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SUMMARY RECORD OF THE TWENTY-FIRST MEETING

Held at Headquarters, New York,
on Thursday, 5 June 1958, at 2.45 p.m.

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President: Mr. SCHURMANN Netherlands

Executive Secretary: Mr. SCHACHTER

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Article XI (E/2704 and Corr.1, E/CONF.26/L.55)

Mr. KORAL (Turkey) said that, while he supported the Yugoslav amendment (E/CONF.26/L.55), he felt it should not introduce terms such as "res judicata", which was not used elsewhere in the Convention, and "final", the exact meaning of which had not been determined. He therefore proposed that the amendment should read: "This Convention shall apply only to arbitral awards rendered after the entry into force of the Convention".

Mr. BEASOROVIC (Yugoslavia) accepted the Turkish amendment.

Mr. POINTET (Switzerland) recalled that the primary purpose of the draft Convention was to facilitate the recognition and enforcement of foreign arbitral awards. Under the Yugoslav amendment, many awards would arbitrarily be denied the benefit of the Convention, which should apply to as many awards as possible. He therefore opposed the amendment.

Mr. COHN (Israel) agreed with the Swiss representative. While it was a recognized rule that conventions and laws should not be made retroactive, that rule should not apply to purely procedural instruments. Since the purpose of the draft Convention was to make recognition and enforcement as easy as possible, it would be in accordance with sound legal practice for it to apply to awards made before the Convention's entry into force.

Mr. KORAL (Turkey) thanked the Yugoslav representative for accepting his suggestion.

The purpose of the Yugoslav amendment was to exclude from the application of the draft Convention awards made many years ago and not enforced for one reason or another. To permit the revival of such cases might cause great trouble and expense.

Mr. POINTET (Switzerland) replied that cases on which a court had rendered a judgement could not be reopened. Consequently, the Convention would apply only to unenforced awards which had not been brought before the courts. Such awards could not be many and there was no reason to exclude them.

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Mr. GEORGIEV (Bulgaria) pointed out that, if the Yugoslav amendment were adopted as it stood, it would not be clear whether the words "entry into force of the Convention" applied to the country in which the award had been made or to the country in which it was sought to be relied upon. Since the two countries might accede to the Convention at different times, the point was material and should be clarified.

With respect to the question of retroactivity raised by the Israel representative he remarked that the draft Convention was not purely procedural, but also concerned questions of substance.

Mr. KORAL (Turkey) agreed with that remark. To make the draft Convention retroactive would be equivalent to antedating it by some ten or fifteen years, and that was certainly not the intention of the Conference. Furthermore, other difficulties might be caused by the fact that not all the States which would accede to the draft Convention were parties to the Geneva Convention of 1927.

He therefore supported the Yugoslav amendment.

Mr. HERMENT (Belgium) also supported the amendment. The Conference was creating new law, which, moreover, was not purely procedural; to make the draft Convention retroactive would greatly complicate the work of the judges in the country of enforcement, as they would have to look into many additional matters, all connected with foreign law. To meet the point of the Bulgarian representative, however, the Yugoslav amendment should be supplemented by some such form of words as: "in the country where the award was made and in the country where its enforcement is sought", making it clear that the Convention must have entered into force for both countries concerned.

Mr. ARNAUD (France) remarked that arbitral awards were the results of arbitration agreements entered into voluntarily and presumably in good faith. The majority of such awards were voluntarily enforced and the draft Convention would therefore apply retroactively only to awards whose enforcement had been prevented by the bad faith of the losing party.

Mr. RAMOS (Argentina) agreed with the French representative. Good faith was the basis of arbitration. There was no possible objection to the retroactivity of an instrument designed to facilitate an existing procedure, and he was therefore unable to accept the Yugoslav amendment.

Mr. BEASOROVIC (Yugoslavia) replied that the draft Convention was intended to facilitate procedure in the future; to make it retroactive would lead to great difficulties, especially with regard to States which had not acceded to the Geneva Convention of 1927.

The PRESIDENT put to the vote the Yugoslav amendment (E/CONF.26/L.55) as amended by Turkey.

The result of the vote was 17 in favour and 11 against, with 10 abstentions.

The Yugoslav amendment (E/CONF.26/L.55), as amended was not adopted, having failed to obtain the required two-thirds majority.

The PRESIDENT stated that there was general agreement to change the word "second" in paragraphs 1 and 2 of article XI to "third". He put to the vote the Belgian representative's proposal to replace the word "third" by "sixth".

The Belgian amendment was rejected by 14 votes to 2, with 19 abstentions.

