United Nations
GENERAL ASSEMBLY
TWENTIETH SESSION
Official Records

SIXTH COMMITTEE, 894th MEETING

Thursday, 9 December 1965, at 11 a.m.

NEW YORK

CONTENTS

Chairman: Mr. Abdullah EL-ERIAN (United Arab Republic).

AGENDA ITEM 92

Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade (A/5933; A/C.6/L.571, L.572, L.579 and Add. 1 and 2)

1. Mr. USTOR (Hungary) said that during the debate on items 90 and 94 he had pointed out that the Hungarian Government's proposal to consider the steps to be taken for the progressive development of private international law with a particular view to promoting international trade flowed directly from the principle of co-operation. The duty of States to co-operate carried with it the obligation to define the rules which were to govern that co-operation and to regulate all fields of activity of importance in achieving the common goals of mankind. Economic development in general and the promotion of international trade in particular certainly were among those goals. He read out General Principles Four and Six adopted by the United Nations Conference on Trade and Development,[1] in which those objectives were expressly formulated. They placed particular emphasis on the need to create conditions of international trade conducive to the achievement of a rapid increase in the export earnings of developing countries and to the promotion of an expansion and diversification of trade among all countries, regardless of level of development or economic and social system. If such an expansion and diversification were generally goals, it followed that co-operation should extend to the removal of the obstacles to the fulfilment of those goals. His delegation particularly wished to draw attention to the legal barriers.

2. The laws governing trade relations were traditionally part of domestic law, that is, the law of every country. But the laws of the various countries differed widely. In the first place, there were different legal systems and since they were based on the economic structure of a particular society, they differed according to the economic and social order of the State. Even the legislation of States with the same economic and social systems might show substantial divergencies, as, for example, the difference between the legal systems of civil law and common law countries.

3. In international trade the questions to be regulated by law were essentially the same: offer and acceptance of trade contracts, their conclusion and performance; examination, acceptance and rejection of the purchased goods; transfer of property from the seller to the buyer; the question of who was to bear the risk of accidental loss; the rights of the buyer arising out of the seller's failure to fulfil a contract; the rights of the seller in case of non-payment; the meaning and effect of force majeure. Those were only some examples of the problems arising in that branch of law, which affected the international sale of goods. The solutions proposed for those and similar problems by the laws of different countries varied not only among countries with different legal systems, but even among those belonging to one and the same legal family. Not only did the laws governing trade embody different substantive rules, even the ideas on which they were based might have different meanings in different States. Those differences might apply not only to complex ideas such as failure to comply with a contractual obligation, but to the definition of a word as simple as the word "dozen" which, in some parts of the world, meant not twelve, but thirteen.

4. The laws of different countries also showed divergencies on the question of when and how foreign law was to be applied in cases where trade flowed across State boundaries. Certain rules, known as rules of private international law or rules on the conflict of laws, provided an answer to that question. In most cases, the parties could agree that their contract would be governed by the laws of one country, but that right was subject to many different kinds of limitations so that an agreement of that kind might be recognized by the courts of one country and denounced wholly or partly by the courts of another country. A common feature of international trade was the widespread use of arbitration tribunals. That was a very encouraging phenomenon, but one problem still remained: what law applied when, as was often the case, the parties had not made any stipulation on the subject.

5. It was really paradoxical that international trade which, by its very nature, tended to be universal, should be governed by such a chaotic diversity of laws. As trade relations developed and the pattern of international trade became more complex, the situation became increasingly anachronistic, especially as nations became more and more interdependent. That

[1] See Proceedings of the United Nations Conference on Trade and Development, vol. I, Final Act and Report (United Nations publication, Sales No.: 64.II.B.11).

had long been recognized by States, international organizations and jurists. The question therefore arose whether there was any way to alter the situation and bring about a rapprochement between legal systems based on fundamentally different economic and social structures.

6. In the law of international trade, it was an absolute necessity, by the very nature of things, to work out a common language. The improvement of the means of understanding and the refinement of the common language of law was of concern to all who wished international trade to develop in a spirit of good faith. Not only the diversity of national laws governing international trade, but the existence of common interests in the world community were well-known phenomena which had led to unilateral, bilateral and multilateral efforts to make those laws similar or uniform. In its background paper (A/C.6/L.571), the Hungarian delegation had quoted several scholars all of whom stressed the need to improve the situation through international action. To illustrate the consensus of opinion on that subject among experts from such diverse parts of the world as the Soviet Union and the United States, Yugoslavia and the Ivory Coast, he referred first to the views of Professor Romashkin of the Soviet Union, who had pointed out that since the establishment of the Soviet State, the USSR Government had sought to promote international trade and that lawyers had an important part to play in considering the problems of international trade, as, for example, those relating to the general terms of delivery and standard contracts.[2] From the other side of the world, Arthur H. Dean had recognized, in an article entitled "The importance of international law in the maintenance of peace", that "the clear need for agreements on international law relating to the complex problems of world commerce ...". "To ensure that all peoples can benefit from increased international trade", he had written, "it is important that the rules of law be established governing such trade ...".[3] Professor A. Goldstajn of Yugoslavia had noted the great importance of promoting trade co-operation among all countries on the basis of equality and mutual advantage and believed that "an attempt should be made to achieve the unification of the fundamental principles of the law of international trade on the international level".[4] In a study defining the interests of States in international trade, even trade involving individuals or firms, the late Judge Ernest Boka of the Ivory Coast had referred to the extreme difficulty experienced by the developing countries in linking their economy with the complicated mechanism of international trade developed throughout the centuries without their active participation and without regard to their own economic needs.[5]

