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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE SIXTH MEETING

Held at Headquarters, New York,
on Friday, 23 May 1958, at 10.45 a.m.

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President:	Mr. SCHURMANN	Netherlands
Executive Secretary:	Mr. SCHACHTER	

CONSIDERATION OF THE DRAFT CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (E/2704 and Corr.1, E/2822 and Add.1 to 6; E/CONF.26/2, 26/3 and Add.1, 26/4, 26/7; E/CONF.26/L.6 to L.12) (continued)

General debate

Sir Claude COREA (Ceylon) said there were many reasons for concluding a new convention. The volume and complexity of international trade had grown steadily since 1927; the entire character of world trade had been altered as a result of revolutionary changes, some of them political, such as the attainment of independence by many nations, others economic, such as increased co-operation between States, and still others technical, caused by the latest scientific discoveries. A more precise and comprehensive international instrument than the 1927 Convention would encourage the expansion of trade and thus promote general well-being and prosperity. It would also further the progressive development of international law - one of the purposes of the United Nations. Ceylon, which in recent years had enacted laws to encourage and facilitate arbitration, particularly welcomed the holding of the Conference.

Generally speaking, his delegation was in favour of the Ad Hoc Committee's draft (E/2704 and Corr.1). Nonetheless, he wished to make a few comments, while reserving his right to speak at greater length during the discussion of the draft article by article. The scope of application of the Convention had rightly been made very flexible, so as to ensure acceptance by the largest possible number of States. However, its provisions must not be made too vague. His delegation would support any draft which introduced clearly defined legal concepts, while taking account of the special difficulties of some States. Lastly, the Conference should consider with particular care the provisions on the judicial control of the recognition and enforcement of arbitral awards, because of the difficulty of striking a happy medium between respect for the will of the parties and the prerogatives of the State in whose territory the award was to be enforced.

Mr. TODOROV (Bulgaria) said that the conclusion of a convention would indirectly promote trade, in particular between countries belonging to different economic and social systems, and that it would also contribute to the development of international law and co-operation between nations.

(Mr. Todorov, Bulgaria)

Bulgaria's foreign trade had more than doubled in volume since 1952; at present, Bulgaria maintained trade relations with sixty-three countries. Consequently, arbitration was being resorted to with increasing frequency and was expressly provided for in some commercial agreements.

The primary purpose of the Convention should be to institute rapid, simplified, clear and efficient procedures for the elimination of the consequences of differences and disagreements in business transactions. The Convention should therefore be as widely applicable as possible; political discrimination should be avoided. The Convention should be open to all States. For the same reason, the Conference should reject the so-called "colonial" clause, which had been eliminated from the Convention on the Political Rights of Women and the draft Covenant on Economic, Social and Cultural Rights. The federal clause should also be rejected.

The grounds on which the recognition and enforcement of arbitral awards could be refused should be stated precisely and the list given should be exhaustive.

The decisions of permanent arbitral authorities established under the laws of the Contracting States should be regarded as arbitral awards within the meaning of the Convention. Lastly, the fact of referring disputes on the interpretation or application of the Convention to the International Court of Justice should not eliminate the obligatory jurisdiction of the Court.

Mr. MALOLES (Philippines) recalled that there was a standing conflict, in arbitration, between the principle that the will of the parties should prevail and the right of control exercised by the States and their courts. That conflict arose, in particular, in connexion with the enforcement of arbitral awards, especially when they were to be relied upon in a country other than that in which they had been made. The diversity of provisions on arbitral procedure, on methods of appeal against arbitral awards and on the manner in which they were to be enforced presented additional difficulties. It was to overcome those very difficulties that the 1923 Protocol and the 1927 Convention had been drawn up. More recently, the Consultative Assembly of the Council of Europe had recommended the establishment of a committee of Government experts to prepare a European arbitration convention based on the uniform arbitration law prepared by the International Institute for Unification of Private Law. The Organization of

(Mr. Maloles, Philippines)

American States, for its part, had elaborated an inter-American arbitration system and had included provisions on the enforcement of foreign awards and judgements in the Montevideo Treaties and the Bustamante Code. The Seventh Conference of American States had recommended the adoption of certain rules concerning arbitration, but the recommendation had been followed only by Colombia. In 1956, a draft uniform law on inter-American commercial arbitration had been adopted. The work of various non-governmental organizations also deserved mention.

