

Fordham International Law Journal

Volume 6, Issue 2

1982

Article 6

V.S. Mani, International Adjudication: Procedural Aspects

Gerhard Wegen*

*

Copyright ©1982 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

V.S. Mani, International Adjudication: Procedural Aspects

Gerhard Wegen

Abstract

International Adjudication presents abundant material, particularly concerning the practice of early mixed claims commissions and tribunals. For that, it is commendable. It may prove significantly helpful for the developing practice of adjudication of claims between states and nationals of other states.

BOOK REVIEW

INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS. By V.S. Mani.
The Hague, Boston, London: Martinus Nijhoff, 1980. Pp. xx,
456. \$68.50.

V.S. Mani's *International Adjudication: Procedural Aspects* is the first book in English on international procedure¹ since Rosenne's two volume *The Law and Practice of the International Court*.² Mani may be known to international lawyers as the author of a series of articles on procedural questions³ published in the late 1960's and the early 1970's. His book will be very useful to those interested in international procedure; it is commendable but with certain reservations.

I.

Mani's work is a thorough and painstakingly researched work of legal scholarship, especially in its treatment of international claims commissions and tribunals. It is not, however, a comprehensive presentation of procedure before all international tribunals.

1. Mani defines international procedure as "the actual procedure before an international tribunal commencing from initiation of proceedings, through presentation of pleadings, oral proceedings, evidence, incidental proceedings, and post-decisional proceedings." V.S. MANI, *INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS* 10 (1980).

2. S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* (1965). Rosenne's *PROCEDURE IN THE INTERNATIONAL COURT: A COMMENTARY ON THE 1978 RULES OF THE INTERNATIONAL COURT OF JUSTICE* has not yet been published. For other important works on international procedure, see C.M. BISHOP, *INTERNATIONAL ARBITRAL PROCEDURE* (1930); K.S. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* (1946); A.H. FELLER, *THE MEXICAN CLAIMS COMMISSIONS 1923-34: A STUDY IN THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* (1935); M.O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942* (1943); R.C. MORRIS, *INTERNATIONAL ARBITRATION AND PROCEDURE* (1911); J.H. RALSTON, *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* (1926); 8 J. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: INTER-STATE DISPUTES AND THEIR SETTLEMENT* (1976).

3. Mani, *A Review of the Functioning of the International Court of Justice*, 11 *INDIAN J. INT'L L.* 27 (1971); Mani, *Audi Alteram Partem: Journey of a Principle from the Realms of Private Procedural Law to the Realms of International Procedural Law*, 9 *INDIAN J. INT'L L.* 381 (1969); Mani, *Interim Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the UN Charter*, 10 *INDIAN J. INT'L L.* 359 (1970); Mani, *On Interim Measures of Protection: ICJ Practice*, 13 *INDIAN J. INT'L L.* 262 (1973); Mani, *The Advisory Opinion in Namibia Case: A Critique*, 11 *INDIAN J. INT'L L.* 467 (1971); Mani, *The Barcelona Traction Case (Second Phase) 1970 through the International Court: A Case Comment*, 11 *INDIAN J. INT'L L.* 112 (1971).

The author hardly mentions the Court of Justice of the European Communities and his description of the 1978 Rules of the International Court of Justice⁴ never reaches the level of critical commentary. His presentation of materials through the early 1970's is complete, but later developments, such as the oil concession arbitrations⁵ and the decisions of the International Court of Justice after 1974, are omitted. Finally, Mani ignores several significant French and Italian scholarly works on the subject.⁶

An outstanding feature of Mani's study is its presentation of arbitration practice, emphasizing proceedings before mixed claims commissions and tribunals. The author's historical discussion brings early arbitration practice to the modern lawyer's attention. Most of those cases arose in Anglo-American settings and involved claims of individuals against foreign states. Mani's treatment of this area is especially valuable in view of the developing arbitration practice between states and foreign nationals, as in the oil concession arbitrations.⁷

Unfortunately, Mani does not follow his excellent treatment of early arbitrations with an adequate consideration of recent developments. His analysis of the 1958 Model Rules on Arbitral Procedure⁸ is insufficient. He does not address in detail the World Bank Convention,⁹ its International Center for the Settlement of Investment Disputes (ICSID) or the arbitration rules it promulgated.¹⁰

4. 4 I.C.J. Acts & Docs. 92 (1978).

5. *Libyan Am. Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic*, 62 I.L.R. 141 (1977); *Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Republic*, 53 I.L.R. 389 (1975) (preliminary award), *merits decided*, 53 I.L.R. 422 (1977); *BP Exploration Co. (Libya) v. Government of the Libyan Arab Republic*, 53 I.L.R. 297 (1973), *re-opening denied*, 53 I.L.R. 375 (1974).

