Taking the meeting as a whole, it was very encouraging. The need for an instrument of the character of our draft was recognized. Nobody found anything radically wrong with it. My impressions at the meeting itself were confirmed by what I learned from various sources about reactions of delegates expressed to others who were in Addis Ababa for other conferences being held concurrently.

I had expected a good and sympathetic discussion, but it was more constructive and more helpful and encouraging than I had dared to expect.

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Z8 (June 12, 1964)

SETTLEMENT OF INVESTMENT DISPUTES

CONSULTATIVE MEETING OF LEGAL EXPERTS

Santiago, Chile, February 3-7, 1964

SUMMARY RECORD OF PROCEEDINGS

June 12, 1964

LIST OF PARTICIPANTS

Chairman: A. BROCHES, General Counsel, IBRD

ARGENTINA	Mr. Enrique Alberto WYDLER	Banco Central de la República Argentina
	Mr. Julio BARBOZA	Ministerio de Relaciones Exteriores
BOLIVIA	Mr. Adán SORIA Diez Causeco	Corporación Boliviana de Fomento
	Mr. Alejandro ZORRILLA Pinto	Director, Banco Central de Bolivia
	Mr. Jaime ESCOBAR Quiroga	Ministerio de Hacienda
BRAZIL	Mr. Francisco da CUNHA RIBEIRO	Abogado, Superintendencia da Moeda e do Credito
	Mr. Odilon de CAMARGO PENTEADO	Embajada del Brasil en Chile

(i)

CANADA	Mr. E. Richmond OLSON	Department of Justice
	Mr. H. Courtney KINGSTONE	Legal Division, Department of External Affairs
	Mr. George Bernard SUMMERS	Canadian Ambassador to Chile
CHILE	Mr. Luis ARTEAGA Barros	Subsecretario de Relaciones Exteriores
	Mr. Hugo GALVEZ	Banco Central de Chile
	Mr. Helmut BRUNNER	Profesor de Derecho Internacional
	Mr. Fernando GAMBOA Serazzi	Ministerio de Relaciones
	Mr. Ricardo WALKER	Primer Abogado, Banco Central de Chile
COLOMBIA	Mr. Antonio del CASTILLO	Ministerio de Relaciones Exteriores
	Mr. Jaime CANAL Rivas	Ministerio de Relaciones Exteriores
COSTA RICA	Mr. José Antonio CASTRO	Banco Central de Costa Rica
	Mr. Froylán GONZALEZ	Asesor Legal, Banco Central de Costa Rica
DOMINICAN REPUBLIC	Mr. Antinoe FIALLO	Consultor Jurídico de los Bancos del Estado
ECUADOR	Mr. Luis René SALAZAR	Banco Central del Ecuador
	Mr. Teodoro BUSTAMANTE Muñoz	Embajada del Ecuador en Chile
	Mr. José V. ORDEÑANA	Abogado
EL SALVADOR	Mr. Rafael Ignacio FUNES	Jefe, Sección Jurídica, Banco Hipotecario de El Salvador
	Mr. Francisco VEGA-GOMEZ	Colaborador Jurídico, Ministerio de Justicia
GUATEMALA	Mr. Eduardo PALOMO	Vice Ministro de Economía
	Mr. Victor Salomón PINTO	Abogado, Ministerio de Economía
HONDURAS	Mr. Roberto RAMIREZ	Banco Central de Honduras
JAMAICA	Mr. V.B. GRANT	Attorney General
	Mr. K.O. RATTRAY	Crown Counsel
NICARAGUA	Mr. Gonzalo MENESES Ocón	Ministro de Estado en el Despacho de Educación Pública
	Mr. Guillermo SEVILLA-SACASA	Embajador de Nicaragua, Decano del Cuerpo Diplomático en Washington
PANAMA	Mr. Dulio ARROYO C.	Decano de la Facultad de Ciencias Politicas, Universidad de Panamá
	Mr. Oscar UCROS G.	Decano de la Facultad de Derecho, Universidad de Panamá
PARAGUAY	Mr. Miguel Angel PANGRAZIO	Abogado Adjunto del Banco Central de Paraguay
PERU	Mr. Antonio NAVARRO Madrid	Abogado
	Mr. Alfredo CARPIO Aguirre	Abogado
	Mr. Hubert WIELAND	Embajada del Perú en Chile

TRINIDAD AND TOBAGO	Mr. Errol S. CHERRIE	Legal Secretary to Attorney General
UNITED STATES OF AMERICA	Mr. G. d'Andelot BELIN	General Counsel, Treasury Department
	Mr. John O. HALLY	Acting Assistant General Counsel, Treasury Department
	Mr. Andreas F. LOWENFELD	Assistant Legal Adviser for Economic Affairs, Department of State
VENEZUELA	Mr. Alfonso ESPINOSA	Abogado
	Mr. Carlos A. TROCONIS Santana	Abogado, Banco Central de Venezuela

NOTE

This document contains a summary record[1] of the views of the experts on the proposals contained in the Working Paper entitled "Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (Doc. COM/WH/1)[2].

Suggestions made for changes in drafting, for improvement of the English and Spanish texts, and for confirming one text more closely to the other, were noted by the Secretariat but have not been included in this record.

FIRST SESSION
(Monday, February 3, 1964 - 3:45 p.m.)

The CHAIRMAN invited Mr. Daza to take the floor.

Mr. DAZA (Under Secretary of State for Foreign Affairs of the Republic of Chile) welcomed the delegates on behalf of the Chilean Government and wished them every success in their deliberations. The fact that the study of the project put forward by the International Bank for Reconstruction and Development had begun in Addis Ababa[3], and would continue in Geneva[4] and Bangkok[5], was proof of the universal validity of the juridical concepts that it was desired to formulate and place at the disposal of the international community.

Countries such as Chile that needed foreign capital in order to accelerate their development must view with satisfaction any study that might contribute to such co-operation between nations.

[1] This summary record was sent to the delegates for clearance in provisional form and reflects their comments
[2] Doc. 24
[3] See Doc. 25
[4] See Doc. 29
[5] See Doc. 31

The CHAIRMAN invited Mr. Santa Cruz to take the floor.

Mr. SANTA CRUZ (Deputy Executive Secretary, Economic Commission for Latin America) reminded tha delegatas that ECLA had from its inception devoted a major part of its efforts to studies connected with economic development and the financing of such development, and was consequently interested in both the subject-matter and the objectives of the present meeting.

Foreign private investments could contribute much to the economic development of the Latin American countriee, especially if tbey could be adapted to the neede of those countries at their present state of economic, social and political development. On the other hand, the investment of private capital made necessary a juridical system guaranteeing the legitimate interest of the investor. Hence the importance of finding a formula that could effectively guarantee such interests, whila respecting the sovereignty of each country in accordance with the principles of international law and the constitutional rules of the country.

The CHAIRMAN thanked the representatives of the Government of Chile and of ECLA for their words of welcome and in turn welcomed the delegates on behalf of the President of the World Bank. He said that the present meeting was the second of four consultative meetings of legal experts called by the World Bank to discuss informally the draft of en international convention on settlement of investment disputes. The first had been held at Addis Ababa, end almost all the African nations invited had sent delegates. Several of the more important African countries had expressed support and no country had been opposed to the basic features of the proposals. The comments made at that meeting would be very useful in studying more deeply the new problems of international law. The headquarters of the regional economic commissions of the United Nations had bean made available for the other three meetings; for the present meeting, ECLA had given its valuable support, and its effective help in preparing the administrative arrangements was very much appreciated.

It was gratifying to see that so many nations of the Western Hemisphere had sent such eminent jurists to the meeting, which reflected the importance attached by their governments to the matters to be discussed.

All countries of the Western Hemisphere had won political independence less than two centuries ago, some much more recently, but their economic vicissitudes since then had been such that their representatives would bring to the meeting valuable ideas concerning their past experience in the field of foreign investment, some of which had not been pleasant. However, international law could no longer be feared as a tool of the strong against the weak.

Certain juridical traditions that had developed in the Western Hemisphere might have been justified in the past, but the time had come to reappraise them in tbe light of the present urgent neede for tha bettarment of human life in an atmospbere of growing co-operation among independent nations.

The World Bank's initiative in promoting an international agreement in a field whicb might not be regarded ae falling directly within its sphere of activity was not unusual in view of the nature of the Bank, which was not

merely a financing mechanism but, above all, a development institution. Its activities necessarily consisted largely in the provision of finance, but much of its energy and resources were devoted to technical assistance and advice directed toward the promotion of conditions conducive to rapid economic growth, and the creation of a favorable investmant climate in the broadest sense of the term. To that end, sound technical and administrative foundations were essential, but no less indispensable was the firm establishmant of the rule of law.

In the past, international investment might justifiably have been of interest chiefly to the capital-exporting nations and their citizens. Today it was universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world and had become one of the major features of the partnership between the richer and poorer nations; its promotion was a matter of urgent concern to capital-importing and capital-exporting countries alike. This was particularly true of private foreign investment which, if wisely conducted, could make great contributions to the development of the economies of the recipient countries. Unfortunately, private capital was not moving in sufficiant volume to areas in need of capital, one of the most serious impediments to its flow being the fear of investors that their investment would be exposed to political risks such as outright expropriation without adequate compensation, government interference and non-observance by the host government of contractual undertakings on the basis of which the investment had been made.

The Bank had therefore been led to wonder whether, in view of its reputation for integrity and its position of impartiality, it could not help in removing that obstacle to international private investment. It had on a number of occasions been approached by governments and foreign investors who had sought its assistance in settling investment disputes that had arisen or might arise in the future. The Bank had concluded that the most promising approach would be to attack the problem of the unfavorable investmant climate from the procedural angle, by creating international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes. Some might think it desirable to go beyond that and attempt to achieve a substantive definition of the status of foreign property, and there was undoubtedly a need for a meaningful understanding between capital-exporting and capital-importing nations on those matters. At the same time, however, there was need to pursue a parallel effort of more limited scope, represented by the proposals to be discussed at the meeting.

The Convention would make available facilities to which States and foreign investors could have access on a voluntary basis for the settlement of investment disputes between them. The method of settlement selected might be conciliation, arbitration, or conciliation followed by arbitration if the conciliation effort should fail. The Convention would set up a mechanism for the selection of conciliators and arbitrators and for the conduct of proceedings. The initiative for such proceedings might come from a State as well as from an investor. In the opinion of the Bank those institutional facilities and procedures were better suited to disputes between a State and a foreign investor than those offered by other existing or proposed institutions. Taken by themselves, however, they could be put into effect by corporate action by the Bank and would not require the conclusion of any inter-governmental agreement.

Such institutional facilities were nevertheless, in his opinion, secondary to other parts of the proposals, which it was necessary to embody in a convention.

Those parts comprised, firstly, recognition of the principle that a non-State party, an investor, might have direct access in his own name and without requiring the espousal of his cause by his national government, to a State party before an international forum. States, in signing the Convention, would admit that principle, but only the principle. No signatory State would be compelled to resort to the facilities provided by the Convention, or to agree to do so, and no foreign investor could in fact initiate proceedings against a signatory State unless that State and the investor had specifically so agreed. However, once they had so agreed, both parties would be irrevocably bound to carry out their undertaking and the Convention eetablished rules deeigned to prevent frustration of the undertaking and to ensure its implementation.

Secondly, while the Convention implied a recognition that local courts were not necesearily the final forum for the eettlement of disputee between a State and a foreign investor, it did not imply that local remediee could not play a major role. When parties consented to arbitration, they would be free to etipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhaueted before the dispute could be submitted for arbitration under the Convention. It was only if the parties had not made either stipulation that the Convention provided for arbitration in lieu of local remedies.

Thirdly, a far more important feature of tha Convention was that in traditional international law a wrong done to a national of one State for which another State was internationally reeponsible was actionable not by the injured national but by his State. In practice that principle had been supereeded by a number of instances in which provision had been made for settlement of inveetment disputes by direct conciliation or arbitration between the host State and the foreign investor. Tbe internationally binding character of such arrangemente had not, however, been recognized hitherto, and the Convention wae designed to fill that gap. Thus the Convention would be in harmony with the growing recognition of the individual as a subject of international law.

While an agreement by a State to submit to international arbitration admittedly implied some limitation of national eovereignty, one of the essential attributes of sovereignty wae the capacity to accept limitations on it, which is what happened whenever a State entered into an international agreement. The proposed Convention would give internationally binding effect to the limitation of a sovereignty inherent in an agreement by a State, pursuant to the Convention, to eubmit a dispute with a foreign investor to arbitration. But as a corollary of the principle allowing an investor direct and effective accese to a foreign State without the intervention of his national State, the Convention introduced an important innovation, namely, that the investor'e national State would no longer be able to espouse the claim of its national. A host State would therefore not be faced with the likelihood of having to deal with a multiplicity of claims and claimante. The Convention would offer a means of settling directly, on the legal plane, inveetment disputes between the State and the foreign investor, and would insulate euch disputee from the realm of politics and diplomacy. He was convinced that this would eerve the best interests of investors, hoet Statee and the cause of international co-operation generally. Local remedies would inevitably eometimes be unsatisfactory from the standpoint of the investor; as things stood, the investor would be left to claim the protection of his own government, which would transform the controversy into a dispute between States, a result more often than not dis-

tasteful or embarrassing to all the partiee concerned.

Fourthly, awards of arbitral tribunals rendsred pursuant to the Convention would be recognized by, and enforceable in all Contracting Statee as if they were final judgments of their national courte regardless whether the State in which enforcement was sought or was not a party to the dispute in question. This aspect was of particular intereet to hoet States rather than to investors. Since any State against which an award was granted would have undertaken in advance a solemn international obligation to comply with the award, the question of enforcement against a State was somewhat academic. In that connection he wished to make it clear that where, as in moet countries, the law on immunity of foreign States from execution would prevent enforcement against a State as oppoeed to execution against a private party, the Convention would leave that law unaffected. All the Convention would do would be to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national Courts.

Fifthly, it should be borne in mind that ths Convention did not lay down standards for the treatment by States of the property of aliens, nor did it prescribe etandards for the conduct of foreign investore in their relations with host States. The Convention was therefore not concerned with the merits of investment disputes but with the procedure for eettling them.

While the Bank believed that private invsstment had a valuable contribution to make to economic development, it wae neither a blind partisan of the cause of the private investor, nor did it wish to impoee its views on others. He did not expect or think it desirable that every dispute between a foreign investor and a host State should neceeearily be dealt with by the facilities established undsr the Convention, nor was it intended to superseds national jurisdiction gensrally. It ehould, however, be stressed that there might be instances when recourse to an international forum would be in the intereet of the host State ae well as of the investor.

Two further points needed emphasis. The first was that the Convention was designed to deal with claims by host States against investors, as well as with claims by investors against host States; the eecond, that the Convention dealt with conciliation as well ae with arbitration. Indeed, it might well be found that when the Convention came into being, conciliation activities under the auspices of the Centsr proved more important than arbitral proceedings.

In conclusion he pointed out that the Convention left States and investore free to establish their mutual relatione on whatsver basis they deemed proper, and no signatory State would be under any obligation to submit a dispute either to conciliation or arbitration. The true eignificance of the Convention lay in the fact that it ensured that, if the parties agreed to have recourse to an international forum, their agreement would be given full effect. This would create an element of confidence which would, in turn, contribute to a healthier investment climate.

It was important to realize that there were no easy solutions to problems of development. For that reason every new idea ought to be studied with an open mind and with the sole concern of determining whether it could make any contribution to the common goal. The view had already been expressed in Latin America that the time had come for jurists to play a role in modifying the traditional legal concepts in the field of

international trade and investment, and he hoped that the proposals before the meeting would be studied in that spirit.

The session was suspended at 4:30 p.m. and resumed at 5:00 p.m.

The CHAIRMAN invited representatives to make general remarks on the preliminary draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Mr. BRUNNER (Chile) said that the draft Convention touched on novel problems and concepts in the field of international law in giving individuals direct access to States before international tribunals. The most enlightened jurists had long denied that only States could be subjects of international law, and it had been increasingly recognized that the individual was both an active and a passive subject of rights beyond those granted under national laws. Although the draft Convention was of a highly technical character, it contained theoretical implications that would endow the deliberations of the presant meeting with special importance and interest. Direct access of individuals to an international jurisdiction which was found in the Statute of the Central American Court of Justice and had been acquiring increasing importance in the European Economic Community was being projected upon the world plane through the initiative of the International Bank.

The present age of international organizations which followed a period when the rights of national States were regarded as paramount made it necessary to seek the common good by means of a redistribution of wealth not only within particular communities but on a world-wide basis. This was a meeting of jurists who, because of their high calling should persevere in the search for that common good through law and justice.

In establishing adequate rules and institutions for conciliation and arbitration between a State and nationals of another State in disputes relating to investments, the present meeting would help to facilitate the inflow of capital to areas in need of it. That work would also help to promote the legal conditions favoring the social and economic development essential for many nations and areas if they were to live in peace and freedom, and the Chilean delegation were glad to collaborate in it.

Mr. RAMIREZ (Honduras) emphasized that the long period of Latin American disintegration was drawing to a close, as demonstrated by the formation of the Latin American Free Trade Association and the economic integration of Central America. However, juridical institutions had not caught up with the changing economic conditions of the world today, and it was therefore highly significant that jurists should be meeting to discuss an instrument designed to resolve conflicts that might arise in connection with the investments that countries needed for their economic development.

One of the basic requirements for the development of a country was the protection of investments. The legal processes of arbitration and conciliation embodied in the draft Convention might furnish the required procedural guarantees, but those processes would require greater refinement because they touched on new economic and legal questions. Naturally, the mechanism designed for the purpose must be entirely independent and not linked with any interests which might have a deter-

mining influence on its decisions.

Mr. GRANT (Jamaica) said that the social conscience of the world strongly felt the need to reduce the existing gap between the developed and the developing countries. But efforts to do so must take due account of the developing countries' sovereignty over their natural resources and their control over their own economic planning, and in that connection he referred to the U.N. General Assembly's resolution 1803 (XVII) of 14 December 1962.

He congratulated the World Bank on the effort represented by the comprehensive draft placed before the meeting. He recalled that the International Law Commission's efforts in respect of the Model Rules on Arbitral Procedure between States had not borne fruit but he believed that past disappointments should not blight hopes for the future.

He wondered whether the principle of non-frustration of an agreement to have recourse to the Center embodied in Articles III and IV might not prove an obstacle to acceptance of a convention truly multilateral in its conception; refusal by a State to nominate its member on a tribunal would imply a decision not to co-operate or accept an adverse award, and could undermine respect for the institution. He also believed that the exclusion of national arbitratore might impair the confidence of States. Since the new machinery would be required to administer national as well as international law, it would be important that the background of national legal arguments and principles be fully understood by the Tribunal. An idealistic approach that could accept a denationalized tribunal might also accept the concept of an impartial national arbitrator. While recognizing the merit of the draft Convention, he had put forward certain criticisms designed to avoid dangers to tha success of the proposed institution, and in that connection he aleo questioned the need for the new Center to be so closely linked with the World Bank itself.

Mr. RIBEIRO (Brazil) considered that the proposed Center possessed certain characteristics that set it apart from the principles that had traditionally inspired international arbitration, a legal institution designed for the peaceful solution of disputes between nations. Moreover, the draft Convention raised constitutional problems, since it implied a certain curtailment of the scope of national legal processes. Brazilian constitutional law guaranteed the judicial power a monopoly of the administration of justice (see Art. 141, paragraph 4, of the Brazilian Constitution) and therefore it would be inadmissible to create within the territory of the nation a body entrusted with decisions in the field of law. Were such activities to be delegated to an international organization, the violation of this constitutional precept would be even more flagrant. Another aspect of the problem that raised doubts in his mind was that despite the optional character of the draft Convention, foreign investors would be granted a legally privileged position, in violation of the principle of full equality before the law.

He was also disturbed by the possibility mentioned in the Preamble that a State might espouse the cause of one of its citizens involved in a dispute with another State; this possibility, legally questionable, did not in any case provide a sufficient justification for overlooking constitutional principle.

All the above considerations would influence Brazil's decision as

to whether to join the proposed Center.

Mr. SUMMERS (Canada) said that the draft Convention was an impressive and forward-looking document, but it would have to be examined with great care by each country in the light of its own political, constitutional and financial circumstances. The present capital requiremente of the developing countries exceeded domestic resources, and an inflow of capital from abroad was needed to provide foreign exchange and furnish the experience and techniques of long-eetablished induetries elsewhere. Most of such capital must come from industrial countriee where the great part of the capital available for such purpoee was in private hands, and the general investment climate abroad wae therefore a major factor. Canada had long been supporting programs of economic and technical assistance in Latin America, Aeia and Africa, as well as measures to improve the investment climate and increase the flow of private capital to the developing countriee, and now supported the Bank's initiatives in that field. The Bank had played a useful role both in the preparation of investment programs in the developing countries, and in guiding private capital into countries urgently in need of it. It had also played a major role in settling a number of important investment disputes (such as the Suez Canal and City of Tokyo Bonds cases). The Bank was therefore well equipped to take the present initiative in seeking to establieh voluntary facilities which might be available in appropriate cases for the conciliation and arbitration of investment disputes with a view to improving the investment climate and increasing the flow of private capital to the developing countries.

Mr. ARROYO (Panama) wished to make two observations which, although of a formal nature, might contribute to a better understanding of the draft Convention. In the first place, the present layout of the draft Convantion was not conducive to an understanding of the subject-matter, and he asked that it be divided into chapters and articles in the usual manner, instead of into long articles and sections as it now was. He also referred to the comments accompanying each part of the draft, and said that some of them were of unquestionable value in themselves and could well be incorporated into the actual text of the draft.

Mr. UCROS (Panama) said he wished to make a comment of substance. The competence of the proposed Center was limited to disputes in connection with investments between one State and the nationals of another State. In fact, however, most of the investments in question were now made by international organizations, and consequently the scope of the draft Convention should be extended to include the problems arising between such organizations and States or their Nationals.

The CHAIRMAN said that disputes between States had deliberately been excluded from the draft Convention, since there were already available a number of procedures for settling such disputes. As regards international bodies, most agreements in which they were involved contained specific arbitration provisions which had generally proved satisfactory because they operated in a field of international law which was traditional, and not in a new field, such as that which would be covered by the draft Convention.

Mr. BARBOZA (Argentina) found great difficulty in accepting the principle underlying the draft Convention for several reasons. National sentiment could not accept the delegation to international organizetione

of powers belonging to national institutions. Foreign investors in Argentina had sufficient guarantees so as to make recourse to other bodies unnecessary. No shadow of suspicion must be allowed to fall on thoee guarantees, as would be the case were the suggested agreement ratified. There were also legal difficulties. Agreeing with the opinion expreeeed by the Brazilian delegate, the speaker pointed out that an unjuet die-crimination would exist if some persons could be excepted from the principle of equality of all before the law. From the theoretical point of view, there were no firmly established precedents for the use of arbitration between an individual and a State. While it was true that the individual had found increaeing recognition in international law, eepecially in the field of human rights, it would etill be long before he could act legally on equal terms with other international pereons.

Despite the urgent need for inveetments, the draft Convention involved a cession of the powere of the State with regard to pereons and thinge eituated within its national territory. Argentina was not prepared to curtail ite jurisdiction and felt thet to detract from national sovereignty wae not an acceptable method for improving the inveetment climate.

Mr. BELIN (United States of America) eaid that the United Statee took a great interest in the draft Convention, which was obviously the result of arduous and thoughtful preparation. If a sufficient number of countriee proved interested in working out some arrangment on the basie of the draft, the United States would support it. He stressed the voluntary nature of the arrangements proposed in the draft, which should appeal to many countries. While his delegation would in the course of the proceedings presant comments on individual provieions of the draft, the United States wae in full accord with the basic design of the Convention.

Mr. ESCOBAR (Bolivia) eaid that the eovereignty of States could not be subordinated to the authority of an international institution without being seriously impaired. Sovereignty could not be alienated, for any consideration whatever, without undermining the State through the dispereion of its powers. He believed that those reeponeible for preparing the draft had failed to appreciate its adverse effects. Thus the Bank itself seemed to be displaying a lack of confidance in the inetitutione of the countriee wishing to attract foreign capital; moreover, the existence of the draft Convention might have caueed inveetors to defer action pending the Governments' decision on it. In view of those ill effecte, he would prefer the Bank to abandon the project.

Bolivia had an investment development law in force which recognized a series of rights, privilegee and safeguards in reepect of foreign capital invested in the country. Any problems that might ariee must be settled by Bolivia's own courte, eo ae to preclude any unconstitutional diecrimination against its own nationals.

The Bank ehould suggest to governments the adoption of a specific and expeditious procedural system to eettle dieputes with foreign investors within the legal and administrative machinery of each country. He also observed that if the draft Convention were not unanimously rejected, foreign capital might blacklist the countries that did not wish to submit their disputes with investors to international adjudication.

The CHAIRMAN said that he would not presume to dispute interpretations by participants of specific provisions of their own Constitutions, but he

would comment on the relation of the draft Convention to what had been called by several speakers the democratic spirit on which all such Constitutions were based. He himself had stressed in his opening remarks that when a State agreed to submit a dispute to arbitration or conciliation, it was exercising a sovereign right, namely that of limiting its own sovereignty. He could not agree that sovereignty was inalienable in the sense that every State would be the judge of its own actions; he was convinced that the world had progressed beyond that extreme and narrow view. He had no intellectual difficulty with the point of view of the Argentine representative who had simply said that in the circumstances he did not wish to curtail its sovereignty, but he thought that the draft Convention could hardly be regarded as violating "natural" international law. He did not believe that the Bolivian representative had intended to suggest that the Bank's aim had been to destroy the confidence of investors in the good faith of governments. The Bank's proposal had been inspired by the fact that experience had shown that many investors and prospective investors were concerned about the lack of satisfactory means of settling disputes, and the effect had been a falling off in foreign private investment in many underdeveloped areas, including in particular Latin America.

Mr. ESPINOSA (Venezuela) pointed out that in the course of the meeting two schools of thought had been expressed. Some speakers had stressed that the law should be adapted to present-day changes in order to favor the inflow of capital and contribute to the economic development of the countries of the Western Hemisphere. Others had dwelt on constitutional problems, emphasizing principles, attitudes, beliefs and feelings adopted towards certain institutions and certain general legal principles.

The tone of some of the statements did not augur well for the meeting. However, the participants were jurists and therefore it was particularly incumbent upon them to find ways of reconciling both schools of thought.

In Venezuela, conciliation was a fully recognized procedure in both public and private law, without any restrictions, but arbitration was subject to certain limitations established by the Constitution and by national legislation. In Venezuela an agreement to arbitrate was not complete or binding unless ratified before the competent Court. No undertaking to submit to arbitration was valid in respect of matters connected with public interest or good morale.

As regards public law, Venezuela's Constitution clearly distinguished, with respect to arbitration, between the agreements concluded with other nations, or international institutions such as the World Bank, and contracts touching the public interest that the Government, in its administrative capacity, concluded with private persons. Disputes regarding the former were subject to the means of peaceful settlement recognized by international law or previously agreed to by the parties, such as arbitration; but the settlement of disputes relating to the second category of agreements was reserved to the exclusive competence of Venezuela's Courts, in accordance with its legislation. Those constitutional precepts were considered as falling within the domain of public policy which precluded the conclusion of agreements inconsistent therewith; even with the consent of the litigants or interested parties. Foreign judicial decisions, including arbitral awards, could not be enforced if they contained provisions contrary to public policy or to the national public law of Venezuela.

Although the foregoing comments might seem to cloud the possibility

of Venezuela's adhering to the Convention, they reflected his country's legal situation at the present time. Speaking personally he repeated his sincere hope that a way would be found of harmonizing the two positions. It would be up to his Government to take the appropriate decisions on the matter at the proper time.

Mr. PALOMO (Guatemala) shared the concern expressed by other delegations as to a possible conflict between the draft Convention and national legal systems. Such was his uneasiness that he wondered whether the meeting should continue studying the draft, which had given rise to serious misgivings on the part of other delegations. He therefore suggested that the meeting first decide the general question of the desirability of the proposals before proceeding to a detailed study of the draft Convention.

Mr. BUSTAMANTE (Ecuador) said that the draft Convention was based on two assumptions. The first was that private foreign investment was regarded as a prime factor in the development of countries in the process of growth or in the process of increasing impoverishment. Its contribution hitherto had been negligible; presumably the Bank had calculated the increased investment that would result from the proposed Convention. He feared, however, that if the draft Convention were approved, governments would have serious difficulties, particularly of a constitutional nature, in signing it. In Ecuador, as in other countries, the Constitution embodied the principle of equality of nationals and foreigners before the law. To make a different jurisdiction available to foreigners would place them in a privileged position.

The second assumption was that the State could act in two capacities: as a person under private law borrowing capital and as a sovereign body under public law granting protection to investors. In the first case, it was very difficult to accept the idea of submission to an international tribunal; and in the second such submission came very close to impairing the exercise of sovereignty.

Mr. VEGA-GOMEZ (El Salvador) said that although all the delegates of the Latin American countries had expressed objections to the draft, they all admitted that conciliation and arbitration were valuable instruments. There must be an attempt to reconcile the constitutional side of the question with the need to find incentives to development, but that did not mean that in order to obtain such incentives, principles vital to the very existence of the Latin American countries could be abandoned. A way should be sought to reconcile difference, and if necessary to seek other solutions, always bearing in mind the idea of conciliation and arbitration.

Mr. CANAL (Colombia) had some doubts as to the appropriateness of the creation of the Center, but would consider the proposals in a conciliatory spirit. He requested that the summary records and final report of the Addis Ababa meeting should be made available, to assist the present meeting in its discussion.

The CHAIRMAN said it had been decided not to distribute the records of previous meetings in order to minimize the already considerable task of studying the complex provisions of the draft Convention. He would, however, refer to the views expressed at the Addis Ababa meeting where it would be necessary or useful in the discussion.

Referring to the general remarks made by some of the experts he observed that they were inspired by sentiments very different from those that had prevailed in Addis Ababa. The African experts had shown less interest in conceptual problems of sovereignty and had taken a pragmatic approach being concerned, however, to establish a balance between an admitted need for and desire to encourage private foreign investment, and the degree in which adherence to the Convention might limit a State's freedom of action. Thus some African experts had suggested that the Center should not be empowered to judge the legitimacy of certain acts of a government, and that States should be permitted to stipulate in advance, for instance, that they would not agree to consideration of questions of the legality of expropriation but would submit to the Center only matters such as the amount of compensation. Such a stipulation would not require a reservation to the Convention in the strict sense, since the Convention imposed no legal obligation to submit disputes to conciliation or arbitration unless there had been a specific undertaking to submit a particular dispute or a particular category of disputes to these procedures.

The meeting rose at 6:55 p.m.

SECOND SESSION
(Tuesday, February 4, 1964 - 10:45 a.m.)

General Remarks on the Draft Convention (conclusion)

The CHAIRMAN invited Mr. Navarro to take the floor.

Mr. NAVARRO (Peru) commended the meeting's purpose of adopting new procedures for promoting a favorable foreign investment climate. Peru was convinced of the importance of foreign capital in the process of development and provided ample safeguards for investors in the form of free exchange and laws for economic promotion and social and economic development. The interests of investors were guaranteed under the constitution by the independence of the powers of the State and in particular of the judiciary. While it was true that in Peru the constitution established certain restrictions on the use of arbitration, the development of the life of peoples and international coexistence required new legislation and new developments in that field, and Peru would make the greatest efforts to achieve this. in order to overcome any difficulties which might arise he fervently hoped that it would be possible to harmonize the requirements of domestic law with the purposes of international law.

ARTICLE I - International Conciliation and Arbitration Center

The CHAIRMAN invited the meeting to start consideration of the text of the draft Convention before them. He recalled that some delegations had voiced objections of principle, which, if maintained, would lead them to advise their governments not to adhere to the Convention. Once the discussion of the Articles of the Convention had been concluded the Preamble would be considered and delegations would then have a further opportunity to address themselves to questions of principle.

In view of certain shortcomings in the Spanish text he asked the meeting to regard it simply as a working document. Authentic texts in Spanish, French and English would be prepared at a later stage, in the light of the amendments suggested at the various consultative meetings.

He invited the meeting to begin by considering Sections 1, 2 and 3 of Article I.

Establishment and Organization (Sections 1 - 3)

Mr. KINGSTONE (Canada) raised a point with respect to the last sentence in Section 1: "The Center shall have full juridical personality." Although admittedly a common expression it was usually followed, in conventions of a similar kind, by details elaborating upon its meaning. For example, in the Convention on the Privileges and Immunities of the United Nations, it was specified that tbe United Nations had the power to contract, to acquire and dispose of immovable and moveable property and to institute legal proceedings. He wondered whether such details had been deliberately omitted in the case of the present Convention, and if so, for what reason.

The CHAIRMAN explained that the Center had been endowed with juridical personality to distinguish it from the Bank. But no further details had been added because he had not thought that they were necessary from a legal point of view and they might give the erroneous impression that the Center was thought of as a large bureaucracy. He did not think that the phrase as it stood would give rise to difficulties of interpretation.

Mr. ESPINOSA (Venezuela) suggested that Article I should stipulate who would be empowered to sign on behalf of the Center.

The CHAIRMAN thought that Section 10(1) of Article I would answer the question raised by the expert from Venezuela, but recognized that it was desirable to indicate clearly who was to act on behalf of the Center, either in the Convention itself or in the regulations of the Administrative Council.

Mr. RAMIREZ (Honduras) agreed with the Venezuelan expert, but considered that the appropriate place to clarify this point was the Sections in which the duties and functions of the Secretary-General were described. With regard to Section 1, he wondered whether it might not be advisable to incorporate into it a general description of the objectives and main activities of the Center. Regarding the point raised by one of the Canadian experts, he considered that the expression "full juridical personality" in Section 1, would suffice and need not be elaborated.

Mr. ESCOBAR (Bolivia) wondered what would be the source of the Center's personality.

Mr. SALAZAR (Ecuador) referred to Section 2(1), and suggested that ths meeting consider the possibility that the Center, especially when ths conciliation was to be used, might function in the country where the dispute had arisen, and act as a kind of court of first instance. This might inspire confidence in the State concerned and contribute to the efforts toward conciliation. The Center, the investor and the country where the problem had arisen could appoint their respective representatives, and an initial effort could be made there to resolve the conflict. Should this fail, a fresh effort would be made toward conciliation, this time

at the headquarters of the Center. He would therefore suggest that Section 2(1) provide that the Center be able to function occasionally in the country where a dispute occurred.

The CHAIRMAN explained that the expression "the seat of the Center" in Section 2(1) referred to the administrative headquarters of the Center only. It was made clear later in the Convention that actual conciliation and arbitration proceedings could be held wherever it was deemed to be most appropriate for the case in question. The suggestion made by the expert from Ecuador was more relevant to Article III, dealing with conciliation. He would like to consider further whether some general statement should be included in Section 2(1) to the effect that it referred only to the headquarters of the Center and not to the place of proceedings which could be held wherever they were most likely to lead to the best results.

Mr. MENESES (Nicaragua) pointed out that there was a contradiction between the words in Section 2(1) "the Center shall establish its Headquarters ...", which appeared to create a binding obligation, and Section 2(2) which referred to the discretionary power of the Center to enter into agreements with the Bank covering the use of the latter's offices.

The CHAIRMAN replied that the wording of Section 2(2) was merely intended to authorize the Center to make administrative arrangements with the Bank. The ambiguities that had been pointed out would be removed by redrafting the Section.

Mr. PALOMO (Guatemala) proposed that the provision in Section 2(1) be permissive rather than mandatory as he did not feel it necessary for the Center to have its headquarters at the Bank; if this were done the provisions of Section 2(2) could stand.

The CHAIRMAN pointed out that Section 6(vi) empowered the Administrative Council to move the seat of the Center away from the headquarters of the Bank. The main issue was whether it was acceptable for the Center to have an administrative link with the Bank. Although the Bank would be powerless to influence the Center's proceedings, its image would inevitably be associated with the Center. But once it was agreed that such relations would be desirable, the question of where the Center should be located became of secondary importance, and should be decided on grounds of practicability. Section 6(vi) provided the necessary flexibility in case it was thought desirable to move the headquarters of the Center elsewhere at some future date.

Mr. FUNES (El Salvador) reverting to Section 1(1) pointed out that the term "juridical personality" expressed adequately the concept of "full" juridical personality. He therefore proposed that the word "full" be deleted. He asked whether that adjective appeared in the text of the Convention on the Privileges and Immunities of the United Nations.

The CHAIRMAN replied that the term used in the Convention on the Privileges and Immunities of the United Nations was simply "juridical personality" without the adjective "full".

Mr. RATTRAY (Jamaica) said that the significance of the expression "juridical personality" varied from one country to another, and should

therefore be explained in more detail in the present Convention.

Mr. RAMIREZ (Honduras) thought that Section 2 should also establish the right of the Center to move its headquarters. He suggested the deletion of Clause 2 of Section 2, since the power to conclude the agreements referred to was inherent in the Administrative Council.

Mr. PALOMO (Guatemala) pointed out the desirability of permitting the Administrative Council to determine the location of the Center's headquarters at will, without specifying in the Convention that the headquarters would be in the offices of the Bank.

The CHAIRMAN said that it was desirable to specify the location of the institution in conventions of the kind under consideration. If no such reference was made, it should be made clear that one of the first duties of the Administrative Council would be to choose the site of the Center. From a practical point of view it would be helpful to link up the Center with the Bank at the administrative level, since the Administrative Council would be composed mainly of the Governors of the Bank and its meeting should preferably coincide with the annual meeting of the Board of Governors. He agreed with the delegate of Guatemala that the provision could be reworded, although he believed that most member countries were agreed that the Center might, initially at least, have its seat at headquarters of the Bank.

Mr. RATTRAY (Jamaica) agreed that it was a question of drafting, and suggested that the words "subject to Section 6(vi)" might be added to Section 2(1).

Mr. MENESES (Nicaragua) suggested that a particular city be designated as the headquarters of the Center rather than the offices of the Bank. That would be more in accordence with the possibility that the Center would enter into agreements with the prescribed type of institution whether it was the Bank and or Permanent Court of Arbitration.

The CHAIRMAN said that the Bank had deliberately refrained from mentioning a headquarters city for the Center, since it would be difficult to select a city in the abstract. There was a reason for having the headquarters at the Bank, regardless whether the Bank's seat was in Washington or elsewhere.

The meeting adjourned at 11:30 a.m. and resumed at 11:45 a.m.

The Administrative Council (Sections 4 - 7)

Mr. ARROYO (Panama) expressed doubte concerning the composition of the Administrative Council, since Section 4(1) would appear to convey that it was composed both of representatives and alternates. Alternates were not members of the Council and it should be specified that they could act only in the absence of the principal representatives.

He wondered, too, whether the President of the Bank was a member of the Council. In that respect, he pointed out that there appeared to be some contradiction between the wording of Section 4(1) and that of Section

5, and he failed to see how the President of the Bank, if not a member of the Council, could have the right to vote or to cast a deciding vote in a case of an equal division.

The CHAIRMAN referring to the voting rights of the Chairman of the Administrative Council observed that there were several precedents for this system, such as the Charters of the International Monetary Fund, the World Bank and its affiliates and the Inter-American Bank. It would, however, be possible for Section 4 to be amended so as to provide that the Chairman of the Administrative Council would also be a member of that body.

Mr. ARROYO (Panama) thought it inexplicable from a legal standpoint that a person who was not a member of an organ should be able to vote. He pointed out that the institution now being set up should not be bound by precedents like those of the Bank. He thought it preferable, if the President of the Bank were to have a vote, that he should be a member of the Council.

Mr. UCROS (Panama) supported Mr. Arroyo's opinion. He also observed that, since the Center was an arbitral agency essentially juridical in its principles, the representation of its members was of paramount importance were the Chairman of the institution of the same nationality as one of its members, the problem of double representation of a country would arise.

The CHAIRMAN pointed out that the question of nationality was not important because the Administrative Council would not be engaging in arbitration. Moreover, the President of the Bank was a public international official.

Mr. RAMIREZ (Honduras) recalled that the President of the World Bank was Chairman of the Board of Executive Directors but not of the Board of Governors of the Bank. If the Governors would be members of the Administrative Council the same procedure should be followed and they should elect their own Chairman from among themselves.

Mr. NAVARRO (Peru) cited the first part of Section 5 and pointed out that it would not be desirable for the President of the Bank to act as ex officio Chairman of the Administrative Council, since that might be interpreted as legal tutelage when actually it was no such thing. Since he had the power to elect twenty-four of the Panel members, he acted not merely in an administrative capacity but also as the head of the organization. He therefore thought that the Chairman should be elected by the members for a term of four years, and proposed that the wording of Section 5 be changed to read: "The Chairman will be elected by the members of the Administrative Council."

The CHAIRMAN pointed out that the two points raised by the expert from Peru were not necessarily interdependent. The Bank did not lay particular stress on the right of the President to designate members of the Panels. But that right was useful in that it enabled a larger number of highly qualified people to be selected from a particular country than would be possible for the country itself to designate in view of the limit placed on the number of persons it could nominate.

Mr. ARROYO (Panama) referred to the second part of Section 5: "During the President's absence or inability to act and during any vacancy

in the office of President of the Bank, the person who shall be the chief of the operating staff of the Bank shall act as Chairman." He thought that a very vague system and considered that the Administrative Council should itself designate two persons to replace the Chairman in case of his absence or inability to act.

The CHAIRMAN said that the suggestion made by the expert from Panama would have to be considered once it had been decided whether or not the Chairman of the Council was to be elected.

Mr. RAMIREZ (Honduras) stressed that each member should have one vote in the Administrative Council and that there should be no weighted voting as in the Bank.

Mr. PALOMO (Guatemala) did not consider it desirable for the President of the Bank to act as Chairman of the Administrative Council with the power to designate twenty-four members to the Panels. This link between the Bank and the Center might prove embarrassing for the Bank in its relations with a losing party.

The CHAIRMAN observed again that the question of the President's right to designate members to the Panels was not of crucial importance. He stressed on the fact that the Bank did not wish to become too intimately involved in disputes, particularly those submitted to arbitration, and recalled that it had taken part in conciliation proceedings in the past only at the express request of the parties involved.

Mr. UCROS (Panama) wondered how the system contemplated in Section 7(1) would work, since that section stipulated that the Administrative Council "may by regulation establish a procedure whereby the Chairman may obtain a vote of the Administrative Council on a specific question, without calling a meeting of the Administrative Council". He pointed out that since the Center was going to deal with problems of an international character any decision taken would be of great importance. He asked what purpose was served by deciding specific questions without convoking the Administrative Council.

The CHAIRMAN said that the Administrative Council would not become involved in proceedings between States and private investors. With respect to the possibility of obtaining a vote of the Council on a specific question without calling a meeting, it had been thought that much time and trouble would thus be saved since the members of the Council were scattered all over the world and decisions often had to be taken without delay. This provision was based on similar provisions in the Charters of the Bank and International Monetary Fund.

Mr. NAVARRO (Peru) referring to Section 7, observed that no provison had been made for cases where the Council would have to meet at the request of a certain number of States. He also inquired whether any decision had been taken as to the number of States constituting a quorum.

The CHAIRMAN said that provision had been made for a quorum in Section 7(3), but that the number of requests from members required for calling a meeting had not been specified. A provision on the matter could be inserted if it was deemed advisable.

Mr. ARROYO (Panama) suggested that in Section 7(1) a distinction

should be drawn between ordinary and extraordinary sessions, and that in Section 7(2), where it said that "The annual meeting of the Administrative Council shall be held in conjunction with the annual meeting of the Board of Governors of the Bank", it should be made clear that the Convention was not stipulating "joint sessions" in the strict sense, but separate sessions timed to take place at the same time in order to take advantage of the presence of the representatives of the members concerned.

The CHAIRMAN agreed that the wording of Section 7(2) should be amended to indicate that the annual meetings in question would take place at the same time rather than in conjunction with those of the Board of Governors of the Bank.

The Secretariat (Sections 8 - 10)

Mr. RATTRAY (Jamaica) wondered whether Section 8 gave sufficient recognition to the autonomy of the Administrative Council, especially when it was considered that the Secretary-General would be nominated by the Chairman and not by the Council. He also doubted whether the concurrence of the Chairman ought to be required for determining whether the office of the Secretary-General was compatible with some other office. Finally, he thought that provision should be made for designation of which Deputy Secretary-General should act in the absence of the Secretary-General when the latter is unable to make such designation.

The CHAIRMAN pointed out that, although the Council could not itself nominate a Secretary-General, it could reject a candidate designated by the Chairman if it so wished. The proposal that the Council elect the Secretary-General raised problems in connection with the system of voting to be used. The advantages and disadvantages of some voting systems had been discussed in paragraph 8 of the Comment to Article I. It should be borne in mind that the aim of the draft Convention was to create an atmosphere of mutual confidence between the capital-importing and capital-exporting countries, and that this end could best be served by a procedure for impartial designation such as the one proposed.

With respect to the incompatibility of the office of Secretary-General with any other office he recalled that it had been suggested at the Addis Ababa meeting that the post of Secretary-General should be full-time rather than part-time in order to have sufficient prestige. The reason for drafting the provision in its present form was that it was impossible to assess beforehand the amount of work that the Center was liable to have and that without the assurance that there would be sufficient interesting work the right type of person could not be attracted to the post. Consideration would be given to an express provision in the draft indicative that a combination of functions would be permitted only in the early years of the Center as a temporary measure. As to the concurrence of the Chairman in decisions on questions of incompatibility of function, he had no strong views. As to the third point raised by the expert from Jamaica, he thought that a Secretary-General would promptly after his appointment determine the order in which his Deputies would act.

Mr. FUNES (El Salvador) referring to Section 9 and Section 10(2) considered it more logical that the order of precedence among Deputy Secretaries-General should be determined at the time of their nomination, and not later by the Secretary-General.

Mr. ARROYO (Panama) referred to Section 9(1), and proposed that the Chairman should nominate three candidates for selection, and that the Secretary-General should be elected from among these.

The CHAIRMAN observed it might be difficult to find three persons willing to stand for election to the office. He did not think that this procedure should be compulsory, but thought in practice sufficient consultation regarding candidates would take place through the Executive Directors of the Bank between the Chairman and the Administrative Council to meet the objectives underlying the suggestions which had just been made.

Mr. ARROYO (Panama) referring to the concluding words of Section 9(2): "... except as the Administrative Council, with concurrence of the Chairman, may otherwise decide." He proposed that this formula should be changed, since it placed the Chairman on a higher level than the Council, which should be the supreme authority. He proposed the inclusion in Section 10(1) of the words: "The Secretary-General shall be the principal administrative officer of the Center." Minimum requirements should also be laid down for the selection of the Secretary-General (as had been made for members of the Panels) such as professional and moral qualifications; provision should also be made for the length of tenure of the post (say four years) the grounds for removal from that post and a precise definition of the duties involved. The Secretary-General was the principal officer of the Center and therefore his functions should be clearly indicated.

Mr. ESPINOSA (Venezuela) suggested that the text should be amended to make it clear that the Secretary-General's absence or inability to act or vacancy in the office of Secretary-General contemplated by Section 10(2) was of a temporary nature.

<u>The Panels</u> (Sections 11 - 15)

Mr. SALAZAR (Ecuador) suggested that Sections 11(1) and 12(1) be merged into one provision and Section 11(2) should read: "Each Contracting State shall designate up to six persons ..." and that the number of designations by the Chairman under Sections 11(3) and 12(3) be reduced to two or three. He also proposed that the minimum qualifications for the arbitrators designated by States should be stipulated in detail. Referring to Section 14(2), he suggested that it be made clear that two or more States could not jointly designate the same person to the Panels. He concluded by suggesting that the right to designate a substitute Panel member under Section 13(2) be reserved to the State which had first proposed him.

The CHAIRMAN agreed with the representative of Ecuador that the qualifications of the Panel members should be specified in greater detail. Consideration might be given to elaborating upon the meaning of the term "qualified persons" in Sections 11(1) and 12(1) by enumerating therein the type of qualifications now listed as desirable in Section 15(1), and also to making it obligatory that the designation be guided by those criteria. Section 15(1) might then be deleted.

Mr. ARROYO (Panama) proposed that Section 11(3) and 12(3) should indicate that the members of the Panels designated by the Chairman must not be from the same country, but rather from different countries representing different legal systems.

Mr. PALOMO (Guatemala), referring to the Chairman's right to desig-

nate twelve persons to serve on the Panels of Conciliators and Arbitrators as set out in Sections 11(3) and 12(3), wondered whether such a right did not represent a form of weighted voting, which, while acceptable in a purely financial organization, would not be appropriate for the Center.

The CHAIRMAN remarked that it had not been intended to give the Chairman any particular weight as regards the composition of the Panels, but rather to enable the Chairman to fill gaps that might occur if, for instance, one field of activity was not represented and so achieve a balance in the conjunction of the Panels. If there was a fear that designations of the Chairman would lead to an imbalance, the provision could be omitted.

Financing the Center (Section 16)

The CHAIRMAN explained that the phrase "out of other receipts" in Section 16 had been inserted in order to take account of the possibility that the Bank itself might finance the overhead cost of the Center. The President of the Bank was prepared to recommend to the Executive Directors that the Bank pay the administrative expenses, which were expected to be very low.

Privileges and Immunities (Sections 17 - 20)

The CHAIRMAN introduced Sections 17 to 20 on privileges and immunities of the Center and explained that in general they followed the provisions of the Charters of the International Monetary Fund, the World Bank and its affiliates, and the Inter-American Development Bank.

Mr. UCROS (Panama) referring to Section 18(1)(ii), felt that in the case of arbitrators and conciliators, in order that they might act with greater freedom, their privileges and immunities should be better defined, because of the delicate nature of their functions in settling legal disputes affecting the interests of countries.

The CHAIRMAN agreed with the remarks of the expert from Panama and incidentally remarked that the reference to privileges and immunities of "officials and employees and comparable rank of other contracting States" seemed on reflection to lack precision, and reference might be made to the privileges and immunities of the United Nations Specialized Agencies.

Mr. ARROYO (Panama) pointed out the apparent contradiction existing between Section 20(2), regarding taxation on "salaries or emoluments paid by the Center to the Chairman and members of the Administrative Council", and Section 7(5) which stated that members of the Administrative Council and the Chairman would serve as such without compensation from the Center.

The CHAIRMAN said that the contradiction referred to in Section 20(2) was apparent rather than real. The members of the Council did not receive salaries but their travel expenses and per diem could be paid, and in some countries payments of that kind were subject to taxation.

Mr. ARROYO (Panama) suggested that the contradiction be removed

by eliminating the term "salary" in relation to the Chairman and members of the Administrative Council.

The meeting rose at 1:05 p.m.

THIRD SESSION
(Tuesday, February 4, 1964 - 3:30 p.m.)

ARTICLE II - Jurisdiction of the Center

The CHAIRMAN pointed out that Article II referred to both jurisdiction and competence. The Hague Conventions of 1899 and 1907 had been used as precedents, since the proposed Center had much in common with the Permanent Court of Arbitration, in that the Center itself would not engage in conciliation or arbitration, just as the Permanent Court was not actually a court. In both cases a framework was provided for certain proceedings to take place. In The Hague Conventions the word jurisdiction was used in the sense of the scope of the Convention or of the Permanent Court.

In the present draft Convention the word "competence" was used in relation to the commissions or tribunals set up under the auspices of the Center. Section 1 defined the scope of the Center, in the first place in terms of the kinds of proceedings that could take place under its auspices, namely, conciliation and arbitration. There was no specific reference to conciliation followed by arbitration, since such reference had been considered unnecessary. Secondly, the type of disputes to be dealt with was defined, namely, existing or future investment disputes of a legal character. The jurisdiction or scope of the Center was further limited by reference to the parties to the disputes to be dealt with, namely, in the first place a Contracting State, in the second place the national of another Contracting State, and thirdly that other Contracting State, if it replaced its national in the dispute on the grounds that it had been subrogated in the rights of its national, for example, in the case of an investment guarantee. The most important feature was that the jurisdiction of the Center was based on the consent of the parties. Section 2 showed how that consent might be evidenced.

Mr. PALOMO (Guatemala), referring to the definition of the jurisdiction of the Center in Section 1, considered that the words "existing or future" used to qualify a dispute of a legal character were superfluous, in view of the fact that existing disputes should be treated from a different angle, and that the Center should really only concern itself with future disputes. The words "existing or future" in Section 1 should therefore be deleted.

The CHAIRMAN explained that the reference to existing or future disputes was intended to cover both disputes existing at the time when the parties decided to apply for conciliation or arbitration procedures, which might be termed an ad hoc reference of disputes, and also disputes arising out of an agreement that included a reference to the procedures of the Center as the course to be followed for settling such disputes. In both cases consent was required.

Mr. PINTO (Guatemala) raised the problem of the definition of nationality for the purposes of submitting a dispute to the jurisdiction of the Center. For the definition of nationality different countries applied different criteria, for whereas in some of them the principle of *jus sanguinis* held good, others followed the principle of *jus soli*; this could give rise to disputes caused by dual nationality, with regard to both natural and to juridical persons.

The CHAIRMAN said that he was aware that Section 3(3) posed a problem but he thought Section 1 should be discussed on the assumption that some satisfactory way of defining and determining nationality could be found. The nationality referred to in Section 3(3) was that of either a natural or a juridical person. Some of the problems involved might be solved by amendments to Article X.

Mr. RATTRAY (Jamaica) asked if the Tribunal would be empowered to decide whether or not a State was involved in a dispute, for example in the case of a dispute involving State agencies or corporations.

The CHAIRMAN said that in Africa, for example, investment agreements were normally entered into by public development agencies rather than by the State itself. It had been suggested that Section 1 might be expanded to cover disputes between public institutions of Contracting States, or political subdivisions such as states in a federal system or provinces. In such a case double consent would be required, both by the public institution or political subdivision of the Contracting State, and by that State itself.

Mr. ESPINOSA (Venezuela) pointed out that in the legislation of the majority of countries the scope of arbitration procedures was limited to exclusively two contractual matters and excluded all matters connected with the status or capacity of persons. This criterion coincided with the scope of Section 1, but it would be advisable to make the wording more precise by inserting, after the words "investment dispute of a legal character" the words "arising out of contractual transactions".

The CHAIRMAN wondered if a limiting phrase of that nature might have the effect of excluding certain major investment agreements, of the type Ghana had entered into for a power and aluminum smelting project, for instance, covering such varied fields as free entry of raw materials, undertakings to export on a given scale, training of local staff, entry permits for experts, tax facilities, etc. He thought such a limitation as that suggested by Venezuela might lead to unnecessary confusion over the type of dispute that could be dealt with under the Convention, and it might be preferable, for States whose legislation precluded them from submitting disputes of a particular type, to make a declaration of the limitations in question when signing the Convention.

Mr. ESPINOSA (Venezuela) said that in view of the explanation offered by the Chairman, he withdrew his suggestion.

Mr. FUNES (El Salvador) considered that the wording of Section 1 would gain in clarity and conciseness if it were simply stated that the jurisdiction of the Center was limited to investment disputes between States and nationals of other States. He therefore proposed that the words "to proceedings for conciliation and arbitration with respect" be deleted, together with the words "existing or future", as had been

suggested by the Guatemalan delegate.

The CHAIRMAN replied that this drafting suggestion would be considered.

Mr. BELIN (United States of America) suggested the deletion of the words "of a legal character", on the grounds that it might lead to misunderstandings of the scope of the draft Convention.

The CHAIRMAN said that the phrase in question was the result of compromise between two positions, the first being that the reference need only be to investment disputes, and the second that there should be a precise definition of an investment dispute. The danger had been envisaged that a party might attempt to bring before the Center disputes of a purely commercial or political nature. The words "of a legal character" were intended to cover cases involving a difference of view as to a legal right. That would exclude such cases as those, for example, of a company wishing to raise objections to a price control system, which involved questions of fairness and not of legal right. It was perhaps advisable to make it clear that if no legal right were involved, the facilities of the Center would not be available. In that connection he referred to Article 36 of the Statute of the International Court of Justice which defined "legal disputes".

Mr. BELIN (United States of America) thought that the case of the Center would be somewhat different from that of the International Court, since in the case of a Center disputes might be submitted which were not necessarily of a legal character. If a State party to the dispute first went through legal proceedings according to its own legislation which resulted in a nominal financial award, should the dispute be regarded as a commercial dispute and not as a legal dispute under this Article?

The CHAIRMAN said that submission of a dispute to the facilities provided by the Center would include the issue of whether or not any local decision was proper as a matter of law which, in the case mentioned by Mr. Belin, would be international law. If the parties had agreed that only local law would apply, then the local decision would settle the matter and there would be no review of local law by the proposed international body. If, for example, a State expropriated a public utility company in accordance with its own laws and the law was in accordance with its constitution, a question might still arise as to the amount of compensation. If there were provisions in the concession agreement for the submission of any dispute, say, after exhaustion of local remedies, to the Center but there was no provision on applicable law, then the party concerned could argue that although local legal requirements had been met there had been a violation of international law, and the Tribunal would decide whether or not international law applied. The point to be argued must be the alleged violation of a legal right, and he did not believe that that would limit the scope of the Center unduly. Several European countries believed that the field for voluntary conciliation should be unlimited; but that arbitration should be limited to legal disputes.

The CHAIRMAN suggested that the meeting should proceed to consider Section 2, which described the three ways in which consent to the jurisdiction of the Center could be evidenced. The first would be a prior

written undertaking such as an investment agreement containing an arbitration or conciliation clause. The second, an *ad hoc* submission of a dispute where there was no pre-existing agreement. The third, which had been put in for sake of completeness, covered acceptance by a party in respect of a dispute submitted to the Center by the other party.

Mr. PINTO (Guatemala) reiterated his doubts with regard to the definition of nationality for the purposes of the draft Convention under discussion. He wondered what would be the most appropriate authority to decide questions of nationality, above all where a natural person possessed two nationalities. He was equally disturbed about the problem of the nationality of juridical persons. He mentioned the specific case of a company that claimed to possess a certain nationality for the purpose of carrying on its activities in a certain country, and asked who could be held responsible if that company failed to honor its agreements, to the prejudice of the State contracting with it, and then disappeared. The draft Convention dealt solely with the protection of the private investor *vis-à-vis* the Contracting State, but there was no provision for guaranteeing a similar protection to the State *vis-à-vis* a foreign juridical person who had failed to honor its agreements.

The CHAIRMAN said that if a company were assumed to have disappeared, it would be difficult to decide against whom the award was to be executed. It could be enforced in any Contracting State in which assets of that corporation were found.

Mr. PINTO (Guatemala) suggested, on the basis of the view he had just expressed, that the draft Convention should include a clause providing that the State that had certified that a juridical person was of its nationality should be obliged to compensate the Contracting State for damages the latter might suffer as a result of the private investor failing to honor agreements entered into.

Referring to the problem of the existence of persons possessing dual or even triple nationality, he considered the solution given in Section 3(3), providing for certification of nationality by the Minister of Foreign Affairs of the State, as unsatisfactory, because insufficiently precise. There were States that conferred their nationalities on investing companies in return for payment. The Convention seemed to recognize as valid a fictitious nationality of that kind and that could leave the capital-importing countries at a disadvantage. He also thought that cases where a group of States had a common nationality had not been adequately covered.

He suggested that the whole question should be more thoroughly studied and should be dealt with specifically in the revised draft Convention.

The CHAIRMAN said that in Africa it had been suggested that the certificate mentioned in Section 3(3) should be issued by the "competent" official rather than necessarily by the Minister of Foreign Affairs and that this certificate be only *prima facie* evidence of nationality so that the Arbitration Tribunal would have to determine the nationality of the party. It might be to the interest of capital-importing States to have a method of confirming in advance that an investor was a national of the other State concerned, in order to be able to claim the enforcement of any award against the investor in respect of assets held in that State.

Referring to the definition of nationality in Article X, he said the aim had been to leave the Contracting States maximum freedom to decide that a person was to be regarded as foreign, if he had multiple nationality, even if one nationality were that of the State in question, so that the Convention would make such an agreement effective. In Africa it was not unusual for countries to retain the liberty to treat people enjoying dual nationality as either nationals or foreigners. It was for the meeting to say whether or not such an approach was desirable in respect of the draft Convention. It might also be possible for the question of nationality to be treated as a question of interpretation of the Convention which might eventually be referred by the States concerned to the International Court. He agreed that the question of multiple nationality was one that required further study.

Mr. UCROS (Panama) referring to the procedure suggested for proving the consent of one of the parties when a dispute was submitted to the jurisdiction of the Center, pointed out that the present Spanish text of sub-paragraphs (ii) and (iii) of Section 2 seemed to indicate that the intention of one of the parties to submit the dispute to the Center would suffice for the other party to come under that jurisdiction. He considered that submission and acceptance should be simultaneous acts, and for that reason he proposed that the two sub-paragraphs referred to should be combined to form one sub-paragraph only.

The CHAIRMAN said that the Spanish version of Section 2(ii) was unfortunately not correct, and that the English text was not open to the criticism just advanced, but he would like to consider in any event whether sub-paragraphs (ii) and (iii) might be combined as suggested.

The meeting was suspended at 5:10 p.m. and resumed at 5:35 p.m.

Mr. UCROS (Panama) referred again to a point that he had raised at the first meeting. International organizations were at present the most active agents of capital investment; in view of the possibility of disputes arising that might affect them, they should be covered by the provision of the draft Convention, and he hoped that this point would be taken into account in redrafting the Convention.

Mr. ESPINOSA (Venezuela) referred to sub-paragraph (i) of paragraph (2) of Section 3 of Article II and said that the objection that there was no dispute could not be treated as a preliminary question, since a finding that no dispute existed in itself constituted a decision on the merits. Therefore the sub-paragraph should be deleted, or transferred to a special section dealing with substantive questions. The same section should also provide for another objection to the Commission's or Tribunal's competence, namely, that the dispute was not of the nature specified in Section 1.

With regard to sub-paragraph (iv) of the same paragraph, the objection described should be amplified by the addition of the words "or one of the parties to the dispute is not a Contracting State". Unless that amendment were incorporated, there would be no provision concerning one of the procedural requirements necessary for the dispute to be tried.

The most important point raised in the present session was the question of the definition of nationality. For the Latin American countries, where the concept of nationality was based on the principle of

jus soli, it was very difficult to admit the definition that appears in Article X of the draft Convention. He suggested that the rule in cases of conflict of nationality be that the nationality of the State with which the dispute has arisen prevail, since it was difficult to conceive of a State in full possession of the facts wishing to submit to an international jurisdiction, a dispute with a person whom it regarded as possessing its own nationality.

With respect to paragraph (3) of Section 3, he pointed out that the certifying of nationality was not in all countries the responsibility of the Foreign Minister, and that consequently a more flexible wording should be used, such as "by a competent official and duly authenticated".

Mr. MENESES (Nicaragua) warmly supported the statement made by the representative of Venezuela regarding sub-paragraph (iv) of Section 3(2). He would like to add in that same sub-paragraph the exception of any case in which the party to the dispute was a national of the State party to the dispute. The issue might arise in the case of a juridical person with mixed capital that had obtained the nationality of that State and wished to make use of the Center as a means of litigation against that State.

The CHAIRMAN said that he agreed with the specific suggestion respecting the various subdivisions of Section 3(2). There would probably be no great problem with respect to natural persons if the concept of dual nationality were omitted from the definition, but the question of corporations required further thought. In certain African countries foreign investment legislation permitted companies to choose whether they would be treated as domestic or foreign, for the purposes of taxation, etc. A company that was mainly foreign-owned could be treated as a foreign company even though established under the laws of the host State and in some cases such treatment was mandatory. A number of African countries had asked that such situations be taken into account in the draft Convention.

Mr. RATTRAY (Jamaica) said that the listing of preliminary objections in Section 3(2) might be interpreted wrongly as being exhaustive and should be drafted so as not to rule out any other types of preliminary objections. For instance, one ground for objection which had not been covered was that the State party to the dispute was not a Contracting State.

He also pointed out that the mandatory language of Section 3(2) which required that objections on the grounds listed be treated as preliminary objections was insufficiently flexible and did not allow for joinder of such objections to the merits. In that connection he referred to the Rules of the International Court of Justice, and suggested that perhaps Article 62, paragraph 5 of those Rules might be adapted for the purposes of the draft Convention.

Mr. WALKER (Chile), said that without entering upon an abstruse juridical analysis, the beginnings of a solution to the problem of determining nationality might be found through certain practical measures. In concluding an undertaking with a State, a foreign investor could declare his nationality and evidence it by an instrument issued by the competent authority of the State whose nationality was claimed. If later the

investor should change his nationality, the undertaking would be terminated unless it were renewed by agreement between the parties.

The meeting rose at 6:00 p.m.

FOURTH SESSION
(Wednesday, February 5, 1964 - 10:40 a.m.)

ARTICLE II - Jurisdiction of the Center (conclusion)

Mr. DEL CASTILLO (Colombia) pointed out that the Colombian Constitution did not permit the typs of arbitration provided for in the draft Convention, since it affirmed the principles that nationals and foreigners were equal befors Colombian courts. At the present time, Colombia was studying an agreemsnt with an important investing country, which included a special provision: that country's investors in Colombia would submit to the jurisdiction of the Colombian authorities all disputes with the State, but in case of denial of justice recourse to an international arbitration tribunal was contemplated after exhaustion of local remedies. The international tribunal would consist of a singls arbitrator appointed by agreemsnt between the parties or, failing that, by the President of the International Court of Justice. Two years ago in Colombia a draft intended to amend the Code of Commercial Law was made, in which text the creation of arbitral tribunals was envisaged; these provisions might be of interest in connection with the present discussions.

The CHAIRMAN pointed out that the Colombian limitation on consent to arbitration was completely consistent with the system envisaged by the draft Convention. For instance, it was possible under the draft Convention to stipulate that no arbitration could take place until all national judicial remedies had been exhausted and that the issues to be dealt with by the Center would be limited to denial of justice or other specific (matters) which the country in question was willing to have examined. The Convention also left the parties to a dispute free to decide on the number of arbitrators and the method by which they would be selected. He stressed that the aim of Articles III and IV was simply to indicate some rules for the selection of arbitrators and to fill any gaps that might occur in arrangements between the parties to a dispute.

Mr. CARPIO (Peru) suggested that a furthar sub-paragraph, to be numbered (3) should be added to Section 3 of Article II, worded as follows: "The Commission may carry on its work in the headquarters of the Center or in the place or country designated by the parties or chosen by the Commission itself."

ARTICLE III - Conciliation

Request for Conciliation (Section 1)

Mr. RATTRAY (Jamaica) rsferred to Ssction 1 of Article III which indicated that the requsst for the initiation of conciliation proceedings had to state expressly that the other party had consentsd to the

jurisdiction of the Center. There was en apparent inconeistency between that Section end ths provisions of Articls II, which stated that consent might be evidenced by the acceptance of one party of jurisdiction in respect of a dispute submitted to the Center by another party. He thersfore suggested that the words "ae far as possible" be insrted in the laet sentence of Section 1 of Article III, between the worde "shall state" end "that the other party".

Mr. UCROS (Penama) considered that the second sentence of Section 1 of Article III was in conflict with previous articles end the epirit of the draft Convention which wes based on consent to conciliation or arbitration. He proposed that it be amended to read "end shall submit evidence that the other party has given ite consent ...", or thet it should state that the other perty would be asked to furnish proof of its consent. The provision in question would then agree more closely with Section 2 of Article II.

The CHAIRMAN agreed that the suggeetions made by the expert from Panama would clarify the meaning of the provision and make it more compatible with Section 2 of Article II.

Conetitution of the Commission (Sections 2 - 3)

Mr. BELIN (United States of America) inquired, with reference to Section 2(2) of Article III, whether the membere of the Conciliation Commission would be eelected from ths Panel only if ths partise to the dispute had been unable to egree on the choice of persons?

The CHAIRMAN explained that the intsntion was to allow tha parties to choose a conciliator from among the memhers of ths Panele or from outside ae they wished, except, of couree, in cases of disagreement. It had been suggeeted et the Addis Ababa meeting that the choice should be restricted in all cases to Penel membere, but there had been a slight preference for not meking the provieion ebsolutely binding either for concilietion or arbitretion.

Mr. BELIN (United States of America) pointed out that es the Stetes had been enjoined to nominate highly qualified pereons as members of the Panels, it eeemed logical to require parties to use their services in preference to thoee of others.

The CHAIRMAN egreed that the deeirability of selecting conciliatore from the Panele might be indicated in the draft Convention but the freedom of choice of the parties should not be restricted.

Powers and Functions of the Commission (Sections 4 - 5)

Mr. SALAZAR (Ecuador) suggested that the rules of procedure for conciliation should be clearly established in the draft Convention and not left to the regulations. He also reiterated the proposal he had made earlier that the conciliation procedure should take place in two stages, the first to be carried out in the country where the dispute arose.

The CHAIRMAN agreed that it might be helpful for the conciliation proceedings to be held in the country where the dispute originated. But as the aim in drafting the Convention had been to keep it as flexible as

possible no special provision to that effect need be inserted. The regulations to be drawn up by the Administrative Council could deal more fully with the matter since it would be easier to amend them later, if it were found necessary.

Mr. FUNES (El Salvador) said that Section 4 of Article III appeared to admit the possibility of two sets of rules, one in force when consent was given, and the other in force at the time when the request for conciliation was submitted. That point should be clarified, because there might be a lapse of several years between the two events.

The CHAIRMAN confirmed that the rules (referred to in Section 4) applicable in a particular proceeding were those in force at the time the State had agreed to resort to conciliation. The English text was quite clear on that point but the Spanish version would have to be reworded.

Obligations of the Parties (Sections 6 - 7)

The CHAIRMAN introduced Section 6, he said that it embodied two basic rules for conciliation, the first being that the parties must fully co-operate with the Commission and the second that the recommendation of the Commission should not bind the parties unless they so agreed. Section 7 was also very important since, without the protection that it extended to the parties in a dispute, they might be reluctant to seek agreement and take rigid positions that might defeat the purposes of the conciliation proceedings.

Mr. SALAZAR (Ecuador) suggested that in cases where the parties had agreed to be bound by the recommendations of the Commission, they should be allowed to make use of these recommendations in later proceedings.

The CHAIRMAN agreed.

Mr. BRUNNER (Chile) suggested the adoption of the solution laid down by the Tratado de Soluciones Pacificas signed at Bogota: recommendations would appear in the record of the conciliation proceedings, but would only be published at the request of the parties.

The CHAIRMAN thought that the best way to deal with the problem would be through the rules. He agreed that it was important that records be kept of the conciliation proceedings and that Section 7 would not be infringed thereby.

Mr. ARROYO (Panama), suggested that Section 7 in the Spanish text be reworded to make it clear.

The meeting was suspended at 11:32 a.m. and resumed at 11:50 a.m.

ARTICLE IV - Arbitration

Request for Arbitration (Section 1) and Constitution of the Tribunal (Sections 2 - 3)

The CHAIRMAN suggested that if the delegates' views on Section 1

of Article IV were much the same as those expressed in relation to Section 1 of Article III, it could be taken for granted that they wished similar amendments to be introduced.

He pointed out that Sections 2 and 3 resembled the equivalent Sections in Article III as regards the number of arbitrators and the method of selection. But there was one significant distinction between the constitution of conciliation commissions and arbitration tribunals, viz. the provision that no member of an arbitral tribunal could be a national of the State party to the dispute or of the investor's State. It was a departure from the usual practice but was expected to give more satisfactory results. The possibility of having five arbitrators of whom three would not be nationals of the parties concerned had not been provided for in the draft Convention since the cost might be prohibitive in all but particularly important cases.

Mr. ESPINOSA (Venezuela) referring to the first part of Section 2(1) of Article IV dealing with the constitution of the Tribunal suggested that, in order to avoid a possible impasse, it should be specified that an uneven number of arbitrators must be appointed.

The CHAIRMAN agreed.

Mr. BELIN (United States of America) pointed out that there were discrepancies between Sections 2 and 3 and the Comment thereto. He asked whether it was obligatory for the arbitrators to be selected from the Panel irrespective of whether the parties agreed on the choice of nominees. If they were in agreement, might it be possible for them to choose arbitrators from outside the Panel and, if so, to designate their own nationals? His Government attached great importance to the principle of having, in all cases, arbitrators who were members of the Panel and, more particularly, who were not nationals of the parties concerned.

The CHAIRMAN agreed with Mr. Belin on the importance of the principle involved. He favored a compromise whereby the autonomy of the parties would be respected except that they would not be permitted to choose their own nationals as arbitrators. He also agreed that the Comment would have to be reconciled with the provisions of Sections 2 and 3.

Mr. DEL CASTILLO (Colombia) stressed that the best solution would be for the parties in all cases to agree upon a single arbitrator.

Mr. RATTRAY (Jamaica) referred to Section 3 of Article IV. He doubted whether the rule was sufficiently flexible since it seemed to him that it empowered the Chairman to select arbitrators only from the Panel when the parties could not agree on their choice of persons. It might happen that although the parties disagreed on the choice of persons, they agreed that certain persons outside the Panel were less objectionable than others. In such cases the Chairman should be allowed to select arbitrators from outside the Panel.

The CHAIRMAN stated that as the parties were allowed to select arbitrators from outside the Panel, the Chairman could be empowered to give effect to the parties' preference and select arbitrators from outside the Panel. He would like to consider how this rule could best be expressed.

Mr. LOWENFELD (United States of America) referring to the suggestion of Mr. Rattray, said that in his opinion arbitration proceadinge would be slowed down if the Chairman had to saek agreement of the parties to pereons outside the Panel. The consultation provision in Section 3 was intended in his opinion to take account of objections of the parties to particular individuals but not to obtain agreement at any cost.

The CHAIRMAN expressed the view that the two poeitione could perhaps be reconciled to permit the appointment of some peraona outside the Panel whom the Chairman found to be acceptable to both parties, although not expressly agreed upon by them. He would want to etress, however, the exceptional character of such a caee.

Powere and Functione of the Tribunal (Sections 4 - 10)

The CHAIRMAN, introducing the Sectione dealing with powere and functione of the Tribunal, pointed out that the main aim was again to preserve the autonomy of the parties involved. In the case of lack of agreement between the partiee on the law to be applied, the Tribunal would iteelf be reeponsible for deciding whether to apply a particular domeatic or international law ae it found most appropriate. The provieions in paragraph (2) of Section 4 ware commonly included in conventions of the kind under consideration.

Mr. RATTRAY (Jamaica) wondered whether existing rules of national or international law would be adequate in many cases to settle an investment dispute and whether the arbitrators ought not to decide issues on the basis of law, justice and equity when the parties had not agreed on a specific law. Section 4 did not specify the type of international law that would be applicable and should enter into more detail on that point, on the lines of Article 10 of the Model Rules adopted by the International Law Commission.

The CHAIRMAN explained that he had deliberately refrained from following Article 10 of the Model Rules since many of the decisions would not be based on international law. But he had no objection to the inclusion of some explanation as to the meaning of the term "international law".

Mr. LOWENFELD (United States of America) asked whether, it was necessary to state that the Tribunal, in the absence of agreement to the contrary, would decide in accordance with rules of law, whether national or international, and suggested that the Tribunal might of its own motion wish to rule ex aequo et bono.

He pointed out that Section 7, in its present form, required a statement of the reasons on which an award was based which would presumably include a reference to the particular law that had been applied. He suggested that it might be desirable for the Tribunal not to be compelled to state its reasons if, in its opinion, a satisfactory settlement could be achieved without making detailed reference to them.

The CHAIRMAN said he attached great importance to the requirement of a statement of reasons. He felt, however, that statement need not refer to the particular law applied unless that had been a crucial issue involved in the decision.

Mr. SALAZAR (Ecuador) referring to provisions contained in Section 5 and the corresponding provisions for conciliation, emphasized that the Arbitration Rules by their nature represented an instrument for the mere application of the provisions of the Convention, both substantive and adjective. He considered that the Rules should not be used to legislate, as might be implied from the last part of Section 5: "If any question of procedure arises which is not covered by the applicable arbitration rules, the Arbitral Tribunal shall decide that question." He stressed the fact that what was not contemplated in the Convention should and could not be covered by the Rules.

