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UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

SUMMARY RECORD OF THE SECOND MEETING

Held at Headquarters, New York,
on Wednesday, 21 May 1958, at 10.55 a.m.

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| <u>President:</u> | Mr. SCHURMANN | Netherlands |
| <u>Executive Secretary:</u> | Mr. SCHACHTER | |

ADOPTION OF THE DRAFT RULES OF PROCEDURE (E/CONF.25/5; E/CONF.26/L.1 to L.5
(continued))

The PRESIDENT announced that the United States had submitted a number of amendments (E/CONF.26/L.2) to the draft rules of procedure (E/CONF.26/5) drawn up by the Secretary-General, an amendment (E/CONF.26/L.1) to which had been adopted by the Conference at the preceding meeting.

Mr. COHN (Israel), commenting on the United States amendment to rule 1, observed that the Economic and Social Council had decided that the Conference would be a conference of plenipotentiaries and that that decision could not be reconsidered. Under the draft rules of procedure, States could send observers to the Conference if they did not think that they should appoint plenipotentiaries. It would be unfortunate if the participants in the Conference were mere "representatives" whose exact status was not defined and who might, in fact, not have been given full powers by their Governments. He would, therefore, vote against the first United States amendment.

Mr. URQUIA (El Salvador) and Mr. KANAKARATNE (Ceylon) said that they shared the Israel representative's reservations and would not support the United States amendment.

Mr. MAURTUA (Peru) observed that a distinction should be made between the right to participate in the Conference, which did not raise any question other than that of the sovereignty of States, and the willingness of States to sign or ratify an international instrument at the conclusion of the Conference. In the light of that distinction, the United States amendment seemed acceptable to him and he would vote in its favour.

The PRESIDENT put the United States amendment to rule 1 of the draft rules of procedure to the vote.

The first United States amendment (E/CONF.26/L.2, paragraph 1) was rejected by 14 votes to 7, with 15 abstentions.

Mr. COHN (Israel) proposed that the words "if possible, not later than twenty-four hours" in rule 2 should be replaced by "not later than ten days", since it was customary for participants in an international conference to have a certain amount of time in which to present their credentials.

The Israel amendment (E/CONF.26/L.4) was adopted by 29 votes to one, with 5 abstentions.

Mr. BERMENT (Belgium), Mr. MALOLES (Philippines) and Mr. RENOUF (Australia) said that they would vote in favour of the second United States amendment, which proposed the appointment of a Credentials Committee. It was usual to appoint such a committee in all conferences in which there were many participants and the procedure had been followed at the recent Conference on the Law of the Sea.

Mr. VILKOV (Union of Soviet Socialist Republics), supported by Mr. PCCOLKA (Czechoslovakia) thought that there was no reason to depart from the draft prepared by the Secretary-General (E/CONF.26/5). The rules of procedure of the Economic and Social Council provided that the credentials of its members should be examined by the President and the Vice-Presidents. The same rule was followed by other bodies and by numerous conferences. Moreover, the members of the Credentials Committee would find it impossible to take part in all the proceedings of the Conference. In the circumstances, some doubts might be entertained as to the real intentions of the authors of that amendment.

Mr. MAURTUA (Peru) thought that the examination of credentials provided for in rule 2 of the draft rules of procedure was intended merely for purposes of information and that, in any case, it would be necessary to re-examine the credentials when the Convention was signed.

Sir Claude COREA (Ceylon) said that he had no special preference for either one of the proposed procedures, but in view of the fact that it was common practice to appoint an ad hoc committee, he did not, in principle, see any valid reason for opposing it.

The PRESIDENT put the second United States amendment to the vote.

The amendment (E/CONF.6/L.2, paragraph 2) was adopted by 27 votes to 3, with 6 abstentions.

Mr. DAPHTARY (India) was afraid that the third United States amendment, which seemed to be based on the procedure adopted by the Conference on the Law of the Sea, might have the effect of unduly delaying the proceedings. The Conference on the Law of the Sea had had to consider politically important and controversial

(Mr. Daphtary, India)

issues, whereas nobody questioned the desirability of a convention on the recognition and enforcement of foreign arbitral awards. The comments on the draft Convention were in fact more concerned with questions of procedure than with questions of principle. In the circumstances, he did not see the need for the United States amendment and would oppose it.

Mr. RENOUF (Australia) said that he would vote against the United States amendment for the same reasons.

Mr. URQUIA (El Salvador) felt that an effort should be made to have the draft convention adopted by as many States as possible and that a majority of at least two-thirds should therefore be required on all questions of substance. He would support the third United States amendment.

Mr. BEALE (United States of America), replying to a question by Mr. COHN (Israel), explained that his amendment would only replace the first sub-paragraph of rule 23 and that the second sub-paragraph would remain unchanged.

The PRESIDENT put the third United States amendment (E/CONF.26/L.2, paragraph 3) to the vote.

It was decided by 14 votes to 12, with 14 abstentions that the first sub-paragraph of rule 23 of the draft rules of procedure should be replaced by the text in paragraph 3 of document E/CONF.26/L.2.