The main obstacles in the way of the development of commercial arbitration were: the existence of many different arbitration laws and procedures; the difficulty of preventing disputes settled by arbitration from being brought before the courts; the difficulty of deciding which law was applicable; the uncertainty regarding the extent to which an arbitral tribunal could judge in equity rather than on the basis of legal concepts; the conditions regarding the nationality of the arbitrators; the difficulty of enforcing a foreign award; the fact that arbitral clauses were rarely suited to the precise nature of the dispute; the lack of arbitration facilities; and exchange difficulties which made it difficult to pay fees to foreign arbitrators.

It was to be hoped that the draft Convention, suitably amended, would help to remove those difficulties. It had been suggested in particular that an international record office might be set up under the United Nations to register, examine and attest the validity of international awards; that would greatly facilitate their enforcement, which could then be refused only on the grounds stated in the Convention.

The Philippines had long ago recognized arbitration as a valid method of settling disputes. The Civil Code of 1899 and the revised Civil Code of 1950 contained provisions on the subject. In principle, the Supreme Court was to have defined rules governing the appointment of arbitrators and arbitral procedure but, in the absence of such a definition, the Congress had adopted Act No. 876 on arbitration which represented a considerable step forward, although it had no provision on the enforcement of foreign awards. Philippine jurisprudence recognized the validity of arbitral awards made in accordance with the law and with the compromis or the arbitral clause, provided that the awards had become final and operative and were compatible with the public order. Nevertheless,

(Mr. Maloles, Philippines)

arbitration procedure was still little used in the Philippines and Philippine courts had so far had to deal with only two arbitral awards.

Mr. KESTLER FARNES (Guatemala) said that his delegation was participating in the present Conference because it was convinced that the latter was of great importance for the development of international trade. In the present state of international relations, it was necessary to adopt common standards for the settlement of commercial disputes. The recognition and enforcement of foreign arbitral awards raised complex problems. That explained why some provisions of the draft Convention were drawn up in rather general terms, whereas others contained some restrictions. That should not, moreover, be regarded as a defect but rather as a virtue, since it showed that its authors had tried to adapt it to reality. The variety of legal systems made it necessary to establish common standards which would state universally recognized principles, while respecting the sovereign rights of States and the principles on which their municipal law or public policy were based.

Guatemala recognized the validity of arbitration proceedings and had participated in the work of inter-American conferences on the question. The Guatemalan delegation found the draft Convention acceptable as a whole, although it would have to make reservations concerning certain articles. It reserved the right to speak again during the discussion of individual articles.

Mr. KAISER (Pakistan) said that the development of international trade had revealed the inadequacy of the Geneva Convention and that it would be well to re-examine the procedure for enforcing arbitral awards in the light of present circumstances. Arbitration was an economic method of settling disputes which arose out of international trade relations; since some of its merit lay in its simplicity, a leading role in the proceedings should be left to the parties. That factor should not be forgotten in examining the draft Convention.

That document was an improvement on the 1927 Convention. Nevertheless, it was open to certain reservations. To keep within the bounds of generalities, it might be pointed out, among other things, that the draft did not contain any definition of the most important key terms and phrases to be found in it. It would therefore be advisable to draft an additional article which would define, among other things, arbitral awards, arbitration proceedings, persons whether

(Mr. Kaiser, Pakistan)

physical or legal, commercial contracts and Contracting States. The inclusion of such an article would not only be in conformity with the usual international practice but it would also provide a more practical basis for the Convention.

Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) thought that no efforts should be spared to increase international economic co-operation. The development of trade relations between nations, based on equality and mutual interest, should be particularly encouraged inasmuch as it helped to increase confidence between States. In that respect, a convention on the recognition and enforcement of foreign arbitral awards which would facilitate the rapid and effective settlement of disputes would exert a propitious influence. It would, of course, be necessary to ensure that none of the provisions of that instrument were likely to create difficulties and that it was possible for all States to accede to it. It would be advisable, therefore, to amend certain points in the draft before the Conference.

Article I (continued)

Mr. KORAL (Turkey) said that the criticisms that had been made of his amendment (E/CONF.26/L.9/Rev.1) at the preceding meeting (E/CONF.26/SR.5) could be reduced to a single one: namely, the fear that States might be obliged to recognize the validity of arbitration proceedings held in their own territory in conformity with a foreign law. The proposed text would by no means have that result; to say, as did the Turkish amendment, that awards made under the authority of a law other than that of the country in which they were relied upon were considered foreign or international awards was quite different from saying that arbitration proceedings could be held in a given country in conformity with the law of another country. In the latter case there was an element of permission which was completely absent from the former. The Turkish formula was merely a definition; it specified that if an award was made under the authority of a law other than that of the place where it was relied upon, such an award would come under the Convention. It did not go farther than that and there appeared to be no grounds for the fears felt in that respect.

The following example would illustrate the exact scope of his amendment. Two Englishmen, residing in England, submitted a dispute to French law for

(Mr. Koral, Turkey)

settlement; the arbitrator gave an award in conformity with that law; application for exequatur was made to the English judge, who found that the proceedings had been held in conformity with French law whereas in that case English law required that English arbitral procedure should be followed. The proposed formula would not have the effect of obliging the English judge to consider the award a foreign one and to order exequatur, inasmuch as he was confronted with an English rule of law, of clearly defined scope, which prohibited enforcement.

The proposed criterion was not calculated to provide an exception in English internal rule. It merely provided a definition of a non-national award. The English judge, therefore, would be able to apply the Convention in cases where, under English law, an award made in conformity with a foreign law might be valid. Thus there would apparently be no objection, from the point of view of English law, to the English judge granting exequatur of an arbitral award rendered in Turkey, in conformity with Turkish law, even if the dispute was between a Turk and a Greek and even if that dispute was settled in Turkey in conformity with French law.

The criterion proposed by Turkey was in no way meant to be in opposition to internal prohibitory or imperative laws but it was more flexible than the territorial criterion. It was essential that a judge who had to decide on an exequatur in countries using the continental legal system should be given wider latitude in determining internal awards and foreign awards. The Turkish amendment met that need without thereby inconveniencing the countries of Anglo-American law and the countries of South American law. It was the only formula which could be acceptable to all: it did not contain the words "foreign" or "internal"; it did not prevent a local judge from ruling that an arbitral award made in his country in conformity with a foreign law was to be considered a national award; it permitted the judge to regard any award made in a foreign country in conformity with the law of that country as a foreign award; it gave due regard to the continental conception whereby arbitration proceedings could be held in one country in conformity with the law of another.

The adoption of the Turkish amendment would not require any changes in the terminology of the rest of the Convention: it would be sufficient to define, in one article, the meaning to be given to the expression "foreign awards".

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Mr. BULOW (Federal Republic of Germany) wished to supplement his Government's observations on article I of the draft Convention (E/2822, annex 1). The solution whereby the Convention would apply to arbitral awards made in the territory of a State other than the State in which such awards were relied upon did not appear to be satisfactory. He gave the following example. Two German businessmen residing in the United Kingdom submitted a dispute to arbitration; for that purpose they selected an arbitral tribunal sitting in London which consisted of German nationals and which followed the German procedure. If the territorial criterion alone was considered, there could be no doubt about the nationality of the award: it would be an English award. That solution, however, did not seem right: since the German law of procedure had been applied, German law regarded that award as German; in addition, such a solution would have the effect of seriously infringing the autonomy of the will of the parties, which should be respected. Moreover, accorindg to Russel on the Law of Arbitration, it was not certain that the territorial theory was strictly applied even in the Anglo-Saxon countries.