7. He drew the Committee's attention to the date contained in the background paper submitted by his delegation and in the note prepared by the Secretariat (A/C.6/L.572). Many international agencies had taken and were taking theoretical and practical measures for the development of international trade. All were doing useful work and the Hungarian delegation had no intention of encroaching on their activities. It merely sought to establish sound co-ordination among those various activites in order to give new impetus to that work. Their activities had the following characteristics in common: most, if not all of those agencies worked on the regional level; some of them, like the International Institute for the Unification of Private Law and The Hague Conference on Private International Law, did not deal exclusively with international trade, but were concerned with other fields as well; in most cases, they worked independently from one another and there was no co-ordinating organ. The results achieved did not warrant the view that no further efforts should be made to develop the law of international trade both in depth and in scope. Lastly, the most striking feature was that the participation of the developing countries in those activites was nil or very minimal. The need to establish a closer liaison between the agencies working on the law of international trade and to make further efforts to eliminate the legal obstacles to the expansion of international trade had been expressly recognized at various meetings of high-level experts. The Hungarian delegation had cited examples in paragraph 70 of its background paper. It considered that, in view of the universal nature of the law of international trade and the vital material interests of the developing countries, the latter should participate in any activities affecting them. A body of international laws which would not be imposed by a supra-national authority, but would be accepted by sovereign States, might be formulated and embodied in international conventions. However, other methods should not be excluded, such as the adoption of standard contracts or the definition of general conditions of sale, which would produce more rapid results. In any event, it would be desirable for the substantive rules themselves to be unified. It was undoubtedly easier to harmonize laws when the contracting States had similar legal systems, but it could not be argued a priori that it was an impossible task when the legal systems were different.

8. Some might argue that international trade was a reality and that those engaged in it and not the United Nations should resolve the problems it presented. But that would be to misconstrue the United Nations Charter and disregard the duty of States to co-operate and the responsibilities of those entrusted with promoting the development of international law. It would likewise demonstrate a lack of interest in the developing countries, which hoped to increase their international trade, train a generation of merchants among their nationals capable of achieving that objective and establish their own State enterprises. It was particularly important for them that the law of international trade should be updated and guarantee the highest security so that they would not be at the mercy of more experienced trade partners.

9. The further question arose whether the General Assembly and the Sixth Committee were competent to deal with the question inasmuch as it was not part of traditional public international law. He stressed the need for a broader approach to public international law and remarked that, regardless of the category in which the question was classified, lawyers practising in the

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[2] Clive M. Schmitthof, The Sources of the Law of International Trade (London, Stevens and Sons, 1964), p. 261.

[3] International Law in a Changing World (Dobbs Ferry, New York, Oceana Publications Inc. 1963), p. 70.

[4] The Sources of the Law of International Trade (London, Stevens and Sons, 1964), p. 117.

[5] Clive M. Schmitthof, op. cit., p. 36.

field would concede that the field of public international law encompassed all relations governed by agreements between States. Theoretically, it might be argued that States had only an indirect interest in matters relating to the private sector, whether they involved individuals or companies. One counter-argument might be that at the time when States had arrogated to themselves the unlimited right to make war, jus ad bellum, they had not hesitated to include jus in bello in the body of public international law, whereas private interests, the interests of soldiers and prisoners, were also at stake. In order to maintain peace, States should have the right to concern themselves with the jus commercii, and it was important that the issue should not be confined to abstract relationships, and that the attention of lawyers should be drawn to trade relations as they existed. His delegation considered that the Sixth Committee, which was the legal conscience of the United Nations, was the appropriate body to decide the steps to be taken for the progressive development of the law of international trade. It admitted that the idea was not a new one since many authorities in several regions of the world had already said that it was both proper and urgent to consider the question. The problems it presented should be settled either by the General Assembly or by some other organ.

10. The Hungarian delegation agreed to the Secretariat's proposal (A/C.6/L.572) that experts should be asked to make a technical study of the question. It appealed to the members of the Committee to adopt the draft resolution which it had submitted together with other delegations (A/C.6/L.579 and Add.1), so that at its twenty-first session, the General Assembly might embark upon a detailed study of the item.

11. Mr. HERRAN MEDINA (Colombia) said that the question under consideration was not altogether a new one for the United Nations which, in the course of the considerable work of codification and progressive development carried out by its various organs, particularly the International Law Commission, had already had occasion to broach subjects bordering on or inseparable from private international law, e.g. the question of statelessness and that of international commercial arbitration, in which it had achieved fruitful results.

12. In its explanatory memorandum accompanying its request for the inclusion of the question on the agenda (A/5933), the Hungarian delegation stated that it was a matter of seeking not so much an international agreement on the rules to be applied by national courts and arbitral tribunals to settle conflicts of laws and legislations but rather the unification of private law and specifically international private law. In the circumstances, it might be asked at the very outset whether it was possible to consider as a contribution to the progressive development of private international law an endeavour which would be limited to the unification of positive private law and would expressly exclude everything related to the solution of conflicts of legislations which eminent writers regarded as the very essence of private international law.

