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SUMMARY RECORD OF THE EIGHTH MEETING

Held at Headquarters, New York,
on Monday, 26 May 1958, at 11.20 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/CONF.26/L.10 (continued))

Mr. COHN (Israel) thought that the Czechoslovak amendment (E/CONF.26/L.10) was superfluous. If the procedure followed by the permanent bodies referred to therein was genuinely arbitral, the Convention would apply to the resulting awards in any event. On the other hand, if those bodies were really courts of justice, exercising compulsory jurisdiction, the fact that they were described as arbitral would be wholly meaningless and they could never come within the scope of the Convention.

He agreed with the USSR representative that international trade was of vital importance to the promotion of understanding between States. Equally important, however, was the acceptance of the true nature of international arbitration, which several countries still tended to misunderstand. Real international arbitration presupposed the existence of a universal arbitral body composed of all States or the appointment of neutral arbitrators freely selected by the parties to the dispute. There could be no such arbitration in a tribunal imposed by one State alone. In those circumstances, the Czechoslovak amendment should be rejected.

Mr. ADAMIYAT (Iran) said that, in his Government's view, the safeguards contained in paragraph 2 made article I fully satisfactory. The text should, however, affirm the principle of reciprocity, in the manner envisaged in the Yugoslav amendment (E/CONF.26/L.12). Lastly, the additional article proposed by Sweden (E/CONF.26/L.8, paragraph 1) would remedy an unwarranted omission.

Mr. KORAL (Turkey), referring to the Czechoslovak amendment said that most permanent arbitral tribunals were governed by mandatory legislation and parties were obliged to refer their disputes to such bodies regardless of their will. The Convention, however, was specifically concerned with awards consequent upon a voluntary submission to arbitration, and as soon as there was any element of compulsion, regardless of the designations used, the proceedings ceased to be arbitral and became judicial. In such cases, the enforcement of the decision would be governed by agreements concerning the execution of judgements. The Czechoslovak amendment thus seemed to refer to a subject outside the scope of the Convention.

Mr. MALOLES (Philippines) said that the distinction between arbitral awards and court judgements was sometimes less sharply drawn than had been suggested. Under the statute governing arbitration in the Philippines, the parties to a dispute were entitled to refer it either to specially selected arbitrators or to a permanent commercial tribunal. The submission would always be voluntary, the parties enjoying the fullest freedom of contract. The final award, however, would not be enforceable until it had been expressly confirmed by a court of law. The statute in fact stated in explicit terms that the mere reference of a dispute to arbitration would be deemed evidence of submission to the jurisdiction of the court of first instance. If the Czechoslovak proposal was rejected, awards confirmed under such a system might be wrongly excluded from the application of article I.

Mr. MATTEUCCI (Italy) pointed out that the crucial question regarding the Czechoslovak amendment was not whether the body was permanent or specially appointed, but whether there was an element of compulsion in the submission. If the reference to arbitration was voluntary, the fact that the arbitral body was permanent would raise no difficulty. On the other hand, if the parties were bound to refer their disputes to that body, the procedure was of a judicial nature.

Mr. ANGEL (Colombia) agreed that the Czechoslovak proposal would present no difficulty if the permanent bodies mentioned therein heard disputes voluntarily referred to them pursuant to a freely concluded agreement. But if those bodies exercised compulsory jurisdiction, their decisions would be on the same footing as those of the courts and would be subject to the rules governing the execution of foreign judgements in the country where the writ was applied for.

Mr. MAURTUA (Peru) thought that the difference between permanent and ad hoc bodies was fundamental. Whether the recourse to arbitration was compulsory or voluntary, a permanent body would always have to adhere to certain generally applicable rules while an ad hoc body would be governed by rules expressly drawn up for the case specified in the arbitration agreement. Furthermore, the competence of a permanent body might be expressly limited by the statutory provisions which established it.

