

PERMANENT COURT OF ARBITRATION  
OPTIONAL RULES FOR FACT-FINDING  
COMMISSIONS OF INQUIRY



OPTIONAL RULES FOR FACT-FINDING COMMISSIONS OF INQUIRY

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## INTRODUCTION

These Optional Rules for Fact-finding Commissions of Inquiry represent the first set of Permanent Court of Arbitration Optional Rules not to be patterned after a comparable UNCITRAL text, but rather to be drafted in their entirety to meet a specific need. The Steering Committee established in 1994, to prepare for the centennial of the Permanent Court of Arbitration (PCA) and advise on improvement of its dispute resolution procedures, noted that the 1899 Convention for the Pacific Settlement of International Disputes devotes only six brief articles to international commissions of inquiry. These provisions were broadened in the 1907 Convention, to twenty-nine fairly detailed articles. In spite of the degree of detail introduced in the 1907 Convention for the Pacific Settlement of International Disputes, that Convention still allows for a degree of party autonomy. For example, article 10 provides that the agreement between the parties (referred to as the ‘inquiry convention’) determines ‘the mode and time in which the Commission is to be formed and the extent of the powers of the Commissioners.’ Article 12 expressly allows the parties to agree to deviate from the provisions of articles 45 and 57, concerning the formation of inquiry commissions. Finally, the Convention provisions governing the inquiry procedure apply only ‘. . . in so far as the parties do not adopt other rules’ (art. 17).

In light of these provisions, the Steering Committee concluded that it would be particularly appropriate for the International Bureau to establish optional rules for inquiry proceedings, which parties could elect to adopt. These Rules are intended to provide a self-contained procedural framework for commissions of inquiry, rather than simply supplementing the non-mandatory provisions of the 1907 Convention.

The most important elements of the new Rules for fact-finding commissions of inquiry include:

- (a) the denomination ‘Fact-finding Commissions of Inquiry’ satisfies the need for modernization, while retaining a link to the Conventions;
- (b) the Rules create a system of fact-finding that does not depend on the Conventions – it can be used by States and other parties that are not necessarily parties to the Conventions;
- (c) the parties have the freedom to identify the type of facts to be found;
- (d) in line with the other PCA Optional Rules, the parties are entitled to determine the place at which the Commission meets;

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- (e) membership on a Commission is not limited to Members of the PCA, among which judges and lawyers predominate, as fact-finding often requires technical and special expertise;
- (f) the parties may seek the assistance of the Secretary-General of the PCA to act as appointing authority, or to designate an appointing authority;
- (g) the Commission's report need not be absolutely confidential – the parties are free to make it public if they so agree;
- (h) the Rules recognize the need, and provide, for obtaining the co-operation of States to assist commissions of inquiry.

In view of the specificity and ad-hoc nature of fact-finding proceedings, it was not considered advisable to include model clauses or agreements for recourse to these Rules. Parties that contemplate engaging in fact-finding may, at all times, seek the advice of the International Bureau with respect to drafting and procedural decision-making.

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*Effective December 15, 1997*

**Application of the Rules**

*Article 1*

1. These Rules shall apply when the parties have agreed to have recourse to a Fact-finding Commission of Inquiry ('Commission') pursuant to the Permanent Court of Arbitration ('PCA') Optional Rules for Fact-finding Commissions of Inquiry, to establish, by means of an impartial and independent investigation, facts with respect to which there is a difference of opinion between them.
2. The parties may agree to exclude or vary any of these Rules at any time.

**Initiation of Fact-finding Proceedings**

*Article 2*

1. The party initiating fact-finding shall send to the other party a written invitation to engage in fact-finding under these Rules, briefly identifying the facts to be established. A copy of the invitation shall also be sent to the International Bureau of the PCA ('International Bureau').
2. If the other party rejects the invitation, there will be no fact-finding proceedings under these Rules.
3. If the party initiating fact-finding does not receive a reply within sixty days from the date on which the invitation was sent, or within such other period of time as specified in the invitation, it may elect to treat this as a rejection of the invitation to engage in fact-finding. If it so elects, it shall inform the other party accordingly.
4. The parties may also jointly request in writing, addressed to the Secretary-General of the Permanent Court of Arbitration (the 'Secretary-General'), that a Commission be established. The request shall, to the extent possible, specify the facts to be established, without excluding any relevant new facts that may come up in the course of the fact-finding.