13. Having regard to the results of the efforts made so far to solve the difficult and complex problems of private international law, the development of private law seemed unlikely to be achieved merely by the unification of the rules of positive private law to be found in municipal law. Such unification was, of course, conceivable and might solve once and for all the problems of international private law by the simple elimination of the latter. But the compilation of international civil and commercial law by the method of unification was an extremely difficult task on a world-wide scale. It had not been accomplished even in the numerous federal States where each unit of the federation had a separate legislature and its own private law. Moreover, in view of the amount of time and effort which had been devoted to the unification of certain branches of positive private law between two or more States, a logical conclusion was that even partial unification on a world-wide scale was, at that juncture, almost unattainable.

14. It was in the sector of conflicts of laws properly so-called and adjacent areas of law that the Committee might find it necessary to seek solutions of the grave problems of international private law, thus contributing more rapidly to its progressive development. At first sight, it might seem more practical, for the unification of the rules of private international law or "règles de rattachement", to think in terms of the conclusion of international agreements rather than the compilation of universally applicable civil and commercial codes. It was only in "super law" dealing with the spatial application of positive private law that positive results had been achieved but they were still partial and limited to certain geographic regions. It was not in that direction either that the Committee should look for solutions to all the problems of private international law. To solve them methodically, it would be necessary to begin by drawing up international conventional rules for the delimitation of the legislative competence of States in the field of private international law properly so-called.

15. To achieve uniformity of law, it would be necessary to create a supranational legislative system, which would presuppose that the world had evolved to the stage of unification of government authorities and which would enable a positive private law common to all mankind to be applied and enforced. Even then it might not be possible to guarantee the universal unification of private international law since, in the territory of one and the same federal State, e.g. the United States of America, Canada or Switzerland, there was a multiplicity of civil law enactments and systems of positive private law existing side by side and varying according to the states, provinces or cantons making up the federation. The result was that within one and the same country questions arose concerning the territorial limits of applicability of the various laws and, therefore, problems of intercantonal or interprovincial law which corresponded, within those federal States, to the problems of international private law in regard to the territorial limits of applicability of the positive private law of the various sovereign States.

16. Admittedly, with regard to civil and political rights, the United Nations Charter had established a certain essential basis of unification by demanding recognition of a minimum number of individual rights and by encouraging respect for human rights and fundamental freedoms, but the recognition of such

rights by every legislature in the world would not imply the legislative unification of municipal public law or of positive private law. A right might be guaranteed by law under different forms in accordance with the characteristic sociological features of the various nations and with their respective legal systems.

17. It seemed therefore that in the present state of law, universal standardization of positive private law, though a very laudable aspiration, was almost impossible to achieve.

18. On the other hand, an international agreement of universal scope, concluded under the auspices of the United Nations for the distribution, or even a rough demarcation, of the legislative competence of States in matters of private international law would be a beginning in the systematic solution of the fundamental problems arising out of the encroachment by one State on legislative matters which, theoretically, should be settled by another State. All those problems turned basically on the question of international legislative competence. The progressive development of private international law would take a great step forward if it was found possible, by means of a convention, to demarcate the domestic jurisdiction of States in private international law so that no State would attempt to apply its own rules of private international law in a domain which international jurists held to be within the legislative competence of another State.

19. Although the existence of standard rules of private international law in several or all States could not suffice to solve all the theoretical and practical problems involved and although the conclusion of very important multilateral treaties, to which a considerable number of States were parties, had not led to the disappearance of such problems, that path was still open for the elimination of a number of specific difficulties which with regard to certain features of private law were due to the existence of divergent national legal systems or courts. The States of the inter-American system, having the benefit of geographic proximity and cultural and social affinities, had obtained important results in regard to the progressive development and codification of both public and private international law, and that might be a useful example to similar bodies already existing or to be established. He cited the treaties relating to international civil, commercial and procedural law which had been concluded at the First South American Congress on Private International Law, held in Montevideo 1888-1889 as well as the Code of Private International Law or Bustamante Code which had been signed in 1928 at the Sixth International Conference of American States and ratified, although with certain reservations, by fifteen American States.

20. Europe likewise offered many examples of international collaboration in the codification and development of private international law culminating in the conventions, which had been signed in the course of a series of conferences held at The Hague between 1894 and 1928, concerning inter alia civil procedure, family law and the law of succession. The conventions on negotiable instruments were also worth citing; they had been adopted under the auspices of the League of Nations at the International Conference for the Unification of Laws relating to Bills of Exchange, Promissory Notes and Cheques, held in May-June 1930 at Geneva, [6] as well as the conventions which had been concluded at the Second South American Congress on Private International Law held at Montevideo in 1939-1940. If new multilateral efforts had not been undertaken since then, it was probably chiefly because of doctrinal departure from the internationalist trend, which had been losing its popularity since the turn of the century, in favour of the thesis that private international law was not transformed from the doctrinal point of view into public international law by the existence of formal international sources of private international law and that no universal system of private law really existed, despite the efforts at deductive interpretation inherent in the internationalist trend. Such conventions as those of The Hague and of Montevideo and such instruments as the Bustamante Code were binding on a few countries only and dealt with only a few of the elements which might constitute a system of the kind. That did not mean that no further effort should be made to solve the difficulties arising, particularly in trade, from the diversity of laws governing legal relations in regard to a particular international trade transaction; nor that the efforts at codification and progressive development should not be pursued even though, in the latter case, the rules were no longer considered international by contemporary legal doctrine.