The CHAIRMAN pointed out that the Administrative Council had to have certain powers to decide on such matters as timetables, languages, etc., that were purely administrative in nature, and could be properly set forth in the Arbitration Rules. In that connection he invited attention to Section 6 of Article I which made quite clear that the Council could not adopt Rules inconsistent with the provisions of the Convention but could only supplement the Convention in matters of detail.

Mr. UCROS (Panama) suggested that it should be specified in Section 6 of Article IV that all questions before the Arbitral Tribunal must be decided by an absolute majority vote. He pointed out the possible danger of providing, as was done in Section 7(1), that an award signed by the majority of the Tribunal would constitute the award of the Tribunal, and took the view that if the award was to have full legal validity it should be signed by all the members of the Tribunal but that any dissenting members might put their reasons for their dissent in writing.

The CHAIRMAN pointed out that the rule might be that award should be signed by all the members of the Tribunal. In that case it should also be provided that refusal by one of the members to sign should not frustrate the award. It had been suggested at the Addis Ababa meeting that if a minority refused to sign the award, that fact should be recorded in the award signed by the majority.

Mr. FUNES (El Salvador) suggested that the Convention should impose an obligation on all the members of the Tribunal to sign while giving those members who disagreed with the award the right to offend their dissenting opinions.

Mr. MENESES (Nicaragua) described how decisions were rendered by the Courts of his own country. The award of the majority of judges was signed by them and set forth the reasons on which the decision had been based. The Secretary thereupon recorded that the award had been approved by the majority and listed the number of dissenting members. He considered that all the members of the Arbitral Tribunal should be required to sign the award but agreed that failure to do so by one of them should not frustrate the award.

Mr. SEVILLA-SACASA (Nicaragua) proposed that Section 7(1) should be redrafted to require that an award should be arrived at by a majority decision of the Tribunal, that it should be in writing and be signed by all the members of the Tribunal, and that it should set out the reasons upon which it was based. Dissenting members should be required to sign, but could attach their dissenting opinion.

Mr. ARROYO (Panama) endorsed the views of the representative of

Nicaragua to the effect that it should be specified that the award was to be signed by all the arbitrators. Any case of failure to sign should be placed on record.

Mr. ESPINOSA (Venezuela), suggested that a final paragraph might be inserted to the effect that notwithstanding the obligation of all the members of the Tribunal to sign an award, should one of them fail to sign it, the award signed by a majority would constitute the award.

Mr. KINGSTONE (Canada) thought that the last sentence of Section 8(1) seemed to imply that the non-appearance of a party would automatically call for a decision in favor of the party appearing. Although that impression was offset to some extent by paragraph (2) it might be best to amend paragraph (1) so as to read: "Whenever one of the parties does not appear before the Tribunal, or fails to defend its case, the Tribunal may nevertheless continue to consider the case."

The CHAIRMAN explained that Section 8(1) followed closely a similar provision in the Model Rules adopted by the International Law Commission. He suggested that the point made by the representative of Canada might be met if the words "to decide in favor of" were replaced by "decide", and Section 8(2) could then be reworded accordingly.

Mr. RAMIREZ (Honduras), referring to Section 7(2) proposed that a time limit be set for notification of the award to the parties concerned. With regard to Section 8(1) he expressed his agreement with the Canadian expert and suggested that the provision be redrafted from the point of view of what the Tribunal could do rather than in terms of the plaintiff's position. Section 8(2) should be redrafted to give more scope to the Tribunal's discretion and not restrict the Tribunal by referring to a decision in favor of one of the parties.

Mr. RATTRAY (Jamaica) expressed his doubts about the phrasing of the last sentence in Section 8(2). The word "appears" was not included in the relevant Model Rule of the International Law Commission and could with advantage be omitted, because the Tribunal could, in his view be "satisfied" only on the basis of the evidence before it.

The CHAIRMAN agreed that the word "appears" should be deleted.

Mr. LOWENFELD (United States of America) considered that Section 8 had a twofold purpose: firstly, to prevent the failure of a party to appear before the Tribunal from defeating the purpose of the proceedings and, secondly, to ensure that there should be no automatic judgment by default and that the criteria on which an award would be based in case of default ought not to be different from those set forth in Section 4. He suggested that Section 8(2) be reworded as follows: "In such case, the Tribunal may nevertheless hear the case and proceed to an award in accordance with the provisions of Section 4."

Mr. ARROYO (Panama) considered that, if an investor or a Contracting State were requested to appear before the Tribunal, it would be imperative for them to appear and defend their respective points of view. He therefore suggested that a sanction for non-appearance should be provided and it seemed appropriate that non-appearance should constitute a presumption of confession which the Tribunal would take into account rendering its award.

The CHAIRMAN said that the observations made by the expert from Panama were particularly interesting. He observed that the reason why provision had been inserted expressly enjoining the Tribunal to ascertain that the claims presented to it were well-founded, was that international proceedings were of a delicate nature. Procedural requirements in such proceedings frequently went beyond those provi ed for in national codes of procedure.

Mr. ESPINOSA (Venezuela) pointed out that in domestic procedural law a fictional confession based on non-appearance of a party in the first instance was justified because a losing party had the right to appeal. Where only a tribunal of first instance existed, as was the case with the Arbitration Tribunals under the Convention, he could not agree that such fictional confession be admitted solely on the grounds of non-appearance, because such a measure would be unduly severe, at least in the absence of an opportunity for the non-appearing party to cure his default. The Rules should establish the correct procedure for summoning the parties, and some other sort of sanction might perhaps be found for cases of non-appearance. As regards Section 8(2), he agreed with the change proposed by the expert from Jamaica.

As to the proposal of the expert of Honduras on notification of the award to the parties, he referred to the procedure established in Venezuelan law, whereby judgments were delivered at a previously announced time and in the presence of anyone who wished to attend. He suggested that Section 7(2) be amended to read as follows: "The award will be delivered by the Tribunal in the place where it normally sits, on the day and at the time appointed, these having been notified to the parties, and in the presence of those parties that may have appeared."

The meeting rose at 1:10 p.m.

FIFTH SESSION
(Wednesday, February 5, 1964 - 3:50 p.m.)

ARTICLE IV - Arbitration (continued)

Powers and Functions of the Tribunal (Sections 8-10) (continued)

The CHAIRMAN said that there seemed to be general agreement that Section 8(1) should provide that the failure of one party to the dispute to appear or co-operate in the proceedings should not defeat the proceedings, but that the Tribunal should in such a case be empowered to decide the case. As to the proper course in those circumstances, there appeared to be three views. The first was that the party failing to appear or defend its case must be presumed to admit the allegations against him, if the defendant, or to have withdrawn his own allegations, if the plaintiff. The second was the position as set forth in the draft Convention under Section 8(2). The third view was that in addition to making out a *prima facie* case the claimant should produce some evidence in support of his claim, which appeared to be the system of the International Court of Justice in the application of Article 53 of its Statute.

Mr. DEL CASTILLO (Colombia) expressed serious doubts about the inclusion of Section 8 of Article IV in the draft Convention. He agreed with the comment made at the previous meeting by the representative of Panama, that it would be highly unlikely that a party would fail to appear before the Tribunal after having given its consent to arbitration. However, he had arrived at the opposite conclusion to that reached by the representative of Panama. While under the terms of Article II, the jurisdiction of the Center based on the consent of the parties, the Section under consideration appeared to imply that arbitration was compulsory, and paragraph 5 of the Preamble gave the same impression. The proposed Convention by itself represented such a departure from established principles of international law by allowing an individual to litigate with a State on the same level, that any element of compulsion should be avoided. Accordingly, he thought it inadvisable to include either Section 8 or paragraph 5 of the Preamble.

The CHAIRMAN thought the Colombian comments might be based on a misunderstanding. No signatory of the Convention would assume any obligation to enter into an undertaking to submit to erbitration but once such an undertaking had been voluntarily made, no subsequent withdrawal was possible. In most cases a foreign investor would agree to operate under the laws of the country concerned, but there hed been cases where governments had agreed to grant special treatment, and later had withdrawn the privileges in question. There would be no point in contemplating a Convention unless a government's word wae regarded as its bond. The decision to submit a dispute was voluntary, but once made, became binding. The obligation in question was not to make a promise, but to keep it once made.

Mr. MENESES (Nicaragua) said that two aituatione were confueed in Section 8: failure to appaar before the Tribunal and abandonment of the case after appaaring before the Tribunal. The first situation wae unlikely, since the two partiee had agreed to requeat arbitration; in the second type of situation three different possibilitiee ehould be considered. Firstly, if the plaintiff abandoned the claim, ha ehould be considered to have abandoned the caee and the Tribunal ehould rule in the defendant'e favor. Sacondly, if tha defendant did not appear there should be eome sanction or penalty for his non-appearance, but not neceasarily a presumption of confaaeion. Thirdly, if the dafendant abandoned his casa after appearing in the proceedinga, no penalty should be imposed on him since the burden of proof lay not on him but on the plaintiff. He aeked that his commente ba takan into account in redrafting the Convention.

Mr. SEVILLA-SACASA (Nicaragua) considared that the Convention would not be favorably received if it eetablished compulsory arbitration. It was not a question of one party bringing an action against the other, but rather of the two partiee presenting a joint requeet for arbitration. He was surprised, therefore, to find the word "claim" in the draft Convention because, in practice, there was neither a "plaintiff" nor a "defendant". Hence, if one of the parties failed to appear, that did not mean that the Tribunal should necessarily decide in favor of the othar. The reason for failure to appear could be the belief of the party in default eithar that a point of law was involved which did not naed to be proved to tha Tribunal but merely to be applied by it, or elae that the opposing party was right. He suggeeted that the wording of Section 8 ba changed in order to clarify those concepts.

The CHAIRMAN said that the situation contemplated in Section 8 was

ths refusal of one party to appear after having agreed to submit the dispute to arbitration. There was no suggestion of compulsory arbitration, unthinkabls at the present stage of legal and political developmant as a method of rseolving disputss bstwesn Statee and private partise; ths proposal was that neither a State nor an invsetor, having agreed to submit the dispute, ehould be allowed to retract that voluntary agreement.

Mr. RAMIREZ (Honduras) recalled that the draft Convention represented a completely nsw approach, which wae et varianca with the classic formalistic concepts of legal procedure. Arbitration proceedings had been rulsd lees and leee by euch formalism, since the partise appeared before an arbitrator with the request that ha declare not only who was right, but on whoee side justice lay. It would be fetal for the draft Convention to introduce the penaltiee and claseic procedural formulae, of legal procedure. He emphaeized that the draft Convention was concerned with the economic aepecte of a diepute and not only with its formal legal aspecte. He agreed with the eubstance of Section 8, but would like to eee ite form changed in line with his comments.

Mr. ARROYO (Panama) said that ths representatives of Colombia and Nicaragua had raised a very important issue. Their approach completely vitiated the existing concspt of the proposed Convention, since if one party could voluntarily agree to arbitration and then fail to appear before the Tribunal, the present meeting would be wasting its time. He endorsed the Chairman's explanation and maintainsd that there was no question of imposing compulsory arbitration. A State was obliged to accept arbitration only if it had voluntarily decided to enter into a prior agreement providing for such a procedure. Thsre were two possibilities: first, there must bs rscourse to arbitration wherever there was a prior undertaking to that sffect, as was most frequently the case. Secondly, if there were no such clause and a dlspute arose, ths parties could decide whether they would jointly agree to have recourse to arbitration. Only in the first case could there be any question of compulsory arbitration. He urged that the position stated by the expsrts from Nicaragua and Colombia not be accepted.

Mr. CANAL (Colombia) explained that Colombian law placsd nationals and foreigners on an equal footing; hence, Colombia would only agree to the procedure proposed in the draft Convention in very exceptional cases, that is, if there were a denial of justice by the State towards the foreign investor. In that respect, he read a few paragraphs from a statement prepared by the Inter-American Juridical Committee on the American legal principles governing the international responsibility of States: "A State is not responsible for acts or omissions with respect to foreigners except in the same cases and subject to the same circumstances in which, in accordance with its own legislation, it is responsible towards its own nationals ... The State is relieved of all international responsibility if the foreigner has by agreement renounced ths diplomatic protection of his Government or if the domestic legielation subjects the foreign contracting party to local jurisdiction or assimilates him to a national for the purposes of the contract."

He wondered whether the obligation of a State and an individual person to have recourse to the Center was incurred at the time when a dispute arose or at the time when the investment was dscided upon.

The CHAIRMAN said that as to the time when the obligation arose,

there were two possibilities. An investor might enter into a contract with a government that included an arbitration clause and, if any dispute arose, that clause would take effect. Alternatively, there might be either no contract, or a contract without such a clause, and yet a State, although under no pre-existing obligation to submit a dispute to arbitration under the auspices of the Center, might nevertheless wish to do so for some reason at that time. In the latter case the obligation would arise after a compromis providing for such submission had been concluded.

With respect to the position of the expert from Colombia, if that country was not able to submit any question to arbitration except one relating to a denial of justice, that was a fact that must be accepted. Such a position was not, however, inconsistent with Section 8. If Colombia agreed with an investor that, after exhaustion of local remedies, a question of denial of justice could be considered by an arbitral tribunal, Colombia should not then be free to withdraw its prior consent to such a course. The question was one of honoring a specific commitment; the scope of the commitment could be limited as thought proper by the government and as permitted by the laws and constitution of the country concerned.

Mr. CHERRIE (Trinidad and Tobago) said that there might be various reasons why a party to the dispute should fail to appear or defend his case. He thought the text might include some provision on the application of Section 8 in cases where the default was for reasons, not involving the culpability of the party for failure to appear, in order to guide the Tribunal in rendering the award.

The CHAIRMAN said that possibly provision might be made for a period of grace, in line with the International Law Commission's Model Rules on Arbitral Procedure. He observed that Section 8 was not intended to provide an automatic penalty against a defaulting party. However, he thought Section 8, which was a reflection of the principle pacta sunt servanda, was of crucial importance as preventing the frustration of arbitration agreements.

Mr. ARTEAGA (Chile) did not share the fears expressed by some other experts. He agreed with the Chairman that Section 8 did not establish compulsory arbitration. He thought that the situation contemplated under this Section was an unlikely one, namely that a party that had agreed to go to arbitration would fail to appear; it was logical to provide in such a case that the matter would be resolved according to law.

Mr. NAVARRO (Peru), reverting to a question dealt with earlier, said he would like to see a closer co-ordination between paragraphs (1) and (2) of Section 8. If the words "in favor of its claim" were deleted from paragraph (1), consequential changes would have to be made in paragraph (2). He agreed with the speakers who considered that Section 8 did not establish compulsory arbitration.

Mr. CARPIO (Peru) considered that language should be included to enable the Tribunal of its own motion and after an examination of the relevant facts, to declare that it had no jurisdiction.

The CHAIRMAN proposed that the meeting should consider Section 9, dealing with counterclaims and incidental or additional claims. Since the question had been raised at the African meeting, he wished to stress

that the aim of the section was not in any way to extend the competence of the Tribunal. No issue could be brought before the Arbitral Tribunal that the parties had not agreed to submit to arbitration. The point of the section was to obviate separate proceedings for incidental claims, but in all cases there must be a specific undertaking to submit the question to arbitration.

Mr. BELIN (United States of America) suggested that the phrase "to the extent that the parties so agree" might be used rather than "except as the parties shall otherwise agree", as in the text of the draft Convention.

The CHAIRMAN said that if the Tribunal was to possess that power as a general rule, the existing wording should be retained, so that any other procedure would be regarded as a departure from the rule; but if the Tribunal were not, as a rule, to have that power the United States' suggestion could be accepted. It might be advisable to make clear beyond any doubt that submission of any incidental claims was subject to the overriding principle of consent: for instance, the words "and within the competence of the Tribunal" might be added at the end of the section.

Mr. CHERRIE (Trinidad and Tobago) suggested that it should also be made clear that proceedings for incidental claims should be subject to the provisions of Sections 4 to 8.

The CHAIRMAN proposed that the meeting should consider Section 10 on provisional measures.

Mr. UCROS (Panama) considered that it would be advisable to clarify what kind of provisional measures lay within the powers of the Tribunal for the purpose of safeguarding the rights of the parties. It would likewise be necessary to state clearly the rights of which party were to be safeguarded, and whether the _status quo_ to be protected should be that existing during the normal execution of the contract or that existing at the time when the controversy arose. That was important in order to ensure that the measures adopted provisionally were not to be regarded as prejudgment of the situation.

The CHAIRMAN thought that the purpose of the provisional measures must be as far as possible to preserve the _status quo_ at the time when the provisional measures were asked for.

Mr. LOWENFELD (United States of America) said that the purpose of provisional measures must be to ensure that a party did not take action that would frustrate a possible award. If the question related to the ownership of land, for example, the land should not be parcelled out in such a way that it could never be recovered if awarded to the other party. He suggested therefore that the words "necessary for the protection of the rights of the parties" in Section 10 be substituted by the words "necessary to prevent the frustration of such award as the Tribunal might render" or words to that effect.

Mr. WALKER (Chile) said that in Chilean law and in that of other Latin American countries, such measures were called "precautionary" measures and their purpose was to safeguard the rights which the parties invoked, with good reason and on the basis of sound assumptions. The draft Convention should state in general terms what those provisional

measures should be, and under what circumstances they could be granted.

Mr. SALAZAR (Ecuador) suggested that it would be advisable, with regard to the provisional measures, to consider the adoption of some provision similar to the one appearing in Section 15 with regard to the enforcement of awards. It would be appropriate for the Contracting States to be bound by a similar obligation to enforce the provisional measures.

The CHAIRMAN agreed that the expert from Ecuador had pointed out a lacuna that should be filled, and that there should be no difference between provisional measures and arbitral awards in that respect. He also accepted the suggestion made by the expert of Chile.

The meeting was suspended at 5:10 p.m. and resumed at 5:35 p.m.

Mr. RATTRAY (Jamaica) suggested that in addition to the provision on provisional measures a new provision should be included in the Convention imposing an obligation on the parties, once the Center was seized of the dispute, to refrain from taking any steps that would aggravate or extend the dispute.

Mr. PALOMO (Guatemala) questioned the advisability of empowering a tribunal to prescribe provisional measures as a means of safeguarding the rights of the parties. Arbitration was ultimately dependent on the goodwill of the contending parties, while provisional measures were of a binding nature. It would be difficult to require that the national courts, which had been deprived of jurisdiction to resolve the dispute should enforce the provisional measures prescribed by an arbitral tribunal.

Mr. WALKER (Chile) pointed out that an arbitral tribunal lacked the power to enforce any decision, whether it were an award or a provisional measure. However, that should not prevent it from prescribing such measures. Explaining this more fully, he proposed that the wording of Section 10 should be changed to read as follows: "Unless the parties shall otherwise agree, the Tribunal shall be empowered to prescribe, at the request of either party, such provisional measures as it may deem appropriate, according to the merits of the case for the purpose of protecting the rights invoked by both parties. For that purpose the plaintiff shall furnish sufficient evidence for the Tribunal to have a strong presumption that his claim is made in good faith and that his rights may be impaired if the request for provisional measures is denied." He observed that he had used the term "good faith" as that criterion was used in Article VI of the Convention in connection with the assessment of costs against a party.

Interpretation, Revision and Annulment of the Award (Sections 11 - 13)

The CHAIRMAN suggested that the meeting consider Sections 11, 12 and 13 dealing with interpretation, revision and annulment of awards. He remarked that there was no provision for appeal to an authority outside the Center.

Mr. VEGA-GOMEZ (El Salvador) requested that in Section 11 the words

"after the date of award" should be replaced by the words: "from the date of notification of the award to the parties."

Mr. UCROS (Panama) referred to the problem of the enforcement of awards. At what moment precisely would the award become operative and its carrying out obligatory? There was an unsatisfactory translation at the end of paragraph 1 of Section 11, where the words (in the Spanish version) "pendientes de resolucion" after the word "laudo" appeared to give the impression that the said award was not complete and final.

Referring to paragraph 3 of Section 12, he considered that revision was the responsibility of the same Tribunal that rendered the award. If, as was contemplated in that Section, a new Tribunal had to be constituted to hear the proceedings for revision then perhaps one ought to speak of an appeal, rather than of revision in the strict sense of the word.

The CHAIRMAN agreed with the representative of Panama that Sections 11, 12 and 13 might have to be studied with a view to removing certain ambiguities particularly in relation to when an award had to be executed and how a stay of execution would operate. These matters might be discussed when considering Sections 14 and 15. He thought that it might be left to the Tribunal to decide whether an award should take immediate effect, as it could do if it were a question of money, or if it should be executed within a given period, as it would have to be if it consisted in the undoing of certain acts. In that case a stay of execution would be possible. As to the possibility he thought this was unlikely to happen. However, the award had not yet been complied with, there would be a need to defer compliance until the interpretation had been determined. As for revision, on the other hand, new facts might well come to light after the award had been complied with. With respect to the comments of the representative of Panama, he observed that the view that a revision properly so called could only be carried out by the Tribunal which rendered the award would create no difficulties where there were standing Tribunals. However, despite its obvious desirability, such a procedure might not be possible to apply in relation to an ad hoc tribunal, some of whose members might not even be alive at the time when revision was requested. Section 12(3) provided an alternative procedure since it would be unfair to the parties to limit the right to revision to those cases in which the original Tribunal could be reconvened.

Mr. ARROYO (Panama) pointed out that Section 11 did not set any limit to the number of times that an interpretation of the award could be requested, and this seemed to allow a party to stay enforcement indefinitely by using this procedure on a separate occasion with respect to different parts of the award. He therefore suggested the inclusion of the words "once only" after the words "be submitted".

Mr. RATTRAY (Jamaica) said that an award in an investment dispute might impose a continuing obligation over a long period, so that questions as to the meaning of the award could arise even after a considerable delay. In that connection he referred to Article 60 of the Statute of the International Court of Justice, in which no time limit was fixed for requests for interpretation of judgments and said that allowance should be made for the possibility of a long delay before interpretation was requested. He wondered if the time limits relating to annulment on grounds of corruption were sufficiently flexible, and suggested that they should be related to the time when the corruption was discovered. There should,

however, be a maximum time limit, such as ten years. In that connection he referred to Article 36 of Model Rules adopted by the International Law Commission.

The CHAIRMAN thought that for a stay of enforcement in connection to proceedings for interpretation of an award, a short period of time was more appropriate. It might of course be possible that in some requests for interpretation stay of execution of the award would be appropriate. It might for instance be advisable to consider allowing a time limit of three months for requests for interpretation involving a stay of execution, leaving open the question of requests subsequent to the execution. He observed that claims based on a question of interpretation brought after long delay could be treated either as a request for interpretation of the original award, or as a new case, as convenient to the parties.

Mr. GAMBOA (Chile), referring to sub-paragraph (b) of paragraph 1 of Section 13, on annulment asked how corruption could be proved if the Tribunal consisted of only one member. This member could hardly be expected to give a decision regarding corruption of which he himself stood accused.

The CHAIRMAN pointed out that in the case of annulment, unlike that of revision, the proceedings would not be before the same Tribunal, but before an ad hoc Committee, and it was expressly provided that none of the members of the Committee could be persons involved in the original decision.

Mr. RAMIREZ (Honduras) expressed the opinion that annulment was not the proper remedy in cases of corruption and that the remedy would possibly be to proceed against those who were guilty of corruption. Referring to sub-paragraph (c) of paragraph 1 of Section 13, he suggested that it should be expanded by inclusion of "violation or unwarranted interpretation of principles of substantive law" as an additional ground for annulment.

The CHAIRMAN said that if sub-paragraph (c) were expanded to cover serious errors in the application of substantive law, it would be tantamount to providing for an appeal, a step which had not thus far been contemplated. However, one expert at the African meeting had suggested adding a reference to serious departures from the principles of natural justice, in the sense of some unconscionable act.

Mr. WALKER (Chile) expressed great interest in the suggestion of the Jamaican delegate, namely that a time limit should be established for challenging the validity of the award on the grounds described in sub-paragraph (b) of paragraph 1 of Section 13. With regard to Section 11, he thought that if one of the parties were to request interpretation, two situations might result; firstly, if the award contained an obligation to be fulfilled immediately, and the request was made after three months there would be no point in allowing it; on the other hand, when the award imposed a continuous obligation on the party, then requests for interpretation should be allowed, e.g., for the purpose of clarifying some provision of the award but without stay of execution.

Mr. ARROYO (Panama) observed that Section 14 of the Convention said that the award was binding but did not say from what moment. He could not agree that an award should be enforceable immediately and even during the periods allowed for the making of requests for interpretation, revision or annulment.

He also thought that there was insufficient reason to provide, as the draft had done, that the effect of a request for interpretation would be different from that of requests for annulment or revision. In paragraph 1 of Section 11 it was laid down as mandatory that a request for interpretation should automatically stay the execution of the award. On the other hand, the request was one for revision or annulment (both of which could fundamsntally affect the award), it was merely left to the discretion of the Tribunal to decide whether there should be a stay of execution. He asked the reason for this distinction.

The CHAIRMAN said he would like to reconsider the question of introducing in Section 14 a short time limit for compliance with an award, corresponding to the period allowed for appeal in private law systems of procedure.

As to why the draft did not provide for automatic etay of execution in casee of rsqueets for revision and annulment, he pointed out that such a requirement might heve no meaning in relation to requeets for revision which might be brought during e ten-year period and perhaps even after the award had been carried out. Thia waa leaa true of requests for annulment under Section 13 es it etood. However, if that Section were redrafted, as had been suggested, along the lines of Article 36 of the Model Rulee on Arbitral Procedure so as to provide for a ten-year period, automatic stay would be inappropriate.

Mr. ESPINOSA (Venezuela) said that, like the Chilean delegats, he too was interestsd in the queetion of the extension of the time limit within which a requeet for interpretation could be made. In hia opinion Section 11(1) was broad enough to cover questions ariaing in connection with the carrying out of an award over a period of time, and any time limit should run from the time when such questions arose. For the purpoae of clarification, he suggeeted that, in paragraph 1 of Section 11, after the words "to the Tribunal which rendered the eward" the following words should be added: "while the award to the extent that such award shall not already have been carried out shall be stayed."

The meeting rose at 6:30 p.m.

SIXTH SESSION
(Thursday, February 6, 1964 - 10:45 a.m.)

ARTICLE IV - Arbitration (continued)

Interpretation, Revision and Annulment of ths Award (Sections 11 - 13) (continued)

Mr. GONZALEZ (Costa Rica) pointed out that the periods of time referred to in Sections 11, 12 and 13, while representing provisional suggestions only, were too long. In Costa Rica it was a constitutional principle that justice should be executed promptly, and although the time limits in internationel proceedings wsre longer than those in national proceedings, he urged that the time limits specified in the Sections referred to be reduced.

He also proposed that in each case time should run from the moment when the award was communicated to the parties.

The CHAIRMAN agreed that any period of time decided upon should start from the moment of notification of the award to the parties. With respect to the question of immediate compliance with the award, he inquired whether the delegates felt that some period of grace should be allowed for, as was done in domestic legislation? While agreeing with the delegate of Costa Rica that there should be as little delay as possible in the interests of justice, it might be necessary to authorize a longer poriod, in the Convention, since in the case of international disputes, the two parties were liable to be geographically far apart and that would inevitably lead to more delay than might be encountered in the case of purely local disputes.

The ambiguity arising out of the use of the word "immediately" in Section 14, which had been pointed out by one of the experts at a previous session, had not yet been cleared up. The Tribunal might indicate a time limit in each case, or the Convention might epecify a general time limit which would apply unless otherwise stated by the Tribunal.

Mr. FUNES (El Salvador) asked for clarification of the provisions of Section 11(1), and Section 13(1). He thought that the first of those provisions empowered the Arbitral Tribunal to determine the sense and scope of the award, while the second established, as a ground for invalidating an award, the Tribunal having exceeded its powers. Neither provision seemed to take account of casee where the Tribunal had failed to exercise its jurisdiction to the full, as where it omitted to decide some of the issuee or had rendered an incomplete or contradictory award. This was not a caee for annulling an award but for referring it back to the original Tribunal for rulinge on ieeuee not previously dealt with.

The CHAIRMAN agreed that he did not consider that the case mentioned by the representative of El Salvador would properly come under Section 11. It seemed to him that it would be covered by Section 13, in sub-paragraphs (a) or (c). The difference between Section 11, which was a _sui generis_ provision on interpretation of the award on the one hand, and, Sections 12 and 13 on the other, was that these two sections provided a limited form of appeal, in the broad sense of the term.

Mr. FUNES (El Salvador) pointed out that Section 13(2) referred to a tribunal established _ad hoc_, and made no provision for the case of an omission to decide on the part of the Tribunal that had rendered the award.

The CHAIRMAN agreed that the point raised by the representative of El Salvador might not be properly provided for in the present text. He had no immediate solution and would like to consider the matter further.

Enforcement of the Award (Sections 14 - 15)

Mr. UCROS (Panama) suggested that in Section 14 a distinction should be made between the time limit set for the issue of the writ of execution and the time limit set for the implementation of the award.

The CHAIRMAN agreed that it would be useful to make a distinction

between the two periods. The first would be short and the second would depend on the nature of the award, and of the acts to be performed thereunder.

Mr. RATTRAY (Jamaica) referred to Section 15 dealing with the enforcement of the award. His first impression on reading the draft Convention was that the intention had been to derogate from the doctrine of State immunity. While that impression had later been dispelled, there were, in fact, good grounds for claiming that such immunity was excluded, because under the Section the Contracting States assumed the obligation to recognize the award of the Tribunal as binding and to enforce it as if it were a final judgment. He thought the Convention should make it clear that the doctrine in question was not affected.

The CHAIRMAN agreed that it was essential to make that completely clear and suggested that something on the following lines might be inserted "Nothing in this provision shall have the effect of derogating from the respective local laws on the subject of State immunity." He observed that a precedent for the provision proposed in Section 15 existed in the Treaty establishing the European Economic Community. The relevant provision of that Treaty had been reproduced in Doc. COM/WH/8 and reads as follows:

Article 192

"Decisions of the Council or of the Commission which contain a pecuniary obligation on persons other than States shall be enforceable.

Forced execution shall be governed by the rules of civil procedure in force in the State in whose territory it takes place. The writ of execution shall be served, without other formality than the verification of the authenticity of the written act, by the domestic authority which the Government of each Member State shall designate for this purpose and of which it shall give notice to the Commission and to the Court of Justice.

After completion of these formalities at the request of the party concerned, the latter may, in accordance with municipal law, proceed with such forced execution by applying directly to the authority which is competent.

Forced execution may only be suspended pursuant to a decision of the Court of Justice. Supervision as to the regularity of the measures of execution shall, however, be within the competence of the domestic courts or tribunals."

Mr. LOWENFELD (United States of America) said that Section 15 in its present form seemed to cover two distinct subjects which, in the opinion of his delegation, should be dealt with separately. The first concerned enforcement of an award in the State party to the dispute or the State of which the other party was a national, while the second related to the enforcement of the award in a third State. He agreed that in the second case there should be no derogation from the rules of sovereign immunity. But in the first case, it was important that the concept of sovereign immunity should not be maintained.

The CHAIRMAN said that he saw no particular reason for differentiating between the two cases, and, in fact, had deliberetely placed them on the same level. As he had indicated in his opening statement, the principal purpose of Section 15 (although this was not its only effect) was to give States which had been successful plaintiffs a means to enforce awards egainst investors who did not have assets within the host State's territories. States would be directly bound by the Convention to comply with awarde rendered against them, which could not be void of investore. In the unlikely event that a losing State failed to comply with an award it would be in clear violation of the Convention itself, and the Stete whose national had failed to obtain setisfaction, could take up his case.

Mr. LOWENFELD (United Statee of America) felt that the Chairman was over-simplifying the issue by treating an eward as e judgment between e winner and loser. More often than not an award would require some action on the part of both partiee and would be relied upon not only for purposes of collection or enforcement, but also for tha defense of res judicate. Recognition of ewards was not, in his opinion eufficiently covered in Section 15, and the text should contain principles deeigned to ensure that an award - whethar invoked for the purpose of enforcement or as e defense - should not be re-examined on such basic grounde as, for instance, consent of the parties or juriediction of the Tribunal.

He also raieed an edditional point which concerned federal states in particular: in a federal system, recognition of an award might not be granted automatically by a conetituent State even though the federal authority, by signing tha Convention, had in effect consented to the enforcement of the award.

The CHAIRMAN egreed that ewards were not necessarily e mere matter of collecting e sum of money from the loser and that recognition and enforcement were two different aspects. He would give further thought to the res judicata espect although he was inclined to doubt that the issue of sovereign immunity would arise in that connection. He invited the attention of tha experts to Article 192 of the Treaty of Rome which had excluded enforcement against States. He thought that this exclusion had been based on the same reasoning that had led the staff of tha Bank, in drafting the present Convention, to think that forceeble execution against States should not be provided for. The dreft Convention was based on the recognition by Statee that once they had agreed to comply with an award, they would hold that agreement valid. He also referred to the technique used in Article 192 of the Treaty of Rome for enforcing awards against non-State partiee and suggsstsd that a similer technique might be used in the draft Convention.

With respsct to the last problem raieed by the United States representetive, he eesumed that a country could, if nsceesary, modify its legislation to allow for compliance with Section 15. The problem, however, deeerved further etudy.

Mr. OLSON (Canada) wondered whethar e point of substance would be involved if the word "enforce" in Section 15 were changed to "enforceable".

The CHAIRMAN agreed thet the suggeeted change would be closer to the intent of that provision.

Mr. OLSON (Canada) agreed with the Chairman that consent was the keystona of the Convention. It was, however, absent in two important areee of Section 15, viz., in cases of enforcement in the State of the private party and of enforcement in a third State and he wondered whether one could devise e wey of introducing the element of consent in these areas as well, for instance by requesting recognition by those Statea of enforceability at the time the investment wes actually made or at the time the dispute arose or was being heerd.

The CHAIRMAN seid that he was not quita clear where the question of consent was involved. The provisions in question were similar to those contained in e number of existiug treaties on recognition and enforcement of foreign judgments and foreign awards and differed from tham only inesmuch as they did not grant rights of review to locel courts.

Mr. OLSON (Canada) replied that the issue of consent was involved in the sense that States might be obliged to change their domestic lagislation to make allowance for the provisions of Section 15 in a wey that would be in conflict with other principles on which such legislation was founded. He wondered if tha lack of successs in obtaining ratificetions of the treaties referred to by the Chairman might not have been due to the provisions under discussion, and suggested that they should be lightened.

The CHAIRMAN thought that the reletively slow progress in securing widespread acceptance of, for instance, the 1958 New York Convention wee principally due to the conservatism of most lawyers and the lathargic attitude of governments on purely procedural quastions. He explained that the provisions in question were bound up with a number of other innovations made in the draft Convention, and hoped that States which thought the objectives of the Convention important would find it poseible to accept the procedural aspects as well as the subetantiva innovations.

Mr. PALOMO (Guatemala) suggested that, in Section 15, the word "enforce" should be raplaced by the words "shall ba enforceable" or a similar expression, since that Section in its present form would be in conflict not only with local legislation but elso with international Conventions on this matter, like the Bustamante code, under which a State did not have to enforce an award if it conflicted with its public policy. This waa particularly important as an award might heve to ba enforced in a State which was not a party to the dispute, or possibly not even a signatory to the Convention.

Mr. LOWENFELD (United Statea of Americe) suggested thet the Convention provide that when a Stete manifested its consent to tha jurisdiction of the Center, in any of the ways indicatad in Articla II, Section 2, it might be presumed to hava thereby waived its sovereign immunity in respect of the enforcement of an award.

The CHAIRMAN agreed that the suggeetion might solve the problem, but would run counter to the basic preeumption of the Convention, that Stataa would live up to the obligations which they asaumed thareunder.

Mr. PALOMO (Guatemala) pointed out that in Latin America the internal juridical principlea of a country prevailed. If the provisicns of the Convention ware in conflict with those already incorporated in the legislation of the country concerned, such as the Bustamante code, there

might be a contradiction between the internal procedural law of the country, and the terms of the award.

The meeting rose at 11:35 a.m. and resumed et 11:55 a.m.

Mr. ESPINOSA (Venezuela) supported the suggestion put forward by the experts of Canada and Guatemale. If ths text were amended as suggested, the scope of the provision under study could better be explained to the legislative bodies and governments of the various countries. The question raised by those representatives should be cerefully studied with a view to reaching a satisfactory solution.

Mr. GONZALEZ (Costa Rica) referring to Sections 14 and 15 on enforcement of the award rendered by a tribunal, proposed that in order to resolve the serious problem involved, the text might be emended to read: (1) "A Contracting Stats is in fact and in law compelled to enforcs the award rendersd by the Arbitral Tribunal"; and (2) "The Arbitral Tribunal, in rendering the award, should take into account the provisions in force whsrever ths award is to bs enforced." This would avoid conflicts with local laws.

Mr. RATTRAY (Jamaica) said that the mesting ought to give careful consideration to the purpose of Section 15. Under Articls XI, when a State signed the present Convention it would declare that it had taken all steps necessary to enable it to carry out ell its obligations under the Convention. This would allow awards to be reciprocally snforced. He found the provisions of Section 15 to be very useful because awards would be recognizsd as final and binding in every Contracting State - subject to the perheps overriding principls of Stete immunity. It might be worth considering es an exception to that provision some notion of international public policy.

Mr. SUMMERS (Canada) pointed out the prectical difficulties involved in the enforcement of non-pecuniary awards. For instance, he wondered how an award requiring some action such as training of personnel could be effectively enforced by local courts in the absence of local legislation rsquiring that action. It ehould also be borne in mind that the partiss, being free to chooss arbitrators from outsids the Panel, might, with the best of intentions, chooss arbitrators who were not of the highest competence and who might render an eward which was difficult to enforce because of its vagueness.

He hoped that the phraseology of the draft Convention would be tightensd up with respect to the whole question of enforcement of awerds.

The CHAIRMAN summarizing the discussion on rscognition end enforcement of awards said that ssveral issues had emerged: the first was the question whether the doctrine of sovereign immunity should, as hs thought, be preserved; the second the possible distinction to be made between enforceability in the States concsrned in the dispute on the ons hand, and enforcement in a third Stete on ths other; the third issus wes whether snforceability should be general or limited to pecuniary obligetions for which methods of enforcement existsd in every country; and fourthly, whether the rule of enforceability should be subject to some exceptions based on public policy, et least in third States. Finally, it had also

been suggested that it might be useful to dietinguish between recognition of awards as binding and their execution. Although no very clear conclusions had been reached, on these issues, the discuseion had been extremely helpful. He observed that Section 15 was intended to protect the interests of the host States which while they were themselves internationally bound to comply with the award, might want an effective assurance that the private party would be compelled to do the same.

Mr. PALOMO (Guatemala) drew attention to the close connection between the provisions of Sections 14 and 15 of Article IV and thoee of Section 10 of that Article on provisional measuree.

With regard to pecuniary obligations, he wondered whether parties having recourse to the Arbitral Tribunal, might be required to poet a bond or otherwise guarantee compliance with their respective obligations. That would assure compliance with an award which might not be otherwiee enforceable because its provisions were in conflict with domestic public policy. Even though, as the expert from Jamaica had pointed out, the legislation of each Signatory State would have to be adapted so as to permit enforcement, this might be a long drawn proceee.

Mr. ARROYO (Panama) referring to the comment made by the representative of Guatemala, considered that bonds or similar guarantees could be furnished only when the two parties were willing to do so, and he failed to see how the defendant could be compelled to furnieh such guarantees.

Mr. PALOMO (Guatemala) agreed with the representative of Panama that guarantees could not be furnished without the prior consent of the party, but he thought that they could be required at the time of consent to arbitration.

Mr. ARROYO (Panama) explained that in his own country the investor was required to provide bonds to eecure fulfillment of his contract. The investor, however, had no guarantee in tha event of the State's failure to comply with its obligation.

<u>Relationship of Arbitration to Other Remedies</u> (Sections 16 - 17)

The CHAIRMAN explained that Section 16 merely contained a rule of interpretation whereby a party in undertaking to go to the Center would be deemed to have chosen those proceedings as the sole method of resolving the dispute. That provision did not seek to establish any substantive rule on the exhaustion of local remedies, and indeed left ths partiss entirely free to stipulate that local remedies must be exhausted before recourse to the Center or that there could be a choice between local remedies and recourse to the Center. However, where a <u>compromis</u> or compromissory clause contained an unqualifisd undertaking to have recourse to the Center, it should be reasonable to presume that arbitration was to be the sole remedy.

Mr. ARROYO (Panama) supported by Mr. MENESES (Nicaragua) considered that it was impossible to fully understand the meaning of Section 16 without reading the relevant comment. The Articles of the Convention ought to be drafted clearly and categorically and he suggested that both the English and Spanish texts of that Section be revised.

Mr. GALVEZ (Chile) considered that the ecope of Section 16 was far broader than might appear at first eight, since it brought to light a possible conflict between national legielation and the award rendered by the Arbitral Tribunal. A foreign inveetor, having exhausted all his remedies under the national legislation would be able to reeort to arbitration and thus be placed in a privileged poeition vie-à-vis nationals of the hoet State. Hence, it ehould be epecified what ieeues could be submitted to arbitration.

The CHAIRMAN sald there had certainly bean no intention of creating a problem in that reepect. Rather, the aim wae to help Statee, such ae Colombia, which were unable to accept the principle of arbitration unlese local remedies had first been exhausted. He observed that the partiee could follow any one of three poesible coureee: first, the States in agreeing to arbitration might require the prior exhaustion of all local remedies; second, parties might agree to go either to arbitration or to the local courts; and third, if there were no euch etipulation, it would be assumed that it was the intention of the parties that arbitration be the exclusive remedy. Ae the representative of Panama had euggeeted, the wording of this Section could be made clearer.

Mr. MENESES (Nicaragua) proposed that the wording of Section 16 ehould be changed to read along the following lines: "Consent to have recourse to arbitration will be preeumed to be consent to the exclusion of any other remedy, unleee otherwise specified."

Mr. ARROYO (Panama) requested that it ehould be made clear in Section 16 whether reference wae made to arbitration in conformity with the law or ex aequo et bono.

The CHAIRMAN referring to Section 17, pointed out that an innovation had been made in the sense that the Section curtailed the right of the Contracting Statee to eepouse a claim of their nationals when these nationale had agreed to resort to the Center. He wae aware that there wae no general agreement at any rate in the Weetern Hemisphere on the existence of the right of espoueal.

Mr. UCROS (Panama) pointed out thet Section 17(1) which sought to limit a State's right of diplomatic protection, seemed by implication to prohibit a State from being subrogated to the righte of its nationals and that thie would be inconeistent with Section 1 of Article II which contemplated the State as eubrogee.

The CHAIRMAN explained that it wae not the intention of Section 17(1) to prohibit a claim on the grounds of contractual subrogation by a State, e.g., where as guarantor it had eatisfied the claims of an investor. What was excluded was the traditional legal right of a State to espouse the cause of one of its nationale through the usual international channels, thus protecting the host State from exposure to the risk of multiple claims.

Mr. ESPINOSA (Venezuela) considered that the provieions of Section 17 wsre superfluoue sincs it was eelf-evident, that no Contracting State whose national had had recourse to arbitration could resort to other means of reeolving the dispute, such ae diplomatic protection, unlees that national had grounds for complaining of the other State's failure

to abide by the agreement in connection with the arbitration proceedings. He also pointed out that as Venezuela had had unpleasant experiences with regard to diplomatic and foreign claims, public opinion there might react unfavorably to the concepts contained in Section 17. He therefore proposed that it be deleted.

The CHAIRMAN said that if there was universal acceptance of the Venezuelan representative's point of view, there would be no need for the provision. However, since the Convention would be signed by countries in different parts of the world where different views on the right of espousal prevailed, he thought that it would be dangerous to delete the Section. It was too early, however, to take a decision on the matter.

Mr. FUNES (El Salvador) asked if the obligations referred to in Section 17(1) were only those resulting from the award rendered by the Arbitral Tribunal, or all the obligations of a Contracting State under the Convention, such as the obligation to appear before the Tribunal, to defend one's case, etc. Since the Convention provided remedies for breaches of most of the procedural obligations, he thought that it should refer only to those resulting from the awards.

The CHAIRMAN said that the questions arising out of non-compliance with the award were probably the only ones for which the provisions in this Section were necessary. If that were the case it would be made clear in redrafting the text.

Mr. SUMMERS (Canada) supported the view put forward by the delegate of Venezuela that Section 17 was unnecessary. A State would seem to be debarred from making diplomatic representations or presenting in international claim either on its own behalf or on behalf of one of its nationals in a matter in which the State had accepted the jurisdiction of an arbitral tribunal, and if it did attempt to do so those representations could be answered without difficulty.

Mr. MENESES (Nicaragua), referring to Section 17(1), pointed out that in his country no foreigner could have recourse to diplomatic channels of complaint, except in the case of denial of justice. The Section seemed to allow, at least implicitly, the possibility of such complaints by States that were not parties to the Convention, thereby contravening the law of his country prohibiting foreigners from resorting to diplomatic channels of complaint. That prohibition was included in the laws of several Latin American countries.

The CHAIRMAN said that he would consider the point raised by the representative of Nicaragua as to a possible argumentum a contrario to be derived from the provision.

Mr. UCROS (Panama) considered that paragraph (2) of Section 17 was liable to give rise to a concurrent jurisdiction. It was necessary by some means to prevent the possibility that a private person who was party to a dispute might have recourse to arbitration, while his State would have recourse to diplomatic channels.

The CHAIRMAN said that the case intended to be covered by Section 17(2) was one in which there existed at the same time an agreement between a host State and an investor to submit to arbitration under the Convention,

as well as a bilateral investment protection agreement (like those concluded recently by Germany and Switzerland with certain developing countries) between the host State and the investor'e State which provided inter alia a forum for the settlement of disputes arising under that bilateral agresment. In such a case, a dispute might be referrable either to the Center, or to the forum set up under the bilsteral agreement. Section 17(2) provided that if the investor were to bring his csse before the Center, this would not prevent his State from initisting proceedings on the same facts under the inter-governmental sgreement. The decision in the latter proceedings was, however, expressly stated to be without effect on an awsrd made in the case before the Center. It had been suggested in Addis Absba that that intention might be made clearer if the words "of a declaratory naturs" were sdded sfter the words "international claim" in Section 17(2).

On the othsr hand the investor's Stste might institute proceedings under the bilateral sgreement before the investor himself brought his claim before the Center. Those proceedinge could not, of couree, be brought on behalf of ths particular investor, ss such action would be precluded under Section 17(1). It was likely, however, that the Tribunal constituted under the Convention would regard itself se bound by the decision under the bilsteral sgreement, to the extent that the interpretation of that agreement had a bearing on the csse before it.

Mr. CANAL (Colombia) said that be had refrained from intervening in the discussion on Section 16, eince he had undsrstood that that Section contained only a rule of interpretation, and that it was to be redrafted to make it clear that States could make their consent to arbitration conditional upon the exhaustion of national judicial procedures. He wanted to point out, however, that if Colombia were to ratify the Convention, it would not want to sttribute to tbe Center the character of a court of sppeal after exhaustion of local remedies, except in cases of denial of justice. With regard to Section 17, he had thought that its purpose had been to limit recourse to the Center only to cases of denial of justice. After the discussion and particularly the Chairman's explanation he realized that this wae not the case and he did not consider that his country could accept the Section in its present form.

Mr. ORDEÑANA (Ecuador) suggested that, in order to try to reconcile the conflicting views expressed by the experte, the text of the Convention should be amended so ae to make it clear that tha concepts contained in Section 17(1) did not constitute s limitation of the sovereign right of esch State to include in ite Constitution provisions prohibiting foreigners from having recourse to their States for the purpose of making claims through diplomatic channele. The Section eo amended would be very useful.

The meeting rose at 1:10 p.m.

SEVENTH SESSION
(Thursday, Februsry 6, 1964 - 3:50 p.m.)

ARTICLE V - Replscement and Disqualificstion of Arbitrators and Conciliators

The CHAIRMAN, introducing Article V, said that at the African meeting some delegates had had doubts about the distinction between challenges of conciliators or arbitrators appointed by the parties, and of those appointed by the Chairman; although there were good reasons for making that distinction, some experts had suggested that it introduced en element of discrimination which might not be well regarded by prospective Contracting States. If that were the general view, sub-paragraph 2(1)(b) could be deleted, together with the reference in sub-paregreph 2(1)(a) to Article III, Section 3 and Article IV, Section 2.

Mr. RATTRAY (Jamaica) seid he was not sure the drafting of the English version of Section 1 was sufficiently flexible to allow a party who had initially failed to appoint an arbitrator or conciliator to do so later when a vacancy occurred. He suggested that the formula used in the Model Rules of the International Law Commission was to be preferred, since it spoke of following the method "prescribed" for the original appointment rather than the method which was actually used.

Mr. ORDEÑANA (Ecuador) said that paragraph 1(b) of Section 2 was ambiguous, since it could be taken to mean that the fraud alluded to had been committed by the Chairman, whereas the meaning must be that the fraud was committed by one of the interested parties, or by the arbitrator himself. He asked thet the wording be changed accordingly.

Mr. PANGRAZIO (Paraguay) suggested that provision should be made for the designation, by election or by casting of lots, or by agreement of the perties, of an alternate conciliator or arbitrator in the event thet e concilietor or arbitrator was disqualified, became incapacitated or resigned.

The CHAIRMAN pointed out that although it would be useful to have alternates, three would have to be appointed on the aesumption of a tribunal consisting of three members, and it might be difficult in practice to find persons willing to serve on that baeis. The parties were free to appoint alternates if they wished, but rather than inserting a provision to that effect in the draft Convention, it might be preferable to refer to the possibility in the report that would be forwarded to States with the draft Convention.

ARTICLE VI - Apportionment of Costs of Proceedinge

The CHAIRMAN said that the two main guiding principles in drafting Article VI on the apportionment of costs of proceedings had been, first, that since the proceedings were to be of a friendly nature, it had seemed appropriate that each party should bear its own expenses and an equal share of the costs of the proceedings; and second, that it would be inconsistent with the friendly nature of the proceedings to bring claims that were frivolous or motivated by bad faith. Consequently the Tribunal had been empowered in the latter case to award costs against a party that brought such claims, such costs to include both the expenses of the other party and the costs of the proceedings.

Mr. ESPINOSA (Venezuela) considered that Section 1 of Article VI could be improved. Instead of the Tribunal having the power to evaluate culpability and award costs, there should be an automatic system whereby

costs would be awarded against a party only in the event that the decision was wholly in favor of the other party. If the findings were that the position taken by a party was not wholly without justification, that fact would be sufficient proof that that party had valid reasons for resorting to arbitration or conciliation.

The CHAIRMAN replied that the system proposed in the draft Convention was that as a rule each party would bear his own expenses and one-half of the costs of the proceedings regardless whether he won or lost the case. The only exception was based not on the substantive merits of the claims as adjudicated by the Tribunal, but on the motives of the party initiating proceedings.

Mr. VEGA-GOMEZ (El Salvador) supported to some extent the views of the representative of Venezuela. It was a common principle of Latin American legislation that the party that brought an action and lost it was liable for all the costs of the proceedings including the expenses of the defendant and that, if his claim was a frivolous one, he must also pay damages to the other party. If the decision was not entirely in the defendant's favor, each party had to bear its own costs. In that way equity was observed and frivolous claims were discouraged. That seemed a fair principle, which should be maintained in an arbitration tribunal's decision.

He thought the words "from time to time" in Section 2 of Article VI were unfortunate. There should be pre-established charges for the use of the facilities of the Center, because otherwise it would not be known whether it was worthwhile instituting proceedings in respect of minor claims.

The CHAIRMAN said that the purpose of Section 2 was to enable the Administrative Council to review the level of charges in the light of experience, but at any given moment the tariff would be known. He also asked the expert from El Salvador whether the apportionment of costs should be based on the results of the case rather than on the question of good or bad faith.

Mr. VEGA-GOMEZ (El Salvador) confirmed that, in his opinion, a claimant in bad faith ought to indemnify the other party for damage suffered in addition to reimbursing him for the normal expenses of the case. Where there was no bad faith, i.e., when a claim is founded on mistake, the losing party should bear only the cost of the suit itself.

Mr. LOWENFELD (United States of America) pointed out that the present wording of Section 1 left it open to the parties to agree not to pay the charges for the use of the Center; that seemed to be a drafting error that needed correcting. The costs assessment referred to in the last part of Section 1 was based on the British system, in that it included attorney's fees. A different system had been adopted in the United States, in the belief that all should be free to seek justice without fear of having to bear heavy costs if they lost their case; consequently any costs apportioned included only the expenses of such items as clerical work, translations, etc. He believed the Article as drafted was sound. Parties seeking to resolve a dispute should not be penalized by the risk of having to bear the major expenses of the other party if they did not succeed in their claim, unless it could be shown that the claim was frivolous.

The CHAIRMAN said that apparently there was support for the view that costs should be split; he understood the view of the delegate of Venezuela to be that such an arrangement would be in order except where the award was wholly against one party, in which case the costs assessed would include those referred to in both sub-paragraph (a) and sub-paragraph (b).

Mr. ESPINOSA (Venezuela), while agreeing with the representative of El Salvador, added that even if a party completely lost his case, he might still be exempt from payment of costs if the Tribunal feels that there were reasonable grounds for resorting to the proceedings.

Mr. GALVEZ (Chile) said that such a system was applied by Chilean law. It was the courts' responsibility to evaluate the grounds for the action, which made possible a more flexible system.

Mr. GONZALEZ (Costa Rica) said that his country followed a similar procedure and suggested that the Arbitral Tribunal should have the power of awarding costs against one party or the other in the light of the circumstances of each case.

The CHAIRMAN noted that although sharing of costs was usual in cases of international arbitration, it was apparently not so in national cases.

Mr. PINTO (Guatemala) considered that submission to arbitration based on consent presupposed the good faith of both parties. He thought that to give an arbitration tribunal the power to penalize by awarding costs implied that one of the parties might have instituted proceedings frivolously or in bad faith and he wondered whether such a rule would be consistent with the consensual nature of arbitration. He therefore suggested that the reference to frivolous proceedings or bad faith in the last part of Section 1 be eliminated.

Mr. ORDEÑANA (Ecuador), referring to the same part of Section 1, said that the words "a party has instituted proceedings" should be replaced by the words "a party has resorted to arbitration", to avoid the implication that costs would be awarded only against the plaintiff.

The CHAIRMAN said that several delegates had suggested that the system envisaged should not refer to a "plaintiff" or "defendant", and that the position of a party as plaintiff or defendant would be irrelevant if the Tribunal was given the power to award costs on the bais of good or bad faith. In any case the aim would be to find the system most likely to appeal to the majority of the countries that would wish to accede to the Convention.

ARTICLE VII - Place of Proceedings

The CHAIRMAN said that the aim of Article VII was to leave the maximum flexibility to the parties to decide on the place of the proceedings, while bearing in mind the administrative aspects and the convenience of persons willing to act as arbitrators or conciliators. Administrative considerations suggested a preference for proceedings either at the headquarters of the Center, namely, the International Bank, or at the Permanent Court of Arbitration, or at other institutions in various parts of the world with which the Center could make the

necessary arrangements to provide facilities. Hence the Secretary-General was left some discretion. It had been suggested that with respect to conciliation, the proceedings should be held at least in their initial phase in the country where the dispute arose, unless otherwise agreed.

There was no comment.

ARTICLE VIII - Interpretation

The CHAIRMAN observed that Article VIII which provided for submission of disputes and questions of interpretation of the Convention arising between Contracting States to the International Court of Justice was of the type usually found in international agreements of this character. Such disputes might arise in connection with the recognition and enforcement of awards, immunities of the Center, etc. It had been pointed out at the African meeting that no provision had been made regarding questions of interpretation of the Convention arising in the course of arbitral proceedings between a State end a national of another State. A tentative amendment to Article VIII wes now submitted to the meeting (Doc. COM/WH/9) as follows:

"1. .....

2. (1) If in the course of eny arbitrel proceeding pureuant to this Convention a question arises between the parties thereto concerning the interpretation or application of this Convention, and the arbitrel tribunal is of the opinion that the question hes merit end may affect the outcome of the proceedings, the tribunal shall suspend the proceedings for a period of three months.

(2) If within that period the tribunal shall have been notified thet the Internetional Court of Justice has been seized of the question by the States concerned the arbitral proceedings shall remein suspended as long as the question is pending before the International Court of Justice.

(3) If the tribunel shall not have been so notified, the arbitral proceedings shall be resumed at the expiration of the aforeseid period."

Mr. BELIN (United Stetes of America) said that he could not see the function of the proposed addition to Article VIII in relation to Article II, Section 3(2) on preliminary questions and Article IV, Section 11 on interpretetion of awards. So little was left uncovered by those two provisions that he thought Article VIII would be more likely to lead to unnecessary delay and confusion than to be helpful and would provide an occasion for the possible intervention of States which would presumably have to espouse their national's case in order to bring it before the International Court. He thought that the purpose of the Convention was to avoid as much as possible the intervention of States and he would prefer to see the amendment deleted.

The CHAIRMAN said that Article IV, Section 11, referred to the

Tribunel's power to interpret its own dacisions, and did not cover questions of the interpretation of the Convention itself. It had been thought desirable to provide for some forum to rule on such matters. Although Section 3(2) of Article II empowered the Tribunal to decida certain questions of interpretetion as preliminary questions, that was only in specific cases, and interpretetions might be asked for not in relation to a specific case. Different Tribunels might teka different views of the meaning of an Article in daciding ceses, and an independant forum would be a means of ansuring some uniformity of decisions. It was, of course, the right and duty of an arbitration tribunal to intarpret the Convention in relation to the case before it, but the additionel procedure proposed might be useful.

Mr. BELIN (United States of America) thought the position might be clarified if it were provided that problems of interpretation of the Convention arising as preliminary questions in the course of a proceading were to be dealt with in Article II and that Article VII would allow States to have recourse to the International Court for interpretations of a general nature.

The CHAIRMAN thought that while the proposed new provision might not be strictly necessary, it could be helpful.

Mr. GALVEZ (Chile) suggested that in paragraph 2(1) of Article VIII as amended, it should be clarified whether the words "the parties thereto" meant the parties to the arbitral proceedings or the States parties to the Convention.

The CHAIRMAN seid that the present text of the amendment was imperfect in both English and Spanish, since the word "thereto", which appeered to refer to the Convention, was meant to refer to the arbitral proceedings. He pointed out that the State would be espousing the cause of its national not on the marits but only on the narrow question of interpretation of the Convention. If it wera considered important that there be uniform interpretation of the Convention, and this was his own view, then the proposed new provision as wall as the existing provision of Article VIII would be useful. If, howevar, as had been suggested by the expert from the United Statas, these procedures might lead to confusion and delay, both provisions might be omitted.

Mr. OLSON (Canada) asked if it would complicate mattars if another signatory State also wished to intervene before the International Court.

The CHAIRMAN said that he did not think so and refarrad in that connection to the Stetute of the International Court which provided that if a question involved a multilateral Convention, the signetorias were notified so that they could intervene in the case if they so wished.

Mr. PALOMO (Guatemala) considared that it would be well to revise the whole of the additional clause becausa as it stood at present it appeared to refer to a dispute betwaan Statas parties to tha Convantion. In disputes covered by the Convention a Contracting Stata did not institute proceedings against another Contracting State, but against a foreign national, who would have to ba sponsored by his own Stata in ordar to bring the matter bafore tha International Court.

The CHAIRMAN said that the axisting provision in Article VIII of

the draft Convention dealt witb questions arising entirely outside any arbitral proceedings, but the proposed amendment deelt with questions arising during such proceedings. He believed there was a case for including the proposed amendment, but there seemed to be a difference of opinion at the present meeting.

Mr. ORDEÑANA (Ecuador) raised the following problem: if an arbitration proceeding between State A and a netional of State B was under way at the same time as an interpretation proceeding between States C and D before the International Court and the Arbitration Tribunal felt that the judgment of the Court on interpretation might affect the award, would the arbitration proceedings be suspended?

The CHAIRMAN said that, in the case mentioned by the expert from Ecuador, it would be logical to extend the application of the proposed new provision and require the suspension of the arbitration proceedings.

Mr. RATTRAY (Jamaica) remarked that Article VIII did not cover disputes between the Center and a State and some provision might be made for resolving these differences perhaps through the means of an advisory opinion of the International Court.

The CHAIRMAN said that presumably the Center would not wish to press a question of an interpretation of the Convention unless at least one State supported the position of the Center. That State could then perhaps be prevailed upon to espouse the Center's claims before the International Court. He did not think that it would be possible to obtein for the Center the right to obtain advisory opinions having regard to the provision of the U.N. Charter which etrictly limited this right to specialized agencies.

Mr. VEGA-GOMEZ (El Salvador) pointed out that disputes of the type envisaged by Article VIII could only arise during the course of arbitration proceedings, and consequently, Article VIII would be clarified by the insertion of the words "during the course of arbitration proceedings" after the words "between Contracting States".

The meeting was suspended at 5:05 p.m. and resumed at 5:35 p.m.

Mr. ESPINOSA (Venezuela) said that he wished to digress briefly from the discussion on Article VIII. He pointed out that the draft Convention did not have general provisions dealing with the rules necessery for the implementation of the provisions of the Convention. He wondered what would be the nature and scope of those rules, and whose responsibility it would be to draft them. In Venezuela when the Convention would be presented to Congress, that body would want to know the precise scope of the legislation it was approving as well as the degree of delegation given to the Administrative Council. The rules could cover two different fields. In the first place, they could fulfill the primary objective of any rules, i.e., to interpret and develop the provisions of the Convention without altering its spirit, purpose or meaning. Thet was not e legislative but an administrative function, and as such it could without difficulty be granted to the Center. Secondly, the rules could also establish principles for the organization and internal functioning of the Center itself, and no legislative body would have reason to object to those. It would be advisable to establish clearly the regulatory powers of the Administrative Council and their limits.

The CHAIRMAN observed that Article I, Section 6, sub-paragraphs (i) and (v) did confer regulatory powers to the Administrative Council with respect to administrative matters and to conciliation and arbitration proceedings and specified that these rules could not be inconsistent with the Convention.

Mr. ESPINOSA (Venezuela) replied that the rules referred to by the Chairman were only some of the rules which might be required to interpret and develop the Convention and fill any gaps.

The CHAIRMAN remarked that he agreed with the ideas expressed by the representative of Venezuela and thought that, without paralyzing the administrative functions of the Council, it should be made clear that it could not legislate beyond the letter or spirit of the Convention. Incidentally, he wished to point out, by way of clarification only, that the Conciliation Rules referred to in Article III and the Arbitration Rules referred to in Article IV would apply unless the parties otherwise agreed, so that the rules could be derogated from by the parties.

Mr. WALKER (Chile) suggested that paragraph 2(1) of the proposed amendment to Article VIII would be clearer if the word "thereto" in the second line were replaced by the words "to the case". Likewise, in paragraph 2(2) the sense would be clearer if the words "the States concerned" were replaced by the words "the litigating State or by the State to which the other litigating party belongs". It did not appear to him advisable that, as provided in paragraph 2(2), the proceedings should be stayed during the entire time that the question was pending before the International Court of Justice. The text should be amended so as to empower the Tribunal either to suspend arbitration proceedings, or to continue them if it considered that the nature of the case did not justify suspension.

The CHAIRMAN said that if a question of interpretation arose, the Arbitral Tribunal could decide that the question was without merit or irrelevant to the dispute. If this did not entirely meet the point made, a provision could be made in Section 2(2) of Article VIII enabling the Tribunal to permit such action as the taking of evidence, etc. to proceed pending the decision of the International Court.

ARTICLE IX - Amendment

The CHAIRMAN said there was no universally accepted practice with respect to amendments, but where provision for amendment was made it was usual to require a high majority as was done in the draft Convention. The Convention under Article XI, Section 5 allowed States that objected strongly to the amendment to withdraw from the Convention before the amendment took effect. Amendments, moreover, would not have retroactive effect.

Mr. LOWENFELD (United States of America) said that the Article posed a problem for his country. International agreements had to be submitted, prior to ratification, to the United States Senate for advice and consent, but as the text stood, the Convention would be an open-end convention that could be amended without ratification by the United States, and still be binding. It did not seem desirable to impose the alternative of denouncing the Convention. He thought an amendment should enter into force only for those governments which accepted it, thus permitting States which opposed it to declare that they did not consider themselves bound by it, without being obliged to denounce the Convention.

Mr. ESPINOSA (Venezuela) agreed with the United States delegate that the meeting should consider the situation that would arise if a government did not accept an amendment approved by a majority of the members of the Council. In Venezuela the draft Convention would constitute a law, therefore amendments to that Convention should be subject to the same constitutional procedures as the original document.

The CHAIRMAN recalled that the Articles of Agreement of the International Monetary Fund, the World Bank and many new institutions that had been created in recent years contained similar provisions for amendment by a majority vote.

Mr. ESPINOSA (Venezuela) pointed out that the proposed Convention contained several provisions which could be contrary to existing domestic legislation while the charters of international financial institutions referred to did not.

The CHAIRMAN said that the main issue was whether a State should be bound by an amendment against its will or be forced to choose between being so bound and denouncing the Convention.

Mr. VEGA-GOMEZ (El Salvador) agreed with the United States delegate. He considered that a majority of States could not oblige another State to accept the validity of the amendments they had approved. Each country should be free to submit the amendments to its own legislative body for approval.

Mr. LOWENFELD (United States of America), replying to a question from the CHAIRMAN, said that he was not suggesting that the majority requirement should be ruled out; no amendment should be effective for any State until a majority had been obtained.

The CHAIRMAN said that they system requiring adoption of an amendment by a qualified majority as well as ratification would not have the effect of defeating any important objectives of the Convention; actually an amendment procedure was not essential.

Mr. RATTRAY (Jamaica) said that the full meaning of the Convention might only be revealed by experience, and an interpretation by the International Court might show that the Convention as drafted could not be applied as intended. Therefore an amendment procedure was needed, to enable a change to be made in accordance with the views of a substantial majority, otherwise one State might stand in the way of the continuation of the Center as a practical working body. No doubt some means could be found for dealing with the constitutional problems posed for a number of countries.

Mr. ORDEÑANA (Ecuador) agreed with the delegate of Jamaica and expressed the view that the approval of the Convention itself should follow the appropriate constitutional procedure, but not the approval of the amendments. In his opinion, that constituted a most useful and necessary innovation in the field of Public International Law.

The meeting rose at 6:30 p.m.

EIGHTH SESSION
(Friday, February 7, 1964 - 10:10 a.m.)

ARTICLE X - Definitions

The CHAIRMAN stated that, as had bean borna out by the discussion at earliar sassione, the main issue raiaed by Article X was that of dual nationality, this form being usad in the eense of two nationalitiea, one of which was that of the hoat State. Some hoat Statea might ba reluctant to extend tha benafits of tha Convention to paraons or companiaa poaaessing their nationality, and Article X did not requira them to do so. All that was intanded by the broad definitiona in Article X waa to anabla a country, if it so desirad, to enter into a valid and binding agraement to have racoursa to conciliation or arbitration under tha auspicee of tha Center with a person possassing dual nationality. Dual nationality might arise in relation to natural persons as well aa to companias.

Mr. FUNES (El Salvador) requested that the meaning of Section 1 (b) of Articla X ba clarified. Companiea might be stock corporations in which tha control waa datarminad by the number of sharee held by aach shareholder, or partnerships in which aach partnar hed one vote, regardless of hie capital contribution. It was nacassary to atata more praciaaly what was meant by "controlling interast" in each case.

Mr. UCROS (Panama) aaid, with reference to Section 1, that in his country commercial organizationa wera not legally considared to be "Companias" unless they possassed juridical personality.

The CHAIRMAN said that the provieion had been deliberately drafted to take into account tha fact that countriea might differ in tha way their national laws treated partnerships. For that raaaon it had been thought desirable to kaep the definition aa neutral as poaaible.

Mr. RAMIREZ (Honduras) thought that Section 1 had adaquately considered the comparative law aepecte of ona problem,eince some national laws, such ae those of Italy, did not racogniza tha juridical personality of all companies.

Mr. ARTEAGA (Chile) agreed with the expart from Honduras, and pointed out that the definitiona eatebliebad in Article X had baen formulated for tha purposes of the Convention only.

Mr. BELIN (United Statea of Amarica) undarstood Articla X to mean that a corporation or company in which tha controlling intereat was hald by a national of another Contracting State could daaignate itaalf as being a national of that State, if it so wiahed. But he did not understand the dafinition to mean that a Contracting State would have the right to deny that quality to a corporation owned by a national of anothar Contracting State.

The CHAIRMAN thought that there was no differanca of opinion about tha interpratation of Articla X. Nationality could be definad in two ways: by the country of incorporation or by the country of control. Under paragraph (2) of Article X, whanaver a company or person had a nationality of a Contracting Stata othar than the host State, than it could be regarded aa a national of anothar Contracting State for tha purposes of tha Convention.

Mr. BELIN (United States of America) askad whather undar paragraph (2)

a State could decline to regard e company as a national of another Contracting State, on the ground that it also possessed its own nationality.

The CHAIRMAN replied that it was improper for a State to do so on that ground. However, if a State had strong constitutional or other reasons and had announced in advance that it would not make use of the facilities of the Center in a dispute with company or person, possessing, in addition to some other nationality, its own nationality under its legislation, such refusal would be quite consistent with the Convention.

Mr. BELIN (United States of America) expressed the view that that possibility would lessen the value of the Convention.

The CHAIRMAN emphasized the importance of distinguishing between natural persons and companies. Some countries would never submit to arbitration disputes with natural persons possessing dual nationality, and he would consider such a position not unreasonable. As regards the dual nationality of companies, he pointed out that at the Addis Ababa meeting some African countries were in favcr of the definition given as it would permit them to treat a company organized under their laws as a national of another State, if there was any convenience in so doing, but they would not be compelled to enter into an arbitration agreement with them.

Mr. RAMIREZ (Honduras) considered that Article X contained all the necessary elements, since it dealt with the problem of the juridical personality and nationality of companiee and the different forms of organization of their capital. It would be dengerous to carry the definition too far.

The CHAIRMAN said that at the Addis Ababa meeting one of the African delegates, the expert from Ethiopia, had shown a way out of the difficulty indirectly raised by the representative of the United States at the present maeting. If a country found it difficult to consent to arbitral proceedings with a foreign ownad company organized under its own laws, it was always possible for the State to enter into an agreement with the foreign investors who owned the company.

Mr. UCROS (Panama) explainad that in his country all companies set up according to national law were considered to be Panamanian. A predominance of foreign shareholdera merely involved certein restrictions on the activities of the companies (such as the prohibition againat engaging in retail trade).

Mr. BELIN (United States of America) was deeply concerned about the interpretation of the Convention in the light of what the expert from Panama had just seid. He thought that the usefulness of a Convention that was optional in nature would be seriously impaired if a number of countriee were to insist on mejor exceptions in respect of the companies that might invoke it.

The CHAIRMAN did not think that there were grounds for concern, but agreed that it was important to clarify the meaning of the provisions in question. What was intended was to shape the definition so as to give it the greatest possible flexibility.

Mr. LOWENFELD (United States of America) wished to elaborate on the point made by Mr. Belin, particularly with regard to the possibility of an agreement with the investors who owned a company as distinct from the company itself. The idea was acceptable in theory but he pointed out thet

the way in which business was conducted depended on many factors, such as local tax and labor laws, which often required local incorporation. The Convention should not contain anything that would force a change in business organization and decisions; it should be open in any event as a means of peaceful settlement of disputes in accordance with all the objectives outlined by the Chairman at the opening of the meeting.

Mr. ESPINOSA (Venezuela) stressed the importance of the observation made by the Chilean delegate that the definitions in question were established for the purposes of the Convention only. He drew attention to the difficulty of ascertaining the proportion of the capital held by nationals and by foreigners in the case of companies with bearer shares, which could be transferred without any form of registration. He also remarked that there may be different groups of interest in any company with different nationality and it might be extremely difficult to determine at any given moment tha nationality of the "controlling interest", especially if bearer shares are used.

The CHAIRMAN agreed that it was more difficult to prove nationality in the case of a company with bearer shares than in the case of a company with registered shares. However, the basic concept itself remained valid.

Mr. RAMIREZ (Honduras) remarked that each country could achieve a sufficient degree of control through its domestic legislation, for instance by requiring, at the time a company invested in the country, information on holdings of shares in connection with Annual General Meetings of Shareholders.

Mr. RATTRAY (Jamaica) said that the question of what constituted a controlling interest varied widely from one country to another. It was desirable to keep the definitions as flexible as possible so that the element of "control" may be determined in each particular case. This would enable a wide variety of disputes to be brought within the jurisdiction of the Center. The Convention already provided that questions of nationality be determined by the Arbitral Tribunal as preliminary questions.

Mr. UGROS (Panama) suggested that the wording of Article X be amended to provide that a company could be considered foreign, even though it has been established under the laws of the host State if that company was subject to restrictions in the exercise of commerce by reason of the nationality of its shareholders.

The CHAIRMAN remarked that the suggestion of the expert from Panama might solve the problem in some countries but might create more difficulties in other countries. The definitions contained in the Convention gave maximum recognition to the wishes of the parties who freely entered into investment agreements.

Mr. DEL CASTILLO (Colombia) said that the Colombian Constitution did not allow foreign governments to own real estate in Colombia. Foreign States which acquired shares in a company owning real estate in Colombia therefore violated that constitutional principle. He pointed out that in Chapter IV, entitled "Private Investments" of the 1948 Economic Convention of Bogota, it was established that foreign capital was subject to national laws, with the guarantees provided by that Chapter, and without prejudice to existing or future obligations between States. The Bogota Convention still influenced Latin American thinking on the question of investments. If the draft Convention under discussion were to be accepted, it would create an entirely different set of guiding principles.

ARTICLE XI - Final Provisione

The CHAIRMAN, in introducing Sections 1, 2 and 3 of Article XI emphasized the open nature of the Convention end observed thet it did not require signatura or acceptance before any specific date. The draft had left blank the minimum numbar of acceptances or ratifications required for the entry into force of the Convention.

Mr. LOWENFELD (United States of America) suggested that it might be useful to insert in the Convention a formula which had been used in e number of multilateral agreaments since the war, namely "This Convention shall be open for signature on behalf of States membars of the Bank, the United Natione or the specialized agencies." He also indicated that he hed comments not of a substantive nature which would be communicated to the Secretariet.

Mr. PINTO (Guatemala) proposed that the broader term "adherenca" be used in Section 1 instead of "signature".

The CHAIRMAN agreed to take note of the suggestione made by the delegates of the United States and Guatemala.

Mr. ARTEAGA (Chile) understood thet in treeties or conventions of this kind there was a distinction between the terms "eigneture" and "adherence", and suggested that due account would be taken of the idee put forward by the representative of Guatemala if tha Convention were steted to be open "for signature or adhsrence."

The CHAIRMAN felt that there was no particular reason for establishing a distinction between signature and adherence, unless the original signatories were in a position to control the admission of later signatories. He thought that tha question of substance was that all States referred to in Section 1 should be welcome to the Convention, and that the difference between signature and adharence was a matter of legal technicality rather than of substance.

Mr. ESPINOSA (Venezuela) suggested that Section 2 of Article XI be changed to allow for the possibility of restrictive declarations by States in order to allow as many States as possible to adhere to the Convention. He consequently proposed that the last part of the Section should read: "The instruments of ratification or acceptance shall be deposited with the Bank and shall contain a declaration that the State in question has takan all the necessary steps to enable it to carry out all the obligations undertaken upon signature of, or adherence to the Convention." This wording would allow the State to commit itself only to those obligations that the State felt it could undertake, but not necessarily all obligations imposed by the Convention.

The CHAIRMAN recalled that some experts had indicated that after signing and ratifying the Convention countries might be prevented by their own constitutions from consenting to arbitration of particular disputes. It was important to note that that position was not inconsistent with their obligations under the Convention, and no reservation was necessary to maintain it. It was only when a State wished to sign the Convention, but felt unable to carry out the obligations imposed by the mere signature and ratification of the Convention that the question of reservations would arise. Reservations to international agreements posed several complex problems and he hoped they could be avoided.