Article XI, paragraph 2 of the Committee's text (E/2704 and Corr.1) was adopted by 36 votes to none.

Article XI as a whole was adopted by 39 votes to none.

Article XIII (E/2704 and Corr.1, E/CONF.26/L.56)

Mr. BAKHTOV (Union of Soviet Socialist Republics) introduced his amendment (E/CONF.26/L.56). Article XIII as it stood provided that States could be brought before the International Court of Justice without their consent. Such a procedure was entirely contrary to the principles of international law, in particular, that submission to the jurisdiction of the Court was entirely voluntary. The USSR amendment was intended to remedy that defect.

Mr. RAMOS (Argentina) stated that his delegation wished the following declaration to be included in the Final Act of the Conference:

"The Argentine Government reserves the right not to submit to the procedure indicated in article XIII any dispute directly or indirectly related to the territories mentioned in its declaration with respect to article IX."

Mr. MATTEUCCI (Italy) said he was unable to support the USSR amendment. If it were adopted, there would be a danger that, if the parties themselves could not agree, there would be no competent jurisdiction to effect a final settlement. Article XIII was designed to avert that very danger, particularly as regards countries not parties to the Statute of the Court, which might easily contest the Court's competence unless it was expressly stipulated in the draft Convention.

Mr. MAURTUA (Peru) thought that the word "negotiation" in article XIII, paragraph 1, should be replaced by the words "agreement of the parties". It would then be clear that the procedure, like all methods of pacific settlement, was to be voluntary.

The whole process of arbitration was based on voluntary agreement of the parties, and he was therefore in sympathy with the USSR amendment.

Mr. WORTLEY (United Kingdom) remarked that the 1927 Geneva Convention contained no provision similar to article XIII. The effect both of the article and of the USSR amendment would be to make the decisions of domestic courts open to challenge in international law. Even without such a provision, States would still be free to bring unresolved disputes to the International Court of Justice, and they should not be encouraged to do so. He therefore proposed the deletion of the article.

Mr. PSCOLKA (Czechoslovakia) remarked that the express agreement of the parties to accept the jurisdiction of the International Court of Justice was a basic principle of international law, set forth in the Statute and confirmed by subsequent practice. By virtue of its sovereignty, no State could be compelled to submit to the Court's jurisdiction. He supported the USSR amendment, without which his country would be compelled to make a reservation on article XIII.

Mr. MACHOWSKI (Poland) also found article XIII unacceptable. Any instrument prepared under the auspices of the United Nations should be in full conformity with the United Nations Charter and the Statute of the International Court of Justice. The present wording of article XIII went beyond article 36 of the Statute, which provided for voluntary acceptance of the jurisdiction of the Court. It was the prerogative of each sovereign State to decide whether or not it wished to submit a matter to the Court, and any such submission must therefore have the consent of both parties to a dispute, and not of only one of the parties, as provided in article XIII. It should be borne in mind that the draft Convention would apply not only to States which, while parties to the Statute, had not made a declaration recognizing the jurisdiction of the Court as compulsory, but also to States not bound by the Statute at all. He therefore strongly supported the USSR amendment.

Mr. SULLIVAN (United States of America) said the USSR amendment would render article XIII nugatory since there would be no assurance that a dispute could be finally resolved.

Mr. POINTET (Switzerland) said that draft article XIII was not a novelty in international conventions. A similar provision had appeared in copyright conventions, including the 1954 Convention prepared under the auspices of UNESCO. His delegation would vote for draft article XIII as it stood, because it would ensure the final settlement of any disputes that might arise concerning the interpretation or application of the present Convention.

Mr. TODOROV (Bulgaria) pointed out that the issue was not that the International Court would acquire compulsory jurisdiction. That was excluded by paragraph 2 of article XIII. The question was whether the power to submit a dispute to the Court should be given to only one State concerned in a dispute or whether it should be reserved to all of the States concerned.

Mr. MALOLES (Philippines) supported the Peruvian proposal, to replace the word "negotiation" by the words "agreement of the parties", because it would preserve the principle of contractual autonomy. On the other hand there was merit in the position that at some stage there had to be an end of litigation in cases in which the parties could not reach agreement. Only the International Court could be the final arbiter in such cases.

(Mr. Maloles, Philippines)

He saw no reason for opposition to the inclusion of such a provision in the Convention. Contracting States which did not wish to go to the International Court could avail themselves of the reservation in paragraph 2. Nevertheless, as a compromise solution, he proposed the omission, from paragraph 1, of the words "at the request of any one of the parties to the dispute".