21. Although the question on the agenda was about the steps to be taken for the progressive development of private international law, they were with a particular view to promoting international trade. Thus, the explanatory memorandum made reference to the unification of the law on the international sale of goods and on the conclusion of contracts and cited the special efforts of the United Nations to develop international trade. When considered thus from the point of view of the consequences that superimposed juridical situations might have on international economic relations, the question assumed a far more complex character. It might seem possible, in the field of private international law proper, to unify the rules determining which particular positive private law should be applicable among those concurrently affecting a legal relationship created by an international commercial contract. But there were several closely connected questions: first, the question of the nationality of the bodies corporate under private law, which had very important practical implications for the question of the international responsibility of States, one of the matters reserved by the International Law Commission for codification; and secondly, the question of the legal régime governing investments of foreign private capital in the developing countries as well as problems of jurisdiction in disputes arising from legal acts and from the private commercial or financial relations of an international character resulting therefrom.

22. The need to ensure a solid legal foundation for international commercial transactions, particularly those which made up the fabric of international economic relations, must not be forgotten or minimized by anyone wishing to encourage and regulate those economic relations in the interest of the developing

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[6] See League of Nations, Treaty Series, vol. CXLII, 1933-1934, No. 3313.

countries to whose economic growth the United Nations had devoted the current Development Decade. The most detailed expression of that aim was to be found in the recommendations of the first United Nations Conference on Trade and Development and in the work of the Trade and Development Board; and several resolutions of the General Assembly, of the Economic and Social Council and of the Conference itself dealt directly or indirectly with the elimination of obstacles, including those of a legal nature, to international trade.

23. With regard to the unification of positive private law on contracts, there would be considerable obstacles in the way of preparing universal uniform legislation on the subject and viable results could only be a very long-term affair. The rules in question were part of the municipal law and were connected with systems of national law within which they were blended with other branches of law to such an extent that any reform of that legislation intended to align it in accordance with a universally applicable type of law would have effects in each State on all the other laws. On the other hand it would seem possible, without too long a wait, to adopt uniform rules of private international law properly so-called in order to determine what law should govern the legal relations of contractual origin certain aspects of which fell under the jurisdiction of several States. The Permanent Court of International Justice had laid down: "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws. The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law." [7]

24. Of the legal acts the effect of which went beyond the territory of the State in which they were to be carried out, the most important from the point of view of international economic relations were those which took first place in international commercial and financial operations. Those acts were contracts and unilateral declarations of intention. Any attempt to standardize the rules of international private law on contracts must take into account a number of questions which were far from being simple because they were connected with other branches of the same law.

25. The first concerned the capacity of the parties. That might be governed by the personal law of the parties, which might be understood to mean the law of the State of which they were nationals or the law of their place of domicile; or they might be governed by the law of the State on the territory of which the contract was concluded or—as often happened in cases of commercial operations—if it was a matter of contracts by correspondence, by the law of the territory where the contract was supposed to have been concluded, or again according to some authorities by the law of the State in which the contract should take effect if it should take effect in one State only and if it was possible to designate that State. But if the legal relationship gave rise to a legal dispute, even if the parties had chosen any one of those legislations in an international convention binding on the State whose courts would take cognizance of the dispute for reasons of competence, the rule in the convention might be shown to be inapplicable if, as happened in conventions of that kind, there were reservations respecting the application of foreign laws contrary to the public policy of the State to which the court in question was subordinate. And even if under a clause to submit a dispute to arbitration the dispute was submitted not to the national courts but to arbitral tribunals, the execution of an arbitral award applying a foreign law contrary to the public policy of the State in which it should be carried out would also come up against the exception based on public policy.

26. Another question would be the choice under an international agreement of the legislations to which would be subordinate the legal relation that would govern the validity of the juridical acts and their effects: it might be a matter of the personal law common to the parties, of the law of the country in which the contract was concluded (solution adopted by the Bustamante Code) or of the law of the place where the contractual obligations were to be carried out (standard adopted in the Treaty concerning International Civil Law, signed at Montevideo in 1889). If it was not a matter of public policy, then the question of the law applicable when judging the validity of the act in question could be solved by an express or tacit agreement of the parties, according to the principle of the autonomy of will. The research carried out on that point by eminent authors and learned societies could be utilized in a systematic undertaking for the standardization of the rules of international private law with reference to juridical acts and in particular contracts, a task that could be usefully undertaken by the International Law Commission which might be requested to submit a report on the practical possibilities of carrying it out.

27. With regard to the question of nationality which was connected with international private law, properly so-called, the formulation of rules after a systematic study could be extremely useful in view of the implications of those questions with regard to international economic relations. The International Law Commission had undertaken the codification of the law of nationality including that of stateless persons. There were important precedents in that branch of law, such as the conventions still in force which had been signed under the inter-American system and dealt with nationality in general, the nationality of married women and the status of naturalized citizens who returned to take up residence in their countries of origin. The Convention on the Nationality of Married Women, drawn up on the initiative of the Commission on the Status of Women, was adopted by the General Assembly in 1956 and came into force in 1958. [8] In the same way the Convention relating to the Status of Stateless

[7] Publications of the Permanent Court of International Justice, Collection of Judgments, Series A. Nos. 20/21—Case concerning the payment of various Serbian loans issued in France, Judgment No. 14, 1929, p. 41.

[8] See United Nations, Treaty Series, vol. 309 (1958), No. 4468.