The modification of the text proposed by the expert from Venezuela was designed to underscore the difference between two separate sets of obligations - those which were undertaken upon ratification merely, and others assumed only when an agreement for conciliation or arbitration was concluded pursuant to the Convention. He saw no objection to the deposit by a State, at the time of signature or ratification, of a statement explaining the constitutional limitations on its recourse to the Center. While such a statement might be useful in making the State's position known to other States, it was not legally necessary in order to preserve ite right to withhold consent to the jurisdiction of the Center in a specific case. Such a statement should not be confused with a reservation properly so called, which modified those obligations of a Stete which were undertaken by mere ratification of the Convention.

Mr. RATTRAY (Jamaica) endorsed what the Chairman had said, but expressed the fear that any expression in the Convention concerning explanatory statements by signatory States might create some confusion as to whether or not reservations to the Convention were permitted. He thought it preferable that any such statement be submitted together with the instruments of ratification or acceptance, but that no explicit provision be made to that effect in the Convention.

The CHAIRMAN introduced sections 4, 5, 6 and 7 of Article XI, on which the meeting had no comments to make.

Preamble

Mr. PANGRAZIO (Paraguay) proposed that the term "international co-operation" in paragraph 1 of the Preamble be replaced by "co-operation among nations."

Mr. GAMBOA (Chile) proposed thet in the Spanish version of paragraph 3 of the Preamble the phrase "or may be subjected to these processes" be inserted after "subject to national legal processes." That would allow for recognition of such a possibility and would avoid any misinterpretation to the effect that international methods were preferable to national legal processes, which was not the intention of that paragraph.

The CHAIRMAN said that he would consider the suggestion which seemed consistent with the intent of the paragraph.

Mr. CANAL (Colombia) reaffirming the position taken by his delegation at earlier meetings, considered that paragraphs 5 and 6 of the Preamble were in conflict with each other since paragraph 5 recognized that an undertaking to submit disputes to conciliation or to arbitration through facilities of the Center was a legal obligation, while paragraph 6 which was the keystone of the Convention, declared that no Contracting State was obliged to do so by the mere fact of its ratification or acceptance of the Convention.

The CHAIRMAN remerked that there was possibly e letent ambiguity in paragraphs 5 and 6 as a result of the use of the word "undertaking" in two somewhat different contexts. At the Addis Ababa meeting some experts would have preferred to invert the order of the two paregraphs. The drafting of these two paragraphs would be carefully considered.

Mr. BRUNNER (Chile) thought that the question was one of ambiguity in the Spanish translation, since the English text clearly established that recognition of an undertaking inevitably involved legal obligations.

Mr. ESPINOSA (Venezuela) pointed out that the essence of paragraph 3 of the Preamble was the recognition that "international methods of settlement might be appropriate in certain cases." He therefore suggested that the essential part of the paragraph be retained and that the rest of the paragraph be deleted.

The CHAIRMAN noted that the discussion of the Convention had been completed and thanked the delegates for their valuable advice, and the many improvements they had suggested. With reference to the steps that would be taken after this meeting, he explained that the report of the proceedings would be sent to all delegates and their governments as well as to the governments which had been unable to be represented at this meeting. Two more regional consultative meetings would be held in the near future in Geneva[6] and Bangkok[7] and thereafter a composite report on all four meetings[8] would be distributed to the Executive Directors of the Bank and all member governments. The Executive Directors would decide how to proceed further, but he thought that the Executive Directors, assisted by legal advisers of their choice, would study the reports and prepare a new text of the Convention for admission to governments.[9]

Mr. GONZALEZ (Costa Rica) said his delegation was gratified to have been able to participate in the meeting. His delegation accepted the Draft Convention in principle, but recognized that it might be improved. The draft, which was in harmony with the contemporary trend towards the universal establishment of the rule of law, might improve conditions for an increasing extention of credit to countries in need of it.

He believed that the Convention would have a favorable effect on investment and economic growth. Moreover, in providing a mechanism for the settlement of disputes between States and nationals of other States, it would contribute to the reduction and eventual elimination of conflicts among nations.

Such obstacles as might exist in the way of its ultimate adoption could be overcome through introduction of the relevant amendments and changes in drafting. He did not share the view of those who thought that the Convention would endanger the sovereignty of Contracting States.

He emphasized, however, that final approval of the Convention was a matter for the appropriate governmental agencies of his country, and that the opinions he had expressed should not be interpreted as committing them in any way. He would like, however, on behalf of his delegation, to express their best wishes for the achievement of the purposes of the Convention.

Mr. BRUNNER (Chile) said that in the opinion of his country's delegation the draft Convention represented a useful step forward. He commended the Bank's initiative in seeking a solution to a difficult problem and emphasized the importance the Convention might have for encouraging the flow of capital to the areas in need of it. States would be able to submit some disputes to the proposed mechanism while reserving jurisdiction over others. Gradually general standards would be evolved through an internationalization of the jurisdiction over investment disputes.

Mr. BELIN (United States of America) thought that the meeting had been extremely helpful and thought-provoking and had contributed greatly to the development, a significant new international agreement.

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[6] See Doc. 29
[7] See Doc. 31
[8] See Doc. 33
[9] See Docs. 43, 123, and 145

Mr. SEVILLA-SACASA (Nicaragua) on behalf of all delegates thanked the Chilean Government for its hospitality and the Chairman for his conduct of the meeting.

The meeting rose at 11:40 a.m.

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SecM 64-32 (February 14, 1964)

EXECUTIVE DIRECTORS' MEETING, FEBRUARY 11, 1964

EXTRACTS FROM STATEMENT BY MR. CANCIO[1] ON THE WESTERN HEMISPHERE REGIONAL MEETING HELD IN SANTIAGO, CHILE, FEBRUARY 3-7, 1964,[2] FOR DISCUSSION OF A DRAFT CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES DATED OCTOBER 15, 1963[3]

Twenty countries, out of the 23 countries invited, were represented at the Santiago meeting. Only Mexico, Uruguay and Haiti were absent.

The sessions were held in the Hotel Carrera and the administrative arrangements were handled by the Economic Commission for Latin America. The arrangements were most satisfactory. We had excellent press coverage. The newspapers of Santiago ran daily articles and editorials on the importance of the discussions.

The meeting lasted five days. Many comments and suggestions were made by the delegates which, I am sure, will be very helpful for our work. As in the case of the Addis Ababa meeting, a report will be prepared and sent to the governments invited to the Santiago meeting. At the opening session, Mr. Broches made a long statement in Spanish. After Mr. Broches' speech, there were general statements made by the delegations of some 15 countries. The next four days were devoted to detailed discussions.

Most of the delegates were lawyers, some of them of great distinction, like Mr. Sevilla Sacasa of Nicaragua and Mr. Alfonso Espinosa of Venezuela, both veterans of Bretton Woods. Mr. Roberto Ramirez, president of the Central Bank of Honduras and an old friend of the Bank, represented his country. Many others were diplomats, professors or of cabinet rank.

Some countries voiced their worry that provisions of their constitutions, such as those which consecrate the principle of equality of both citizens and foreigners before the law, and the principle of the exclusive power of the domestic Judiciary to administer justice, would be in conflict with our proposals. One country, for instance,

[1] Attorney, Legal Department
[2] See Doc. 27
[3] Doc. 24

has a constitutional article which specifically requires that all Government contracts must contain a clause of submission to the domestic courts. Others stated that the adjudication of conflicts by arbitration tribunals such as those foreseen in our draft Convention would be constitutional only after exhaustion of all local remedies and only in the case of denial of justice. However, the great majority of the delegates agreed that, even though the countries would have to make changes in their internal legal structures, including their constitutions, the proposals were of great importance to the developing countries and that efforts should be made to modernize their laws in order to enable them to put the Bank's proposals to good use.

Many comments were of a very technical legal nature. As, among the delegates, we had experts in all branches of the law, their comments often reflected their diverse backgrounds. There is certainly no lack of legal development in Latin America! Both civil law and common law training were represented, the latter by Canada, Jamaica, Trinidad and the United States. Some comments, I understand, were very similar to the comments made in Addis Ababa, while other points raised were quite different. This is, of course, what we are trying to achieve, so that, when the results of the four meetings are brought together, the text of the Convention can be drafted so that it would be acceptable to a substantial majority of the members of the Bank.

The Board will recall that in Africa it was thought useful to expand the scope of the Convention by bringing before the Center investment conflicts between foreign investors and state-controlled enterprises or development boards. In some countries of Latin America, the governments, by law, seldom enter into investment agreements with foreign investors or lenders. This is done exclusively through the so-called financieras which, although entirely separate legal entities, in their operations speak for and have the full backing of the State. In others, public corporations with separate personality are charged with all aspects of the economic development of entire regions, or deal, on a nationwide basis, with one or more of its basic factors, such as electric power or railroads. The Latin Americans felt that this feature would make the draft Convention more attractive to their governments.

All in all, the meeting was, in my opinion, very encouraging. We received excellent counsel from men who had prepared themselves well. The constitutional issues raised were not new. In the past we have had to face similar issues in loan negotiations where domestic public policy has been invoked, for instance, against the Bank's arbitration clauses. In fact, some of the issues raised are not at all alien to the legal systems of very large and sophisticated countries. Changes in these systems will be part of the price which will have to be paid for progress.

Personally I have returned from Santiago with a feeling that much was accomplished there. The discussions were constructive and there was general awareness of the need for an instrument such as the one we have proposed.

SETTLEMENT OF INVESTMENT DISPUTES

CONSULTATIVE MEETING OF LEGAL EXPERTS

Geneva, February 17-22, 1964

SUMMARY RECORD OF PROCEEDINGS

June 1, 1964

NOTE

This document contains a summary record[1] of the proceedings of the consultative meeting of legal experts held at Geneva on the proposals contained in the Working Paper entitled "Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (Doc. COM/EU/1)[2].

Suggestions made by the experts for changes in drafting, for improvement of the English and French texts, and for conforming one text more closely to the other, were noted by the Secretariat but have not been included in this record.

[1] This summary record was sent to the delegates for clearance in provisional form and reflects their comments.
[2] Doc. 24

LIST OF PARTICIPANTS

Chairman: A. BROCHES, General Counsel, IBRD

AUSTRIA	Mrs. Maria PILZ	Commissioner, Fed. Ministry of Finance
	Mr. Kurt HERNDL	Secretary, Fed. Ministry of Foreign Affairs

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BELGIUM	Mr. Jacques KARELLE	Directeur au Ministère des Affaires Etrangères
	Mr. Karl ANDRE	Conseiller Adjoint
	Mr. Jean-Jacques REY	National Bank of Belgium
DENMARK	Mr. Jørgen TROLLE	Judge of the Supreme Court
	Mr. Svend HARTLEV	Ministry of Commerce
FINLAND	Mr. Åke ROSCHIER-HOLMBERG	Attorney at Law
	Mr. Pertti TAMMIVUORI	Secretary of the Bank of Finland
FRANCE	Mr. André RODOCANACHI	Conseiller des Affaires Etrangères
	Mr. Daniel DEGUEN	Administrateur Civil, Ministère des Finances
FEDERAL REPUBLIC OF GERMANY	Mr. Wilhelm BERTRAM	Ministerialrat, Federal Ministry of Justice
	Mr. Helmut KOINZER	Oberregierungsrat, Federal Ministry for Economics
	Mr. Hans ARNOLD	Ministerialrat, Federal Ministry of Justice
GREECE	Mr. Nicholas KANELLOPOULOS	Legal Expert, Ministry of Coordination
	Mr. Denys MANTZOULINOS	Avocat à la Cour de Cassation
ITALY	Mr. Giuseppi GUARINO	Professeur, Université de Rome
	Mr. Ricardo MONACO	Chef du Service Juridique du Ministère des Affaires Etrangères
NETHERLANDS	Mr. C.W. van SANTEN	Deputy Legal Advisor, Ministry of Foreign Affairs
	Mr. C. van der TAK	Multilateral Affairs Department, Ministry of Finance
NORWAY	Mr. Egil AMLIE	Deputy Director, Ministry of Foreign Affairs
	Mr. Thomas LØVOLD	Director, Ministry of Commerce and Shipping
PORTUGAL	Mr. Andre PEREIRA	Professeur à la Faculté de Droit de Lisbonne
SOUTH AFRICA	Mr. David GOULD	Practicing Advocate of Supreme Court of South Africa
	Mr. J.N. OBERHOLZER	Deputy Secretary for Justice
SPAIN	Mr. Jose A. GONZALEZ-BUENO	Secretario General del Instituto de Estudios Fiscales
	Mr. A. MELCHOR DE LAS HERAS	Jefe Asesoría Ministerio de Asuntos Exteriores
	Mr. GALLEGO BALMASTEDA	Economista del Estado Presidencia del Gobierno
	Mr. Manual VARELA	Secretary General, Ministry of Commerce
SWEDEN	Mr. S.A.T. BRUNDIN	Head of Division, Ministry of Justice
	Mr. K.V. HELLNERS	Ministry for Foreign Affairs

SWITZERLAND	Mr. Angelo HÜSLER	Legal Service of the Political Federal Department
TURKEY	Mr. Samim BILGEN	Chief Legal Advisor of the Ministry of Finance
UNITED KINGDOM	Mr. P.J. ALLOTT Miss Gillian M.E. WHITE	Assistant Legal Advisor, Foreign Office Legal Assistant, Board of Trade
YUGOSLAVIA	Mr. Ladislav SERB Mr. Djordje PRAŽIĆ	Assistant Chief Legal Advisor, State Secretariat for Foreign Affairs Councellor, Yugoslav Investment Bank

Secretariat: Mr. P. Sella)
Mr. L. Cancio) Legal Department, IBRD
Mr. C.W. Pinto)

FIRST SESSION
(Monday, February 17, 1964 - 3:00 p.m.)

Opening Statements

Mr. VELEBIT (Executive Secretary, Economic Commission for Europe) welcomed the participants and stressed the great interest which the United Nations and its Economic Commission for Europe took in the subject to be discussed by them. In particular, the Economic Commission for Europe had been closely associated with the development of arbitration in matters of a similar kind and was also deeply involved in the work of economic development. It was therefore natural that the Commission should take a very keen interest in the result of the work of the present meeting. He expressed his sincere wishes for the success of the Bank's consultation and the certainty that the Bank's initiative could make a very valuble contribution to the economic development of the developing countries.

The CHAIRMAN thanked Mr. Velebit for his words of welcome and encouragement and expressed the Bank's appreciation for the assistance it had received from the United Nations and particularly from its European Office. He welcomed the participants on behalf of Mr. Woods, President of the World Bank, and stated that the present meeting was the third of four consultative meetings of legal experts called by the World Bank to discuss informally the draft of an international convention on the settlement of investment disputes (Document COM/EU/1). The first, attended by countries of the African continent, had been held at Addis Ababa in December 1963.[3] The second had been held early in February 1964 at Santiago, Chile,[4] and had been attended by countries of the Western Hemisphere. The last would be held at Bangkok in April 1964.[5]

He would not attempt at the outset to report in detail on the views expressed at the Addis Ababa and Santiago meetings; he would do so in

[3] See Doc. 25 [4] See Doc. 27 [5] See Doc. 31

connection with the discussion of the various articles of the Draft. At this stage he could say, however, that he had been greatly encouraged by the reception of the Bank's proposals. At the African meeting, general support had been expressed for the proposal and no objections of principle had been raised; the consensus seemed to be that the draft had taken account of the legitimate interests of capital-importing countries as well as of investors. At the Santiago meeting, a number of Latin American participants had expressed their governments' reservations concerning certain innovations which the draft sought to introduce into traditional international law and their uneasiness about what they regarded as a serious limitation on their countries' sovereignty which the use of the proposed Center might entail. Other Latin American delegates, however, had welcomed the proposal, emphasizing the optional nature of the Convention, and felt that it should be acceptable to Latin American countries even if many of them might not be able, without changes in their laws, to make full use of the arbitration facilities, as distinguished from facilities for conciliation.

The fact that the World Bank had taken the initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity was due to the fact that the Bank was not merely a financing mechanism but, above all, a development institution. While its activities did consist in large part in the provision of finance, much of its energy and resources were devoted to technical assistance and advice directed toward the promotion of conditions conducive to rapid economic growth, to creation of a favorable investment climate in the broadest sense of the term. To that end, sound technical and administrative foundations were essential, but no less indispensable was the firm establishment of the Rule of Law.

International investment was universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world and had become one of the major features of the partnership between the richer and poorer nations; its promotion was a matter of urgent concern to capital-importing and capital-exporting countries alike. That was particularly true of private foreign investment which, if wisely conducted, could make great contributions to the development of the economies of the recipient countries.

Unfortunately, private capital was not moving in sufficient volume to areas in need of capital, one of the most serious impediments to its flow being the fear of investors that their investment would be exposed to political risks such as outright expropriation, government interference and non-observance by the host government of contractual undertakings on the basis of which the investment had been made.

The Bank had therefore been led to wonder whether, in view of its reputation for integrity and its position of impartiality, it could not help in removing that obstacle to private investment. It had on a number of occasions been approached by governments and foreign investors who had sought its assistance in settling investment disputes and had been encouraged to bend its efforts in that direction by such events as the enactment by Ghana of foreign investment legislation which contemplated the settlement of certain investment disputes "through the agency of" the World Bank. Similarly, Morocco and a group of French investors had entrusted to the President of the Bank the appointment of the President

of an arbitral tribunal to settle disputes that might arise under a series of long-term contracts.

The Bank had concluded that the most promising approach would be to attack the problem of the unfavorable investment climate by creating international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes. Some might think it desirable to go beyond that and attempt to reach a substantive definition of the status of foreign property. There was need for a meaningful understanding between capital-exporting and capital-importing nations on those matters. The draft on Protection of Foreign Property, prepared in the Organization for Economic Cooperation and Development,[6] might constitute a useful starting point for discussions between those two groups of countries. At the same time, however, there was need to pursue a parallel effort of more limited scope, represented by the Bank's proposals.

The Convention would make available institutional facilities and procedures to which States and foreign investors could have access on a voluntary basis for the settlement of investment disputes between them. In the opinion of the Bank those facilities and procedures were better suited to disputes between a State on the one hand and a foreign investor on the other than those offered by other existing or proposed institutions. Taken by themselves, however, they could be put into effect by administrative action by the Bank and would not require the conclusion of any inter-governmental agreement.

Such institutional facilities were nevertheless, in his opinion, secondary to other parts of the proposal, which it was necessary to embody in a Convention.

Those parts comprised, firstly, recognition of the principle that a non-State party, an investor, might have direct access, in his own name and without requiring the espousal of his cause by his national government, to a State party before an international forum. States, in signing the Convention would admit that principle, but only the principle. No signatory State would be compelled to resort to the facilities provided by the Convention, or to agree to do so, and no foreign investor could in fact initiate proceedings against a signatory State unless that State and the investor had specifically so agreed. However, once they had so agreed, both parties would be irrevocably bound to carry out their undertaking and the Convention established rules designed to prevent the frustration of the undertaking and to insure its implementation.

Secondly, while the Convention implied a recognition that local courts were not necessarily the final forum for the settlement of disputes between a State and a foreign investor, it did not imply that local remedies could not play a major role. When parties consented to arbitration, they would be free to stipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute could be submitted for arbitration under the Convention. If the parties to a dispute had not made either stipulation, then and only then, did the Convention provide that arbitration would be in lieu of local remedies.

A third and more important feature of the Convention followed from

[6] See OECD Doc. 15637, dated December 1962, revised and reissued as OECD Doc. 23081, dated November 1967

the fact that in traditional international law a wrong done to a national of one State for which another State was internationally responsible was actionable not by the injured national, but by his State. In practice that principle had been superseded in a number of cases in which provision had been made for the settlement of investment disputes by direct conciliation or arbitration between the host State and the foreign investor. The internationally binding character of such arrangements had not, however, been recognized hitherto, and the Convention was designed to fill that gap.

Every international agreement signified the acceptance in one form or another of a limitation of national sovereignty. The proposed Convention was intended to give internationally binding effect to the limitation of sovereignty inherent in an agreement by a State pursuant to the Convention to submit a dispute with a foreign investor to arbitration. As a corollary of the principle of allowing an investor direct and effective access to a foreign State without the intervention of his national State it was proposed - and this was an important innovation - that an investor's national State would no longer be able to espouse a claim of its national. In this way it was sought to ensure that States would not be faced with having to deal with a multiplicity of claims and claimants. The Convention would therefore offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.

Fourthly, awards of arbitral tribunals rendered pursuant to the Convention would be recognized by, and enforceable in all Contracting States as if they were final judgments of their national Courts, regardless whether the State in which enforcement was sought was or was not a party to the dispute in question. In that connection he wished to make it clear that where, as in most countries, the law of State immunity from execution would prevent enforcement as opposed to execution against a private party, the Convention would leave that law unaffected. All the Convention would do would be to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national Courts. If such judgment could be enforced under the domestic law in question, so could the award; if that judgment could not be so enforced, neither could the award.

Fifthly, it should be borne in mind that the Convention did not lay down standards for the treatment by States of the property of aliens, nor did it prescribe standards for the conduct of foreign investors in their relations with host States. Accordingly, the Convention would not be concerned with the merits of investment disputes but with the procedure for settling them.

While the Bank believed that private investment had a valuable contribution to make to economic development, it was neither a blind partisan of the cause of the private investor, nor did it wish to impose its views on others. He did not expect or think it desirable that all disputes between foreign investors and host States should necessarily be dealt with by the facilities established under the Convention, nor was it intended to supersede national jurisdiction generally. It should, however, be stressed that there might be instances when recourse to an international forum would be in the interests of the host State as well as in those of the investor.

Two further points needed emphasis. The first was that the Convention

was designed to deal with claims by host States against investors, as well as with claims by investors against host States; the second, that the Convention dealt with conciliation as well as with arbitration. As to the latter, it might well be found when the Convention came into operation, that conciliation activities under the auspices of the Center proved more important than arbitral proceedings.

In conclusion he pointed out that the Convention left States and investors free to establish their mutual relations on whatever basis they deemed proper. Its true significance lay in the fact that it ensured that if the parties agreed to have recourse to an international forum, their agreement would be given full effect. This would create an element of confidence which would, in turn, contribute to a healthier investment climate.

At the present meeting the Bank would be able to draw on the experience of legal experts from a group of countries which included traditional exporters of capital, and also countries which were rapidly progressing on the road of economic development. European jurists had been particularly imaginative in creating new forms of economic co-operation and he was looking forward to lively and valuable discussions.

General Comment on the Draft Convention

The CHAIRMAN invited general comments on the draft Convention. He pointed out that the working paper had been drafted in English, and that the French text was no more than a working translation. On completing the series of regional meetings, equally authentic texts would be prepared in English, French and Spanish.

He reminded the participants that they were free to express their personal views on the paper before them. He hoped, however, that they would also give some indication of their governments' thinking but stressed that they would not be regarded as committing their governments in any way. In keeping with the essentially consultative character of the meeting, no formal decisions or resolutions would be adopted. No minutes of the proceedings would be issued during the meeting, but a summary record of the proceedings would be sent to all participants at a later date.

Mr. RODOCANACHI (France) commended the Chairman for his illuminating address which had enabled participants to have a clearer understanding of the proposed machinery and of the principles involved.

The French authorities supported the Bank in its efforts to obtain maximum support for a convention of the proposed type to deal with disputes between private investors and capital-importing States.

While there was general support for the aims pursued, the difficulty lay in the search for machinery to achieve the proposed objective. The machinery proposed by the Bank had undoubted merits and the discussion would bring these to light. At that stage, he stressed that in the subject under discussion procedures played an essential role. On the quality of the procedures adopted would depend the number of ratifications that the proposed convention would ultimately secure. A convention of that type was important only in so far as it attracted ratifications from a sufficient number of countries, capital-importing and capital-exporting alike.

It was necessary to arrive at a balanced system which would ensure due respect for the sovereignty of the capital-importing countries and which would give investors the protection to which they were entitled.

Lastly, he stressed that he was in full agreement with the objectives of the proposals under discussion, and would co-operate fully in trying to work out a satisfactory system.

Mr. KOINZER (Federal Republic of Germany) commended the Chairman and the staff of the Bank for their work and expressed satisfaction at being given an opportunity to exchange views with his European colleagues on the Bank's proposals.

His Government had invariably stressed the value of private investment in the developing countries, a form of investment which constituted an excellent means of transferring know-how and experience to those countries. Accordingly, his Government had consistently striven to create incentives for such private investment, particularly in the form of guarantees given to investors.

All those efforts, however, would be in vain unless they were supplemented by a corresponding effort on the part of the recipient countries to create a favorable investment climate. His Government had endeavored to achieve that result by means of bilateral agreements, but had nevertheless favored all the initiatives taken in that connection, in particular by OECD and the Council of Europe. From the outset, therefore, his Government had welcomed the Bank's initiative in the matter; the draft which had been prepared constituted an excellent basis of discussion.

He welcomed the progressive idea of giving private persons the right to be directly perties to international conciliation and arbitration proceedings. That idea was consistent with a practice which had already developed in the international sphere. It was gratifying to see that conception receive the support of the Bank with its unique prestige. He attached great importance to the fact that the proposed Center would function under the auspices of the Bank.

The draft raised a considerable number of questions of detail, to which he would revert during the discussion article by article. At this stage, he wished to stress that the criterion should always be whether the proposed provisions would afford an additional feeling of security to private investors. In that connection, the proposed new arrangements must not impair in any way existing schemes, such as those already practiced by his Government in its relations with the developing countries. It was on that understanding that he would wholeheartedly co-operate in the discussion of the draft.

Lastly, he stressed that the willingness of the developing countries to participate in the scheme was e decisive factor in its success. While his Government had not yet taken a definite position regarding the Convention, he believed that the discussion at the present meeting would help to clarify its views.

Mr. van SANTEN (Netherlands) stressed the co-operative spirit in which he approached the present Meeting. While he had, at the stage of preliminary discussions, felt some reluctance in seeking to multiply the

possibilities of international jurisdiction, he had since become convinced that there might be merit in the proposal to establish a new and workable institution which would be enhanced by the prestige of the World Bank, particularly taking into account the assurance that there would be, to the extent practicable, co-operation with the Permanent Court of Arbitration.

He would, however, welcome clarification as to the precise character of the present Meeting. It was his understanding that participants were attending as guests of the World Bank rather than as national delegations, and were accordingly participating in their capacity as legal experts in order to explore all aspects of the draft Convention without in any way committing their governments to any specific stand.

He was also in some doubt as to the way in which it was proposed to ascertain the views of the various governments on the draft Convention and as to whether it was intended to convene a diplomatic conference at some juncture to enable governments to discuss the proposals with each other and with represantatives of the Bank. The situation was not clear from the existing documentation. Moreover, it would appear necessary for the Meeting to have some further information of the reactions of those attending the Regional Coneultative Meeting in Africa regarding whether it would be wise to institute procedures for the settlement of investment disputes under the auspices of the Bank. It was extremely important to know the viewe of the African experts regarding the deeirability of a link between the proposed Center and the Bank as thie would give some indication of whether the Convention would not only be signed but also used. Indeed, the extent to which the draft Convention would be put to actual use for the purposes of conciliation and arbitration, (since, as the Chairman pointed out, accession did not obligatorily imply recourse to it) constituted the primary criterion of its success.

The CHAIRMAN believed that the nature of the present Meeting had been accurately described in the invitation extended to the experts by the Presidant of the Bank. It was indeed a purely consultative meeting and the experts would be expressing their personal opinions. Naturally, any indications they could give of the tentative or definitive views of their governments could but be helpful.

With regard to the procedure to be followed after the holding of the final regional consultative meeting in April, he said that a report, together with a revised draft of the Convantion, would be submitted to the Executive Directors of the Bank, who had requested such regional consultations with a view to providing both them and the President of the Bank with guidance for future action. Should it be decided that it appeared useful to pursue the undertaking, the tentative plan would be to follow the procedures which had obtained in respect of the preparation of the charters of IFC[7] and IDA[8]. Discussion by the Executive Directors would then take the place of a diplomatic conference since both the capital-importing and capital-exporting countries were represented among them. It was likely that the Executive Directors would wish to have the assistance of legal advisers from some or all of their constituent countries. There was therefore no proposal in mind to convene a diplomatic conference for that purpose.

With regard to the consultative meeting held in Africa for which no full record was as yet available, the Bank did have notes on the sugges-

[7] International Finance Corporation
[8] International Development Association

tions made, and he hoped that all delegations present would feel free to ask what particular comments had been raised in the course of the meetings held in Africa and in the Western Hemisphere. Since no votes had been taken and since the points of view expressed on which there wes no disagreement had not necessarily been reiterated, it was somewhat difficult to essess the views of all the experts attending. Nonetheless, certein opinions had clearly emerged on the most important issues. In respect of the link of an International Conciliation and Arbitration Center with the Bank, no objections had been raised at the African meeting and a number of the experts from the most important countries had takan en extremely positive view.

He also emphasized the fact that the value of the Convention would indeed be measured by the practical use to which it wes put. There were already some indicetions that it would in fact be used, although clearly no one could guarantee to what extent. It seemed to him that it was important to guard against seeking too many guarantees as to its application, and indeed as to accessions, in advance, though naturally the Bank had no intention of putting before governments for their signature a document which did not have the likelihood of acceptance by a representative number of both types of countries concerned.

Mr. ALLOTT (United Kingdom of Creat Britain and Northern Ireland) said that he was in a position to inform the Meeting of his Covernment's general attitude with regard to the draft Convention.

His Government warmly welcomed the initietive taken by the Bank. It supported the view that there was a need for international machinery of that type of a non-obligatory basis and endorsed the general lines of the proposal. It had been particulerly impressed by the elegance and realism of the draft Convention, and with its lack of unnecessary detail at the presant juncture.

Since the purpose of the plan was to improve the investment climate, the favorable reactions at the African Consultative Meeting were to be walcomed.

Mr. MELCHOR (Spain) said his delegation was in agreement with the general outlines of the proposal. By declaring that an individual could be a subject of international law, the proposed Convention could help to settle in a friendly spirit disputes which might otherwise have to be resolved at governmental level. From that point of view he thought that the proposal was of the greatest interest.

He would appreciate it if the Chairman could further elucidate one important point and indicate what the reactions to this point had bean in Santiago. While he hed noted thet the type of dispute it was intended that the draft Convention should cover was to be of a legal character as distinct from political, economic or purely commercial disputes, that basic point called for additional clerification.

He also asked the Chairman to indicate the Bank's present intentions with respect to the procedure to be followed for the eventual signature of the Convention.

The CHAIRMAN, replying to the first epecific point raised by the representetive of Spain, said that tha definition of the type of invest-

ment dispute to be covered would be considered in the context of the detailed consideration of Article II.

In respect of the more general points made by the Spanish representative, he stated that the tenor of the Western Hemisphere consultative meeting had been somewhat differant from that of the African meeting. The fundamental point at issue had been the difficulty encountered by many Latin American countries in placing the individual or the individual company on the same level as the State. While specific constitutional difficulties existed in certain cases, other reservations had been made on grounds which were less clear-cut as regards constitutional repercussions but which were rather based on legal traditions in that continent. It had become apparent both from the discussions in the meeting and from private conversations that some eminent jurists were reluctant to run counter to such traditional attitudes and did not feel it possible, either legally or politically, to agree in advance to arbitration, other than on an _ad hoc_ basis. It had been the point of view of the Bank that, rather than to seek to amend the draft Convention to meet those difficulties, governments might find it possible to sign it without stipulating a specific reservation but making a formal statement at that time showing their position in that respect. It would be a significant step forward for the draft Convention to receive the signatures of Latin American countries. Although those conceptual problems of not according special advantages to foreign investors had been stressed at the Western Hemisphere consultative meeting, he had been gratified by the pre-eminently practical approach voiced at the African meeting; African countries were possibly more familiar with the proposed procedures owing to their past associations.

With regard to future procedure, he recalled that a diplomatic conference had not been called in connection with the establishment of IDA and IFC but that the text of the constitutent instruments of these institutions had been established by the Executive Directors. He noted the fact that both the Bank's Board of Governors and the Executive Directors have a system of weighted voting related to the size of members' contributions to the Bank's capital. The possibility was, therefore, always present that these organs of the Bank could take decisions over the objections of a numerical majority of the member countries. However, as had been borne out in the cases of IDA and IFC, the Executive Directors would wish to assure that the Convention would not merely be put up for signature but that it would be acceptable to an adequate number of developing as well as industrialized countries.

Mr. ROSCHIER-HOLMBERG (Finland) complimented the Bank on the work it had accomplished on the draft Convention. Its motivation and fundamental norms had been clearly expressed by the Chairman and he had nothing to add. He expressed full support for the proposal which should contribute towards encouraging investments.

He wished, in particular, to stress the importance of the Conciliation and Arbitration Rules, which would be just as important as the Convention itself.

While it was evident that in formulating the draft the Bank had cooperated with all the appropriate international organizations and would continue to do so, he drew special attention to the desirability of collaboration with the International Bar Association, which would soon

publish a report on the results of a study on the protection of investors abroad.

Mrs. Pilz (Austria) welcomed the efforts made by the Bank, which because of its experience was particularly well qualified to find ways and means for solving investment disputes.

The competent Austrian authorities had studied the draft Convention. A number of problems arising out of the Austrian legal system had become apparent but it was hoped that they could be settled. The draft Convention would require ratification by the Austrian parliament. The Austrian authorities considered that the draft Convention would contribute towards creating a favorable investment climate and were therefore inclined to take a positive view.

Mr. PEREIRA (Portugal) said that he believed his Government to be extremely favorably disposed towards a convention of the type proposed. Such a convention was clearly progressive in its recognition of the individual or individual company on an equal basis with the State. There were, however, a number of details which might not be entirely acceptable in that they had repercussions on the internal legal authority which in his own country was dependent on parliament. Furthermore, while signature of the draft Convention did not imply any obligation on the country acceding to make use of the facilities of the Center, provisions such as Article IV, Sections 14 and 15 on recognition and enforcement of arbitral awards had reporcussions in the national field.

The CHAIRMAN confirmed that legislative action would in most if not all cases be needed following signature of the draft Convention.

Mr. OBERHOLZER (South Africa) expressed appreciation to the Bank for the invitation extended to his delegation to attend the present regional consultative meeting.

He viewed the initiative for a draft Convention as an attempt to improve the foreign investment climate, and coming as it did from the Bank, it was to be welcomed.

Commenting generally, he wondered whether it was in fact a sound principle to elevate the individual to the status of a subject of international law, and whether, if the answer to that were in the affirmative, the definition given of "national of another Contracting State" was sufficiently circumscribed; he would raise this point again at an appropriate stage in the discussion. He wondered further whether the arbitral tribunal envisaged by the Convention would be sufficiently equipped to deal with points of international law which might arise in connection with those provisions.

He expressed the hope that the discussions at the present Meeting would prove fruitful.

Mr. KARELLE (Belgium) said that his Government was favorable to the conclusion of the draft Convention. He would raise some points on particular provisions of the Convention when they were taken up for discussion.

Mr. SERB (Yugoslavia) considered that in discussing the Convention

two questions of a general nature ought to be borne in mind. The first was the usefulness of a Center backed by the prestige of the Bank and the second, the matter of the enforcement of the awards of an arbitral tribunal. In connection with the first question, paramount importence should be given to the views of the capital-importing countries as the creation of tha Center should primarily be in their interest. As to enforcement of awards it seemed to him that the draft Convention went too far in providing for enforcement against States as the proposal was not justified in the light of the record of States' compliance with arbitral awards. He believed that the draft Convention would be more widely acceptable if it were in a sense less revolutionary in that sphere.

The CHAIRMAN agreed that the record of States in complying with arbitral awards had been good and emphasized the fact that the question of the enforcement of awards had been included in the draft Convention mainly for the benefit of the developing countries who were thus given a means to enforce awards in their favor against foreign investors. Moreover, the draft Convention did not confer on the investor any right to seek judicial enforcement against the State unless such enforcement was possible under national law.

Mr. LØVOLD (Norway) wished, without committing his Government, to express support for the proposal for creating a Center for the settlement of disputes as that plan would be of great value in inducing investments in developing countries. He welcomed the fact that the proposals were put forward under the auspices of the World Bank.

The meeting rose at 5:10 p.m.

SECOND SESSION
(Tuesday, February 18, 1964 - 9.30 a.m.)

ARTICLE I - International Conciliation and Arbitration Center

The CHAIRMAN invited the meeting to consider the sections of Article I in groups under the headings given them in the draft Convention.

Establishment and Organization (Sections 1 - 3)

The CHAIRMAN said that at the meetings held in Addis Ababa and Santiago the points raised had been mainly drafting suggestions. The location of the seat of the Center and the possibility of creating regional "sub-seats" had been discussed, but the question of where proceedings would take place was more important than the location of the administrative headquarters of the Center. The general desire had been to allow for the maximum flexibility in regard to the place of proceedings.

Mr. RODOCANACHI (France) said that the French text, which as the Chairman had said was only a rapid translation of the English version, did not in some cases correspond to the sense of the English original and he would like to point out these inconsistencies as the discussion progressed. Referring to Section 3 he suggested that the word "liste" be replaced by the word "corps".

Mr. MELCHOR (Spain) proposed that in the same section in the Spanish text the word "nomina" be replaced by the word "lista".

The CHAIRMAN observed that the word "cuerpo" had also been proposed for this section.

Mr. RODOCANACHI (France) suggested that in the last sentence of Section 1 the words "capacité juridique" would be a better rendering of the English "juridical personality".

The CHAIRMAN said that at Addis Ababa the representative of Nigeria had suggested deleting the word "full", which was redundant, and replacing it by the word "international".

Mr. ALLOTT (United Kingdom) asked whether juridical personality under international, or municipal, law was envisaged.

Mr. AMLIE (Norway) said that if the intention was to give the Center international juridical personality the statement to that effect was in its right place in Section 1. He felt, however, that the intention had probably been to give the Center juridical personality under the law of the host country. In that case the sentence would be better placed in the sections dealing with privileges and immunities.

The CHAIRMAN explained that the sentence had been placed in Section 1 rather than in the sections dealing with the privileges and immunities of the Center in order to make it absolutely clear that the Center was a wholly separate and distinct entity, particularly with regard to the World Bank. The juridical personality privileges, immunities, etc. of the Center would certainly have to be recognized at least by all the Contracting States. At a previous meeting it had been suggested that the personality of the Center be defined in terms of the traditional distinguishing qualifications of such personality, viz. the rights to acquire and dispose of property, to sue and be sued, and to enter into contracts.

Mr. RODOCANACHI (France) asked whether the Permanent Court of Arbitration had been approached in connection with the arrangements referred to in Section 2(3).

The CHAIRMAN said that no official contacts had been made with the Permanent Court, although informal talks had taken place. The Permanent Court of Arbitration had been specifically mentioned in Section 2 because the possibility of such arrangements had been suggested at an early meeting of the Executive Directors of the Bank by the Netherlands Executive Director. The general desire was to provide for arrangements with any appropriate body which could facilitate the work of the Center. Before the submission of the final draft of the Convention, the Permanent Court would have to be approached to make sure that it would be willing to consider the proposed arrangements.

Mr. BERTRAM (Federal Republic of Germany) said that he would not like to have the interpretation of Section 2(3) restricted to institutions "which might in the future establish machinery for the settlement of investment disputes" as stated in the comment on page 4, paragraph 4, since that would exclude organizations such as the OECD, which did not at present contemplate setting up machinery of that kind.

Mr. MELCHOR (Spain) said that in the interests of giving the Convention the maximum flexibility it might be desirable to allow arbitration or conciliation proceedings to be held in the country where a dispute had arisen.

The CHAIRMAN agreed that maximum freedom should be given to the parties in the choice of the location of actual proceedings, but tbat this point could conveniently be taken up under Articles III, IV and VII.

Mr. van SANTEN (Netherlands) said that the place of honor accorded to the Permanent Court of Arbitration did not mean that any preference would be given to that Court, or imply any obligation on the new Center to come to en arrangement with it. However, no one could object to the World Bank's taking any initiative in that sense. The specific reference to the Permanent Court was, in his view, particularly useful since there was always a tandency when creating new institutions to give them competence in fields already covered by existing bodies. His delegation would regret the omission of the reference to the Permanent Court. He suggested that the word "may" in lines 1 and 4 of Section 2(3) be replaced by the word "shall". Since the new institution was intended to deal with investment disputes, he proposed that in Section 1 the words "for investment disputes" be added at the end of the name of the Center.

The Administrative Council (Sections 4 - 7)

The CHAIRMAN said that the only substantive comments made on Sections 4-7 dealing with the Administrative Council had been concerned with Section 5. At Santiago one delegation, supported by two others, had suggested that the Chairman of the Administrative Council be an elected Chairman instead of the President of the Bank acting ex officio. This suggestion had been supported by drawing an analogy with the Board of Governors, which unlike the Executive Directors, was presided over by an elected Chairman.

Mr. BERTRAM (Federal Republic of Germany), suggested that Section 6(vi) on transfer of the seat of the Center be deleted.

The CHAIRMAN observed that some experts at the Addis Ababa meeting had felt that paragraph (vi) could be deleted. In his opinion the major question was the location of arbitration or conciliation proceedings; he could not visualize circumstances in which the Center would be so divorced administratively from the Bank that it would be necessary to move it. Proposals had ranged from those requiring a simple majority to those requiring a nine-tenths majority.

Mr. MELCHOR (Spain) suggested that a two-thirds majority be required for the transfer of the seat of the Center.

Mr. BERTRAM (Federal Republic of Germany) suggested that a two-thirds majority be required for adoption of financial regulations and for approval of the annual budget of the Center.

Mr. DEGUEN (France) questioned the need for a qualified majority for the establishment of administrative arrangements between the Center end other existing institutions. However, if it were necessary there, it was still more necessary for the adoption of financial regulations and the approval of the annual budget of the Center. At the same time

his delegation would prefer simpler arrangemente, making the World Bank directly responsible for the budget. He felt that if, as was said in the comments, the Center was to be sponsored by the World Bank, the closest possible relations with the Bank should be maintained and the statement that the Center was sponsored by the Bank ehould be included in the text of the Convention. For the same reason he thought that no provision be made allowing transfer of the seat of the Center from the headquarters of the Bank and that it was desirable that the President of the Bank should ex officio be Chairman of tha Administrative Council and he was in favor of deleting the provision opening the possibility of a trensfer of the seat of the Center.

Mr. MELCHOR (Spain), supported by the representative of Portugal, agreed that the President of the Bank should ex officio be Chairman of the Administrative Council.

The CHAIRMAN observed that the three delegations at the Santiago meeting which had opposed the proposal that the President of the Bank be Chairman ex officio of the Administrative Council had done so in order to avoid giving the Chairman excessive powers, particularly in view of his authority to nominate members of the Panels.

Mr. van SANTEN (Netherlands) said that if the Center were sponsored by the World Bank it was desirable that everything done by the Center should be done under the eyes of the Bank's chief. He therefore supported the requirement that the President of the World Bank should be Chairman of the Council. The powers of the Chairman of the Council in connection with the Panels were also desirable since they would ensure the fair representation on the Panels of qualified persons from both investing and receiving countries.

The CHAIRMAN said that the views expressed by the representatives of France and the Netherlands, emphasizing tha link between the Center and the World Bank were particularly valuable. The principle underlying the link with the Bank had not been seriously questioned at previous meetings, and this was, in his view, because the World Bank had now in practice become essentially a development institution and as such was necessarily impartial.

Mr. HELLNERS (Sweden) asked whether any draft had been made of the Conciliation and Arbitration rulee referred to in Section 6(v). Those rules might have a bearing on the Convention and certain representatives might be of the opinion that some of them ought to be included in the Convention. He thought that the words "not inconsistent with any provision of this Convention" were redundant and euggested that they be deleted.

Mr. BERTRAM (Federal Republic of Germany) eaid that the importance of the rules referred to in Section 6(v) could only be assessed after the articles on procedure had been discuseed. It would be useful to have the co-operation of members of the Panels in drafting the rules of procedure. He felt that a two-thirds majority might be too small and that a larger mejority or even unanimity would be deeirable.

The CHAIRMAN observed that all essential points of procedure, such as those on rendering awards on default of a party, would be included in the Convention. The Conciliation and Arbitration Rules adopted by the

Administrative Council would not necessarily be applied because parties would be free to substitute other rules, or leave the tribunal to formulate its own rules. To insist on unanimity for the adoption of the Conciliation and Arbitration Rules might not afford sufficient flexibility and so discourage disputants from having recourse to the Center. With regard to drafting of the Conciliation and Arbitration Rules, he thought that some model rules should be available by the time the Convention was submitted to Governments. The advice of persons with practical experience in the field of international arbitration would have to be sought in this connection.

Mr. BERTRAM (Fedsral Republic of Germany) felt that the question of default awards might need more detailed treatment than could be given it in the Convention. The Convention and Arbitration Rules adopted by the Council should be a model of their kind covering as many eventualities as possible. While it might be too much to require unanimity for their adoption it was important that they should receive the support of as large a majority as possible of the members of the Administrative Council.

Mr. van SANTEN (Netherlands) was of the opinion that the majority required for the adoption of the rules should be kept as low as possible, and that all matters of importance should be included in the Convention rather than relegated to the rules of procedure. Those rules were of a subsidiary character applicable only insofar as the parties had not agreed on their own rules of procedure.

Mr. MELCHOR (Spain) said that a two-thirds majority was necessary for the adoption of the rules in order to give them adequate prestige. That majority should not be hard to obtain since there were plenty of precedents to choose from in drafting the rules. He recalled that rules had been developed by the Permanent Court of Arbitration which dealt with disputes between States and by the International Chamber of Commerce which dealt with disputes between individuals. It should be borne in mind however that the Center would normally be dealing with disputes between individuals on the one hand and Stetes on the other. The main requisite for its rules was that they should be flexible enough to cover as wide a range of cases as possible.

Mr. PEREIRA (Portugal) asked whether the President, in addition to his casting vote, would be entitled to vote in cases where his vote would complete a two-thirds majority.

The CHAIRMAN said that the President would be allowed a casting vote only as a means of avoiding a deadlock in the case of an equal division, in accordance with the precedent established by the Charters of the Bank and its affiliates.

Mr. DEGUEN (France) thought that the system, reflected in paragraph 7 of the Comment to Article I, whereby the Conciliation and Arbitration Rules would become binding on the parties to a dispute only with their consent, was unsatisfactory in that it allowed one party to frustrate proceedings by withholding its consent.

The CHAIRMAN replied that paragraph 7 of the Comment did not accurately reflect the provisions of Section 4 of Article III and Section 5 of Article IV which were to the effect that those rules would apply except as the parties might have otherwise agreed.

Mr. KOINZER (Federal Republic of Oermany) speaking with reference to Section 7(4) on the voting procedure in the Administrative Council, asked whether in view of tbe fact that the majority of member countries could be capital-importing countries, consideration could be given to distinguishing, as had been done under the Charter of the International Development Association (IDA), between capital-importing and capital-exporting countries, and to requiring a majority in both groups of countries for decisions of the Councils.

The CHAIRMAN said that among the Executive Directors of the Bank - those representing capital-importing as well as capital-exporting countries - there had been strong opposition to any form of voting other than by a simple majority of all the members.

The meeting was suspended at 11 a.m. and resumed at 11.20 a.m.

The Secretariat (Sections 8, 9 and 10)

The CHAIRMAN explained that some of the legal experts at the Addie Ababa meeting had been opposed to the provision in Section 9(2) whereby the office of Secretary-General could be combined with employment by the Bank or the Permanent Court of Arbitration. One expert had explained that his opposition was not motivated by fear of partiality but by the conviction that it would detract from the dignity of the office if it were not held as a full time appointment and that as far as cumulation of functions was concerned he made no distinction between the Bank and the Permanent Court.

The experts had been informed that the provision had been inserted not for financial reasons but to avoid difficulties in finding a suitable candidate who might be unwilling to accept the post of Secretary-General for fear that it would not offer sufficient interest.

His impression was that, by and large, a provision of the kind contemplated in Section 9(2) would be regarded as acceptable as a temporary measure though some States might prefer employment by tha Bank to be ruled out.

Mr. BERTRAM (Federal Republic of Germany) said that he was not in favor of allowing the office of Secretary-General to be combined with employment by the Bank or the Permanent Court of Arbitration.

Mr. van SANTEN (Netherlands) said that in principle he was in support of Section 9(2) particularly at the outset when, for practical reasons, it might be desirable not to exclude the possibility of combining the function of Secretary-General with employment by the Bank. Perhaps if the provision were intended to be of a transitional character it should be transferred to a special section at the end of the draft Convention devoted to transitional measures as was more usual in international instruments.

The Cheirman agreed that such a solution might allay the concern felt in certain quarters.

Mr. DEGUEN (France) said that bearing in mind the example of the Permanent Court it might prove unnecessary to make mandatory the appoint-

ment of Deputy Secretaries-General. The question of assuring continuity would only arise in acute form if the Center were kept very busy and it should not be impossible to devise means of filling any vacancy in the post of Secretary-General quite quickly.

Mr. BILGEN (Turkey) said that the last sentence in Section 10(2) needed revision. The Secretary-General could not determine in what order the Deputies would act as the situation would only arise if his post were vacant. The decision would need to be taken by some other person, possibly the Chairman of the Administrative Council.

The Panels (Sections 11, 12, 13, 14 and 15)

The CHAIRMAN explained that the figures in square brackets in Sections 11 and 12 regarding the numbers of persons to be designated to the Panels were tentative. Some experts at other consultative meetings had expressed the view that the number suggested in Sections 11(2) and 12(2), viz. six persons, might be too high and some believed that the Chairman should not have the right to designate as many as twelve persons to serve on each Penel. The last point was prompted by the fear that in case of disagreement by the parties the Chairman would seek to designate his own appointees. While he did not think that the point had merit, he did not consider the Chairman's powers of designation essential.

There had been some criticism, mainly of a drafting nature, of Section 15. Although it had been generally recognized that some criteria for selection were necessary, the view had been expressed that tha wording was not altogether satisfactory. It had also been pointed out by a number of experts that the second sentence in Section 15(1) should be deleted because, being purely an exhortation to governments to seek the advice of certain national institutions, it had no place in a draft convention and might better be embodied in a recommendation by the Administrative Council, by the Executive Directors or by the Bank's Board of Governors to accompany the submission of the draft Convention to governments. Certainly the provision was vague and imposed no obligation upon States to seek such advise.

Mr. BILGEN (Turkey) considered that there was no justification for conferring upon the Chairman the right to designate persons to serve on the Panels and therefore proposed the deletion of paragraph (3) in Sections 11 and 12 and paragraph (2) in Section 15. In his opinion the Panels could only be constituted by the Contracting Parties to an international convention the purpose of which was to establish arbitral machinery for the settlement of disputes between States and nationals of other States.

Regarding Section 13(1), he wondered whether a term of four years might not be too short since conciliators and arbitrators were not going to be called on to perform their functions continuously. It would seem desirable to enable the Contracting Parties to extend the term of service beyond four years and only to specify a minimum term.

The CHAIRMAN said that the proposed term of four years was a tentative one.

Mr. RODOCANACHI (France) said that some provision must be made to enable States acceding to the Convention after it had entered into force to designate persons to serve on the Panels.

He was in favor of the Chairman being empowered to designate persons to serve on the Panels in order to assure balanced representation on the Panels to the extent possible, but thought that designation of persons by the Chairman ought to be made mandatory as in the case of designation by States. Some mention must be made in Section 15(1) of independence among the qualifications of members of the Panels. The second sentence in Section 15(1) seemed a little peremptory: surely governments had the right to consult whomsoever they wished.

The CHAIRMAN said that although some distinction might be drawn in the final provisions between the original signatory States and States which adhered to the Convention at a later stage, no such distinction was made in the present draft. In the present text the term "Contracting States" included any signatory irrespective of the date on which it ratified the Convention.

Mr. ALLOTT (United Kingdom) said that in general the scheme for selection of the Panels was acceptable and the argument in favor of giving the Chairman the right to designate members put forward in the Comment to Section 15 had considerable force.

For the reason given by the expert from France, he favered deletion of the second sentence in Section 15(1).

Mr. DEGUEN (France) was also in favor of deleting the second sentence in Section 15(1).

Mr. BERTRAM (Federal Republic of Germany) agreed with the expert from Turkey that a Panel member's term of office ought to be longer than four years which would be more conducive to the creation of a uniform body of law. It was noteworthy that the term of office of members of Panels under the Hague Convention of 1907 was six years.

It would be desirable to include a provision in Section 13 to ensure that the member of a Panel whose term ended during a hearing would continue to serve until the proceedings had been concluded.

The CHAIRMAN agreed that an express provision of that kind might be desirable although he felt there was no doubt that an arbitrator would continue to sit even though his term of appointment to the Panel had expired.

Mr. van SANTEN (Netherlands) said that it was probably necessary to enumerate criteria for selection even though the qualifications stated in the first sentence of Section 15(1) might appear self-evident. He also believed that express mention should be made of the need to designate persons of independence in the sense that not only should they be capable of exercising independent judgment but also of acting with complete impartiality without accepting instructions from the parties appointing them. This would be in accordance with the novel principle, which ha endorsed, whereby the arbitratore could not be nationals either of the State party to the dispute or of the State whose national was a party to the dispute.

The CHAIRMAN agreed that independence should be mentioned among the criteria in the first sentence of Section 15(1) which would probably need some redrafting.

Mrs. PILZ (Austria) said that although she was in general agreement with the proposed system she would prefer that each State appoint four persons to each Panel as was done in the Permanent Court, which had proved satisfactory in practice. She was inclined to sympathize with the view that it was not absolutely necessary to empower the Chairman to designate persons to serve on the Panels, particularly if the main reason for doing so was to ensure a balanced representation of the principal legal systems of the world because that should be effected by the Contracting Parties and any failure in this regard would presumably be due to the fact that the legal systems concerned were those of States that had not adhered to the Convention.

Mr. AMLIE (Norway) disagreed with the expert from the Netherlands and considered that the whole essence of arbitral procedure lay in the fact that the party appointing an arbitrator could not give him instructions. Accordingly, there was no need to make any reference to independence among the criteria in Section 15(1).

The CHAIRMAN said he had recently been informed by one of the legal advisers in an arbitration case between two States that a more rigid clause regarding independence of the arbitrators in the agreement between the parties would have been helpful.

Mr. BERTRAM (Federal Republic of Germany) considered that it was useful to insert some express provision about independence so as to ensure that the arbitrators did not act under instructions. It might also be desirable to exclude from an arbitral tribunal a person who had previously been involved in the dispute in some other capacity. Perhaps suitable language might be borrowed from the rules of other international tribunals.

The new provision contained in Article IV, Section 2(2) raised some important issues. As the institution of a national judge or a judge _ad hoc_ was a familiar one in international arbitral proceedings he would be reluctant to exclude that possibility. Surely if the Chairman of the tribunal were not a national of one of the States parties to the dispute that should provide an adequate safeguard.

Mr. DEGUEN (France) as a minor argument in support of the Chairman's power to appoint persons to the Panels, referred to the possibility that a dispute might arise between the only two countries ratifying the Convention. In that case no arbitrators could be appointed from the Panels in view of Article IV, Section 2(2).

Mr. PEREIRA (Portugal) said that an express provision specifying that arbitrators must act with complete independence, would greatly enhance the international prestige and authority of arbitral awards.

Mr. HELLNERS (Sweden) doubted whether it was strictly necessary to touch upon the question of independence in Section 15, since the whole issue of disqualification on grounds of lack of independence was adequately dealt with in Article V.

Mr. MELCHOR (Spain) was also against including any specific reference to independence in Section 15. In the first place it was not clear what was covered by that requirement: would it, for instance, prevent a government from appointing one of its functionaries to Panels? Would professional relationships have to be taken into account? Secondly, lack of independence of members of a commission or tribunal was adequately covered by the provisions on disqualification in Article V. In this connection he also supported the power of the Chairman to appoint twelve persons to each Panel as these appointees would very probably be persons enjoying international prestige, and parties would often choose arbitrators from among them because of their independence.

Mr. BERTRAM (Federal Republic of Germany) pointed out in reply to what had been said by the expert from Sweden that the disqualification of a member of an arbitral tribunal for lack of independence was a serious weapon which parties to the dispute might be very reluctant to use. Perhaps some provision on the lines of paragraphs 2 and 3 of Article 17 of the Statute of the International Court of Justice might be useful in the present draft.

Mr. PEREIRA (Portugal) emphasized that independence was not an abstract qualification. He doubted whether a man of complete independence existed anywhere, but persons of recognized standing could be found and relied upon in a given dispute to exercise their functions with complete impartiality in a given case.

The CHAIRMAN observed that two aspects of the quality of independence had been elucidated and that the matter needed further consideration.

Financing the Center (Section 16)

The CHAIRMAN explained that although the question of the Bank financing the Center's overhead expenses had not yet been put to the Executive Directors, his personal impression was that such a proposal would not meet with serious opposition. The bare overhead costs might be of the order of $50,000.

The question of financing by the Bank of the overhead expenses of the Center had been discussed not so much in the context of avoiding possible additional burdens on governments, but in the context of how to determine the basis for contributions and how to avoid problems of collection and bookkeeping.

Mr. DEGUEN (France) said that the idea of financing by the Bank was the best solution. There remained the problem of contributions from States not members of the Bank, but he thought the Bank could properly decide to bear the entire overhead cost of the Center without creating any undesirable precedent.

Privileges and Immunities (Sections 17, 18, 19 and 20)

The CHAIRMAN said that the provisions contained in Section 18(1) were modelled on those in the Bank's Articles of Agreement but perhaps were not wholly appropriate. The immunities ought perhaps to be of the kind

accorded to officials of international organizations under tha relevant agreements relating to the privileges and immunities of the United Nations and its specialized agencies.

Commenting on Section 20(2) he pointed out that although the Chairman and members of the Administrative Council served without compensetion they might be eligible for subsistence allowances or travel expenses, which in some countries were in principle subject to taxation. However, that paragraph could be reworded in order to remove what to some experts hed appeared to be an inconsistency.

The scope of the provisions concerning privileges and immunities was more or less the same as was customarily accorded to international organizations. In some countries they might require implementing legislation or executive action.

Mr. KOINZER (Federal Republic of Oermany) said that tha financial experts of the Federal Ministry of Finance had expressed misgivings about Section 20 and would prefer something on the lines of the provisions contained in the Convention on the privileges and immunities of the specialized agencies. He also edvocated the deletion of Section 20(3) on immunity from taxation of honoraria or fees of arbitretors or conciliators which was not consistent with usual prectice.

The CHAIRMAN said that Section 20(3) was intended to evoid the possibility that the location of the proceedings alone might attract tax liability.

Mr. MELCHOR (Spain) said that tax exemptions should only apply to the operation of the Center and not to possible decisions or effects of decisions of the arbitral tribunal itself.

The CHAIRMAN explained that the intention had not been to extend immunities to the tribunal's decisions. The language of Section 20(1) was taken from the Bank's Articles of Agreement and "transactions" referred in the context of the Center to such matters as purchases of office equipment and tha like.

Mr. ALLOTT (United Kingdom) commenting on the sections dealing with privileges and immunities asked for clarification of why the present draft differed from an earlier one in not conferring immunity from legal process in respect of their official acts on those taking part in the proceedings. It might be argued that such a provision could constitute a guarantee against pressure and hence an additional safeguard that arbitrators and conciliators would act with independence.

Some clarification was needed of the language used in Section 18(2). The term "agents" had been understood in the ordinary sense used in international proceedings but it was not clear what was meant by the term "representatives of parties".

Presumably the purpose of Section 19(2) was to accord to communications of the Center the kind of status given to government communications under the ITU Convention, Annex 3. That privilege was only accorded to a limited class of international organizations and he believed it was the policy of the parties to that Convention strictly to limit extensions of

the privilege. His own Government would prefer to accord the same type of privileges as those given to other international organizations.

Section 20(1) seemed to deviate from existing precedents in respect of privileges and immunities. It did not make clear to what extent the Center would be exempt from local taxes imposed by the municipality in respect of the services it provided which in the United Kingdom were known as "rates". The United Kingdom Government had consistently supported the view that exemptions for international bodies of the kind under discussion should be limited to that portion of those local taxes from which the Center would not derive any benefit. There were certain well-established precedents in that regard and the exemption would not be difficult to accord. He therefore suggested that Section 20(1) should be modified so as to specify more clearly for which internal taxes the Center would be liable.

The purport of the last sentence in Section 20(1) was not clear. The United Kingdom experts had deduced from the comment that it followed a precedent set in the Articles of the Bank. The question was whether it was intended that the Center should be in the same position as the Bank with regard to the holding of bonds, etc. He would have thought it to be surprising if the Center were in such a position as to have to collect taxes and customs duties and therefore preferred that provision to be dropped.

Section 20(2) on taxation of emoluments of the personnel of the Center would be acceptable if it were to be interpreted in the same sense as the corresponding provision in the Articles of the Bank. He understood that a recorded interpretation of that provision existed which if applied to the present provision would mean that nationals of the country other than those in which the Center had its seat would not be subject to local income tax in the country of their employment, but might be liable to tax in their own country if they came within its jurisdiction. If that interpretation was correct the provision would be acceptable.

Regarding Section 20(3) on the taxation of honoraria and fees of arbitrators he said that United Kingdom financial experts were somewhat doubtful about the provision but would hesitate to oppose it if it were regarded as necessary by the Bank and the legal experts attending the various consultative meetings. However, it would only be acceptable if its present scope were not extended and if the proviso therein remained unchanged.

The CHAIRMAN, replying to the United Kingdom expert, said that the provision in Section 18(1)(i) had been changed to conform to the Articles of the Bank because of the great opposition by certain governments to according additional immunities. However, there were cogent reasons for extending the immunity from legal process to conciliators and arbitrators and he would personally welcome such a provision.

The language of Section 18 paragraph (2) could be revised and he would have thought it possible to omit reference to "representatives of parties".

He noted the United Kingdom's objection regarding the privileges accorded to communications under Section 19(2) which he assumed related to the question of preferential rates. The point made concerning Section 20(1) would also be noted.

Section 20(2) should be interpreted in the same sense as the corresponding provisions in Articles of the Bank, the IMF, the International Development Association and the International Finance Corporation. By now the practice was a well-established one and no differing interpretations need be expected.

He confirmed that the proviso at the end of Section 20(3) was essential.

The meeting rose at 12.55 p.m.

THIRD SESSION
(Tuesday, February 18, 1964 - 3:00 p.m.)

ARTICLE I - International Conciliation and Arbitration Center

Privileges and Immunities (Sections 17 - 20) (continued)

Mr. AMLIE (Norway), questioned the necessity for modelling the provisions relating to privileges and immunities on the corresponding provisions existing in respect of the International Bank, particularly as the Center would be a separate entity having full juridical personality. He recalled the exhaustive work accomplished by the two recent codification conferences on privileges and immunities, the results of which were intended to be of lasting value. It might, therefore, be useful if the Bank could study those provisions and possibly revise the draft Convention accordingly.

He drew attention to a number of discrepancies in the text as compared with accepted international law. There was no provision in the draft Convention relating to the status of persons connected with the Center, and it seemed to him that the draft Convention should include a reference to their inviolability and protection. While provision for inviolability of the archives was contained in Article I, Section 19(1), there should also be included a provision regarding inviolability of the premises of the Center which might be transferred from the headquarters of the Bank pursuant to Article I, Section 6(vi).

A reference to the possibility of waiver of immunity should also be included.

On points of drafting, he suggested that the term "representatives, officials and employees of comparable rank" in Article I, Section 18(ii) required clarification.

The CHAIRMAN said that the reference to "representatives, officials and employees of comparable rank" would be adapted to be in line with the Convention on the Privileges and Immunities of the Specialized Agencies.

Mr. AMLIE (Norway) believed that the drafting of Article I, Section 19(2) should be improved in order to make it entirely clear what type of official communications it was intended to cover thereby.

With regard to Section 20(1), it was hard to see, as that provision was drafted at present, how "operations and transactions" could be subject to customs duties.

Clarification was required regarding the differentiation implied between local citizens, local subjects or other local nationals, as listed in Section 20(2).

While the points he hed raised were not of fundamental importance, it seemed nonetheless desirable for the provisions relating to privileges and immunities to be constructed with the help of instruments which had recently been adopted.

The CHAIRMAN agreed that there was no actual necessity for the provisions under consideration to be based on the corresponding regulations obtaining in respect of the Bank itself. The Bank texts had been followed since member countries often preferred to follow the basis of an already accepted text which was well known to them. The points of drafting raised were clear in the context of the Bank documents. However, the question of principle should be decided whether the Center should, as a new affiliate of the Bank, follow its terminology or whether it should follow the newer codifications on privileges and immunities.

Mr. KARELLE (Belgium) asked what was meant by the phrase "other income" in Section 20(3) and suggested that the comment to this section specify that honoraria, fees or other income of conciliators and arbitrators could be taxed by the country in which they were resident or had their fiscal domicile.

The CHAIRMAN replied that the words "or other income" in Section 20(3) had been included as an omnibus clause and would be reviewed as they seemed superfluous. He confirmed that there was no intention to limit the right of national authorities to levy taxation in the country of residence; the final draft could be made more explicit.

Mr. ALLOTT (United Kingdom) said that the personal immunity of arbitrators from jurisdiction constituted a central issue. He would welcome an indication of the attitude of other members to the view that arbitrators should have such immunity.

Mr. AMLIE (Norway), Mr. TROLLE (Denmark), Mr. HELLNERS (Sweden), and Mr. ROSCHIER-HOLMBERG (Finland) associated themselves with that view.

Mr. BERTRAM (Federal Republic of Germany) said that he was in agreement in principle with the extension of immunity to arbitrators and conciliators. Caution would have to be exercised in respect of other persons, such as experts and witnesses; circumstances might arise where a witness might not be able to give evidence without permission from a national authority.

Commenting on the term "representatives of parties" included in Section 18(2), he wondered whether it would cover, for example, the general manager of a limited liability company.

The CHAIRMAN confirmed that "representatives of parties" would indeed comprise such persons. The text of Section 18 would be studied further with a view to possible clarification.

Mr. van SANTEN (Netherlands) said that, while he agreed in principle with the opinion expressed by the representative of the United Kingdom the point did not seem to him of primary importance since proceedings would take place in closed sessions. To make provision for every possibility, however unlikely, was not always altogether desirable. The question of immunity for the foreign investor himself was also worthy of consideration.

Mr. DEGUEN (France), commenting on Article I as a whole, was of the opinion that none of the provisions in that Article, as distinguished from the later Articles, really called for a convention and that a less formal decision taken on the initiative of the Bank could have been sufficient.

On the more general problem of the relationship between the proposed Center and the Bank itself, he felt that a delicate balance hed been struck between maintaining the independent character of the Center and its enjoying the full benefit of the Bank's prestige. He wondered, however, whether undue stress had not been laid on that independence and whether it might not be preferable for the Center to be linked even more closely with the Bank, particularly by means of informal consultations with the Executive Directors of the Bank by the Chairman of the Center, who was of course also the President of the Bank, thus achieving the maximum unity among all initiatives undertaken under the auspices of the Bank with a view to ensuring the most favorable climate for public and private investment in developing countries.

The CHAIRMAN said that, while it had not been expressly stipulated in the draft Convention, the Chairman of the Administrative Council of the Center in his capacity as President of the Bank, could properly seek the informal advice of the Executive Directors and inform the Council of their views. His own preliminary reaction to the suggestion made by the representative of France was that it would be superfluous to have a specific provision on that point. However, the matter called for further consideration.

ARTICLE II - Jurisdiction of the Center

The CHAIRMAN, introducing Article II, suggested that the Meeting consider it section by section. He called particular attention to the comment which explained why the term "jurisdiction" had been used.

The point had been made in the course of the two regional consultative meetings already held, and particularly in Africa, that the possible parties to a dispute with a foreign investor might be a public authority, a development institution or a constituent part of a non-unitary State. It had therefore been suggested that Section 1 be expanded to include reference to disputes between an investor and an instrumentality of the State. The text of that suggestion in the form of an additional article would be circulated. If accepted, it might be incorporated in Section 1 or included as a separate provision.

The suggestion had also been put forward that a multilateral guarantee fund which had indemnified the investor could be subrogated to him in proceedings before the Center.

Mr. GOULD (South Africa) fully supported the principle of confer-

ment of procedural capacity on individuals and companies, which he considered to be a wholesome development of international law. Certain difficulties might, however, arise in connection with the definition of nationals as proposed in Article X, which article he proposed to consider in conjunction with Article II, Section 1.

While there could be no objection prima facie to the definition of a national of a Contracting State as laid down in Article X, that somewhat simplified definition might in fact lend itself to a situation whereby individuals could assume nationalities of convenience, with the result that the individual might in fact take his own real State before an international tribunal. Any jettisoning of the accepted principle of international law regarding the real and effective nationality of the individual might lead to that unwholesome position. In this connection he recalled the decision of the International Court of Justice in the Nottebohm Case which had dealt with effective nationality as opposed to a nationality of convenience. He believed accordingly that it was essential not to relieve any tribunal of its duty to take an objective decision on the nationality of an individual on the plane of international law. To give an individual with dual nationality the right of bringing an action against the State of his effective nationality would amount to additional privilege and would represent an unwarranted invasion of the sovereignty of the national State.

The question of the nationality of companies required even closer scrutiny. The definition given in Article X represented an over-simplification of the matter since in an overwhelming number of cases companies had dual nationality. Speaking from his own experience in South Africa, there was a growing tendency for the interposition of companies between the true investing companies and the host State, and that was a basically undesirable state of affairs. However great the difficulties, a real effort would have to be made to determine nationality adequately if individuals were to be given procedural capacity. It would not be a salutary principle for a company with control and management in the host State to have direct access to litigation with the host State before international tribunals.

The case of consortia called for further consideration since it was not covered by any of the definitions contained in Article X. He referred to the situation in Southern Africa where the basic facilities were provided by a large number of private companies; in those cases it would be difficult to put a stamp of true nationality on a particular company under the terms of definition in Article X alone. Since in general it would be the major components of an infra-structure which might be most liable to be nationalized, it was important for there to be a general understanding of where they stood from the point of view of international adjudication. It seemed to him that a more precise and comprehensive definition of nationality might make the draft Convention more acceptable.

Referring to the provision contained in Article II, Section 3(3) to the effect that a written affirmation of nationality by the Minister of Foreign Affairs of the State whose nationality was claimed by the party should be conclusive proof, he expressed the view that for a Minister of Foreign Affairs to make a thorough investigation of the case, presuming he were willing to do so, would be tantamount to usurping the function of the international tribunal. He believed that the onus of establishing his identity should remain with the claimant. A statement by the Minister of Foreign Affairs should constitute only prima facie proof and should be

subject to rebuttal by the other party.

He also drew attention to difficulties which might arise in connection with the reference to the operative date of nationality contained in Article X, paragraph 1, and suggested that as a pre-requisite for jurisdiction foreign nationality should be maintained throughout the proceedings.

With regard to the term "investment dispute of a legal character" in Article II, Section 1, he believed that there was a clear understanding of what was meant thereby and that no further definition should be sought.

The CHAIRMAN observed that the consideration of the definition of "national of a Contracting State" was related to the entire scope of the draft Convention. Since the draft Convention wae based on consent, it had seemed possible to include a broader category of individuals than if it had been compulsory.

He agreed that the certificate of nationality provided for in Section 3(3) of Article II, should be accepted as <u>prima facie</u> evidence only.

Various views had been expressed regarding plural nationality and the undesirability of a citizen instituting proceedings against his own State. The purpoee which thoee drafting the Convention had had in mind had been to meet cases where a host country with full knowledge of the facts elected to treat an individual with dual nationality as an alien. The original intention had been to omit mention of the question of effective nationality to see whether there would be acceptance of the general proposition that where a host State in full knowledge of the facts elected to treat an investor as a foreigner even though it could claim with justification that he was its national that election should be given effect by the Convention. Although some African countries were in favor of doing so, on balance opinion seemed to be against it.

With regard to companies, the term "nationality" had been used for the sake of convenience. Some objections had been raised in respect of the possibility that under the Convention a company might bring its own national State before an international tribunal; although such objections had not been as forceful as those with regard to natural persons.

He agreed that the question of consortia was not adequately covered under the draft Convention as it stood.

Referring to the use of the term "investment dispute of a legal character", he expressed the hope that there would be general agreement on not attempting to define further the term "investment dispute". The more definitions were included in the Convention the more likelihood there was of jurisdictional controversies.

Mr. MELCHOR (Spain) stressed the difficulty of defining the term "dispute of a legal character". He agreed that the term should exclude disputes of a political character but felt that commercial and economic factors were generally too closely bound up with legal disputes for those factors to be ruled out in the manner suggested in the Comment.

He urged the deletion from Section 1 of Article II of the words in brackets "or that State when subrogated in the rights of its national", which could only lead to difficulties in the application of the Convention.

It was precisely the merit of the proposed Convention that it would serve to avoid turning a dispute between a private investor and the host State into an Interstate dispute.

With regard to the problem of dual nationality, he felt that, where one of the two nationalities involved was that of tha host State, that State would not agree to being brought bafore an international forum by a person whom it claimed as its national.

The complex problem of the nationality of such bodies corporata as limited companies had baffled many leading authorities in international law. However, the problem would probably not often arise in that form. It would normally not be a company as such that would invoke the Convention but rather the private foreign interests involved in the Company. Very often, the investing company was owned as to 50 per cent by such foreign interests (often a foreign company) and as to 50 per cent by local interests.

He felt that Section 2 on consant to jurisdiction should be removed from Article II and placed in the provisions dealing with procedure, as consant to conciliation and arbitration respectively would require different treatment.

Lastly, he had serious misgivings regarding Section 3. As Legal Adviser to the Spanish Ministry of Foraign Affairs, he doubted whether his Ministry was in a position to issue a certificate of the kind indicated in that provision. in many countrias that Ministry was indeed not the authority competent to issue such a certificate. Perhaps the best course would be to require a certification from the Ministry of Foreign Affairs that the authority issuing a certificate of nationality was competent to do so under the laws of the State concerned.

Mr. RODOCANACHI (France) pointed out that the correct French translation of the English term "jurisdiction" was "compétence". The French term "juridiction" had a geographical connotation.

He found the term "dispute of a legal character" too restrictive. Discrimination in taxation, or even police measures, could adversely affect an investment contract without touching in any way the legal aspects of the contract. It was essential that disputes arising in such circumstances should be covered by the Convention.

He felt that the amendment contained in document COM/EU/6*/ would provide a solution to most of the problems which had arisen on the points covered by it; however, in the French text, he suggested that the terms

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*/ The text of the amendment circulated by the Secretariat at the meating reads as follows:

"Section ... Notwithstanding the provieions of Section 1 of Article II the jurisdiction of the Center shall extend to any dispute between a political subdivision or instrumentality of a Contracting Stata and a national of another Contracting State, where euch political subdivision or instrumentality and euch national have consented to the jurisdiction of the Center in reepect of such dispute, and such political subdivision or instrumentality hae given its consent with the approval of the Contracting State concerned."

"subdivisions politiques" and "institutions publiques" should be replaced by the more appropriate terms "collectivités locales" and "organismes publics".

On the question of subrogation, he did not share the views of the Spanish representative: a State which was subrogated in the rights of its national would not have any different rights from that national himself and would be acting as an assignee under private law and not as a sovereign State.

He agreed with the doubts thet had been expressed on Section 3. The Ministry of Foreign Affairs might well not be the competent body to issue a certificate of nationality. Moreover, the proposed provision would remove from the purview of the arbitral tribunal a matter which was essentially within its jurisdiction.

With regard to the complex problem of the nationality of companies, he was interested by the suggestion that an effort should be made to afford protection to the foreign interests involved in a company, regardless of the company's nationality, which might well not be that of one of the Contracting States.

He shared the misgivings expressed on the problem of dual nationality; a provision allowing a national of another Contracting State whom France claimed as a French citizen to invoke the Convention against France would imperil the chances of his country's accession to the Convention.

The CHAIRMAN recalled that the Convention was optional in character. It was clear, for example, that no Contracting State would have to face the problem mentioned by the French representative unless it specifically agreed to bring under the Convention an investment contract entered into with a person of dual nationality.

He wished to know whether the feeling in the matter was so strong thet it was desired to preclude a State which was fully aware of an investor's dual nationality from consenting to give that investor the benefit of the Convention and its provisions on conciliation and arbitration.

