-R, *Commission v Alessandro Albani and Others*, Order of President dated 27th November 1990, not reported); Case C-348/90-P, *European Parliament v Gabriela Virgili-Schettini*, [1991] E.C.R. I-5211; and Case C-35/92-P, *European Parliament v Erik Dan Frederiksen*, [1993] E.C.R. I-991.

¹⁵⁶. [1993] E.C.R. I-7027.

¹⁵⁷. [1992] E.C.R. I-3997.

¹⁵⁸. A3-0228/93, item I(1)(h).

question referred to the Court for an advisory opinion is manifestly identical to one on which the Court has already ruled or given an opinion. In such an event the Court may give its decision by Order only after informing the court or tribunal which referred the question to it and after hearing any observations submitted by the Governments of the E.F.T.A. States, the E.F.T.A. Surveillance Authority, the Community, the E.C. Commission and the parties to the dispute. In this context the expression "after hearing" cannot be taken to mean "after giving an oral hearing to". It denotes consideration of any representations made by the parties so identified. It is thought also that the obligation to inform the referring court is intended to give the latter an opportunity to indicate to the E.F.T.A. Court any reasons why it appears to the referring court that the question posed may not be identical to the one previously answered. This reading of Article 97(3) of the E.F.T.A. Court Rules is reinforced by the opening words of Article 97(4) of those Rules.

Article 97(4) authorises the E.F.T.A. Court to dispense with the oral procedure (other than in cases governed by the antecedent paragraph) only when no request to present an oral argument has been made by those who are entitled to submit statements or observations, as provided for in Article 20 of the Statute and paragraph 1 of Article 97 of the E.F.T.A. Court Rules. Article 20 of the Statute lists as persons entitled to submit statements or observations the Governments of the E.F.T.A. States, the E.F.T.A. Surveillance Authority, the Community and the E.C. Commission. Article 97(1) adds to that list the parties to the dispute.

The Court of First Instance has not been authorised to dispense with the oral stage; and in view of the greater reliance placed on oral hearings in the Court of First Instance, that tribunal might well be reluctant to exercise any such power, were it conferred. The increase in the volume of its work since the transfer certain functions formerly discharged by the Court of Justice,¹⁵⁹ may however compel it in due course in due course to seek authority to dispense with oral hearings.

Like the Statutes of the Community Court, Article 43(1) of the Statute of the International Court of Justice states that the procedure shall consist of a written and an oral part. In the case of the International Court, that has been construed as imposing an

¹⁵⁹. Decision of 8th June 1993 amending Council Decision 88/591/E.C.S.C., E.C. and Euratom establishing a Court of First Instance, OJ 1993 L144/1.

obligation to hold oral hearings in all cases, with the sole exception of applications to intervene. By Article 62 (2) the Court may determine such applications without oral hearing.

Proceedings of the European Court of Human Rights, likewise, comprise two stages: written and oral. In the case of ordinary applications, no provision is made for dispensing with oral hearings. Conversely, in the case of requests for advisory opinions, the President decides, at the end of the written procedure, whether the parties are to be given an opportunity to develop their arguments at an oral hearing. The Court has however a general power to derogate from the Rules

“for the consideration of a particular case after having consulted the parties where appropriate”.

It may be possible to identify, on the basis of the Court’s practice under the old rules, some circumstances in which it might make use of its general powers to reach decisions in the absence of an oral hearing.

In *Fouquet v. France*¹⁶⁰ the Applicant and the government reached a friendly settlement after the case had been referred to the Court by the Commission. The Court “decided to dispense with a hearing in the case, having satisfied itself that the conditions for this derogation from its usual procedure had been met”.¹⁶¹ In *Baegen v. Netherlands*¹⁶² the Court also took the decision to strike the case out of the list, without an oral hearing. The Applicant had failed to respond to attempts made by the Registry to confirm his participation in the case. According to Rule 51 of Rules of Court "B", the Court took the decision to strike the case out of the list. In *Morganti v. France*¹⁶³ the Court decided, without an oral hearing, that the application inadmissible, since the applicant government had plainly exceeded the 3 months period laid down in Article 32 of the Convention. The common feature of these cases is that the Court was able to dispose of the matter without ruling on the substance of the case.

^{160.} *Fouquet v France*, judgment of 31st January 1996, Reports of Judgments and Decisions 1996-I; see also *Marlhens v France*, judgment of 24th May 1995, Series A No. 317-A.

^{161.} *Fouquet v France*, judgment of 31st January 1996, Reports of Judgments and Decisions 1996-I, paragraph 6.

^{162.} *Baegen v Netherlands*, judgment of 27th October 1995, Series A No. 327-B.

^{163.} *Morganti v France*, judgment of 13th July 1995, Series A No. 320-C.

In World Trade Organization disputes, Article 12(1) of the D.S.U. provides that the Panel has to follow the Working Procedures in Appendix 3 unless the Panel decides otherwise. This indicates that the Panel might derogate from Appendix 3 after consultation with the parties, however it may not be allowed to derogate from the D.S.U.. In the D.S.U. parties and third parties have rights to present their arguments orally. Therefore only with the consent of all parties, including also third parties, the Panel might dispense with oral proceedings. This is also confirmed by the practice adopted by Panels not to dispense with hearings. In proceedings before the Appellate Body Rule 27(1) states that oral hearings shall be held without making any restrictions. Therefore it might be concluded that oral hearings cannot be dispensed with.

The proceedings under Chapter 20 of the North American Free Trade Agreement in Article 2012(1) expressly require the Model Rules to assure a right to at least one hearing before the Panel. Therefore dispensing with such a hearing seems to be impossible. However Article 2012(2) provides that the Panel conducts its proceedings in accordance with the Model Rules of Procedure unless the disputing parties agree otherwise. Therefore the disputing parties might agree to dispense with the oral hearing. In Panel proceedings established under Article 2019(3), according to Rule 59(d) the Panel may decide not to convene a hearing unless the disputing parties disagree.

The following general observation may be made. Dispensation with the oral stage is uncommon in international courts and tribunals. Conversely, many domestic legal systems provide for the omission of an oral stage, at least at the appellate level. In proceedings before the constitutional court of Germany, for instance, oral hearings are rather the exceptions than the rule.¹⁶⁴ The Civil Procedure Rules in England and Wales, which entered into force on 26th April 1999, provide in Rule 23(8):

- “The court may deal with an application without a hearing if:
- (a) the parties agree as to the terms of the order sought;
 - (b) the parties agree that the court should dispose of the application without a hearing, or
 - (c) the court does not consider that a hearing would be appropriate”.

¹⁶⁴. See Christian Pestalozza, *Verfassungsprozessrecht*, 2. Auflage, Munchen, p.42.

The rule applied in this respect in the Community Courts, dictated by practical considerations, more resembles the position seen elsewhere at the national level than that seen in international courts and tribunals.