6. *See, e.g.*, M. BOS, *LES CONDITIONS DU PROCES EN DROIT INTERNATIONAL PUBLIC* (1957); A. DEL VECCHIO, *LE PARTI NEL PROCESSO INTERNAZIONALE* (1975); G. GUYOMAR, *COMMENTAIRE DU REGLEMENT DE LA COUR INTERNATIONALE DE JUSTICE. INTERPRETATION ET PRATIQUE* (1973); B. SCHENK GRAF VON STAUFFENBERG, *STATUT ET REGLEMENT DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE. ELEMENTS D'INTERPRETATION* (1934).

7. *See supra* note 5.

8. 13 U.N. GAOR Supp. (No. 9) at 5, U.N. Doc. A/3859 (1958), *reprinted in* 53 AM. J. INT'L L. 239 (1959).

9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

10. ICSID Doc. No. 4, pt. D (1967), *reprinted in* 7 I.L.M. 351, 376 (1968). For a discussion of the first arbitration utilizing the ICSID facilities, see Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123 (1980).

The UNCITRAL Arbitration Rules of 1976¹¹ are not even mentioned. The author thus missed an opportunity to blend or “cross-fertilize,” to use J.G. Wetter’s expression,¹² historical arbitration practice with the most recent developments. One can only hope that he will pursue that worthy goal in the future.

The introduction clearly indicates that the author’s intent was to treat only selected aspects of international procedure which are relevant to the communicative process. Mani views the communicative process as the main function of international adjudication. He explicitly excludes such topics as default, special chambers, settlement/discontinuance, the post-judgment issues, and the internal practices of the courts. Hence, some of the most urgent problems of international procedure are not discussed.

The most serious flaw in the communicative process of current international adjudication is default. Default occurs when one of the parties refuses to participate in the communicative process, as it has been traditionally understood, by declining to appear before the appropriate tribunal. Since 1972, all seven proceedings instituted in the International Court of Justice by unilateral application have been default cases.¹³ In a default situation, the principle of *audiatur et altera pars*¹⁴ is of overwhelming importance. The exclusion of default from *International Adjudication* is therefore inexplicable, particularly in light of Mani’s emphasis on the *audiatur* principle.

The author discusses both arbitral and judicial procedure. He recognizes that differences exist between the rules of procedure for ad hoc tribunals and for preconstituted tribunals. Mani rightly advocates a “contextual approach to procedure”¹⁵ and speaks out for flexible rules that “must be compatible with the type of tribunal before which they are sought to operate and the nature of the

11. 31 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/31/17 (1976), reprinted in 15 I.L.M. 701 (1976).

12. 1 J.G. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS. PUBLIC AND PRIVATE* 3 (1979).

13. See 1979-80 I.C.J.Y.B. 114 n.2 (1980).

14. The term is synonymous with the right to be heard or due process. See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY THE INTERNATIONAL COURTS AND TRIBUNALS* 291 (1953).

15. V.S. MANI, *supra* note 1, at 5.

controverted claims awaiting solution.”¹⁶ He consistently separates the procedural rules for different types of tribunals. Unfortunately, he does not clearly indicate those features of the communicative phase which distinguish tribunals for the resolution of interstate disputes from tribunals for the resolution of claims by individuals against a foreign state. Those differences may lead to widely divergent rules of procedure.

Mani thus portrays “the state of [the] law on the basis of empirical evidence”¹⁷ by presenting only selected aspects of international procedure which relate to the technical side of the communicative process. For the material it presents, his study is commendable. Unfortunately, it ignores the real defects in international procedure, their origins, and possible remedies.

II.

In chapter II, Mani develops a definition of fundamental procedural rights. His formulation encompasses “ ‘certain fundamental rules of procedure’ . . . which are ‘inherent in the judicial process’ . . . and . . . ‘generally recognized in all [municipal] procedures.’ ”¹⁸ According to Mani, such principles include *audiatur et altera pars*, also known as *audi alteram partem*, or the right to be heard and the principle of equality of the parties. The *audiatur* and equality principles are complementary and inseparable from the principle of impartiality. Yet, the first two have different origins. The equality principle is based on the structure of international law; it emanates from the consent basis of international arbitration and adjudication between states and from the sovereign equality of states. The *audiatur* principle, in contrast, has made the “journey of a principle from the realms of private procedural law to the realms of international procedural law.”¹⁹

Problems arise in applying fundamental procedural rights to actual cases, not in reaching a consensus about their validity.²⁰ The

16. *Id.*

17. *Id.* at 6.