With reference to the nationality of companies he noted that two approaches had been suggested. One would rely on the effective economic control of the company by foreign interests as a test of foreign nationality. The other would allow the foreign interests in a local company, as distinct from the company itself, to be parties to proceedings under the Convention.

With reference to the discussion on the expression "dispute of a legal character" he recalled that the words "all legal disputes" had been used in Article 36(2) of the Statute of the International Court of Justice. He agreed that the language used in paragraph 4 of the Comment was not altogether satisfactory: the intention had been to exclude claims that were based on purely economic or commercial considerations and in which it was not even alleged that there had been a breach of legal rights.

Mr. MANTZOULINOS (Greece) urged that the emphasis should not be placed on the nationality of the investor, but on the movement of capital

from one national economic unit to another. He observed that three situations could arise: first, that of an investor who freely invested in a private company in a foreign country; second, an investment freely made by a foreign investor where the recipient of the funds was a foreign State or public entity; third, the situation arising where a special investment contract was concluded in respense to an appeal or offer made by the host State. He wondered whether the term "investment" should cover all three situations or only the third.

The CHAIRMAN explained that the Convention was intended to cover all three situations, provided of couree that there was consent by the parties.

Mr. MELCHOR (Spain) referring to the question of subrogetion of the investor's State in the righte of its national, acknowledged that a State in such a case would have only the rights of the investor concerned and would not be acting in its sovereign capacity. On the other hand the Convention esteblished the valuable principle whereby the investor and the host Stete could confront each other on the same plane before an international tribunal. If, through subrogation the investor's State became party to the proceedings this would to some extent modify this principle. It had been said that subrogetion would arise principally in the context of a system of investment guarantees or insurance. In his opinion this Convention would eliminate the need for such insurence.

On the question of dual nationality he could not agree that e State would under any circumstance consider foreign an investment made by one of its nationals even if he had concurrently the nationality of another State. A national should have access to his State only before the Courts of that State.

In that connection he expressed the view that foreign nationality should be determined at the time the investment was made as he believed that any dispute between the investor and the host State should be decided according to laws of that State in force at the time the investment was made.

The CHAIRMAN said he would like the experts to consider whether an arbitretion or conciliation agreement between e State and one of its nationals who had concurrently the nationality of another State should be treated as invalid end as being outside the scope of the Convention.

Mr. GUARINO (Italy) drew e distinction between three cases. First, the case of a person investing abroad for the same reasons which might lead him to invest in his own country. Second, thet of an investor attracted by special legisletion for the promotion of foreign investments, but having no specific investment contract, and third, the cese where the investment was made under an investment contract. In the last mentioned case the contract could be with the State itself (a purely theoretical hypothesis nowadays), with a public entity (e rare occurrence) or, more usually, a company organized under private lew but controlled by the host State. That last situation - by far the more common one - was not covered by the provisions under discussion. The same was true of the case of a State which retroactively aboliehed benefits offered to foreign investors under special legislation and on the besie of which investments hed been made. He therefore suggested that the jurisdiction of the Center be extended to cover disputes with government-controlled corporations and disputes between private parties arising out of unilateral modification

of the conditions under which the investment was made.

The CHAIRMAN explained that the provisions of the draft, with the proposed amendment (Document COM/EU/6), would cover all the cases mentioned, except conflicts between two companies organized under private law, conflicts which should be settled by the national courts, through commercial arbitration, or other appropriete proceduree.

Mr. ALLOTT (United Kingdom) recalled thet, ae between the parties to a dispute, the Center's jurisdiction was essentially based on consent. The provisions of Article II, however, were of special importance to other contracting perties who, under the Convention would be required to consider an award enforceable. For purposes of enforcement, the limits of the Center's jurisdiction, as defined in Article II, were especially relevant. In that connection, he noted the absence of any provision for ex officio determination of jurisdiction by e conciliation commission or arbitral tribunal, those organs should be able to say, as a matter of course, that a particuler dispute was not covered by the Convention. The provisions under discussion covered only the case where the issue of jurisdiction was raised by one of the parties.

In Section 1, he found ambiguous the words "existing or future" which qualified the term "investment dispute". Those words should be deleted, or else clarified by reference to some point of time.

In view of the difficulty of defining the term "investment dispute" he wondered whether it might not be possible to establish some procedure for determining outside the tribunal whether an investment dispute existed in each particular case. Perhaps the President of the World Bank might be given this function.

He could not readily accept the qualificetion "of a legal character" if construed as tending to exclude questions of fact. That expression should only be used, for convenience, to designate disputes suitable for determination by semi-judicial bodies.

He urged the retention of the reference (in brackets) to subrogation in Section 1. The point was of considerable practical importance in view of the United Kingdom's and other countries' echemes of export credit guarantees.

With regard to Section 3, he felt that the Foreign Office would not gladly shoulder the burden of issuing certificates of nationality.

Section 1 seemed to envisage that there would only be two parties to a dispute; in fact, there might well be more than two, as other provisions of the draft seemed to admit. He thought some consideretion ought to be given to this problem, although he realized the difficulties involved.

Lastly, he saw no difficulty in admitting that an individual could have a right of action before an international body against hie own State.

The CHAIRMAN thanked the United Kingdom repreeentative for drewing attention to a number of important points, in particular the relevance of Article II to the question of enforceability and the need to provide for the possibility of several parties.

Mr. OBERHOLZER (South Africa) said that while there might be no objection to the Convention being invoked by a person who had been born a national of the respondent State but had since acquired and affectively exercised another nationality, a State could not accept the possibility of being brought to international arbitration by a person who was effectively its own national.

It was essential to bear in mind, moreover, that once the Center was set up, a practice was likely to grow up of referring disputee to it by means of a clause in bilateral agreements. Clauses of that type which were often very brief would incorporate the provisions of Article II by reference. It would thus be necessary to define the jurisdiction of the Center as precisely as possible.

Mr. TROLLE (Denmark) and Mr. LØVOLD (Norway) agreed with the Chairman's remarks on the subjact of dual nationality.

Mr. BERTRAM (Fedaral Republic of Germany) agreed with the Uhited Kingdom expert's observations in connection with Section 3 on cartification of nationality.

Regarding the proposed amendment (COM/EU/6) he felt that serious problems could arise beceuse it provided that a political subdivieion or instrumentality of a Contracting State could take action against a national of another Contracting State in casee which would normally go to tha competent domestic courts.

Mr. HERNDL (Austria) said that Section 1 gave rise to no difficulty in cases where an inveetor complained of ection which affected the performanca of the contract. In thet event, the Center was merely a subetitute for the domeetic courts and would apply municipal law. Whara, however, the investor complained of State action contrary to international law, the question of the lew to be applied etood in need of clarification.

Mr. HELLNERS (Sweden) pointed out that dual nationality was largely an academic issue in the caee of natural persons, since at prasent practically ali investors acted through limited liability companies. He wondered what would happen in the case where e local company controlled by foreign intereste which had entered into an investment agreement with the host State was subeequently nationalized. In such a casa it seemed as though the foreign shareholdere would have no means of forcing the com-

pany to bring the dispute before tha Center, and he thought some mention of this problem ought to ba made in tha Comment to Articla II.

He doubted the wisdom of including in Articla II tha reference to "investment disputes of a lagal character". He euggeeted that it should be transferred to tha Preamble.

Mr. DEGUEN (France) said that a State and one of its nationals might well both participate in an investment operation in another Contracting State. In that case, it was perhaps desirable to provide for all three parties to be associated in the proceedings. Otherwise, there might be two conflicting decisions in the same dispute.

The CHAIRMAN eald that it was preferable for a case of that type to be dealt with by means of an agreement between the two States that they would abide by the decision that would be given in the dispute between one of them and the investor. It wae not deeirable to introduce a radical exception to the provisions of the Convention.

Mr. BERTRAM (Federal Republic of Germany) recalled that there existed a body of well-established case-law on the definition of the term "legal dispute" in tha practice of the International Court; he referred, in particular, to the recent Advisory Opinion of the Court on certain expenses of the United Nations.

He reserved his position regarding the question just raised by the French representative, which appeared to coma within the scope of the matter of the overlapping of competenca of saveral international adjudicating bodias.

The meating rose at 6:00 p.m.

FOURTH SESSION
(Wednasday, February 19, 1964 - 9:35 a.m.)

ARTICLE II - Jurisdiction of the Center (continued)

The CHAIRMAN invited the meeting to conclude its consideration of Article II except for the question of nationality which could be deferred. He invited the attention of the experts in particular to Section 2 dealing with consent to jurisdiction.

Mr. ROSCHIER-HOLMBERG (Finland) said he supported the observations made in paragraph 4 of the Comment to the effect thet the inclusion of a more precise definition of tha disputes that could be submitted to the Center would tend to open the door to frequent disagreements as to the applicability of the Convention. He stressed that under Section 3(2)(iii) the objection that a dispute was not within the scope of the Convention would be dealt with expeditiously and impartially. With regard to the question of dual nationality, he supported the view of the representative of Denmark.

Mr. BERTRAM (Federal Republic of Germany) said be had no objection

to Section 2(iii) provided a party could refuse to accept the jurisdiction of the Center without having to give an explanation.

Mr. ALLOTT (United Kingdom) said that in Section 2 line 2 he would prefer to have the words "may be evidenced by" replaced by a rendering nearer to the French version: "peut résulter". He suggested that consent to the jurisdiction of the Center should in all cases be given in writing and that once consent had been given, no party should be allowed to withdraw its consent unilaterally. He pointed out that in order to cover the case of acceptance by the other party of the jurisdiction of the Center following a unilateral approach under Section 2(iii), the drafting of the Section in Article IV dealing with requests for arbitration might need amendment.

The CHAIRMAN, with reference to the suggestion that no party having accepted the jurisdiction of the Center should be allowed unilaterally to withdraw that acceptance, observed that the Preamble affirmed that consent was binding and that this principle was further implemented at various stages by methods for overcoming possible attempts to frustrate the application of the Convention.

Mr. GUARINO (Italy) suggested the addition of a sub-paragraph in Section 2(i) to read: "Consent to the jurisdiction of the Center by any party to the dispute may be given by a declaration of the State, officially notified to the Center, that it will submit to the jurisdiction of the Center all future disputes or all disputes concerning foreign investments made in reliance on a law that the State has promulgated." A stipulation of that kind would constitute a prior guarantee in the legislation of the State that the foreign investor would be protected by international arbitration, whereas without some such guarantee it might be difficult after a dispute had arisen to make a State accept the jurisdiction of the Center.

The CHAIRMAN said that the suggestion put forward by the representative of Italy dealt in reality with a special case covered by the existing Section 2(i).

Mr. GUARINO (Italy) replied that he was not convinced that Section 2(i) covered the circumstances he had in mind. If a State passed a law inviting foreign investments and included in that law an undertaking to submit possible disputes to arbitration, that State could not be denied the right to modify the law in question at a later date. The Convention should therefore require that a definitive written undertaking be made to it directly expressing the consent of the State to the jurisdiction of the Center. Since the consent was in all cases voluntary, he saw no reason why States should not be willing to make general as well as particular undertakings to accept the jurisdiction of the Center.

The CHAIRMAN said that it might be desirable that all expressions of consent to submit disputes to conciliation or arbitration under the terms of the Convention should be registared at the Center.

Mr. PEREIRA (Portugal) said that he could not see how effect could be given to Section 2(iii) since in the case mentioned, it would be unlikely that the other party would be willing to submit to the jurisdiction of the Center.

The CHAIRMAN said that the paragraph followed the precedent of the International Court of Justice with regard to cases involving acceptance of its jurisdiction where no prior agreement existed.

Mr. PEREIRA (Portugal) asked whether a clause of the kind was in keeping with the nature of arbitration.

The CHAIRMAN said he had thought that it was a useful residuary clause in case other clauses did not apply, but he would give the matter further thought.

Mr. BERTRAM (Federal Republic of Germany) said thet the use of the word "submission" might lead to confusion. The Secretary-General would be "approached" to ask the other party if it would be prepared to have recourse to the tribunal. He suggested that some expression other than "submission" might be more appropriate.

Mr. DEGUEN (France) observed that Section 2(i) contained two important innovations from the juridical standpoint. In the first place, it involved the question of the extent to which a tribunal could judge whether consent was valid or not and, in the second place, the extent to which a Contracting State which did not recognize the right it had granted to the citizen of another State to arbitration could be brought by thet other State before an international court such as the International Court of Justice for having failed to fulfill its obligations under an international convention it had signed. He felt that it was doubtful whether the tribunal could enforce its award if a State at the time of a dispute were unwilling to submit that dispute to arbitration and denied the validity of its earlier consent to do so. In that case the only recourse of the injured party would be to claim normal diplomatic protection and he feared that the introduction of an additional contractual obligation would tend to give rise to additional juridical controversy. He stressed the need to strengthen the international legal obligations of Contracting States to make their consent irrevocable and any form of evasion more difficult.

The CHAIRMAN said that the most important juridical innovation introduced by the Convention was the affirmation that agreements between States and individuals were internationally binding, a principle that had not till then been universally accepted and one that should, thanks to the Convention, be thenceforward definitely established. If it was felt that the Convention did not clearly establish the irrevocable character of such agreements its language could be modified so as to leave no doubt on this point.

Mr. KARELLE (Belgium) said that he shared the view of the represantative of Spain that Article II Section 2 would better be transferred to Articles III and IV.

The CHAIRMAN pointed out that since the section was applicable to both conciliation and arbitration, it had been thought more economical to include it in Article II. Furthermore, since consent was the most important prior condition to conciliation or arbitration it had also seemed logical that the section dealing with it ehould precede the articles on conciliation and arbitration.

With regard to the inclusion of the parenthetical language in Section 1, which was considered desirable by most speakars (except the representative of Spain) the difference of opinion might be due to the

question of how such caeee of subrogation could arise.

Under the usual bilateral programs in which investments were guaranteed by a State, the only relations involved were those between the investor and hia own State. However, inveatora might in addition enter into an inveatment agreement with the host State. In that caae, an event claimed to be a violation of the investment agreement could also be one against which the investor was insured by his own State. The investor might then either bring the dispute at issue befora the Center (assuming his agreement contained a compromissory clause to that effect), after which, whether the decision was or was not in his favor, the matter as between him and the host State would be settled. If the investor lost his case, he could then turn to his own government and be entitled under the guarantee contract to recover his loss regardless of the legality of his claim against the host State. The State having paid the investor would thereafter be subrogated in his rights, but since the investor had already exhausted all possibilities for legal action, his claim even though preferred by the subrogee State could not lead to further proceedings. On the other hand, the investor might be entitled to claim an indemnity from the State or from a guarantee fund regardless of the legality of the event covered by the guarantee and without taking prior legal action. The provision included in Section 1 would then allow the guarantor to take the place of the investor and bring the corresponding claim before the Center, although the State would, in such a case, have no rights other than those of the investor. Section 1 indicated only the outer limits of poesible action and whether in fact the State would or would not be able to have recourse to the jurisdiction of the Center would depend on the existence or otherwise of a compromissory clause.

Mr. MELCHOR (Spain) reiterated his suggestion that Section 2 ought to be transferred to Articles III and IV. He pointed out that where conciliation was in question, a compromissory clause would not normally be necessary, whereas in cases of arbitration a clause of that kind would have to be included. The two should therefore be dealt with separately in the corresponding Articles.

With regard to subrogation, while a State could obviously come before the Center as an individual in private law, in certain countries where for historical or other reasons sovereignty was a sensitive issue, the presence in proceedings of a State instead of an individual might give rise to political difficulties. Furthermore, he saw no reason why the State should not pay on the guarantee only after the tribunal had rendered an award. He asked whether subrogation would not be applicable also in the case of insurance companies. With regard to the definition of "investment dispute", he was of the opinion that the Preamble and Article I, read in good faith, adequately indicated the questions that could be submitted to the Center.

The CHAIRMAN said that insurance companies were not mentioned in the context of subrogation because they would come within the category of nationals of other States. Whether an insurance company could be subrogated to the investor would depend on the terms of the particular investment agreement. The parenthetical language had been inserted in order to avoid excluding a State from proceedings solely because it was a State.

He was of the opinion that any attempt to give a more detailed definition of investment disputes might lead to endless discussions, although a non-exclusive list of the types of investment involved could be made, if desired.

Mr. GOULD (South Africa) said that while Section 2 contained exhaustive and practical provisions from the standpoint of large-scale capital-exporting countries and for investments of major importance, he felt there was room for further consideration of the position of the smaller investor. The foreign capital needed by developing States was largely provided by a multiplicity of small investors. To attract those investors the developing countries had to offer and guarantee investment incentives, particularly in the field of taxation and tariff allowances, of special facilities for the repatriation of capital and the transfer of profits and of currency convertibility. Since no country could be obliged to keep its investment laws unchanged, the chief preoccupation of the small investor was to know how long the incentives offered him would be maintained. He suggested that countries should be left free to alter their investment laws, but not with retroactive effect. Undertakings to go to arbitration should be irrevocable in respect of disputes concerning implied or express promises in investment legislation and arising before the change in that legislation.

The CHAIRMAN observed that in the suggestion put forward by the representative of South Africa two issues appeared to be involved: irrevocability was applied in the first place to the incentives offered by the country's municipal law and in the second place to the consent to have recourse to arbitration. The Convention did not attempt to limit the right of a State to modify its legislation. All it did was to ensure that consent to arbitration would be irrevocable. Unilateral consent in advance to arbitration before the Center given by States in investment legislation was covered in Section 2(i). The Bank had, however, refrained from singling out this form of consent in order to avoid creating in developing countries the impression that this ought to be the normal means of dealing with foreign investors, and in the investors themselves, the expectation that Contracting States would follow this practice.

Mr. GOULD (South Africa) said that the small investor would not place his investments in a country for the sake of the incentives without the acceptance by that country of recourse to arbitration in the case of disputes. The point he had raised referred to the possible withdrawal of that acceptance.

The CHAIRMAN observed that in that event the remedy lay in the proper formulation of the acceptance of arbitration which should be in its terms irrevocable.

Mr. KOINZER (Federal Republic of Germany) said that while it would be impossible to establish the principle of irrevocability with regard to a country's legislation, investors ought nevertheless to be assured that the promises made to them would be fulfilled. He asked if an investor who responded to incentives offered him by laws or unilateral declarations which included a clause binding the Government to submit to arbitration brought a claim before the Center on the ground that these incentives had been revoked, would the tribunal be entitled to decide

that the State had to fulfill the undertakings given in the incentives originally offered?

The CHAIRMAN said that if there had been unqualified consent to submit all questions to arbitration the tribunal would be able to consider whether the revocation of incentives was proper under national and international law. Most agreements of that kind would, however, in all probability contain qualifying clauses with regard to the question of consent to arbitration. In that event, of course, no one could complain because the investor would have known exactly what was being offered to him.

Mr. GUARINO (Italy) said that an intermediate solution to the question raised by the representatives of South Africa and the Federal Republic of Germany might be found by mentioning explicitly in the comment that the State may give its undertaking to have recourse to the Center in a law for the promotion of foreign investments and within the terms of that law with respect to any investment made pursuant to the law.

Since the basis of the Convention was to be consent, he saw no reason why signatory States could not consent to have recourse to arbitration even in the case of investors from non-signatory countries. He therefore suggested that in Section 1, line 5, the word "Contracting" be deleted.

The difficulty raised by the representative of Spain with regard to subrogation could be met by removing the clause in parenthesis in Section 1 and excluding subrogation unless it were explicitly envisaged in the State's acceptance of arbitration.

The CHAIRMAN observed that the present Convention had to be limited to disputes between States and nationals of other States because it was essential that it should treat States and individuals on the same footing. In Article IV it would be seen that in return for a State's consenting to be sued by individual investors of another State before an international tribunal, nationals of the investors' State renounced their normal right to seek diplomatic protection. If the agreement were extended to non-contracting States, the diplomatic protection afforded to citizens of those States would stand and the principle of reciprocity which was the basis of the Convention would be abandoned. The Convention should not therefore be extendad to cover investors who were citizens of non-contracting States.

The meeting was suspended at 11:05 a.m. and resumed at 11:25 a.m.

The CHAIRMAN referring to Section 3, suggested that paragraph (3) be left aside until the question of nationality was discussed in connection with definitions.

Paragraph (1) should give rise to no difficulties since it stated the ganerally accepted principla that en international tribunal was judge of its own competence.

The purpose of paragraph (2) was to list the kind of questions that might ba determined as preliminary questions. Sub-paragraph (i) was

drawn from the Model Rules on Arbitral Procedure drawn up by the International Law Commission but could be replaced by a statement that "the dispute is not within the jurisdiction of the Center". Such wording would be very broad indeed and the other sub-paragraphs could enumerate more specific examples, i.e. that there had been no valid consent, that the dispute was not within the scope of the consent or that a Party was not a national of a Contracting State etc. The list need not be exhaustive but there would be some edvantage in indicating the kind of issues that might come up for decieion ae preliminary questions. He wes uncertain whether the mandatory form used in the last phrase wes edviseble. Perhaps it would have to be left to the discretion of the commiesion or tribunal to decide whether or not these queetions ought to be decided as preliminary qusetions.

Mr. BERTRAM (Federal Republic of Germany) expressed doubts about the wisdom of using mandatory language in the laet phrase of Section 3(2) and drew attention to Article 62, paragraph 5 of the Rulee of the International Court of Justice according to which it was open to the Court after hearing the parties to give ite decieion on the objection or to join the objection to tha merits.

Mr. ALLOTT (United Kingdom) pointed out that there was an express provision in Article IV, Section 8(2) by virtue of which the tribunal would have to decide that it had jurisdiction before it could render an award on default. He attached considerable importance to the fact that the Center'e jurisdiction was limited to a very narrow and specialized field and believed it eesential to make it clear that a tribunal could raise the iesue of its juriediction of ite own motion.

He believed that another subparagraph would have to be inserted in Section 3(2) reading: "The dispute is not within the ecope of the Convention", in order to cover the cese where the parties might have agreed to submit a dispute to the Center, but in doing so had gone beyond the terms of the Convention itself. Such a case could give rise to a situation similar to that which occured by the Monetary Gold Case, when Italy initiated proceedings in the International Court of Justice, then itself raised the question of jurisdiction and the objection had been upheld.

The CHAIRMAN pointed out that one of the main underlying purposes of the draft was to secure general recognition of arbitral awards, and the United Kingdom representative's comments should be viewed with that consideration in mind.

Mr. AMLIE (Norway) said that the concluding phrase of Section 3(2) had not at first raised objections in his country but on closer examination he had found a puzzling disparity between the text of the article and paragraph 11 of the comment, from which it appeared that a decision by an arbitral tribunal as to its competence would be binding on the parties, but that a decision on the same subject by a conciliation commission would only have the force of a recommendation. The point was not of crucial importance but he could see no harm in the latter being made binding also.

The CHAIRMAN said that the original draft had followed the line advocated by the expert from Norway but had met with opposition. From the practical point of view he doubted whether it would make much difference since refusal to accept a recommendation by a conciliation commission on

the issue of jurisdiction would not be favorably received either by the other party or public opinion. On the other hand, as the members of the conciliation commission might not have been selected on grounds of legal competence, there was a case for not stipulating that their decision on the commission's own competence would have binding legal force.

Mr. HELLNERS (Sweden) observed that there seemed to be some inconsistency between the language used in Section 3(2) and the last sentence in paragraph 11 of the comment in so far as the text of the article did not explicitly state that the decision of the tribunal concerning its own competence would be binding. Nor was it clear what bearing such a decision would have on a decision by another court. It ought to be made clear that one of the parties could not secure from another court a ruling as to the validity of its consent to submit a dispute to arbitration under the Convention and an express provision in that regard might be inserted in Section 3.

The CHAIRMAN explained that the word "binding" had been used in paragraph 11 of the comment so as to emphasize the distinction between the ruling of a tribunal and a recommendation by the conciliation commission concerning competence. The binding character of any decision by the former on preliminary questions or merits, was clearly set forth in Article IV and could be discussed under that Article.

Mr. van SANTEN (Netherlands) said that at the outset of the discussion he had been reassured by the distinction the Chairman had rightly drawn between the jurisdiction of the Center and the competence of the tribunal. In his view the process should be regarded as consisting of two stages. The first was the written request addressed to the Secretary-General at which moment consideration would be given to the question whether the dispute came within the scope of the Convention, otherwise there would be no point in having a Center at all.

The second was the procedure envisaged in Section 3. At that moment the question of the tribunal's competence might become of primary importance and perhaps in that regard the Rules of the International Court of Justice were too liberal. Great caution should therefore be exercised about changing the last sentence in Section 3(2) from the mandatory to the permissive form. He also considered that greater precision was needed in the sub-paragraphs enumerating the grounds of lack of competence. In his own mind there could be no doubt that sub-paragraph (ii) should refer to "competence" and not "jurisdiction". It seemed to him that a confusion had arisen during the course of the discussion as to the difference between jurisdiction and competence.

The CHAIRMAN observed that, if one disregarded considerations of economy in drafting, the content of Section 3 could be transferred to Articles III and IV respectively. The expert from the Netherlands had rightly stressed the importance of ensuring that preliminary questions be disposed of as rapidly as possible so that time should not be wasted on discussions that might conclude with a decision that the commission or tribunal lacked competence because there had been no valid consent.

Perhaps the tribunal could be relied upon to dispose of as many issues as possible as preliminary questions in the interests of speed. Possibly the mandatory form used in the final phrase of Section 3 might cause difficulties: Perhaps the comment could make it clear that the

mandatory language would apply only when questions of jurisdiction could be decided without joining them to the merits.

It would be difficult to substitute the word "competence" for the word "jurisdiction" in Section 3(2)(ii) because the latter referred back to the "jurisdiction" of the Center and was not intended to refer to the jurisdiction of any particular tribunal. He would like to consider the matter further.

Mr. van SANTEN (Netherlands) emphasized the importance of giving careful thought to the wording so as to remove any confusion between the competence of the tribunal and the jurisdiction of the Center. He was inclined to disagree with the United Kingdom expert regarding determination by the tribunal sua sponte of its competence. Since the question of jurisdiction would have been discussed with the Secretary-General prior to proceedings a tribunal would have to express itself on its own competence only on rare occasions. Such an eventuality should not be over-stressed.

The CHAIRMAN said his understanding was that the United Kingdom expert had in mind cases where a dispute manifestly lay outside the scope of the Convention rather than more technical points such as whether the plaintiff was a national of one of the Contracting States or whether the dispute was within the scope of the consent.

Mr. ALLOTT (United Kingdom) confirmed that the concern he had expressed was inspired in the main by the enforceability provisions which were very serious ones. He was not worried by marginal cases of excess of jurisdiction.

Mr. GUARINO (Italy) asked what was the relationship between the provisions contained in Section 3 and those in the last sentence of Article III, Section 5(2). It seemed that a party disputing the competence of a conciliation commission would not participate in the proceedings, in which case it seemed otiose to appoint a commission at all if its only function would be to state that fact in its report. For that technical reason he agreed with the expert from Spain that a sharp distinction must be drawn between the rules of governing the procedure of an arbitral tribunal and those of a conciliation commission.

The CHAIRMAN suggested that that point be taken up under Article III.

Mr. DEGUEN (France) hoped that the United Kingdom suggestion to give the Chairman of the Administrative Council some responsibility for determining the tribunal's competence would be carefully explored as it might offer a solution to some of the problems that had been raised.

Mr. KOINZER (Federal Republic of Germany), reverting to Section 1, said that the new draft provision extending the jurisdiction of the Center to disputes involving political sub-divisions or instrumentalities of States (Doc. COM/EU/6)† had been considered by the Federal Republic's experts. Even after hearing about the opinions expressed at the Addis Ababa consultative meeting he did not view the proposal with any greater sympathy. He had already explained that as far as the Federal Republic was concerned the usefulness of the Convention would depend on whether

† See p. 28 of this document

it would offer investors a greater sense of security. At first sight the proposal seemed to imply that claims could be brought against national agencies rather than States and that raised three questions. First, what would be the situation if a special agreement existed between an investor and a national agency and the State introduced measures thet might adversely affect the interests of the former. Would it then be open to the agency to disclaim responsibility for those measures and thus frustrate any attempt to bring the matter to arbitration or would the investor still be entitled to sue the State?

Secondly, was the record of national agencies similar to the record of governments in observing arbitral awards? If not, the kind of loophole being proposed would weaken the force of the instrument under discussion.

Thirdly, could national agencies be expected to exercise the same kind of restraint thet States were likely to exercise in instituting proceedings against investors. If the answer to that qusstion were in the negative the amendment would greatly detract from the value of the Convention.

He also asked whether in the event of a State making a unilateral declaration of the kind mentioned by the expert from Italy that would imply some measure of reciprocity and whether the State would then be able to sue the investor even if the investor had not formally consented to the jurisdiction of the Center.

The CHAIRMAN, replying to the last question, said that in his opinion a unilateral declaration would not give the State any right to initiate proceedings against the investor.

The misgivings about extending the scope of the Convention to disputes involving political sub-divisions and instrumentalities of States seemed mainly inspired by doubts about the desirability of entering into agreements with entities other than States, a significant distinction. The reason for the amendment proposed at the African meeting was not to enable the State, to stand aside as it were, and escape liability but to cover those cases when agreements were in fact concluded not with the State itself and thus to bring them within the scope of the Convention. It was considered that their exclusion would be regrettable because investors might wish to have a means of submitting disputes with such agencies to impartial adjudication

He could not give an answer to Mr. Koinzer's second question concerning the record of agencies in regard to compliance with arbitral awards.

Mr. Koinzer's third point could be taken up when the meeting discussed the cost of proceedings. Fears had been expressed at meetings of the Bank's Executive Directors and in the other regional meetings about the possibility of investors bringing forward unjuatifiable claims in order to secure better treatment and it had been useful to be reminded of the converse possibility at the present meeting. There was no completo answer to either argument. The purpose of the present draft was to provide first for an unofficial screening process by the Center which would have no binding force on the parties, to be followed by some punitive provisions on the subject of costs. Of course, he could not

see into the future but doubted whether the fears on either side were really justified since the parties would probably be cautious about bringing claims before the Center that were likely to be rejected on the ground that they had no foundation, or that they had been brought in bad faith. Nevertheless, if a legal right was conferred there was always some possibility of it being used indiscriminately or abused. He thought that the amendment would not weaken the Convention since it would merely enable investors, if they so desired, to seize the Center of a case involving political sub-divisions or instrumentalities of States, while leaving untouched the issue of whether or not it was desirable to conclude contracts with any body other than the central government of a State.

Mr. HERNDL (Austria) observed that the purport of the amendment was not very clear. The text at first sight seemed to mean that there could be consent between an investor and a State agency to bring disputes before the Center. What then would be the situation, as far as international law was concerned, if there had been no violation of a contractual obligation but the investor claimed that the State concerned, by legislative action (e.g. expropriation or fiscal measures prohibiting the export of capital) had violated his rights as an individual under international law? Could the provision enable the individual investor to bring an action against the State on those grounds?

The CHAIRMAN replied in the negative. When it came to an action of the State itself nothing less than an agreement with it for ad hoc submission of the case to the tribunal would suffice. The amendment would be of limited application but had some value for cases where the dispute was one that fell just short of the exercise of sovereign power by the State.

Mr. HELLNERS (Sweden) asked what was the Chairman's view about the consensus reached in the meeting concerning the phrase "legal character" in Section 1 The Scandinavian countries were extremely anxious to have it deleted so as to avoid confusion.

The CHAIRMAN said his impression was that there was no division of opinion as to the purpose of the provision, but only on the drafting. He was aware of the difficulty for Scandinavian countries created by the distinction between law and fact in their legal systems but the wording of Section 1 was not intended to exclude disputes on facts relevant to arriving at a legal determination. He hoped a better draft could now be devised to take account of the discussion and to make it plain that the claim must be based on a contention that some legal right had been denied or legal duty had not been observed but that the issue could turn on some question of fact. The two were surely not incompatible.

Mr. AMLIE (Norway) said that it had been taken for granted by Norwegian lawyers examining the text that the term "legal disputes" comprised disputes on questions of fact.

Mr. BERTRAM (Federal Republic of Germany) drew attention to the definitions contained in the Geneva General Act of Arbitration of Geneva and to the European Convention for the Peaceful Settlement of Disputes (Strasbourg, 1957) listing the kind of issues that might be submitted for judicial settlement.

The CHAIRMAN observed that the latter text followed the wording of the Statute of the International Court of Justice which some Latin American experts had suggested might be used to indicate the kind of disputes that were not excluded from the scope of the draft Convention.

Mr. van SANTEN (Netherlands) said that when the Netherlands Government came to study the text of the draft Convention with a view to signature and ratification its decision would depend on what opportunities the Center offered for the settlement of disputes. His objection to the words "legal character" was not one of language but substance. They seemed to him restrictive in circumscribing the character of the disputes that could be brought before the Center. It must be borne in mind that under Section 3 the tribunal could decide that it lacked competence on the ground that the dispute was not of a legal character, which constituted a most undesirable limitation. Perhaps the wisest course would be to stipulate in Section 1 that any investment dispute might be brought before the Center with the proviso that the signatory States had the right to exclude certain categories of disputes which they might be unwilling to submit to conciliation and arbitration. In principle the Convention should constitute an invitation to States and private enterprise to make the widest possible use of the Center. Thus broad language was needed to define the jurisdiction of the Center, which should be extended to disputes involving political sub-divisions and instrumentalities of States.

The CHAIRMAN said that Mr. van Santen had cogently defended the "open" point of view, but various countries for different reasons were anxious to write certain restrictions into the Convention.

The exchange of views had been most useful.

ARTICLE III - Conciliation

Request for Conciliation (Section 1). Constitution of the Commission (Sections 2 - 3)

The CHAIRMAN said that as had been peinted out at a previous meeting, the text would need some modification to take account of cases when there had been no previous consent.

Under the provisions of Sections 2 and 3, if the parties failed to agree on the appointment of conciliators, the Chairman would make the appointments from the Panel. The parties themselves were free to choose persons from the Panel or any others they considered suitable to act as conciliators.

Mr. BERTRAM (Federal Republic of Germany) wondered whether it might not be advisable to insert an express provision in Section 2 to the effect that when the commission consisted of three conciliators the third must be its Chairman. That might seem self-evident but perhaps needed saying.

The CHAIRMAN agreed that a provision on those lines might also be desirable in the case of the arbitral tribunal.

Mr. KARELLE (Belgium) wondered whether it might not be wise to stipulate that the request for conciliation should contain a statement indicating the subject of the dispute.

The CHAIRMAN agreed that such a requirement might also be applied in arbitral proceedings, since the Secretary-General of the Center would need the information to give preliminary advice.

Mr. RODOCANACHI (France) wondered whether it was necessary to mention that the Chairman should select conciliators from the Panel: he would have thought that to be self-evident.

The CHAIRMAN explained that at the African regional meeting there had been a considerable amount of discussion on that point. One school of thought was in favor of restricting even the parties to choosing from the Panel while another took the extreme view that both the parties and the Chairman should be entirely free in their selection. The provision to which the expert from France had taken exception because he regarded it as self-evident was perhaps necessary in the interests of clarity.

Mr. GUARINO (Italy) saw no need for a provision regarding appointment by the Chairman of a conciliator if one party failed to appoint one because, in the absence of agreement between the parties, there would be no point in continuing the proceedings. If one side or the other refused to appoint conciliators, the Chairman of the Center had no other course open to him but to record the fact that the conciliation effort had failed.

The CHAIRMAN pointed out that there might be cases when the parties themselves might be unable to agree but would be willing to accept nominations made by a third party. The provision therefore did serve a useful purpose since once a commission had been set up the parties would find it difficult not to co-operate in the proceedings.

Mr. HELLNERS (Sweden) considered that the provisions contained in Section 3 were necessary because it was conceivable that the parties might agree on constituting the Commission but take no steps to make the actual appointments.

Mr. ALLOTT (United Kingdom) hoped he was right in assuming that the possibility of there being more than two parties to a dispute was implicit throughout the draft even though express mention were not made of that fact wherever it was applicable.

Mr. BERTRAM (Federal Republic of Germany) asked whether it would be possible under the terms of the Convention for the parties to consent either to arbitration or to conciliation or to both procedures.

The CHAIRMAN replied that the intention of the present draft was to leave the parties free to choose between conciliation, arbitration or a combination of both.

The meeting rose at 12:30 p.m.

FIFTH SESSION
(Wednesday, February 19, 1964 - 3:00 p.m.)

ARTICLE III - Conciliation (continued)

Powers and Functions of the Commission (Sections 4 and 5)

The CHAIRMAN said that, at other regional meetings, proposals had been made - with which he himself concurred - to delete the words "and the Commission" from Section 4, thus leaving the parties free to determine whether the Conciliation Rules adopted by the Administrative Council or other rules would apply in the proceedings.

Mr. ALLOTT (United Kingdom) said he had intended to make a similar proposal.

Mr. RODOCANACHI (France) pointed out that the correct French translation of the term "settlement" in paragraphs (1) and (3) of Section 5 was not "une transaction" (which actually meant a compromise" but "un règlement". In the second sentence of paragraph (2) of the same section, the same French term "une transaction" was wrongly used as equivalent to "agreement"; the accurate French rendering was, of course, "accord".

Mr. BERTRAM (Federal Republic of Germany) asked whether, in the light of recent experience, the possibility of the Commission stating the grounds on which its recommendation was based should be excluded.

The CHAIRMAN pointed out that such a statement of reasons was not excluded by the text of Section 5(3).

Obligations of the Parties (Sections 6 and 7)

Mr. RODOCANACHI (France) suggested that it might be useful for arbitrators or judges who might later have to decide the dispute to know the reasons for the failure of a conciliation effort so as to take those reasons into account in making their decision.

Mr. ALLOTT (United Kingdom) felt that it might be advisable to delete Section 7 altogether. If, however, it were decided to retain that section, he suggested that a proviso be included to the effect that the parties could give their consent to the use of the material in question in later proceedings.

The CHAIRMAN said that it might indeed be useful to provide for the possibility of the parties waiving the rule embodied in Section 7. However, it was highly desirable to retain that section because sometimes the willingness of one of the parties to endeavor to reach a settlement was invoked subsequently by the other party as in some way implying a doubt as to the correctness of the first party's position.

Mr. BERTRAM (Federal Republic of Germany) favored the retention of Section 7. The parties would be much more inclined to co-operate in efforts to reach agreement during conciliation proceedings if they did not fear that some offer made or views expressed by them during such proceedings might be used against them at a later stage in a court of law or before an arbitral tribunal.

Mr. TROLLE (Denmark) agreed with that view. If conciliation efforts were to have a chance of success it was essential that no proposal made during conciliation proceedings should be in any way binding unless accepted by the other party.

Mr. HERNDL (Austria) favored the retention of Section 7 which underlined the fundamental difference between conciliation and arbitration.

Mr. PEREIRA (Portugal) also favored the retention of Section 7.

Mr. ALLOTT (United Kingdom) pointed out that in suggesting the deletion of Section 7 he had not wished to imply that the parties should be able to rely in later proceedings on statements or offers of settlement made in the course of conciliation proceedings.

Mr. RODOCANACHI (France) said that his previous remarks did not refer to compromise offers made by the parties during conciliation proceedings. His suggestion had been that where the Conciliation Commission itself (and not merely one of the parties) made a recommendation which had not been accepted by the parties, that recommendation should be known in any other later proceedings. His objection had therefore been directed only at the last clause of Section 7.

Mr. TROLLE (Denmark) said that that suggestion would raise difficulties in practice. Recommendations made by a conciliation commission usually had their origin in offers made by the parties themselves and generally constituted an attempt to induce the parties to take a further step in each other's direction. In the circumstances, it might be difficult to draw a distinction between an offer made by a party and a recommendation made by the Commission.

The CHAIRMAN said that the different views expressed by the various speakers would be duly noted.

Mr. RODOCANACHI (France) said that while he had no objection to the inclusion in the Convention of Article III on conciliation, he did not himself believe in the effectiveness of conciliation unless it constituted a disguised form of arbitration. He recalled that in the fifty-five years that had elapsed between the setting up of the Permanent Court of Arbitration (to the Statute of which over sixty States were members) from 1907 to 1962, out of twenty-eight cases submitted to the Court, only four were cases of conciliation, the remaining twenty-four being cases of arbitration.

The CHAIRMAN said that he could himself recall a case of conciliation which had constituted a disguised form of arbitration. He was thinking of the case between the bondholders of the City of Tokyo and that City in which the World Bank had assisted the parties in reaching a settlement. In that case, the report on the conciliation proceedings had given extensive reasons for its conclusions.

ARTICLE IV - Arbitration

Request for Arbitration (Section 1). Constitution of the Tribunal (Sections 2 and 3)

The CHAIRMAN, introducing Sections 2 and 3, drew attention to the

principle in Section 2(2) of exclusion of national arbitrators. He also recalled that at another regional meeting, it had been suggested that Section 2(1) should provide expressly that an arbitral tribunal should always consist of an uneven number of arbitrators.

Mr. PEREIRA (Portugal) expressed reservations with regard to the principle of the exclusion of national arbitrators. However, in the interests of consistency and in the light of the provisions of Section 12(2) of Article I (which enabled a Contracting State to designate persons who were not its own nationals to serve on the Panel of Arbitrators) the exclusion should be extended to nominees of the two States in question even if they were not nationals of those States.

The CHAIRMAN agreed that such a corollary would logically follow from the principle that had been embodied in Section 2(2).

Mr. GOULD (South Africa) suggested that, in order to cover the case of an investor with plural nationality, a provision excluding arbitrators possessing any of the nationalities of the investor should be included in the second sentence of Section 2(2).

The CHAIRMAN said that the point was probably covered by the use of the indefinite article before "State", but that he would note the point.

Mr. AMLIE (Norway) pointed out the contradiction between the rule in the first sentence of Section 2(2), to the effect that the arbitrators must be selected from the Panel, and paragraph 13 of the Comment to Article I, wherein it was stated that the parties were entirely free to agree to use conciliators and arbitrators who had not been designated to the Panel.

The CHAIRMAN explained that paragraph 13 of the Comment did not reflect the position correctly and would be brought into line with the text of Section 2(2).

Mr. AMLIE (Norway) and Mr. HELLNERS (Sweden) expressed satisfaction with the text as it stood since they preferred that the arbitrators should be selected exclusively from the Panel.

Mr. SERB (Yugoslavia) opposed the exclusion of national arbitrators which constituted a departure from long-standing practice. An element of conciliation was inherent in all arbitration proceedings and it was precisely the national arbitrator who provided a link between arbitration and conciliation. Moreover, the knowledge and experience of national arbitrators was of great value to the arbitral tribunal, particularly when seeking information on municipal law.

It was not without significance that paragraphs 2 and 3 of Article 31 of the Statute of the International Court of Justice made provision for the appointment of an ad hoc judge of the nationality of the party or parties in cases where the Court did not already include upon the Bench judges of the nationality of those parties.

The CHAIRMAN said that it was fully realized that the rule embodied in Section 2(2) constituted a departure from tradition. Since arbitration proceedings were more flexible than court proceedings, arbitrators would be able to obtain information more easily than judges.

Mr. van SANTEN (Netherlands) wished to know the views of the African countries on the proposed innovation.

The CHAIRMAN said that only the UAR representative had voiced any opposition to the proposed rule.

Mr. MELCHOR (Spain) asked what views had been expressed at the Santiago meeting on the point.

The CHAIRMAN replied that no support had been expressed for national arbitrators.

Mr. van SANTEN (Netherlands) said that there would be no objection in his country to the innovation. However, he was eager to find out whether any opposition existed in countries outside Europe because the Convention would be of little use unless it attracted the support of those countries. He urged that Asian views on the subject should be carefully canvassed.

Mr. BERTRAM (Federal Republic of Germany) said that, while he had not reached a final view on the matter, he had been impressed by the Yugoslav representative's remarks on the national arbitrators' knowledge of the municipal law of the States concerned. He also observed that if one excluded the appointment not only of national arbitrators but also of arbitrators who had been designated to the Panel by the States concerned, the range of selection could be rather limited. He recalled that the OECD draft did not exclude national arbitrators. In that connection he thought the Center might be given the right to draw upon the unrivalled experience and large staff of available arbitrators of the International Chamber of Commerce.

Mr. PEREIRA (Portugal) said that the problem of national arbitrators was a very difficult one. Perhaps the best solution would be not to include any provision on the subject and to leave it to the parties to agree to exclude national arbitrators if they so desired.

The CHAIRMAN said that a possible way out of the difficulty was to qualify the rule by means of a proviso to the effect that the parties could agree to appoint nationals as arbitrators.

He asked Judge Trolle whether if he were an arbitrator he would prefer to have experts on municipal law with him on the tribunal, or on the other side of the table.

Mr. TROLLE (Denmark) replied that he would prefer them not to be on the tribunal. In an arbitral tribunal of five arbitrators, however, it might be useful for two of them to be nationals of the parties to the dispute.

The CHAIRMAN said that a system of five arbitrators had been envisaged as an alternative to the exclusion of national arbitrators. The system would follow the pattern of the European Convention for the Peaceful Settlement of Disputes, which, however, dealt with inter-State disputes. It would, however, be costly and hence suitable only for major cases.

Mr. ALLOTT (United Kingdom) favored allowing the parties to choose arbitrators from outside the Panel.

Mr. SERB (Yugoslavia) suggested that where the Chairman had appointed an arbitretor the parties should still have the right to substitute their own appointee if they so wished at a later stage.

The CHAIRMAN said thet since the parties would be consulted by the Secretary-General before such an appointment was made, the parties' views would, in any event, be taken into consideration.

Mr. van SANTEN (Netherlands) wondered whether the provision requiring the Chairman to consult the parties only through the Secretary-General was not too rigid. Particularly if the Secretary-General ware a part-time official it might be useful to permit the Chairman to consult directly with the parties.

The CHAIRMAN replied that it had been suggested at the African meeting that the provision on consultation with the partiee might be left to the Rules. He thought that it would be preferable for the Secretary-General to handle preliminary discussions with the parties, but they could always consult directly with the Chairman if they so wished.

<u>Powers and Functions of the Tribunal</u> (Sections 4 - 10)

The CHAIRMAN pointed out that Section 4 dealt with the important question of the law to be epplied by the arbitral tribunal. At other meetings, it had been suggested that the reference to international lew should be clarified, perhaps by means of provisions along the lines of Article 38(1) of the Statute of the International Court of Justice.

Mr. BILGEN (Turkey) stressed the need to clarify the term "national law" used in Section 4(1). As it stood, that term could be construed as referring possibly to the municipal lew of ths capital-exporting country. In fact only the municipal law of the capital-importing country applied.

The CHAIRMAN said thet the choice of national law would be a matter for the tribunal to decide in accordance with the appropriats rules of private international law. In most cases, the proper law would indeed be the municipal law of the capital-importing country. However, in certain cases - such as licensing and know-how agreements - there might be a question as to what law epplied.

Mr. RODOCANACHI (France) pointed out that the phrese "agreement betwean the parties concerning the law to be applied" ehould not be understood to refer only to an agreement on the eubject of the choice of law at the time of the <u>compromis</u>, but also to the intention of the parties to a contract, expressed in that contract or to be implied from the circumstances surrounding it.

A dispute would, however, frequently involve queetions of international law. It might be claimed that the national law applied in the matter conflicted with some rule of international law. Unfortunately, there were few well-established rules of international law on the subject of investments. It would therefore be of great value if some guidance were to be given to the tribunal on that score. Of course, it would not be possible to provide a complete <u>corpus juris</u> but at least some general code of conduct for both the investor and the host country ehould be laid down. While he acknowledged that it might be difficult to include such a generel code in thie Convention, he recalled that certain European projecte on the subject of

investment disputes dealt with questions of substantive law, and he stressed that there was no incompatibility between the Convention and those projecta.

The CHAIRMAN eaid that the text under discussion left the whole question of the substantive rules of law to the tribunal.

At the African and Latin American meetings, there had been an unwillingness to provide for submission of queetions of the legality of certain measures such as nationalization or expropriation (whether under municipal law or international law) to the tribunal, although there was no objection to having the question of compensation freely determined by the tribunal. After it was pointed out that each country would be free to decide which questions it would agree to submit to arbitration these misgivings were dispelled.

Mr. MELCHOR (Spain) agreed with the remarks by the Turkish and French representatives.

Spanish law, and the law of certain Latin American countries, drew a clear distinction between arbitration under law (in which etrict rules of law were applied) and the reference of a dispute to amiables compoeiteurs, who had the power to decide ex aequo et bono. In the aecond case, no problem of choice of law arose. In the former, however, it was necessary to make it clear that the national law to be applied was the municipal law of the host country. The arbitral tribunal must have the power to apply international law, but where national law waa concerned, it was not admissible that any municipal law other than that of tha host State should be invoked in an investment dispute.

In the light of the case-law built up by the Permanent Court of International Justice in such cases as that of Polish Upper Sileaia, the arbitral tribunal should have the power to say whether, in a particular case, any of the following measuree had been taken: first, unjustified measures (e.g. expropriation measures which could have been avoided); second, discriminatory measures; or, third, measures contrary to the international public policy or general principles of law.

Mr. GUARINO (Italy) agreed that the question of which law, whether national or international, should be applied was a basic issue. As regards the application of a contract, recourae should be had to national law ae stipulated in the contract. However, there were of course casee where national law would no longer be applicable when that law was modified to the detriment of the investor, and that eituation was inadequately provided for under international law at preeent.

He considered that it would be desirable for the draft Convention to specify the fundamental principles of international law which should be applied by the arbitral tribunal, namely, protection against discriminatory treatment and the obligation to act in good faith. He also pointed out that where contracte were involved, traditional international law could be supplemented by general principles of the law of obligations recognized by the laws of the Contracting Statee. That would give greater protection both to the hoet State and the inveetor.

The CHAIRMAN explained that those drafting the proposed Convention had attempted to meet the difficulties by leaving the situation relatively flexible. There would be a great variety of types of cases before the

tribunal, some arising out of contract disagreements and others being *ad hoc* cases arising out of past investments. The draft Convention was based on the assumption that the parties stood to gain from international adjudication and that that would, moreover, provide assurances for investors. Clearly, such freedom did not exclude any narrower definitions where there was general agreement.

Mr. ALLOTT (United Kingdom) said that he was in favor of leaving the rules in as simple a form as possible and was therefore in support of Section 4(1) as it stood. The arbitral tribunal was of course faced with a difficult problem in establishing the extent to which international law would be applicable in a case involving a non-State party. He also pointed out that a tribunal which had been given the power to decide *ex aequo et bono* should not necessarily be prevented from applying rules *of law*. Some re-drafting of Section 4 might be required. There was some merit in the suggestion made by the representative of France that guidelines should be established regarding where international law should prevail over clearly applicable national law.

The CHAIRMAN said that experience had shown that international arbitral tribunals had not in the past encountered insuperable difficulties and had in fact applied international law as if the national government of the individual concerned had espoused his case. On balance it had been considered preferable not to state the position too specifically.

Mr. GOULD (South Africa) believed that the essential advantage of setting up the proposed tribunal would be the right it gave individuals within the narrow domain of foreign investments to have access to international adjudication, on the same footing as his State would have had, had it espoused his case.

It was to be hoped that the establishment of the Center would hasten the acceptance by nations of at least minimum rules for foreign investments.

There was no doubt that the present situation under bilateral treaties was confused. Nevertheless, he wondered whether in fact a multiplicity of arbitral tribunals would constitute the beet posssible element to further the harmonious development of international law. They would, by definitiun, deal only with disputes and their awards would only bind the parties. Not only would these tribunals produce conflicting decisions, but many aspects of international law, particularly in the field of foreign investment, were not yet settled.

He wondered whether it would be practicable for the arbitral tribunals to be granted by the United Nations General Aesembly a status equivalent to that of the specialized agencies so as to enable them to seek advisory opinions from the International Court of Justice. That might well inspire greater confidence among prospective litigante and provide for the harmonious growth of international law.

The CHAIRMAN very much doubted whether the arbitral tribunals would be authorized formally to seek the Court's advisory opinions. Furthermore, that proposal, linked as it was with the entire question of foreign investment, was unlikely to gain unanimous support in the forum of the United Nations. However, arbitrators would naturally have the power to eeek advice from experts, including legal experts.

The real problem was that there did not as yet exist a standing jurisdiction which was generally accepted. Even the OECD Convention did not provide for a uniform method of settlement of disputes even though it provided for compulsory adjudication.

Mr. BERTRAM (Federal Republic of Germany) expressed the view that, while there was as yet no entirely clear cut distinction between the type of law applicable in respect of the disputes under consideration, it was most important to mention international law in the context of Section 4(1) since it provided additional protection for the private investor and since developments were tending towards the application of international law regarding those types of contracts.

Mr. HERNDL (Austria) believed it desirable to mention both national and international law in Section 4(1) since both were clearly involved. However, the question of the extent to which the parties themselves had a right to determine whether national or international law should be applicable was a delicate one. In those circumstances, it might be preferable to specify that international law could be applied only to the international aspects of the dispute.

Mr. DEGUEN (France) suggested that the words "whether national or international" should be amended to read "national and international" in the penultimate line of Section 4(1).

The CHAIRMAN, referring to Sections 6 and 7, said that a number of alternative drafting points were under consideration in respect of those sections. He noted that there were few objections to the stipulation in Section 7(1) to the effect that the award should state the reasons upon which it was based; that constituted an important point. There was no provision for the recording of dissenting opinions and he thought that that point could be left to the arbitration rules.

Mr. HELLNERS (Sweden) wondered what would happen if in a pecuniary claim each of the three arbitrators were to arrive at a different amount.

The CHAIRMAN said that at the African meeting one expert had suggested that in such a case a fourth arbitrator should be appointed with instructions to cast his vote in favor of one of the three solutions. He thought this would be unnecessary as arbitrators were under a duty to deliver an award.

The CHAIRMAN, referring to Section 8(2), said there had been some criticism of the use of the words "appears to be" in the last line. The text could be amended to require the tribunal to be satisfied that the claim was well-founded before rendering an award on the default of one party.

There had also been some objection to the drafting of the section in terms of default of the defendant only. He thought those were valid objections.

Mr. BERTRAM (Federal Republic of Germany) believed that Section 8 regarding judgment by default should be expressed in greater detail. He suggested that on this point it would be desirable to consult the rules of procedure of the Arbitral Commission on Property Rights of interests in Germany.

Mr. ALLOTT (United Kingdom) asked whether, in keeping with a fundamental principle in his own country, provision might be included under Section 8(1) for due notice to be given to the defaulting party and for him to have an opportunity to present his case.

Mr. KARELLE (Belgium) considered that Section 8(1) should also provide for cases where a party was for legitimate reasons prevented from appearing.

The CHAIRMAN, referring to Section 9, said that its provisions had been generally accepted. It had, however, been suggested that it should be made explicit that that provision was in no way intended to extend the jurisdiction of the arbitral tribunal.

Mr. BERTRAM (Federal Republic of Germany) referred the meeting to Article 63 of the Rules of the International Court of Justice which dealt in greater detail with the question of counterclaims and incidental claims.

The CHAIRMAN, referring to Section 10, said that a number of drafting suggestions had been made at the Santiago meeting. Some experts had felt it desirable to establish criteria for the exercise of the tribunal's power to prescribe provisional measures. The suggestion had been made at the African Regional Consultative Meeting that the words "at the request of either party" should be deleted.

<u>Interpretation, Revision and Annulment</u> (Sections 11 - 13)

The CHAIRMAN, introducing these sections, said that the three types of recourse provided therein were intended to give the Convention a self-contained character. With particular reference to Section 11 on interpretation he recalled that at the previous meetings some experts had suggested that there be a much longer period or no time-limit at all for requests for interpretation, as certain awards might have to be carried out over a long or undetermined period of time.

Mr. AMLIE (Norway) compared the provisions regarding the stay of enforcement of the award in the three sections and suggested that that power should be discretionary in Section 11 as well as in the others.

The CHAIRMAN agreed with that suggestion, particularly if in Section 11 on interpretation the three-month time limit were to be removed.

Mr. BILGEN (Turkey) suggested that the words "the date of the award" should be amended to read "the date of notification of the award" in Section 11.

The CHAIRMAN agreed.

Mr. OBERHOLZER (South Africa) believed that Section 12 called for some amplification of procedural detail. He saw a clear distinction between an application for leave to review, for which a <u>prima facie</u> case was sufficient, and the review itself, which required facts to be established.

Mr. RODOCANACHI (France) suggested the deletion of Section 12 on revision of an award. To allow revision of an award over a period of

10 years would deprive awards of their finality. He also thought it unlikely that new facts justifying a revision would be discovered and that setting aside an award 10 years after it had been rendered would be impractical.

The CHAIRMAN said that the period of 10 years suggested in the text had been considered unduly long at the other regional meetings. No objection had, however, hitherto been raised regarding the actual principle of revision of an award.

Mr. ALLOTT (United Kingdom) said that, while he was open to the majority view, six years would appear to constitute a more practical period.

The CHAIRMAN said that a number of suggestions had been made with respect to the drafting of Section 13. It had been suggested that the ground for declaring an award invalid in Section 13(1)(a) should read "that the Tribunal has no jurisdiction". It had also been suggested that in Section 13(1)(c) the words "a serious departure from the principles of natural justice..." or "a serious misapplication of the law ..." should be added.

Mr. KARELLE (Belgium) considered that the grounds for annulment of an award should be set out in greeter detail, and referred to Article 26 of the European Convention on uniform arbitration law.

The CHAIRMAN said that it had been fully recognized that only limited recourse had been provided and that acceptance of the binding character of the award went beyond what was normally expected in respect of an arbitral tribunal. He suggested that the parallel with commercial arbitration should not be drawn too closely because the Convention sought to establish a new jurisdiction. The parallel if any lay with the International Court of Justice rather than with commercial arbitration.

Mr. BERTRAM (Federal Republic of Germany) said that he had no objection in principle to the provisions of Section 13. There might, however, be some risk of frustration of awards in some cases and he was accordingly inclined to make the section more restrictive, for example, saying in paragraph (1): "only on one or more of the following grounds", and in sub-paragraph (a) of paragraph (1): "that the Tribunal has manifestly exceeded its powers".

Mr. BILGEN (Turkey) pointed out that if the exclusion of national arbitrators were maintained in spite of the objections of some delegations it would then become necessary to amplify the provisions of Section 13(1)(c) to include also the case where a member of the tribunal had been a national of either of the two States concerned.

The CHAIRMAN said that it would be possible to meet that point.

Mr. GUARINO (Italy) thought it was unusual that the award of one arbitral tribunal should be reviewed by another such tribunal and considered that a decision of principle would have to be taken as to whether an award should be regarded as final and without appeal or whether there should be a possibility of an appeal to the International Court of Justice as had been suggested by the expert from South Africa.

The CHAIRMAN said that any such appeal would of course require the espousal of the case by the State of which the litigant was a national. The procedure was therefore somewhat complicated. Furthermore, the object was to draw up within the framework of the draft Convention a self-contained system.

In reply to a question by Mr. ALLOTT (United Kingdom), the CHAIRMAN said that in cases of annulment or revision of an eward, the decision could contain an order for restitution, and he did not think that new provisions specifically covering the point needed to be written into the draft Convention.

The meeting rose at 5:50 p.m.

SIXTH SESSION
(Thursday, February 20, 1964 - 9:35 a.m.)

ARTICLE IV - Arbitretion (continued)

Enforcement of the Award (Sections 14 - 15)

The CHAIRMAN invited the meeting to consider Article IV, Sections 14 and 15. He pointed out that for the purposes of ensuring compliance with an arbitral award between States, Section 14 would have been sufficient but, since one of the parties to a dispute brought before the Center would be a private individual, Section 15 was necessary to give a State the means of enforcing an award in its fevor against an individual. The Article had been included with a view to meeting the possible needs of developing countries in disputes with private investors. It was not intended to affect the domestic law of States with regard to forced execution of awards against a State.

Mr. ARNOLD (Federal Republic of Germany) seid that the question of forced execution of awards was a very complicated problem of international law. In the case of States, the acceptance of arbitration and the obligations created by Section 14 should be an edequate guarantee that the award would be regarded as binding and complied with by the Contracting State, but something might perhaps be done in the Convention to strengthen the sense of obligation, e.g. by creating a surveillance committee. With regard to the forced execution of awards against private persons, the Convention provided that awards were enforceable within the State of the domicile of the individual in the same way ee a final judgment of the Courts of that State. The system proposed created eerious problems and was not altogether comparable with that under the Treaty of Rome. Under that treaty States had surrendered certain of their sovereign rights. The execution of decisions had already created difficult constitutional problems in some countries. Even in a specialized field like that covered by the Treaty of Rome decisions of the European Court were not enforceable unless a writ of execution was issued by the national euthorities.

An alternative solution, which he favored would be to consider an award as equivalent to a contract, equally binding on States as on individuals. It should not be difficult to obtain from national Courts a judgment on the basis of the contractual obligetions deriving from the

award. This would have the advantage of maintaining equality of treatment between the State and the private party. The system proposed in the Convention, on the other hand, derogated from the principle of equality and, although this derogation might not be discriminatory because of the different circumstances in which States and individuals were placed, it would be preferable to avoid it.

The solution he had proposed would be in line with the system of the U.N. Convention on enforcement of commercial arbitral awards (1958). The present draft Convention might refer mutatis mutandis to the 1958 Convention. He would be willing to consider reducing the number of possible grounds for attacking the award as compared to the 1958 Convention.

The CHAIRMAN said that Article 192 of the Treaty of Rome referred to by the expert from the Federal Republic of Germany limited enforcement judgments to decisions of the Council against private parties involving financial awards. The second of those two qualifications might be considered for inclusion in Section 15.

He pointed out that the draft Convention had not established any mechanism for the enforcement of awards pronounced under the auspices of the Center. The Treaty of Rome, however, had set up such a mechanism, and had also established obligations regarding recognition and enforcement judgments which went as far as Section 15. Members of the European Economic Community had renounced certain of their sovereign rights and accepted decisions as binding in the same way as was being attempted by the present Convention. He did not think that the alternative proposal put forward by the representative of the Federal Republic of Germany would establish the full mutuality or equivalence between the treatment of States and individuals which it was desired to achieve. The developing countries had pointed out that a State coming before a tribunal automatically surrendered part of its sovereignty, because it put the decision in the hands of an arbitral tribunal, agreed without qualification to abide by the award, waived any right of appeal and submitted to an autonomous system in which immediate sanctions would be incurred if an award against it were not complied with. Apart from legal sanctions based on the revival of the right of diplomatic protection of the investor's State there would be even more serious indirect sanctions because a State which did not comply would fail to meet its obligations not only to the investor but also to the community of Contracting States which would presumably include capital-exporting countries from which the losing State could expect assistance. On the other hand no such sanction would exist against an investor who lost a case. The winning party would be left to sue on the award or to try to obtain an exequatur of the award as a foreign award subject as such to all the limitations contained in the Geneva or New York Conventions which, in any event, were not yet ratified by most future Contracting States.

The present Convention ought to contain a clear statement of the position of a State which had won an award against a private investor brought before the Center. He felt that it was essential in order to obtain the widest possible acceptance of this Convention, particularly by the developing countries, to ensure that a winning State could obtain satisfaction of the rights conferred by the award wherever the investor's property was located without being subject to undue delays and being met by defenses based on local laws.

Mr. PEREIRA (Portugal) pointed out that the problem raised by Section 15 was a direct consequence of granting individuals access to an international tribunal. He stressed the fact that it was the chief exception to the principle of consent on which the Convention was based. He saw no analogy between the system proposed by the Convention and similar agreements establishing different degrees of integration in supranational organizations such as the European Economic Community, etc. The enforcement of awards against States and private parties was in both cases difficult. An award against the citizen of a Contracting State ought naturally to be enforceable in his country, but he queried whether any State would be willing to enforce in its territory an award in a dispute which had been rendered between another State and a national of a third State. He suggested that Section 15 be deleted and a provision included in Section 14 covering the execution within a State of awards rendered against its own nationals, which was the most that appeared to him reasonable and practicable.

Mr. MONACO (Italy) said that the execution of awards in each Contracting State should be effected by the classical system of recognition, which would not be immediately effective, but subject to some review by local Courts, or by some system along the lines of those established by the Treaty of Rome although the degree of political integration achieved through that Treaty made any comparison between it and the present draft not entirely valid. The fact that whenever a foreign judgment or award was enforceable in a national jurisdiction, execution proceedings had to follow the national law, would then be a sufficient guarantee for the State in which enforcement was sought.

A separate problem was whether any difference should be allowed between the procedure for the execution of awards against States and those against individuals. It would be dangerous to try and formulate rules dealing with States' immunities and the answer in this case too might be to specify that enforcement in any Contracting State should follow the normal execution procedures of that State.

The CHAIRMAN said that it was essential to find a link between international decisions and their municipal implementation according to the procedural laws of each country concerned. The question, however, was not so much one of procedural method as of limiting the grounds for attacking awards. Those grounds were limited by the Geneva[10] and New York[11] Conventions and the present Convention sought to limit them still further.

Mr. TROLLE (Denmark) said that Section 15 did not appear to him of much practical importance. Investors were more likely to be suing host States than vice versa. The need for the section was almost wholly political and he suggested that the meeting should not go out of its way to look for technical complications which might be created by it. By becoming party to this Convention States would not undertake greater obligations than they had undertaken by acceding to the Geneva and New York Conventions, since most of the grounds for challenging an award under those Conventions were covered by the provisions of Section 13 of the present Convention.

Mr. DEGUEN (France) said that in certain circumstances awards against investors having property in third countries could have serious consequences. If an investor in a foreign country agreed to reinvest part of his profits in his business there, but was later prevented from doing so by domestic

[10] Geneva Convention on the Execution of Foreign Arbitral Awards of 1927
[11] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

legislation and the host country sought and won a decision against him, in such a case execution of the award might raise issues of considerable practical importance.

Mr. ALLOTT (United Kingdom) said that he was prepared to accept Section 15 provisionally, but observed that opinion at a higher level would have to be taken into account. Parliament would certainly have much to say on the question of principle involved. The acceptance of foreign awards without the right to attack them would be a new departure. The choice before them was between leaning towards international or towards private arbitration; the Convention sought a middle course. He personally felt that the trend towards international arbitration was desirable. Some States might regard the issue as a matter of inspiring confidence which was, indeed, the aim of the whole Convention. He felt therefore that the Section should be accepted regardless of the fact that on paper it appeared a strange innovation. The final result would depend on the quality of the awards given; if the awards were good, they would justify the acceptance of the system.

Mr. AMLIE (Norway) wondered whether the bold innovation proposed in Section 15 was necessary. To the best of his knowledge, such a provision did not appear in any international instruments in which enforcement clauses were usually hedged about by certain standard reservations which ought to suffice for the present purpose. He had in mind the discretionary power usually reserved by States entering into treaties on the reciprocal enforcement of judgments to examine the circumstances in which the award had been given before discharging enforcement obligations, to decide whether, for example, adequate notice had been given to a party before judgment was entered on default; whether enforcement would be contrary to public policy; and to ascertain that the arbitrators were not disqualified. If modified in that manner Section 15, which would require legislative action in his country, might not cause much concern.

The CHAIRMAN pointed out that as stated by the expert from Denmark most if not all the grounds on which execution could be refused were provided for in the clauses relating to remedies within the framework of the Convention.

The present draft was designed to establish a self-contained system as was found in judicial or arbitral proceedings between States under which there would be no recourse to an outside authority against decisions of tribunals or conciliation commissions; it was something midway between commercial and inter-State arbitration as the expert from the United Kingdom had pointed out. Since one of the purposes of the Convention was to give a greater sense of confidence not only to investors but also to capital-importing countries the latter would expect some assurance that compliance with an award made in their favor would be just as automatic as it would be if they lost the case. If a clause were inserted allowing considerations of public policies as grounds for refusal of execution against an investor, it would be necessary to set forth in detail the other corresponding circumstances in which a State could refuse to comply with an award. The interesting example mentioned by the expert from France turned on the issue of whether an investor had been properly authorized by his national authority to enter into an agreement. If he in fact had such authority it would be for the arbitral tribunal to decide whether a change in legislation of the investor's State was an act of the Prince which could be invoked as a ground for non-compliance. It had been pointed out at previous meetings that if provision were made for situations of the type described by the expert from France a reciprocal clause would be needed requiring the Con-

tracting State of which the investor was a national to offer some guarantee that he would abide by the award.

Mr. MELCHOR (Spain) said that Section 15 was necessary and had its logical place in the whole scheme proposed in the draft and should not cause surprise to practising lawyers. It was normal to provide for enforcement of arbitral awards which in the context must be equated with the final judgment of the national courts of a State. As the expert from Italy had pointed out, enforcement of the award would have to follow national law of execution of judgments.

He was preoccupied by another problem, namely, the possibility that municipal law might conflict with the execution of the award when the State was party to the dispute. If under national law execution of an award against the State could be stayed, could an arbitral award still be enforced? That problem should be taken into account in the final draft of the Convention, but he felt that in any case the principle of the enforcement of the award should be upheld.

Mr. HELLNERS (Sweden) associated himself with the views expressed by the experts from Denmark and the United Kingdom.

Mr. SERB (Yugoslavia) said that Section 15 would create serious constitutional and practical difficulties, particularly in regard to enforcement in third States. This impelled him to think that a solution on the lines of the one offered in Articles 187 and 192 of the Rome Treaty was greatly to be preferred since it differentiated between awards enforceable against States and other types of award. Nor would that course lead to inequality between the parties because States would be compelled to comply with international arbitral awards in order to maintain their standing in the international community which would not be true of private investors.

As there was provision in the draft to cover judgment by default, it seemed impossible to require immediate compliance in Section 14. At least the party in default should be notifed of the award and given a reasonable opportunity to raise objections.

The attempt in Section 15 to identify the awards of the tribunal with the final judgment of a national court would need qualification to take into account the procedures that some States had established for execution of judgments against other States.

The CHAIRMAN emphasized that the intention was not to modify the existing law on State immunity. The view had been expressed at the Santiago meeting that Section 15 as now drafted would force a modification in State practice and law on the question of a State's immunity from execution. He thought this view unfounded, but an express proviso removing any doubt as to the intent of the section might be inserted.

Referring to the last point made by the expert from Yugoslavia, he said that there was no problem because by definition the host State would have undertaken to abide by the award and the problem of enforcement in a third State was not likely to arise.

The lack of uniformity in State practice, concerning the immunity of other States from execution had convinced him that it would be prefer-

able to refrain from attempting to legislate either positively or negatively in Sections 14 and 15.

Mr. HERNDL (Austria) considered that as the award of the tribunal was analogous to an award made in commercial arbitral proceedings, the provisions of the New York Convention should apply in order to avoid a multiplicity of international rules on the matter. He thought that Section 15 if it did not modify existing law on sovereign immunity would lead to some injustice because the same award could be enforced in States which allowed enforcement against foreign States but could not be enforced in States following the opposite rule.

Mr. BERTRAM (Federal Republic of Germany) said that the special problem of enforcement in third States was of crucial significance; by a third State he meant a signatory of the Convention which was neither a party to the proceedings nor the State whose national was a party to the proceedings. The consent of the parties to resort to arbitration or conciliation in a concrete case was one of the fundamental principles of the Convention. He doubted whether the obligation of a third State to enforce an award within its territory was in harmony with that principle.

The provision contained in paragraph 7 of the Annex relating to the Statute of the arbitral tribunal in the OECD draft Convention provided not only for arbitration between States but also between States and private individuals and was pertinent to the whole problem of enforcement. It had been argued by several speakers that the position of the State in regard to enforcement of awards would remain largely unchanged under the system envisaged in the draft. As a consequence, since many municipal systems were extremely diverse in that regard, enforcement against a foreign State would often not be possible. Differences in the status of the private individual under municipal systems would be of relatively much less significance and in nearly all instances the judgment of a foreign national court could be executed directly. Some guidance could be sought in the New York Convention on commercial arbitration and perhaps it might be possible to devise a formula that would lead to greater uniformity in means of enforcement by limiting the conditions to those laid down in that Convention.

A provision on annulment had been included in the model rules on arbitral procedure drawn up by the International Law Commission whereby the request had to be submitted to the International Court of Justice. Under the present draft a decision on such a request would have to be taken by an _ad hoc_ committee drawn from the same Panel of arbitrators.

The self-contained system proposed in the draft, if examined in the context of validity of awards, might be acceptable. But this was less true if it were examined in the light of the enforcement provisions.

In conclusion he thought that Section 15 ought to be carefully reviewed and some conditions should be provided for the enforcement of the award along the lines of the New York Convention.

The CHAIRMAN pointed out that the reason why the International Law Commission's model rules in regard to annulment had not been followed was that the parties could not present their case to the

International Court of Justice unless the State of the investor's nationality were willing to espouse his cause. Perhaps the only issue that called for a decision was whether the exceptions or conditions for enforcement laid down in the New York Convention should be conditions for the operation of Section 15 or whether they should only be conditions governing the right to seek an annulment. Provision did exist in the New York Convention for enforcement in third States.

The real stumbling block was whether or not to insert in Section 15 what might be regarded by some developing countries as escape clauses for private investors. The State itself, having undertaken to accept an award as final and binding, could not evade the obligation. On the other hand, refusal by private investor to comply with an award would have to be taken before a national court and the New York Convention did provide some grounds for attacking the award.

Mr. BERTRAM (Federal Republic of Germany) pointed out that the State had no need for escape clauses because its position was in no wise as vulnerable as that of private individuals.

The CHAIRMAN did not altogether share the previous speaker's concern about the position of private investors. Clearly some safeguard against non-compliance by them was needed in the present draft. Failure by a State to abide by an award would undoubtedly arouse strong reactions by other States.

Mr. KARELLE (Belgium) supported Section 15 in its present form but suggested that a clause be added on the lines of Article 197 of the Rome Treaty. He also suggested that a stipulation be included to the effect that priority must be given to enforcement of the award against a national of a State in the territory of that State.

Mr. GUARINO (Italy) said that Section 15 was essential and formed a logical link in the system, since it enabled a successful party to seek execution of the award in any Contracting State wherever property of the losing party could be found, subject only to the local laws and procedures on execution of judgments including any law on the immunity of the property of a foreign State from execution.

Mr. AMLIE (Norway) emphasized that the misgivings he had expressed in his capacity as a legal expert during the discussion should not be interpreted to mean that Norway would not find it possible to accept the Convention as it stood in order to contribute to furthering its very meritorious objectives.

Mr. van SANTEN (Netherlands) welcomed the innovation whereby States would recognize as final and binding, arbitral awards in proceedings instituted by private investors and hoped that the wording adopted for Sections 14 and 15 would be as watertight as possible. There was no need to allay the fears of States which seemed on the one hand willing to accept the Convention while at the same time wishing to limit the enforceability of awards. He therefore urged that any modification of Sections 14 and 15 introduced to take into account constitutional requirements of some Contracting States should not in any way impair the principle that awards will be enforceable and enforced. The answer to States who found such provisions too far-reaching lay in Section 17

according to which the right of espousal would revive and thus bring about an even more disagreeable situation.

Mr. BERTRAM (Federal Republic of Germany) observed that the question at issue was not escape clauses but the possibility of conflict with internal systems of law. Even Article 192 in the Rome Treaty, an instrument that sought to establish what must be regarded as a supranational system provided for execution being governed by the rules of civil procedure in the State where it was to take place. Article VII of the Bank's Loan Regulations[13] also contained provision of an analogous nature.

Relationship of Arbitration to Other Remedies (Sections 16 - 17)

The CHAIRMAN said that the language used in Section 16 was perhaps somewhat unusual and indirect, but as explained in the comment the purpose was to state a rule of interpretation rather than of substance. The reason for doing so was that it had been felt necessary to widen the scope of the Convention by allowing for three alternatives: arbitration as the sole remedy; arbitration as an optional remedy; or arbitration only after local remedies had been exhausted.

Mr. BILGEN (Turkey) considered that Section 16 needed to be stated in converse terms, in conformity with the generally accepted principle of international law, that the exhaustion of local remedies was a condition precedent for bringing a case before an arbitral tribunal unless the parties had agreed otherwise.