Mr. KESTLER FARNES (Guatemala) said that his delegation could not suppo paragraph 1 as it stood, because under the constitution of his country, the speci approval of the National Congress was required in every concrete case for the submission of any matter to international judicial decision or arbitration.

He also announced that if article XIII was adopted, his Government would reserve its position with respect to disputes relating to the subject-matter of article IX.

Mr. BAKHTOV (Union of Soviet Socialist Republics) observed that the speakers who had objected to his amendment had not explained why they favoured, in article XIII alone, a departure from the basic spirit of the Convention, namel the voluntary agreement of the parties. His Government could never accept compulsory submission to the International Court at the request of only one party

Mr. COHN (Israel) moved, under rule 16 of the rules of procedure, the closure of the debate on article XIII.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) opposed the Israel motion.

The Israel motion was adopted by 14 votes to 10, with 11 abstentions.

Mr. RENOUF (Australia), in explaining his vote on article XIII, said that his Government had consistently favoured any action that sought to uphold the authority of the International Court of Justice as the supreme tribunal of the United Nations in international legal questions. He would therefore vote for paragraph 1 as it stood.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) said that his delegation would vote for the Soviet amendment because it preserved the principle of voluntary submission of disputes to the International Court. That principle was laid down in Article 36 (1) of the Court's Statute and had been reaffirmed in so important and recent an international instrument as the Statute of the International Atomic Energy Agency.

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Mr. AGOLLI (Albania) expressed his dissatisfaction with paragraph 1, because it contradicted the principle of voluntary submission to the jurisdiction of the International Court. His delegation would vote for the Soviet amendment, which corrected that shortcoming.

The PRESIDENT put the proposals relating to paragraph 1 of article XIII (E/2704 and Corr.1, Annex) to the vote.

The United Kingdom proposal to delete the whole of draft article XIII was rejected by 16 votes to 15, with 7 abstentions.

The Soviet amendment (E/CONF.26/L.56) was rejected by 18 votes to 15, with 5 abstentions.

The Peruvian amendment to replace the word "negotiation" by the words "agreement of the parties" was adopted by 19 votes to 3, with 13 abstentions.

The PRESIDENT called for a vote on the Philippine amendment, to delete the words "at the request of any one of the parties to the dispute".

The result of the vote was 20 in favour and 14 against, with 4 abstentions.

The Philippine amendment was not adopted, having failed to obtain the required two-third majority.

The PRESIDENT called for a vote on paragraph 1 of article XIII, as amended.

The result of the vote was 21 in favour and 12 against, with 3 abstentions.

Paragraph 1 of article XIII, as amended, was not adopted, having failed to obtain the required two-thirds majority.

The PRESIDENT announced that paragraph 2 would not be put to the vote, since it was meaningless without paragraph 1.

Mr. MATTEUCCI (Italy) pointed out that in spite of the rejection of paragraph 1, States parties to the Statute of the International Court of Justice

(Mr. Matteucci, Italy)

which recognized the compulsory jurisdiction of the Court in accordance with Article 36 (2) of the Statute, would still be under an obligation to submit disputes concerning the Convention to the Court.

Mr. MALOLES (Philippines) proposed the reconsideration of paragraph 1 under rule 21 of the rules of procedure.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) opposed reconsideration.

The Philippine motion was rejected by 15 votes to 13, with 8 abstentions.

Article XIV (E/2704 and Corr.1)

Mr. WORTLEY (United Kingdom) remarked that article XIV, sub-paragraph (c) should also contain a reference to article I, if paragraph 2 of that article was adopted by the Conference.

Mr. MATTEUCCI (Italy) said that, if the Conference agreed to allow reservations, the Secretary-General should also notify the States parties to the draft Convention of any reservations made.

The PRESIDENT stated that, if the provisions in question were adopted, the Drafting Committee would make the necessary adjustments in the text of article XIV.

Article XIV was adopted by 30 votes to none.

Article XV (E/2704 and Corr.1)

Article XV was adopted by 33 votes to none.

The meeting was suspended at 4.45 p.m. and resumed at 5 p.m.

Report of Working Party No. 1 on reservations (E/CONF.26/L.49)

Mr. DAPHTARY (India), Chairman of Working Party No. 1, introduced the report. While most representatives on the Working Party had felt that no reservations should be permitted, they had drawn up a text for the consideration of the Conference, in case it took the opposite view. Sub-paragraphs (a) and (b) of that text were substantially the same as provisions (a) and (b) of the Itali proposal (E/CONF.26/L.41), but sub-paragraph (c) of the Italian proposal had omitted. The USSR representative had moved an amendment to insert the words " the basis of reciprocity" in the introductory phrase; but he had not pressed i and it had not been adopted.