### **Number of Commissioners**

#### *Article 3*

The Commission may consist of one, three, or five commissioners.\* Unless the parties agree otherwise there shall be one commissioner.

### **Appointment of Commissioners**

#### *Article 4*

1. (a) In fact-finding proceedings with one commissioner, the parties shall endeavour to reach agreement on the name of a sole commissioner;
- (b) In fact-finding proceedings with three or five commissioners, each party shall appoint one or two commissioners, as the case may be. Within two months of the last appointment, the party-appointed commissioners shall designate a third or fifth commissioner, as the case may be, who will act as President of the Commission.
2. The parties may enlist the assistance of an appropriate institution or person in connection with the appointment of commissioners. In particular,
  - (a) A party may request such an institution or person to recommend the names of suitable individuals to act as commissioner; or
  - (b) The parties may agree that the appointment of one or more commissioners be made directly by such an institution or person.
3. The parties may also enlist the assistance of the Secretary-General in connection with the appointment of commissioners. In particular,
  - (a) A party may request the Secretary-General to designate an institution or person to perform the function set forth in paragraph 2(a) of this article;
  - (b) The parties may request the Secretary-General to designate an institution or person to perform the function set forth in paragraph 2(b) of this article; or
  - (c) The Secretary-General may be the ‘person’ performing the functions set forth

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\* Throughout these Rules, the fact-finding body is referred to as the ‘Commission’, irrespective of the number of commissioners.

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in paragraphs 2(a) and (b) of this article, pursuant to a request or agreement.

4. In recommending or appointing individuals to act as commissioners, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial commissioner, and, with respect to a sole, third or fifth commissioner, shall take into account the advisability of appointing a commissioner of a nationality other than the nationalities of the parties.

5. Any vacancy on the Commission shall be filled in the manner in which the original appointment of the commissioner being replaced was made.

### **Independence of Commissioners**

#### *Article 5*

Commissioners shall act in strict conformity with their mandate and perform their task in an impartial manner. Upon accepting appointment, each commissioner shall submit to the International Bureau a declaration confirming his or her independence from the parties.

### **Place of Meeting of the Commission**

#### *Article 6*

1. Unless the parties have agreed otherwise, the Commission shall meet in The Hague. The International Bureau shall act as Registry, keep the Commission's archives, and place its offices and staff at the disposal of the Commission.

2. If the fact-finding proceedings are held at a place other than The Hague, the Commission may, in consultation with the International Bureau, appoint a secretary.

3. The Commission may determine the locale of the fact-finding proceedings within the country agreed upon by the parties. It may hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the fact-finding.

4. The Commission may meet at any place it deems appropriate for the inspection of goods, property, documents, or sites, or for the interrogation of witnesses. The parties shall be given sufficient notice to enable them to be present at such inspection.

5. For purposes of the activities contemplated in paragraphs 2-4 of this article, the Commission or the International Bureau shall, where necessary, seek the permission of,

and any requisite assistance from, the country in which these activities are to be undertaken.

### **Representation and Assistance**

#### *Article 7*

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons shall be communicated in writing to the other party and to the Commission; such communication shall specify whether the appointment is made for purposes of representation or of assistance.

### **Language**

#### *Article 8*

Subject to an agreement by the parties, the Commission shall determine the language or languages to be used in the proceedings. The Commission may request that any documents submitted in the course of the proceedings be accompanied by a translation into the language or languages agreed upon by the parties or determined by the Commission.

### **Co-operation of Parties with the Commission**

#### *Article 9*

1. The parties shall co-operate with the Commission in good faith and shall, in particular, comply with requests by the Commission to submit written materials, provide evidence and attend meetings. All such documents submitted to the Commission shall, at the same time, be transmitted to the other party and to the International Bureau.
2. The parties undertake to make use of all means at their disposal to insure the appearance of witnesses and experts before the Commission. If witnesses or experts are unable to appear before the Commission, the parties shall arrange for their evidence to be taken before qualified officials in the place where the witnesses or experts are located, and speedily transmit the evidence thus obtained to the Commission.
3. A State that agrees to engage in fact-finding pursuant to these Rules shall be deemed to have granted its permission for the conduct in its territory of any of the activities set forth in article 6, paragraphs 2-4, and further undertakes to use all means at its disposal to provide the Commission with whatever assistance it may require in the conduct of the fact-finding proceedings, including but not limited to, ensuring the appearance or written testimony of witnesses and experts, as contemplated in paragraph 1 of this article.