The CHAIRMAN explained that the provision as at present formulated was meant to represent what was the normal interpretation of consent to arbitration. It was intended to apply not to the case of a private investor approaching a government with a claim that he had a moral right to ask it to resort to arbitration, but to that where consent to arbitration had already been given, and the only question at issue was to determine whether that consent had been tacitly qualified by requiring the prior exhaustion of local remedies. It seemed wise to assume that such a reservation did not exist unless expressly stated. The clause contained in Section 16 was emphatically not designed to introduce any change in accepted rules of international law.

Mr. RODOCANACHI (France) did not think the difference between the present formulation and that advocated by the expert from Turkey was very material. States themselves would know whether they needed to make a reservation concerning the exhaustion of local remedies.

It would be interesting to know whether traditional capital-importing countries were in favor of requiring prior exhaustion of local remedies.

The CHAIRMAN did not think that the formula suggested by the expert from Turkey would serve much practical purpose.

But if it were felt that the present draft implied that the prior exhaustion of local remedies was undesirable per se the wording would call for reconsideration.

In reply to the question of the expert from France, he said that some suggestions had been made of the same kind as Mr. Bilgen's on the ground that it was undesirable to deviate from an existing rule of inter-

[13] See Loan Regulations No. 3 and No. 4, dated February 15, 1961 (amended February 9, 1967), Sections 7.03 and 7.04

national law. The expert from Colombia had put forward yet another view to the effect that his country would never consent to have recourse to arbitration except on questions involving denial of justice.

Mr. GUARINO (Italy) pointed out that it was not always desirable to stipulate as a condition precedent, the exhaustion of local remedies; nor was it desirable to require in all cases that the parties resort to arbitration. He therefore suggested that Section 16 be modified by adding at the end the words "if the other party so demands" so that if the plaintiff wished to have recourse to local courts and the defendant did not object the cost and difficulties involved in an international arbitration could be avoided.

The CHAIRMAN explained that one of the reasons for the wording suggested was that Section 16 was intended to deal with two different cases. First the possibility that a government might insist on local remedies being exhausted, second the existence of an option for both parties to resort to other remedies.

At the Addis Ababa meeting some experts had suggested that the draft Convention should lay down a minimum limit on the financial interest in a dispute submitted to the Center and that suggestion had later been modified to apply only to cases where a sum of money was claimed because it was recognized that there might be test cases of principle when the monetary limit was not of great significance.

The CHAIRMAN introducing Section 17(1) said that it could be viewed as a corollary of the principle of direct access of an individual to a State before an international tribunal. To the extent that such access was available to an individual and could be put to effective use, the reason for giving his State a right to afford him diplomatic protection fell away.

Section 17(2) had been inserted as the view had been expressed at meetings of the Bank's Executive Directors[11] that Section 17(1) might have the effect of preventing recourse by the investor's State to machinery for the settlement of disputes set up under bilateral investment agreements. He thought, however, that even in the absence of Section 17(2) such a right of recourse would have been available to the investor's State.

At the African meeting no objections had been raised to the principles contained in Section 17. At the Santiago meeting several experts had remarked that Section 17(2) might be superfluous and Section 17(1) was not only unnecessary but even harmful, because by withdrawing the right of diplomatic protection it implied that that right did exist generally - a proposition unacceptable to a number of Latin American countries.

Mr. KOINZER (Federal Republic of Germany) said that his Government gave qualified support to the clause contained in Section 17(1). He regarded it as justifiable from the psychological point of view if the private investor could effectively utilize the rights conferred upon him by the Convention. In deciding whether this would be achieved one had to take into account Section 16. He would have thought that if an investor was to give up his right to claim diplomatic protection, as a matter of reciprocity, the host State should forego its right to demand

[11] See Doc. 14

the exhaustion of local remedies. Otherwise the provision would become unacceptable since the process of exhausting local remedies might be inordinately long.

The CHAIRMAN pointed out that as long as local remedies had not been exhausted and no denial of justice had been claimed, under customary international law no right to claim diplomatic protection existed, and the private investor would have no right which he could surrender.

Mr. MONACO (Italy) said that in principle Section 17 was acceptable, but he wondered whether it was expedient to mention diplomatic protection in this context. Diplomatic protection was not a legal remedy and was often extended even while a more formal proceeding was pending. The section excluded diplomatic protection from the moment consent to arbitration had been given. Diplomatic protection could, in fact, play a useful role in the period between the undertaking to go to arbitration and the commencement of actual proceedings, and might in particular cases even obviate such proceedings.

Mr. ALLOTT (United Kingdom) agreed with the previous speaker. Much depended on what was meant by diplomatic protection. Although he could understand the reason for proposing that a formal claim to protection be waived, he nevertheless considered that the possibility of some contact between the two States concerned at the diplomatic level should not be excluded.

On another point, he said the wording of Section 17(1) appeared to suggest that if arbitration failed the only ground for action by the injured State would be in respect of failure to observe the Convention as though the right in respect of the original injury had somehow lapsed. Such an injury might have been per se a breach of international law, as, for example, in the case of expropriation. It seemed to him that in such a case there would be two causes of action for the injured State, and he wondered whether his understanding was correct.

The CHAIRMAN agreed that in the hypothetical case mentioned by the United Kingdom expert there would in fact be two causes of action for the injured State. The drafting would have to be reviewed.

Mr. MELCHOR (Spain) agreed with Mr. Monaco because some form of diplomatic intervention might be necessary in order to make arbitration or conciliation proceedings possible and the mention of diplomatic protection in the Convention might create difficulties for some countries in South America.

He viewed with disfavor Section 17(2) and the reasons for it contained in the comment, and suggested that both be eliminated.

Mr. BERTRAM (Federal Republic of Germany) considered that Mr. Monaco's comment was very pertinent, in view of the fact that there could be occasions when diplomatic protection could usefully be exercised.

He reserved his comments on Section 17(2) for a later stage in the discussion.

"Mr. AMLIE (Norway) stated that while he agreed that the

Contracting State should not be allowed to espouse a claim of one of its nationals which had been submitted to arbitration under the Convention, he saw no reason why that State should be debarred from approaching the authorities of the other State through diplomatic channels. The important thing was to secure a settlement and, if a settlement could be achieved through diplomatic channels, the Convention should not make this impossible. He therefore suggested that the reference to diplomatic protection in Section 17(1) be deleted."

The CHAIRMAN thought that the words "diplomatic protection" whose meaning was, in any event, not altogether clear could perhaps be eliminated. He pointed out that governments could not, however, have it both ways. If they had accepted that disputes would be submitted to arbitration that must be interpreted to mean that they preferred such a method to negotiation. Of course there was no reason why diplomatic contacts should be excluded.

The meeting rose at 12:45 p.m.

SEVENTH SESSION
(Thursday, February 20, 1964 - 3:00 p.m.)

ARTICLE IV - Arbitration (continued)

Relationship of Arbitration to Other Remedies (Sections 16 - 17) (continued)

Mr. RODOCANACHI (France), commenting on Article IV, Section 17(1), agreed with the point raised by various members regarding the value of diplomatic protection in the stages preceding the submission of the dispute to the arbitral tribunal. It could, in his opinion, be covered by deleting the words "shall have consented to submit, or" in that paragraph so that diplomatic protection would come to an end once the dispute was submitted to the tribunal and would revive, after the award was rendered if it were necessary to obtain compliance with it.

With regard to Section 17(2), it was essential to avoid any risk of conflict between decisions taken by arbitral tribunals set up under the terms of bilateral agreements on the one hand and by the draft Convention on the other. Accordingly, some system would have to be evolved for the parties to choose between these two possibilities. It was also important to differentiate between existing bilateral agreements and bilateral agreements which would be concluded after the entry

into force of the draft Convention. Existing agreements for the most part provided for arbitration between States, although some agreements did provide for arbitration between an investor and a host State. It would appear that Section 17(2) gave preference to arbitration under the Convention, while he thought that in the case of existing bilateral agreements, they ought to prevail since they provided for compulsory arbitration. However, the possibility should not be excluded of an investor preferring to have recourse to the arbitral tribunals set up under the draft Convention if that were also agreeable to the States concerned. Where a dispute arose between two States, the bilateral treaty would of course prevail as the draft Convention was not intended to cover disputes between States.

The problem with relation to bilateral agreements concluded after the entry into force of the draft Convention was somewhat different. The possibility of access to the Center would not lessen the value of bilateral agreements which would provide substantive rules of conduct for investors and the host State. It would be desirable, with a view to avoiding any contradictory situations, for future bilateral agreements, and possibly multilateral agreements of the type envisaged under the auspices of the Organization for Economic Co-operation and Development, to provide for compulsory arbitration through the Center. Bilateral agreements could continue to include provision for arbitration between the States concerned, unless specific provision for that were to be included in the draft Convention to the extent considered desirable. It should be clearly stated that any dispute which had already been the object of an arbitral decision under a bilateral agreement should not be submitted to the Center, and _vice versa_. He was not sure whether Article IV was the appropriate place for the insertion of some reference to that important problem; it might be considered preferable for any provisions to that effect to be inserted in the final clauses of the draft Convention.

The CHAIRMAN said that since Section 17(2) dealt with the relations of one Contracting State with another, it did not cover bilateral agreements which provided for arbitration between the investor and the host State. Accordingly, there would seem to be no conflict of jurisdiction. Indeed, it could be argued that Section 17(2) was not strictly necessary; it had been included out of a possible excess of caution to ensure that the more general terms of Section 17(1) did not exclude the situation covered under Section 17(2). If it were wished to take into account the position raised by the representative of France, there would be a case for inserting an entirely separate provision on that whole subject.

Mr. BERTRAM (Federal Republic of Germany) said that he was in favor of the retention of Section 17(2) in the draft Convention. The risk of a possibility of contradictory decisions would present a greater practical problem if the draft on protection of foreign property of OECD entered into force. It seemed to him, therefore, that the general question raised by the French representative could be held over for the time being.

Mr. van SANTEN (Netherlands), making a general comment on Article IV as a whole, wished to put before the meeting the point of view expressed to him by a large company that a clause similar to the one contained in Article III, Section 6, providing for full co-operation by the parties, should also be included in an appropriate place in Article IV.

ARTICLE V - Replacement and Disqualification of Conciliators and Arbitrators

The CHAIRMAN introducing Article V referred to a significant criticism which had been made in Article V in connection with the inequality of treatment of conciliators and arbitrators appointed by the parties and those appointed by the Chairman with regard to disqualification. He was prepared to accept uniform provisions for both.

Mr. BILGEN (Turkey) considered that the reasons for disqualification of conciliators and arbitrators should be specifically enumerated in the draft Convention. He also suggested that the different treatment accorded to arbitrators and conciliators appointed by the parties and those appointed by the Chairman in regard to disqualification be eliminated.

The CHAIRMAN said that there seemed to be a strong feeling that the question of the qualifications and the disqualification of conciliators and arbitrators should be dealt with in greater detail. The question of how best that could be done called for further study.

Mr. HERNDL (Austria) thought that it would be preferable to include those details under the heading of disqualification rather than, in a more positive form, under qualifications.

ARTICLE VI - Apportionment of Costs of Proceedings

The CHAIRMAN said that the draft followed the general principle of the equal apportionment of costs customary in international proceedings. However, the commission or tribunal was given discretion to depart from the standard rule in cases where proceedings had been instituted frivolously or in bad faith.

Mr. HERNDL (Austria) believed that there would be general agreement that the principle of Article VI, Section 1 was in accordance with international practice. He felt that the draft Convention might well go beyond that and introduce the principle current in many national systems that the losing party would be required to pay all expenses. That might somewhat lessen the risk of actions being brought unnecessarily. If that suggestion were not acceptable he would propose that at least the words "it shall assess" be substituted for the words "it may assess" in the penultimate line of that paragraph.

In reply to a question from Mr. HELLNERS (Sweden), the CHAIRMAN said that the intention had been that, where the costs of proceedings were assessed wholly against one party the obligation to pay them would be included in the award, and thus be enforceable under Article IV, Section 15. There was, however, clearly no "award" in the case of conciliation, and he would be glad to have the advice of the experts on how to deal with this point.

Mr. ARNOLD (Federal Republic of Germany) wondered whether the provisions for apportionment of costs (taking into account possible high travel expenses, etc.) might not discourage many small and medium-sized enterprises whose investment in foreign countries it was particularly important to encourage from submitting disputes to the Center. It seemed to him that that aspect of the question should be borne in mind. Possibly, a scale of charges determined by the Administrative Council would meet the situation.

In addition a provision might be included under Article VI, Section 2 for some form of appeal in the matter of the assessment of costs.

The CHAIRMAN said that the question of expenses, fees and charges had given rise to a number of suggestions. The draft already provided for a tariff to be set up by the Secretary-General within the limits determined by the Administrative Council. The inclusion of the words "from time to time" in Section 2 had been deemed necessary since overhead expenses might well change over a period of time and general review thus become necessary. Administrative charges for the use of the Center's facilities would not themselves be very high. Fees and expenses of arbitrators or conciliators, however, might well be high. Some objections had indeed been raised in respect of the freedom given conciliators and arbitrators to fix their own fees and expenses in the absence of agreement between the parties, those objections being based on the interests of small investors and small States. It had been suggested that the Administrative Council should establish some guidelines for fees. The matter required further study in order to arrive at an equitable situation.

Replying to a point raised by Mr. DEGUEN (France), the CHAIRMAN confirmed that the Center would not be responsible for the payment of fees and expenses.

ARTICLE VII - Place of Proceedings

The CHAIRMAN said that, while it had been provided that the place of proceedings should normally be at the seat of the Center or at such other institutions where administrative arrangements could be made, the matter had been left fairly flexible. The possibility had been mentioned, both at the Santiago meeting and at the present one by the Spanish representative that unless there were strong reasons to the contrary conciliation proceedings should be held at the place where the dispute had arisen.

In reply to a question from Mr. BERTRAM (Federal Republic of Germany) as to whether the official language of proceedings should be specified, the CHAIRMAN said that the matter might be left to the rules of procedure.

ARTICLE VIII - Interpretation

The CHAIRMAN drew attention to a draft additional section on interpretation (COM/EU/8), which read as follows:

"2. (1) If in the course of any arbitral proceeding pursuant to this Convention a question arises between the parties to the dispute concerning the interpretation or application of this Convention, and the arbitral tribunal is of the opinion that the question has merit and may affect the outcome of the proceedings, the tribunal shall suspend the proceedings for a period of three months.

(2) If within that period the tribunal shall have been notified that the International Court of Justice has been seized of the question by a State party to the dispute, or the State whose national is a party to the dispute, the arbitral proceedings shall remain suspended as long as the question is pending before the International Court of Justice.

(3) If the tribunal shall not have been so notified, the arbitral proceedings shall be resumed at the expiration of the aforesaid period."

Mr. RODOCANACHI (France) suggested that the words "or application" in Article VIII should be deleted in order to avoid any risk of introducing into the draft Convention the notion of recourse or appeal to the International Court of Justice against an arbitral award because it could be argued that there had been a wrong application of the Convention if the tribunal had not taken into account certain rules of international or national law as it was required to do under Section 4 of Article IV.

The CHAIRMAN said that that point called for thorough review in order to avoid any such risk.

Mr. MONACO (Italy) said that he saw no objection to the retention of the words "or application" in Article VIII since that Article referred only to Contracting States and did not therefore affect a particular dispute between an investor and a State.

He wondered, however, whether Article VIII implied that Contracting States were accepting the compulsory jurisdiction of the International Court of Justice and whether it might not be preferable, taking into account the provisions of Article 36 of the Statute of the Court, to amend Article VIII to read "... shall be referred by mutual consent of the parties to the International Court of Justice ..."

The proposed addition to Article VIII (Doc. COM/EU/8) was in principle acceptable, but he wondered whether the arbitral tribunal should be given the power to reject a question of interpretation on the ground that it was without merit or could not affect the award. The latter ground in particular would be very difficult to determine.

Mr. KARELLE (Belgium) suggested that it was preferable to amend Article VIII so as to read "shall be referred, at the request of either party, to the International Court of Justice". The amendment proposed by the representative of Italy might well enable one party to prevent recourse to the Court by withholding its consent.

The CHAIRMAN said that it was the feeling of some countries that, in view of the continuing resistance of some States to accept the compulsory jurisdiction of the International Court of Justice even on narrow issues, it would be desirable to include a proviso for mutual consent, as suggested by the Italian representative. On the other hand, the suggestion of the Belgian expert would make it clear that Article VIII made recourse to the Court compulsory. The final decision would depend on the wishes of the countries interested in the Convention.

Mr. ALLOTT (United Kingdom) upheld the view that the jurisdiction of the International Court of Justice should be compulsory and that reference to it could be made at the request of one party.

He wondered whether the words "any question or dispute" should not, in the present context, be replaced by the words "any dispute", having regard to the doubt whether the International Court could, at the instance of States, determine "questions" without there being a dispute.

He supported the retention of the words "or application", although it might be necessary to specify clearly that that did not imply a right of appeal from an arbitral award.

He supported the suggestion made by the representative of Italy to delete the words "and may affect the outcome of the proceedings" in Section 2(1) of the proposed addition to Article VIII.

Mr. van SANTEN (Netherlands) considered it preferable to omit mention of the compulsory jurisdiction of the International Court of Justice. Article 36, paragraph 1 of the Statute of the International Court of Justice governed that situation.

He believed that, in view of the final provisions of Article IV, Section 17(1) which reaffirmed the right of a Contracting State to bring an international claim against another State which had failed to perform its obligations under the Convention, it was necessary to maintain the words "or application" in Article VIII, although it should not be considered as giving a right of appeal against an award.

He commended the proposal contained in document COM/EU/8. It was his view, however, that any signatory of the draft Convention, and not merely the Contracting States directly concerned, should have the right of bringing the matter before the International Court of Justice. Accordingly, he suggested the deletion in Section 2(2) of document COM/EU/8 of the words "by a State party to the dispute or the State whose national is a party to the dispute".

Article VIII was a crucial one and should be retained.

Mr. MELCHOR (Spain) said that his original doubts on Article VIII as it stood had been further strengthened by the draft additional section proposed. He was concerned lest those provisions should constitute interference with the competence of the arbitral tribunals and conciliation commissions. He was in favor of the retention of the words "or application" in Article VIII. He had no objection to a clause on interpretation provided it referred solely to the Convention itself. Any extension of that to cover an interpretation of the Convention in connection with a particular dispute was bound to lead to difficulties, and a suspension of the proceedings of the tribunal, as suggested in the proposed additional section could only aggravate the situation. A position might arise where a contrary decision was given by the International Court of Justice and that might detract from the authority of the arbitral tribunal. He shared the doubts expressed with regard to the retention of the words "and may affect the outcome of the proceedings".

In conclusion he suggested that Article VIII clearly state that it would apply only to general questions of interpretation of the provisions of the Convention and that in an actual dispute the arbitral tribunal would be the one to interpret the provisions of the Convention relevant in the dispute.

Mr. AMLIE (Norway) believed that a large number of questions regarding interpretation and application of the Convention might in fact bear on the competence of the arbitral tribunal. It was therefore essential to ensure that the arbitral tribunal was not relieved of its duty (under Section 3(1) of Article II) to determine its own competence

and it might be desirable to include a reference to that Section in Article VIII.

Mr. HERNDL (Austria) supported the proposal of the Belgian expert that reference should be made to the International Court of Justice at the request of either party. It seemed to him that Article VIII constituted a compromissory clause and ought to be drafted in unequivocal terms. Should the compulsory jurisdiction of the Court be unacceptable to the majority, it would be preferable to delete it as States were always free to have recourse to the Court under a special agreement between them.

The CHAIRMAN noted that there appeared to be a preponderance of opinion at the meeting in favor of making it compulsory that States submit all disputes on the interpretation of the Convention to the International Court.

It had also been agreed that on no account should the provisions of Article VIII become a procedure for appeal against awards. Certainly, no such suggestion was intended in the use of the words "or application".

It was also the consensus of the meeting that the original provisions of Article VIII ought not to affect in any way those of Section 3(1) of Article II which made an arbitral tribunal judge of its own competence.

Lastly, there was no doubt in his mind that the arbitral tribunal would accept any ruling on interpretation given by the International Court. The only real issue was whether that tribunal would have the power - or the duty - to suspend its proceedings pending that ruling, if the States concerned desired to have recourse to the Court.

Mr. MELCHOR (Spain) suggested that if the States concerned had agreed to submit a question of interpretation of the Convention to the International Court, there was no need to provide in the Convention for the suspension of the arbitral proceedings, as the parties themselves would ask for such a suspension. He thought it important, however, to stress that all questions connected with actual disputes should be decided by the arbitral tribunal.

Mr. BERTRAM (Federal Republic of Germany) said that it would be difficult to apply the proposed new Section 2, since there were still doubts as to whether the original provisions of Article VIII made the jurisdiction of the International Court compulsory.

Doubts could also arise regarding the binding character for the arbitral tribunal of an interpretation given by the Court.

Another difficulty was that a private investor who had a dispute with the host State on interpretation might find his own national State unwilling to espouse his case before the International Court; he would thus be in a position of inequality as compared with the host State, which - as a State - always had direct access to the Court, and could delay proceedings at will.

Mr. SERB (Yugoslavia) agreed that the investor's States might be unwilling to espouse his claim and might even share the host State's view on the interpetation dispute.

The interpretation of a treaty being primarily a matter for the Contracting States, he suggested that, in the event of a dispute regarding interpretation in the course of arbitral proceedings the Secretary-General of the Center should be asked by the arbitral tribunal to seek the Contracting States' views on the question of interpretation at issue. If the Contracting States were unanimous there would be no question of interpretation to be decided.

Mr. van SANTEN (Netherlands) felt that there could be no doubt that Article VIII brought the parties within the compulsory jurisdiction of the Court. Nor could there be any doubt that any ruling by the Court on interpretation would be binding upon the arbitral tribunal. Finally he observed that if the State of the investor did not wish to submit to the Court a question of interpretation that had arisen during an arbitral proceeding, or agreed with the State party to the dispute on that question, then after the three-month period provided for in the new Section 2 of Article VIII the arbitral tribunal would have to decide that question according to its best judgment. Although the system of reference to the Court of questions of interpretation incidental to a proceeding might entail some delay, he was in favor of it.

ARTICLE IX - Amendment

The CHAIRMAN said that the amendment procedure embodied in Article IX had followed the constituent instruments of the Bank and its affiliated bodies, and was intended to permit amendment of the Convention without requiring unanimous action by the Contracting States themselves.

At the Addis Ababa meeting the provisions of Article IX had been regarded as useful. At Santiago, however, there had been some Latin American objections that legislative approval for the Convention was unlikely in some countries if the text included amendment provisions that would make the decision of a majority (however large) binding upon a minority of States. It had been suggested, as an alternative, that a certain majority should be required for a proposed amendment, but that the amendment should enter into force only with respect to those States that accepted it.

Mr. KARELLE (Belgium) said that Belgium had signed a number of international agreements which had an amendment clause along the lines of Section 2 of Article IX but the Conseil d'Etat of Belgium had pointed out that in such cases Belgium might become bound by an amendment which had not received the approval of its legislature. The Minister of Foreign Affairs had accordingly stated officially that he would oppose similar clauses in the future.

Mr. KOINZER (Federal Republic of Germany) and Mr. TROLLE (Denmark) said that a similar difficulty would arise in their countries.

Mr. van SANTEN (Netherlands) said that the same was true in the Netherlands, where Parliament would be extremeley reluctant to permit a Convention which it had approved to be amended without its further approval.

The CHAIRMAN asked whether the system proposed at Santiago would be acceptable to those representatives who had found the proposed amendment procedure difficult to accept.

Mr. RODOCANACHI (France) said that a system under which an amendment to a Convention would apply to some, but not all, the parties to the Convention, would create insoluble problems regarding the legal relationships among Contracting States. For the same reason he thought reservations to the Convention ought not to be permitted.

Mr. AMLIE (Norway) said that if a majority rule were to be introduced for the amendment of the Convention, it should at least be stipulated that the basic nature of the Convention could not be altered, and in particular that there would be no departure from the optional character of the Convention.

The CHAIRMAN explained that, under the provisions of Section 5(2) of Article XI, a Contracting State would have the right of withdrawal and its withdrawal would take effect twelve months after the notice given by it. Since under Section 2 of Article IX, amendments only become effective twelve months after their adoption and would not be retroactive, it was always possible for a Contracting State to avoid being bound by the Convention as amended, if that State felt that the amendments introduced were too radical. This, however, might be regarded as too high a price to pay for having an amendment procedure.

Mr. SERB (Yugoslavia) felt that some further consideration ought to be given to the so-called Latin American system as in practice there were conventions amendments which had not been accepted by all the Contracting States, so that some States were bound by the new text, while the others remained bound by the old.

ARTICLE XI - Final Provisions

The CHAIRMAN suggested that Article X (Definitions) should be considered last and invited the meeting to discuss Article XI.

Entry into Force (Section 1 - 3)

The CHAIRMAN said that, at the other regional meetings, suggestions had been made to replace the concluding words of Section 1 "and all other sovereign States" by a formula along the following lines: "all other States members of the United Nations or of the specialized agencies".

Mr. ALLOTT (United Kingdom) and Mr. KOINZER (Federal Republic of Germany) expressed strong support for that suggestion.

Mr. KARELLE (Belgium) suggested that a time limit be set for signing the Convention, and provision be made for adherence to the Convention thereafter.

Mr. RODOCANACHI (France) asked why the term "acceptance" had been used in addition to the more traditional one of "ratification".

The CHAIRMAN replied that in recent years certain countries had preferred to adhere to a Convention by way of acceptance rather than ratification for internal constitutional reasons. From the point of view of international law the effect would be the same.

Mr. MONACO (Italy) suggested that the requirement in Section 2 that a State deposit a declaration that it "had taken all steps necessary to

enable it to carry out all of its obligations under the Convention" should be deleted as being unnecessary: a State which deposited an instrument of ratification or acceptance was thereby bound to carry out all its obligations under the Convention. It was not logical that the State in question should be asked to make a separate declaration to that effect.

The CHAIRMAN explained that the sentence in question had been borrowed from the text of the constituent instruments of the World Bank and the International Monetary Fund. In the case of those instruments, there may have been special reasons in view of important financial obligations resulting from membership. He had no strong views on the matter.

Mr. ALLOTT (United Kingdom) agreed with the proposal of the Italian representative regarding Section 2.

The CHAIRMAN said that it was too early to suggest any definite figure for the minimum number of ratifications required for entry into force. At the present time all that could be said was: first, that the minimum number should not be too high, considering that the Convention established a new procedural system and not new substantive rules of international law; second, that the minimum number of ratifications should include States from both the capital-importing and the capital-exporting groups.

Mr. KARELLE (Belgium) suggested that a provision should be included to the effect that ratifications and acceptances subsequent to the date of entry into force of a Convention would take effect immediately.

The CHAIRMAN agreed with the Belgian expert.

He observed that no provision on the subject of reservations had been included in the draft and the matter would thus remain subject to the rules of international law in force on that subject.

If there were some clearly recognizable problems for States with a federal form of government which might prevent them from accepting the Convention in its present form without reservations, the Convention should make some provision for such reservations and no other.

On the specific question of the jurisdiction of the International Court of Justice provided for in Article VIII, he said that it would be regrettable if certain countries were unable to join the Convention because they were not allowed to make reservations to that Article. At the same time, it would also be a matter for regret if compulsory jurisdiction of the Court in this limited field could not be accepted.

Territorial Application (Section 4)

The CHAIRMAN said that at the other regional meetings, the suggestion had been made to insert at the end of Section 4 the words "either at the time of signature or subsequently".

At the African meeting, it had been suggested that a provision should be inserted to the effect that if a dependent territory which was a party to the Convention became independent, the Convention would cease to apply

to it; a clause of that type would cover the case where the former metropolitan power failed to exclude the territory before its accession to independence.

Mr. ALLOTT (United Kingdom) asked whether at the other regional meetings there had been any reaction to Section 4.

The CHAIRMAN said that at the African meeting there had been one statement to the effect that Section 4 represented a relic from the past and that no State should be responsible for the international relations of another nation. The opposite view, however, had prevailed, it being pointed out that a distinction should be drawn between the actual situation and the desirable state of affairs.

<u>Denunciation</u> (Section 5)

The CHAIRMAN said that at another regional meeting, it had been suggested that, in Section 5(1), the words "at any time" should be added after "may denounce this Convention".

<u>Inauguration of the Center</u> (Section 6)

In reply to a question by Mr. KOINZER (Federal Republic of Germany), the CHAIRMAN said that the arrangements for meetings of the Administrative Council of the Bank were sufficiently flexible to enable any person to be designated to serve upon it.

It was desirable that draft rules of procedure for the Center should be drawn up before the Convention was submitted to governments since the actual rules of procedure would be adopted by the first States to become parties to the Convention.

Mr. van SANTEN (Netherlands) said that it would be desirable to specify in Section 6(i) of Article I that the Administrative Council was entitled not only to adopt but also to amend the administrative rules and regulations of the Center.

The CHAIRMAN said that the intent of Section 6(i) of Article I had been to include the power of amendment in the power to adopt administrative rules and regulations.

<u>Registration</u> (Section 7). <u>Final Clause</u>

Mr. KARELLE (Belgium) said that it was necessary to specify that the Bank would have a duty to advise all Contracting parties of the deposit of any instrument of ratification or accession.

He noted that the final clause made no reference to the language of the Convention.

The CHAIRMAN replied that it was intended that the Convention should be signed in three equally authentic texts viz., English, French and Spanish.

<u>The meeting rose at 6:00 p.m.</u>

EIGHTH SESSION
(Friday, February 21, 1964 - 9:35 a.m.)

ARTICLE X - Definitions

The CHAIRMAN invited the meeting to consider Article X on definitions. With regard to the definition of nationals, which had been discussed previously in connection with Article II, he said that the definition was included in the agreement not in order to give rights to investors but in order to allow governments to enter into agreements with them. On the question of dual nationality, he suggested that where one of the person's nationalities was that of the host State, the person should not be excluded on that account from the protection afforded by the Convention, provided firstly that it was stated in the agreement that the host State recognized that the person had or might come to have its own nationality and secondly, that the person must have had foreign nationality at the time of the signing of the agreement as well as having it at the time application was made to the Center for the appointment of a conciliation commission or an arbitration tribunal.

Mr. RODOCANACHI (France) said that as far as physical persons were concerned the conditions suggested by the Chairman would go a long way towards removing the objections he had raised based on the probable reluctance of any State to allow its own nationals to proceed against it before an international tribunal.

Mr. TROLLE (Denmark) pointed out that States might well confer their nationality on persons making investments or working in their country some of whom might thereby acquire dual nationality, perhaps without their even being aware of the fact. The existence of dual nationality should not be an obstacle to the protection afforded by the Convention except when a host State was unaware that a person had its citizenship.

The CHAIRMAN said that his suggestion had been intended to meet a case of the kind cited by the representative of Denmark.

Mr. GOULD (South Africa) said that it was only in connection with companies or corporate persons that problems would be likely to arise over the question of nationality. If the Chairman's suggestion were accepted, it would still be impossible at the time of signing an agreement to foresee what the nationality of a company's shareholders would be at the time of a possible dispute.

Mr. BERTRAM (Federal Republic of Germany) suggested that the best place to deal with most of the difficulties over the question of nationality might be in the comments accompanying the Convention.

Mr. van SANTEN (Netherlands) said that it would be unrealistic to expect nations to recognize the dual nationality of persons living in their territory in order to give those persons the right to sue them. It had to be remembered that in such cases the person's second government would have the right to give him diplomatic protection, whereby the first government would at once lose part of its rights over a resident citizen. Since such cases were likely to be rare, he felt it might be wiser not to mention the question in the Convention in order to avoid frightening possible signatories.

He asked why the second nationality should have to be known at the time of the request for conciliation or arbitration. In his opinion, only the latter date was important.

The CHAIRMAN replied that the right to make a claim before the international tribunal would depend on the recognition of the person's foreign nationality, which would necessarily have to be known at the time consent to arbitration was given.

Mr. BERTRAM (Federal Republic of Germany) suggested that in the first paragraph the words "possessing the nationality of" be substituted by the words "was a national of".

The CHAIRMAN observed that the Convention sought to deal with the problem of defining the nationality of corporate persons by a departure from the generally accepted rules, which defined as a national of a State a company which was a national of that State by virtue of its own laws either because the company has its seat in that country under one system or because it is incorporated under the law of that country under another system. The draft added as a further criterion the element of control so that a company having its seat in country A controlled from country B would have dual nationality. That system had been objected to on the grounds that the question of control should be kept apart from that of nationality. Undoubtedly, a local company's foreign interests ought to come within the scope of the Convention. It had been suggested that the protection afforded by the Convention should be given to foreign holders rather than to companies as such. In that way, a company established in a given country would not have to be described as foreign and the problems raised by the greater or lesser degree of foreign control would be avoided.

Mr. MELCHOR (Spain) said that since the definition of the nationality of juridical persons was a very complex matter, it might be better to study the question of affording direct protection to individual investors rather than to companies whose nationality had to be determined according to the host country's laws. The idea of the Convention was to afford protection not only to companies whose capital was predominantly foreign-owned but also to protect all foreign investors, including minority interests.

Mr. GUARINO (Italy) said that investments could be grouped in three categories: voluntary investments; investments made pursuant to a particular contract with a State, and investments made in reliance on a law of the host country. Persons investing without special incentives in a foreign country did not deserve special protection. In the case of investors who entered into particular contracts with a State, nationality should be determined at the time the Contract was made. Where investments were made in reliance on a law of the host country, the nationality of the investor would be that possessed by him at the time he registered the introduction of his capital into the host country. By granting protection on the basis of the nationality at the time of registration of the investment, the problem of the rights of minority holdings in companies would be eliminated.

The section on definitions should include the definition of a State as well as that of a national of a State, since the modern State operated through companies under its direct or indirect control. The definition should comprise the State, local authorities, public corporations and

companies directly or indirectly controlled by the State or by public corporations.

Mr. KOINZER (Federal Republic of Germany) said he was not convinced of the importance of clause (b) of paragraph 1 of Article X. Companies could be nationals of the capital-exporting country, of the host country, or of a non-contracting State. In the first case there would be no difficulty in extending the portection of the Convention to the company. In the case of nationals of the host country it had to be asked whether the company as such would be eligible for protection, or whether the eligibility would not arise from the fact that the individual investors were nationals of a Contracting State. Since nationals would be unlikely to sue their own government it would be more reasonable to formulate the article in such a way as to give the individual investors the right to sue. With regard to companies of a non-contracting State there arose the question whether they were entitled to be covered by the Convention where nationals of a Contracting State had a majority holding of their capital. He thought this latter case ought to be covered by the Convention. It would also be desirable to clarify the meaning of a "controlling interest", which ought perhaps to include not only the owners of a majority holding, but also interests sufficiently important to be able to block major changes in the company.

The CHAIRMAN explained that the second paragraph of Article X meant that as long as a person could be regarded as a foreign investor with the nationality of a Contracting State it did not matter what other nationality he had. However, many experts seemed to feel that the words beginning with "notwithstanding" in paragraph 2 could be deleted and that companies incorporated, or having their seat, in the host country should not be included as such in the Convention, protection being afforded to individual investors in those companies. He suggested that clause (a) be retained, clause (b) be deleted and that the remainder of paragraph 1 of the definition be retained as it solved the difficulties created by the vagaries of different legal systems in attributing juridical personality to various forms of business organizations.

Mr. ALLOTT (United Kingdom) said that the changes proposed by the meeting introduced a new idea of the investments that would be covered by the Convention and once again raised the question of the definition of "investments". He wished to reserve his position.

Mr. GOULD (South Africa) said that it was necessary to look behind the corporate veil to the shareholders or physical persons affected by adverse action. If that could be done the difficulties raised by such questions as the nationality of the Company and problems created by the existence of holding Companies, nominees, voting arrangements, trusts and various forms of disguised ownership would be eliminated. Careful investigation would be necessary, but in his view that was the only way to afford full protection to the individual foreign persons who had real patrimonial interests in the host country The suggestion put forward by the representative of Germany that any company recognized by another Contracting State as its national should be acceptable would open the door to abuses and allow nationals of non-contracting States to benefit by the protection afforded by the Convention. With regard to the definition of a "controlling interest", owing to the different classes of shares, with and without voting powers, control defined in terms of shareholders representing 51 per cent of the voting power was

an artificial conception; that control could in fact be acquired by persons holding only 25 per cent of the Company's capital.

The CHAIRMAN feared that the suggestion made by the representative of South Africa would involve an immense amount of investigation in each case and be unduly complicated. He felt that it should be left to the State concerned to carry out at the time of signing the agreement whatever investigations it felt to be necessary. It also had to be remembered that the Convention was based on consent and that the purpose of the definition was to establish the outer limits within which this consent could be exercised.

Mr. GOULD (South Africa) pointed out that the great fear of the underdeveloped countries was neo-colonialism. Those countries needed to establish pioneer and key industries and had to look to former colonial nations for assistance in creating those industries. They were afraid of finding themselves at the mercy of investors. The investor was not necessarily going to be the injured party, since he would have the new countries' economic activitites very largely in his own hands.

The CHAIRMAN said that he was fully aware of some fears on the part of underdeveloped countries and that he himself had pointed out that investors as well as States might be defendants in proceedings under the auspices of the Center. Moreover, the Convention had introduced a number of features tending to protect the position of the underdeveloped countries. He did not think, however, that the problem mentioned by the expert of South Africa affected the question of how to determine the nationality of a company.

Mr. RODOCANACHI (France) observed, with regard to the last sentence in paragraph 1, that no State would be able to recognize associations which were illegal under its own domestic laws.

Mr. MONACO (Italy) said that if the definition contained in clause (b) were dropped there seemed no need to retain paragraph 2 of Article X because for purposes of any particular dispute the nationality would be that possessed by virtue of the applicable municipal law. The comment which was not very clear on that point certainly failed to justify the need for paragraph 2.

The criterion of "control" was one of fact rather than law and unless there were compelling reasons to regard it as essential for the application of the Convention, it could be left out.

Mr. ARNOLD (Federal Republic of Germany) said that the definition must be consistent with existing law and practice on nationality. In theory, bodies corporate could not possess nationality in the sense that it was possessed by individuals if at all, the matter was regulated by municipal law.

If some objective criterion were deemed necessary, perhaps Article 58 of the Rome Treaty might provide guidance because it dealt with an analogous problem and did contain a territorial criterion designed as a safeguard against the creation of fictitious companies.

He agreed with Mr. Monaco that the criterion of "control" caused great difficulties and observed that it had for that reason been generally discarded by international lawyers; he therefore agreed with Mr. Monaco

that in the final draft of Article X account should be taken of the provisions in The Hague Convention on the recognition of the personality of juridical persons. Although that instrument had only been ratified by very few States it had the great merit of reconciling continental and common law concepts of juridical personality.

Mr. TROLLE (Denmark), observing that the Chairman seemed to favor deletion of clause (b), asked whether the effect of that would be to preclude companies set up in a country B whose capital was owned by persons in country A from entering into arbitral agreements under Article II, Section 2.

The CHAIRMAN confirmed that the national company in country B would not be entitled to enter into an arbitral agreement but the foreign holding company in country A could do so and the consequences of deleting clause (b) would be that the local company could not be a party to proceedings.

Mr. TROLLE (Denmark) pointed out that the example he had in mind was that where there was no holding company in country A but the shares were sold in that country.

The CHAIRMAN explained that unless the shareholders in country A could organize themselves into some kind of recognized group, if the criterion contained in clause (b) were dropped there would be no way of their bringing a case before the tribunal. It might simplify matters if that were made possible, but the criterion of control was obviously going to cause difficulties and there was a patent reluctance on the part of a number of capital-exporting as well as capital-importing countries to accept the possibility of instituting international proceedings between a local company and the host State.

On the last point it was of interest that an exception did exist. Many African States, formerly associated with France, had accorded a special regime to companies that had originally been French, by way of compensation for obliging them to change their nationality when the territory in question had become independent.

Mr. TROLLE (Denmark) observed that the only way out in the hypothetical case he had described would be to turn, say, a manufacturing enterprise into a company of the capital-exporting country, or, if that were contrary to the laws of the capital-importing country a holding company in country A might need to be created. All of which would make for perhaps unnecessary complications.

The CHAIRMAN said that greater lattitude might have been desirable on that point but clause (b) seemed to be giving rise to considerable opposition in various quarters. Perhaps it should be borne in mind that in most cases the investment would be of a corporate character and not private.

Mr. RODOCANACHI (France) mentioned as a precedent the solution arrived at when the Indonesian Government had enacted a special law some years previously requiring that plantation concessions be given only to companies organized under Indonesian law. The French interests which had previously beneficially owned the concessions through Dutch companies transferred all the Indonesian assets to an Indonesian company whose shares they held. The Indonesian Government had recognized that

France could continue to exercise diplomatic protection in respect of these Indonesian companies.

Mr. ALLOTT (United Kingdom) said that the observations made by the experts from Denmark and France were extremely pertinent. In his view the definition ought to be simple and should say as little as possible in the interests of devising a convention that could serve as a practical instrument for the settlement of as wide a range of disputes as possible. Though aware that it was impossible to define with precision the concept of "a controlling interest" it would be unrealistic to omit all mention of the concept. After some informal exchanges of view he was now inclined to think that perhaps what was needed was a rule of interpretation to the effect that consent to proceed under the Convention implied recognition by the State concerned of the foreign nationality of the other party. If a solution on those lines were feasible, a definition of nationality would become unnecessary. Of course the issue which had arisen in the course of the discussion belonged to the domain of what the Chairman had aptly described as the "outer limits". In fact every dispute likely to arise must be viewed in the context of consent and at that stage the issue to be determined would be the true status of the company and whether it was eligible to benefit from the provisions of the Convention.

The CHAIRMAN said that the discussion had indicated that the issues were more intricate than had been realized. Perhaps it should be borne in mind that certain political preoccupations were due to a misconception and a failure to appreciate the consensual nature of the Convention. The matter obviously called for further consideration in order to achieve the maximum freedom compatible with certain political considerations.

Mr. OBERHOLZER (South Africa) asked whether the effect of deleting the words, "notwithstanding that such person ... party to the dispute" in paragraph 2 would be as it were to reverse the International Court's criteria in the Nottebohm Case, transferring them from the State to the individual.

The CHAIRMAN replied that he was not quite certain of the exact effect of such a deletion but did not believe that the previous speaker's supposition was justified.

Mr. GUARINO (Italy) said he did not regard the issue of nationality as of capital importance once the host State had accepted the principle of submitting a dispute with a particular investor to arbitration.

Mr. LØVOLD(Norway) asked whether some exchange of views would be possible on the difficult subject of defining "investment" though he had no solution to offer. Although the comment on Article II mentioned the difficulties of definition and stressed the optional character of the scheme envisaged under the draft Convention surely it would be difficult to omit any definition altogether. He had noted the argument put forward in the last sentence of paragraph 4 of that comment but believed that a case could be made for the reverse contention that the total absence of a limit on the category of disputes might open the door to controversies about applicability of the Convention. An example of such a possibility was the much too sweeping assertion made during the discussion, that every capital transfer constituted an investment: many thousands of short-term transactions would never be regarded as coming within the terms of the proposed draft.

The argument in favor of retaining the possibility of subrogation by a State under an export insurance scheme seemed to carry the unwarranted implication that suppliers' credits as such constituted investments. Surely short-term credits for the import of non-durable consumer goods were not the kind of transaction that would require protection though a case could be made for a loan of say twelve years or more for the purchase of capital goods. Some countries recognized that kind of distinction whereby export credits that could be regarded as contributing to the economic development of a country qualified as investment. Perhaps a definition on those lines would be feasible.

The CHAIRMAN questioned whether a definition of a concept generally recognized to be vague would obviate disputes about jurisdiction. There were good reasons for eschewing detailed definitions which was why he had suggested that some examples of what was meant by investment (even though not exhaustive) could usefully be set out in a separate document rather than in the text of the Convention itself.

Mr. ALLOTT (United Kingdom) said that in mentioning export credit guarantees he had not intended to express any opinion as to whether or not they would fall within the scope of the Convention.

Mr. van SANTEN (Netherlands) thought that definitions should be kept to a minimum in order to avoid unnecessary delays as a result of preliminary objections.

It was for that reason that Article II, Section 3(2), made no mention of investment disputes. If the distinction drawn in that Article between the jurisdiction of the Center and the competence of the tribunal had any meaning at all it was that a request for arbitration pursuant to Article IV would first be processed by the Secretary-General of the Center who would inform the Administrative Council if he thought the claim fell outside its jurisdiction by reason of not being an investment dispute. That would constitute an initial screening process so that when the issue came before the tribunal with the consent of both parties that body would act on the assumption that the dispute was within its competencce.

The CHAIRMAN observed that as the expert from the Netherlands would recall, Article II, Section 3(2) as at present formulated, was incomplete. An additional sub-paragraph was needed on the question of disputes not being within the jurisdiction of the Center. The reason for inclusion of that provision was that many capital-importing countries were anxious to leave certain categories of disputes outside the scope of its jurisdiction. It was necessary to include a provision of that kind because the Secretary-General had no power to screen requests for arbitration and to refuse to set the machinery in motion. If the Secretary-General and Administrative Council were to be given the power contemplated by the Netherlands expert that would have to be expressly stated and then a more precise definition of an investment dispute would become necessary. Perhaps it would be expedient to say as little on the subject as possible.

The Preamble

Mr. RODOCANACHI (France) suggested that paragraphs 1 and 2 of the Preamble should be merged; alternatively, the concept of the respect for the sovereign rights of States should be introduced into paragraph 1. He

found that that concept was just as important in connection with the contents of paragraph 1 as it was with those of paragraph 2. It was important to stress that the scheme proposed would not lead to any results detrimental to national sovereignty and it would be desirable to state that international investments ought to respect the national sovereignty of host States; there was a persistent fear of "neo-colonialism" in the newly-independent States and that feeling should be taken into account.

Also in paragraph 2, it was not clear whether the concluding phrase "in accordance with international law" related to the exercise of sovereignty or to the settlement of disputes.

Lastly, the question arose whether international law limited the exercise of sovereignty or guaranteed the sovereignty of States.

The CHAIRMAN said that international law undoubtedly did both.

He thought that the suggestion for the introduction into paragraph 1 of the Preamble of a reference to the respect due to the sovereignty of States would be helpful.

The somewhat cumbersome language of paragraph 2 had been drawn from the well-known General Assembly resolution on the subject of permanent sovereignty over natural resources;[*] the text of that resolution had represented an even compromise between the language proposed by the underdeveloped countries and that proposed by the industrialized countries, so that the over-all effect was somewhat confusing.

Mr. BERTRAM (Federal Republic of Germany) noted that paragraph 3 laid too much emphasis on national legal processes. He suggested that a reference should be introduced to private arbitration, both at the national level and at the international level through such bodies as the International Chamber of Commerce.

The CHAIRMAN said that paragraph 3 had been introduced in order to stress that there was no intention to endeavor to set up an extra-territorial jurisdiction for investment disputes. Hence the stress on the fact that such disputes would usually be subject to national legal processes.

Mr. van SANTEN (Netherlands) felt that the use of the words "without prejudice" in the phrase in brackets in paragraph 3 was somewhat inappropriate. Perhaps the best course was to remove the brackets and to link, by means of a preposition such as "or" or "and", the idea contained in that phrase with the one embodied in the opening sentence.

Mr. ALLOTT (United Kingdom) criticized the use of the word "such" before "disputes" and "facilities" in paragraph 5. The principle embodied in that paragraph was of general application and should not be limited to investment disputes.

With regard to paragraph 6, he said that its contents were a matter of substance and should therefore be either deleted or transferred to the Convention itself.

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[*] United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962

The CHAIRMAN said that difficulties would be involved if the word "such" were dropped. He suggested that a statement should be introduced into the comment to the effect that the limitation in question had been introduced into paragraph 5 so as to confine the reference to the subject matter of the Convention, and not because the principle was not a general one.

Mr. PEREIRA (Portugal) agreed with the suggestion to delete paragraph 6. As an alternative, he suggested that it should be replaced by a statement recognizing that the basis of authority for conciliation and arbitration was consent.

The CHAIRMAN explained that originally the contents of both paragraph 5 and paragraph 6 of the Preamble had been in the Convention itself. They had been removed from the text of the Convention because they were already implemented by the specific provisions of the Convention. It had been felt, however, that these principles should be reaffirmed in the Preamble.

Mr. LØVOLD (Norway) opposed the suggestion to delete paragraph 6, which embodied an extremely important principle, namely the optional character of the Convention. In fact, he wished to see the Convention include a clear statement of the fact that no amendment of its text could lead to a departure from its essential optional character.

Mr. BERTRAM (Federal Republic of Germany) advocated the inclusion of a reference in the Convention to the need to avoid overlapping with other multilateral and bilateral systems of international arbitration.

Mr. DEGUEN (France) found the language of paragraph 4 unduly strong; it would be a mistake to believe that the setting up of optional arbitration machinery was a matter to which States attached a very high degree of importance.

In the same paragraph, he suggested that the term "establishment" (in French "_création_") should be replaced by "availability" (in French "_existence_"), since there already existed other facilities for international conciliation or arbitration.

Mr. van SANTEN (Netherlands) noted that nothing was said in the Preamble on the role of the Bank with regard to the Convention. That omission, in his view, underlined the need - which he had stressed earlier - of a diplomatic conference to discuss the draft and air the views of governments.

He did not think that the cases of the Bank's own affiliates (International Finance Corporation and International Development Association), constituted valid precedents because those organizations dealt with matters which came within the competence of the Bank. As to the proposed Convention on the settlement of investment disputes, it was felt in the Netherlands that it was outside the Bank's competence to draw up such a Convention and to offer it to States on a "take it or leave it" basis.

Mr. RODOCANACHI (France) supported the suggestion for a diplomatic conference to examine the final draft of the Convention prepared by the Bank and to adopt, if necessary, amendments thereto by a majority vote. That procedure would be a good means of ensuring that the maximum

possible number of States became parties to the Convention. A diplomatic conference enabled plenipotentiaries to understand each other's points of view and to make mutual concessions.

After the Bangkok meeting, it would be advisable for the Bank to conduct extensive consultations with the Organization for Economic Co-operation and Development, which had drawn up a draft Convention on Protection of Foreign Property. The purpose of such consultations would be twofold: first, to avoid any possible contradiction between the two texts (and he felt sure that OECD would be prepared to amend its text in order to avoid any such conflict) and second, to enable the two draft Conventions to supplement each other in a logical and constructive manner. It was highly desirable that the two Conventions should receive parallel if not necessarily simultaneous approval from States. There was an impression in many capital-importing countries that the two texts called for a choice. It was essential to stress that, far from being competitive, the two draft Conventions were complementary.

The CHAIRMAN said that no doubts were felt in the Bank regarding its powers to prepare a Convention in a field which was mentioned in the purpose of the organization itself. This view was obviously shared by the member governments, since the Board of Governors had in 1962[15] authorized the Executive Directors to draft a Convention for submission to governments.

He stressed that so far it had proved impossible for any organization to place before governments even a draft on the subject of the settlement of investment disputes. He felt strongly that a diplomatic conference, apart from the delays which it would involve, would entail the risk of failure of the present attempt to draw up a Convention on the subject.

The Bank was at least in a position to submit to governments a draft approved by its Executive Directors. The Executive Directors would be guided by the comments made at the Consultative meetings and, in addition, would presumably be assisted during the final stages of considerations by legal experts who would be governmental representatives of the countries who had appointed or elected the Executive Directors. Thus the "confrontation" desired by several delegates would take place within the framework of the Bank.

The method of approach which had been adopted by the Bank might be open to question if the Convention were intended to create new substantive rules of international law. However, since its purpose was only to make facilities available on certain conditions (which admittedly would require some changes in national legislation) it was permissible to use the organs of the Bank in order to place a complete draft before governments.

With regard to the consideration of the draft by the nineteen Executive Directors of the Bank, he stressed that on the basis of earlier experience the Executive Directors would not simply rely on the weighted voting system in force in the organs of the Bank. They would not want to present a draft which did not commend itself to a representative number of capital-exporting and capital-importing countries. Nevertheless, the decisions of the Executive Directors would express the view of the Bank as an institution and would not be binding on member governments who could decide whether or not to sign the Convention.

[15] Doc. 11

With regard to the OECD Convention, he had no objection to consultations with that body. As he had already stressed, the present Convention was not intended in any way as an alternative to the OECD Convention on Protection of Foreign Property. In his address to the World Conference on World Peace through Law, held at Athens from 30 June to 6 July 1963, he had expressly recognized the merits of the OECD draft. No attempt should, however, be made to link the two conventions too closely. The OECD Convention was intended to deal with questions of substance and embodied the acceptance of compulsory adjudication of disputes; accordingly, that draft was a much more difficult one for governments to accept than the draft drawn up by the Bank.

Mr. KOINZER (Federal Republic of Germany) said that he did not wish to express a final opinion on the desirability of a diplomatic conference. He had sympathy for some of the points raised by the delegates of the Netherlands and of France, but on the other hand he shared to a certain extent the concern expressed by the Chairman. He felt that the Executive Directors of the Bank, who were normally not lawyers but economists and financiers, were perhaps not ideally qualified to judge all the legal intricacies necessarily involved in working out an arbitration convention. Perhaps some middle course might be found between the procedure suggested by the Bank and the holding of a diplomatic conference, e.g. by adding legal experts of member countries to their Executive Directors. Lastly, he stressed the importance of a co-operation between the Bank and OECD in the drawing up of their respective Conventions.

The CHAIRMAN said that the consultations held at the regional level had already shown the value of obtaining the views of government representatives. The Bank would certainly wish to have the advantages of a diplomatic conference without its drawbacks.

Mr. ALLOTT (United Kingdom) asked when and how the decision would be made with regard to the next step to be taken in connection with the Convention.

The CHAIRMAN explained that the only decision taken by the Bank so far had been to hold the four regional consultative meetings. When those consultations were terminated, it would be for the Executive Directors of the Bank to decide, at their May or June meetings, on the next step.

Mr. HERNDL (Austria) agreed on the need to co-operate with OECD in order to ensure that the two Conventions supplemented each other. He also agreed with the representatives of the Netherlands and France on the desirability of a diplomatic conference. In that connection, he wished to draw attention to the success achieved by the two Vienna Conferences of 1961 and 1963 which had resulted in the adoption of the two Conventions on diplomatic intercourse and consular privileges respectively.

The CHAIRMAN said that one of the drawbacks of a diplomatic conference was its public character, which tended to harden positions and to encourage polemics. In addition, such a conference would be costly and time consuming.

Mr. BERTRAM (Federal Republic of Germany) urged that some inter-

mediate solution should be sought between the process of consultation and that of a diplomatic conference.

Mr. DEGUEN (France) found it surprising that there should be no reference to the Bank in the Preamble.

It was felt in France that it would be regrettable if the preparation of the Convention were to have the effect of reducing the role which the Bank at present played in the settlement of disputes. As was well known, the draft now under discussion had its origin in the largely spontaneous activities undertaken by the Bank and its President in the settlement of investment disputes. It was logical that an attempt should be made to institutionalize that somewhat empirical experience but every effort should be made to avoid doing injury to the activities already being conducted by the Bank in that field. In particular, the question arose whether the proposed new Center would have the same authority as the Bank and its President had. Moreover, there was no doubt that the Bank and its President would continue to play a part in the process of the setttlement of disputes. For all these reasons, his Government was anxious that no hasty decision should be taken in the matter.

The CHAIRMAN said that some appropriate reference to the sponsorship of the scheme by the Bank should perhaps be introduced.

Undoubtedly, the creation of the new machinery would not mean that the Bank and its President would henceforth refuse to lend their good offices in appropriate cases. But the Center would provide convenient machinery to which the President of the Bank could refer parties willing to avail themselves of it.

He thanked the representatives for their valuable contributions to the discussion, which had included an unusually large number of new thoughts, both critical and approving, on the subject of the proposed Convention. The results of the discussion would be reported to the Executive Directors and the provisional summary records of the proceedings would be circulated both to the participants and their governments as well as to governments which had been unable to send representatives to the meeting.

Mr. MELCHOR (Spain), speaking on behalf of all the participants, thanked the Chairman for the able and courteous manner in which he had conducted the discussions.

<u>The meeting rose at 1:20 p.m.</u>

EXECUTIVE DIRECTORS' MEETING, FEBRUARY 27, 1964

EXTRACTS FROM STATEMENT BY MR. SELLA[1] ON THE EUROPEAN REGIONAL MEETING HELD IN GENEVA, SWITZERLAND, FEBRUARY 17-21, 1964,[2] FOR DISCUSSION OF A DRAFT CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES DATED OCTOBER 15, 1963[3]

The Third Consultative Meeting of legal experts was held from February 17 through February 21 at the Palais des Nations in Geneva. The two previous meetings were held in Addis Ababa last December and in Santiago early this month respectively.

Mr. Broches chaired the meeting, which was attended by thirty-seven experts from seventeen European countries and South Africa. Iceland, Ireland and Luxembourg had declined the invitation, and the expert designated by Cyprus was unable to sttend. Observers from the Economic Commission for Europe were also present, and Mr. Velebit, its Executive Secretary, addressed the meeting st its opening session.

There was great similarity between the Addis Ababa and Geneva meetings in two respects. First, there was at both meetings a general acceptance of the basic ideas underlying the Convention and of its most important provisions. The second characteristic which the two meetings had in common was a clear realizstion that the Convention, in order to be useful, would have to be acceptable to capital importing and capital exporting countries alike. It goes without saying that most of the experts at the Geneva meeting paid particular attention to the position of investors, but without losing sight of the fact that the interests of the host countries had to be carefully considered as well.

The discussions were highly technical, as could be expected from an assembly of people who had had much practical experience with problems of international investment. No new issues were raised, but a number of issues discussed at length at the earlier meetings, such as the enforceability of awards, the criteria for determining the nationality of investors, and the surrender by a state of the right of espousal of its investors' claims were analyzed in detail and, we believe, clarified.

Such criticisms as there were of particular provisions were offered in a constructive spirit in order to improve the text of the draft and to make the proposed settlement mechanism more efficient.

Some experts stressed the importance of avoiding competition or unnecessary overlapping between the Bank convention and the draft convention on the protection of foreign property prepared in OECD.[4] These experts recognized that the two proposals need not be linked, but suggested that the Bank keep in close touch with OECD in order to avoid as much as possible inconsistencies between the two proposed Conventions.

The atmosphere of the meeting was friendly and extremely constructive and, in my opinion, it was the consensus of the experts present that the

[1] Attorney, Legal Department
[2] See Doc. 29
[3] Doc. 24
[4] See OECD Doc. 15637, dated December 1962, revised and reissued as OECD Doc. 23081, dated November 1967

proposed Convention could make a substantial contribution to the improvement of the investment climate.

As the Executive Directors know, the last of these consultative meetings will be held at the end of April in Bangkok with legal experts from the Asian countries.

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Z10 (July 20, 1964)

SETTLEMENT OF INVESTMENT DISPUTES

CONSULTATIVE MEETING OF LEGAL EXPERTS

Bangkok, Thailand, April 27 - May 1, 1964

SUMMARY RECORD OF PROCEEDINGS

July 20, 1964

LIST OF PARTICIPANTS

Chairman: A. BROCHES, General Counsel, IBRD

AUSTRALIA	Mr. B.J. O'DONOVAN	Principal Legal Officer Attorney General's Dept.
CEYLON	Mr. T.E. GOONERATNE	Acting Deputy Secretary to the Treasury
	Mr. R.S. WANASUNDERA	Crown Counsel
CHINA	Mr. Paul CHUNG-TSENG TSAI	Counsellor, Council for International Economic Co-operation & Development
INDIA	Mr. B.N. ADARKAR	Additional Secretary, Ministry of Finance
	Mr. R.S. GAE	Joint Secretary, Ministry of Law

(i)

IRAN	Dr. Mostafa MANSOURI	Director, Foreign Relations Dept. Ministry of Finance
	Dr. Ahmad ASKARI-YAZDI	Asst. to Governor, Central Bank of Iran
ISRAEL	Mr. E. LANDAU	Legal Adviser, Ministry of Finance
	Mr. M. HETH	Senior Economist, Bank of Israel
JAPAN	Mr. M. SHIRATORI	Assistant Chief, International Organizations Sec., Foreign Exchange Bureau, Ministry of Finance
	Mr. H. NEMOTO	Counsellor, Japanese Embassy, Rangoon
JORDAN	Mr. Nijmeddin DAJANI	Secretary General, Development Board
	Mr. Amin Mohammad HASAN	Member of Development Board
KUWAIT	Mr. Abdlatif AL-HAMAD	Director General, Kuwait Fund for Arab Economic Development
	Mr. Saad EL-FISHAWY	General Counsel, Kuwait Fund for Arab Economic Development
LEBANON	Mr. Raja HIMADEH	Government Commissioner to BCAIF, Ministry of Finance
	Mr. Robert GHANEM	Head, Legislation and Counsel Service, Ministry of Justice
MALAYSIA	Mr. Ahmad ROOSE	Principal Asst. Secretary, The Treasury
	Mr. Mohamed Salleh Bin ABAS	Senior Federal Counsel, Attorney General's Office
NEPAL	Mr. Y.P. PANT	Secretary, Ministry of Finance
	Mr. B. SHARMA	Under Secretary, Ministry of Law and Justice
NEW ZEALAND	Mr. William R. HART	Solicitor to the Treasury
	Mr. Albyn J. QUILL	Crown Counsel
PAKISTAN	Mr. Amin UL ISLAM	Joint Secretary, Ministry of Law
PHILIPPINES	Mr. Felix L. LAZO	Special Assistant to the Governor Foreign Loans & Investments Dept. Central Bank of the Philippines
	Mr. Manuel ABROGAR	Chief, Industrial Financing Division Central Bank of the Philippines
REPUBLIC OF KOREA	Mr. B.K. CHOO	Assistant Chief, Foreign Exchange Division, Ministry of Finance
	Mr. P.S. PARK	Assistant Chief, Overall Programming Division, Economic Planning Board
SAUDI ARABIA	Mr. Taher Ahmed OBAID	Economic Expert, Ministry of Finance and National Economy
	Mr. Saleh AL HOUSEIN	Legal Expert, Ministry of Finance and National Economy

THAILAND	Mr. Serm VINICCHAYAKUL	Permanent Under-Secretary, Ministry of Finance
	Mr. Chapikorn SRESHTHAPUTRA	Chief of Legal Division, Treaty and Legal Dept., Ministry of Foreign Affairs
	Mr. Sompob HOTRAKITYA	Legislative Councillor of the Juridical Council
	Mr. Paisarl KOOMALAYAVISAI	Ministry of Justice
	Mr. Uttit SANKOSIK	Department of Public Prosecution
	Mr. Pandit BUNYAPANA	Fiscal Policy Office, Ministry of Finance
	Mr. Kiatikorn PHROMYOTHI	Chief Economist, Fiscal Policy Office, Ministry of Finance
	Mr. Somkid SREESANGKOM	Economist, Bank of Thailand
VIET-NAM	Mr. Buu HOAN	Executive Director, Industrial Development Center

Secretariat: Mr. P. Sella)
Mr. C.W. Pinto) Legal Department, IBRD

NOTE

This document contains a summary record[1] of the proceedings of the consultative meeting of legal experts held at Bangkok on the proposals contained in the Working Paper entitled "Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (Doc. COM/AS/1).[2]

Suggestions made by the experts for changes in drafting, for improvement of the English and French texts, and for conforming one text more closely to the other, were noted by the Secretariat but have not been included in this record.

FIRST SESSION
(Monday, April 27, 1964 - 11:00 a.m.)

Opening Address by His Excellency Sunthorn Hongladarom, Minister for Finance of Thailand

The CHAIRMAN invited His Excellency to open the session.

His Excellency Sunthorn Hongladarom, Minister for Finance of Thailand, after welcoming the participants to Bangkok, congratulated

[1] This summary record was sent to the delegates for clearance in provisional form and reflects their comments
[2] Doc. 24

the Bank on having taken the initiative and continued to play an important role in attempting to resolve problems relating to the settlement of investment disputes. The inherent difficulties involved should not be a deterrent to exploring all possibilities in order to produce a multilateral convention which would be acceptable and satisfactory to both capital-exporting and capital-importing countries.

While most countries had to rely largely on their own resources for their economic development, at the outset outside help in the form of grants, loans and investments was necessary.

A balance should be struck between the natural interest of foreign investors in the safety of their investments and the fear of capital-importing countries of encroachment upon their sovereignty and freedom of action.

He wished the delegates all success and a happy stay in Bangkok.

The CHAIRMAN thanked His Excellency for his statement and invited U Nyun, Executive Secretary, ECAFE, to take the floor.

Opening Address by U Nyun, Executive Secretary, Economic Commission for Asia and the Far East

U NYUN welcomed the delegates to the meeting. The countries of the ECAFE region had already benefited from various types of aid including private investment and had, in fact, done much to improve the climate for investment particularly in projects relating to industry, power, irrigation and transport. Investments in the region, which were often negotiated by private enterprises themselves and sometimes by the governments concerned, covered not only the provision of finance but also other related factors such as royalties, charges for technical services, participation of local capital and personnel in the establishment and management of enterprises.

However, a government in implementing its plans for development might take certain measures affecting not only purely national ventures, but also projects financed from abroad, and misunderstandings or disputes could arise regarding implementation of agreements entered into by investors. The Bank considered it desirable to evolve suitable facilities for the settlement of such misunderstandings or disputes, and the task before the delegates was to consider the desirability and practicability of establishing institutional facilities such as those provided for in the draft Convention. He recalled that systems of arbitration and conciliation had already been evolved by governments and private enterprises and that ECAFE had itself actively encouraged the institution of commercial arbitration in that region.

He considered the meeting to be of vital importance. ECAFE had for many years taken a keen interest in measures for financing economic and social development in the region and recognized the need for and the importance of finding a formula whereby the interests of investors as well as the sovereignty of host countries could be protected, and which would take due account of the special needs of those countries in their present state of economic, social and political development.

He expressed his gratitude to His Excellency Sunthorn Hongladarom for his valuable opening address and paid tribute to the Minister's admirable work for Thailand and for ECAFE.

He wished delegates success in their deliberations.

Chairman's Opening Address

The CHAIRMAN welcomed the delegates on behalf of the President of the International Bank for Reconstruction and Development. He thanked His Excellency the Minister for Finance of Thailand for his words of greeting and expressed his gratitude to the Executive Secretary of the Economic Commission for Asia and the Far East for his statement and for the facilities made available by the Commission. The fact that the Bank was holding the present meeting in ECAFE headquarters was evidence of the good relations and spirit of co-operation existing between the Commission and the Bank in their common effort to promote economic and social well-being in the ECAFE region.

The current meeting was the last of four consultative meetings of legal experts convened by the Bank to discuss informally a draft Convention on the settlement of investment disputes. The discussion at the previous meetings had been constructive and the comments and opinions expressed had been most useful. At the African meeting[3] most of the countries represented had shown great interest in the proposals and there had been no objection on grounds of principle to the essential features of the draft. At the meeting in Latin America[4] a number of participants had expressed their governments' reservations concerning certain innovations which the draft sought to introduce into traditional international law as understood in Latin America. However, other delegates had welcomed the proposals emphasizing the optional nature of the proposed Convention. A number of Latin American experts had also expressed the opinion that the time had come for their countries to re-examine their traditional attitude towards foreign investment.

At the meeting in Europe[5] there had been general support for the proposed Convention, but several delegates had stressed that it would achieve its purpose of encouraging the flow of capital to developing countries only if a sufficient number of these countries found it acceptable. On balance, the Bank had been greatly encouraged by the way in which its proposals had been received at the three meetings.

It was most gratifying that so many governments had agreed to attend the current meeting and that such eminent representatives had been designated.

The fact that the World Bank had taken the initiative in promoting an international agreement in a field which might not be regarded as falling directly within its sphere of activity was due to the fact that the Bank was not merely a financing mechanism but, above all, a development institution. While its activities did consist in large part in the provision of finance, much of its energy and resources were devoted to technical assistance and advice directed toward the promotion of conditions conducive to rapid economic growth, to creation of a favorable investment climate in the broadest sense of the term. To that end, sound technical and administrative foundations were essential, but no less indispensable was the firm establishment of the Rule of Law.

[3] See Doc. 25
[4] See Doc. 27
[5] See Doc. 29

International investment was universally recognized as a factor of crucial importance in the economic development of the less developed parts of the world and had become one of the major features of the partnership between the richer and poorer nations; its promotion was a matter of urgent concern to capital-importing and capital-exporting countries alike. That was particularly true of private foreign investment which, if wisely conducted, could make great contributions to the development of the economies of the recipient countries.

Unfortunately, private capital was not moving in sufficient volume to areas in need of capital, one of the most serious impediments to its flow being the fear of investors that their investment would be exposed to political risks such as outright expropriation, government interference and non-observance by the host government of contractual undertakings on the basis of which the investment had been made.

The Bank had therefore been led to wonder whether, in view of its reputation for integrity and its position of impartiality, it could not help in removing that obstacle to private investment. It had on a number of occasions been approached by governments and foreign investors who had sought its assistance in settling investment disputes and had been encouraged to bend its efforts in that direction by such events as the enactment by Ghana of foreign investment legislation which contemplated the settlement of certain investment disputes "through the agency of" the World Bank. Similarly, Morocco and a group of French investors had entrusted to the President of the Bank the appointment of the President of an arbitral tribunal to settle disputes that might arise under a series of long-term contracts.

The Bank had concluded that the most promising approach would be to attack the problem of the unfavorable investment climate by creating international machinery which would be available on a voluntary basis for the conciliation and arbitration of investment disputes. Some might think it desirable to go beyond that and attempt to reach a substantive definition of the status of foreign property. There was need for a meaningful understanding between capital-exporting and capital-importing nations on those matters. The draft on Protection of Foreign Property, prepared in the Organization for Economic Cooperation and Development[*] might constitute a useful starting point for discussions between those two groups of countries. At the same time, however, there was need to pursue a parallel effort of more limited scope, represented by the Bank's proposals.

The Convention would make available institutional facilities and procedures to which States and foreign investors could have access on a voluntary basis for the settlement of investment disputes between them. In the opinion of the Bank those facilities and procedures were better suited to disputes between a State on the one hand and a foreign investor on the other than those offered by other existing or proposed institutions. Taken by themselves, however, they could be put into effect by administrative action by the Bank and would not require the conclusion of any inter-governmental agreement.

Such institutional facilities were nevertheless, in his opinion, secondary to other parts of the proposal, which it was necessary to embody in a Convention.

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[*] See OECD Doc. 15637, dated December 1962, revised and reissued as OECD Doc. 23081, dated November 1967

Those parts comprised, firstly, recognition of the principle that a non-State party, an investor, might have direct access, in his own name and without requiring the espousal of his cause by his national government, to a State party before an international forum. States, in signing the Convention would admit that principle, but only the principle. No signatory State would be compelled to resort to the facilities provided by the Convention, or to agree to do so, and no foreign investor could in fact initiate proceedings against a signatory State unless that State and the investor had specifically so agreed. However, once they had so agreed, both parties would be irrevocably bound to carry out their undertaking and the Convention established rules designed to prevent the frustration of the undertaking and to insure its implementation.

Secondly, while the Convention implied a recognition that local courts were not necessarily the final forum for the settlement of disputes between a State and a foreign investor, it did not imply that local remedies could not play a major role. When parties consented to arbitration, they would be free to stipulate either that local remedies might be pursued in lieu of arbitration, or that local remedies must first be exhausted before the dispute could be submitted for arbitration under the Convention. If the parties to a dispute had not made either stipulation, then and only then did the Convention provide that arbitration would be in lieu of local remedies.

A third and more important feature of the Convention followed from the fact that in traditional international law a wrong done to a national of one State for which another State was internationally responsible was actionable not by the injured national, but by his State. In practice that principle had been superseded in a number of cases in which provision had been made for the settlement of investment disputes by direct conciliation or arbitration between the host State and the foreign investor. The internationally binding character of such arrangements had not, however, been recognized hitherto, and the Convention was designed to fill that gap.

Every international agreement signified the acceptance in one form or another of a limitation of national sovereignty. The proposed Convention was intended to give internationally binding effect to the limitation of sovereignty inherent in an agreement by a State pursuant to the Convention to submit a dispute with a foreign investor to arbitration. As a corollary of the principle of allowing an investor direct and effective access to a foreign State without the intervention of his national State it was proposed - and this was an important innovation - that an investor's national State would no longer be able to espouse a claim of its national. In this way it was sought to ensure that States would not be faced with having to deal with a multiplicity of claims and claimants. The Convention would therefore offer a means of settling directly, on the legal plane, investment disputes between the State and the foreign investor and insulate such disputes from the realm of politics and diplomacy.

Fourthly, awards of arbitral tribunals rendered pursuant to the Convention would be recognized by, and enforceable in all Contracting States as if they were final judgments of their national courts, regardless whether the State in which enforcement was sought was or was not a party to the dispute in question. In that connection he wished to make it clear that where, as in most countries, the law of State immunity from execution would prevent enforcement as opposed to execution against a private party,

the Convention would leave that law unaffected. All tha Convention would do would be to place an arbitral award rendered pursuant to it on the same footing as a final judgment of the national courts. If such judgment could be enforced under the domestic law in question, so could the award; if that judgment could not be so enforced, neither could the award.

Fifthly, it should be borne in mind that the Convention did not lay down standards for the treatment by States of the propsrty of aliens, nor did it prescribe standards for the conduct of foreign investors in their relations with host States. Accordingly, the Convention would not be concerned with the merits of investment disputes but with the procedure for settling them.

While the Bank believed that private investment had a valuable contribution to make to economic development, it was neithsr a blind partisan of the cause of the private invsstor, nor did it wish to imposa its views on others. He did not expect or think it desirable that all disputes between foreign investors and host States should neceesarily be dealt with by tha facilities established under ths Convention, nor was it intended to supersede national jurisdiction ganerally. It should, however, be stressed that there might be instancea when recourse to an international forum would be in the interests of the host State as well as in those of the investor.

Two further points needed emphasis. The first was that the Convantion was designed to dsal with claims by host States against invastors, as well as with claims by investors against host States; ths second was that the Convention dealt with conciliation as well as with arbitration. As to the latter, it might wall be found when the Convention came into operation, that conciliation activities under the auspices of the Center proved more important than arbitral proceedings.

In conclusion he pointed out that the Convention left Statee and investors free to establish their mutual relations on whatevar basis thay deemad proper. Its true significance lay in the fact that it ensursd that if the parties agreed to have recourse to an international forum, thair agreement would be given full effect. This would creata an elemant of confidence which would, in turn, contribute to a healthier inveetmant climate.

Tha saasion was suspended at 11:55 a.m. and resumed at 12:15 p.m.

General Comment on the Working Paper

Mr. SERM (Thailand) said that the subject matter of the proposed Convention was of great importance both to developed and to developing countries. The draft should therefore be considered not only from the theoretical point of view but also from the standpoint of the feasibility of applying its proposals at the current stage of international relations.

The Preamble of the draft made it clear that the principle of jurisdiction by consent, generally recognized in settling international disputes, was to be applied, and to that extent the draft Convention was unexceptionable. However, past experience showed that even when jurisdiction was based on consent, judicial machinery for the settlement of international disputes had not worked satisfactorily.

Among the characteristic features of voluntary jurisdiction which unfortunately appeared also in the provisions of the draft Convention, was the fact that no detailed definition was given of the types of disputes which would come under the jurisdiction of the proposed International Conciliation and Arbitration Center. The term "dispute of a legal character" given in Article II, Section 1 could give rise to uncertainty, particularly in view of the fact that a State, in the ordinary course of exercising governmental functions, may have to take various broad measures which could affect the interests of foreign investors e.g. measures required to protect the health, morals and welfare of the community, as well as the security of the nation.

The question regarding the law to be applied by an international tribunal had given rise to much controversy in the past and was raised again by Article IV, Section 4 (1). In the ordinary system of international arbitration or adjudication, the fundamental rule was that the tribunal should apply rules of international law deemed applicable to the case before it, in which process it might take cognizance of the national systems of law not so much with a view to determining the dispute itself but rather in order to determine whether there was an applicable general principle of law recognized by civilized nations.