Persons [9] was one of the most important instruments drawn up by the United Nations. But there was still much to be done for the codification and progressive development of the law on nationality in general and, in particular, on the nationality of bodies corporate in private law, a question which had important effects on the international responsibility of the State and the legal system governing foreign private investments. At present those investments were being carried out most often through commercial companies. If a company that undertook private investments in a State was given a nationality, the responsibility of the State with respect to the law of that body corporate, considered from then onwards as an alien body, and above all with respect to the rights which might be owned by the State whose nationality had been adopted by the company in question, would not be the same if the company in question possessed no nationality at all. In order to secure the situation of private investment he would emphasize that it was important to establish a system of bilateral conventions respecting the guarantees to be given to those investments which constituted one of the most stimulating factors for economic development. In connexion with that aspect the United Nations Conference on Trade and Development in its Recommendation A.IV.12 had referred to the plans prepared by the International Bank for Reconstruction and Development (IBRD) [10] with a view to setting up arbitration machinery for the settlement of disputes between investors and the States in which their investments were placed. At the meetings in Santiago de Chile and Tokyo, IBRD had studied the question and came to the conclusion that it would be advisable to adopt a convention on optional or voluntary, as against compulsory, arbitration, so as not to prejudice in principle the primacy of the municipal jurisdiction of a State. From another point of view, those questions were also connected with the problem of the legal status of aliens, concerning which the Sixth International Conference of American States had drawn up a Convention regarding the Status of Aliens which had been signed and ratified by thirteen States. [11]

28. The conflicts of law regarding competence constituted another legal aspect of international commercial and financial operations. The situation was fairly satisfactory at present by reason of the progress achieved in favour of the systemization of international commercial arbitration. The bilateral agreements concluded mainly between European countries with a view to recognizing the validity of the arbitration clauses were followed by studies carried out by the League of Nations which led to the Protocol of 1923 [12] and the Convention of 1927 [13] on the execution of foreign arbitral awards.

29. The American States had proceeded without delay to organize a multilateral system of commercial arbitration recommended in 1915 by the first Pan American Financial Conference. The establishment of that system and its gradual execution were marked by the resolutions of four international Pan American Conferences, the Governing Board of the Pan American Union, the fifth Pan American Trade Conference in 1935 and the Rio de la Plata Regional Conference in 1941. An Inter-American Commercial Arbitration Commission, established in 1934, had contributed decisively to the success of the operation of that regional system of commercial arbitration, due in the main to the regulations which it adopted. The system was based on the participation of the private commercial bodies of the American States. Connected now with those operating in other parts of the world it had given proof of its utility and efficacy which was restricted solely in certain cases by the inadequate adaptation of the municipal legislation of the States governing recognition of the validity of the respective arbitration clauses and the special arbitration agreements.

30. In connexion with that world movement set off to a great extent by private trade associations, a United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards [14] had been signed in 1958 and came into force on 7 June 1959. The United Nations Conference on International Commercial Arbitration, of which that Convention was a result, had also adopted a resolution under the terms of which the United Nations through its competent organs did everything possible to encourage the study of new measures likely to increase the efficacy of arbitration in the settlement of disputes in private law. In 1959 the Economic and Social Council had adopted resolution 708 (XXVII) under which the Economic Commission for Europe had drawn up a European Convention on International Commercial Arbitration and the Economic Commission for Asia and the Far East had set up in its own secretariat a centre for the development of commercial arbitration.

31. With regard to the settlement of private disputes on questions of international trade the situation had become quite satisfactory: the parties frequently resorted to the clauses regarding submission to arbitration which gave to the contract including such clauses the desirable legal foundation. But with regard to international commercial operations based on contracts without an arbitration clause there was still much work to be done with respect to education and information as stated in the Economic and Social Council resolution mentioned.

32. Finally, the Colombian delegation was of the opinion that it would be desirable to invite the International Law Commission to submit to the General Assembly at its twenty-first session a report in which it would state if it would be possible for it to undertake the tasks of the progressive development and codification of private international law, with a view in particular to preparing projects on the delimitation of the legislative competence of States in that subject, on the unification of the rules of international private law relating to the legislation that should govern the validity and the effects of contracts and the capacity to contract and, finally, on nationality, in particular

[9] Ibid., vol. 360 (1960), No. 5158.

[10] Proceedings of the United Nations Conference on Trade and Development, vol. I, Final Act and Report, p. 50 (United Nations publication, Sales No.: 64.II.B.11).

[11] See League of Nations, Treaty Series, vol. CXXXII, 1932-1933, No. 3045.

[12] Ibid., vol. XXXVII, 1924, No. 678.

[13] Ibid., vol. XCII, 1929, No. 2096.

[14] United Nations, Treaty Series, vol. 330 (1959), No. 4739.

the nationality of dodies corporate in private law and, above all, of commercial companies.

33. Mr. KRISPIS (Greece) said that the rules of private international law had existed in olden times (for example, Isocrates' Aegineticus, 393 B.C.), and the very trial of Jesus Christ was connected with a question of conflict of laws.

34. By private international law was traditionally meant the rules which determined the scope of application of the laws of each State in a given matter relating to private individuals. Thus, the marriage of a Greek man and a French woman raised the question of which law must be applied in order for the marriage to be valid. French law, Greek law or any other law might be applicable, depending on the circumstances (law of the place of celebration of the marriage, etc.). It was assumed—in his opinion, wrongly—that in the example cited the various laws competed with each other. As the International Court of Justice had stated in the case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (the Boll case): "The 1902 Convention [i.e. private international law] was designed to put an end to the competing claims of several laws to govern a single legal relationship".[15]/ In other words, it was assumed that there was a conflict between the laws of the various States which must be resolved by the rules of private international law (also known as the rules of conflict of laws).