18. *Id.* at 12 (quoting K.S. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 38 (1946)).

19. This is the title of one of Mani's articles concerning the *audi alteram partem* principle, *supra* note 3.

20. Mani argues that the *audiatur* principle is a general principle of law recognized by most legal systems, but notes that transposition of this municipal principle onto the body of

audiatur principle discussed by Mani is, in the opinion of this reviewer, so vaguely formulated that almost everyone would agree with it, and it probably exists in most municipal legal orders.

The first step in the application of basic principles is defining their place among other tools of decision. A preconstituted tribunal should resort to general principles only after having considered its constitutional instrument and rules. An ad hoc tribunal should examine general principles only after having considered its jurisdictional instrument/*compromis* and possibly its promulgated rules. Once the tribunal has concluded that it must invoke basic principles of procedure, it must decide which specific rights flow from those principles. Mani lists six specific rights that flow, in his view, from the *audiatur* and equality principles: the right to composition of the tribunal, the right to be heard, the right to due deliberation by a duly constituted tribunal, the right to a reasoned judgment, the right to a tribunal free from corruption and the right to proceedings free from fraud.²¹

Mani concisely presents the practice of international courts and tribunals with regard to those six rights. The discussion reveals that many of the limitations on those rights are highly technical. At the same time, he emphasizes that flexibility and the absence of technicalities are the essence of international procedure. The author concludes that failure to observe these fundamental rights results in a denial of justice. He does not, however, analyze the consequences of such denial, which might include nullity and the revision of decisions.

In chapter III, Mani examines the legal formalities required to initiate international proceedings. This reviewer disagrees with Mani's characterization of the application/*compromis* as *l'acte introductif*.²² That document is not of a mere "informal" character.²³ It is the very point of departure for the facts to be considered, the law to be applied, the determination of the subject matter of the

international law may not necessarily be successful. V.S. MANI, *supra* note 1, at 20. For a prominent example of a mere transposition onto the international level, see BIN CHENG, *supra* note 14, at 290-98. For a critical approach, see von Mangoldt, *La comparaison des systemes de droit comme moyen d'elaboration de la procedure des tribunaux internationaux*, 40 ZEITSCHRIFT FUR AUSLANDISCHES OFFENTLICHES RECHT UND VOLKERRECHT 554 (1980).

21. V.S. MANI, *supra* note 1, at 25-36.

22. *Id.* at 78.

23. *Id.*

dispute and is the "critical date" for amendments of pleadings and submissions.²⁴ Similarly, Mani's treatment of the concept of seisin does not reveal its critical importance.²⁵

Mani examines written proceedings at length in the fourth chapter. He focuses on the problems of simultaneous, as opposed to successive, presentation of "pleadings." He does not elaborate the problems involved in default proceedings nor discuss the practice of the International Court of Justice regarding the institution of a quasi-preliminary objections phase without formal objections.²⁶ The treatment of dilatory pleas (preliminary objections) is descriptive rather than problem-oriented. Without supporting argument, Mani asserts that international courts have the inherent power to entertain and to raise preliminary objections *suo motu* (*proprio motu*). That proposition is disputable and needs to be supported.

The discussion of ancillary claims reveals that different types of international tribunals may not be treated in the same way. Mani asserts that counterclaims and set-offs do not arise "and in the nature of things cannot", arise before an international tribunal."²⁷ Such a statement is too sweeping.

The critical problems surrounding submissions and their interpretation are developed inadequately. Mani had no lack of sources from which to draw material. The Nuclear Test Cases of 1973-74²⁸ provide sharply divided concurring and dissenting views²⁹ in addi-

24. See M. BOS, *supra* note 6, at 41; 2 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 509-25 (1965). That point has been criticized elsewhere. See Book Review, 76 AM. J. INT'L L. 660-61 (1982).

25. Cf. I. SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION: COMPETENCE DE LA COMPETENCE* 84-89 (1965).

26. The difficult and controversial question is whether the International Court of Justice may on its own motion initiate a preliminary phase examining its jurisdiction and the admissibility of the application. See, e.g., Fisheries Jurisdiction (W. Ger. v. Ice.), 1973 I.C.J. 12 (Judgment of Feb. 2); Fisheries Jurisdiction (U.K. v. Ice.), 1972 I.C.J. 12 (Interim Protection Order of Aug. 17).

27. V.S. MANI, *supra* note 1, at 134 (quoting J.H. RALSTON, *supra* note 2, at 211).

28. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Judgment of Dec. 20); Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Judgment of Dec. 20).

