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United Nations Commission on International Trade Law
Thirty-ninth session

Summary record (partial)* of the 827th meeting
Held at Headquarters, New York, on Friday, 30 June 2006, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) . . . . . (Mexico)

Contents

* No summary record was prepared for the rest of the meeting.

06-41324 (E)

The meeting was called to order at 10.10 a.m.

The discussion covered in the summary record began at 12.20 p.m.

Adoption of the report of the Commission (*continued*) (A/CN.9/XXXIX/CRP.1/Add.6, 8 and 9)

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Document A/CN.9/XXXIX/CRP.1/Add.6

1. **Mr. Costello** (United States of America) said that, in the heading and paragraph 1 of document A/CN.9/XXXIX/CRP.1/Add.6, there were references to a "declaration". Given that the Commission had subsequently decided on a recommendation, he proposed that those references should be amended accordingly.

2. *It was so decided.*

3. *Paragraph 1, as amended, was adopted.*

4. *Paragraphs 2 to 6 were adopted.*

5. **Mr. Bellenger** (France) proposed that, in paragraph 7, the following additional sentence should be inserted after the first sentence: "It was recalled also that in the Working Group anti-suit injunctions had given rise to serious reservations on the part of many delegations."

6. *It was so decided.*

7. *Paragraph 7, as amended, was adopted.*

8. *Paragraphs 8 to 12 were adopted.*

9. **Mr. Costello** (United States of America) proposed that, in paragraph 13, the words "respect to the determination of the conditions" should be replaced with the words "many judicial systems".

10. *It was so decided.*

11. *Paragraph 13, as amended, was adopted.*

12. *Paragraphs 14 to 26 were adopted.*

13. **Mr. Costello** (United States of America) proposed that, in the second sentence of paragraph 27, the words "provision of security was not a condition precedent for the granting of the coming into effect of a preliminary order" should be replaced by the following: "tribunal could, at the same time that it grants a preliminary order, also establish a deadline for the requesting party to put security in place and that this possibility was the reason for the flexible wording".

14. *It was so decided.*

15. *Paragraph 27, as amended, was adopted.*

16. **Mr. Costello** (United States of America) proposed that the following sentence should be added before the last sentence of paragraph 28: "Further, it was said that parties usually honour interim measures out of respect for the arbitrators' authority and a desire not to antagonize them."

17. *It was so decided.*

18. *Paragraph 28, as amended, was adopted.*

19. *Paragraphs 29 to 34 were adopted.*

20. **Mr. Costello** (United States of America) proposed that, in the first sentence of paragraph 35, the words "facts or" should be inserted before the word "arguments", since the obligation was to report changed circumstances, which would primarily be facts rather than arguments.

21. *It was so decided.*

22. *Paragraph 35, as amended, was adopted.*

23. **Mr. Costello** (United States of America) said that, in the first sentence of paragraph 36, the words "objected that article 17 septies" should be replaced by the following: "recalled that the two paragraphs of article 17 septies reflected two distinct disclosure obligations that operated in distinct circumstances. Whereas the obligation in paragraph 1 to disclose changed circumstances related to interim measures, the obligation to disclose all 'relevant' circumstances in article 17 septies, paragraph 2,". The last two words of that sentence, "interim measures", should be replaced with the words "preliminary orders." The following additional sentence should be inserted after the first sentence: "Similarly, in many other legal systems, a comparable obligation arose from the recognized

requirement that parties act in good faith." The last sentence of the paragraph would remain unchanged.

24. *It was so decided*.

25. *Paragraph 36, as amended, was adopted*.

26. *Paragraphs 37 to 46 were adopted*.

27. *Document A/CN.9/XXXIX/CRP.1/Add.6, as amended, was adopted.*

Document A/CN.9/XXXIX/CRP.1/Add.8

28. *Paragraphs 1 and 2 were adopted*.

29. **Mr. Costello** (United States of America) proposed that, in the fourteenth line of paragraph 3 of document A/CN.9/XXXIX/CRP.1/Add.8, the word "radical" should be replaced by the word "significant", as his delegation did not recall any participant using the phrase "radical change". In the last line of paragraph 8, the words "to policymakers" should be deleted, as the guidance in question was not intended solely for policymakers.

30. **Mr. Boulet** (Belgium) proposed that, in order to give a more complete account of the Committee's work, a sentence should be added at the end of paragraph 3. The sentence should read: "However, it was also pointed out that the question of the proof of the content of the agreement and the question of the proof of the consent of the parties could not be entirely disassociated from one another, and that a written form could prove the content of the arbitration agreement only if also established that it emanated from one of the parties to the agreement".