It was necessary, therefore, to provide a different connecting factor from the one given in the draft. The representative of France had shown that according to the jurisprudence of the French Court of Cassation and the Supreme Court of the Federal Republic of Germany the nature of the award depended on the rules of procedure which were applied. That was also the opinion of Mr. Klein in his work entitled Considération sur l'arbitrage en droit international privé (page 311). Lastly, it should be noted that the nationality of the parties did not affect the internal or foreign character of an award and that that was just as true in the civil law countries as in the common law countries.

The eight-Power amendment (E/CONF.26/L.6) and the Turkish amendment (E/CONF.26/L.9/Rev.1) revealed similar points of concern, but while the latter formula seemed acceptable the former seemed even better. By leaving it to the judge to decide whether an award was national or not, it avoided any interference with internal law.

Lastly, he pointed out that the joint amendment (E/CONF.26/L.6) could be incorporated into the rest of the draft without raising any difficulties of terminology.

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Mr. ZULETA ANGEL (Colombia) said that the field of application of the Convention raised a fundamental problem. As the Federal Republic of Germany pointed out in its general observations (E/2822), the best solution would be for the internal laws of countries to be standardised by the adoption of a uniform law. Otherwise it would be necessary to find a criterion whereby it would be possible to specify to which arbitral awards the Convention was applicable. It was, indeed, most important that each signatory State should know exactly what the other States were undertaking to do. It was for that reason that the Colombian delegation was not satisfied with the eight-Power amendment (E/CONF.26/L.6). The proposed criterion was much too vague. It was essential that an absolutely clear criterion, incapable of divergent interpretations, should be established. The Conference was called upon to draw up a Convention on the recognition and enforcement of certain so-called foreign awards, and the least it could do was to determine to which awards that Convention should be made applicable. In the case considered by the Federal Republic of Germany (E/2822), the same award could be regarded as a national award by two different States, but that situation really provided a weighty argument against the over-vague formula set out in the eight-Power amendment. If the Conference adopted that amendment, the signatories of the future Convention would not know the exact scope of the field of application of the Convention.

The representative of Turkey had attempted to lay down a criterion on the basis of which it would be possible to determine whether an award was foreign in the sense of the Convention (E/CONF.26/L.9/Rev.1). Unfortunately, that amendment was not satisfactory either; on that point his delegation's view was very similar to that of the representatives of Belgium and Guatemala. In Colombia certain rules of procedure governing arbitration were public provisions; they were imperative in character and had the status of constitutional laws. Colombia could not, therefore, recognize the authority of any arbitral award other than one given in accordance with those imperative rules.

If the majority of members were in favour of the Turkish amendment, it might perhaps be advisable to alter the wording. The representative of Turkey had referred to the case of a country in which all rules regarding arbitration would

(Mr. Zuleta Angel, Colombia)

be optional. If in such a country the parties decided to set up an arbitral tribunal applying a foreign procedure, the Colombian delegation considered that, under the Turkish amendment as it stood, the arbitral award would have to be regarded as national and not as foreign, since it would have been made under the authority of the national legislation which authorized the parties to apply a foreign law.

The territorial criterion embodied in article I of the draft Convention had been criticized. The representative of the Federal Republic of Germany had cited examples in which an award made in the territory of a State other than that in which it was relied upon would nevertheless have to be regarded as domestic. The representative of France had criticized the territorial criterion on the grounds that it might be difficult to specify the place of the award, when, for example, such an award was made by correspondence. That, however, was an exceptional case. The arbitrators were obliged to discuss the question, to hear the parties and to deliberate, all of which factors made it necessary for the arbitral tribunal to have a permanent place of meeting. Even in the exceptional case of an award being made by correspondence, the place of the award could be determined, just as was, in all legislative systems, the place where a contract was entered into by correspondence. He therefore saw no valid objection to article I of the draft Convention. It was not perhaps perfect but it had the merit of providing a criterion and the obvious course seemed to be to entrust the task of improving it to a working group.