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4. In the event that the Commission requires the permission or cooperation of a third State, for example, as contemplated in article 6 of these Rules, the parties shall use all reasonable means at their disposal to obtain such permission and/or co-operation. A State that is a party to fact-finding undertakes to make the necessary request to the State concerned.

### **Confidentiality**

#### *Article 10*

Unless the parties agree otherwise, or unless disclosure is required by the law applicable to a party, the members of the Commission and the parties shall keep confidential all matters relating to the fact-finding proceedings, including the investigations, hearings, deliberations and findings of the Commission. Unless the parties agree otherwise, the Commission shall meet *in camera*.

### **Submission of Statements to the Commission**

#### *Article 11*

1. Upon its establishment, the Commission shall request each party to submit to it a brief written statement describing the general nature of the facts to be established and the points at issue. The Commission shall have the discretion to determine whether these statements are to be submitted simultaneously or responsively.
2. The Commission may request the parties to submit further written statements of their respective positions and the facts and grounds in support thereof, supplemented by any documents and other evidence that each party deems appropriate.
3. At any stage of the fact-finding proceedings, the Commission may request a party to submit such additional information as the Commission deems appropriate.
4. All documents, statements, information or evidence supplied by one party shall at the same time be provided to the other party, and a copy shall be filed with the International Bureau.

### **Conduct of the Fact-finding Proceedings**

#### *Article 12*

1. Subject to these Rules and the agreement of the parties, the Commission may conduct the fact-finding proceedings in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity to present its case.
2. The Commission shall give the parties every opportunity to be present at hearings and investigations, and to submit documents, present evidence and have witnesses and experts called. The Commission may also take initiative in asking for documents and calling witnesses and experts. The method for obtaining oral testimony from witnesses and experts shall be determined by the Commission.
3. Unless the parties have decided otherwise, and having regard to the circumstances of the case, the Commission shall determine the scope and type of any record to be made of the hearings and other meetings of the Commission.

### **Decision-making**

#### *Article 13*

When the Commission consists of three or five members, all decisions of the Commission shall be made by a majority of its members.

### **Termination of Fact-finding Proceedings**

#### *Article 14*

1. Unless agreed otherwise, the fact-finding proceedings shall terminate upon the issuance of a written report by the Commission.
2. Unless the parties have agreed otherwise, the report of the Commission shall not be binding on the parties.

#### *Article 15*

The report shall be signed by the sole commissioner or the President of the Commission, as the case may be, and signed for acknowledgment by the Secretary-General. Individual opinions may be attached to the report. The report shall state in detail the facts established by the Commission, and the reason why certain facts may not be considered

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as having been established. Unless the parties agree to make it public, the report shall remain confidential.

**Costs**

*Article 16*

1. Upon termination of the fact-finding proceedings, the Commission shall, in consultation with the International Bureau, fix the costs of the fact-finding and give written notice thereof to the parties. The term 'costs' shall include:

- (a) The fees of the commissioners, which shall be reasonable in amount;
- (b) The travel and other expenses of the commissioners;
- (c) The travel and other expenses of witnesses requested by the Commission;
- (d) The costs of any expert advice requested by the Commission;
- (e) The costs of any services of the Secretary-General and the International Bureau, including costs related to the holding of proceedings outside The Hague.

2. The costs, as defined above, shall be borne equally by the parties unless the Commission provides for a different apportionment. All other expenses incurred by a party, including those related to the written or oral testimony of any witnesses or experts that it presents, shall be borne by that party.

**Deposits**

*Article 17*

1. The Commission, on its establishment, may request the parties to deposit equal amounts as an advance for the costs referred to in article 16. All amounts deposited by the parties pursuant to this paragraph and paragraph 2 of this article shall be paid to the International Bureau, and shall be disbursed by it for such costs.

2. During the course of the fact-finding proceedings the Commission may request supplementary deposits from the parties.

3. If the required deposits under paragraphs 1 and 2 of this article are not paid in full by both parties within sixty days of a request therefor, the Commission may suspend the proceedings or may make a written declaration of termination to the parties, effective thirty days after the date of that declaration.

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4. Upon termination of the fact-finding proceedings, the Commission shall render an accounting to the parties of the deposits received and amounts disbursed, and shall return any unexpended balance to the parties.