Mr. SCHACHTER (Executive Secretary) drew the attention of the Conference to rule 21 of the draft rules of procedure and pointed out that it was the intention of the authors that the two-thirds majority rule regarding reconsideration of proposals should apply not only to plenary meetings but also to the work of committees and sub-committees.

Mr. COHN (Israel) thought that rule 42 clearly showed that that was the intention.

The PRESIDENT suggested that the Conference should adopt that interpretation.

It was so decided.

Mr. MALOLES (Philippines) submitted an amendment (E/CONF.26/L.3) to bring rule 44 into harmony with the provisions of rule 43. Under rule 43, States which had been invited to the Conference but which were not participating in it could submit proposals but did not have the right to participate in the proceedings, although under rule 44 that right was recognized in the case of representatives of the specialized agencies and other inter-governmental organizations. He thought that the representatives of non-participant States should at least have the same rights as those of the specialized agencies and intergovernmental organizations. The latter had had ample opportunity to express their point of view concerning the draft convention. The Conference was essentially a conference of plenipotentiaries and the latter should properly take the leading part in the discussions. For those reasons, he proposed that representatives of the specialized agencies and of other intergovernmental organizations should only be authorized to participate in the Conference under the conditions specified by the President and upon his invitation, and only for purposes of clarifying a controversial matter.

Mr. POINTET (Switzerland), Mr. URQUIA (El Salvador) and Mr. KORAL (Turkey) thought that it would be unfortunate if organizations with great experience in commercial arbitration were unable to take part in the debate for procedural reasons. They would therefore oppose the Philippine amendment.

Mr. COHN (Israel) pointed out that under rule 9 of the rules of procedure the President was empowered to control the proceedings and, in particular, to limit the length of speeches.

The PRESIDENT stated that only two organizations had sent observers: the Hague Conference on Private International Law and the International Institute for Unification of Private Law.

Mr. VAN HOOGSTRATEN (Hague Conference on Private International Law) said that it would be awkward if his organization were not granted the treatment it had itself accorded to Government representatives participating in its work. He suggested that the text drawn up by the Secretariat should be maintained.

The PRESIDENT put the Philippine amendment to rule 44 to the vote.

The Philippine amendment (E/CONF.26/L.3) was rejected by 28 votes to 1, with 10 abstentions.

The PRESIDENT invited the Conference to consider the United States amendment (E/CONF.26/L.2, paragraph 4) to rule 45 of the draft rules of procedure.

Replying to questions by Mr. URQUIA (El Salvador) and by the PRESIDENT on the precise scope of the amendment, Mr. BEALE (United States of America) explained that invitations to submit written statements would always be made by the Conference itself, whether the statements were to be presented in plenary or at meetings of committees and sub-committees.

Mr. COHN (Israel) thought that in the circumstances, the words "or to any of its committees or sub-committees" should be inserted after the words "submit to it" in the second paragraph of rule 45.

Mr. BEALE (United States of America) accepted that amendment.

The United States amendment (E/CONF.26/L.2, paragraph 4), as amended, was adopted by 29 votes to 4, with 10 abstentions.

Mr. RAMOS (Argentina) proposed that the words "Where a two-thirds majority is not required under Rule 23" should be inserted at the beginning of rule 31 in order to take account of the amendments introduced by the Conference in rule 23.

The PRESIDENT put the proposal to the vote.

The Argentine amendment (E/CONF.26/L.5) was adopted by 21 votes to none, with 17 abstentions.

The PRESIDENT invited the Conference to adopt its draft rules of procedures as a whole.

The draft rules of procedures (E/CONF.26/5) as a whole were adopted.

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)

General debate

Mr. MATTEUCCI (Italy) said he was generally in favour of the draft Convention (E/2704 and Corr.1). The draft offered an intermediate and realistic solution that would make it possible to meet the needs of the business community while safeguarding the jurisdictional prerogatives of States. At the present time there was no possibility of securing acceptance of a solution founded solely on the principle of contractual autonomy, in which the law would be relegated to a secondary position and would be resorted to only in the absence of an agreement between the parties. Application would have to be made to the courts for the enforcement of arbitral awards and for psychological reasons the courts could hardly be expected to have confidence in an award which had not been made within the framework of a legal system and whose form or substance did not respect the mandatory provisions of the law. In any case, absolute liberalism was a thing of the past. The sphere of private law was steadily and inevitably contracting as optional provisions gave ground to mandatory rules of law. If the Convention was to be ratified by a greater number of States than the 1927 Geneva Convention, it would be necessary to eschew unduly revolutionary solutions whose acceptance would be impeded by the conservatism of jurists.

The draft Convention before the Conference took into account the considerations he had mentioned and also the need to improve on the Geneva Convention as much as possible. It gave proper place to the wishes of the parties while subordinating those wishes to the mandatory rules of the laws governing arbitration. Moreover, assimilating arbitral awards to judicial decisions, the draft provided that the award must be final and operative under the law governing the proceedings. Lastly, in article IV - a very important innovation as compared with the Geneva Convention - the draft provided a partial unification of certain rules of procedure.