Mr. MATTEUCCI (Italy) said that he was not satisfied with the Working Party's text, because no provision had been made for the one reservation which Italy, in accordance with its domestic legislation, would be compelled to make. He would prefer no reservations at all, for then all States would find themselves in the same position.

Mr. MALOLES (Philippines) stated that his Government would be unable to accede to the Convention unless it provided for reciprocity.

Mr. RONGLIEN (Norway) thought that not to allow reservations with regard to reciprocity would be contrary to the provisions of article VII as already adopted.

Mr. KORAL (Turkey) said that provisions regarding reciprocity and commercial contracts were so common in arbitration that they need not be regarded as reservations. The commercial clause, in particular, was to be found in all international conventions on arbitration, and its insertion would enable his country to accede to the draft Convention.

Mr. HERMENT (Belgium) said that, inasmuch as the draft Convention would apply to both civil and commercial disputes, some reservations must be allowed, since in some countries the two types of disputes called for different procedures.

Mr. KANAKARATNE (Ceylon) thought that all views might be met if a reciprocity clause and a commercial clause were included in the draft Convention without being regarded as reservations, and if no reservations as such were permitted.

Mr. COHN (Israel) remarked that a possible alternative would be to adopt a general reservations clause, permitting any State to make such reservations as it saw fit, and providing that other States were not bound vis-à-vis that State to any greater extent than it was. Such a provision would ensure genuine reciprocity, while offering less encouragement to States to make reservations than would a list of possible reservations. Furthermore, it would enable States to resolve their particular difficulties, and the result should be accession by a very large number of States.

Mr. BULOW (Federal Republic of Germany) supported those remarks.

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Mr. URABE (Japan) opposed the Israel representative's suggestion. The Conference had been endeavouring to make the draft Convention as simple to apply as possible, so that it could be readily understood and used by ordinary businessmen. To permit an unlimited number of reservations applying to different groups of States would result in confusion and would defeat the very purpose of the draft Convention.

Mr. BAKHTOV (Union of Soviet Socialist Republics) agreed with the Japanese representative and thought it would be better to have no reservations at all. He therefore opposed the Israel proposal.

Mr. KANAKARATNE (Ceylon) agreed with the Israel representative that the Convention should be signed by as many States as possible but did not think that such a result should be purchased at the price of the Convention's usefulness. It would serve little purpose to have the Convention accepted by all the States present at the Conference, only to find that businessmen in those States refused to avail themselves of it. While he recognized that, owing to their domestic legislation, various States had specific difficulties, an effort to resolve those difficulties had been made in the drafting of the substantive articles of the Convention, all of which were the result of compromise and had been accepted by large majorities. The effect of a general reservations clause would be disastrous where the business world was concerned, and he would rather have no reservations at all.

Mr. GEORGIEV (Bulgaria) felt that the difficulty to which the representatives of the USSR and Ceylon had referred was theoretical rather than practical. In his view, a general reservation clause would have the opposite effect. As States would not wish to impede international trade, they would hesitate to burden an international instrument with reservations that reflected the problems to which application of the Convention might give rise under their domestic law. He therefore believed that a general reservation clause was the best solution.

Mr. MATTEUCCI (Italy) was prepared to accept the Israel amendment on condition that the general reservation clause applied only to the application of the Convention as specified in article I.

Mr. KORAL (Turkey) said that the fewer the reservations the more effective the Convention would be. The reservation in sub-paragraph (a) of the Working Party's report was redundant since the scope of the Convention's application was already stated in article I. He proposed that the clause in sub-paragraph (b) beginning with the words "provided that..." should be deleted. Sub-paragraphs (b) and (c) would then meet the point raised by the Israel and Italian representatives.

Mr. SANDERS (Netherlands) felt that, while the Convention should be accessible to as many States as possible, it would be wrong not to restrict the number of reservations which could be entered. He was therefore in favour of the inclusion in the Convention of a few, carefully drafted, reservation clauses.

Mr. PSCOLKA (Czechoslovakia) said that the only permissible reservation should be one which safeguarded the principle of reciprocity. He would therefore support the reservation in sub-paragraph (a) and vote against those set out in sub-paragraphs (b) and (c).

Mr. ZULETA ANGEL (Colombia) supported the Israel amendment. A general reservation clause would recognize the right of every State not to accede to the Convention at all, to accede to it without reservations or to do so on certain conditions. The principle of reservations was well-known in international law. The argument that a general reservation clause would diminish the effectiveness of the Convention did not stand criticism because, without such a clause, many States would not sign the Convention.