35. Was private international law really part of international law, however? There were basically two schools of thought on that point: one held that private international law constituted a part of international law lato sensu, while the other held that it belonged to the municipal law of each country. If the second point of view still prevailed in the field of legal theory—so that "private international law" could be said to be a misnomer, since it was neither private nor international—it was mainly for historical reasons. One of the greatest obstacles to classifying private international law as international law had been the opinion that only States could be subjects of international law, which could therefore be concerned only with the rules governing relations among States as such. Little by little, that opinion had lost ground, however, and the view that private international law should be regarded as a part of international law had begun to gain currency.

36. The theory that private international law was part of municipal law was subject to an important exception which had been clearly stated by the Permanent Court of International Justice in its judgement in the case concerning the payment of various Serbian loans issued in France, and in the case concerning the payment in gold of the Brazilian Federal Loans issued in France (July 12th 1929), as follows:

> "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law, or the doctrine of the conflict of laws. The rules thereof may be common to several States, and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law."[16]/

37. No one would think of questioning the validity of the statement that the rules of private international law arising out of international conventions, such as the 1902 Convention already referred to, or from international custom, such as the rule of locus regit actum, possessed the character of "a true international law". Moreover, it should also be affirmed that "the general principles of law recognized by civilized nations", to use the words of Article 38, paragraph 1 (c) of the Statute of the International Court of Justice, were part of true international law. That third source of private international law was extremely important, because a great many rules of private international law of various States were similar in content, were of a general character, reflected ideas of both justice and convenience, and had been in force for a long time, so that they could be regarded as satisfying the criterion of general principles of law recognized by civilized nations and, hence, as rules of international law. That being so, it was high time for the United Nations to start contributing to the internationalization of various selected topics of private international law by initiating procedures and exploring ways and means of bringing about the adoption of international conventions in the matter.

38. There were other reasons why the United Nations should take initiatives in that field. As the Permanent Court of International Justice had said in the cases already referred to, only agreements "between States in their capacity as subjects of international law" formed part of international law. Agreements in which at least one of the parties was a private individual were "based on the municipal law of some country". Consequently, international law had nothing to do with such agreements, even when States were parties to them. That meant that when the Government of a State entered into a contract with a foreign company, the contract was valid only if the municipal law of a given country recognized it as valid. But which country's municipal law was to govern such a contract? That question had to be answered by a rule of private international law. However, since those rules were the product of the legislative authority of each State, the question was which State's point of view should be adopted in determining the law to be applied in order to test the validity of the contract. If the rules of private international law of the State party to the contract were applied, it would most probably be found that the law governing the contract was the municipal law of the State concerned. It followed that that State could amend its law in such a way as to free itself from some of its obligations under the

15/ Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958: I.C.J. Reports 1958, p. 71.

16/ See Publications of the Permanent Court of International Justice, Collection of Judgments, Series A, Nos. 20/21—Case concerning the payment of various Serbian loans issued in France, Judgment No. 14, 1929, p. 41.

contract. It might then happen—and it frequently had happened—that the private individual who was a party to the contract applied to his Government for protection, whereupon that Government took up the case itself, thus bringing it within the field of international law, and invoked the rule that no State could avail itself of its own municipal law in order to avoid international obligations. There was a contradiction in that, however, since the original premise had been that the contract which had not been fulfilled was a contract under municipal law. The problems connected with agreements in which at least one of the parties was a State and at least one a private individual had not yet been explored. It was apparent that the increasing activities of all States in the field of trade and industry, extending as they did beyond the frontiers of the States concerned, called for some legal regulation of an international character, such as general multilateral conventions. The need for such conventions was being increasingly felt, especially since the emergence of new States which had extensive natural resources and called upon foreign capital to develop them. Since prospective investors feared that those States might not fulfil their obligations, they understandably asked for guarantees in advance, while the States in question, naturally proud of their newly won independence, just as understandably were reluctant to grant strong guarantees.

39. As for international organizations, of which there were now more than one hundred, their emergence had caused a radical change in traditional international law as it had generally been formulated up to the end of the Second World War. Those organizations had problems which were of such a nature as to come within the field of private international law. Which law, for example, governed the various private law relationships in which a particular international organization was the subject or one of the subjects? Which law governed the contracts which the United Nations entered into every day, under the same conditions as private individuals, in many parts of the world? Which law governed wrongful acts committed at United Nations Headquarters? And where was the domicile of United Nations staff members for tax or other purposes? The treaties relating to the European Economic Community and the European Atomic Energy Community, for their part, contained some explicit provisions of private international law. Furthermore, the question of the law governing labour relations between international organizations and their staff was of great importance. Fortunately, a body of rules of private international law stricto sensu as well as rules of so-called substantive private international law already existed in that field, thanks to the decisions of the United Nations Administrative Tribunal and the League of Nations Administrative Tribunal, the latter having survived as the Administrative Tribunal of the International Labour Organisation, and some new international organizations such as the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization of the United Nations, the World Health Organization, the International Telecommunication Union and the World Meteorological Organization.