While accepting the draft in principle, his delegation felt that it could be improved in certain respects. First, the Conference should reconsider the definition of the awards to which the Convention would apply. The mere fact that

(Mr. Matteucci, Italy)

an award had been made in a country other than that in which it was sought to be relied upon was not enough to make it a foreign award from the point of view of the country of enforcement. The Conference should seek other criteria better suited to the purpose of the Convention, which was intended to facilitate the settlement of international commercial disputes. Secondly, it was desirable that the question of the recognition and enforcement of arbitral awards should be resolved at the same time as that of the recognition of the validity of arbitral clauses, as the two questions were closely related. Such a solution would be consistent with the Geneva instruments of 1923 and 1927 and would eliminate the difficult problem of co-ordinating the new Convention with those instruments. Thirdly, it also seemed desirable to simplify the provision relating to the verification by the enforcing judge of the fact that the award had become final and operative in the country in which it had been made. In that connexion the solutions suggested in the note by the Secretary-General (E/CONF.26/2) deserved consideration. Consideration might also be given to the problem of criteria to be used in determining the law applicable to arbitral proceedings.

Mr. BEALE (United States of America) said that his Government was aware that it was necessary to improve both the law and practice of arbitration if it was desired that that institution should play its part properly in the settlement of disputes arising out of international trade. It was the first time that the Government of the United States was taking part in an important conference on commercial arbitration. Such participation showed that the United States realized the full benefit which countries could derive from the swift and inexpensive settlement in an atmosphere of goodwill of private disputes arising out of international trade.

The Government of the United States was happy to note that the agenda of the Conference (E/CONF.26/1) included consideration of measures for increasing the effectiveness of international commercial arbitration. In view of the differing interpretations in different countries of the idea of arbitration and differences in legislation and practice, flexibility should be shown in seeking a wide range of solutions to meet the diverse questions which arose.

(Mr. Beale, United States)

The United States delegation was authorized to take part in the discussion of any question which might be put before the Conference, as the United States Government considered that any proposal which might improve the law or practice of arbitration was worthy of close examination by the experts attending the Conference.

In studying arbitration throughout the world, the United States delegation had been struck by the usefulness of a pragmatic approach. The United States delegation believed that the improvement of arbitration methods, the standardization of arbitration clauses, the drafting of more efficient rules of procedure and the adoption of uniform arbitration laws would be most profitable. Private organizations dealing with such questions had already done valuable work in that direction locally, nationally and even internationally, and it was to be hoped that the Conference would provide an opportunity for further progress.

Mr. COLOMA-SILVA (Ecuador) said that Ecuador had taken part in drawing up the draft Convention (E/2704 and Corr.1) which he approved although he believed that it could be bettered. Arbitration held an important place in Ecuador both in legislation and in practice, and commercial contracts between Ecuadorian and foreign undertakings always contained an arbitration clause. Arbitration provided modern international trade with the flexibility and rapidity it needed. It would most certainly be desirable to adopt universal rules dealing both with the substance and the procedure of international commercial arbitration as such rules would make it possible to solve conflicts between different national legislations; such a scheme seemed, however, over-ambitious for the moment. The draft Convention represented an advance as compared with the 1927 Geneva Convention and the 1923 Protocol on Arbitration Clauses. Ecuador was particularly in favour of the draft Convention as its national legislation contained no law on procedure dealing specifically with disputes arising from international trade relations.

The Ecuadorian delegation approved the Secretary-General's comments in paragraphs 3, 4 and 5 of his note (E/CONF.26/2) with reference to the scope of the Convention as defined in article I. His delegation also approved the opinion expressed in paragraph 6 of the note regarding article I (2).

(Mr. Coloma-Silva, Ecuador)

The comments and suggestions made in paragraphs 7 and 8 regarding procedure for enforcement of arbitral awards were extremely valuable and in particular the suggestion in article II to the effect that arbitral awards would be enforceable by a simplified and rapid procedure which should in no event be more complicated than the procedure applied to domestic arbitral awards.

With regard to articles III and IV of the draft Convention which were the subject of paragraphs 9 to 24 of the note by the Secretary-General, the Ecuadorian delegation reserved its right to express an opinion at a later stage. He could, however, at the present stage, state that he was in favour of article III (a) and not in favour of the end of article III (b). His delegation approved the three formulae suggested by the Secretary-General in paragraph 16 of his note to avoid the disadvantages arising from article III (b); his delegation expressed its preference for the third formula. It also agreed with the Secretary-General regarding the advisability of adding in the Convention the grounds for refusal enumerated in paragraph 17 of the note.

The Ecuadorian delegation also believed that sub-paragraph (f) should be deleted from article IV, as it would allow defendants to have recourse to dilatory tactics; the end of sub-paragraph (g) should also be made clearer if not deleted. In sub-paragraph (h) it would be enough to mention the incompatibility of the award with public policy without speaking of the fundamental principles of the law. Lastly, the Ecuadorian delegation agreed with the comments made by the Secretary-General in paragraphs 25 to 27 regarding the relationship between any new multilateral convention and other treaties or laws relating to the same subject.

The meeting rose at 1 p.m.