The draft Convention, however, empowered the Arbitral Tribunal to apply the rules of national or international law "as it shall determine to be applicable". While the national law referred to could and should mean none other than the internal law of the State party to the dispute, it could, however, conceivably include the law of the State of the individual investor party to the dispute, or indeed any other national system of law whatsoever. Such a procedure could give rise to strange results. In the light of the general principles of private international law, the nationality of a party could not justifiably be considered so controlling as to necessitate the application of the national law of that party as the proper law governing the dispute.

Passing to the provisions concerning the enforcement of arbitral awards, he said that the obligations entailed by Article IV, Section 15 were extremely wide and were bound to encounter formidable obstacles in practice. In Thailand, an arbitral award could be recognized and enforced only after either party to the arbitral proceedings had made application to a competent court and that court had entered a judgment in consonance with the award. There could be no automatic enforcement of arbitral awards. The provisions of Article IV, Section 15 went far beyond the normal universal practice of States as evidenced in Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

He expressed doubt whether the establishment of facilities for voluntary conciliation and arbitration of investment disputes would do much to improve the investment climate. A viable and reliable system of settling disputes would be of great interest to prospective investors but it was only one of the many factors which would stimulate the flow of investment.

He stressed that the views which he had expressed were not final and should not be considered as committing the Thai Government in any way.

The CHAIRMAN said that in order to conserve the time of the opening session for statements by delegations, he would defer stating

his own views on the important issues raised by Dr. Serm until tbe subjects were reached in the article-by-article discussion of the draft.

Mr. QUILL (New Zealand) said that borrowing by New Zealand had not been subject to any restriction as to the application of the borrowed funds and that New Zealand had rarely lent money. As a State it had therefore had no experience in inveetment disputes of the type contemplated in the draft Convention and could approach the proposals only from a theoretical standpoint. It was, however, familiar with conciliation and arbitration procedures in domestic law, and it welcomed the opportunity of considering the extension of those procedures into tbe wider field of investment disputes between States and nationals of other States.

Three points which needed discussion and clarification were:

1. whether conciliation as a means of settling investment disputes was useful in disputes of a legal character;

2. whether the proposed macbinery to establish conciliation panele and arbitration tribunals was not over-elaborate; and

3. whether the term "investment dispute of a legal character" was sufficiently clear.

Mr. GOONERATNE (Ceylon) expressed his gratitude to the Bank for its work in convening the meeting and thanked the Chairman for his clear introduction of the points to be discussed.

His country attached very great importance to conciliation and arbitration as methods of settling international disputes and to the establishment of the rule of law in international investment. It is in pursuance of this policy that his country had accepted and ratified conventions relating to Pacific Settlement of International Disputes, International Arbitrations and the Measure of Recognition to be given to Arbitral Awards. However, the establishment of an international rule of law depended on the acceptance of judicial settlement of international disputes; such a legal order should be equitable and acceptable to all States and based on a sympathetic understanding not only of legal concepts but also the economic problems of different countries.

It might be helpful to consider the desirability of declarations regarding the obligations of capital-importing countries to the foreign investor, as well as the foreign investor's responsibility in relation to the economy of the country in which he was making the investment. The ultimate aim was to foster mutual confidence and goodwill which formed the only basis for successful international co-operation. It was therefore essential that the capital-importing and capital-exporting countries should make an attempt to understand each other's point of view with sympathy, without thinking too narrowly of legal rights and obligations which flow from traditional concepts which might appear to them to be universal and fixed but which may quite legitimately have only limited acceptance elsewhere.

It seemed important to bear in mind the achievements made by international organizations in establishing procedures for the settlement of disputes, and to recognize the need to evolve a machinery for the settlement of disputes that would command the unreserved confidence of the disputants. Such confidence was a minimum requirement that any government must be able truly to offer its national Parliament before it could be asked to agree to divest itself of much of its domestic sovereignty in this field of law.

The draft Convention should be considered in as wide a forum as possible, giving particular attention to aspects where departures from accepted international law or practice were involved.

It was important to consider carefully the relationship of the Bank to the Center so that confidence in the Center and its image of independence might not be affected. He added that if the proposal were restricted to concilietion it would not appear removed from the Bank's real function and there would be no danger that the relationship of the Bank to the Center would impair the latter's independence.

A precise definition of the scope of jurisdiction of the Center was vital. Also it should be remembered that in international law and actual practice, there existed certain disputes which were eccepted generally as not being justiciable despite the fact that on legal principles alone it might appear that they could be resolved.

Several countries such as Ceylon, newly independent from foreign rule, had only recently been able to regulate the terms of admission of foreign investment. Since the express intent of the Convention was to create a favorable climate for foreign investment in the future, it was important to recognize the validity of a distinction between old and new investment. The status of the capital-importing countriea at the time of the foreign investment should also be taken into consideration as otherwise the Convention could be criticized on the grounds that it gave additional protection to existing investment in certein countries without a corresponding increase of investment that could be traced to the Convention.

Mr. LANDAU (Israel) urged that efforts be made to narrow the gep in the standard of living between the developed and developing countries both by unilateral aid by governments and by increasing private capital investment, and he recalled that proposals by his Government for promoting privete investment were at present under discussion at the UN Conference on Trade and Development in Geneva. The Convention would help to remove present uncertainties, increasing investors' confidence by providing a forum for concilietion or arbitration. It would be necessary in bringing the Convention into operetion to find a formule which would preserve the effectiveness of the arbitretion machinery without deterring too many countries from accepting the Convention, which would serve its purpose only if adhered to by a majority of all capital-exporting and capital-importing countries.

More precise definition of some terms in the draft Convention seemed desirable, in particular of the terms "investment dispute" and "of a legal cheracter".

Parties to the Convention would be Stetes whereae partiee to arbitration and conciliation would be both States and individuals. It might therefore be preferable to request the individual to obtain the consent of his own State before resorting to internetional erbitration. Article IV, Section 17, proposing elimination of diplomatic protection by the State whenever its nationals consented to erbitration under the Convention, seemed to foresee a case in which the individual desired his Stete's protection. It was, however, also possible that an individual might embarrass his State by calling another Stete to arbitration before an international tribunal without even first exhausting the remedies of

the local courts. Some means should be found of avoiding such a possibility.

The Convention empowered an arbitral tribunal to decide a dispute - in the absence of agreement between the parties on the matter - in accordance with such rules of law as it determined to be applicable. The principle by which these rules of law would be determined required more precise definition.

Mr. PANT (Nepal) thought that sponsorship by the Bank of a mechanism for the settlement of investment disputes would improve the investment climate in developing countries and would add to the incentives already provided in those countries to encourage the flow of private capital. The task of expanding private international investment was not easy. Differences in internal legal systems made the outcome of possible litigation sometimes difficult to anticipate; a judgment obtained in one country might not be recognized or executed in another. Those and other problems hindered the creation of a favorable investment climate. Various efforts had been made to ensure the security of foreign capital, such as the rules on the protection of investments abroad proposed by the International Bar Association in 1958 and the International Convention concerning Guarantees for the Investment of Capital proposed by Switzerland, also in 1958.

Since 1961 a favorable atmosphere for foreign investment had been created in Nepal both by the country's political stability and by the enactment of legislation offering many incentives to investors in industry both local and foreign. Since, however, the existing internal legal system of Nepal did not provide quite adequately for litigation of commercial disputes, the proposed Convention would be beneficial in providing an alternative procedure. Its machinery would promote the flow of private capital to the developing countries by allaying investors' fears of expropriation or of the dishonoring of the terms of an agreement by the host State.

Mr. ADARKAR (India) expressed appreciation of the work of the World Bank, and of the Chairman's elucidation of the document in his introductory statement. In India there were no foreign exchange restrictions as regards remittance of profits or dividends, and in cases of approved investments, investors were free to repatriate their capital, including capital appreciation. If foreign property was acquired by the Government, just compensation was provided. Agreements were entered into with foreign investors, and many of them included clauses for arbitration. India ordinarily would therefore not object in principle to a Convention of the type proposed, but it shared the doubts expressed by the delegates of Thailand and Ceylon.

The basic principles as set out in the Preamble did not, in his opinion, state the problem adequately and failed to bring out the fact that the Convention involved an important departure in international law.

This Convention aimed at setting up a forum where States and individuals were placed on a par. It overlooked an important aspect in the relationship between the State and foreign investor, viz. that corresponding to the duty of the State to give just and equitable treatment to foreign investors, there was an obligation for foreign

investors to abide by national policies and laws of the State. No investor should be able to challenge any measure taken by a State in the lawful pursuance of its national policy unless such measure involved discrimination against a class of investors, or was in conflict with the terms of a contract between the State and an investor.

Although it was true that national laws might not take into account all the difficulties of the private investor, the right course would be to guard against such difficulties by specific contracts or intergovernmental arrangements. If, under a specific contract with a foreign investor a State agreed to arbitration, it placed itself on a par with the investor for that particular purpose. The Convention on the other hand placed the foreign investor and the State on a par regardless of any law, national or international, or the terms of any contract or other arrangements between the State and the foreign investor.

There was also no precise definition of the category of disputes referrable to the Center and that was a fundamental weakness. Only one limitation had been explicitly stated, namely the consent of parties, and thus a tremendous burden was placed on the State. The explanation that a more precise definition would open the door to disagreements was inadequate.

This vagueness would in his opinion increase rather than minimize the likelihood of disputes and would probably expose States to pressure to consent to arbitrate disputes which would not be arbitrable under any international law or understanding.

Section 2(3) of Article II on jurisdiction allowed a party to submit a dispute to the Center even before the State's consent had been obtained, and then to try to use the good offices of the Secretary-General to secure the consent of the State. As a precise definition of disputes within the jurisdiction of the Center was lacking, it would be difficult for the Secretary-General to decide whether he should take the matter up with the State concerned or try to discourage the investor from pursuing his request.

The Convention in fact conferred an additional right on the foreign investor without placing additional obligations on him, and thus the basic principle of reciprocity, fundamental in all international agreements, was not present.

Refusal of consent could cause considerable damage to the reputation of the State for fair dealing if that refusal were to be misinterpreted as being due to an unwillingness on the part of the State to submit to international jurisdiction. Such a refusal might very well be entirely bona fide as where, for instance, the matter concerned national policy, or again if the matter did not involve discrimination between foreign and national investors or conflict with any contractual obligation of the State. In such cases no purpose would be served by submitting it to an international tribunal because an award involving a change in the national law would be unenforceable. If a distinction were not drawn between cases where the dispute itself was not arbitrable according to the principles laid down in the Convention or otherwise internationally agreed upon, and those others where the State was unwilling or unable to submit itself to international juris-

diction, the Convention would either compel every State to agree to conciliation or arbitration in every case for fear of an adverse inference or, alternatively, it would create an unnecessary and unwarranted impediment to the flow of foreign investment instead of promoting it, which was the object of the Convention. In his opinion, therefore, it was essential to clarify the precise scope of an undertaking under the Convention. If an "investment dispute of a legal character" were to be related to a specific contract or agreement between the State and the investor, or to an undertaking given in local legislation, he would have less difficulty.

Assuming, however, that the intent of the Convention was to enforce only those obligations of a State undertaken by it pursuant to any law, specific contract or international arrangement, he was not clear as to how the Convention would improve the existing position. Those instruments normally specified the machinery for settlement of disputes arising out of them, and India had always honored its undertakings in such cases. If, on the other hand, that was not the intent of the Convention, then a clear statement of the kind of circumstances in which an obligation or an "investment dispute of a legal character" could arise without reference to any law or agreement would be needed. In this connection he referred to other international instruments like the Bank's Loan Regulations[7] and the Rules of the International Chamber of Commerce, under which arbitral proceedings were available in respect of disputes arising out of specific agreements. The United States agreements in connection with its program of investment guarantees, for instance, provided for settlement on the intergovernmental plane of disputes arising out of such agreements. In general, they covered two or three specific problems which, by their very nature, were not always suitable to be dealt with in contracts with investors, e.g. convertibility, expropriation, and war risk. In addition, while they took account of the particular difficulties of the investor, they did not offend the principle of equality of status between foreign and national investors. While he recognized that the Convention sought to deal with a far wider variety of investment disputes, he was not clear as to why any legitimate investment dispute could not be dealt with on those lines and why it was considered necessary to create a forum where a foreign investor was placed in a position vis-à-vis the host State different to that of the national investor not only with respect to specified aspects of his relationship but with respect to his entire relationship with that State.

Two further points needed clarification. If the Center was meant to function as a judicial body, serious consideration should be given to the propriety of its having links at all levels with the World Bank which was not a judicial body, and in his view, the reasons for those links given in the Working Paper did not justify them. He wished to make it quite clear, however, that he did not thereby imply any criticism of the Bank's impartiality, or its interest in, and its valuable contribution to, the economic development of the developing countries. At the same time it had to be considered whether the link would really operate to the advantage of the Center or to that of the Bank. It had been said on the one hand that the Center would benefit from the Bank's image and reputation for impartiality, and on the other - and this he thought was contradictory - that the Bank would have no influence whatever over the proceedings under the auspices of the Center. If the latter were true he wondered what benefit the Center could possibly derive from its connection with the Bank.

[7] See Loan Regulations No. 3 and No. 4, dated February 15, 1961 (amended February 9, 1967), Sections 7.03 and 7.04

A similar problem arose with regard to the Secretary-General. The Working Paper on page 9 emphasized the importance of the Secretary-General's maintaining a position of complete independence vis-à-vis Contracting States as well as the Administrative Council. But he would welcome clarification as to whether, if at all, the Secretary-General might be affected in the discharge of his functions by the fact that he would not be independent of the Bank, and might even be one of its employees.

In conclusion, he expressed support for the Ceylon delegate in urging that the draft receive careful consideration in a somewhat wider forum where there would be an opportunity to receive the benefit of the views of other developing countries in Africa as well as of those in Latin America. He hoped that before the final draft of the Convention was adopted by the Bank and recommended to Governments it would be considered in such a wider forum.

The CHAIRMAN said that he would depart briefly from his announced intention to defer replies to opening statements until the next day because he thought that some of the views expressed by Mr. Adarkar and earlier speakers reflected a possible misreading of the text. As to the Preamble, he said that it did not impose duties on investors nor did it seek to establish standards of fair treatment of investors by host States. On the contrary, all reference to matters of substance of that nature had been avoided, and the Convention limited entirely to the procedural aspects. In that connection he would like to stress that the Convention did not, as had been suggested by Mr. Adarkar, give the investor new rights without corresponding obligations. Indeed it gave the investor no rights whatever but only a procedural capacity in cases where States had consented to proceedings under the Convention.

The question of a definition of the scope of activities of the Center was of obvious importance, and he had heard a variety of views on this point at previous meetings.

Regarding a State's refusal of a request made ad hoc to submit a dispute to the Center, he could not agree that such dire consequences were to be feared, and this point would be taken up in due course as would be the question of the link with the Bank. As to the latter question he could not agree that the statements on page 9 of the Working Paper referred to by Mr. Adarkar were contradictory. Not only were there sound practical reasons for linking the Center to the Bank, but account should also be taken of certain imponderables best exemplified by the fact that in the past, governments as well as private investors had come to the Bank for assistance in settling their disputes - a fact which had given rise to the idea of a Convention in the first place.

On the question of the role of the Secretary-General, he personally felt that, except possibly during the early stages of the Center's existence, the Secretary-General ought to be a full-time official of the Center and should have no connection either with the Bank or with the Permanent Court of Arbitration. The relevant provisions as drafted at present reflected a variety of views - both those of the staff and those of the Bank's Executive Directors.

Mr. HIMADEH (Lebanon) said that the Center as defined would be of considerable assistance in settling disputes connected with international investment and would thus create a more favorable atmosphere for such

investments. He wondered, however, if it would be within the terms of reference of the Executive Directors to add to the principal function of the Center a "preventive" function, viz., to advise on new investment agreements with the object of ensuring clarity of their provisions, full understanding of their implications and fairness of their terms. He was convinced that such a function would not only serve to reduce the number of investment disputes, but would also facilitate their settlement if they did arise. It would also promote international cooperation, since experience had shown that in many cases ill-feelings, which sometimes led to serious disputes, arose from the discovery of adverse implications or unfair terms not understood or perhaps known of at the time the agreement was concluded. In many cases States might not know of qualified consultants or might not have confidence in their advice.

An international organization like the proposed Center would be an ideal channel for this purpose. If it were agreed that such an additional function would further the objectives of the Center, and that it would not be outside the terms of reference of the Executive Directors to give the Center that function, it should not be difficult to implement the proposal. For instance, the Secretary-General might respond to requests for advice by appointing, in consultation with the Chairman of the Administrative Council, a commission of experts qualified in the particular field that was to be the subject of the agreement, to advise the parties on how best to formulate its terms. If the Executive Directors consider, however, that the addition of such an advisory function to the principal function of the Center is not within their terms of reference, they can, if they are convinced of the importance of this addition, recommend to the Board of Governors the adoption of a draft resolution to the effect of including this proposed function in the Convention they have been asked to draft.

Mr. O'DONOVAN (Australia) said that while Australia did make some small capital exports, on a net basis in any year its capital importation was far in excess of its capital exportation.

Australia had a close interest in the Bank's proposals, although the Government had thus far given them only preliminary consideration, and saw an advantage in the idea of creating a scheme of conciliation and arbitration separately from the formulation of a code of substantive rules such as that proposed by the OECD. He pointed out, however, that in practice the remedies provided in Australia by the local courts had to date proved satisfactory to foreign investors and that the current inflow of foreign capital was at a relatively high level. However, he did not think it the function of the delegates at the meeting to express the views of their governments on the desirability or otherwise of establishing the proposed machinery. Rather, in his view, the primary function of the delegates was to examine the draft Convention as lawyers to clarify in their minds the precise purposes of the draft Convention and to make suggestions for its amendment with a view to ensuring that if the draft were to be adopted, it would be capable of convenient operation in practice, having regard to the constitution of and the laws in force in, the vast majority, if not all, of the member States of the Bank.

There were three points to which he would like to invite attention in his opening statement: first, that his main concern was to obtain some clarification of the manner in which it was foreseen that the Convention would apply in relation to a federal State which was predominantly capital-

importing; second, that he had the impression that the draft Convention was concerned not only with investment by foreign investors in consequence of which the invastor directly acquired tangible assets in the host country, but also to the borrowing of cash by the host country from foreign private investors; and third, that he wondered whether any particular difficulties might be involved for Australia by reason of the operation of the Financial Agreement between the Commonwealth and the States with respect to borrowings by the Commonwealth and the States. The Bank was familiar with the latter agreement, but because its provisions were unique to Australia any possible difficulties that might arise from it were probably of little concern to other delegates.

Finally, he emphasized that the Commonwealth had not until then consulted with the States regarding the proposals embodied in the draft Convention, and he hoped that as a result of the meeting they could obtain a clear idea of the ways in which the Convention might affect the States and so facilitate those consultations.

Mr. NEMOTO (Japan) said he recognized the important role of international investment in the field of economic development and favored in principle the establishment of a new international organization for the settlement of investment disputes such as that proposed in the draft Convention. He expressed his appreciation of the efforts made by the Bank toward inaugurating this scheme since 1961.

With a view to making the scheme acceptable and fruitful both to capital-exporting and capital-importing countries he would invite attention to five points. The first concerned the scope of the activities of the Center, and in particular the term "investment" or "investment disputes". Although he sympathized with the view of the Bank's staff that inclusion of a more precise definition of those terms would involve various difficulties and would not necessarily be useful, some further clarification of those terms - and, therefore, of the scope of the proposed scheme - seemed necessary. Second, the Convention provided that arbitral awards would be binding on and enforceable in all Contracting States. In his opinion this provision would be most effective in protecting investors but would only have the desired result of promoting private investment when the necessary internal measures for enforcement of awards were taken in each State. Third, the functions of the proposed Center seemed to overlap in some fields the functions of the Permanent Court of Arbitration, and he considered it desirable that the relationship between the two organizations be re-examined. A fourth point of similar character was the need to consider clarifications and adjustments of the Convention to take account of two other major approaches to the problem of improving the investment climate at present under study by the OECD viz., the draft Convention on the Protection of Foreign Property and the multilateral investment insurance scheme. Finally, as to future work on the Convention, he requested that after the present meeting the World Bank provide a full opportunity in which each government could express its official views or make official proposals before the draft Convention was finalized.

The CHAIRMAN, referring to the question of the relationship of the proposed Convention to the Draft Convention on the Protection of Foreign Property and to the proposals or studies being made in the field of multilateral investment insurance, observed that the three approaches were, in a sense, parallel and complementary efforts toward increasing the flow of international investments. The OECD Convention

imposed certain obligations on States with respect to a minimum standard of treatment of foreign property and provided for a system of compulsory arbitration. The multilateral investment insurance scheme sought to ensure the investor of a measure of compensation if he suffered loss as a result of unfair treatment by the host State.

The present Convention represented the most modest of the three approaches and was based on the belief that the very establishment of facilities where parties could come together voluntarily would be helpful in improving the investment climate. All three approaches had their value and could be acted on in a parallel manner. In his opinion, the proposals embodied in the Convention under discussion would be the least controversial and, therefore, constitute the most promising approach at the present time.

Mr. GOONERATNE (Ceylon) wondered whether copies of the delegates opening statements, some of which were of considerable importance, could be made available in the course of the meetings or immediately thereafter.

The CHAIRMAN explained that at previous meetings it had been the practice not to distribute any statements, in part to conserve the informal character of the meeting, and in part as a result of practical difficulties resulting from a lack of adequate staff for that purpose. The summary records which would be prepared as soon as possible after the meeting would, however, reflect all the substantive points made as well as the flavor of the discussion. These records would first be sent to the participants in the meeting for correction before preparation of the final version.

The meeting rose at 1:40 p.m.

SECOND SESSION
(Tuesday, April 28, 1964 - 8:30 a.m.)

General Comment on Working Paper (continued)

The CHAIRMAN thought that before opening the discussion on Article 1 a few general remarks on his part, inspired by the discussions at the opening session, might be in order.

The Bank's purpose in convening regional meetings of experts had been two-fold: to enable experts from member countries to exchange views regarding the Convention among themselves, and to enable them to exchange views with the Bank's staff. The staff of the Bank - including its President - had, in the light of its assessment of prevailing conditions taken the view that the proposed Convention would benefit the cause of economic development in that it would promote private investment. In doing so it had clearly taken a position on the matter, and one of his functions as Chairman of the meeting would be to explain the beliefs and convictions which underlay that conviction. The Bank had on many occasions in the past taken positions based upon its own judgment, for instance, on certain measures which it believed would foster development, and had actively campaigned for them. These judgments

had invariably been based on professional and non-political considerations. But that did not mean that they were always universally accepted or acclaimed. For some time the Bank had been urging capital-exporting countries to soften the terms of bilateral aid. In that context the Bank was sometimes criticized for allegedly not paying sufficient attention to the financing problems of some of these countries. Again, the Bank's views on how its loanable funds could be allocated so as to produce the greatest effect had sometimes been criticized as having led to an undue concentration of financial transactions in one area or country.

He did not expect that delegates would uncritically accept the Bank's views on the suitability of the proposed Convention but he did suggest that in considering the proposed Convention delegates should bear in mind the fundamental question whether their countries wished to attract private investment - and he thought that most of them did - and, if so, what price they were prepared to pay by way of special concessions and incentives for investors. Most such incentives involved conferring rights on foreign investors, and for that reason he found it difficult to appreciate criticism of the proposals based on the sole argument that they gave investors "additional rights."

Mr. ADARKAR (India) said his country wished to attract private capital and to maintain a favorable investment climate, and for that purpose it was prepared to give the foreign investor the necessary safeguards including additional rights. His criticism, however, had been directed to the fact that the proposals in their present form gave investors additional rights of unspecified scope. In order to make the Convention acceptable to the developing countries, an effort should be made to clarify the precise scope of the benefits it conferred on the foreign investor.

While his country might have no objection to giving the foreign investor additional rights, he believed that such rights should be given by means of specific agreements or understandings, so that the additional rights would be the counterpart of certain additional obligations undertaken by the investor. Under the Convention as it stood the investor enjoyed certain benefits while - as he was himself not a party to the Convention - it placed no obligations upon him. He felt, however, that this criticism could be met by appropriate modification of the text despite the fact that the investor would not be a party to the Convention.

ARTICLE I - International Conciliation and Arbitration Center

The CHAIRMAN proposed that the meeting take up Article I of the Working Paper.

Establishment and Organization (Sections 1 - 3)

Mr. O'DONOVAN (Australia) suggested that consideration be given to modifying Section 2(2) on arrangements with the Bank and Section 2(3) on arrangements with the Permanent Court of Arbitration so as to place them on a par with respect to the use by the Center of the offices, administrative services and facilities of the two organizations.

The CHAIRMAN said it had been felt that a distinction should be made between treatment of the two organizations; since the Bank could signify its approval of the scheme proposed it was somewhat easier to use uncon-

ditional language than in the case of another institution over which the Bank had no influence.

While there had as yet been no formal contact with the Court, he had had informal talks, and had the impression that the Court would welcome arrangements with the Center. The Court had been referred to by name since it was in existence and had publicly announced its wish to make its services available in disputes between States and private parties. Thus while the Center would have its seat in Washington it would have a base in Europe through arrangements with the Court. The reference to "other public international institutions" in Section 2(3) took account of the fact that at some future time parallel arrangements might be made with suitable institutions in Asia, Africa and Latin America.

Referring to the link between the Center and the Bank the CHAIRMAN observed that two issues were involved. The first was the question whether there should be a link at all, and the second was the specific way in which this link would be evidenced. A link with the Bank had been thought useful since in the past both host States and investors had sought the advice of the Bank as being an institution in which both parties had confidence. Again, experience had shown that some governments found it easier to have conciliation or arbitration proceedings under the auspices of an institution of which they were members rather than under the auspices of an institution like the International Chamber of Commerce. He realized, however, that other governments had used the services of the I.C.C.

As to the specific manifestations of the proposed link, the Bank might be able to provide administrative assistance by way of staff and office facilities. The Administrative Council could meet at the time of the Bank's annual meeting so that accommodation and facilities for the Council's meeting would be available without additional expense. Such essentially practical considerations had led to the view that an administrative link was desirable. Other aspects of the link, which would be discussed in due course, were those connected with the appointment of the Secretary-General, the appointment of arbitrators and designation of persons to the Panels.

Mr. GAE (India) referring to the link between the Bank and the Center said he did not think it desirable that the Center, one of whose organs - the Panels - would have judicial functions, should be linked to the Bank, which had administrative functions. Reference had also been made to the "use of the Bank's facilities." As this might be taken to mean that confidential material in the possession of the Bank would be made available in connection with the functions of the Center, an express prohibition against release of such information ought to be included in the Convention. His delegation would like to see the Center established as a fully independent institution.

Section 2 provided that "The seat of the Center shall be at the headquarters of the Bank," while Section 6(vi) gave the Administrative Council power to move the seat of the Center from the headquarters of the Bank by a 2/3 majority of the votes of all its members. To avoid any apparent inconsistency between these provisions, and to make it clear at the outset that the seat of the Center need not always be at the headquarters of the Bank, some phrase like "subject to the provisions of Section 6(vi)..." might be included in Section 2.

The CHAIRMAN referring to Mr. Gae's last point said that while some of the Executive Directors had taken the view that the Center should not necessarily have its seat at the headquarters of the Bank, no Director had objected to having it there initially. However, the way in which their views had been expressed in the draft lacked elegance and might well be improved.

The phrase "use of the Bank's facilities" referred to the Bank's administrative facilities as was clearly stated in Section 2(2) of Article I. He would note Mr. Gae's concern regarding a possible leakage of confidential information in the possession of the Bank, e.g., through a Bank official who was also an official of the Center. He agreed that officials of the Center should not be able to use information they had acquired in any other capacity.

He failed to see what dieadvantages lay in the various aspects of the link with the Bank. While officials of the Bank might also be officiale of the Center, they would have no connection whatever with actual conciliation or arbitration proceedings. Even the Secretary-General would at most act as friend of the parties to the dispute in the manner in which the President of the Bank might act at present. The Panels were lists of names from which persons would be selected by the parties to function as conciliatore or arbitrators. Those persons would act in accordance with their conscience and would certeinly not be influenced by the Bank, much less controlled by it.

Mr. WANASUNDERA (Ceylon) recalled that his delegation had, in its opening address, suggested that it might be preferable to confine the Convention to conciliation, had stated that it was not in agreement with some of the provisions of the draft which were of a fundamental nature, and had questioned the need for and the desirability of having a Convention on arbitration at all. While they would like to participate as fully as possible in discussion of the technical aspects of the proposals, any observations they might make should not be understood to indicate a change in their basic position.

With regard to Sections 1-3, of Article I, his delegation was against the proposed close link between the Center and the Bank save for administrative purposes. Should the Convention eventually cover both conciliation and arbitration, he would suggest that the seat of the Center should be away from the Bank, preferably at a place like The Hague.

Administrative Council (Sections 4 - 7)

Mr. TSAI (China) referred to Section 6(v) which empowered the Administrative Council to adopt Conciliation Rules and Arbitration Rules not inconsistent with any provision of the Convention, and to Section 13(1)(c) of Article IV which permitted an award to be challenged on the ground that there had been a serious departure from a fundamental rule of procedure including failure to state the reasons for the award. The legal systems of States would differ as to what was covered by the term "the fundamental rules of procedure," and for that reason he would make a comment on the latter provision at the appropriate time.

The CHAIRMAN said he would like at that point to invite attention to an ambiguity in the wording of paragraph 7 of the Comment on page 6 the

last sentence of which was to the effect that the Conciliation and Arbitration Rules to be adopted pursuant to Section 6(v) would become binding on the parties to a dispute "only with their consent". It might perhaps have been clearer to say that those rules would be binding "except as the parties otherwise agree" - which was the wording used in Section 4 of Article III and Section 5 of Article IV to which reference was made in that connection.

Mr. EL-FISHAWY (Kuwait) would like to raise another point in that connection. Section 4 of Article III and Section 5 of Article IV stated that the time at which the Conciliation and Arbitration Rules respectively applicable in proceedings would be determined was the time when consent became effective. That was not necessarily the same time as that when consent had been given, and there might be an interval between these two points in time. During that interval the applicable rules might have been changed by the Administrative Council so that the consent of the parties would not in fact relate to the rules of which they were aware and had accepted as applicable at the time they gave their consent. In his opinion, therefore, it would be preferable to state that the rules applicable to the proceedings were the rules prevailing at the time consent was given rather than those prevailing at the time when that consent became effective.

Mr. ADARKAR (India) asked why Section 4 of Article III differed from Section 5 of Article IV in the matter of applicable rules of procedure. In the case of conciliation, if the parties wished to depart from the Conciliation Rules adopted by the Administrative Council, then not only agreement of the parties but also of the commission was required, while in the case of arbitration, for any departure from the Arbitration Rules, only the agreement of the parties was required.

The CHAIRMAN said that the reason for the distinction was that since conciliation was an informal proceeding, it had been thought that conciliators ought to be given more influence on the procedural rules. However, experts at previous meetings had also criticized the distinction referred to, and he had been convinced that it would be better to take away a Conciliation Commission's power in effect to veto the agreement of the parties.

Mr. UL ISLAM (Pakistan) thought that the formulation of Conciliation and Arbitration Rules ought not to be left to a body like the Administrative Council which might even find it impossible to reach agreement upon such rules as a result of the conflicting interests represented by the capital-exporting and capital-importing countries. It would be preferable to incorporate rules of procedure in the Convention, so that they might be adopted at the same time as the Convention, and, therefore, reflect the consensus of all signatory States.

The CHAIRMAN said that the rules of procedure had been left out of the Convention in part to limit its scope at this stage of the deliberations and in part for the reason that rules of procedure should have a greater flexibility than would be afforded through incorporation in the text of an international agreement. However, he was convinced that it would be desirable to have model rules of procedure ready in some form before the Convention was put up for signature. While it would be impractical to incorporate detailed rules in the Convention since that would make them as rigid - as far as amendment was concerned - as the Convention itself, they could be included in an annex subject to change by the Administrative Council. This might to some extent meet the concern which had been expressed at thie and other meetings that there might be a split of opinion between the capital-importing and capital-exporting

countries on the question of the substance of the rules of procedure. It should be remembered, however, that if the Convention achieved even moderate success a 2/3 majority could only be obtained with the support of the capital-importing countries since they were by far the more numerous.

Mr. UL ISLAM (Pakistan) elaborating upon his earlier statement said that in his opinion the main rules of procedure should be annexed to the Convention, and should be capable of amendment only in the manner prescribed for amendment of the Convention itself. On the other hand minor detailed rules should be left to the tribunal or commission so that those rules would reflect the agreement of the parties concerned. To leave the framing of such rules to the Administrative Council - which would act by majority vote - might be regarded as infringing the traditional principle of sovereignty of States.

The CHAIRMAN saw certain difficulties in providing for three tiers of rules viz., those in the Convention, those in the annex or protocol, and those left for formulation by the tribunal or commission. Many minor rules would be of a non-controversial nature, and it might impose an unfair burden on a commission or tribunal to require it to formulate rules in each case. It would be simpler if such rules could be adopted by the Administrative Council which, it should be remembered, was composed of representatives of States and not mere officials. It was true, however, that decisions of the Council were subject to the majority rule, and the whole matter would be given further thought.

Mr. TSAI (China) supported the view of the delegate of Pakistan that the fundamental rules of procedure should be included in the Convention either in an annex or as an integral part of it. In the first place, the Convention was intended to offer investors a procedural safeguard, and should, therefore, itself contain the relevant procedural rules. Second, the Convention provided that an award could be invalidated on the ground of a "departure from a fundamental rule of procedure", and in the interests of clarity it seemed necessary that such rules form part of the text.

The CHAIRMAN, while agreeing that the question of rules of procedure should be subjected to further review, pointed out that the term "fundamental rule of procedure" contemplated in Section 13(1)(c) of Article IV should be understood as having a wider connotation than that of concrete rules to be adopted by the Administrative Council. "Fundamental rules" would comprise, for instance, the so-called principles of natural justice e.g. that both parties must be heard and that there must be adequate opportunity for rebuttal. At a previous meeting it had been suggested that the term in question should be replaced by "fundamental principles of justice".

Mr. O'DONOVAN (Australia) wished to make three points. (1) The second sentence in Section 5 which read: "During the President's absence or inability to act and during any vacancy in the office of President of the Bank, the person who shall be the chief of the operating staff of the Bank shall act as Chairman," did not effectively cover the case where the President of the Bank retained his office and functions as chief of the operating staff, but was still unable to act. (2) As the Convention could continue for a long period and as the business of the Center might in time be quite substantial, some provision should be included which would enable a meeting of the Administrative Council to take place apart from the meeting of Governors of the Bank, if, for some reason, such an arrangement were more convenient. (3) The delegate from Kuwait appeared to have taken the

view that consent to arbitration or conciliation under the auspices of the Center included also consent to submit to the rules of procedure adopted by the Administrative Council. He was himself of the opinion that consent to the jurisdiction of the Center was independent of the question whether the parties would agree to the Council's rules of procedure, and that the latter would be dealt with perhaps not at the time consent was given, but at the time when a dispute did in fact arise.

The CHAIRMAN said it was quite possible that the parties would expressly leave open the matter of procedure to be determined at a later time. If no such provision was made, then the resulting gap in the agreement between the parties would be filled through operation of the residual clauses in Section 4 of Article III and Section 5 of Article IV which provided that in the absence of a contrary agreement between the parties, the rules adopted by the Administrative Council and in force at the time when consent was given would apply.

With regard to the possible need to hold meetings of the Administrative Council at times other than the occasion of the annual meeting of the Bank, he pointed out that provision for such meetings had been made in Section 7(1).

Mr. GHANEM (Lebanon) invited attention to an apparent inconsistency between Section 7(5) which stated that members of the Administrative Council and the Chairman would serve "without compensation from the Center," and Section 20(2) which exempted from taxation the salaries or emoluments paid by the Center to the Chairman and members of the Administrative Council.

The CHAIRMAN agreed that the provisions quoted appeared to contradict one another and that several experts at previous meetings had proposed that the text be clarified. The contradiction was, however, only apparent, as while the Chairman and members of the Administrative Council would not receive "salaries" from the Center, they might nevertheless receive other payments such as reimbursement for travel expenses, and subsistence allowances which, in some countries were in principle subject to taxation. It might be possible by adding a few words to make it clear that the term "salaries" in Section 20(2) had no application in relation to the Chairman and members of the Administrative Council.

Mr. GAE (India) said that if the Administrative Council were to be composed of such important persons as those who acted as Governors of the Bank, it might be difficult for it to convene at short notice between annual meetings of the Bank. He would, therefore, suggest that an Executive Committee be constituted which could perform some of the functions of the Administrative Council during such an interim period. For instance, the power to nominate the Secretary-General and Deputy Secretary-General could be given to such a Committee. Where action was taken by the Committee on important questions, their decision could be subject to ratification by the Council. He thought the Bank's Executive Directors might well act as such a Committee, and noted that a similar function was entrusted to the Court of Arbitration of the International Chamber of Commerce.

Referring to the second sentence of Section 5, he asked whether "the person who shall be the chief of the operating staff of the Bank" could mean anyone other than the President, since Article V, Section 5(b) of the Articles of Agreement of the Bank provided that "The President shall be the chief of the operating staff of the Bank."

Section 6 which enumerated the powers and functions of the Administrative Council might be interpreted as being exhaustive, and it might, therefore, be desirable to add to it a residual clause which would enable the Council to perform such other functions and exercise such other powers as it might consider necessary with a view to giving effect to the Convention.

In connection with Section 7 on meetings of the Administrative Council, he suggested that a provision be included empowering a specified number of members, say 1/5 or 1/10 of the members of the Council, to convene a meeting by declaration.

In conclusion he urged that consideration be given to resolving the inconsistency between Section 7(5) and Section 20(2) referred to by the expert from Lebanon.

The CHAIRMAN said that Mr. Gae's suggestion to provide for an Executive Committee of the Administrative Council, and that the Bank's Executive Directors might well act as such a Committee, had been made at a previous meeting as well. In his opinion, however, it would be better to give such a Committee only powers of recommendation coupled with a provision which would enable the Administrative Council to vote by mail, following the precedents of the International Monetary Fund and of the Bank and its affiliates. As to the use of the phrase "the chief of the operating staff of the Bank," Mr. Gae was correct in stating that the Bank's Articles of Agreement did not designate any person to act in that capacity as deputy to the President. It was precisely in order to fill that lacuna that Section 5 provided in effect that if the President of the Bank were unable to act, the person who, though he lacked the title "President" was nevertheless for the time being chief of the operating staff of the Bank, should act as Chairman of the Council. He was himself in favor of Mr. Gae's suggestion to add a clause to Section 6 giving residual powers to the Council but would like to hear comments on the point from the other experts. He was also in agreement with the suggestion that some provision be included requiring that the Council convene at the request of a specified number of its members.

Finally Section 7(5) would be amended to make it clear that, while it prohibited payment of "compensation" to the Chairman and members of the Council, that provision did not exclude reimbursement of their reasonable expenses, and was thus not inconsistent with Section 20(2).

Mr. WANASUNDERA (Ceylon) said that the question whether the President of the Bank should _ex officio_ be Chairman of the Council depended on whether it was thought desirable to have a very close link between the proposed Center and the Bank. He himself would prefer that the link be a loose one, and that Section 5 be modified accordingly. This suggestion in no sense cast a reflection on the impartiality or the integrity of the President of the Bank but was motivated by considerations of principle.

While he associated himself with the comments of other delegates on Section 6(v) on the adoption by the Council of rules of procedure, he would, in addition, like to see the required majority increased from 2/3 to 3/4.

Finally he suggested that the application of the second sentence of Section 7(1), which empowered the Council by regulation to establish a procedure whereby the Chairman might obtain a vote of the Council on a

specific question without calling a meeting, be confined to matters of a purely administrative nature.

Mr. LAZO (Philippines) referring to Section 6(iii) on the power of the Administrative Council to approve the annual budget of the Center, enquired what would be the source of income of the Center. The Convention ought to specify how the charges for the use of its facilities would be allocated among Contracting States and how States would be required to make contributions.

The CHAIRMAN recalled that under Section 16 of Article I Contracting States would be required to bear the expenditure of the Center in proportion to their subscriptions to the capital stock of the Bank. It could be assumed that in practice the Bank would bear the overhead cost of the Center and he was aware that the President was prepared to make a recommendation on those lines to the Executive Directors. Further thought would be given to including more detailed provisions on the allocation of charges, payment of contributions, and the steps to be taken on default of payment.

<u>The Secretariat</u> (Sections 8 - 10)

Mr. GAE (India) asked whether the power vested in the Administrative Council by Section 9(1) to appoint the Secretary-General and Deputy Secretaries-General also gave the Council the right to remove those officials. If so, the grounds on which they would be removed from office should also be stated expressly. With regard to Section 9(2) he thought that the concurrence of the Chairman should not be required for a decision on the compatibility of other employment with the offices of Secretary-General and Deputy Secretary-General, which should be a matter for the Council alone.

The CHAIRMAN thought it might be necessary to consider further the implications of specifying the grounds for removal of the Secretary-General and Deputy Secretary-General though in principle he agreed that the Council should have the right to remove these officials too. He further agreed that the requirement of the Chairman's concurrence in a decision on the compatibility of other employment with the offices of Secretary-General and Deputy Secretaries-General might be deleted.

Mr. MANSOURI (Iran) stressed the desirability of precluding the Secretary-General from exercising any political function whatever. Section 9(2) which implied that the Administrative Council could in certain circumstances permit these officers to exercise political functions should, therefore, be modified accordingly.

The CHAIRMAN said that Section 9(2) had been drafted so as not to exclude altogether persons who held such minor and completely non-controversial political offices as, for instance, membership of a local education board.

Mr. GOONERATNE (Ceylon) thought that while employment by the Permanent Court of Arbitration might be compatible with these offices, employment by the Bank might not, and that the reference to the latter ought to be deleted together with the requirement of the Chairman's concurrence in the Council's decision on compatibility of employment.

Mr. O'DONOVAN (Australia) saw no objection to retaining in Section

9(2) the provision permitting employment by the Bank, With respect to Section 10(2) he thought the Secretary-General should be required to determine, at the time of his appointment, the order in which his Deputies would act for him.

Mr. HOAN (Viet-Nam) thought that Section 9(2) which required the concurrence of the Chairman in a decision of the Council on the compatibility of other employment seemed to contradict Section 5 which provided that the Chairman would have no vote except a deciding vote in the case of an equal division.

The CHAIRMAN observed that in any event there had been a consensus regarding deletion of the provision requiring the concurrence of the Chairman in Section 9(2).

Mr. TSAI (China) suggested that nationals of non-member States of the Bank should not be appointed either to the offices of Secretary-General and Deputy Secretary-General, or to the Panels. His government would be unwilling to submit disputes to arbitration before a tribunal whose membership would not be limited to nationals of Contracting States and consequently might include nationals of unfriendly nations.

The CHAIRMAN thought the situation contemplated by Mr. Tsai was unlikely to arise. It was improbable that the nominating authority would nominate to the tribunal, say an umpire, who was persona non grata with one of the parties.

Mr. MANSOURI (Iran) suggested that the powers of the Secretary-General be specified in the way that the powers of the Administrative Council were specified in Section 6.

The CHAIRMAN said he could not see much advantage in describing the powers of the Secretary-General in detail. The precise character of that office could not yet be determined. It could remain purely administrative, or grow to be of greater significance, depending on the attitudes of States and investors, as well as the incumbent's own personality. If necessary, details of his functions could be spelled out in the Rules to be adopted by the Administrative Council in the manner in which the functions of the Registrar of the International Court of Justice were spelled out in the Rules of the Court.

Mr. GOONERATNE (Ceylon) proposed that the requirement in Section 9(1) that the Chairman nominate the candidate for Secretary-General be deleted as being unduly restrictive of the powers of the Administrative Council.

The CHAIRMAN said that the scheme proposed formed part of a general system of checks and balances. In the first place, each Contracting State had one vote in the Council and, as most Contracting States would be importers of capital, they would command a majority in the matter of appointment of the Secretary-General. On the other hand, the power to nominate a candidate lay in the Chairman who was neutral and would undoubtedly make every effort to nominate persons acceptable to both capital-importing countries and capital-exporting countries. Under this system, however, while there would be a deadlock where the Chairman nominated a person not acceptable to the capital-importing countries, where the Chairman nominated a person acceptable only to the capital-importing countries, the capital-exporting countries would have no remedy.

Mr. ADARKAR (India) thought it would be better to regard the Chairman's

power to nominate the Secretary-General as a device merely intended to facilitate the Council's search for a candidate in whom all its members had confidence, rather than a means to achieve a balance of political interests. For the successful working of the Center it was essential that it remain an independent institution. He asked whether there were any precedents in other international agreements for this particular procedure for appointing the principal officer of an organization.

The CHAIRMAN said he doubted whether there was any precedent for such a procedure. On the other hand, it was important to recognize that the Center was itself unique in that neither in the case of the International Chamber of Commerce, nor that of the Permanent Court of Arbitration were there associated with the organization in the public mind, two distinct groups of potential litigants. In the case of the Center it was quite clear that there were two such groups with divergent interests - both, however, quite legitimate. He therefore believed that some device such as the present one was desirable to insure confidence in the person chiefly responsible viz. the Secretary-General.

Mr. ADARKAR (India) wondered why it was necessary to provide checks and balances in the procedure for appointment of the Secretary-General if he were to function as a non-political and purely administrative officer or "registrar" performing routine functions e.g. explaining to States and investors the facilities available under the auspices of the Center, and the rights and obligations associates with them, the documents to be filed in proceedings, etc.

The CHAIRMAN said that the answer to that question would depend on what rôle was envisaged for the Secretary-General, and in this connection recalled that there had been a tendency, dating from the initial discussion of the proposals, to build up the position of the Secretary-General at the expense of that of the Chairman of the Administrative Council. Since the Secretary-General might come to be regarded as reflecting the "image" of the Center he thought there was a need for checks and balances in the matter of his appointment.

Mr. HIMADEH (Lebanon) suggested that Section 9(1) be modified to provide that the Council appoint the Secretary-General from a list of candidates submitted by the Chairman, on the lines of the system for appointment of Executive Directors of the Bank.

The CHAIRMAN said that while that idea was a useful one, it would be difficult to find candidates willing to have their names put forward at the risk of their being rejected. In the case of appointment of the Bank's Executive Directors it was a question of appointing candidates proposed by countries and as such resembled election to political office more than did appointment to the office of Secretary-General which was a staff post.

The meeting was suspended at 11:00 a.m. and resumed at 11:30 a.m.

The Panels (Sections 11 - 15)

The CHAIRMAN introducing Sections11-15 listed some suggested changes in the provisions on the qualifications of persons to be designated to the Panels which had received wide support at previous meetings: (1) that the prescribed qualifications include independence and a capacity for independent judgment, (2) that the qualifications required be stated at some earlier

point in this group of Sections so as to apply to all designations to the Panels and (3) that the second sentence of Section 15(1) which, though not mandatory, directed States to seek the advice of certain institutions before designating their members, was superfluous and ought to be deleted.

Mr. TSAI (China) observed that while the Convention was explicit as to the qualifications of persons to be designated by States, the Chairman in designating persons was only required to pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity. While he had no objection to the Chairman being required to take the latter aspect into account, he thought that the Chairman should also be required to consider the other qualifications stipulated e.g. high moral character.

The CHAIRMAN agreed and observed that Mr. Tsai's point would be met if, as had earlier been proposed, the qualifications of Panel members were stated first and as being generally applicable regardless of who might designate them.

Mr. TSAI (China) recalled that he had previously suggested that the Secretary-General and all persons designated to the Panels be nationals of Contracting States. If such a suggestion were not acceptable he would propose that it be provided that if an official like the Secretary-General or an arbitrator was regarded by the State party to the dispute or by a State whose national was a party to the dispute as persona non grata (regardless of whether he were a national of a Contracting State or not), such State should at least be permitted to veto the appointment of the official or arbitrator, since it would be embarrassing for it to have to grant to such persons any prescribed status under the Convention e.g. to accord them privileges and immunities, including travel facilities.

The CHAIRMAN thought it would be extremely difficult to include such a provision in the Convention. The problem could usually be avoided in practice by not selecting for the proceedings a location where either the parties or the members of the commission or tribunal would not be admitted. However, if the proposed veto were written into the Convention it could be used in all cases in which a State wished to interfere with the immunities that it was obliged to grant under the Convention. The problem could best be resolved as far as the parties were concerned if, on entering into the arbitration agreement, they were to consent to be bound by such restrictions.

Mr. HOAN (Viet-Nam) agreed with the delegate of China that a Contracting State should be able to veto the appointment of an official or member of a Panel whom it regarded as persona non grata. In the case of appointment of the Secretary-General, at least the by-laws of the Administrative Council should include a provision giving a member the right to veto the appointment.

Mr. EL-FISHAWY (Kuwait) referred to the freedom given to parties under Section 1 of Article III and Section 1 of Article IV in the first instance to agree upon constitution of a commission or tribunal in any way they wished, and by appointing persons from the Panels or from outside. Paragraph 13 of the Comment seemed to imply that this would be the normal case, and thus that the Panels would have only limited significance. However, since in most cases it could be expected that there would be no agreement on constitution of a commission or tribunal, the later provisions of Articles III and IV on appointment of conciliators and arbitrators respectively would be the most frequently applicable, and these restricted the choice of the parties

to the Panels. He was in favor of allowing the parties to choose conciliators and arbitrators from outside the Panels in all cases and would propose that that principle be adopted for two reasons: (1) the parties were precluded from appointing an arbitrator who was a national of the State party to the dispute or of the investor's State, and therefore their choice ought not to be further restricted to the nominees of other States on the Panel; and (2) appointment to the Panel was for the duration of four years and the dispute might take place at a time when the Panels failed to offer a person whom they regarded as acceptable.

The CHAIRMAN recalled that a large number of experts at previous meetings had felt that it would be very desirable to give the Panels a certain significance, at any rate more significance than had hitherto been enjoyed by, say, the Panels of the Permanent Court of Arbitration.

Mr. GAE (India) recalled that Section 11(1) and Section 12(1) provided that the Panels should consist of "qualified persons" and that Section 15 spelled out the qualificationsrequired. In his opinion it would be desirable to delete Section 15 and to leave it entirely to the discretion of Contracting States not only whom they appointed to the Panels but also whom they should consult in making such appointments. In any event, were Section 15 to be retained, paragraph 2 should be clarified, particularly with respect to what area was covered by the expression "the main forms of economic activity."

The CHAIRMAN said that the expression "the main forms of economic activity" in Section 15(2) covered such sectors of the economy as banking, industry, agriculture and the like. He thought that if Section 15 were deleted - and he would be in favor of doing that - the qualifications could be tested in Sections 11 and 12.

Mr. GAE (India) would have no objection to that solution.

Referring to Sections 11(2) and 12(2) which permitted Contracting States to designate to the Panels not only their own nationals but also those of other States, he felt that the use of the term "nationals" in that context might not be entirely appropriate since as used in the Convention that term covered both natural and juridical persons. He suggested that the term "citizens" be used in these Sections and that it be made clear that only natural persons could be designated to the Panels.

Section 13(1) required Panel members to serve for four years. Authority to designate to the Panels should carry with it the discretion to terminate the appointment, and the position might be clarified if Section 13(1) were to be amended so as to provide that members would serve "subject to the pleasure of the Contracting State or the Chairman as the case may be."

Section 13(2) provided that "in case of death or resignation of a member" of either Panel the authority which appointed him - a Contracting State or the Chairman as appropriate - had power to fill the vacancy for the balance of the member's term. That procedure should, however, be applied not only in cases of death or resignation of members, but in any instance of what might generally be termed a "casual vacancy," or vacancy occurring other than by expiry of a stipulated term of office.

The CHAIRMAN referring to Mr. Gae's remarks on the use of the term "nationals" in Sections 11(2) and 12(2), confirmed that it was intended that

only natural persons should be eligible to serve on the Panels, and that in this particular context the term "citizens" might be more appropriate.

He saw no objection to modifying Section 13(1) on the term of service of Panel members so that it would provide that they serve at the pleasure of the designating authority. It should, however, be understood that once the member had been selected to serve on a commission or tribunal, it would no longer be within the discretion of the designating authority to terminate the Panel member's appointment.

As to the suggestion that Section 13(2) should cover not only designation in the event of a Panel member's death or resignation but all types of "casual vacancy," he was not sure whether that phrase was regarded as a technical term outside countries with a legal tradition linked to that of the United Kingdom. If the other instances which Mr. Gae had in mind were insolvency and general incompetence, his point might be met through the provision which had seemed to receive support, viz., that Panel members would serve at the pleasure of the designating authority. Thus, if for instance, a member became insolvent and did not resign it would be open to the Contracting State which appointed him to withdraw his name from the Panel and fill the resulting vacancy.

Mr. TSAI (China) said he had understood that once a person had been designated to a Panel he could not be removed and would cease to be a member only if he had resigned or died. If Panel members were to serve during the pleasure of the appointing authority, it might be difficult to persuade persons of the required stature and repute to accept nomination. The wisdom of thus modifying Section 13 ought to be reconsidered.

The CHAIRMAN emphasized that a member could not be removed by the designating authority if he was serving or had been appointed to serve on a specific commission or tribunal. He recalled that at a previous meeting one expert had asked what would happen if the regular period of four years expired during the pendency of a case. It was generally acknowledged that in such a case the Panel member would continue to function in the case in which he was engaged, but would not be eligible for appointment to a new commission or tribunal.

Mr. GOONERATNE (Ceylon) referring to the proposal to delete Section 15, said he would like to see retained in some form that part of paragraph 2 which required the Chairman in designating members to the Panels to pay due regard to the importance of "assuring representation on the Panels of the principal legal systems of the world."

The CHAIRMAN agreed.

Mr. LAZO (Philippines) supported Mr. Gae's proposal, and suggested that the requirement might be added to Section 12.

Mr. ROOSE (Malaysia) referred to Section 14(2) whereby, in the event of multiple designation of a Panel member, he would be considered to have been designated by the authority which first designated him. In view of the fact that parties to a dispute were precluded from nominating to an arbitral tribunal nationals of either State concerned, he did not see why it would be of significance to know that a particular State had nominated a particular Panel member. In his view, it would be appropriate merely to record the names of the various States nominating the member.

The CHAIRMAN said that the Convention provided that each State nominate a certain number of persons to the Panels (tentatively six) so as to ensure that a wide variety of Panel members would be available for selection. If more than one country should nominate the same person, the number of members and therefore that variety would be reduced.

Mr. O'DONOVAN (Australia) said he assumed that the rules to be adopted by the Administrative Council under Section 6 of Article I would make provision for machinery for the designation by Contracting States of members of the Panels. He foresaw that if no rules were established a State might in the first instance designate three members, and then when a dispute seemed imminent, it might designate three more who were rather more favorably disposed and perhaps even a little biased in favor of the State. He thought it would be desirable that appointments be made once every four years, or in the event of a vacancy occurring by death or any other contingency provided for.

The CHAIRMAN thought it would be difficult to fill all the possible loopholes. Nor would failure to do so be of serious significance if the provision of Article IV excluding national arbitrators were accepted.

Mr. TSAI (China) asked how the number "12" had been arrived at in connection with the number of persons that the Chairman was authorized to designate to each Panel.

The CHAIRMAN said the number was purely tentative and had been chosen arbitrarily as being a small number relative to the number of persons designated to each Panel by States, which, assuming that all members of the Bank became parties to the Convention, would be in the region of 600. He would be glad, however, to receive other suggestions as regards the number of members to be designated by the Chairman.

Mr. GHANEM (Lebanon) referring to the qualifications stated in Section 15(1) asked why, in addition to legally trained persons, persons competent in the fields of commerce, industry or finance should also be designated. Since it was made clear in Section 1 of Article II that only disputes of a "legal character" would be submitted to arbitration, he wondered how such persons could be qualified to sit on a tribunal.

The CHAIRMAN thought that there was no inconsistency between limiting jurisdiction to disputes of a legal character while stipulating that the arbitrators should have a particular knowledge in a field of activity other than the law. The juridical tribunals of a number of States included persons who were not lawyers, and so did the Panels of the International Chamber of Commerce. The fact that the jurisdiction of the Center was limited to legal disputes did not exclude a dispute regarding the facts essential to a determination of legal rights and obligations, and it would be an advantage to have on the Panels persons capable of appreciating the factual situation arising in a particular sector of economic life which was relevant to a determination of legal issues.

Mr. EL-FISHAWY (Kuwait) thought it would be useful in order to give Panel members greater independence, to give them immunity against removal for the period of their designation, especially since in most cases States would appoint to a tribunal members designated to the Panel by other States.

The CHAIRMAN said he would welcome the views of other delegates

on Mr. El Fishawy's suggestion as well as on Mr. Gae's proposal that Panel members serve during the pleasure of the designating authority.

Financing the Center (Section 16)

The CHAIRMAN recalled that he had earlier stated that the overhead expense of the Center would be borne on a pro rata basis by Contracting States in proportion to their subscriptions to the capital stock of the Bank and, in the case of Contracting States which were not members of the Bank, in accordance with rules adopted by the Administrative Council. Provision for other sources of income viz. "charges for the use of its facilities" and "other receipts," referred respectively to charges in connection with actual conciliation or arbitration proceedings (to be discussed more fully in connection with Article VI), and to the possibility that the Bank might underwrite the overhead of the Center as distinguished from expenditures incurred in connection with specific proceedings. As to the latter possibility he said that the President of the Bank would be willing to recommend this arrangement to the Executive Directors, since it might serve to avoid excessive administrative complexity while insulating the Center from the effects of delay by Contracting States in paying their contributions.

There was no comment on Section 16.

Privileges and Immunities (Sections 17 - 20)

The CHAIRMAN introducing Sections 17-20 said that these provisions had been adapted, to the extent possible, from the provisions on privileges and immunities from the Charters of the Bretton Woods institutions for the reason that it should be easier for Governments to accept them, having accepted them before in relation to those institutions. He recalled that at a previous meeting it had been suggested that immunity from legal process with respect to acts performed in an official capacity granted by Section 18(i) should be extended to arbitrators and conciliators who would be more likely to need that protection than the Chairman and members of the Administrative Council.

It had also been suggested that the standard of treatment required by Section 18(ii) viz. treatment "accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States," would be difficult to apply as no real basis for comparison existed between, say, the officials of the Center and those of a Contracting State. It might thus be more appropriate to adopt as a standard the privileges and immunities of the specialized agencies of the United Nations, and to include in Section 18(ii) a reference to the Convention dealing with that subject.

Mr. O'DONOVAN (Australia) thought that the protection of Section 18(i) should be extended not only to arbitrators and conciliators following the suggestion referred to by the Chairman, but also to persons appearing as parties, representatives of parties, agents, counsel and experts or witnesses in proceedings.

The CHAIRMAN said that while some delegates at the Geneva meeting had been prepared to go that far, other delegates had felt that experts and

witnesses were not likely to be in need of such protection.

In reply to a question from Mr. Gae, he said the wording of the Section 20(2) would be re-examined together with Section 7(5) with a view to eliminating any appearance of inconsistency between those provisions.

Mr. TSAI (China) said he would like to see written into the Convention an assurance that a Contracting State would not be required to grant privileges and immunities to an individual whom it considered _persona non grata_.

Mr. EL-FISHAWY (Kuwait) said he could agree with the extension of immunity proposed by the delegate of Australia only in so far as counsel or agents of parties were concerned. To extend it to witnesses, for instance, would in his opinion go too far, and it might be best to leave the extent of immunity to the local legal system applied in each case.

Mr. SHIRATORI (Japan) observed that while the provisions concerning privileges and immunities were generally patterned after those of the Bank, the Bank's privileges and immunities were also covered by the detailed provisions of the Convention on the Privileges and Immunities of the Specialized Agencies (1947). As the latter Convention could not be applied to the Center, he wondered whether it might not be necessary to set out the privileges and immunities of the Center in greater detail on the lines of the Specialized Agencies' Convention.

The CHAIRMAN, while agreeing that that might be possible, observed that governments had shown a reluctance to accept innovations in the field of privileges and immunities. To grant to the Center (which was not a specialized agency) privileges and immunities on the pattern of those of the specialized agencies might be difficult. On the other hand, the Specialized Agencies' Convention went little further than the Bank's Charter. The only significant points of difference were that the Specialized Agencies' Convention gave tax immunity even to local nationals, and included provisions on waiver of immunity in accordance with post-war usage in the matter of immunities. While Mr. Shiratori's proposal would be considered, he thought that any attempt to redraft Sections 17-20 at this stage might give rise to considerable controversy.

ARTICLE II - Jurisdiction of the Center

The CHAIRMAN introducing Article II observed that the term "jurisdiction" had been used in the text to denote the scope of activity of the Center, as had been done in The Hague Conventions of 1899 and 1907 with respect to the Permanent Court of Arbitration. As several experts at previous meetings had pointed out that the term could be read as implying an element of compulsion which was quite inconsistent with the character of the Convention, he had tentatively concluded that it might be advisable to abandon the term in favor of some phrase like "scope of activity." Such a term, while consistent with the optional character of the proposed machinery, also indicated that what was attempted here was a definition of the peripheral limits of the Center's activities.

The jurisdiction of the Center was limited in several ways viz. as to (1) the type of proceedings - conciliation and arbitration, or both consecutively, (2) the type of dispute - investment disputes of a legal character, and (3) the parties - a foreign private investor and a State.

In connection with the latter it should be noted that under the parenthetical clause in Section 1, the investor's State could appear in proceedings before the Center when subrogated in the rights of the investor.

It had been proposed at an earlier meeting to extend the jurisdiction of the Center to disputes between an investor on the one hand and an agency or political subdivision of a Contracting State on the other, and document COM/AS/6 contained the following tentative text giving effect to that proposal.

> "Section ... Notwithstanding the provisions of Section 1 of Article II the jurisdiction of the Center shall extend to any dispute between a political subdivision or instrumentality of a Contracting State and a national of another Contracting State, where such political subdivision or instrumentality and such national have consented to the jurisdiction of the Center in respect of such dispute, and such political subdivision or instrumentality has given its consent with the approval of the Contracting State concerned."

It was important to bear in mind in the course of the discussion that the jurisdiction of the Center was always subject to the over-all limitation that the express consent of the parties to the dispute was required before a dispute could be brought within the jurisdiction of the Center.

Finally, he suggested that discussion of the term "national of another Contracting State" which appeared in Article II and was defined in Article X should be postponed until discussion of the latter Article.

Mr. GHANEM (Lebanon) observed that as "investment" was an economic concept and did not correspond to any European legal concept, it was essential to clarify it before it could be incorporated in a legal instrument. To begin with, the concept should be analyzed in the way in which it was applied by investors and States. Thus in his view the ways in which capital was invested in a country, could be exemplified by three hypothetical cases:

1. An investor might acquire all or part of a local private enterprise or conclude a contract with it. The host State was then outside this legal bond, and could not, therefore, be held to any special obligation *vis-à-vis* the investor that would permit recourse to arbitral procedure. The investor would, in such a case, have the same status *vis-à-vis* the State as that State's nationals.

2. An investor might enter into a contract with the host State but on the terms and according to the rules that would have governed a contract between the State and one of its own nationals. The State was clearly a party to the agreement, but the foreign investor should not be able to count on any form of jurisdictional privilege not enjoyed by the nationals of that State. In this case as in the previous one, the Contract as a whole could only be governed by the internal laws of the host State.

3. The investor might have invested only because of a legal arrangement, quite outside the ordinary law, between him and the host State. Such an agreement could only be valid because it had been concluded by the government of the host State which had the power to make such a contract binding. The State was, therefore, not

> only a party to the contract but, in the very exercise of its sovereign power by virtue of which it concluded the investment agreement, would have given an implicit guarantee to the investor that it would not use that sovereign power to alter the terms of investment unilaterally.

Only in the third case could the possibility of inserting a <u>clause compromissoire</u> be considered.

On the basis of this analysis he proposed inclusion in the Convention of the following definition of the term "investment":

> "For the purposes of this Convention "investment" shall mean the commitment of capital by the national of a Contracting State in the territory of another Contracting State on the basis of an agreement concluded between the latter and the investor, in accordance with a special procedure for which no provision is generally made in the contracts concluded by that State."

The CHAIRMAN noted that the proposal sought to restrict the scope of the Convention, as far as the type of dispute was concerned, to investment disputes arising from investment agreements in which <u>clauses compromissoires</u> were included. <u>Ad hoc</u> submission of disputes was, therefore, excluded.

Referring to the meaning of the term "dispute of a legal character" he thought it might be defined as:

> "any dispute concerning a legal right or a legal obligation, or concerning any fact relevant to the determination of such right or obligation."

Mr. ADARKAR (India) agreed with the delegate of Lebanon that the term "investment" needed definition, and recalled that it had been found necessary to define it in similar documents e.g. the United States' Mutual Security Act.

The term "dispute of a legal character" also needed clarification. Paragraph 4 of the Comment suggested that that expression should be read in the light of the general understanding reflected in the Preamble. However, the relevant part of the Preamble viz. paragraph 2, merely referred in the broadest terms to disputes in connection with international investment arising between a Contracting State and a national of another Contracting State, and was not, therefore, of significant assistance. He was not sure - as seemed to be implied in paragraph 4 of the Comment - that it was really possible to distinguish between political, economic and commercial disputes on the one hand, and legal disputes on the other, since each of the former categories of disputes might in fact have a legal basis. Nor would it be very helpful to try to cover only disputes which were "purely legal."

While it was true that a foreign investor had special problems arising out of his presence in another country, it was necessary to scrutinize any suggested solution of those problems, and to be satisfied that any special regime created for him was really designed to resolve those special problems and no more. It would not always be appropriate to place a foreign investor in a favorable position in relation to some particular problem when the very same problem confronted the local investor as well. For instance, to grant any special facility to foreigners to challenge at will local laws designed to protect moralities and health or the security of the State would run

counter to the aims of justice.

Nor could all these difficult problems be resolved merely through reliance on the optional character of the jurisdiction of the Center, because that would amount to placing too heavy a responsibility on the States concerned. States should have some guidance as to what disputes they would be expected to submit to arbitration, as well as in what circumstances it would be considered unreasonable for the foreign investor to challenge local law.

He was not sure whether the definition of "dispute of a legal character" proposed by the Chairman would meet the point at issue, since it remained a matter of doubt whether the "legal right or obligation" derived from a specific agreement, law or understanding whereby the State had voluntarily accepted a limitation on its sovereignty. If it was agreed that these were the only rights and obligations upon which arbitration before the Center was possible, then the phrase "legal right or obligation" would be defined beyond dispute. That, however, did not appear to be the case. Under the Bank's Loan Regulations and Rules of the International Chamber of Commerce, as well as in the practice of his own government the class of disputes in respect of which arbitral machinery was available was clearly defined, e.g. disputes concerning the interpretation, validity or implementation of the specific agreement. That practice had the effect of relieving a State of the possible embarrassment of having to refuse to submit to an international jurisdiction in cases in which it genuinely believed that the dispute was not arbitrable.

Referring to paragraph 6 of the Comment he pointed out that the phrase "reciprocal performance of obligations which arise out of the application of the Convention" had little meaning in the context. The relationship covered was not that between States but one between a State and a private investor, and he failed to see in that case any basis for reciprocity, since the investor did not have obligations under the Convention but only rights. If such obligations did in fact exist they should be spelled out; if not, he would like to see established within the scope of the Convention a device whereby not only the host State but also the other party to the dispute would be subject to obligations under the Convention. He had in mind an arrangement whereby investment disputes would be transformed from the level of State-investor relations into a dispute where the parties would be the States concerned. The delegate of Japan had earlier observed that a situation approaching reciprocity could be achieved if, in the event of a dispute between a Contracting State and a national of another Contracting State, the State whose national was a party to the dispute could somehow be brought into the picture. In that case the investor's State would be saved the embarrassment of seeing one of its nationals in dispute with another State, and a straining of political relations averted. The dispute arising could be referred eventually to arbitration without violating certain fundamental principles of international law viz. (1) that the claim of a State and that of an individual were on different planes and could not be placed on par with each other and (2) that international law governed relations between States and could not deal with relations between a State and a foreign private individual. This device would, however, be subject to the one exception noted by the delegate of Lebanon viz. the case where the host State itself, in the exercise of its sovereignty, entered into an investment agreement with the foreign investor pursuant to which it undertook to submit disputes with the foreign investor to international adjudication. In that instance reciprocity would be assured as the investor would

himself have undertaken certain obligations under the agreement.

The CHAIRMAN observed that Mr. Adarkar had made a very clear distinction between the definition of "investment", and the definition of "dispute of a legal character" which he would like to be understood in the sense of a dispute eligible for settlement under the Convention. Previous speakers had pointed out that "investment" had been defined in the legislation of certain States, but a precise definition of that term was only part of the problem, as in the view of these speakers, in order to be eligible for settlement under the auspices of the Center, the dispute should, in addition, arise out of some contractual relationship between the investor and the host State. While that type of case would account for 90-95% of the disputes which parties might want to bring before the Center, he thought it was nevertheless essential to provide in addition for those cases where a dispute arose without any previoue agreement. Mr. Adarkar had urged that in the case of ad hoc recourse to the Center, even though consent of the host State would be required, a refusal of that consent might create an embarrassing situation. He could not, however, agree with that conclusion.

As to the attempt in paragraph 4 of the Comment to distinguish disputes of a "legal character" from political, economic or commercial disputes, he agreed that the wording might not adequately convey the distinction, and that further precise clarification was necessary.

On the question of reciprocity and the existence of obligations not only on the part of the host State but also on that of the investor (paragraph 6 of the Comment) particular emphasis had to be placed on the fact that the host State was a "contracting" State and that the investor was also a national of a "contracting" State. There were reciprocal obligations both as between the investor and the host State as well as between the investor's State and the host State. The Convention established one very important obligation for all Contracting States viz. to recognize awards and to take such steps as were necessary under their own law, to make such awards enforceable through local channels. The Comment was intended to distinguish that case from the situation which would arise if the Convention were to permit proceedinge between a Contracting State and a national of a non-Contracting State. Assuming that the assets of the national ware in his own State that State would have no obligation to recognize an award granted by a tribunal under the Convention, nor would that national be bound indirectly by the Convention to abide by the award or indeed to abide by the clause compromissoire.

As to the suggestion that disputes between an investor and a host State should be lifted to the level of inter-State disputes, it would, of course, be possible to work out such a system, which would be consistent with traditional concepts of international law. The present draft, however, sought to do just the opposite in the belief that not only investors but States also would prefer to deal with each other directly (in the manner accepted by Mr. Adarkar for those cases which were covered by investment agreements) and that to translate a dispute between the investor and a State into the realm of inter-State relations might be undesirable. He thought that this progressive development of international law might be especially valuable in cases where smaller States had to deal with investors from larger countries, and the likelihood of successful inter-State negotiations was somewhat reduced. The Convention proceeded on the assumption that in the stated situations, States would be willing to have direct dealings with investors, and he did not believe that this would be in any way inconsistent

with the practice of Mr. Adarkar's government provided the situations were those which it considered appropriate.

On the issue of embarrassment of States raised by the delegate of Japan and referred to by Mr. Adarkar, it had to be considered that while a State might be embarrassed to see one of its nationals in a dispute with another State, it might be equally embarrassing were the national concerned to request his State to espouse his claim. In addition, if his State, having studied all the aspects of the claim decided that while the claim was good it should not be pursued in the light of the greater national interest, the investor himself might be prevented from obtaining any relief. Similarly, it could lead to embarrassment were the Convention to give an investor a right to proceed directly against a host State, but make the exercise of that right subject to the approval of his own State. That would place an undue burden on the investor's State as its action in giving the consent might be regarded by the host State as an unfriendly act.

The meeting rose at 1:40 p.m.

THIRD SESSION
(Wednesday, April 29, 1964 - 8:40 a.m.)

ARTICLE II - Jurisdiction of the Center (continued)

Mr. TSAI (China) said that, although there was a need to limit the scope of the jurisdiction of the Center which, as stated in the Convention, was too broad, it would be quite difficult, in his opinion, to provide a clear-cut definition of the word "investment".

"Investment" was a term whose content varied according to the different economic or political backgrounds or points of view of the various countries. For the purpose of the Convention, however, it should be possible to find guidelines for a definition which would be sufficiently clear when a particular state and an investor consented to the jurisdiction of the Center.

The purpose of the Convention was not to protect foreign property, but rather to give procedural safeguards to foreign investors. Capital-importing countries would join the Convention in order to attract foreign investment and not foreign property as such. This would provide a first guideline to define what was meant by "investment".

Secondly, the foreign investor usually based his investment on a foreign investment law, if there was one, or on a special contract entered into with the local government. If the word "investment" was defined in that law or in that agreement, no difficulty would arise, even without a specific definition in the Convention.

Thirdly, one should remember that a foreign investor's main concern was the fear that his investment would be exposed to certain risks such as expropriation without compensation, or war risk, or deprivation of his right to repatriate his capital or profit. These risks were normally defined in insurance or investment guarantee agreements between states and the subject matter of disputes could be limited to those risks.

With those three guidelines in mind, it would be possible to reach a certain agreement as to the investment disputes of a legal character which could be submitted to the Center.

The definition of "investment" therefore did not pose a serious problem but there might be some difficulties about the subject matter of a dispute. He was inclined to think that such subject matter ought to be limited to those risks that were most feared by foreign investors. He thought that, for instance, investment guarantee programs of the kind which many countries had agreed upon with the United States Government covering investors against expropriation, war risk, and non-convertibility could provide an example of arbitrable questions. Alternatively, a provision could be inserted in the Convention limiting the subject matter of a dispute to the rights or obligations provided by the foreign investment law of the host country or by the specific contract entered into between the investors and the host government.

He also thought that the Convention should also require a minimum amount of investment. In a previous draft, there had been a minimum amount of $100,000. In the present draft, the comment stated that, as some disputes could not be valued in terms of money and parties might want to have a test case to decide questions of principle, it was desirable not to have any limit.

He thought that a limit should be set not with reference to any specific claim but, rather, on the basis of the investment as a whole with respect to which the claim arose. What countries wished to attract were large investments. If a limit was set on the amount of the investment rather than on the value of the dispute, the number of requests for arbitration could be usefully limited.

With regard to the question of subrogation by the investor's State, he was inclined to think that if a government was subrogated in the rights of its national investor and if the investor had consented to the jurisdiction of the Convention, then the government should be bound to submit the issue to the Center, while the Convention seemed to leave the subrogee government a choice in the matter.

The CHAIRMAN said that he saw no reason to have inflexible provisions on the subject of a minimum limit. If a country felt that it did not want to use the facilities of the Center for small investments, it could so state in advance and would not be criticized by anybody, while if one tried to provide for it under the Convention serious difficulties would arise in attempting to define such a limit, whether based on the monetary value of the claim or of the investment. He thought therefore that the matter could better be left to the determination of the parties.

Mr. HETH (Israel) said that a clear definition of "jurisdiction of the Center" was indispensable if the machinery proposed by the Convention was to attain success. Without a definition, even countries that agreed to the principle of arbitration and conciliation embodied in the Convention might hesitate to adhere to it; and the Convention itself, even if accepted by states, might not prove to be a source of confidence to investors who would want to know in what matters disputes arising in connection with an undertaking to arbitrate would actually be subject to arbitration.

He agreed with the views of the delegate of India that only disputes arising out of contracts or agreements or understandings in the nature of contracts should be subject to the jurisdiction of the Center.

Matters relating only to the interpretation of municipal laws, such as tax laws or social security laws, should be left to the domestic courts. Only after the exhaustion of local remedies could the matter conceivably be submitted to international arbitration on grounds such as denial of justice or discrimination.

In case of an expropriation of a foreign investor's property as a consequence of nationalization of basic industries, could the right of the state to expropriate, or only the amount of the compensation to be paid be subject to international arbitration? If, as he thought, only the second issue would be arbitrable, this should be clarified in the Convention.

He also thought that while pecuniary value was not always a sufficient criterion, the Convention should provide for the elimination of insignificant matters from the jurisdiction of the Center, at least by requiring an individual to obtain the consent of his State before referring the dispute to international arbitration.