Mr. MALOLES (Philippines) felt that the best course would be to include the general reservation clause proposed by Israel, as amended by the Italian representative's proposal to confine its application to article I. A State which entered a reservation could subsequently withdraw it at any time.

Mr. RAMOS (Argentina) observed that the reservations specified in the Working Party's report failed to include a reservation on the territorial application of the Convention.

Mr. WORTLEY (United Kingdom) said that it had not been the Working Party's intention to prohibit such a reservation. It had limited its list of reservations to the subject matter of awards and arbitration agreements.

Mr. RAMOS (Argentina) moved the closure of the debate under rule 16 of the rules of procedure. He felt that the Conference should decide first whether or not to permit reservations to the Convention. If it decided that no reservations would be permitted, his delegation reserved the right to submit an amendment to article IX concerning the territorial application of the Convention.

Mr. WORTLEY (United Kingdom) said that it had been the Working Party's understanding that the question of territorial application would be dealt with during the discussion of article IX. That article had been adopted and could not be amended.

The PRESIDENT said that since it was stated in the Working Party's report that most delegations had expressed the view that no reservations should be permitted, he took that to be the Working Party's proposal. The Israel amendment, providing for a general reservation clause, was the farthest removed from that proposal and should be voted upon first. However, some delegations had expressed the view that the question whether there should be any reservations at all must be decided first. He therefore put the Working Party's proposal to the vote.

The proposal was rejected by 24 votes to 2, with 9 abstentions.

Mr. SANDERS (Netherlands) asked the Israel representative whether he accepted the Italian proposal which would limit the application of the general reservation clause to the cases specified in article I of the draft Convention.

Mr. COHN (Israel) replied in the affirmative.

Mr. WORTLEY (United Kingdom) said that he would vote against the Israel amendment because it failed to impose any restrictions on reservations. He preferred the specific reservations set out in the Working Party's report.

Mr. BAKHTOV (Union of Soviet Socialist Republics) said that the Israel amendment would place commercial enterprises, for the benefit of which the Convention was intended, in a difficult position. He would therefore vote against it.

The PRESIDENT put the Israel amendment to the vote.

The Israel amendment was rejected by 22 votes to 9, with 6 abstentions.

Mr. ROGNLIEN (Norway) said that a reservation to the effect that the Convention would apply only to disputes of an international character was essential. Such a reservation was proposed in paragraph 2 of the amendments his delegation had submitted in document E/CONF.26/L.27 and in paragraph (c) of the Italian proposal concerning reservations with respect to the scope of the Convention (E/CONF.26/L.41).

Mr. MATTEUCCI (Italy) said that his proposal was designed to ensure that the Convention would not apply to disputes which were not international. Unless such a provision was included, two residents of a country involved in a commercial dispute which had no relation to a foreign law could simply move to another State to avoid application of the domestic law in the country in which they had their usual residence. Such action would constitute evasion of the law. His own proposal was somewhat broader in scope than the Norwegian amendment in that it added a proviso to the effect that a State might declare that it would not apply the Convention if the dispute pursuant to which the arbitral award had been made had no reasonable connexion outside the national territory. While his proposal had not been accepted by the Working Party, he submitted it to the Conference because he could not sign the Convention unless it was made clear that the Convention would not apply to disputes which were not of an international character.

Mr. ARNAUD (France) felt that the difficulty to which the Italian representative had referred could be prevented by a State's public policy.

Mr. MATTEUCCI (Italy) observed that public policy was part of a State's domestic legislation. Article I of the Convention, on the other hand, referred to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards was sought.

Mr. SANDERS (Netherlands) asked the Italian representative whether he could not agree to the Norwegian amendment.

Mr. MATTEUCCI (Italy) considered the Norwegian amendment somewhat restrictive. However, he would not object to it.

Mr. WORTLEY (United Kingdom) agreed with the French representative that the point raised by the Italian representative would be covered by the public policy of a State.

Mr. COHN (Israel) suggested that the Conference should first vote on the introductory paragraph to the reservations contained in the Working Party's report. The USSR representative had suggested in the Working Party that the words "on a basis of reciprocity" should be inserted after "Any State may,". He took it that the proposal was being maintained.

Mr. WORTLEY (United Kingdom) said that his delegation had also introduced an amendment to the introductory sentence, which would be found in document E/CONF.26/L.7. It provided for the insertion of the words "or notifying extension under article IX hereof" after the word "Convention,".

Mr. TETTAMANTI (Argentina) said that the statement his delegation had made with respect to article IX at the previous meeting, with the request that it should be included in the Final Act of the Convention, also applied to the United Kingdom amendment under consideration.