29. See Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. at 479 (Forster, J., concurring), 480 (Gros, J., concurring), 483 (Ignacio-Pinto, J., concurring), 494 (Onyeama, J., Dillard, J., Jimenez de Arechaga, J., Waldock, J., dissenting), 524 (de Castro, J., dissenting), 525 (Barwick, J., dissenting); Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. at 275 (Forster, J., concurring), 276 (Gros, J., concurring), 298 (Petren, J., concurring), 308 (Ignacio-Pinto, J., concurring), 312 (Onyeama J., Dillard, J., Jimenez de Arechaga, J., Waldock, J., dissenting), 372 (de Castro, J., dissenting), 391 (Barwick, J., dissenting).

tion to the opinions of the Court. Furthermore, those opinions have inspired heated debate among legal scholars and practicing lawyers.³⁰ The fourth chapter concludes with very enlightening comments on publicity and language problems in international proceedings. The fifth chapter aptly summarizes the technicalities and problems of oral argument.

The author considers the production of evidence in detail. Yet, astonishingly, he does not take note of a fully revised 1975 edition of Durward Sandifer's *Evidence Before International Tribunals*.³¹ Furthermore, Mani does not emphasize sufficiently the problems of judicial notice, which have recently led to heated controversies before the International Court of Justice³² and even before arbitral tribunals.³³ Mani inadequately examines the power of tribunals to procure evidence and the 1978 Rules of Court of the International Court of Justice,³⁴ which enlarge the powers of the Court considerably, but questionably. Article 62 empowers the Court to call upon a party at any time to produce evidence or to furnish explanations or "to itself seek other information for this purpose."³⁵ Article 72 provides parties the opportunity to comment only upon evidence or explanations supplied by another party.³⁶ If the Court, however, acquires information from a source independent of the parties, it need not grant the parties an opportunity to be heard on that information. In this reviewer's opinion, the *audiatur altera pars* principle should apply to that situation as well.³⁷ Recent practice before the International Court of Justice and scholarly writing reveal that the procedure of the Court suffers from an underdeveloped *audiatur* principle. The International Court of Justice thus

30. See, e.g., H. FALSAFI, L'AFFAIRE DES ESSAIS NUCLEAIRES DEVANT LA COUR INTERNATIONALE DE JUSTICE (1978); MACDONALD & HOUGH, *The Nuclear Tests Case Revisited*, 20 GER. Y.B. INT'L L. 337 (1977).

31. D. SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* (2d ed. 1975).

32. See *supra* notes 28-29.

33. See Bowett, *The Arbitration Between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches*, 49 BRIT. Y.B. INT'L L. 1 (1978); Sinclair, *Some Procedural Aspects of Recent International Litigation*, 30 INT'L COMP. L.Q. 338 (1981).

34. See *supra* note 4.

35. *Id.* art. 62.

36. *Id.* art. 72.

37. See G. Wegen, *Mootness in the Contentious Jurisdiction of the International Court* (May 26, 1981) (LL.M. thesis, Harvard University School of Law). See also *supra* note 33.

seems to be emerging as a partner of the courts of continental Europe, whose methods are rather inquisitorial.³⁸

The chapter on intervention summarizes its history and practice. Mani's observations and conclusions have recently been partly affirmed and partly rendered obsolete by the International Court of Justice's judgment concerning Malta's application to intervene in the Tunisian-Libyan dispute over their boundary on the continental shelf.³⁹ The chapter on interim measures of protection is based mainly on two earlier publications by Mani.⁴⁰ Most of the issues that were formerly in dispute have been resolved to some degree by the seven cases involving the "injunctions" that have been before the International Court of Justice in the last ten years.⁴¹

III.

International Adjudication presents abundant material, particularly concerning the practice of early mixed claims commissions and tribunals. For that, it is commendable. It may prove significantly helpful for the developing practice of adjudication of claims between states and nationals of other states.

*Gerhard Wegen**

38. Advocating a decidedly stronger, more inquisitorial International Court is its former President. See Lachs, *The Revised Procedure of the International Court of Justice*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 21 (1980). It may be noted that, in a different context, Soviet Judge Morozov invoked a "sovereign right" of the Court in procedural matters. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1982 I.C.J. 6, 11 (1982) (Order of Jan. 20) (Morozov, J., dissenting).

39. *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1981 I.C.J. 2 (Judgment of Apr. 14).

40. See *supra* note 3.

41. See *supra* note 13.

*Instructor and Research Associate, University of Tubingen School of Law, Tubingen, West Germany. Degree in Law 1975, University of Tubingen School of Law; LL.M. 1981, Harvard University School of Law.