The voluntary nature of the machinery proposed by the Convention was not sufficient to eliminate the need for a clear definition of the jurisdiction of the Center for, once the Convention was adopted, the State would not be at complete liberty to withhold its consent to arbitration on subject matters that could be within the jurisdiction of the Center.

The Convention was designed to impose on States certain obligations, in consideration for which the Convention offered the possibility that the better investment climate would contribute to the acceleration of the flow of investment capital to a developing country. Whereas the obligations imposed were clearly discernible, the benefits to be derived were imponderable, and he would wish at least to minimize the unknowns relating to the scope of jurisdiction of the Center.

With reference to Section 3 of Article II, he thought it preferable not to mention specifically the grounds for preliminary objections. The list of grounds for objection mentioned did not seem to him exhaustive, and the statement that the tribunal would be the judge of its own competence was sufficient basis for entertaining preliminary objections on matters of jurisdiction.

By enumerating a closed list of preliminary questions, the Convention eliminated some grounds that were generally recognized by international law, such as the exhaustion of local remedies, which seemed to him too fundamental not to be mentioned specifically.

The CHAIRMAN pointed out that the scope of the Convention and the question of local remedies were two separate problems. The Convention allowed complete freedom for the parties in their agreement either to provide for the exhaustion of local remedies or to exclude them and this point would be discussed in connection with Article IV.

On the question of the scope of the Convention, he thought that at all the meetings capital-exporters and capital-importers alike had

expressed the view that a more precise definition was required, although only a few specific suggestions had been made while a certain limitation of the jurisdiction of the Center was certainly desirable, he thought that certain types of limitation, e.g. those related to the size of the investments, could be usefully left to the consent of the parties.

On the question of the substance of the issues involved in a dispute, taxation, social security, labor laws had been mentioned. In those cases it seemed clear to him that, unless they had been the subject of an investment agreement, there was no reason why a State should agree to have any such issues submitted to international arbitration except in the case mentioned by Mr. HETH, where after normal court procedures it was alleged that there has been discrimination or some other acts which were cognizable in international law.

He felt, however, rather strongly on the suggestion that the consent of the investor's State be also required because that State would be placed in a very difficult position if it had to approve of an action which one of its nationals took pursuant to an earlier agreement with another State.

He recognized that the present draft seemed to permit an investor to apply to the Center without the previous consent of the host State but, as he had mentioned earlier, the final draft could exclude such possibility which was based only on analogy with the provisions of the Statute of the International Court of Justice.

Referring to the concern expressed that States would hesitate to sign the Convention without knowing clearly what they might be asked to do, and to the fear expressed by some delegates that to sign a Convention of such a broad scope as provided in the present draft might raise false expectations in the minds of investors with attendant criticism of the host State if in a specific case it did not consent to go to arbitration, he pointed out that, in searching for a solution, one should keep in mind that States in different parts of the world dealt with foreign investors in different ways. Some dealt with them strictly on the basis of investment promotion laws, others concluded specific agreements with foreign investors, others again had neither special laws nor agreements.

There were countries, for instance in Latin America, which were not prepared to accept arbitration in advance of a dispute in agreements with investors, but would consider going to arbitration only in certain cases after a dispute had arisen. Those countries could conceivably sign the Convention but publicly state at the same time that they would consent to go to arbitration only in certain cases which in their opinion were arbitrable and raised questions of international law.

In order to accommodate the different methods of dealing with foreign investors and at the same time avoid the danger of creating false expectations, the Convention should first state the scope of the jurisdiction of the Center in broad terms and exclude only the kinds of disputes on which there was agreement that they fall outside the subject matter with which the Convention sought to deal; and then allow each State to state in advance, if it so wished, which types of disputes it would or would not consider submitting to conciliation or arbitration under the auspices of the Center.

Mr. EL-FISHAWY (Kuwait) thought that the term "investment" required

more definition also from the point of view of the capital-exporting countrias because in the caae, for example, of a contractor from such a country building roade or installing power stations in another country tha question would arise whether that would be considsred an investment and whether a dispute arieing out of such contract would accordingly be within the potential juriediction of the Centar or not.

Hs aleo wanted to expresa hia aupport for the proposal to extend the jurisdiction or the acope of activity of the Center to disputsa which had as a party not only Contracting States but instrumentalitiss, autonomous agencies, or political subdiviaions of those Statee. Such en extension would no doubt further the purposes of the Center.

Mr. GHANEM (Lebanon) remarked that there were three main typea of foreign investment. Foreign invsetors could invest in a private enterprise of the host country or anter into a normal business contract with the hoat Stete itself or finelly inveet in a particular country on the basia of an agreement atipulated with the host State in accordance with apecial procedures not gensrally available for the Stete's businese transactions. Only in the last caee would a foreign inveator expect protection against unilateral change in the term of his agreement with the State and be encouraged to inveet if any diepute under that agreement could be brought before an internationsl jurisdiction. Ae obviously the draftere of the Convention had not intended to create a special jurisdictional regime for all foreign investore similar to the old system of "capitulations" he suggested that the Convantion could usefully specify that only disputes ariaing out of the third type of inveatment would come under the jurisdiction of the Center.

The CHAIRMAN confirmed that the main concern of the Bank and of the drafters has been indeed with the third category of invsstments mentioned by the delagate of Lebanon and in that respect the draft brought something new, for it assured investors that, when a government assumed cartain undertakings, thsse undertakings would bs honored.

Hs agreed with Mr. Ghanem that the draft did not attempt to revive the system of capitulations or provide extra-territorial jurisdiction for foreign investors generally. As he had stressed in his opening addrees, he did not expect or think it desirabls that evsry dispute between a foreign investor and a host Stats should be solved through the mechanisms of the Center.

If the Convention were limited to disputes arising out of investment agreements with governments, perhaps 95% of possible disputea would be covered. The reason why the draft want beyond the case of investment agree-mente, in a permissive sense, waa to take account of different situations prevailing in different parts of the world and, specifically, to permit ad hoc submission of disputss, which he thought was very important.

Mr. WANASUNDERA (Ceylon) suggeated that the application of the Convention be limited to disputes arising from invsstments made aftsr ite entry into force, sinca the objsct of the Convsntion was to crsate a favorable climate for new invsstments.

Secondly, it was necessary to formulate a precise definition of "investment dispute" taking into account the fact that there were issuee which were genarally recognized as non-justiciabla. There were conflicts that governments were reluctant to submit to compulsory adjudication not

because it would be impossible for a judge to decide them on the basis of existing legal rules, but because their highly political significance made them unsuited for settlement on the plane of legal debate.

He pointed out that the provisions of the Convention would make arbitration compulsory after an initial consent to arbitrate future disputes had been given. He realized that the drafters had wished to prevent frustration of undertakings to arbitrate, but he wanted delegates to consider carefully the consequences of these provisions. Developing countries were not in a strong bargaining position *vis-à-vis* capital exporters and could hardly resist a request by a prospective investor for inclusion of an arbitration clause. Once a country was bound by its consent to arbitrate all future disputes arising from an investment agreement, and in the absence of a precise definition of "investment dispute", that country would be bound to submit to arbitration (perhaps many years later) disputes involving factors which, had they been foreseeable by the country at the time of its consent would have resulted in its excluding such disputes from arbitration. This introduced an element of compulsion, whereas traditionally international arbitration was founded as far as possible on the real express consent of the parties, which implied knowledge at the time of signing of the precise nature of the issues being submitted to arbitration.

He also remarked that a novel and unique development introduced by the draft Convention was to give the individual the standing to enforce his rights against a State before an international tribunal, although the individual was not a party to the Convention and would not be bound by it. While the State as a contracting party and a member of the community of nations would assume direct obligations, the individual who was given a new international status assumed no obligations. If an investor obtained an award against the State he would no doubt obtain satisfaction. If the award was against the investor, the State would not have the same certainty of obtaining satisfaction from an investor who might, for instance, become insolvent or dispose of his assets before they could be reached. This placed the individual in a position superior to that of the State and (as the Convention dealt almost solely with the difficulty of certain investors and not with a field like that of human rights) represented an unwarranted departure from accepted concepts.

He had no objections of principle against third-party adjudications, but the law to be applied should still be local law and not international law. Raising the relationship between investors and host States from the level of municipal law to that of international law would permit the supremacy of the legislature to be challenged thus inhibiting the legislative power vested in the parliament of a sovereign State. In his country at least, this would require amendment of the constitution and he doubted that it would be feasible at this time.

If his delegation found it difficult to accept the present draft it was not for the reason that they were opposed to arbitration in principle or that they had failed to comprehend the problems involved. While they were willing to make all reasonable concessions, they still found unbridgeable the gap between the proposals and what his government would be willing to accept.

The CHAIRMAN suggested that perhaps the delegate of Ceylon had not fully taken into account the distinction between the procedural and the

substantive issues. The Convention did not call for the application of any specific law. It left the determination of the applicable law up to the tribunal in the absence of an agreement between the parties. A State when entering into an investment agreement could well provide that the agreement would be governed by its own laws as they prevailed from time to time. In that case, no other law could be applied and no complaint could be made of changes in that law. In many cases, however, States gave specific undertakings in offering incentives to investors. In that case, of course, the investor had a right to ask for, but would not necessarily obtain, assurances that those incentives would not be changed.

With reference to the suggestion that, under the Convention, obligations were established only for the State without corresponding obligations for the investor, the Chairman remarked that it was true that the State was directly bound to carry out the award and that if at any stage of the proceedings the State party failed to co-operate in the proceedings, machinery had been devised to prevent frustration of the arbitration, but exactly the same applied to the private investor. If the private investor refused to appoint his arbitrator, it would be done for him. If he failed to appear in the proceedings, an award by default would be rendered against him. Finally, if he failed to comply with the award, that award could be enforced in any State which had adhered to the Convention.

Mr. UL ISLAM (Pakistan) suggested the omission of the words "of a legal character" from Section 1 of Article II and the introduction of a definition of "investment disputes" in the following terms: "Investment dispute means a disagreement on a point of law or fact or the conflict of legal views or of interest in respect of an investment."

If it were so desired, the word "investment" could also be defined and the general consensus of opinion seemed that such definition was necessary.

He also suggested that a minimum value of the subject matter of a dispute be included in the draft because in the absence of any such provision refusal by a State to consent to the jurisdiction of the Center might be subjected to severe criticism by the investors.

Referring to the draft provision for an extension of the jurisdiction of the Center to disputes involving political subdivisions and instrumentalities (Doc. COM/AS/6)[1] he questioned the expression "political subdivision and instrumentalities of the State". He presumed that "political subdivision" meant a component part of a Contracting State and he suggested the use of that term. If the term "instrumentalities" meant statutory corporations set up by different countries for financing industries and other things, then the dispute, even if the approval of the State was required, would ultimately resolve itself into a dispute between two private nationals of two Contracting States.

The CHAIRMAN replied that the terminology of the additional provision (Doc. COM/AS/6) would be reviewed on the basis of the comments made at the several meetings and that an attempt would be made to find terms that were more or less universally understood.

As regards "instrumentalities", which might possibly include statutory corporations, the drafters had in mind public bodies which had

[1] See p. 33 of this document

been entrusted with certain public functions and powers. The requirement of the approval of the Contracting State concerned was intended to provide a screening process, so that governments could withhold their approval where the "instrumentality" should really not be considered as a governmental agency but an ordinary company.

Mr. ASKARI (Iran) observed that the purpose of the Convention as stated in the Preamble was to settle disputes between States and nationals of other States; therefore the clause in parenthesis in Section 1 of Article II on subrogation should be deleted and investors should not be permitted to transfer their rights under the Convention to their national State.

He also thought that existing disputes should be excluded from the jurisdiction of the Center as present investors had made their investment without expecting any relief from the proposed Center.

The CHAIRMAN pointed out that when a State was subrogated in the rights of its national, it had no more rights than the national and would appear in the proceedings not in its capacity as a State, but merely as the successor of the private national.

There could be no question of a transfer of rights under the Convention to a State, in its capacity as such, since the Convention provided that, once an investor had the possibility to go before the arbitral tribunal, his State was specifically prohibited from espousing his case and making an international claim on his behalf.

The clause on subrogation had been introduced, at the suggestion of some capital-importing countries and at least one capital-exporting country, to cover the case where a national had been insured under some scheme and his State, rather than taking the matter up on the diplomatic level, was willing to have the matter adjudicated by an arbitral tribunal under the Center.

Mr. HOAN (Viet-Nam) referring to Section 3(3) of Article II wondered whether it was necessary to require the Minister of Foreign Affairs to issue a certificate of nationality and whether it would not be preferable to allow evidence of nationality to be furnished in other ways. The intervention of the Foreign Minister could, however, be properly required if he would be given the power to screen the request and to refuse it for political, diplomatic or economic reasons.

The draft had not provided for a minimum limit for disputes, thus relying on the consent of the parties which could, however, have conflicting views on the importance of a particular dispute. The Foreign Minister of the investor could perhaps be given a useful role to play in deciding whether a particular dispute was important enough to be brought before the Center.

The CHAIRMAN said that he had doubts about Section 3 as it stood on two grounds:

In the first place not in every country was the Minister of Foreign Affairs the suitable authority to give certificates of nationality.

Secondly it was felt in many quarters that a certificate from what-

ever competent source it came should have no more value than that of prima facie evidence of nationality and that a commission or arbitral tribunal should also in that respect be the judge of the facts placed before it, including facts relating to the capacity of the parties.

Mr. ADARKAR (India) recalled that the Chairman had expressed the view that 95 per cent of the cases intended to be dealt with by the Convention might be covered if it were limited to disputes arising out of investment agreements entered into by host States.

If that was the case, he wondered whether, from a practical point of view, 95 per cent of the objective of the proposal could not be obtained, if not the whole of it, by limiting the scope of the Convention in that way. This would solve many of the practical difficulties that had been mentioned, e.g. in respect of investments inherited from the past, which should not be covered by the Convention but should be dealt with somewhat differently.

He thought that the most fruitful approach to the question of jurisdiction of the Center would be to try to define as clearly as possible the kinds of disputes that would be excluded from the jurisdiction of the Center even where there was agreement between the parties.

The other approach suggested by the Chairman, viz. to permit Contracting States to state in advance the kinds of disputes for which they would not avail themselves of the facilities of the Center did not seem acceptable as it would be inconsistent from a practical angle with the objective of promoting investments. For States to say, without being confronted with any definite investment proposition which caused them difficulty, that there was a certain category of disputes for which they would not use the Center might provide an unnecessary discouragement to the inflow of private foreign capital.

Referring to the explanation given of the term "investment dispute of a legal character" as being a dispute concerning a legal right or obligation or facts relating to such a legal right or obligation, he wondered whether this would cover any dispute concerning what an investor might regard as his legal right.

If a foreign investor argued that he had a legal right to the ownership, control and the management of a particular investment in a foreign country and the State of that country passed a law affecting, for instance, the social security legislation or the taxation legislation or exercised its powers to direct a particular industrial undertaking to sell its output to the State for security reasons or for better enforcement of the regulation of prices, could such a measure be challenged on the grounds that it affected the legal right of that investor to the ownership, control or management?

Likewise, if the State were to expropriate, would the right of the State to expropriate be called in question or would only the quantum of compensation? He had not been able to find an answer in the draft as it stood.

On the question of the applicable law, the Convention said that unless the parties otherwise agreed, the tribunal would determine the

applicable law. He suggested that in the absence of any special privileges granted to a foreign investor by an agreement, it should be made clear in the whole understanding of the proposed scheme that a foreign investor must comply with the national law of the host State and that the law to be applied was that national law, unless it was otherwise agreed by that State. The foreign investor should also be expected to exhaust the national remedies unless it was otherwise agreed.

The CHAIRMAN answered that, on the assumption made by the delegate of India as to the desirable scope of the Convention, viz. disputes arising out of agreements, the only legal questions that could be submitted to the Center were legal questions arising out of the agreement.

If the agreement provided for an undertaking not to expropriate, then the question of expropriation would be a valid question. If the agreement did not deal with expropriation at all, then that question would not arise out of the agreement and could not be dealt with by the arbitral tribunal. Nor could the question of compensation be dealt with by the arbitral tribunal unless there was an agreement to compensate.

Mr. ADARKAR (India) said that the Chairman's answers would be satisfactory on the assumption that the jurisdiction of the Center were limited only to rights and obligations arising out of agreements entered into by the State with an investor.

But if the Convention was also to provide for proceedings pursuant to an ad hoc submission by the parties or a prior undertaking in broad terms to have recourse to conciliation and arbitration pursuant to the terms of the Convention he would like to raise two questions.

The first arose from paragraph 9 of the Comment on Article II where it was stated that a party was free to include such limitations on the scope of a particular undertaking as might seem to it appropriate provided that those limitations were not inconsistent with the obligations derived from the Convention as a whole. That proviso was not part of the text and he wondered where it came from and whether it would be the subject of one of the preliminary questions to be dealt with in arbitration.

Secondly he would like to know whether the legal effect of limitations in a prior undertaking would be to limit the jurisdiction of the Center to only the matters covered by that undertaking, or rather to limit only the scope of the consent?

The CHAIRMAN answered that since jurisdiction was based on consent the purpose of paragraph 9 of the Comment merely was to stress that while parties were entirely free in an undertaking to say that they were willing to have recourse in cases of, say, expropriation of approved investments or cases of issues of compensation with respect to expropriation of approved investments, they could not say that their undertaking would be revocable in the midst of an arbitral proceeding or that they would not abide by the award.

The words "prior written undertaking", covered two cases. The first case was the customary arbitration clause in an agreement. The second would be a unilateral statement by a government in an investment law or by some other means in which it would undertake in advance that whenever there was an approved investment under the provisions of that law, to arbitrate certain specified issues. By thus limiting its undertaking, i.e. its consent, it would at the same time limit the jurisdiction of the Center. Since jurisdiction was based on consent, a limitation of the latter necessarily meant a limitation of the former.

As regards exhaustion of local remedies, the only reference in the Convention to this subject was a rule of interpretation in Article IV, Section 16, which provided in substance that, when a State or a private investor agreed in writing to resort to arbitration, that agreement would be interpreted, in accordance with the ordinary canons of interpretation, as meaning arbitration in lieu of any other remedy and without the requirement of the prior exhaustion of local remedies. It was purely a rule of interpretation.

Where there was no prior arbitration agreement, the Convention left an investor free to address himself to a State and to suggest arbitration proceedings even without having exhausted his local remedies, but a provision could be added to make it perfectly clear that a State would be fully justified in requiring the prior exhaustion of local remedies, since the drafters had no intention to change, in this respect, existing international law.

The question of the applicable law was more difficult because it depended on the circumstances of the case. He fully agreed with the proposition that foreign investors had to comply with local law. But that did not necessarily answer the question. A dispute between a State and an investor might arise out of a licensing or know-how agreement requiring performance both in the host State and in the investor's national State, and while international law might not be involved at all, the applicable local law would have to be found by the application of normal rules of conflict of laws or private international law. There was no reason to assume that the situation would necessarily be governed by the local law of the host State. In other cases, where all the points of contact were centered on the host State, the applications of conflict rules would point to that State's law as the proper law.

Mr. ADARKAR (India) stated that in his view there should be an implicit understanding that the national law of the host State should apply in all investment disputes except with regard to matters specifically covered by an agreement, in which case the agreement should apply.

The CHAIRMAN said that he understood the problem raised by the delegate of India but could not offer a quick solution because whatever one provided in the Convention should be applicable to a large number of different situations. This point would, however, be given further consideration.

The meeting was suspended at 11:00 a.m. and resumed at 11:25 a.m.

Mr. GAE (India) referring to the draft provision on extension of jurisdiction of the Center to disputes involving political subdivisions or instrumentalities of States (Doc. COM/AS/6) asked first whether the words "any dispute" referred to disputes of the nature referred to in Article II, Section 1 of the draft Convention.

Secondly he asked whether the term "political subdivision" was intended to mean a component part of a Contracting State. If that was so, the text ought to be clarified to that effect.

Thirdly he asked what was meant by the expression "instrumentality of a Contracting State". If that expression meant some body which was not a separate, independent entity but which acted as an agent of the State, he would have no further comments to make on the matter. However, in some countries, the expression "instrumentality" was sometimes used in a very wide sense to indicate also a government-owned company, which the law treated as a legal entity, quite distinct and separate from the Contracting State or government concerned, and he thought that such a company should not be covered by the expression "instrumentality of a Contracting State", since this would unduly widen the scope of the Center's jurisdiction.

The CHAIRMAN replied that the term "dispute" in the additional draft provision meant a dispute that would be otherwise within the scope of the Convention.

By the term "instrumentality", the drafters intended to include only governmental agencies. Normally these governmental agencies were legally part of and indistinguishable from the government, but in some countries they were legally separate entities which were nevertheless entrusted with governmental functions, as distinguished from the government-owned companies to which Mr. Gae had referred.

Mr. GAE (India) referring to Section 3, Subsection 2, which empowered the commission or tribunal to deal with four types of claims as preliminary questions, pointed out that enumeration of specific issues might be construed as excluding all others. He suggested that at least an additional provision be added to the effect that any other issue which the commission or the tribunal permitted to be raised as preliminary issue should be dealt with as a preliminary issue.

The CHAIRMAN replied that he would have no objection either to removing the specific enumeration of preliminary issues or to adding a residual clause. He also thought that the words "shall be dealt with" in Section 2(2) should be changed to "may be dealt with", because a tribunal ought to have the power of appreciation also in that regard.

Mr. GAE (India) remarked that Section 3(3), which specified that a certificate of nationality issued by the Minister of Foreign Affairs of a State whose nationality was claimed by the party would be treated as conclusive proof of the facts stated therein, implied that, in the event of a certificate being issued, no further questions on the issue as to whether the party to the dispute was or was not a national of a Contracting State would be allowed to be raised before a commission or a tribunal.

It was quite possible that a Minister of Foreign Affairs of a

State might not be the most suitable authority to give a certificate in certain cases but, under the wording of the Convention, the national of a Contracting State or the State party to the dispute would be precluded from giving evidence that such certificate was not a proper certificate or from offering other evidence on the question as to whether he was or was not a national of a State of whose nationality he claimed.

He therefore suggested that the Convention state that such certificate may be treated as prima facie evidence of the facts stated therein.

The CHAIRMAN said that he agreed with the suggestion made by Mr. Gae.

ARTICLE III - Conciliation

The CHAIRMAN, introducing Article III, pointed out by way of clarification that a party in coming to the Center would be expected to submit to the Secretary-General evidence of the agreement of the two parties to have recourse to conciliation, and that the same should apply to Section 1 of Article IV, dealing with arbitration.

The Secretary-General would not be the judge of the adequacy of that evidence, but such requirement would be a proper safeguard against parties setting the machinery in motion without having satisfied at least the officials of the Center that there was a document in existence which constituted prima facie evidence that there was an agreement to submit to conciliation or arbitration.

The decision on any dispute regarding consent would of course be left to the commission or to the arbitral tribunal in accordance with the rule that the commission or the tribunal was the judge of its own competence.

Mr. GHANEM (Lebanon) expressed his agreement with the Chairman's suggestion that evidence rather than a mere statement of consent of the other party be required of the party applying for conciliation or arbitration.

Mr. QUILL (New Zealand) addressing himself to the question of conciliation generally, said that he found some difficulty in appreciating how an investment dispute of a legal character could usefully be the subject of conciliation. The process of conciliation implied the accomodation of the differing viewpoints of the parties. Of its essence, it was a procedure to accommodate conflicting interests generally rather than conflicting views on legal issues.

He recalled that the Chairman had stated that his experience with conciliation had caused him to appreciate the value of this method and he asked whether the disputes which were thus resolved by conciliation were of the kind which would have fallen within the scope of the Convention.

The CHAIRMAN answered that in a number of disputes of a legal nature the Bank had been asked to assist by mediation, good offices

or conciliation. In one case the legal issues were examined with the lawyers for the two parties. The Bank concluded that further discussion of these issues was likely to be unproductive and suggested that the parties seek a practical compromise through negotiations with the assistance of the Bank. In the event, the parties reached agreement.

In another case the Bank played a more formal role. The two parties asked the President of the Bank to act as a conciliator and draw up a plan. There were a number of legal issues involved which the President took into consideration in framing his plan, but at the same time he gave weight to the known views of the parties which he tried to reconcile to the extent possible. The parties accepted the plan drawn up by the President. The reason for limiting conciliation to disputes of a legal character was the strong feeling on the part of some countries that the scope of the activities of the Center should be so limited. He would be happy to remove this limitation if there were a consensus that this would be acceptable.

Mr. TSAI (China) referring to Section 1, remarked that if "request" was equivalent to the submission of a case to the Center, it might be possible according to Article II that the other party would not yet have consented when the other party first submitted the case to the Center. To avoid any contradiction he suggested that the second sentence of Section 1 be redrafted as follows: "He shall state whether the other party has consented to the jurisdiction of the Center".

The CHAIRMAN acknowledged that there was an inconsistency between the language of paragraph (iii) in Section 2 of Article II and the second sentence of Section 1 of Article III. There had seemed, however, to exist a consensus in favor of deleting the possibility provided for in Section 2(iii) of Article II which, in any event, was not very important or very likely to occur in practice. In that case, the sentence in Section 1 of Article III would be correct.

Mr. TSAI (China) referred to Section 3(ii) of Article III, dealing with the appointment of conciliators, and the similar provision in Article IV concerning the appointment of arbitrators and pointed out that, as the Comment indicated, the nationality of the Chairman was not considered relevant with regard to the selection of the conciliator or arbitrator; so that if the Chairman happened to be of the same nationality of either of the parties, he could still act.

In his country the practice had been to provide that when, for instance, the President of the International Court of Justice had been chosen as the person who would designate arbitrators or conciliators, he would withdraw in favor of the Vice President if he happened to be of the same nationality as one of the parties and if the Vice President was in the same position then the Judge of the highest seniority would make the selection. The question was more serious as regards the selection of arbitrators than of conciliators and he wondered whether the Convention should not follow a similar practice.

The CHAIRMAN said that within the Center itself there would be no available substitute for the Chairman. Obviously, the Convention might provide for the Secretary-General of the United Nations or the President of the International Court or some other outside official, as a substitute, should the Chairman be of the same nationality as one of the parties.

Mr. EL-FISHAWY (Kuwait) thought that the parties should have complete freedom to select conciliators and arbitrators outside of the Panel.

The third arbitrator or conciliator who would be appointed either by agreement of the two parties or by the Chairman could be well selected from the Panel, which had been set up under the Convention.

Mr. ASKARI (Iran) proposed that Section 2 of Article IV be amended to provide that where the parties failed to agree on the choice of the third arbitrator, he would be selected by drawing lots among the members of the Panel.

Mr. SHIRATORI (Japan) asked why Section 5 of Article III provided that the report of the conciliation commission should not include the terms of settlement.

The CHAIRMAN replied that the Bank had been told that frequently both governments and private investors would feel embarrassed by publication. Some delegates at other meetings had suggested that recommendations of the commission should not be included in the report if they had been rejected, and others that on the contrary accepted recommendations should be excluded from the report.

He had no very strong feelings in the matter and would be guided by whatever countries felt to be most appropriate.

Mr. O'DONOVAN (Australia) referring to Section 4 asked why it should be necessary that the parties <u>and</u> the commission should agree in order to preclude the application of the conciliation rules of the Center. He also asked what was meant by the expression "date on which the consent to conciliation became effective", which had not appeared in the preceding Sections of the Convention.

The CHAIRMAN replied to the first question that on reflection he did not think it desirable to require the concurrence of the commission to a departure from the established conciliation rules, and he would like to remove the words "and the commission" from Section 4.

On the second question, he said that the expression "consent became effective" had been introduced to take account of the fact that the agreement embodying the consent might not become effective immediately upon signature. One of the other delegates had previously asked whether the criterion in time for the application of the rules should not be the date when the consent was given rather than the date when the consent became effective since the purpose of this provision was to insure that the rules which would be applicable were rules that were known to the parties when they made their agreement. The point was well taken and he was in favor of making the date of consent the sole criterion in Article III as well as Article IV.

Mr. ADARKAR (India) asked why in conciliation proceedings the disqualification of a conciliator on the grounds that he was a national of a State party to the dispute had not been included as in the case of arbitration.

The CHAIRMAN answered that the inclusion of nationals of the parties in either conciliation or arbitration proceedings had both advantages

and disadvantages. It was generally claimed that the advantage of having nationals was to ensure that knowledge of the position and the views of the parties would be represented on the commission or tribunal as the case might be. The argument against was that nationals were less likely to be impartial, or might appear to be partial and for that reason should be excluded.

He thought there was a case for arriving at different conclusions in the case of conciliation and in that of arbitration. In conciliation the main task of the conciliators is to bring the parties together and for that purpose the familiarity of at least two of the three members of the commission with the particular views of the parties might be helpful rather than harmful.

In the case of arbitration the balance would in his view go the other way. As for familiarity with law or factual conditions, the arbitral tribunal was in the position, if it felt it desirable, to seek information not only from the parties but also from experts in the field. On the other hand, he thought that it would not be desirable in a three-man arbitral tribunal (which was provided for as the normal rule) to have two out of three members identified at least by nationality with the interests of the parties. That threw a very heavy burden on the umpire.

ARTICLE IV - Arbitration

Request for Arbitration (Section 1). Constitution of the Tribunal (Sections 2 and 3). Powers of the Tribunal (Sections 4 to 10)

Mr. GHANEM (Lebanon) asked with reference to Section 4 of Article IV how the scope and limit of a particular dispute to be submitted to arbitration would be defined. If such definition were left entirely to the plaintiff, the defendant might claim that the dispute as so defined exceeded the scope of his consent. He suggested that a pre-arbitral phese in the proceedings be devised in which the parties would agree on a *compromis* defining the scope of the dispute. If a party refused to enter into such *compromis*, then the other party's claim would be accepted in its entirety.

The CHAIRMAN pointed out that the dispute could come before the tribunal either on the basis of a compromissory clause in an agreement or on the basis of an *ad hoc* submission. In each case there would be a definition of the scope of the consent.

It had been the experience of courts, as well as arbitral tribunals, that parties were not always very careful in drafting their agreements, and in many cases, both before regular courts and even more so before arbitral tribunals, a dispute arose between the parties as to the definition of the dispute they had consented to submit. He believed that there was no other practical eolution than to let the tribunal decide that question, in most cases by way of a preliminary decision.

Mr. GHANEM (Lebanon) asked whether in that case a plaintiff could not modify his claim or even bring a new claim after the tribunal had been established, without going through the Secretary-

General; the plaintiff, for instance, after having initially asked for the specific performance of a contract, could later claim instead damages or restitution.

The CHAIRMAN recognized that the subject had not been dealt with in the Convention and that it might be desirable to have a rule in the Convention, rather than in the arbitration rules, that a party could not change the nature of its claim.

Mr. GHANEM (Lebanon) referring to Sections 6 and 7 suggested that the dissenting arbitrator be permitted to state the reasons of his dissent and make it known to the parties who could make use of it in deciding whether to ask for revision of the award.

The CHAIRMAN pointed out that there was no universally accepted practice either requiring or permitting dissenting opinions. He would be in favor of leaving it to the dissenting arbitrator either merely to state his dissent or to give reasons for his dissent which would be part of the award, or which would be appended to the award. He would like to hear the opinion of other delegates.

Mr. GHANEM (Lebanon) asked with reference to Section 10 how the award would be notified to the parties and what was the significance of such notification, since all time references in the Convention were to the date of the award rather than the date of notification.

The CHAIRMAN observed that since the Working Paper had been printed he had become convinced that notification of the award should be made an essential requirement of the procedure because the parties, who would come from different parts of the world, might not in fact be present at the time when the award was issued. Then in the relevant provisions of the Convention the date when the award was notified to the parties would be substituted for the date when it was rendered.

Mr. GHANEM (Lebanon) remarked that it would perhaps be useful to have a specific provision requiring the arbitrators to keep the secrecy of their deliberations until an award was rendered in order to avoid interference by the parties in the just decision of the case.

The CHAIRMAN said that he would consider the point.

Mr. TSAI (China) pointed out with regard to the nationality of arbitrators that in the traditional form of arbitration national arbitrators were usually allowed while the umpire would, of course, not be a national of either party. The Convention proposed a deviation from the conventional arbitration in this respect and the main reason given was the burden that national arbitrators would impose on an umpire. But the umpire would presumably be a capable man who would be adequately remunerated for his work and his burden. The Convention should be more concerned with the problems of the signatory governments who must think in terms of the interest of their countries.

He was therefore inclined to think that, unless there was a stronger reason to the contrary, the Convention should follow the traditional practice of allowing national arbitrators.

The CHAIRMAN said that opinions had been divided on this issue

at previous meetings. He thought that there had been a slight preponderance in favor of the exclusion of national arbitrators but he could not distinguish any dividing line between the countries that were for retaining national arbitrators and those that were against. Those in favor of the exclusion of national arbitrators felt that the exclusion would insure adjudication rather than a negotiation.

He added that, in order to be consistent, if one followed the system proposed in the draft Convention it would be necessary to exclude also panel members designated by a State which was a party to the dispute, or the national State of a private investor who was a party to the dispute, because the Convention permitted Contracting States to designate persons to the Panel who were not of their own nationality.

Mr. DAJANI (Jordan) noting that the exclusion of national arbitrators introduced a significant innovation recalled that the Chairman had, at the previous session, stated that the Chairman of the Center could be relied upon not to appoint arbitrators who were _personae non gratae_ or hostile to one of the States involved. He wondered why in the case of nationality there was an express prohibition, whereas in the other case the matter was left to the discretion of the Chairman. He thought that in order to avoid partisanship or decisions given on grounds of hostility, an arbitrator who was _persona non grata_ should be excluded as well as a national of one of the States concerned.

Mr. TSAI (China) referred to the question of applicable law in connection with Section 4(1). When a foreign investor made an investment it seemed obvious to assume that the act of making an investment in the host country would imply that the investor had consented to the jurisdiction and application of the law of the host State in all respects, unless there was a written and explicit declaration to the contrary. Under such a situation a proper rule of interpretation with regard to the applicable law would not permit the application of international law in the absence of an agreement to the contrary.

He therefore proposed an amendment to Section 4(1) which would then read as follows:

> "In the absence of agreement between the parties concerning the law to be applied, unless the parties shall have given the tribunal the power to decide _ex aequo et bono_, the tribunal shall decide the dispute submitted to it in accordance with such rules of law, whether national or international, as it shall determine to be applicable; _provided, however, that the act of investment implies the investor's consent to the application of law of the host country in the absence of a written declaration to the contrary made prior to the investment._"*

The CHAIRMAN thought that Mr. Tsai's proposal would give rise to a number of problems.

While he agreed that the entry into a country in general implied submission to local law, and that in the absence of an agreement on a

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* The proviso proposed by Mr. TSAI is underscored.

special position for the investor most disputes regarding actions of the government would be determined by local law, he did not think it necessary to have an express provision for these cases.

Moreover, he could think of two cases where the proposed language would not help solve the problem of applicable law. As had been mentioned by the delegate of India there might be special agreements between investors and governments which, in accordance with the laws of those governments, would give special treatment to the investor not provided by local law. In such cases the contract should prevail, since it would be *pro tanto* the law between the parties.

Another example would be a public bond issue placed abroad. At another meeting a delegate had suggested that it might be useful for his country and other countries, in borrowing in foreign markets, to include an arbitration clause referring to the arbitration facilities under the Center. Bond issues sometimes did not contain an applicable law clause but there was general agreement that in the case of a bond issue made in, say, Switzerland where all the aspects of the transaction were linked with Switzerland (where the contract was signed, the underwriting banker's were, and the bonds were payable), even in the absence of a clause stating the applicable law, Swiss law would apply.

There was no doubt that a foreign bond issue by a country constituted an investment by the foreign investors in that country but it would not necessarily be governed by local law.

Mr. TSAI (China) said that the instances which were mentioned by the Chairman indicated that there might be controversies about applicable law. The question under discussion was whether the choice of law should be stated in the Convention as it was. The rule of interpretation in Section 4(1) was that national law, international law, or whatever the tribunal might see fit, would apply. What he had just suggested in his amendment was that national law would first apply in the absence of an agreement to the contrary.

As in his mind the scope of the Center was to be limited to those rights that were exclusively conferred by the laws or by agreement on foreign investors it would hardly be possible to apply foreign law or any law, other than national law, in such cases. When a government approved an investment or entered into a contract or an agreement with an investor, it was presumed to do so in accordance with its own national law. That presumption would be reflected in the rule of interpretation that he had suggested but there would be no restriction on the power of the investor or the government to agree otherwise.

The CHAIRMAN said that Section 4 had been drafted as a substantive rule rather than as a rule of interpretation. He would consider whether the Section could be redrafted in the form of a rule of interpretation, in which case some of the objectives mentioned by Mr. Tsai might be achieved.

Mr. ADARKAR (India) supported the observations made by the delegate for China, and wondered whether the cases described by the Chairman, particularly government bond issues placed abroad did not represent cases where the total investment in all its aspects was governed by the law of the country of placement.

The Convention, however, should cover the majority of cases where most of the aspects of investment were really intended to be governed by the law of the State where the investment was located. In that case the national law of that State should prevail, except to the extent to which a contrary declaration had been made.

The CHAIRMAN said that he would consider the point.

Mr. TSAI (China) referred to the form of the award. Article IV, Section 7(1) stated that the award must be in written form and that reasons must be given. This did not seem sufficient to him. The date of the award was essential as various provisions referred to that date. A statement of the facts and of the particular law applied was equally important.

Finally, the fundamental rules of procedure should also be part of the Convention, especially on questions whether a dissenting opinion should be included, whether the deliberations should be secret, and so forth, as the violation of these fundamental principles of procedure might constitute grounds for invalidating the award.

The CHAIRMAN pointed out that the statement that an award had to be motivated clearly implied that it must enable the reader to follow the reasoning of the tribunal both on points of fact and of law, including the applicable law. He saw some danger in trying to go into too much detail, especially on those subjects on which there was no real disagreement and he thought that an instrument of the kind of the Convention ought to limit itself as much as possible to those points on which there might be doubt, and to clarify obscure points.

Mr. TSAI (China) referring to Section 10 which gave authority to the tribunal to prescribe any provisional measures necessary for the protection of the rights of the parties, thought that the provision as it stood was too broad, even after taking into consideration that the parties could by agreement limit its scope. If such provisional measures related to matters like execution and attachment of property they would encroach upon the jurisdiction of the local courts and thus create more obstacles to the acceptance of this Convention.

The CHAIRMAN stated that at the other meetings questions had also been asked about this provision. In international practice authority to prescribe provisional measures was left to the appreciation of the tribunal, presumably because it was difficult to foresee the types of situations that might arise. If a dispute was properly before the arbitral tribunal, it would seem reasonable to empower it to order the parties not to take action which would make it impossible to comply with a later award.

Mr. TSAI (China) asked whether the wording of the provision should not be modified to allow the tribunal to recommend rather than prescribe provisional measures, particularly against the State party to the proceedings whose government might have to take particular actions for reasons of necessity on national policy. If the government failed to conform to such recommendations and the award was in favor of the other party, it would, of course, have to pay damages.

There would be very few, if any, cases of irreparable damage, because disputes would concern investments and investments could always be valued in terms of money.

The CHAIRMAN replied that there were two reasons why the provision of Section 10 ought not to be taken as constituting any danger. The first was that while provisional measures might be ordered, there was no way for a private investor to obtain specific enforcement of them against the government.

The second was that experience indicated that arbitral tribunals were extremely loath to order provisional or interim measures and one should have some confidence in the self-restraint which tribunals would impose upon themselves.

Mr. TSAI (China) suggested that there might be instances where the government would rather take the action that a tribunal had provisionally forbidden and pay the damage in case of a favorable award to the investor. While submission of an issue by a government to the tribunal was evidence of its confidence in the tribunal, the tribunal on its part should also have confidence in the same restraint and spirit of fairness on the part of the government.

Mr. ASKARI (Iran) stated that he agreed with the delegate from India on the need to apply in the first instance the laws of the host State.

With reference to the rendering of the award, he suggested that the tribunal be required to render its award within a specified time limit, after which, if no award had been rendered, another tribunal would be appointed. If also the second tribunal did not announce its decisions within the prescribed time, further recourse to the Center would require a new agreement of the parties. An award delivered after the prescribed time ought to be considered void.

Mr. GAE (India) referred to Sections 6 and 7 of Article IV and observed that Section 7 provided that an award had to be signed by the majority of the tribunal. He suggested that, even though the award might not be a unanimous award, it should be signed by all members of the tribunal, including those who dissented from the decision, in order that it could be fully understood, particularly since it would have to be enforced in all Contracting States. A dissenting member could set forth the reasons for his dissent, but should be required to sign the award.

The CHAIRMAN said he could agree with the suggestion if a proviso were added that in case an arbitrator refused to sign the award the other members would record that fact; an arbitral award should not become inoperative because one of the arbitrators refused to sign it.

Mr. GAE (India) was in favor of Section 10 on the provisional measures necessary for the protection of the rights of the parties and suggested that power should be expressly given to the arbitrators to make an interim award at a particular stage in the proceedings if the facts and circumstances of the case before them so warranted; otherwise in some cases arbitral proceedings might be unduly protracted.

The CHAIRMAN thought that this was a very useful suggestion.

Interpretation, Revision and Annulment (Sections 11 - 13)

Mr. GAE (India) referring to Section 11(1), suggested that it be made quite clear in connection with time limits within which remedies could be exercised that the date of the award should be understood to mean the date on which the award was communicated to the party concerned.

Mr. GHANEM (Lebanon) questioned the expression "excès de pouvoir" in the French text of Section 13. The expression had a very precise technical meaning in Lebanese as well as French law and referred to an executive act which had been issued by an incompetent authority, or without respecting the forms legally prescribed for such act, or in violation of a provision of the law, or for a purpose which was actually different from the apparent one. He assumed that the drafters had meant something else in Section 13, viz. the case of a tribunal which had decided beyond the scope of the claim. He therefore suggested that the expression ultra petita be used instead of "excès de pouvoir".

With reference to the six months period specified in Section 13 for requesting the annulment of the award on the grounds of corruption of a member of the tribunal, he suggested that the draft make clear that such period would run from the time the interested party had discovered such corruption.

The CHAIRMAN agreed with the second point made by Mr. Ghanem.

On the first point he confirmed that the drafters had intended by the words "excès de pouvoir" to refer to the case where a decision of the tribunal went beyond the terms of the compromis or compromissory clause and that the French text would be reviewed to avoid any misunderstanding on that point.

Mr. GAE (India) referring to Section 12 suggested that in view of the long period allowed for revision of an award and the possibility that the award might have been already enforced, some provision be made to restore the status quo ante so that the parties may ask to be compensated, if it is possible, for the damage already done.

The CHAIRMAN agreed that some provision should be made to that effect.

Mr. GAE (India) on Section 13(1)(c) suggested that the expression "departure from a fundamental rule of procedure" be clarified so as to exclude deviations from the ordinary arbitration rules and to be limited only to those breaches of procedural rules which would constitute a violation of the rules of natural justice. The award should not be challenged solely because conventional procedural rules had not been fully observed.

The CHAIRMAN stated that the point would be clarified.

Mr. TSAI (China) referring to Section 13(1)(a) suggested that the clause "the tribunal exceeded its power" could be improved if the words "including failure to apply the proper law" were added. As the parties were entitled to agree on the applicable law, failure of the tribunal to apply that law would frustrate that agreement.

Mr. LAZO (Philippines) observed that the point raised by the delegate from China seemed to be covered by Section 13(1)(c) which provided for annulment of the award in case of failure to state the reasons for the award.

The CHAIRMAN remarked that the draft Convention did not provide for an appeal against the award and in his opinion a mistake in the application of the law would not be a valid ground for annulment of the award. A mistake of law as well as a mistake of fact constituted an inherent risk in judicial or arbitral decision for which appeal was not provided.

Mr. GHANEM (Lebanon) observed that if the parties had agreed to the application of a particular law and the tribunal had in fact applied a different law, the award would be *ultra petita* and could therefore be validly challenged.

Mr. TSAI (China) stressed that he had had in mind the case just mentioned by the delegate from Lebanon and not merely a mistake in the interpretation or application of the applicable law.

The CHAIRMAN thought that in the case mentioned by the delegate from Lebanon the award could be properly challenged on the ground that the arbitrators had gone against the terms of the *compromis*.

Mr. TSAI (China) called the attention of the Chairman to the fact that while in Section 10 the arbitral tribunal was given power to *prescribe* provisional measures, in Section 13(5) the committee which would consider a request for annulment was given the power to *recommend* provisional measures. He wondered whether the term "recommend" should not be used also in the case of an arbitral tribunal under Section 10.

The CHAIRMAN noted that there was an inconsistency in Section 13(5) between the French text which said "prescribe" and the English text which said "recommend". The matter would be further considered.

Mr. SHIRATORI (Japan) suggested that requests for interpretation under Section 11 and applications for revision under Section 12 should be made to the Chairman or to the Secretary-General, rather than to the tribunal which in the meantime might have ceased to exist.

Mr. O'DONOVAN (Australia) referring to the proviso in Section 12(1) remarked that the draft did not specify how it could be established that the decisive fact upon which an application for revision was based was unknown at the time the award was rendered to the tribunal and to the party requesting revision and that such ignorance was not due to the negligence of said party.

The CHAIRMAN replied that there would probably be a presumption of absence of knowledge and that the burden of proof would be on the party that resisted the application for revision on the ground that the tribunal or the other party had had such knowledge.

The meeting was adjourned at 1:45 p.m.

FOURTH SESSION
(Thursday, April 30, 1964 - 8:35 a.m.)

ARTICLE IV - Arbitration (continued)

Enforcement of the Award (Sections 14-15)

The CHAIRMAN said that Section 14 which declared that the award shall be final and binding on the parties was of crucial importance. In its present form it required that the parties "abide by and comply with the award immediately", followed by the saving clause "unless the tribunal shall have allowed a time limit...". The intent of the provision could, he thought, be clarified and its text simplified by requiring compliance with the award "in accordance with the terms thereof", which would take care of the time within which the award was to be complied with, followed by a saving clause to take account of the unusual cases where the enforcement of the award was to be stayed.

Mr. UL ISLAM (Pakistan) said that as he understood it, Section 14 implied that an award would not be liable to challenge by way of appeal in any forum. On the other hand, Section 13 allowed the award to be challenged before the Center on the ground that it was invalid. Under general law it might be open to a party to challenge an award as well in the local court in which execution was sought on the grounds that the award was invalid. He would, therefore, suggest that the Convention expressly require all Contracting States to take steps to prevent challenges of awards in their courts. While he recognized that Section 2 of Article XI contained a general requirement that a State at the time of ratification declare that it has taken the steps necessary to carry out its obligations under the Convention, he would prefer to include specific provisions requiring each State to set up machinery for the execution of the award as a judgment of the highest court of appeal of that State.

The CHAIRMAN, introducing Section 15, said that it dealt with two problems. The first was the obligation of each Contracting State to recognize an award of the tribunal as binding. In that connection he felt that the word "accept" might express the intent of the provision better than the word "recognize" appearing in the text. What was contemplated in this part of the sentence was the force of the award as res judicata as a valid defence in resisting an action, say, in the ordinary courts of a State, on a matter already determined in arbitral proceedings before the Center. The second part of the sentence dealt with the obligation to enforce the award within the territories of the Contracting State and here, on reflection, he thought the intent of the provision might be better expressed if the words "recognize... and enforce it" were substituted by "recognize as enforceable."

It had been pointed out that there was a considerable jump between action by the international arbitral tribunal and action by the national enforcement authorities. It might be possible to rely on provisions such as those suggested by Mr. Ul Islam and require States to take steps to adapt their machinery in a manner necessary to achieve that result. On the other hand it might be desirable to spell out in some detail what those steps might be, and in that connection he thought that the relevant provisions of the Treaty establishing the European Economic Community (Treaty of Rome) might be interesting as an example of how international

awards could be translated into effect through domestic procedures. Article 192 of the Treaty of Rome (reproduced in COM/AS/7)*/, after stating that certain types of decisions were enforceable, declared first that "forced execution shall be governed by the rules of civil procedure in force in the State in whose territory it takes place", thus making it clear that no change was implied in the types of execution or remedies available under the procedural law concerned. Second, it laid down guidelines for the way in which the execution proceedings were to be started. Each member State was to designate an authority - it might be the Minister of Justice or a similar official - who would issue the writ of execution after having done no more than verify the authenticity of the award. From then on there was no distinction between the execution of a judgment of the courts of that State and of the arbitral award.

In his opening remarks he had alluded to another important point not expressly stated in Section 15 but connected with it, viz. the question of immunity of States from execution. In his view it was not necessary to provide for forced execution against States under this Convention since the Convention imposed a direct obligation on States to carry out the award. While the investor was also under an obligation to comply with the award, there was no direct sanction under the Convention for his failure to do so. It was, therefore, provided that where the State was the winning party it could obtain a writ of execution, whereupon the process of execution would run the normal course in the country concerned.

While those who objected to the principle of State immunity had argued that it ought to be eliminated from the Convention, the majority view was that forced execution should not lie against a State and the rule would, therefore, remain untouched. Equally, in countries where under certain circumstances execution against the State was permitted, e.g. where a State had acted in a capacity similar to that of a private person rather than jure imperii, the law would remain untouched. In other words the Convention would not change the principles (including the limitations on those principles) applying in Contracting States to enforcement of final judgments against States.

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*/ "Decisions of the Council or of the Commission which contain a pecuniary obligation on persons other than States shall be enforceable.

Forced execution shall be governed by the rules of civil procedure in force in the State in whose territory it takes place. The writ of execution shall be served, without other formality than the verification of the authenticity of the written act, by the domestic authority which the Government of each Member State shall designate for this purpose and of which it shall give notice to the Commission and to the Court of Justice.

After completion of these formalities at the request of the party concerned, the latter may, in accordance with municipal law, proceed with such forced execution by applying directly to the authority which is competent.

Forced execution may only be suspended pursuant to a decision of the Court of Justice. Supervision as to the regularity of the measures of execution shall, however, be within the competence of the domestic courts or tribunals."

Mr. UL ISLAM (Pakistan) recalling that a State, being a party to the Convention, was bound directly under it to comply with the award, while the investor was not, again emphasized his earlier proposal that States be expressly required to enact legislation for the enforcement of an award against an investor as if the award were a judgment of its highest appellate courts.

The CHAIRMAN agreed and said that in his opinion provisions along the lines of Article 192 of the Rome Treaty would, together with Section 15, give expression to Mr. Ul Islam's idea.

Mr. ABAS (Malaysia) thought that the provisions of Section 15 were adequate and that no more detailed provisions were needed. That Section imposed a definite obligation on a State to enforce the award and if it did not provide the machinery necessary to enable it to do so, it would be in breach of the Convention.

Mr. GAE (India) said he had reservations regarding the adequacy of Section 15. Under general principles of law, the award of an arbitral tribunal was binding only as between the parties concerned. Section 15, however, imposed on every Contracting State the obligation to give effect to the award as if it were a final judgment of the courts of that State irrespective of the general law of the State regarding other types of arbitral awards.

In some countries an internationally binding award could not be implemented immediately and automatically as was required by Section 15, and the defendant was entitled to take advantage of any procedural safeguards available to him under the law of the State concerned. In his view, therefore, express provision ought to be made in Section 15 requiring each Contracting State to enact legislation to enable the award to become enforceable as a final judgment of its courts, unless such legislation already existed. A provision like that in the Treaty of Rome which read: "forced execution shall be governed by the rules of civil procedure in force in the State in whose territory it takes place", though welcome, would by itself be inadequate in the absence of implementing local legislation.

Under general principles of municipal law execution of international arbitral awards was subject to certain exceptions, viz. (i) where the dispute was not of a kind arbitrable under the law of the State concerned, and (ii) where enforcement of the award would be contrary to its public policy. He would accept these exceptions in relation to awards rendered pursuant to the Convention. Similar provisions were already incorporated in Section 2 of Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed at New York on June 10, 1958.

Finally, he suggested the inclusion of more detailed provisions of steps to be taken to secure recognition or enforcement of the award such as were contained in Article IV of the New York Convention. In particular the award and the agreement to arbitrate, or certified copies thereof, ought to be submitted together with any application for recognition or enforcement of the award.

The CHAIRMAN agreed with the delegates of India and Pakistan that Section 15 ought to be elaborated so as to contain provisions requiring Contracting States to enact appropriate legislation despite the fact

that the Convention in Section 2 of Article XI alreedy in general terms required Contracting States to teke all internal etepe to enable them to carry out their obligations. While too much detail should be avoided, States could be given guidance as to whet minimum steps ehould be taken under Section 15.

On the question of exceptions to implementation of the award, it was important to note ons difference between Section 15 and the corresponding provisions of the New York Convention, viz. that under the latter there exists what might be termed e limited form of appeal to local courts whereas the present Convention creeted a self-contained system. Some of the grounds which could give rise to an "appeal" (in a non-technical sense) to local courts under the New York Convention, would here have to be dealt with under the heading of "revision". However, it was true that two other grounds, namely public policy and non-arbitrability, were not covered by the Convention. He himself had urged in reply to arguments raised by capital-exporting countries that, from the point of view of capital-importing States, the more unconditional the binding force of an award, the better.

Mr. DAJANI (Jordan) pointed out that Section 15 went beyond internationally accepted practices in requiring enforcement of awards by States not parties to the dispute. The Comment to this Section envisaged a situation in which the State would want to enforce an award against an investor. In his view a State would have no difficulty in taking action locally to enforce the award. He had in mind, however, the problems which could arise in the converse case where an investor sought enforcement against a State; where, for compelling reasons, the State party to the dispute found itself unable to comply with the award it would be embarrassing for third States to have to enforce that award within their own territories. He would therefore prefer to return to the prevailing practice whereby the award was enforceable only within the States concerned in the dispute.

The CHAIRMAN recalled that arguments similar to those of Mr. Dajani had been made at previous meetings for the most part by capital-exporting countries. Since, in most States, it was impossible to enforce a judgment or an award against a foreign sovereign, he did not think that the question of embarrassment would ever arise.

The reason for extending the enforceable character of the award to countries other than the State party to the dispute and the investor's State had been to make it possible for the winning party to pursue assets of the losing party wherever they might be. While it was true that in a normal case there would probably be sufficient assets within the territory of the host State to satisfy any award against the investor, it was urged by some of the capital-importing States that that might not always be the case, and that for that reason they would like to see a wider enforceability of the award.

Finally, he observed that it would not be quite accurate to say that it was unusual in international arbitration to provide for such wide enforceability because the New York Convention of 1958 and, to a lesser extent, the Geneva Convention of 1927 did exactly that with respect to international arbitral awards between private citizens. Those two Conventions were in many respects similar to the present draft, one point of difference being that the draft, in excluding certain review procedures,

took enforceability one step further.

Mr. EL-FISHAWY (Kuwait) thought that the enforceability of the arbitral award as envisaged in Section 15 was too broad, and also that it would be more in keeping with the consensual character of the Convention that the test of enforceability of the award should be the extent to which that award would be enforceable as a judgment of the highest court of, say, the party asking for the enforcement of the award, rather than of the State where the award was to be executed. He also suggested that, as it did not seem to have been intended in Section 15 to vary in any way the recognized rule that a judgment is only binding on the parties, the words "on the parties" should be added after the word "binding", in Section 15 to make the position clear.

Mr. O'DONOVAN (Australia) asked whether it was intended that provisional measures prescribed by a tribunal would be enforceable as an award.

The CHAIRMAN said that this was still an open question. At previous meetings some experts had argued that interim measures - and especially what one of the delegates to the present meeting had called an "interim award" - should be treated on the same footing as the final award with respect to enforceability. Others had wanted to leave provisional measures outside the ambit of Section 15. He agreed, however, that the Convention should contain precise provisions on the point.

Mr. O'DONOVAN (Australia) thought that provisional measures ought not to be prescribed unless absolutely necessary in the circumstances, and that if pecuniary compensation would be adequate in lieu of some preliminary measure, then no preliminary measure ought to be prescribed. On that basis, such measures ought to be included in the enforcement provision. That might also have the effect of discouraging tribunals from prescribing preliminary measures save in the most exceptional cases.

Mr. PARK (Korea) asked whether compensation or indemnification would be provided for where, for instance, it was discovered say ten years after the rendering of the award that the decision was incorrect in fact or in law and action was taken under the provisions for revision or annulment. He suggested that some provision be made to compensate or indemnify the State or the investor for the loss or harm which had resulted from the previous incorrect decision.

The CHAIRMAN thought that the Tribunal or the Committee which reviewed the award or declared it invalid respectively would certainly have the power to order restitution or to make such other disposition as it deemed appropriate, and that that decision ought to have the same degree of enforceability as the original award. Appropriate provision to that effect would be made in the draft.

Relationship of Arbitration to other Remedies (Section 16-17)

Mr. GHANEM (Lebanon) said that Section 16 seemed to make possible a contradiction between decisions of international tribunals and those of domestic courts. In his opinion, if that provision were applied it would endanger the authority of even the highest national courts and cause litigation to drag on indefinitely. In particular, it would place

the State in a position of inferiority vis-à-vis the investor. If the host State were condemned in its own court, it would not challenge the decision; but if it won the case, the decision of its court could still be contested by the investor before an international tribunal. The possibility of international arbitration after recourse to local remedies should be eliminated and he, therefore, suggested that Section 16 be deleted.

The CHAIRMAN said he could not appreciate Mr. Ghanem's objection to Section 16 unless that provision could be understood in a manner entirely different from what he thought was its meaning and what should have been clear from the Comment. All that Section 16 did was to state a rule of interpretation of the agreement whereby the parties consented to the jurisdiction of the Center viz., where there was an agreement to go to arbitration and no reservations had been made in that agreement, it would be presumed that no reservations were intended. It would always be open to the parties, however, to include an express reservation e.g. as to the need to exhaust local remedies.

Mr. GHANEM (Lebanon) agreed with the position stated by the Chairman but thought that the language of Section 16 did contemplate the possibility that an investor would first try his chance before the local courts and, if he lost, would then resort to the international jurisdiction. This possibility was, in his opinion, highly unadvisable.

Mr. ADARKAR (India) said that, in keeping with the flexibility provided in the present text, the parties to a dispute ought not to be left with only one remedy through exclusion of all other remedies whenever arbitration had been agreed upon. Some agreements entered into by his government had provided that any dispute arising out of the agreement was to be submitted to arbitration in the manner provided. Other agreements provided that any dispute was to be "finally settled" by arbitration. In the first type of case other remedies were automatically excluded. In the second, other remedies were open to the parties but an arbitral award, when rendered, would be final and binding upon them.

The CHAIRMAN said that he did not think the expert from Lebanon had meant to object to the degree of flexibility of Section 16 but rather to the possibility of interpreting its present language in a way which would enable an unsuccessful investor to go to arbitration after the courts of the host State had ruled against him.

Mr. DAJANI (Jordan) thought there were definite advantages in requiring, as a general rule, that both the Contracting State and the investor before resorting to international arbitration seek local remedies even where - as in most investment agreements - there was an unqualified arbitration clause. In his opinion that would be more within the normal pattern of practice than to reach international arbitration in one step.

The CHAIRMAN emphasized again that Section 16 contained only a rule of interpretation of an agreement, and did not express a preference regarding any conditions which might be included therein. If necessary that could be made clear in a separate comment. If a State wished to make its consent to international arbitration subject to the prior exhaustion of local remedies, it was free to do so, and there was no intention whatever of changing the rule of international law generally accepted, viz. that in the absence of a contrary agreement international

claims could not be brought until local remedies had been exhausted. The language of the section would, however, be reviewed in order to remove any suggestion that exhaustion of local remedies would not be a normal requirement.

Mr. GHANEM (Lebanon) agreed that the language of Section 16 should be reviewed and made absolutely clear in that respect.

Mr. WANASUNDERA (Ceylon) suggested that the draft expressly include provision for recourse to local remedies as part of the scheme for settlement of a particular dispute which led up to international arbitration. Thus, parties dissatisfied with municipal courts might be given the right to go to arbitration at a certain stage. In his opinion, the opposite principle was embodied in Section 16 which seemed virtually to exclude local remedies.

The CHAIRMAN said it was possible in this respect to distinguish two groups of countries. Some found it quite acceptable for an international tribunal to over-rule their own courts provided the latter had first taken cognizance of the dispute. Other countries would stipulate a choice between their own courts and international arbitration, but would not permit an appeal to arbitration from a decision of their courts. For that reason it was essential to retain flexibility.

Section 16 contained nothing more than a rule of interpretation, and the preceding discussion had indicated that such a rule of interpretation might be useful in view of the lack of agreement on whether, for instance, consent to arbitration referred to arbitration (i) as an alternative to local procedurea, (ii) as a final procedure for settlement, or (iii) as the sole mode of settlement of the dispute.

Mr. TSAI (China) thought the principle embodied in Section 16 was a fair one. Exhaustion of local remedies was usually the prerequisite for a government to espouse the claim of its national. If the government gave up this right of espousal, then it would be reasonable to expect waiver by the State party to the agreement of its right to request exhaustion of local remedies. The expert from Lebanon, however, had raised a significant point, viz. the propriety and wisdom of subjecting the decisions of a court to review by an international arbitral tribunal as was permitted by Section 16.

The CHAIRMAN pointed out that several delegates - particularly at the Santiago meeting - had found such a procedure desirable, and had indeed expressed the view that it would be the only acceptable way in which to submit to international arbitration. He could not, therefore, share the view that the situation envisaged by Mr. Tsai was necessarily undesirable. It was possible that ambiguity in the Comment might have given rise to some misunderstanding. It would be made clear that mutuality and consent were always necessary before any conditions in the agreement could be binding on the parties, and he felt that when the Comment was redrafted to reflect this view accurately, most objections to Section 16 would fall away.

Mr. GAE (India) said he failed to appreciate the difficulties referred to by the expert from Lebanon. In his view, the parties when concluding an agreement had a choice as to whether they would stipulate the prior exhaustion of local remedies. If the agreement contained no

such stipulation, the general presumption would be that they thereby precluded themselves from taking the dispute to a court of law. If, in spite of such presumption in favor of arbitretion as the sole remedy, one party went to a domestic court, as was the case in the example in paragraph 10 of the Comment, the other party could ask the court to stay proceedings.

Mr. HETH (Israel) said thet under the present rules of international law, the exhaustion of local remedies must precede recourse to international arbitration unless the parties expressly agreed otherwise. Section 16, by providing that recourse to local courts would be blocked when international arbitretion was contemplated in, say, an investment agreement unless explicit provision to the contrary were made, reversed that principle. Under the rule in Section 16, the tribunal would entertain a variety of arguments that could heve been dealt with by local tribunals, whereas in the traditional procedure only certain arguments, e.g. denial of justice, discriminetion or non-compliance with a most-favored-nation clause, could hava baen entertained. The internetional tribunal would not then appear in tha character of an appellate court ruling on issues on which local courts had passed final judgment.

The CHAIRMAN agreed with Mr. Heth that when a tribunal had sole jurisdiction the scope of the issues before it would be different from those with which it might have to daal in review proceedings, and that questions of fact would not be reopened. However, he could not agree that Section 16 changed the rule of international law requiring the exhaustion of local remedies. It merely seid that when the parties to an agreement consanted without qualification, say, that all disputes arieing out of or in connection with the agraement "shall be settled by arbitration", it would maan what the great majority would understand it to mean viz., "shall be settled by arbitration in lieu of any other remedy."

Mr. ADARKAR (Indie) pointed out that the discussion of Section 16 had so far been only in the context of cases whera there had been an agreement. On the other hand, paragraph 9 of the Comment on page 34 of the Working Paper[†] covered cases where consent was given even where there had been no prior agreement to go to arbitration - a situation which he found generally unecceptable. However, the particular case stated was one where the foreign investor sought the consent of a State ad hoc, and that State in giving its consent unilaterally attached conditions, e.g. exhaustion of administrative processes. He could agree to the particular formuletion of paragraph 9 of the Comment which left the Stata free to impose conditions unilaterally when its consent was sought ad hoc and did not require mutuality of the parties in euch cases.

Mr. GHANEM (Labanon) aaid that perhaps at the Santiago meeting a different approach to the question of prior exheustion of local remedies had been put forward. As for him, he wanted to stress again that the possibility of international adjudicetion after the domestic courts had reeched a final decision was unacceptable.

Mr. EL-FISHAWY (Kuwait) said that it had been mentioned that under Section 16 an arbitral tribunal would not - if it were stipuleted that local remedies ware to be exhausted - review domestic decisions as would

[†] Doc. 24

an appellate court but would only examine such questions as denial of justice or discrimination. However, as it stood, the text might lead to the misunderstanding that arbitral tribunals had broader jurisdiction, including power to review the judgments of local courts from every point of view.

The CHAIRMAN thought that it would depend on the terms of the compromis or compromissory clause which would usually deal with the matter. In the absence of specific terms of reference the arbitral tribunal would have the limited rights normally accepted in international law.

The CHAIRMAN, introducing Section 17(1), explained that one of the purposes of the Convention was to remove disputes from the atmosphere of inter-State relations, and, in order to do so, it had conferred on the investor the capacity to be a party to international proceedings. It had been felt that as a consequence the traditional right of espousal of his claim by his State should disappear in such cases, so that the host State would not be faced with the possibility of having to meet a plurality of claims, e.g. a claim before an arbitral tribunal and another made through diplomatic channels or before the International Court of Justice.

There was one exception to the proposed rule viz., the case where the other Contracting State failed to perform its obligations under the Convention - which in essence meant failure to comply with an award. The investors State's right of espousal, which disappeared on the assumption that the investor had a remedy under the Convention, revived when that remedy was frustrated.

Mr. SHIRATORI (Japan) asked whether if a State enacted an investment law including a provision for submission to the Center of any dispute arising from an investment, and if an investor obtained a license under that law, it would automatically mean that the investor had consentad to submit the dispute to the Center, and that he thereby gave up his diplomatic protection.

The CHAIRMAN thought it would be desirable in a law of that character to insert a provision which would make clear what the situation would be in such a case. It might, for instance, provide that the investor to whom a license had been granted would thereby be deemed to have accepted the procedure for settlement of disputes under the Convention, or the law could make it a condition of the license that the investor expressly accept the jurisdiction of the Center. In the absence of such a provision it could, at least, be argued that until the investor had actually availed himself of the offer contained in the law there would be no agreement to accept the Center's jurisdiction. Consequently his State would not be debarred from espousing his case and bringing an international claim.

The CHAIRMAN, introducing Section 17(2), said that where an arbitral tribunal set up under the Convention rendered a decision in a specific dispute or a dispute arising out of a specific act under an investment agreement between the investor and the host State, that decision would be final. On the other hand, where the subject-matter of the dispute also formed the basis of a dispute between States covered by an inter-governmental agreement which provided for arbitration of such

disputes, it had been felt that the two States ought to be free to proceed under the latter agreement, but should do so only to secure a decision on the question in the abstract without affecting in any way the specific award rendered by the arbitral tribunal. The dacision rendered in the inter-State arbitration would, though intarpretativa of the inter-governmental agreement, be of necessity merely declaratory and without effect on a particular inveetor.

Mr. TSAI (China) asked for clarification of Section 17(2) with respect to a case whera the investor's State was subrogated to the rights of tha invsstor in a dispute covered both by the Convention and by a bi-lateral agreement eetting up an investment guarantee program. Would the investor's State be free, after an arbitral tribunal constituted under ths Convention had rendered an award, to prefer a claim undar the bilateral agreement? If the inveetor'e State were to be precluded from doing so, a specific prohibition to that effect ought to be included in the text.

The CHAIRMAN said that in hie opinion the investor'e State could not maka such a claim under tha bilateral agreement and that the impact of subrogation on Section 17(2) would be revised to make this clear. Although before the Center the State had acted not _qua_ State but merely in place of the investor and only with such rights and obli-gations as he had possessed, it might give rise to confusion if a State were thus permitted to act in two capacities in casss covered by bilateral investment guarantee agreements.

Mr. ADARKAR (India) shared the doubts expreesed by Mr. Tsai and hoped that further thought would be given to tha way in which ralation-ships under investment guarantee agreemente between Statee would be affected by the Convention. Unless action by the inveetor's State as subrogee under the bilaterel agreement wera excluded, a foreign invastor who had insured his investment under an inveetment guarantee agreement might first take advantage of the Convention in the hope that he could thereby obtain for himself a higher benefit than he expected to get under the bilateral guarantee agreement. If he were dissatisfied with the award under the Convention, he might then proceed under the bilateral agreement.

He also pointed out that the effect of the Convention might be to supersede inveetment guarantee agreemente, if not with ragard to paet investments, at least with regard to the futura. Host countries would hava to decide whether they ehould approve any more invsstments under bilateral agreements, and whether by doing so they would give the foreign investor a double remedy, viz., through proceedings under the Convention, as well ae by way of insurance. He inquired how other governments hed viewed this question. Would thoee governments which now provided invest-ment insurance cease to rely on investment guarantee agreements if the present Convention were to entar into force? Which course of action did foreign investore themselves prefer?

The CHAIRMAN in reply said that Section 17(2) had been included on the suggestion of one capital-exporting country which had entered into a series of investment promotion and protection agreements, but had since found favor with a number of countries both capital-exporting and capital-importing. The position of the capital-exporting countries on the issue, however, was not very clear. Nor did he think they had as

yet looked at this provision in the context of its offering a dual remedy in cases covered by investment guarantees. Experts from another capital-exporting country which had a system of investment guarantees had indicated informally that the Convention could offer a convenient way of settling questions between governments, as well as an alternative to, or substitute for, the dispute settlement provisions now incorporated in bilateral guarantee agreements. He agreed entirely with the previous speakers that Section 17(2) called for further careful analysis.

ARTICLE V - Replacement and Disqualification of Conciliators and Arbitrators

Mr. GHANEM (Lebanon) referring to Section 2(2), suggested that the words "shall resign" in the third line before the last, be replaced by the words "shall be dismissed".

He also felt that the provisions of Section 2 should be made more specific, lest proceedings be protracted indefinitely by successive challenges of arbitrators. It was not clear, for instance, on what grounds a party might propose disqualification, or whether a party might only propose disqualification of a conciliator or arbitrator appointed by him or whether he could also propose disqualification of a conciliator or arbitrator appointed by the other party.

The CHAIRMAN said that Section 2 was broad enough to allow a party to challenge a conciliator or arbitrator appointed by the other party, and that tbat had, in fact, been the principal intent of the provision. As to the grounds for challenge of an arbitrator or conciliator, these were stated in general terms similar to those of the corresponding provision in the Model Rules on Arbitral Procedure adopted by the International Law Commission. A closer definition of those grounds might be desirable.

It was to be noted that Section 2 established a distinction between conciliators and arbitrators appointed by the Chairman and those appointed by the parties in that the right of challenge in regard to the former was more restricted. Several experts had suggested that that distinction might offend the sensibilities of parties and ought to be removed.

Mr. GAE (India) suggested that a provision should be included in Article V to the effect that, where a vacancy occurred after proceedings had commenced, the proceedings should continue from the stage that had been reacbed at the time the vacancy occurred, subject to the right of the newly appointed conciliator or arbitrator to require that oral proceedings be commenced _de novo_.

The CHAIRMAN agreed that that would be a reasonable solution.

Mr. GHANEM (Lebanon) also supported that suggestion. Its applicability, however, would depend on what rules of procedure governed the proceedings. If the proceedings were oral it might be necessary to start proceedings _de novo_ when the vacancy was filled; if the proceedings were in writing the provision described could be applied. It should, however, be left to the commission or tribunal to decide how the proceedings should continue after a vacancy had been filled.

Mr. EL-FISHAWY (Kuwait) pointed out that no provision had been made for the case where a conciliator or arbitrator resigned without

the consent of the other members of the commission or tribunal before proceedings had started. As the proceedings would not then be hindered or delayed there seemed no objection to the vacancy being filled by the method used for the original appointment rather than by the Chairman as was now required in all cases by Section 1.

The CHAIRMAN replied that a suitable provision to that effect might be inserted.

Mr. TSAI (China) said that to empower the Chairman to fill any vacancy occurring on disqualification might not be appropriate where more than one such vacancy had to be filled. Another aspect of the matter was that it might be inconsistent with the basic principle of exclusion of national arbitrators to allow the Chairman to fill such vacancies when he himself possessed the nationality of one of the parties.

Referring to Section 2(1) he pointed out that while both subsections dealt with disqualification subsequent to constitution of the commission or tribunal, no time limit was prescribed within which disqualification had to be proposed. Could a party, for instance, propose disqualification even after an award had been rendered? In this connection he drew attention to the possibility that even the party who had appointed the arbitrator could presumably propose his disqualification.

The CHAIRMAN thought that the Chairman of the Administrative Council would rarely, if ever, have to fill more than one vacancy. As to the Chairman's nationality in relation to his power to appoint under Section 1, there did not seem to be an alternative to this procedure since there was only one Chairman.

In his opinion it would be contrary to established international or commercial practice to permit disqualification after rendering of the award, although there seemed to be no objection to proposing disqualification at any time before that date.

Mr. GOONERATNE (Ceylon) pointed out that under Section 1, if in a three-man tribunal an arbitrator appointed by one of the parties was disqualified and the resulting vacancy was filled by an arbitrator appointed by the Chairman, the tribunal would consist of two members appointed by the Chairman and one member appointed by one of the parties. In such a case the party whose arbitrator had been disqualified should at least be consulted by the Chairman who might, in the alternative, fill the vacancy from the Panel by lot. He would suggest, however, that where an arbitrator had been disqualified there was no reason for his successor to be appointed by the Chairman (a procedure which might be reasonable in cases of resignation without consent), and that the phrase "and consequent upon a decision to disqualify him pursuant to Section 2(2) of this Article" be deleted from Section 1.

The CHAIRMAN agreed that the phrase should be deleted.

<u>The meeting was suspended at 11:05 a.m. and resumed at 11:35 a.m.</u>

Mr. PARK(Korea) referred to an extreme case where a tribunal or commission was composed of five persons and disqualification of four of them was proposed. In such a case, under Section 2(2) it would be left to the decision of the single other member whether to disqualify them.

ARTICLE VI - Apportionment of Costs of Proceedings

Mr. EL-FISHAWY (Kuwait) suggested that provision be made in Section 1(b) to the effect that all charges should be assessed against a party who had denied the rights of the other party in bad faith.

The CHAIRMAN agreed, and suggested that that could be done by inserting the words "or resisted" after the words "has instituted," thus taking account of bad faith not only on the part of the plaintiff but also on the part of the defendant. Further consideration would, however, be given to how the text could best be amended.

Mr. EL-FISHAWY (Kuwait) asked why the system in Section 1(b) had been adopted in preference to requiring each party to bear at least the fees and expenses of the members of the commission or tribunal appointed by him.

The CHAIRMAN replied that it had been thought best to provide for equal sharing of the expenses of the umpire, and that unequal payment of members of the tribunal be generally avoided, as that could tend to establish the wrong kind of relationship between the arbitrators and the parties. To that end it had also been proposed in Section 3 that a commission or tribunal would fix its charges in consultation with the Secretary-General. At previous meetings it had been suggested that some guide-lines ought to be laid down, say, in the form of a tariff established by the Administrative Council, as to the limits within which commissions or tribunals could fix their charges.

Mr. EL-FISHAWY (Kuwait) thought Section 3 referred only to cases where there was no agreement between the parties and the members appointed by them. He had referred to cases where, in an agreement between a party and, say, an arbitrator appointed by him, the fees of the arbitrator would be specified.

The CHAIRMAN said that while the language of Section 3 was ambiguous that section was intended to cover only those cases where there was an agreement between the commission or tribunal as a whole and the two parties acting together.

Mr. HIMADEH (Lebanon) thought that the term "its own expenses" in Section 1(a) should be clarified. He also suggested that in Section 3 the requirement of consultation with the Secretary-General be substituted by the requirement that the Secretary-General approve the fees and expenses of arbitrators and conciliators.

The CHAIRMAN said that the phrase "its own expenses" in Section 1(a) would include the fees and expenses of lawyers, experts or agents, and in fact all other expenses except the charges payable for the use of the facilities of the Center, and the fees and expenses of the commission or tribunal.