The PRESIDENT put to the vote the USSR amendment to include the words "on a basis of reciprocity" in the introductory paragraph of the Working Party's report.

The USSR amendment was adopted by 16 votes to 1, with 14 abstentions.

The United Kingdom amendment was adopted by 19 votes to 7, with 7 abstentions.

Sub-paragraph (a) was adopted by 29 votes to 1, with 3 abstentions.

The Italian amendment (E/CONF.26/L.41) was rejected by 16 votes to 6, with 8 abstentions.

Mr. KORAL (Turkey) proposed the deletion of the final clause in sub-paragraph (b) beginning with the words "provided that...".

Mr. BULOW (Federal Republic of Germany) said that his Government attached considerable importance to the reservation in sub-paragraph (b). His country's laws provided for the enforcement of all foreign awards. Under the Convention, it would be compelled to enforce awards made in a foreign country under German procedural law, and which it would regard as domestic. He was opposed to that and would therefore vote in favour of the reservation in sub-paragraph (b).

Mr. WORTLEY (United Kingdom) thought that the point made by the German representative was covered by article I of the Convention.

The PRESIDENT put to the vote the first part of sub-paragraph (b) up to the words "provided that" and including the words "or not considered as foreign" after the word "domestic" in the second line. A suggestion had been made that those words should be included and no objection had been raised.

The result of the vote was 11 in favour and 11 against, with 10 abstentions.

The first part of sub-paragraph (b), as amended, was not adopted, having failed to obtain the required two-thirds majority.

The PRESIDENT said that, in view of the result of the vote, a decision on the Turkish amendment was unnecessary.

Mr. MATTEUCCI (Italy) proposed, with respect to sub-paragraph (c) that the word "relations" should be used instead of "contracts". The term would cover both contractual and non-contractual commercial disputes.

The amendment was adopted.

Mr. ROGNLIEN (Norway) considered the reservation vague and its implications difficult to assess. In Norway no distinction was made between commercial and civil matters. If the reservation was invoked by a State, Norway would have to do so on the basis of reciprocity. He would therefore vote against it.

Mr. KORAL (Turkey) said that he would vote in favour of the reservation. A similar reservation had been included in previous conventions concerning commercial arbitration.

Mr. ARNAUD (France) observed that a similar reservation could be found in the 1923 Geneva Protocol and the 1927 Geneva Convention, which Norway had signed and ratified.

The PRESIDENT put to the vote sub-paragraph (c), as amended by the Italian representative.

The result of the vote was 13 in favour and 11 against, with 7 abstentions.

Sub-paragraph (c), as amended, was not adopted, having failed to obtain the required two-thirds majority.

The PRESIDENT said that, as a result of the vote, the only reservation permitted would be the one set out in sub-paragraph (a). Such drafting changes as might be required would be made by the Drafting Committee.

Report of Working Party No. 2 on provisions concerning the validity of arbitration agreements (E/CONF.26/L.52 and L.54)

Mr. SANDERS (Netherlands) said that after studying the excellent text of the additional protocol prepared by Working Party No. 2 (E/CONF.26/L.52), he felt that the Conference might be prepared to reconsider the decision it had taken at its ninth meeting to have a separate protocol on the validity of arbitration agreements. Representatives had come to the Conference to adopt a single instrument, and he considered that the proposed additional protocol could be conveniently condensed into a single article of the Convention itself.

With that in view, he proposed, in accordance with rule 21 of the rules of procedure, that the Conference should reconsider the decision taken at its ninth meeting and examine the new article prepared by his delegation (E/CONF.26/L.54), which, if adopted, could of course be improved by the Drafting Committee.

Mr. HERMENT (Belgium) opposed the Netherlands proposal. The advantage of having a convention with a separate protocol was that States could ratify one without ratifying the other. In the case of Belgium, mandatory provisions of its law would prevent it from ratifying a convention containing the article proposed by the delegation of the Netherlands.

The PRESIDENT put the Netherlands motion to the vote.

The result of the vote was 18 in favour and 8 against, with 4 abstentions.

The Netherlands motion was adopted, having obtained the required two-thirds majority.

Mr. COHN (Israel) proposed the addition of the following reservation clause to the article proposed by the Netherlands delegation:

"Any State may, at the time of signature, ratification or accession, declare that this article shall not apply to it."

Mr. BAKHTOV (Union of Soviet Socialist Republics) proposed that the Netherlands draft should be examined paragraph by paragraph.

It was so agreed.

Mr. ROGNLIEN (Norway) considered the Netherlands draft an improvement over that proposed by the Working Party, in that it made a clearer distinction between the two elements: the validity of an agreement before an award had been made, and the validity of an award.