40. There was another very important matter. Human relations became legal relations only when they were expressly covered by the municipal law of a State. The Permanent Court of International Justice had stated categorically in the cases above cited on that point, that "any contract [and, to give a fuller picture, any relationship or situation] which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country". Moreover, there were many more legal systems in the world than there were States, since federal States, such as the United States, had as many legal systems as they did constitutent units, while some unitary States had separate legal systems for various territories, as in the case of the United Kingdom and its colonies. A given relationship or situation had legal consequences and legal value only if a specific legal system recognized such consequences or value. Thus, in the United States eighteen States still forbade marriages between Negroes and Whites, while in other countries, such as Greece, such legislation was against public policy ("ordre public international"). Laws of that type were therefore not applied in the territory of those other countries, so that two persons of different colour who properly declared their will to marry while in a country where no such prohibition existed would be validly married in the eyes of that country. The marriage would thus suffer from the defect of being valid in one country but invalid in another (a "lame marriage"). In countries where the marriage was not recognized, not only would the couple not have the status of married persons but their children would be illegitimate and the surviving spouse would not inherit from the other ab intestato. That example could be applied, mutatis mutandis, to all private law relationships and situations. It would be a mistake to think that a given right, obligation or situation was the same everywhere. Every legal system placed, or refused to place, a legal value on each human relationship, and when that value was recognized its content and scope were those which the legal system in question chose to give it. In theory, a given relationship could have as many aspects as there were legal systems in the world.

41. The existence, content and scope of a given relationship or situation must be considered, from a legal standpoint, through the eyes of a given State. Such a State was called, in the terminology of private international law, a forum. Thus, the validity of a commercial contract would be tested by one law if the forum was Greece, France or the United Kingdom and by a different law if the forum was Italy or the United States. Moreover, the rules of private international law were not the same in the various countries. In Europe, for example, lex patriae was generally applied in various cases whereas in the Anglo-Saxon countries lex domicilii was applied. It was natural that the parties to a contract should try to select as a forum a State whose private international law would lead to the application of a law which satisfied their particular interests (a phenomenon known as "forum shopping").

42. It was apparent that the large number of legal systems in the world, coupled with the national character of private international law, could lead to situations which affected either human rights (as in relationships under family law) or world trade (as in the law of contractual obligations), or both. Accordingly, it was very clear that the United Nations had a part to play with regard to private international law,

since all such matters came under one or another of the purposes and principles of the United Nations Charter.

43. Finally, there was a matter connected with the judicial settlement of international disputes which showed that private international law stricto sensu (considered as conflict of laws) came within the framework of the Charter. Under Article 36 of the Statute of the International Court of Justice, a dispute which was of such a nature as to come under private law could be brought before the Court. In such cases, the Court would have to apply the municipal law of a certain country. The same was true of other permanent, temporary or ad hoc international tribunals. In order to determine which municipal law they should apply, they should be able to turn to rules designed to resolve conflicts of laws, which might be termed international rules of private international law in the sense that they formed part of public international law applied by an international tribunal. Such rules did not yet exist, however, and in cases of need the Court would have to fill the gap. The Mixed Arbitral Tribunals set up under the Peace Treaties of 1919 and 1920 had frequently done that. The day would come when the United Nations, in order to promote the judicial settlement of disputes between States, would initiate studies leading to practical results in that regard.

44. Another branch of private international law which was rapidly expanding had recently appeared side by side with conflict of laws: rules of law which directly regulated the subject matter with which they dealt. They were known as substantive rules of private international law and they differed from the rules of conflicts of laws in that the latter simply indicated how to regulate certain relationships or situations by determining the State whose law was applicable, whereas the former provided for direct regulation of the relationships or situations having a "foreign element". There were two kinds of substantive rules which differed according to their sources: they were national when they were the product of the legislative authority of a State and international when they arose out of international conventions, international custom or the general principles of law recognized by civilized nations. Substantive rules of private international law were to be found in some decisions of arbitral tribunals which had to rule on inter-State cases coming under private law. It was interesting to note in that connexion that an Anglo-American arbitral tribunal had decided a case of private law on its calendar by applying rules unfamiliar to both English and American law. Since they were presumably rules of international law, it might be said that international law also contained rules of private law.

45. Among the achievements of the United Nations in the field of substantive private international law were the 1956 Convention on the Recovery Abroad of Maintenance [17] and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Hungary had apparently had substantive rules in mind when it had proposed the item for consideration. The desirability of facilitating private inter-State relations with a view to promoting the maintenance of orderly relations among States was generally accepted. The establishment and harmonious development of private relations extending beyond State frontiers was a factor for international stability and, hence, a factor for world peace and justice. With that objective in mind, efforts should be exerted to make the regulation of private relations universal. A marriage, a commercial contract or a will, for example, should be recognized throughout the world. There were two ways to achieve that universality: either by unifying private international law stricto sensu (conflict rules) or by unifying the municipal law of the various States. If all States adopted the same conflict rules, e.g. the rule that the validity of a contract was governed by the law of the place where it had been concluded, the same law would apply to a particular contract regardless of the forum from whose point of view the contract was considered. On the other hand, if the law of contracts was the same everywhere, it was immaterial in principle which law the private international law of a particular forum deemed applicable to a contract since the solution would be the same in any case. Of course, laws which were identical in two or more countries could be interpreted differently. For that reason an international court with the functions and powers of a supreme court of appeals ("cour de cassation") should be created. The International Court of Justice might be vested with those powers. The example of the Court of European Communities, which interpreted the constitutional treaties of the communities in a manner binding on national courts, was instructive. A bold and imaginative approach must be taken to the problems of international relations if they were to be dealt with successfully.