Mr. KORAL (Turkey) thought that, at first sight, the Czechoslovak proposal seemed to refer both to arbitration proper and to a form of compulsory jurisdiction which was arbitration in name only. If the amendment was designed to apply only to voluntary proceedings, its objectives were already fully secured by the words "arbitral awards". Excessive efforts at clarification would only render the text more vulnerable.

Mr. HOLLEAUX (France) said that he was in complete agreement with the views expressed by the representatives of Israel, Italy and Turkey. He was not sure of the purpose of the Czechoslovak amendment, since it had not been explained by its sponsor. If its purpose was merely to ensure that the Convention extended to arbitral awards made by permanent arbitral bodies, it was, in his opinion, quite superfluous. During all the years of the application of the Geneva Protocol and 1927 Convention, no suggestion had ever been made that the term "arbitral award" did not include an award made by a private permanent arbitral body.

If, however, the purpose was to cover awards made by permanent bodies which might call themselves arbitral bodies but which were really courts because the parties were compelled to have recourse to them, the Czechoslovak amendment was open to serious question. The awards made by such bodies were the same as judicial decisions. The Conference, however, was called upon to deal with the enforcement and recognition of arbitral awards and not of judicial decisions.

Mr. BAKHTOV (Union of Soviet Socialist Republics) could not understand the references of the Israel and French representatives to courts and judicial decisions. The Czechoslovak amendment was simple: it dealt with permanent arbitral bodies, such as that of the French Chamber of Commerce. The parties to a contract often preferred to designate a permanent arbitral body, thereby eliminating the need for a special arbitration agreement.

The Philippine representative, among others, had explained why the Czechoslovak proposal would be useful. There was no reason to consider it superfluous, and the Soviet delegation would support it.

Mr. LIMA (El Salvador) said that in the absence of further clarification of the Czechoslovak amendment, his remarks could only be hypothetical. If the

(Mr. Lima, El Salvador)

amendment was designed to cover the same ground as that described in paragraph 25 of the report of the Committee on the Enforcement of International Arbitral Awards (E/2704), it was superfluous. If, however, it embraced a whole range of permanent bodies including those of a judicial character, the Conference would, before taking a decision, inevitably find itself engaged in a time-consuming discussion of the nature of arbitration.

Mr. WORTLEY (United Kingdom) said that his delegation had no strong feelings in the matter. As a member of the Committee on the Enforcement of International Arbitral Awards, he had been quite satisfied with the solution referred to in paragraph 25 of the Committee's report. However, if the Conference preferred to include in the Convention a reference to permanent arbitral bodies along the lines of the Czechoslovak amendment, he would propose that the words "established in compliance with the laws of respective States" should be replaced by the words "to which the parties have submitted". The words to which he objected were meaningless because the award of a body which was not legal in its own country could not be enforced abroad. At the same time, the principle of voluntary submission should be protected.

Mr. HERMENT (Belgium) proposed a further change, namely that the word "voluntarily" should be inserted between the word "have" and the word "submitted".

Mr. PSCOLKA (Czechoslovakia) accepted the amendments proposed by the United Kingdom and Belgian representatives. Not only did his delegation not question the principle of voluntary submission but it strongly supported it. The awards of the Court of Arbitration of the Czechoslovak Chamber of Commerce were made by independent arbitrators, and the parties were free to decide whether or not they wished to make use of its services. It had the great advantage that the parties knew in advance its rules of procedure and its legal status. Moreover, Czechoslovak trading bodies were under no obligation to submit their disputes to that institution. In maritime disputes, for example, the Czechoslovak party usually submitted to arbitration in London. There was, therefore, no question of compulsory jurisdiction.

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(Mr. Pscolka, Czechoslovakia)

The sole purpose of the Czechoslovak amendment was to include in the text of the Convention the clarification contained in paragraph 25 of the report before the Conference (E/2704 and Corr.1). He did not agree that such an inclusion was unnecessary. It would tend to strengthen the Convention and help in avoiding certain difficulties which had been encountered in the past and might arise again in the future.