Mr. COHN (Israel) asked what was meant in paragraph 1 by the words "recognize as valid". There were a number of interim procedures that might be applied before the enforcement of an award was finally ordered. As it stood, the paragraph might be interpreted to mean that a court could be asked to take steps in accordance with an arbitration agreement even before the award had been made. He proposed the insertion of the words "for the purposes of articles III and IV" after the words "Each Contracting State shall".

Mr. WORTLEY (United Kingdom) said that he preferred no such limitation.

Mr. KORAL (Turkey) opposed the Netherlands draft because the Conference had refused to accept the reservation concerning commercial clauses. The new article would therefore refer to submissions to arbitration not limited to commercial disputes and, consequently, it was unacceptable to his delegation.

Mr. MATTEUCCI (Italy) pointed out that arbitration was not limited to contractual relationships. There were also non-contractual commercial matters which might be covered by an arbitration agreement: the question of damages resulting from a collision at sea, for example.

Mr. SANDERS (Netherlands) suggested that that point might be met by omitting the words "to a contract" and "in respect of such contract" from paragraph 1.

Mr. ROGNLIEN (Norway) opposed the Israel amendment to paragraph 1 and the deletion suggested by the Netherlands representative. Some particular legal relationship between the parties should be specified.

Mr. de SYDOW (Sweden) supported the views of the Norwegian representative.

Mr. HERMENT (Belgium) suggested that the Israel proposal concerning a reservation clause should be voted on first. The fate of that clause would affect the position of his delegation on the paragraphs proposed by the Netherlands representative.

The Belgian suggestion was agreed to.

Mr. WORTLEY (United Kingdom), supported by Mr. BAKHTOV (Union of Soviet Socialist Republics), said that the adoption of the Israel proposal would make it possible for an enforcing court to refuse to recognize a valid submission to arbitration and thereby defeat the purposes of the whole Convention. A validity clause was essential if the Convention was to be viable.

Mr. COHN (Israel) observed that if the Netherlands draft were included in the Convention, many States would be unable to ratify or accede to it. As a result of paragraphs 1 and 3, matters might be referred to arbitration which were wholly within the purview of domestic courts. Those paragraphs had nothing to do with the recognition and enforcement of arbitral awards and were beyond the scope of the Convention. Moreover, they would require a court to treat as valid an agreement resulting in an arbitral award that could not be enforced under article IV (1) of the Convention, or to refer to arbitrators cases which could not have been enforced if an award had been given.

Mr. HERMENT (Belgium) agreed with the Israel representative. He had no powers to sign a Convention which dealt with matters other than the recognition and enforcement of foreign arbitral awards. The Netherlands proposal dealt with arbitration agreements and not with arbitral awards.

Mr. KORAL (Turkey) also supported the Israel representative. The Netherlands proposal was unacceptable because it was concerned with the unification

(Mr. Koral, Turkey)

of private law and, therefore, with the elimination of municipal law provisions relating to arbitration agreements and arbitral clauses. Such a proposal was beyond the competence of the Conference.

Mr. BULOW (Federal Republic of Germany) observed that the words "recognize as valid" did not have the same effect in an article of the Convention as they would have had in a separate protocol.

Mr. WORTLEY (United Kingdom) proposed the omission of the words "as valid".

Mr. MATTEUCCI (Italy) proposed the replacement of the words "in respect of such contract", at the end of paragraph 1, by the following words: "in respect of a determined legal relationship, or contract, relating to subject-matter capable of arbitration".

The PRESIDENT put to the vote the Israel proposal to add a reservation clause at the end of the article.

The Israel proposal was rejected by 13 votes to 9, with 4 abstentions.

The Israel amendment to paragraph 1, to insert the words "for the purposes of articles III and IV", was rejected by 17 votes to 4, with 3 abstentions.

The United Kingdom amendment to delete the words "as valid" was adopted by 14 votes to 1, with 8 abstentions.

The Italian amendment, to add a phrase at the end of paragraph 1, was adopted by 21 votes to none, with 3 abstentions.

Paragraph 1 of the Netherlands proposal (E/CONF.26/L.54), as amended, was adopted by 20 votes to 4.

The PRESIDENT invited discussion on paragraph 2 of the Netherlands draft.

Mr. MATTEUCCI (Italy) felt that paragraph 2 should indicate that an exchange of letters or telegrams did not exhaust all the possibilities. Signed minutes of a conversation might also constitute an agreement in writing.

Mr. BAKHTOV (Union of Soviet Socialist Republics) expressed a preference for the text of the Working Party, in article I (2) of its paper, over the Netherlands version. He could not accept the words "confirmation in writing by one of the parties without contestation by the other party".