46. The international community could no longer ignore issues like those to which he had referred. It was true that various inter-governmental and non-governmental organizations and agencies, such as The Hague Conference on Private International Law, the Council of Europe, the International Institute for the Unification of Private Law at Rome, the International Commission on Civil Status at The Hague, the Economic Commission for Europe and, recently, the United Nations Conference on Trade and Development, were already dealing with questions of private international law in the broad sense; it might be asked, then, why the United Nations should enter the field. The reply was simple: because the matter came under Article 1, paragraphs 3 and 4 of the Charter, as read in conjunction with Article 13, paragraph 1.a, which, in dealing with the progressive development and codification of international law, naturally made no distinction between public and private international law. It was premature to discuss the course which the United Nations should follow for the best results, but the Committee should not rule out the possibility of asking the International Law Commission to undertake the study and preparatory work of codifying selected topics. The members of the Commission were particularly qualified for the task, although it should be borne in mind that the Commission had an extremely heavy programme of work. For the moment, his delegation had no definite opinion as to which United Nations body should deal with those aspects of private international law.

47. In conclusion, he wished to congratulate the Hungarian delegation on the timely initiative it had

[17] See document E/CONF. 21/7 (United Nations publication, Sales No.: 1965.V.4).

taken. The Committee's debate and—if it was adopted—draft resolution A/C.6/L.579 and Add.1 and 2, which Greece had co-sponsored, would unquestionably make history in the implementation of Article 13, paragraph 1.a of the Charter.

48. Mr. YASSEEN (Iraq) said that he wished to emphasize the importance of the development of international commercial law. As soon as trade relations extended, however slightly, beyond State frontiers, they created an international problem which should be internationally regulated and governed by international rules. However, the existing international legal order did not cover the field of international trade. Hence, the municipal law of each State helped to bridge that gap by providing rules applicable to certain aspects of international trade within the limits of its jurisdiction. Generally speaking, the positive sources of international law had not so far provided all the elements of international regulation. In the absence of substantive international rules governing the various aspects of international trade relations, States had had to confine themselves to resolving conflicts of laws, which had most often been done by national rules.

49. However, international trade had experienced the effects of the evolution in the role of the State and, in particular, of State interventionism. The State itself or certain more or less specific State organs were now parties to commercial transactions, and international trade was increasingly becoming a monopoly in certain States. For that reason, certain measures of adaptation and adjustment had to be taken. International trade created problems not only among individuals but, increasingly, among States or organs of the State. Thus, in certain fields, the distinction commonly made between public and private international law was likely to lose its practical significance even though, technically, it continued to exist.

50. He therefore welcomed the initiative taken by the Hungarian Government in proposing the item under discussion for inclusion in the agenda. It was high time for the United Nations to deal directly with the regulation of international trade, because the latter was one of the most important factors in coexistence, co-operation and mutual assistance. The problem was how to internationalize the regulation of international trade and what methods to employ for that purpose.

51. To begin with, international trade was a broad sphere of activity which created many different problems and could be internationally regulated; in particular, it could very well be made subject to unified regulation. The different approaches to the question resulted from differences in method rather than in moral or social philosophy. In some parts of the world, international regulation had already been carried out. He would draw attention to the praiseworthy efforts made at The Hague Conference on Private International Law, at which certain conventions had been drawn up, such as the Convention relating to a Uniform Law on the International Sale of Goods and the draft Convention on the Law governing Transfer of Title in International Sales of Goods. Moreover, conflict of laws governing sales in trade relations between States or their nationals was an item on the agenda of the Asian-African Legal Consultative Committee.

52. It was clear that basically private international life could be regulated either by the process of "rattachement", that is, selection of national legislation which was applicable in accordance with a rule on conflict of laws, or directly by substantive rules. Far from being mutually exclusive, the two methods were often complementary. The Hungarian delegation stressed the second solution. In any event, no decision should be made at present to give precedence to either solution or to delimit the field in which either should be applied. That could be done only after thorough study of the various aspects of international trade.

53. The "rattachement" method supplemented the method based on substantive international law in some existing systems of regulation of a few aspects of international trade. "The General Conditions of Delivery of Goods between Foreign Trade Organizations of Member Countries of the Council for Mutual Economic Assistance", a document signed by the European socialist countries belonging to the Council, were substantive rules which directly regulated trade among those countries, but their provisions were complemented by recourse to the "rattachement" system through the adoption of an important rule of conflict under which the basic law of the seller was applied in transactions involving the delivery of goods not regulated by the general conditions.

54. In his view, it would be sufficient for the present to affirm the need for international regulation of international trade, which was logical in view of the nature of the subject and seemed better able to take account of the realities of international life with a view to promoting trade between various States or the nationals of those States. The United Nations should undertake that task, including the work of harmonizing the various sets of international, regional and special regulations. Draft resolution A/C.6/L.579 and Add.1 and 2 was a useful first step in that task, and his delegation was therefore prepared to support it.

55. Mr. FULCI (Italy) said that the General Secretary of the International Institute for the Unification of Private Law at Rome had sent a communication to the United Nations; he proposed that the text should be circulated to the members of the Committee.

It was so decided.

The meeting rose at 1 p.m.

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