Mr. POINTET (Switzerland) was gratified to note that the Czechoslovak amendment was not designed to challenge the voluntary character of arbitration. While some delegations had questioned the need for the amendment, his delegation could understand the reasons which had prompted the Czechoslovak representative to submit his proposal. He instanced a case where a cantonal court in Switzerland had refused to enforce an arbitral award made in Czechoslovakia on the grounds that the Swiss party to the arbitral procedure had had to select the arbitral authority from a prepared list. The court had considered that requirement to be contrary to public policy. However, a Federal court had subsequently reversed the findings of the cantonal court.

On the question whether the Czechoslovak amendment should be included in the Convention itself, he suggested that, with a view to keeping the text of the Convention as concise as possible, a paragraph reproducing the terms of the amendment might be embodied in a Conference document other than the Convention as an indication of its views on the scope of the term "arbitral award".

Mr. MALOLES (Philippines) supported the inclusion of the revised Czechoslovak amendment in the Convention.

Mr. KORAL (Turkey) felt that, as the voluntary character of arbitration was not challenged, the Czechoslovak amendment was superfluous since the existing text of the draft Convention made no distinction between awards made by arbitral tribunals appointed for each particular case and those made by permanent arbitral tribunals. Moreover, its inclusion in the Convention would be dangerous because a permanent arbitral body might have jurisdictional powers which would place a stamp of judicial approval upon its confirmation of an award. Hence, he would not accept the amendment.

Mr. KANAKARATNE (Ceylon) said that, as the question of the voluntary character of the submission to arbitral bodies had been settled, the only remaining point was whether or not the Czechoslovak amendment was necessary. His delegation had not been convinced by the arguments which several members had adduced against inclusion of the amendment in the Convention. The representative of El Salvador had quoted paragraph 25 of the report of the Committee on the Enforcement of International Arbitral Awards (E/2704 and Corr.1) in support of his contention that inclusion of the Czechoslovak amendment was unnecessary. However, in view of the statement in paragraph 25 and of the fact that the question had been formally raised in the Conference, failure to include a precise definition of the term "arbitral award" in the Convention might leave the term open to various interpretations. For instance, it might be argued that the term did not cover awards made by permanent arbitral bodies and paragraph 25 might be quoted in support of that contention. In order to leave no room for misunderstanding, a precise definition of "arbitral award" should be written into the Convention. The Ceylonese delegation would support the Czechoslovak amendment unless more cogent reasons for its exclusion were given.

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

The PRESIDENT, in the absence of any objection, declared the debate on article I closed. He suggested that the Conference should vote on the Czechoslovak amendment.

Mr. POINTET (Switzerland) observed that he had suggested that the amendment should be included in a Conference document other than the Convention.

Mr. SYDOW (Sweden) thought that the amendment might be inserted in the Final Act.

The PRESIDENT felt that the Conference should vote on the amendment first. The place of its inclusion could be dealt with later, if the amendment was adopted.

Mr. RAMOS (Argentina) suggested that the Conference should first vote on the substance of the Czechoslovak amendment.

Mr. PSCOLKA (Czechoslovakia), Mr. BAKHTOV (Union of Soviet Socialist Republics) and Mr. GURINOVICH (Byelorussian Soviet Socialist Republic) supported the Argentine representative's suggestion.

Mr. COHN (Israel) said that it would be difficult for him to vote on the amendment unless he knew whether or not it was to be included in the Convention. He had no objection to its insertion in the Final Act.

Mr. KORAL (Turkey) said that he could not vote for the amendment if it was to be included in Article I. He would agree to its inclusion in a separate article on definitions.

After an exchange of views in which Mr. KANAKARATNE (Ceylon), Mr. HERMENT (Belgium) and Mr. HOLLEAUX (France) took part, the PRESIDENT asked the Conference to vote on the question whether the substance of the Czechoslovak amendment should be included in the Convention.

The Conference decided, by 25 votes to 8, with 6 abstentions, that the substance of the Czechoslovak amendment, as amended, should be included in the Convention at a place to be determined later.

The meeting rose at 1.10 p.m.