Mr. WORTLEY (United Kingdom) agreed. In common law, the failure to do something could not constitute an estoppel.

Mr. HERMENT (Belgium) proposed the deletion of paragraph 2.

Mr. ARNAUD (France) observed that such a deletion would give a very broad meaning to the words "any agreement in writing" in the paragraph just adopted

The Belgian proposal was rejected by 16 votes to 5, with 2 abstentions.

The PRESIDENT suggested that the Working Party's version should be voted on first, and thereafter, the words in the Netherlands draft to which objection had been made.

Article I (2) of the Working Party's draft (E/CONF.26/L.52) was adopted by 19 votes to none, with 5 abstentions.

The words in the Netherlands draft (E/CONF.26/L.54) to which reference had been made were rejected by 10 votes to 8, with 5 abstentions.

The PRESIDENT invited discussion on paragraph 3 of the Netherlands draft.

Mr. COHN (Israel) pointed out that under article IV (2) of the Convention, (E/CONF.26/L.48) the court could, of its own motion, refuse the enforcement of an award which was not capable of settlement under the law of the court or which was incompatible with public policy. However, under paragraph 3 of the Netherlands draft, the court had to refer parties to arbitration whether or not such reference was lawful or incompatible with public policy. The same situation applied, mutatis mutandis, to the grounds for refusing enforcement specified in article IV (1) of the Convention. He proposed the following amendment: "The provisions of article IV shall apply to an application under this article mutatis mutandis."

Mr. BULOW (Federal Republic of Germany) observed that the problem to which the Israel representative had referred had been caused by the omission, in paragraphs 1 and 3 of the Netherlands draft, of any words which would relate the arbitral agreement to an arbitral award capable of enforcement under the Convention. The situation might be remedied by replacing paragraph 3 of the Netherlands draft by article III of the protocol proposed by the Working Party, (E/CONF.26/L.52), with the necessary changes. In particular, the words

(Mr. Bulow, Federal Republic of Germany)

"valid under article I and capable of execution" could be replaced by the following words based on the final words of article I (1) of the Working Party's draft: "referred to in paragraph 1 and susceptible of leading to an arbitral award capable of recognition and enforcement by virtue of this Convention".

Mr. WORTLEY (United Kingdom) suggested that it would be better to use article III of the Working Party's draft as the basis of paragraph 3 of the new article. He felt that the problems indicated by the Israel and German representatives could be met by inserting in paragraph 1 of the Working Party's article III the words "of their own motion or" between the words "capable of execution shall" and the words "at the request".

The United Kingdom amendment was adopted by 17 votes to 2, with 5 abstentions.

Mr. COHN (Israel) said that the situation was now worse than ever. The United Kingdom amendment could not only deprive a party of its protection under the law but enable courts to engage in Star-chamber proceedings.

Mr. BAKHTOV (Union of Soviet Socialist Republics) did not understand why it was proving so difficult to arrive at a text that would plainly say that courts should not adjudicate where there had been an agreement to arbitrate but should facilitate the arbitration originally agreed upon.

Mr. van HOOGSTRATEN (Hague Conference on Private International Law) said that when two parties to a contract had an arbitral agreement and one wished to have the contract enforced, it went before a court. The defending party could then invoke the arbitral clause and, if the judge decided to refer the parties to an arbitrator, both parties could defend their interests.

The Israel proposal to apply the provisions of article IV, mutatis mutandis, was rejected by 17 votes to 6, with 3 abstentions.

The PRESIDENT put to the vote the German proposal providing for the addition of the final clause in article I (1) of the text submitted by Working Party No. 2.

The result of the vote was 13 in favour and 9 against, with 2 abstentions.

The German proposal was not adopted, having failed to obtain the required two-thirds majority.

Article III, paragraph 1, as amended, was adopted by 19 votes to 3, with 3 abstentions.

Article III, paragraph 2, was adopted by 15 votes to none, with 5 abstentions.

Article III as a whole, as amended, was adopted by 18 votes to 3, with 3 abstentions, as paragraph 3 of the new article of the draft Convention.

Title of the Convention

Mr. BESAROVIC (Yugoslavia) observed that the question of the title of the Convention was a matter of substance and should therefore be decided upon by the Conference.

Mr. MACHOWSKI (Poland) withdrew the amendments to the title of the Convention proposed by his delegation in document E/CONF.27/7.

The PRESIDENT suggested that the wording of the title should be left to the Drafting Committee.

It was so agreed.

The meeting rose at 9.25 p.m.