31. *It was so decided*.

32. *Paragraph 3, as amended, was adopted*.

33. *Paragraphs 4 to 13 were adopted*.

34. **Mr. Costello** (United States of America) proposed that, in the fifth line of paragraph 14, the words "the validity of" should be inserted before the words "oral arbitration agreements". In the third line of paragraph 15, the words "oral arbitration agreements" should be replaced by the words "that removal", and in the fourth line the words "their validity" should be replaced by the words "the validity of arbitration agreements". The last part of the sentence would therefore read: "that removal had not given rise to significant disputes as to the validity of arbitration agreements". In the fifth line of paragraph 15, the words "was unfamiliar" should be replaced by the words "would be unlikely to be adopted". Lastly, in the third line of paragraph 16, the words "alternative proposal" should be replaced by the words "revised draft".

35. *It was so decided*.

36. **Ms. Avenberg** (Sweden) said she believed that the proposed amendment to the fifth line of paragraph 15 referred to a comment made by her delegation to the effect that Swedish law did not recognize such provisions. Her delegation was prepared to accept the proposed amendment but interpreted the draft text differently.

37. *Paragraphs 14 to 16, as amended, were adopted*.

38. *Paragraphs 17 to 21 were adopted.*

39. **Mr. Costello** (United States of America) proposed that, in the third line of paragraph 22, the words "requirement created uncertainty" should be replaced by the words "requirement has created in some cases uncertainty". In the seventh line of the same paragraph, the words ", or court rules," should be inserted after the words "general law of evidence".

40. *It was so decided*.

41. *Paragraph 22, as amended, was adopted*.

42. *Paragraphs 23 to 25 were adopted*.

43. **Mr. Costello** (United States of America) proposed that, in the final sentence of paragraph 26, the words "at a future session" should be replaced by the words "at future sessions" and the words "of the Commission" should be replaced by the words "of the Working Group and the Commission".

44. *It was so decided*.

45. *Paragraph 26, as amended, was adopted*.

46. *Paragraph 27 was adopted*.

47. *A/CN.9/XXXIX/CRP.1/Add.8, as amended, was adopted*.

Document A/CN.9/XXXIX/CRP.1/Add.9

48. *Paragraphs 1 to 3 were adopted*.

49. **Mr. Costello** (United States of America) proposed that, in the first sentence of paragraph 4, the word "purpose" should be replaced by the word "nature".

50. *It was so decided*.

51. *Paragraph 4, as amended, was adopted*.

52. *Document A/CN.9/XXXIX/CRP.1/Add.9, as amended, was adopted*.*

Statement by a representative of the cotton industry

53. **Mr. Gillen** (International Cotton Advisory Association) said that in recent years the patterns of trade in raw cotton had changed, as textile production had moved from the developed to the developing world, where many of the participants were unfamiliar with the rules-based system utilized by the international cotton trade.

54. Most cotton mills in developing countries had recognized the critical need for such a system, because of the assurances it provided through timely delivery of cotton at the contract price. However, a minority of participants in emerging markets had not readily accepted that essential trade ethic and had interpreted a price swing against their position as grounds for abrogating their contractual obligations and ignoring arbitration awards, thereby adding significantly to the cost of doing business and jeopardizing a well-established system of trade.

55. Considering the large volume of cotton traded in the export market each year, the overall record of contract execution through payment and timely delivery of cotton, pursuant to the terms and conditions of the contract, was very positive. However, it was estimated that the level or degree of defaults added approximately $300 million to the cost of doing business each year. That additional cost limited the viability of the cotton trade and the availability of cotton in markets with a high level of defaults. The entities listed for failing to pay their outstanding arbitration awards were mostly either textile mills or buyers that failed to perform their contracts in declining markets or merchants and farm cooperatives that failed to perform as sellers in rising markets.

56. Almost 60 per cent of the defaults had occurred in seven countries that had expanded their textile production over recent years. Currently 312 parties in 55 countries were in default on 337 International Cotton Association arbitration awards, totalling $161.4 million. Three countries accounted for 36 per cent of the defaults: India, with 17 per cent; Bangladesh, with 11 per cent; and Pakistan, with 8 per cent. In 1999 there had been 164 parties from 44 countries listed in default on 188 International Cotton Association arbitration awards, totalling $60.8 million.

57. Accordingly, the cotton industry requested that the Commission focus on the problem of defaults, which was jeopardizing a viable, free and fair trade in cotton.

The meeting rose at 1.05 p.m.

* The discussion of document A/CN.9/XXXIX/CRP.1/Add.9 was reopened at the 835th meeting (see A/CN.9/SR.835, paras. 21-33).