Mr. COHN (Israel) associated himself with the views of the Colombian representative regarding the Turkish amendment (E/CONF.26/L.9/Rev.1). That amendment raised legal questions of all kinds which would no doubt be the joy of jurists, but might be a torment to plaintiffs. It should be borne in mind that the main purpose of the Conference was to draw up a Convention that was clear, unequivocal and easy to put into practice. Having had occasion to speak privately with several representatives, he was more than ever convinced that the best solution was to discuss the questions in working groups.

Mr. KESTLER FARNES (Guatemala) said that as his country was faithful to the principle of territoriality it could not accept any other criterion, which

(Mr. Kestler Farnes, Guatemala)

would raise insoluble problems for it in view of the imperative nature of Guatemalan laws of procedure. Guatemalan legislation was on very much the same lines as Colombian legislation and in Guatemala, as in Colombia, a large number of procedural provisions were of a constitutional nature. Thus Guatemala could not adopt any other criterion without amending its Constitution. Under Guatemalan law exequatur could be granted for a foreign award only under certain conditions deriving from the principle of territoriality or for reasons of public policy. For example, it would not be possible in Guatemala to enforce a foreign arbitral award made in default of the appearance of one of the parties or against a person who was domiciled in Guatemala but absent from the country. It was equally impossible to enforce an award which was based on an action in rem or which involved property situated in Guatemala, since that would create insurmountable difficulties. He had, of course, no intention of forcing Guatemalan legislation on the Conference but he was trying to find a solution which would not undermine the very bases of the various systems in force in each of the participating States.

Mr. URABE (Japan) said that, for the reasons already stated by the representative of Israel, he was not convinced that the eight-Power amendment (E/CONF.26/L.6) was acceptable. The Japanese delegation preferred the original text, which had the merit of laying down a very clear criterion on the basis of which it was possible to determine what was meant by foreign award. What the business world wanted was perfectly clear criteria which would make it possible to know for certain and in advance which awards would be recognized and enforced in a particular country. The business world would be left in doubt if the Conference adopted the eight-Power amendment. In addition, it seemed that that amendment would have far-reaching effects on other articles of the Convention, particularly articles III and IV. It would influence the question of whether legal control should be entrusted to the country of enforcement or to the country of the award. Before taking a final position on the subject the Japanese delegation would like one of the sponsors of the amendment to clarify that point.

The Japanese delegation fully understood the legal theory underlying the Turkish amendment (E/CONF.26/L.9/Rev.1) but was not convinced that the text was acceptable from a practical point of view. If the Conference adopted the

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(Mr. Urabe, Japan)

amendment, the Convention might or might not be applied according to the internal law of the country in which the award would be relied upon. The Japanese delegation considered that the Conference should respect to the greatest possible extent the requirements of international trade, making the law give way to those requirements if necessary.

Mr. HERMENT (Belgium) said that, in view of the divergence of views which had become apparent regarding the field of application of the Convention, it might be premature to entrust the question to a working group. It might perhaps be wiser first to take a decision of principle on the subject. He pointed out to the representative of Turkey that in Belgium it was fully possible to undertake arbitration in accordance with foreign procedure.

The Turkish amendment (E/CONF.26/L.9/Rev.1) would have the disadvantage of leading to refusals to enforce awards in a fairly large number of cases. Under the Turkish amendment an award which was made in a foreign country in accordance with Belgian law and was to be enforced in Belgium would not come within the purview of the Convention. As such an award was considered in Belgium to be a foreign award, it could be enforced neither on the basis of national law nor on the basis of the Convention. It was essential, therefore, that the criterion to be adopted should not be too specific; it would be better to choose a criterion which was adaptable to the different systems and for countries to trust one another for the enforcement of foreign awards.

The meeting rose at 1 p.m.