Mr. HIMADEH (Lebanon) suggested that provision for the expenses covered by Section 1(a) might best be made in a final subsection to the effect that the rest of the expenses would be borne by each party.

ARTICLE VII - Place of Proceedings

There was no comment on Article VII.

ARTICLE VIII - Interpretation

The CHAIRMAN, introducing Article VIII, explained that it had been intended to give the International Court of Justice jurisdiction over questions and disputes regarding interpretation of the Convention without the necessity for a special agreement. Consequently any Contracting State could start proceedings before the Court by application, and in order to remove any doubt on the point, it might be advisable to state expressly that any such question or dispute "may be submitted to the Court by any party by application."

He then referred the meeting to Doc. COM/AS/8 which contained a tentative draft of an additional provision on interpretation as follows:

"1. ....

2. (1) If in the course of any arbitral proceeding pursuant to this Convention a question arises between the parties to the dispute concerning the interpretation or application of this Convention, and the arbitral tribunal is of the opinion that the question has merit and may affect the outcome of the proceedings, the tribunal shall suspend the proceedings for a period of three months.

(2) If within that period the tribunal shall have been notified that the International Court of Justice has been seized of the question by a State party to the dispute, or the State whose national is a party to the dispute, the arbitral proceedings shall remain suspended as long as the question is pending before the International Court of Justice.

(3) If the tribunal shall not have been so notified, the arbitral proceedings shall be resumed at the expiration of the aforesaid period."

At an earlier meeting the question had been raised whether some procedure might be provided for having the International Court pronounce on questions of interpretation which arose, not between members, but between the parties to a dispute in the course of proceedings. Since only States could be parties before the Court the text provided for stay of proceedings during which the States concerned could take up the question with the Court if they so desired. If within the limited period - three months was suggested - the States did not bring the matter before the Court, the proceedings would continue and the tribunal would have to decide the question of interpretation along with the other questions submitted to it.

Mr. QUILL (New Zealand), referring to the proposed additional section, thought it might have been a further advantage if the tribunal could, of its own motion, place a matter of interpretation arising during

arbitral proceedings, before the International Court.

The CHAIRMAN in reply said that while it would only be possible for States to place the matter before the Court, it might be feasible to provide that the tribunal suspend proceedings if it felt that there was a question of interpretation on which it wished to have the views of the Court. The tribunal could then inform the Secretary-General, who in turn could notify the Contracting States who might, if they so desired, take the matter up.

Mr. QUILL (New Zealand) thought it would be useful to add some provision along the lines suggested by the Chairman.

Mr. GHANEM (Lebanon) asked whether the International Bank and its affiliates could request advisory opinions of the International Court and, if so, whether the Center might not be given a similar power.

The CHAIRMAN said that while he had considered the matter of the advisory jurisdiction of the International Court, requests for advisory opinions could only be made by the United Nations and the "specialized agencies". While the latter term as defined in the UN Charter included institutions like the Bank and the International Monetary Fund, he doubted whether the Center would qualify as a "specialized agency". He also doubted whether the Bank itself could request advisory opinions on issues arising before the Center, as such questions might not be regarded as arising out of any operation or function of the Bank.

Mr. MANSOURI (Iran) asked whether the application of Article VIII was restricted to cases where States confronted each other in proceedings, as when the investor's State was subrogated to the rights of the investor.

The CHAIRMAN replied that the provision was stated in general terms, and that no limitation of that nature was implied. He thought the type of dispute contemplated under the original provisions of Article VIII would normally arise, not in connection with a particular proceeding, but on such questions as whether a Contracting State was giving effect to the privileges and immunities provided for, or whether it had provided the necessary facilities for enforcement or recognition of arbitral awards. It might be argued that precisely because the provision was generally drawn no addition was needed, and that all that was required was a mechanism for bringing to the attention of the Contracting States the existence of a dispute or question regarding interpretation so as to enable them, if they so desired, to refer it to the International Court as a question or dispute of their own.

Mr. NEMOTO (Japan) recalled that Section 3(1) of Article II was explicit in stating that any commission or tribunal would be the judge of its own competence. Was it, therefore, intended that matters concerning the competence of the commission or tribunal, or the jurisdiction of the Center, were to be excluded from the operation of Article VIII?

The CHAIRMAN thought that under Article VIII as it stood, such matters would be covered. However, questions of competence would generally arise in relation to a specific proceeding, and if the tribunal wanted guidance - not on its decision but on the interpretation of some provision of the Convention - it might try to solicit an

opinion through the indirect way suggested in his reply to the delegate of New Zealand.

The tribunal would still be the judge of its own competence and no diminution of its powers was intended. If, however, before it reached a decision one of the provisions of the Convention which would be relevant to such a decision were interpreted by the International Court, then the tribunal would regard itself as bound by the decision of the Court as to the meaning of the Convention and would proceed on the basis of that interpretation.

Mr. UL ISLAM (Pakistan) shared the doubts expressed by the expert from Japan and suggested that if it were the intention that the commission or tribunal retain the power to judge its own competence it should be specifically stated in Article VIII that its provisions were subject to Section 3 of Article II.

The CHAIRMAN agreed that such a modification would be useful.

Mr. HETH (Israel) asked whether the present wording of Article VIII precluded the possibility that after the arbitral tribunal had decided the matter of its own competence, the parties could later ask the International Court of Justice for the proper interpretation of the Convention.

The CHAIRMAN said he did not think that that would be permitted. This could be made clear through the modification of the text proposed by the expert from Pakistan.

The CHAIRMAN in reply to Mr. LAZO (Philippines) agreed that the decision of the tribunal on its own competence would be final and not subject to review by any other Court.

ARTICLE IX - Amendment

The CHAIRMAN, introducing Article IX, said it was customary for agreements which consisted of the constitution of a new organization (e.g. the International Bank and the International Monetary Fund) to contain an amendment procedure. In general, amendments were to be adopted by a specific majority - here tentatively fixed at 4/5 - and once such an amendment was adopted it would be binding on the minority. Thus Contracting States which were unwilling to accept the amendment would have a choice between living with it or withdrawing from or denouncing the Convention. In that connection it was to be noted that the amendment would not become effective until 12 months after its adoption, and that an identical period was specified within which a State could effectively cease to be a Contracting State following denunciation.

Mr. GHANEM (Lebanon) thought it was strange that the right to denounce the Convention was extended under the terms of Section 5 even to those members who had voted for the amendment.

The CHAIRMAN pointed out that the right of denunciation was unconditional and that a Contracting State could at any time denounce the Convention by written notice and without giving any reasons. There was no essential link between the right of denunciation and the adoption

of amendments. The only link provided was that the periods of time had been established in such a way that a member wishing to withdraw could do so with effect from the time when the amendment would become effective.

Mr. MANSOURI (Iran) referred to Section 7(4) of Article I which stated the general rule that the decisions of the Administrative Council would be taken by a simple majority, and inquired why it had been thought necessary to stipulate a 4/5 majority in connection with amendment of the Convention.

The CHAIRMAN in reply said he thought the requirement of a 4/5 majority was justified as the decision was an important one, might affect members' obligations and would be binding on the minority.

He recalled that at the other meetings it had been asked whether it was desirable to have an amendment procedure at all since some delegates thought that they might not be able to obtain parliamentary approval of an agreement which provided for the possibility of amendment without unanimous approval. Other delegates had felt that they could get such legislative aproval while still others suggested that while provision for a qualified majority decision should be retained, provision should be made for at least one exception, viz., that the optional or consensual character of the Convention could not be changed without a unanimous vote.

Mr. ADARKAR (India) thought the required majority of 4/5 was too high. He would prefer a procedure whereby amendments would have to be adopted by a certain majority, but would become binding only on those who expressly accepted it. It might, however, be provided, in addition, that other Contracting States if they so desired could require dissenting States to withdraw from the Convention.

The CHAIRMAN recalled that a 4/5 majority was required for amendment of the Charters of the Bank and the International Monetary Fund. It was difficult to discover a prevailing custom in the matter of amendment of multilateral agreements and the drafters had here followed a system of requiring a high majority for adoption, and then declaring the amendment to be effective for all Contracting States. An opportunity was, however, provided for dissenting States to withdraw from the Convention.

The expert from India had suggested a second system (which he did not think would be appropriate in the context) whereby the amendment would be effective only for those States which had accepted it, while giving the accepting States the right to require the withdrawal of dissenting States. A third system would declare the amendment to be binding only on those who had accepted it. Those countries which did not accept the amendment could not then claim any benefits or rights under it, but by the same token would not be subject to any obligations it imposed. The disadvantage of the system was that it would create groups of States with different obligations. Finally, one might remove the amendment procedure completely, which would mean in effect requiring unanimous approval of any change in the Convention. There had been support for each of the four possible approaches without any clear preponderance of one over the other.

ARTICLE XI - Final Provisions

Mr. EL-FISHAWY (Kuwait) asked why it was necessary in Section 5 to provide a certain period after which denunciation would become effective. The purpose of prescribing an identical period in Article IX on amendment was to avoid binding any State which did not approve of the amendment for the period during which it could denounce the whole Convention. However, a State which did not denounce the Convention for, say, two or three months after it had made up its mind, might find itself bound for a like period by an amendment approved by the majority. He would therefore suggest that the denunciation take effect immediately after it had been notified.

Mr. GHANEM (Lebanon) thought that the Convention had failed to indicate clearly the scope of its application in time, so that it could conceivably apply to disputes covering investments made prior to the Convention. As the fundamental purpose of the Convention was to create a favorable climate for future investment, it would not be fair to apply it to old investments, particularly those made when the host State was not master of its own destiny. He therefore suggested that Article XI include an additional provision specifying the scope of the Convention in time and that Article II be amended to exclude existing investments.

The CHAIRMAN thought it would be going too far to say that treatment of old investments was irrelevant to the investment climate for future investments. Investors considering an investment in a country would be guided, at least in part, by the experiences of old investors. He was aware that the political aspects of that question were probably more important than the legal ones, and that several delegates might not find the Convention acceptable if the capacity conferred by it on investors were extended to disputes arising out of investments made either before the date of the Convention or some other specified date.

The answer to that was the optional nature of the Convention - an answer which some delegates accepted, and others, who did not want to be in a position of having to refuse recourse to the Center in a particular case, did not. If, however, the limitation on the scope of the Convention proposed by the expert from Lebanon were to be included, the proper place for it would be in Article II.

Mr. LAZO (Philippines) disagreed with the expert from Lebanon and urged that the Convention be open to use in connection with investments already made. The Convention was based upon the consent of the parties, and if the parties agreed that they could take advantage of the facilities it offered, he saw no reason to deny them the use of these facilities. His delegation would like to go on record that they would like to see the Convention kept open for all such investors as had invested funds in other States, to use it or not as they chose.

Mr. SHIRATORI (Japan) referring to Section 5(2) said that while it was reasonable in case of a voluntary denunciation by a State to terminate its rights arising out of undertakings given prior to the date of notice, he could not agree that denunciation following inability to accept an amendment should have the same effect. He thought it would be important, especially for the protection of private investors, that both the rights and obligations arising out of such undertakings be preserved.

The CHAIRMAN agreed that reference should be made in Section 5(2) not only to obligations but also to the rights of the denouncing State. He would even go so far as to say that both the rights and obligations of a State should be preserved irrespective of the motive for the denunciation.

Mr. ASKARI-YAZDI (Iran) suggested that Section 1 might be revised to read simply "this Convention shall be open for signature on behalf of all sovereign States", as this would obviously include Bank members.

The CHAIRMAN recalled his earlier statement that after hearing a number of experts at previous meetings he had been convinced that it would be desirable to replace the words "to all sovereign States" by "all members of the United Nations or of the specialized agencies".

Mr. TSAI (China) said that in the view of his government signature should be open and limited to members of the Bank, instead of to those of any other organization or to "all sovereign States".

Mr. HIMADEH (Lebanon), referring to Section 5, said that the rights and obligations to be kept alive on denunciation were not only those of the State concerned, but also those of a national of that State, and suggested that the section be amended accordingly.

The CHAIRMAN agreed.

ARTICLE X - Definitions

The CHAIRMAN, introducing Article X, recalled that at this and other meetings at least two additional definitions had been proposed, viz. definition of "investment" and of "dispute of a legal character". As to "investment" he had heard a number of proposals drawn from local legislation none of which had proved entirely satisfactory when considered in relation to practical questions. One thought had been to have an agreed list of transactions that would be regarded as investments, and then to have either some general residual clause or else language like "any other transaction which is regarded as an investment under the laws of the host State." Thus both investors and host States would know in advance a certain number of transactions characterized as investments, while with the latter type of clause it would be open to both to include other transactions provided the host State was willing to treat them as investments under its investment legislation.

As to the two definitions at present included in Article X, he explained that the test of nationality of companies was a dual one, viz. the test of nationality under its domestic law, and the control test. A complication occurred when a company though established under the law of one country was controlled by citizens of another. In such a case a company might, for the purposes of the Convention, have dual nationality.

Mr. O'DONOVAN (Australia) raised two points regarding the definition of a "national of a Contracting State". First, the date on which the nationality of the investor was to be ascertained was the date on which consent to the jurisdiction of the Center became effective. On the assumption that there might be a considerable lapse of time between that date and the date of the award during which the nationality of the investor could have changed, it seemed desirable to provide that immediately before

any award was made a certificate should be issued by the appropriate authority of a Contracting State to the effect that the party concerned was at that time a citizen of that Contracting State. It would otherwise be open to a party to change his nationality in the course of proceedings to that of a non-Contracting State, in which event there would be no means by which the host State could execute an award against the investor, whereas the investor, notwithstanding that he was not open to any action by the host State could, if the award were in his favor, take action against the host State to enforce the award.

Second, he did not think it desirable to extend the definition of the term "company" to any mere association of natural persons, as it was unlikely that, for instance, unincorporated partnerships would make the sort of investment covered by the Convention. Problems of nationality in the case of unincorporated associations could be very great, particularly where some of the partners were nationals of Contracting States and some were not.

The CHAIRMAN recalled that it had earlier been agreed that the date relevant in determining nationality should be the date on which consent to arbitration "was given" rather than the date on which it "became effective". With regard to natural persons, he would agree that they should also possess the nationality of a Contracting State at a later time, but would be reluctant to go further than the date on which proceedings were instituted. He had more difficulties in applying a similar principle to companies, as he thought it unlikely that under the present state of the law a company could become incorporated in a second country without losing its identity.

As to Mr. O'Donovan's second point, the definition sought to treat a partnership as having juridical personality for the purposes of the Convention irrespective of whether it would be so regarded under its domestic law. Its nationality might then have to be determined by the control test. He did not, however, think it necessary to include more detailed rules on the matter in the Convention as it could be left to be worked out by a tribunal in practice.

Mr. TSAI (China) thought there was no justification for applying the control test as it would always be open to individual foreign shareholders to receive protection as natural persons. In any event the term "controlling interest" was very vague and would give rise to controversy. For instance 51% of the shares might not be controlling because it would not necessarily mean 51% of the voting power. For the purpose of a loan by the United States Government to an American company, 25% was regarded as a controlling interest, while for investment guarantees 15% was sufficient. If there were no real need for protection on this basis it ought to be excluded. Similarly in the case of partnerships the individual partners could enjoy protection as natural persons if they were foreigners and there seemed no need to extend protection to those associations.

While he was in favor of continuity of nationality he would not go so far as to require possession of the identical nationality, but only that the party be a foreign national of some Contracting State.

Section 2, which extended protection to those with dual nationality one of which nationalities was that of the host government, was acceptable to him provided it was restricted to natural persons. It should not apply

to companies as it could open the way for evasion of the control of domestic law by a company which was substentially a domestic company.

Recalling that Section 3(3) of Article II treated as conclusive on the question of nationality a certificate from the Foreign Minister issued "for the purpose of those proceedings", he said he was not sure whether a State would be willing to issue certificates to investors who were not nationals in other respects, e.g. for the purpose of tax payments, allegiance to the government, etc. but only for the purpose of receiving the protection of the Convention.

The CHAIRMAN said that earlier in the meeting it had been agreed to change the term "national" in Section 3(3) of Article II to "citizen". That might remove the difficulties to which Mr. Tsai had alluded in connection with his last point.

As to the more general observations regarding the definitions, it was necessary to bear in mind the essential flexibility provided through the consensual character of recourse to the Center. It was always open to a State to choose which investors it would regard as foreign for the purpose of conferring on them the capacity to institute proceedings before the Center. Nor would a refusal of consent to jurisdiction give rise to the "adverse inference" which had been earlier discussed, where a State chose to regard a company as its national despite the fact that it was eligible under the definitions.

On the other hand, a State might, if it found some advantage in so doing, treat a company which had dual citizenship under the control test, as a foreign company. At previous meetings and also at the present one, it had been suggested that some of the problems of determining nationality in such a case might be removed if the host State were to enter into an agreement not with the company as such but with the foreign investors in the company. Here again, however, practical difficulties might arise where the shares were held in varying amounts by a large number of persons.

Mr. EL-FISHAWY (Kuweit) referring to the date relevant for determining netionality, said he was in support of the draft es it stood. As the consent of the parties was fundamental, the most relevant date was that on which consent had been given. He did not see why en investor, after having agreed with a host State to go to arbitration, should be deprived of his contractual right simply because his nationality had changed.

Mr. WANASUNDERA (Ceylon) suggested that the definition of "nationel of a Contracting State" be given further consideretion, since the extended definition of "company" eppeared to be inconsistent with the principal definition. With reference to Section 2 he said that where matters were arbitrated against e background of dual or multiple nationality, it was essential that all questions of nationelity be finally resolved prior to or during arbitration, so es to avoid a multiplicity of claims erising thereafter.

Mr. PINTO (Secretary) referred to two solutions to the problem of nationality suggested et earlier meetings. It had been recognized that Article X did no more than define, from the standpoint of nationality, those types of entity which a host State could - but was not bound

to - regard as being qualified to enter into an investment agreement with it. Some delegates had therefore suggested that reliance should be placsd on the consensual nature of the agreement and that the definition should be very simple: an investor would be rsgarded aa a national of another Contracting State if the host Stats chose to regard him as such when entering into an investment agreement with him.

Another delegate proposed a solution by way of ths practical steps necessary to snter into an invsstment agrsement. Thus whsn concluding an agreement, the investor would stipulsts his nationality as a material condition, and should his nationality change thereafter, the agreement would have to be rs-negotisted or come to an snd.

The meeting rose at 1:20 p.m.

FIFTH SESSION
(Friday, May 1, 1964 - 8:30 a.m.)

Chairman's Summary of Discussion

The CHAIRMAN said that before opening the discussion on the Preamble and calling for the closing observations of delegates he would, in response to an informal request to do so, try to assess the character of the present meeting and compare it with the previous consultative meetings, and attempt a summary of the discussion up to that point.

In his view, the principal point of difference between the present meeting and previous meetings was that here there had been a preoccupation with matters of policy which had led to a close analysis of the political impact of the Convention as such on the position of capital-importing countries vis-a-vis investors or capital-exporting countries, and less discussion of specific provisions of the text.

The chief points of significance raised thus far related to Article II on the jurisdiction or scope of activity of the Center. Seversl delegates had had difficulty with the phrase "investment dispute of a legal character". Those delegates had felt that from a technical point of view that phrase needed clarification. Other delegates who were more concerned with the policy implications of that term had argued with some insistence that the jurisdiction of the Center should comprise only one category of investment dispute viz. disputes arising out of specific agreements with investors, including disputes in connection with investments made in reliance on incentives offered in investment promotion legislation. The proponents of the latter view, while acknowledging that adherence to the Convention did not imply any legal obligation in the State (or the investor) to use the facilities of the Center in the absence of express consent to do so, had nevertheless felt that a State's refusal of consent could possibly lead investors to draw an adverse inference, and that a government would, therefore, find it difficult to refuse to use the Center in a specific case. To provide for ad hoc recourse to the Center would open the door to requesta by investors for such recourse in a variety of disputes which the host State might not regard as arbitrable and was, therefore, undesirable.

In the opinion of the majority of experts at this and other meetings - an opinion shared by the staff of the Bank - those fears were unfounded, and there was no reason to limit the scope of activity of the Center in the manner proposed, since the clearly established consensual nature of the

mechanism established by the Convention offered adequate protection against the poseibility of an "adveree inference". The understanding reflected in the Preamble e.g. the recital in paragraph 3 to the effect that local remedies would in moat casee be adequate and would be the normal way of dealing with inveatment disputes, could be regarded as further emphasizing that the element of consent to jurisdiction was regarded by the drafters as an essential feature of the mechanism. At a previous meeting some experts had suggested that if a Stete edhered to the Convention nearly all new investors would probably wiah to obtain from the host Stete egreement in advsnce to aubmit disputes arising out of investment egreements to the Center. Thoae experts had felt that while their countries might not be able, legelly or politicelly, to include en arbitretion clause in their investment agreements, they might be prepered to eccept *ed hoc* arbitration of a particular diepute. Nor were they in eny wey apprehensive regarding the possibility that refusal by the Stete of en *ad hoc* request for arbitration might give riee to an adverse morel judgment on the pert of the investor.

It had been suggeated during the meeting that the problem of the "adverse inference" might be obviated (1) through inclusion of a provision in the Convention empheeizing in unequivocal terms that edherence to the Convention did not give rise to any duty legal or morel to aubmit disputes to the Center in a given case and (2) through a provieion which would enable States to make declarations et the time of their adherence to the Convention aa to the specific areae in which they would be willing to consider heving recourae to the facilities offered by the Convention, and he would welcome the views of the delegstss on thoee proposals. In his view it would be e sufficient reply to investore requesting recouree to the Center *ed hoc* that not only was the State under no moral or legal duty to consent, but elso thet the diepute wae clearly outaide the erea in which the State hed declared it would coneider recouree to the Center.

Apart from this bseic question as to the ecope of the Convention he hed noted that et leest two delagatee had doubts whether the best method of settling investment dieputes wee, in part, to remove them from the sphere of intergovernmentsl relatione and on to the purely legel plane where Stete and inveetor would meet on equsl terms. In the view of thoee delegetee, it eppeared prefereble to encoursge governmentel inveetment guaranties end to meintain any ensuing inveetment dispute in the intergovernmental ephere, thus making governmente reeponsible for the flow of all foreign inveetment es well es for settling any possible difficulties which might eriee. In that connection he noted that in Africs, where there wae great interest in inveetment guarantees either by cepital-exporting Statea under bilateral agreements, or by a multilatersl guarantee fund, no delegate had dieaented from the view that it would be advantageous to remove disputes from the intergovernmentsl ephere. On the contrary, they had expreesed a preference for the spproech embodied in the Convention.

Finelly, he referred to the propoaal of Mr. HIMADEH (Lebenon) that the Bank or the Center, or possibly some other institution, might provide capitsl-importing countries with expert guidance in drafting investment agreements and srbitrstion clauses. Whils it might be s matter for consideretion whether the Center or the Bank should give euch advice, thst propoeel corrsctly emphasized ths imperative nsed for technical skill in drafting investment egrsements containing s provision for eubmission of dieputes to the Center, ss well es in drsfting other types of inveetment agreements, economic cooperation agreements, concession agreements and the like.

The Preamble and Cloaing Observations

The CHAIRMAN invited the meeting to consider the Preamble and to make such general observations as they might think desirable regarding the Convention as a whole.

Mr. SHIRATORI (Japan) referred to the need to clarify the definition of "investment disputes". For instance, could questions arising out of outstanding and deferred paymenta be brought before the Center? He did not think it appropriate for a meeting of an expert group, auch as the present one, to reach a conclusion on sucb iasuea and felt that the precise scope of the Center'a activitiea ought to be discussed in a wider forum where the official views of both capital-exporting and capital-importing countries could be exchanged.

He asked the Chairman whether he would care to comment on the merits of introducing a new mechanism for conciliation and arbitration in addition to the existing organizations in that field.

The CHAIRMAN thougbt that the two transactions mentioned by the delegate from Japan would come within the term "investment" in its broadest sense, but agreed that it would be difficult for the present meeting to reach any conclusion on queations of definition.

As to the distinction between tbe Center and existing mechanisme for settlement of disputee he pointed out that the principal feature of the propoaed mechanism was that it was accompanied by a aet of rules whereby undertakings made and awards rendered under the Convention were internationally binding - a feature lacking in other mechanisms auch as the International Chamber of Commerce or even the new Rules (1962) drafted by the Administrative Council of the Permanent Court of Arbitration. In addition, the Panels of the Center would be compoaed of peraons believed to be specially competent in mattera arising out of investments, whereas those of, for instance, the Permanent Court of Arbitration were composed of distinguisbed juriats in the field of public international law.

Mr. PANT (Nepal) recslled that in his opening address he had given support to the principles and concepts underlying the Convention, the need for which he had categorically endorsed. The draft seemed to him to have taken due account of the legitimate interesta of the capital-importing countries as well as those of inveators. He thought that there would be a definite advantage in adopting a Convention of this type rather than including detailed proviaions on the settlement of disputea in each individual investment agreement. The Convention would provide a much better and speedier remedy whicb would, in the long run, offer a better incentive to prospective investora. Some countries, bowever, might find difficulty in adopting the draft in view of their municipal or conatitutionsl laws which would therefore have to be changed.

With regard to the specific provisions of the Convention he recalled that the delegate from India hsd rightly pointed out that no investment or commercial dispute could be devoid of legal character. However, in the particular context he thought the expression "legal character" did help to convey the intent of Section 1 of Article II. On the other hand, he associated himself with the general consensus of opinion regarding the need for a more elaborate definition of "investment dispute".

As to Section 3 of Article II he thought it would be better not to enumerate the categories of defenses to be decided as preliminary questions, but rather to provide that whenever a party to a dispute claimed that a commission or tribunal lacked competence, that claim would be dealt with as a preliminary question. With particular reference to Section 3(3) of Article II he agreed with the view that a certificate of nationality granted by the Minister of Foreign Affairs should not be treated as conclusive proof but only as prima facie evidence of nationality.

Finally he said that in the opinion of his delegation, the foreign investor should be required to abide by the national laws of the country where he had made his investment, except where special privileges had been granted to him under the terms of a specific agreement, and he should not be allowed to claim unlimited general immunity from the laws of the land. Consequently, the investor ought to be required to exhaust all his local remedies before he could avail himself of international conciliation or arbitration facilities such as those provided by the Center.

Mr. LAZO (Philippines) asked whether the provisions of Article II on subrogation of the investor's State were intended to cover subrogation of that State prior to recourse to the Center by the investor. If so, was it intended that in such a case a dispute between States could come within the jurisdiction of the Center?

The CHAIRMAN observed that Section 1 of Article II dealt not with assignment or transfer of a claim in general, but only with the particular type of transfer by operation of law known as subrogation. That would occur only after the dispute had arisen, but regardless whether or not the dispute had been referred to the Center. As the investor State would then stand in the shoes of the investor it would only possess the same rights and be subject to the same obligations as those of the private investor, and would not be acting as a sovereign State. To permit the investor State to appear in this manner would not, therefore, be inconsistent with the Convention.

Mr. TSAI (China) said that his government had in the past taken several measures to promote foreign investment, and that foreign investors were by law given protection against expropriation, the right to repatriate not only profits and interest but also capital, facilities to acquire land and the like. Nor did his government object to giving foreign investors further incentives in the form of the procedural safeguards contemplated under the Convention, which brought disputes within an international jurisdiction. His government was receptive to the many new ideas in that Convention; he felt, however, that the proposal made several times by delegates from other countries that an instrument of such significance ought to be discussed in a wider forum than that offered by a regional meeting, deserved serious consideration by the Bank.

With regard to the substance of the Convention, he felt that the scope of activity of the Center should be restricted to disputes arising in cases where special rights and obligations accrued to a foreign investor under an investment promotion law or a special agreement with the investor concerned. For instance, if a tax holiday was allowed to foreign investors only, then disputes concerning such tax holidays might be regarded as "investment disputes" and as being within the jurisdiction of the Center. But if national investors also enjoyed tax holidays, then such disputes should be excluded

from the jurisdiction of the Center. Referring to the proposal of the delegate from Lebanon that the Bank provide expert legal guidance in the drafting of investment agreements or arbitration agreements, he wondered whether the Bank would also consider sponsoring seminars or training courses at which legal experts could be trained in these subjects.

Finally referring to the apprehensions expressed by some delegates that there might be too close a link between the Bank and the Center he asked whether the Chairman could summarize briefly the principal aspects of such a link.

The CHAIRMAN said he was aware of the need for advice to developing countries in the field of invsetment promotion, in particular regarding the drafting of specific investment agreements. The Bank's role thus far had been limited to giving informal advice in a few cases, and in others to urging countries to seek expert guidance and assisting them to secure competent advisers. On the broader question of training legal experts it was a matter for consideration whether it would be possible to institute a program of the type suggested within the framework of the Economic Development Institute.

The various aspects of the link between the Center and the Bank evidenced in the present Draft could be dealt with under three headings, viz. General, Powers and Functions of the President of the Bank as <u>ex officio</u> Chairman of the Administrative Council, and Powers and Functions of the Secretary-General - the latter being included because the Secretary-General could not be appointed without first having been nominated by the President of the Bank.

<u>General</u>

1. The seat of the Center would be at the headquarters of the Bank (Article I, Section 2(1)).

2. The Center might make arrangements for use of the Bank's offices and administrative services and facilities (Article I, Section 2(2)).

3. The President of the Bank would be <u>ex officio</u> Chairman of the Administrative Council (Article I, Section 5).

4. The Governors of the Bank might act <u>ex officio</u> as members of the Administrative Council (Article I, Section 4(2)).

5. The annual meeting of the Administrative Council would be held in conjunction with the Bank's annual meeting (Article I, Section 7(2)).

6. Employment by the Bank would not be incompatible with the office of Secretary-General (Article I, Section 9(2)).

7. The possibility that the Bank might bear the overhead costs of the Center (implicit in Article I, Section 16).

<u>Powers and Functions of the President of the Bank as ex officio Chairman of the Administrative Council</u>

1. To call meetings or obtain a vote of the Administrative Council (Article I, Section 7(1)).

2. To cast a deciding vote in the ceee of an equal diviaion in the Administrative Council (Article I, Section 5).

3. To nominate the candidate or candidatea for the office of Secretary-Generel (Article I, Section 9(1)).

4. To deeignate persons to the Penels of conciliators (Article I, Section 11(3)) end arbitrstore (Article I, Section 12(3)).

5. In the ebaence of a contrsry egreement between the parties, to appoint conciliatore (Articls III, Section 3) or arbitrators (Article IV, Section 3) in casee of feilure by either party to do ao.

6. To appoint a pereon to fill a vacancy occurring upon resignation of e conciliator or en arbitretor without the coneent of the other membera of the commiseion or tribunal, or upon diequalificetion of a concilietor or en erbitretor (Article V, Section 1).

7. To teke e décision on a propoeal to disquelify a single conciliator or arbitrator (Article V, Section 2(2)).

Powers end Functions of the Secretary-General

1. To be the principal administrative officer of the Center (Article I, Section 10(1)).

2. On the instructiona of the Chairman to consult with parties in order to essiet the Chairman in appointing conciliators (Article III, Section 3(1)) or arbitretore (Article IV, Section 3) when that function was aseigned to the Chairman.

3. To fix the charges payable by the parties for the use of the facilitiee of the Center within the limits fixed by the Administretive Council (Article VI, Section 2).

4. To be available in certain circumstencee for consultation with a commission or tribunal in the matter of fixing the feee end expenses of conciliators and arbitrators (Article VI, Section 3).

5. To determine the place of proceedinge aftar coneultation with the parties and with the commiasion or tribunal concerned, in caees where the parties have been unable to agree to hold proceedinga in Washington or The Hague (Article VII, Section 1) and to be svailable for coneultetion with a commission or tribunal when it has been eeked to approve a place for holding proceedings agreed upon by the parties (Article VII, Section 2).

From the foregoing summary it would be clear that while the link between the Bank and the Center had certein administrative advantagee, it could not enable the Bank to influence the proceedings which would take place under the auspices of the Center.

Mr. ROOSE (Malaysia) said his country had taken steps toward eliminating the fears of foreign investors thet their investments would be exposed to non-commercial risks both at a Federal ae well as State level. In keeping with that policy, his government had, after preliminary consideration of the Convention, decided to give ite support in principle

to the proposal to set up an international conciliation and arbitration Center. In his opinion the terms of the Convention were fair and reasonable, and he had no doubt that his government would accept the proposals after further consideration subject, however, to the solution of the problems discussed at the present meeting.

Mr. UL ISLAM (Pakistan) recalling some of the factors which might be said to contribute to the formation of a country's investment climate, said that the Convention represented a genuine attempt to develop an international institution which, if successful, would dispel much of the apprehension of foreign investors regarding the security of their investments, and would lead to a greater participation by them in the development of the less developed countries. The proposala appeared to strike a balance between the traditional idea on State sovereignty on the one hand and recognition of individuals as the subject of international law on the other, both of which concepts had undergone substantial change in recent years. The Convention represented a charter of investment both for the capital-exporting as well as the capital-importing countries, and he was in agreement with the general principles embodied in them.

Mr. MANSOURI (Iran) requested that consideration be given to his proposal that disputes arising in connection with existing investments be excluded from the jurisdiction of the Center.

Mr. ADARKAR (India) paid tribute to the Chairman for the way in which he had dealt with the questions raised in the course of the meeting and for his summary of the discussion up to that point.

In the course of the meeting he had expressed certain doubts regarding the extent of the jurisdiction of the Center. He had not thereby wished in any way to minimize the Bank'a efforts to promote the free flow of foreign private capital to countries in need of it, nor ahould there be any misunderstanding aa to India's readiness to accept international jurisdiction in appropriate fields. India had in the past provided for arbitration in agreements entered into by the government with foreign investors, and had also unilaterally given asaurances to investors through several general policy statements.

He had raised several issues of policy; and that he thought was inevitable having regard to the nature of the Convention itself. On the other hand, his delegation had not confined itself to issuea of policy but had gone on to suggest improvementa of the text - some of which might even be inconsistent with the basic premises his delegation had put forward.

He also wished to make it clear that his preference for settlement of investment disputes at the intergovernmental level had not been expressed in general terms, and was only intended to cover particular types of problems not suitable for being dealt with in specific contracts between States and investors.

Concluding, he pointed out that his views on the policy implications of the Convention had been given in virtual ignorance of the views expreaaed by other developed and developing countries. In his opinion, in order to mould world opinion on these important proposala which introduced a new concept in intergovernmental relations and international law, discuasion of the draft in a somewhat wider forum than a regional meeting would be helpful.

The CHAIRMAN sgreed that it would be useful to have a discussion in a somewhat wider forum. The exact manner in which this should be achieved, however, would bs e matter for further consideration by the Executive Directors of the Bank and by the Governments they represented, after they had had an opportunity to study the summary records of the four consultative meetings.

He welcomed the clarification of Mr. Adarkar's views on the question whether inveetment disputes ought to be removed from the intergovernmental sphere, or should bs dealt with in that ephsre.

He had not intended, in asssssing the character of the present meeting in relation to earlier consultative mestings, to seem critical or to exprese any value judgment. In rssponse to requests from several delegates he had merely eought to indicate certain points of contrsst, one of which wae undoubtedly ths emphasia placed by delegates at the preeent meeting on broad policy issuss.

Mr. LAZO (Philippines) paid tribute to the Chairman for his successful conduct of the meeting and the way in which he had dealt with the various questions raised. His delegation had concluded that the draft Convention was a sort of charter establishing the processes of conciliation and arbitration. While it did not spell out all the procedural details, it did contain fundamental principles which were based on the spirit of friendship and goodwill, and imbued with good faith. While the draft was not perfect, he felt eure it would, in time, be improved taking into consideration the several suggeetions made at the meeting. His delegation was in full accord with the underlying principles of the Convention, and his government, as a capital-importing country, welcomed the propoeals believing that they would improve and encourage the flow of capital into the country. The legislature was now considering several measuree on foreign investment and might tske into account the principles embodied in the Convention, in particular, submission of investment disputes to an international body in order to avoid protracted litigation in the locsl courts.

Mr. HOAN (Viet-Nam) said his country recognized that, in order to encourage the flow of foreign capital, certain measuree were necessary and his government had already taken certain of those measures, e.g. it had guaranteed foreign investors against nationalization, guaranteed the transfer of profits and repatriation of capital, etc. While, to the local investor, those measures might seem discriminatory in favor of the foreign investor, the government had been firm enough to take them. His government welcomed the Convention which he believed to be a means of encouraging and facilitating the flow of capital into developing countries. While he supported the many innovations it sought to introduce into international law, including the principle that an individual would be considered on a par with a State, he hoped that any resulting restrictions on State sovereignty would be kept at a reasonable level. He doubted whether the principle of State-investor equality would be entirely satisfactory when it came to judging whether a dispute was of sufficient importance to bring it before the Center. A dispute would not have the same importance for a Stete as it would have for an individual, and he requested that that aspect of the matter be reconsidered with a view to including in the Convention some provision on the value of the dispute, which should not be e matter for the partiee to decide.

To open the Center to "all eovereign States" (Article XI) might change

it into a political forum, and he would, therefore, prefer to see membership restricted to the member countries of the Bank and the International Monetary Fund.

Mr. GOONERATNE (Ceylon) said he wished to emphasize some of the issues which had been raised in the course of the meeting:

1. Any definition of the jurisdiction of the Center should take into account that in international law there were some disputes which were regarded generally as not justiciable, although strictly such disputes might appear capable of settlement on the basis of legal principles.

2. Some delegates were apprehensive that too close a link between the Bank and the Center might impair confidence in the Center and the measure of its independence. In that connection his delegation had suggested that one of the ways of meeting the difficulty might be to restrict the Convention to conciliation.

3. As the object of the Convention was to create a favorable climate for future investments, some delegates had urged that there was neither a political nor legal basis for including within the jurisdiction of the Center investments made at a time when many Asian countries had not been independent and, therefore, unable to control the conditions under which foreign investment could enter. His country, for instance, had recently entered into an investment protection agreement with a capital-exporting country which expressly provided that it would be applicable only to investments made after signature of the agreement.

4. It had been urged that the Convention imposed obligations on capital-importing States without at the same time creating corresponding obligations for capital-exporting countries toward the economies of capital-importing countries.

5. Viewed in its broadest aspect the Convention appeared to contain an element which would enable pressure to be brought to bear on the developing countries thereby impairing their national dignity and self-respect. Such an element could result in an atmosphere of suspicion and ill will between countries and so tend to subvert the aims of the Convention.

In a Convention of this type it was impossible to separate the political from the technical legal aspects, and despite the fact that the Chairman had with great skill conveyed the views expressed at other meetings, that could not be a substitute for a frank exchange of views between capital-exporting and capital-importing countries on all the issues involved. He, therefore, joined those delegates who had urged that the Convention be discussed in the widest possible forum.

The CHAIRMAN said that in his view the applicability of the Convention to past investment was not wholly irrelevant to the question of the investment climate, for the reason that investors, in looking to the future, inevitably took account of the experience of the past. In doing so, investors and their governments would, however, be likely to take into consideration the time at which, and the conditions under which, certain investments were made as well as the corresponding necessity in some cases to adjust established legal relationships to new political, social and economic realities.

Aa to investment protection agreementa of the type referred to by Mr. GOONERATNE, such agreementa laid down certain rules of substance governing investments and invastors, and could, therefore, be distinguished from a purely procadural instrument lika the Convantion. It would not be illogical for a party to an inveatment protection agreement to agree that, even though the provisions of that agreement did no more than refer to principles of law which it felt already existed, the substantive rights and obligations "codified" in the agreement should apply to future investments only. However, in distinguishing the Convention from investment agreements covering rules of substance, he did not mean to imply that the Convention itself could not in its application by parties be limited to future investments.

Mr. HASAN (Jordan) believed that while foreign investment should be encouraged and protected by the host State, yet there was no compelling reason for establishing institutional facilities for the settlement of disputes concerning them. Remedies obtainable under the existing rules of international law, the laws of the host State, or the provisions of bilateral agreements, might be adequate if observed in good faith by all the parties concerned. In his opinion, the main concern of an investor was the political stability of the country in which he sought to invest, rather than any lack of adequate machinery for the settlement of disputes.

Assuming, however, that the establiahment of such facilities was thought by other delegates to be desirable and practical, their scope should not be such as to encroach seriously upon the sovereignty of the host State and should not extend beyond the limits of what was absolutely necessary. The present Convention seemed to exceed those limits and to place a foreign investor in a better position than the local investor, which could result in a situation under which it would become advantageous to the nationals of the capital-importing countries to export their capital and invest it abroad. His delegation would prefer to see the Convention restricted at the present stage to conciliation.

As to specific provisions, he would prefer the operation of Section 15 of Article IV on the recognition and enforcement of arbitral awards to be confined to the host State, the foreign investor and the State of that foreign investor, rather than bind all Contracting States. In drawing up a final draft due regard should be paid to the several comments made by the delegates to the meeting.

Mr. QUILL (New Zealand) said that while some important points of principle remained to be reconciled, there was a sufficient measure of agreement as to the shape and content of the document to encourage the Bank to continue its efforts toward the conclusion of a Convention which would be generally acceptable.

Mr. SERM (Thailand) after recalling that his delegation had stated its position at the first session paid tribute to the Chairman for his conduct of the meeting and expressed his appreciation to the Bank for its efforts to find ways and meana of promoting the flow of investment to countries in need of it.

Mr. ABAS (Malaysia) aaid that the principlea underlying the Convention were acceptable to hia govarnment which waa doing everything possible to promote foreign investment in the country. The week's discussion, at which important questions of policy had been discussed, had

been very profitable. He was, however, in support of the proposal that those issues be discussed eventually in a wider forum.

The greatest merit he could see in that Convention was its consensual nature; on the other side of the line was the question of the innovations the Convention sought to introduce in the existing rules of customary international law. The desirability of those innovations would have to be carefully weighed by each government. On the question of the jurisdiction of the Center he associated himself with the proposal that jurisdiction be limited to disputes which might arise in the future, and should not extend to existing disputes. In his view, the enforceability of awards rendered pursuant to the Convention should be limited to the State where the investment was made, and the State of the foreign investor and ought not to be required in third States.

Mr. OBAID (Saudi Arabia) said his government, which was mobilizing all its efforts to accelerate economic growth, recognized fully the greater role which would be played by foreign investment. The week's discussions had helped considerably to clarify the problems which might arise in connection with such investments. He believed that the Convention would be of great assistance in establishing a favorable investment climate, and when a final draft was formulated after due consideration of the problems raised by delegates to the meeting, the proposals would achieve their goal, viz. the accelerated economic growth of the developing countries.

Mr. O'DONOVAN (Australia) said it was not the practice in Australia to give any extensive undertakings to foreign investors who were generally treated in the same way, received the same benefits and were under the same obligations as local investors. While the government always permitted repatriation of capital it had undertaken no obligations to do so. In accordance with the government's obligations as a member of the International Monetary Fund, it also permitted repatriation of profits.

While he was not, therefore, greatly concerned about disputes arising out of specific undertakings he would like clarification whether two particular types of dispute would come within the meaning of the term "investment dispute of a legal character" viz: disputes concerning (1) expropriation, and (2) a decision by the government not to permit rapatriation of capital. As to expropriation, Section 51 of the Australian Constitution empowered the Commonwealth to make laws with respect to the acquisition of property on "just terms"; what "just terms" were was for the most part and in the absence of agreement by the parties to the contrsry decided by the local courts, the Commonwealth being subject to the jurisdiction of those courts.

His main concern was the situation where the foreign investor sought approval to repatriate capital and was refused. In such a case, in the absence of any specific undertaking by the capitsl-importing country, would there be an "investment dispute of a legsl character"? If the matter were dealt with according to national law, the decision would be entirely within the discretion of the local authorities. On the other hand, if international law were applied the matter might be more complicated particularly as the rules of international law on the question were not clear.

As to the Preamble, he suggested that paragraph 6 would be an appropriate place in which to emphasize that a country adhering to the

Convention would be under no legal or moral obligation to consent to the jurisdiction of the Center in any particular case.

On the draft provision on extension of the jurisdiction of the Center contained in Document COM/AS/6[10] which sought to cover agreements between investors and the political subdivisions of a State or a State agency, he saw no reason why it ought not to be acceptable. The matter would, however, be one that the Commonwealth itself would have to take up with the states in due course.

The CHAIRMAN said that the answer to the question whether refusal by the Commonwealth to permit repatriation of capital in the case described by Mr. O'Donovan would be an "investment dispute of a legal character" would probably be in the affirmative because the dispute would presumably be based on the contention by the investor either that the Commonwealth had not lived up to its own laws on foreign exchange remittances and repatriation of capital, or that refusal to permit that export of capital would violate some rule of international law either customary (as for instance being discriminatory) or conventional (as being, for instance, in breach of a treaty provision). However, the express consent of the State would be required before such a dispute could be brought before the Center.

He thought Mr. O'Donovan's proposal for adding emphasis to the idea embodied in paragraph 6 of the Preamble might be helpful.

Mr. PARK(Korea) said his country had taken several measures to encourage foreign investment. Local laws provided several safeguards for foreigners and hitherto, in some one hundred instances of foreign investment, there had been no disputes at all. However, he would not deny the necessity for an institution like the Center which would be of use in settling disputes that might arise in the future.

Without going into detail he would like to suggest that consideration be given to (1) the scope of disputes which could be brought before the Center (Article II); (2) the provisions on the binding force of awards (Section 15 of Article IV); (3) providing expressly in Article V for disqualification of conciliators and arbitrators on grounds of general unfitness or personal prejudice; and (4) limiting participation in the Convention to certain countries and not leaving it open to accession by all sovereign States as was now provided in Section 1 of Article XI.

Mr. MANSOURI (Iran) said that his country needed foreign investment and welcomed any measures which would encourage the flow of capital into the country. The present draft needed to be modified in order to make it acceptable to the capital-importing countries, and he felt sure that in doing so the Bank would take into consideration all reasonable views on the matter.

Mr. TSAI (China) recalled that the delegates from Malaysia and Ceylon had urged that the jurisdiction of the Center be limited to future investment disputes, while the delegate from the Philippines had urged the desirability of including existing investment disputes within the Center's jurisdiction. The text of Article II was not clear as to whether existing or future investment disputes were covered, or whether the reference was to disputes regarding existing or future investments. If it were

[10] See p. 33 of this document

intended to cover diaputes ragarding existing or future investments the text would be acceptsble to his government and he would like to sssociate himself with the viewa of the delegsta from the Philippines. He could think of no principle of law or justice sgainat giving auch bsnefits retroactively to sn investor.

The Chairman had mentioned that the formula in Saction 1 of Articla XI might be changed to "members of the United Nstiona and the Specislized Agencies". He pointed out that aoma Statas not members of the United Nstions might still be members of a specializad sgency like the Universsl Postsl Union. Nor would it always be clear what wsa meant by the term "sovereign State" - a politicsl decision batter left to some organ like the Genaral Asaembly of the United Nstions. Ha would propose that membarahip be limited to Ststes members of the Bsnk, and that if non-member States were to be permitted to acceda to the Convention, certain proceduree ba established whereby the Administrativa Council unanimously or by s 4/5 majority would pass on the admission of those States.

Mr. LAZO (Philippines) welcomed the Chinese delegation's support for his proposal that it be open to Ststes and investors to bring disputaa regarding existing investments hefore the Canter. Such disputes ehould not be expressly included or excluded, but under the proposed system, which was baaed on the conaent of the partiee, the parties themselves should be frae to use the Center for the settlement of such disputes.

Mr. GHANEM (Lebanon), addreasing himself to the Preamble, aaid that it accurately reflected the fundamental principles governing the Convention. He would like to suggeat only one modification. In order to meet the wiahea of those host governmenta which would lika to limit the scope of their use of the Center to disputes arising out of futura investments, he suggested that ths phrase "and especially with respect to existing investments" be sdded aftar the words "in sny particular csse" in psragrsph 6.

He exprassed his gratitude to the Bsnk for the promising initiativa it had taken in tha fialds of law snd aconomics and congratulated the anonymous draftsmen for having prepared a csrefully balanced text. The dreftars had succeedad in demonatrating the need for sn entirely new institution baaed, howevar, on techniques alresdy well known to jurists. With great flexibility they had sdspted tha system of arbitrstion, ss known in relations among individuala and smong Ststes, to direct relationships between States on the one hand and privste persons on the other. The standing given in the Convention to privste persons wss kept within eminently reasonable limits which were in no way revolutionsry when compared with the great role which natursl law accords to the individual in international law. In hia opinion the draft, standing by itself and regerdless even of its eventual rstification by Ststes, would prove to be an outatsnding doctrinal contribution to internstionsl law and one of the prime innovations of recent decsdes.

Mr. HETH (Iarael) said thst it was right that a discussion of the policy aspecta of the Convention should precede anslysis of its technicsl aspects, ss policy would be the determining fsctor whsn the Convention came up for ratification. As for the consensual nature of the Convention, if the drafters foresaw recourse to intarnationsl srbitration only in exceptional cases - and he agreed with thst interpretstion - then the Convention should contain express provisions that would ensura that only

matters of sufficient importance would come within the jurisdiction of the Center. It was with that end in view, and not because he was opposed to making individuals subjects of international law, that he had suggested that an individual should be able to resort to international arbitration only with his State's consent. He agreed with the Chairman that the requirement of the consent of the investor's State might be a two-edged sword, and would therefore welcome other proposals which would achieve the same result.

On the question of the jurisdiction of the Center he maintained that some limitation through a meaningful statement of the attributes of a dispute which might be brought before the Center was a prerequisite for the mutual confidence upon which the effectiveness of the proposed mechanism would depend.

Foreign investors could broadly be classified into (1) small and medium-sized investors who would have no contractual relations with the government, and (2) major investors, who would in many cases conclude direct agreements with the government. He believed that disputes involving the first category of investor should be dealt with first in the local courts, snd only after local remedies had been exhausted should the disputes be referred to international arbitrstion if their importance justified such action. Only in cases of disputes involving major investors could international arbitration be considered a substitute for adjudication before local courts.

Concluding, he pointed out that in assessing the need for special safeguards for foreign investors, it should be remembered that their best safeguard was the constant need of developing countries to import capital.

The CHAIRMAN expressed his gratitude to the Thai government for its hospitality and to the Minister of Finance for having addressed the meeting at its first session. The Minister had set the tone for the meeting by saying that the aim of the discussions would be to find the right balance between the interests of developing countries and industrialized countries. The discussions had done much to clarify the various aspects of that balance in the context of the common goal of promoting economic development. As several delegates had pointed out it was quite proper that questions of policy relating to the Convention should have been discussed at the meeting. Now that those issues had been clearly stated it would be easier to deal with them in a manner reasonably satisfactory to all countries.

Concluding, he expressed his appreciation to the delegates for their cooperation, and to the Executive Secretary of ECAFE for his opening address and for having made svailable to the meeting the facilities of the Commission.

The meeting rose st 11:40 a.m.

SID/64-3 (June 10, 1964)
Memorandum from the President to the Committee of the Whole

SETTLEMENT OF INVESTMENT DISPUTES

1. Now that the series of regional consultative meetings regarding the draft Convention on Settlement of Investment Disputes has been concluded, I propose that the Executive Directors resume their study of the proposal and consider what further action should be taken.

2. The Summary Records of the Addis Ababa and Geneva meetings were circulated to the Executive Directors on May 14, 1964 (SID 64-1)[1] and June 2, 1964 (SID 64-2)[2] respectively. The Summary Record of the Santiago[3] meeting is being reproduced and will be circulated shortly. The Bangkok Summary Record[4] is still being prepared. There is also being prepared for circulation to the Executive Directors a report summarizing the principal points raised at the four meetings.[5] I would not expect the Executive Directors to reach any conclusions before they and their governments have received, and have had an opportunity to study, that report as well as the four Summary Records. Several Directors, however, have expressed the wish to be informed as soon as possible of my own views on the matter. I am therefore setting them out in this memorandum.

3. As the Executive Directors will recall, the purpose of the consultative meetings was twofold. First, as an exchange of views between the Bank staff and legal experts from member countries. This educational effort we hoped would be useful for both sides. Second, as a method of gauging the reactions and opinions of those countries which had formed at least a preliminary opinion on the proposal, either at the technical or political level. On the basis of the reports which I have received from Mr. Broches, I have no hesitation in saying that the meetings have served both ends well and have been extremely valuable. In my invitation to the governments I stressed that the meetings would have an informal character and that the participants would not be regarded as committing their governments. Nevertheless, quite a few of the participants were in a position to give us, in greater or lesser detail, views of their governments on the proposal.

4. The four meetings were attended by experts from 86 countries. While it is difficult because of the nature of the meetings to make a precise estimate of the attitudes of the countries which had sent delegations, I think I can state that only a relatively small minority had objections of principle to the basic idea of establishing facilities for international conciliation and arbitration through inter-governmental agreement. Opinions among the large majority which found the basic idea acceptable ranged from strong support for the draft as it stood, subject only to technical amendments, to more or less strongly felt reservations about one or more substantive features of the draft. On an analysis of what was said at the four meetings, Mr. Broches feels that the differences of opinion expressed are negotiable and he is confident that the text of an agreement can be worked out which would both accomplish the purpose sought to be achieved, and meet the reservations of all countries

[1] See Doc. 25
[2] See Doc. 29
[3] Doc. 27
[4] Doc. 31
[5] Doc. 33

but those which have fundamental objections to any form of international conciliation and arbitration proceedings directly between States and foreign investors.

5. It would seem that the regional meetings have broadly confirmed the preliminary assessment which could be made on the basis of the meetings of the Executive Directors sitting as a Committee of the Whole. It is my view tbat the Executive Directors can now conclude that there is adequate support for the basic features of the proposal and that steps should be taken to formulate an inter-governmental agreement providing for the establishment of institutional facilities sponsored by the Bank for the settlement through conciliation and arbitration of investment disputes between States and foreign investors.

6. At the 1962 Annual Meeting the Board of Governors adopted the following resolution:*

> "That the Executive Directors are requested to consider the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through conciliation and arbitration of investment disputes between governments and private parties and, if they conclude that such action would be advisable, to draft an agreement providing for such facilities for submission to governments."

7. If the Executive Directors share my view, they would report to the Board of Governors that they are satisfied as to the desirability and practicability of the proposed institutional facilities. The Board of Governors resolution further asks them to consider whether it would be advisable to draft an inter-governmental agreement for submission to governments and, if so, to draft such an agreement. The language of the resolution of the Board of Governors leaves open the question whether the draft agreement to be prepared by the Executive Directors would be submitted to governments for signature or for further discussion. I am of the opinion that the Bank should follow the example of what it did in connection with the establishment of IFC and IDA and tbat the Executive Directors, assisted in this case by legal experts in the manner indicated below, should constitute themselves both a negotiating and drafting body which would prepare a draft in final form. This draft would then be transmitted to governments for signature and ratification or acceptance. As in the case of IFC and IDA, the approval of the text of the Convention by the Executive Directors would be an action of the Bank and would not commit the governments they represent. The text would therefore be transmitted to governments ad referendum.

8. In expressing this opinion I am aware of alternative suggestions whicb have been made at some of the regional meetings. A number of experts, some of them speaking personally, others representing governmental views, felt that an inter-governmental agreement of the kind involved here should be prepared by a diplomatic or inter-governmental conference convened for the purpose and that the Executive Directors should do no more than prepare a draft which would form the basis of discussion at such a conference. The principal arguments in support of this view were that the subject matter of the Convention was outside the particular expertise of the Executive Directors as a body, and that it would be important for the success of the Convention to make certain that differences in governmental

* Doc. 11

views, especially as between the capital-importing and capital-exporting countries, should be aired in direct confrontation. I do not think that either of those arguments is persuasive. Moreover, I think that such a conference might unnecessarily delay and impede progress toward an objective which has broad support in the Bank's membership.

9. It is clear that the proposal raises broad political and economic issues as well as legal issues of both a theoretical and practical nature. It appears to me that the Executive Directors are eminently qualified to deal with the broad policy questions and that the composition of the Board is such as to permit the "confrontation" of the views of capital importers and exporters. While it may be admitted that the Executive Directors, as a body at least, are not particularly equipped to deal with some of the legal issues raised by the proposals, these issues would in any event require consideration by technical experts. It would seem to me that the Executive Directors might obtain the necessary technical guidance and advice through the establishment of a legal subcommittee on which each Executive Director might appoint legal experts from as many of the countries represented by him as wished to be more directly associated with the preparatory work on the Convention.

10. It is true that the 102 members of the Bank are represented by only 19 Executive Directors, and that some Executive Directors represent a number of countries not all of which may have the same views on the proposals, but I believe that the disadvantage of not giving every member country an opportunity to participate directly in the final process of formulating the text of the Convention can easily be overestimated. Moreover, it could be largely overcome by the presence of the legal experts who, to the extent desired by their governments, could act on their instructions and would be available to express their governments' views on policy issues as well. This, together with the very full documentation on the views expressed at the regional consultative meetings and the record of earlier discussions in the Committee of the Whole of the Executive Directors, would serve most if not all of the purposes of an inter-governmental meeting.

11. It seems to me, therefore, that the Executive Directors, assisted by legal experts in the manner indicated above, would be a particularly suitable forum for the study and discussion of the proposal and for the formulation of the final text of a Convention for submission to governments. If this view is accepted, as I think it should be, it would be appropriate for the Executive Directors to recommend to the Board of Governors that the Board instruct the Executive Directors to proceed on this basis.

George D. Woods
President

REGIONAL CONSULTATIVE MEETINGS

OF LEGAL EXPERTS

ON SETTLEMENT OF

INVESTMENT DISPUTES

Chairman's Report

on

Issues Raised and Suggestions Made With Respect to the Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

July 9, 1964

INTRODUCTION

1. The proceedings of the four meetings of legal experts held at Addis Ababa (December 16-20, 1963), Santiago de Chile (February 3-7, 1964), Geneva (February 17-21, 1964) and Bangkok (April 27-May 1, 1964) have been recorded in Summary Records (Docs. Z-7[1], Z-8[2], Z-9[3] and Z-10-Provisional[4]), which were sent to the Executive Directors and to the participants in the meetings.

2. The purpose of this Report is to present for the convenience of the Executive Directors an account of selected issues raised and suggestions made with respect to the Preliminary Draft of Convention[5] which constituted the working paper for the meetings (hereinafter called the Working Paper). The selection has been based on the substantive importance of the subject-matter as well as on the political significance which participants appeared to attach to certain points.

3. Not all subjects are treated in the same manner in this Report. Where the issues are well-known or require no explanation, the Report does no more than record the views expressed. With respect to some of

[1] Doc. 25
[2] Doc. 27
[3] Doc. 29
[4] See the definitive summary record, Doc. 31
[5] Doc. 24

the more complex issues it has been thought useful to add explanatory remarks intended to place the views expressed in a clearer context and to enable the Executive Directors to assess the likelihood of reconciling conflicting views.

4. In this Report views expressed by participants are attributed to "delegations". This uniform terminology is being used for the sake of convenience only and is not intended to indicate that the views expressed were governmental views. In accordance with the terms of the invitation by the President of the Bank to member governments, the legal experts participating in the meetings were not regarded as speaking on behalf of their governments unless they expressly stated otherwise.

5. In order to facilitate consultation of the Summary Records on points discussed in this Report, the identifying symbols (I), (II), (III) and (IV) are used to indicate that particular statements or views were made or expressed at Addis Ababa, Santiago de Chile, Geneva and Bangkok respectively.

6. In keeping with the consultative character of the meetings there was no need for every delegation to express its view on every provision of the Working Paper. The purpose of the meetings also tended to elicit questions, comments or criticisms rather than statements of support or non-objection. The number of delegations participating in the discussion of a specific provision or issue was normally small. Frequently, a question by one delegation and a reply from the Chair, or statements of their views by two or three delegations were regarded as having adequately elucidated the problem. It was only when delegations felt strongly about some point, or in response to specific requests from the Chair or from a delegation for expressions of opinion, that a larger number of delegations participated. In this Report references to "some" delegations indicate three or four delegations, whereas "several" denotes five or more delegations.

7. The record of comments of delegations on specific issues reflects the general reception of the Working Paper at the meetings. In this Report no attempt has been made to summarize or tabulate general statements made by delegations. They will be found in the Summary Records, generally in the reports of the opening and closing sessions. In many cases these general statements, whether favorable or unfavorable to the proposals, were substantially qualified during the article-by-article discussion. In order to make the record complete it must, however, be noted that some delegations at the Santiago meeting expressed themselves as fundamentally opposed to the idea of international adjudication of investment disputes, and did not actively participate in the discussion of the provisions of the Working Paper. In addition, two delegations at Bangkok expressed serious doubts as to the wisdom of the proposals without participating in the detailed discussion of the Working Paper.

8. This Report is not intended to be a substitute for the Summary Records which must be consulted for an account of the discussions and the general atmosphere of the meetings.

ARTICLE I

International Conciliation and Arbitration Center

General

9. This Article in particular reflects the link between the Bank and the Center and its discussion offered an opportunity for the expression of general views on the desirability of the proposed link as well as for specific criticisms or suggestions with respect to particular aspects of that link.

10. The proposed link between the Bank and the Center met with only few objections of a fundamental nature. One delegation expressed the view that it would be undesirable that the Center, one of whose organs, namely the Panels, would have judicial functions, be linked to the Bank which was an administrative institution (IV). Another delegation expressed itself as opposed to a close link with the Bank "save for administrative purposes", unless the activities of the Center were limited to conciliation (IV). A third delegation, although agreeing that the link with the Bank would give the Center the required prestige, wondered whether the link could not be weakened in some respects (I). As against these views several delegations specifically endorsed the proposed link between the Bank and the Center (I, III) and others even considered this link essential for the success of the Convention (III).

11. In response to a question put at the Bangkok meeting, I gave a survey of the various aspects of the link between the Bank and the Center as evidenced by the Working Paper. This survey is attached hereto as Annex 1.

Establishment and Organization (Sections 1 - 3)

12. One delegation thought that provision for having the seat of the Center at the Bank's headquarters should be permissive rather than mandatory (II), while another thought that the seat should be away from the Bank, preferably at a place like The Hague, if the Center were to deal with arbitration as well as conciliation (IV). Some delegations, while agreeing that the seat of the Center should be at the headquarters of the Bank, urged the desirability of allowing proceedings to take place in the country where the dispute arose (I, II, III). I pointed out that the Working Paper already permits this.

13. One delegation, which opposed a close link between the Bank and the Center, expressed concern that use by the Center of the Bank's facilities, as contemplated in the Working Paper, might in some way enable the Bank to influence proceedings of conciliation commissions or arbitral tribunals by making available its confidential archives (IV). In reply I pointed out that the Working Paper clearly referred to administrative facilities only.

Administrative Council (Sections 4 - 7)

14. Several delegations addressed themselves to the provision permitting the Administrative Council to transfer the seat of the Center away from the Bank's headquarters with a two-thirds majority of the total

votes. One delegation thought that the required majority was too high and proposed that the vote of two-thirds of the members of the Council present and voting should suffice (I). Two delegations expressed themselves opposed to any transfer of the seat of the Center (III), whereas another delegation thought it desirable to define the circumstances in which the seat of the Center could be transferred and to specify the alternative locations (I).

15. Several delegations addressed themselves to the provision making the President of the Bank *ex officio* Chairman of the Administrative Council. Four delegations declared themselves opposed to this provision (II, IV). Two of these delegations proposed that the Chairman of the Administrative Council should be elected from the membership of the Council on the analogy of the Chairman of the Board of Governors of the Bank (II). The opposition of two of the delegations seemed based in large part on the fact that the Chairman of the Administrative Council was given the right by the Working Paper to designate persons to serve on the Panels of conciliators and arbitrators (II). Some delegations expressed themselves strongly in favor of the provision making the President of the Bank *ex officio* Chairman of the Administrative Council (III).

16. I stated as my personal view that while I thought that it would be useful to permit the Chairman to designate Panel members, the right to do so was not essential and might be dropped if there were strong feelings against it.

17. Two delegations suggested that the rules of procedure were of such importance that they should preferably be incorporated in the Convention, rather than leaving their adoption to the Administrative Council (IV). Another delegation, also attaching great importance to the rules of procedure, suggested that a majority of more than two-thirds be required for their adoption by the Administrative Council and even suggested the possibility of requiring unanimity (III), while yet another proposal was to increase the required majority from two-thirds to three-quarters (IV). As against this, another delegation argued that all important matters should be dealt with in the Convention and that the rules of procedure, being of less importance, should be adopted by the Administrative Council by an ordinary majority (III).

18. With respect to voting in the Administrative Council, one delegation suggested that since the great majority of the Contracting States would in all likelihood be capital-importing countries, two groups of countries might be distinguished, as in the Charter of IDA, and a majority of both groups required for important decisions (III).

19. One delegation suggested that since it was contemplated that the Administrative Council would be composed of Governors of the Bank or similar important officials, it might be desirable to establish an Executive Committee (the Executive Directors of the Bank might act as such) to act between meetings of the Administrative Council and to be charged, for instance, with the nomination of a candidate for Secretary-General. On important matters the decisions of the Executive Committee would be subject to ratification by the Administrative Council (IV). Another delegation suggested that the Chairman of the Administrative Council should be able to consult informally with the Executive Directors of

the Bank (III). Both suggestions seem worthy of further consideration.

<u>The Secretariat</u> (Sections 8 - 10)

20. Two delegations suggested that the appointment of the Secretary-General should be entirely a matter for the Administrative Council and that its autonomy might be compromised if nomination of a candidate by the Chairman were to be required as a first step (II, IV). Two other delegations suggested that the Chairman should present the Administrative Council with a list of nominees for the office of Secretary-General, from among whom the Administrative Council could make its choice (II, IV). In reply to the latter suggestion I expressed the view that it would be difficult to find qualified people willing to offer themselves for nomination in these circumstances.

21. One delegation suggested that the Convention should state the qualifications for the office of Secretary-General, his term of office and the grounds on which he could be removed from office (II).

22. There was considerable discussion of Section 9(2) which declares the office of Secretary-General to be incompatible with the exercise of any political function, and with any employment or occupation other than employment by the Bank and the Permanent Court of Arbitration, except as the Administrative Council, with the concurrence of the Chairman, may otherwise decide.

23. Several delegates emphasized that it was essential to ensure that the Secretary-General would be able to perform his functions with complete independence and that he should in no way be regarded as a subordinate of the Administrative Council, the Bank or any other entity. Eight delegations expressed themselves strongly in favor of constituting the Secretary-General from the outset as a full time official of the Center (I, III, IV), although several of these delegations were prepared to accept, for practical reasons, that in the early days of the Center's operations the Secretary-General might also be an official of the Bank or of the Permanent Court of Arbitration (I, III). Two delegations did not think that employment by the Bank was incompatible with the office of Secretary-General (I, IV), one delegation wanted to exclude employment both by the Bank or the Permanent Court (III), while another delegation wanted to delete the reference to compatibility of the office of Secretary-General with employment by the Bank but was not opposed to simultaneous employment by the Permanent Court (IV).

24. At each of the four meetings some of the delegations questioned the need for the concurrence of the Chairman in a decision of the Administrative Council regarding the compatibility of a particular occupation or employment with the function of Secretary-General. I stated as my own view that such concurrence was not needed and could be dispensed with. One delegation thought that the exercise of a political function should never be regarded as compatible with the office of Secretary-General (IV).

<u>The Panels</u> (Sections 11 - 15)

25. With regard to constitution of the Panels one delegation suggested that no Contracting State should designate more than three persons (I), whereas another delegation suggested a limit of four (III). With respect

to the provision authorizing the Chairman to designate persons to the Panels a variety of views was expressed. Two delegations were opposed to this provision (II, III), another would prefer to see it deleted (I), while another questioned the need for the provision (III). As against this, some delegations strongly supported the Chairman's right to designate Panel members and one of these delegations expressed the view that the Chairman should not only have the right but the duty to make the designations (III). Two delegations proposed that the Chairman designate no more than two or three members of the Panels (I, II) and one delegation thought it desirable to specify that the persons designated by the Chairman should come from different countries (II).

26. With respect to the term of office of Panel members, one delegation suggested six years (III), another a minimum of four years (III). One delegation proposed that Panel members serve at the pleasure of the States designating them (IV), a suggestion which was opposed by two other delegations (IV).

27. There was considerable discussion at all the meetings concerning the provisions seeking to define the qualifications of persons to be designated by States to the Panels and concerning the relationship between these provisions and the later provisions dealing with disqualification of conciliators and arbitrators, but there did not appear to be any serious differences of opinion regarding substance.

28. It was generally agreed that, as States might be presumed to know where to seek advice before a designation, the second sentence of Section 15(1), which was in any event merely exhortatory, ought to be deleted. One delegation felt that in order to secure a balanced composition of Panels as between the various fields mentioned in the first sentence of Section 15(1), States might be requested to seek the advice of the Secretary-General before making their designations (I). In the opinion of another delegation, it would be advisable to empower the Administrative Council to screen persons designated to the Panels, and to accept or reject them on a consideration of their qualifications (I).

Financing the Center (Section 16)

29. Four delegations expressed the hope that the Bank would finance the overhead of the Center (I, III).

Privileges and Immunities (Sections 17 - 20)

30. Several delegations pointed out that reference to immunities and facilities "accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States" (Section 18(1)(ii)) did not afford an easily applicable criterion by which States could be guided. I consider this a justified criticism. It would be more practical to adopt as a criterion the treatment by States of international organizations and their officials under the relevant international agreements.

31. Several delegations expressed the view that Section 18(1)(i), which provides immunity from legal process with respect to official acts, should be made applicable to conciliators and arbitrators as well as to officials of the Center (II, III, IV). I share this view.

One delegation wanted to extend the immunity also to parties, counsel and witnesses (IV). Two delegations did not think that witnesses should be included (III, IV).

32. One delegation, while appreciating the reasons which had led the drafters to pattern the provisions on privileges and immunities in the Working Paper after those of the Articles of Agreement of the Bank, suggested that it might nevertheless be preferable to be guided by the most recent practice in this field as reflected in the Vienna Codification Conventions (III).

ARTICLE II

Jurisdiction of the Center

33. At all of the consultative meetings a great deal of attention was devoted to Article II entitled "Jurisdiction of the Center" and in particular to Section 1 of that Article reading as follows:

> "The jurisdiction of the Center shall be limited to proceedings for conciliation and arbitration with respect to any existing or future investment dispute of a legal character between a Contracting State and a national of another Contracting State (or that State when subrogated in the rights of its national) and shall be based on the consent of the parties thereto."

In fact, it was the only provision of the Working Paper to which possibly as many as one-third of the delegations addressed themselves.

34. What Section 1 of Article II seeks to do is to define the outer limits of the activities of the Center, which for all practical purposes is equivalent to saying the scope of the Convention. It is important to note in that connection that Section 1 of Article II establishes what might be regarded as a dual system of limitations or conditions. The overriding condition is consent. Unless the parties to a dispute consent to have recourse to the facilities of the Center, none of the provisions of the Convention become operative with respect to such a dispute. But even with the consent of the parties, the facilities of the Center will not be available except within the framework of a second set of limitations, viz.:

(i) The proceedings for the settlement of such a dispute are either proceedings for conciliation, proceedings for arbitration or proceedings for conciliation followed by arbitration;

(ii) The parties to the dispute must be a Contracting State on the one side and a national of another Contracting State on the other (or that State when subrogated in the rights of its national);

(iii) The dispute must be an "investment dispute of a legal character".

35. Type of proceedings. Two delegations questioned the useful-

ness of conciliation ae a method for settling disputes and in the view of one of these delegations conciliation should be regarded as no more than a first stage, to be followed automatically by arbitration in case the conciliation effort should fail (I, III). As against this, two other delegations suggested that in order to secure widespread agreement to the establishment of the proposed Center, the proceedings under its auspicee should be limited to conciliation (IV), whereas some delegatione noted that the constitutional problems which the proposed Convention raieed for their countries would disappear if its scope was limited to conciliation (II).

36. Parties to the dispute. Two delegations found unacceptable the provision which permitted a State to appear as a party to proceedings under the auspices of the Center when subrogated to its national (III, IV). Other delegations expressly supported the provision (III, IV). Some delegations thought that, in addition to States, a multilateral investment guarantee fund should be given the capacity to be a party when subrogated in the rights of investors (I).

37. Two delegations saw no reason for limiting access to the Center to nationals of Contracting States (I, III) and one delegation thought international organizations should be permitted to be parties to proceedings (II).

38. A proposal, made in Addis Ababa, and receiving support at the other three meetings, would extend the scope of the Center's activities by including political subdivisions and instrumentalities of a Contracting State as potential parties to proceedings under the auspicee of the Center, provided they had obtained the coneent of the State. This proposal wae based on the consideration that in meny cases such political subdivieions or instrumentalities, rather than central governments of States, deal with investment questions. The proposal, with which I am in full agreement, was objected to by one delegation principally on the ground that the State could interfere with the performance by the political subdivision or instrumentality of the substantive provieions of the investment agreement (III). In my opinion thie objection is addressed to the desirability of entering into investment agreements with subordinate organs rather than with the central government, but does not detract from the usefulness of the proposal in those cases in which an investor has in fact concluded an agreement with such a subordinate organ of the State.

39. Investment disputes of a legal character. There were two distinct lines of criticism regarding the category of dispute covered by the Convention. At each of the four meetings there were some delegations which felt that reliance on a general understanding as to the meaning of the word "investment" reflected in the Preamble - the approach advocated in the Comment - would, on balance, create more controversy regarding the jurisdiction of the Center than would a more preciee definition. Several suggestions were made for a definition of "investment" based on definitione contained in domestic legislation or bilateral agreements, but all of these suggestions appeared to be open to criticism. This led some delegations to conclude that the approach of the Working Paper - omitting a definition of investment - was preferable and others that a definition, if included, should be of a non-exhaustive character, listing the principal types of "investment" followed by a residual clause referring to "other transactions of a

like nature", or some such expression. This problem clearly needs further consideration.

40. Several delegations had difficulty in understanding the term "of a legal character" (I, III, IV). This difficulty may have been caused in part by the somewhat unfortunate phraseology of the Comment which distinguishes "disputes of a legal character" from "political, economic or purely commercial disputes". As was rightly pointed out, tha latter classes of disputes may well involve legal issues. Other delegations proposed the deletion of the term as being unnecessary and carrying a possible connotation that issues of fact which might have a bearing on legal issues would be outside the Center's jurisdiction. I expressed as my own view that it would be useful to retain a qualification designed to limit the jurisdiction of the Center to disputes which, as one delegation expressed it, are in principle suitable for determination by a semi-judicial body. I believe that this objective can be met, and the doubts which were expressed removed, by the definition of a dispute of a legal character as a dispute "concerning a legal right or obligation or concerning a fact relevant to the determination of such a legal right or obligation". One delegation made an alternative suggestion intended to achieve the same purpose, viz. to eliminate the words "of a legal character" in Section 1 but to define investment dispute as "a disagreement on a point of law or fact or the conflict of legal views or interests in respect of an investment" (IV).

41. All the foregoing questions, criticisms and suggestions were addressed to the problem whether the terms used in the Working Paper were sufficiently clear to avoid frequent controversy about the scope of the Convention. They must be carefully distinguished from a second group of questions and criticisms, coming from delegations which raised the question whether all "investment disputes of a legal character" (assuming that term to be clear enough or, if necessary, clarified) should be within the jurisdiction of the Center, or whether some types or classes of disputes, although admittedly "investment disputes of a legal character", should be excluded from the jurisdiction of the Center even when the parties to such disputes wished to make use of the Center's facilities.

42. The following are typical examples of suggested exclusions:

(i) The jurisdiction of the Center should be excluded in case of disputes arising out of investments made prior to the entry into force of the Convention or some other specified date;

(ii) The Center should not deal with any disputes other than those arising out of investments made pursuant to an investment agreement with the host State or in response to special investment promotion legislation;

(iii) Same as (ii) but with the additional restriction that there must have been agreement at the time the investment was made that recourse would be had to conciliation and/or arbitration pursuant to the Convention;

(iv) There should be excluded from the jurisdiction of the Center disputes regarding the legality of acts of expropriation or nationalization, as distinguished from disputes regarding the adequacy of the compensation to be paid;

(v) No recourse should be had to the facilities established under the Convention until all local remedies, administrative as well as judicial, have been exhausted;

(vi) Proceedings under the auspices of the Center should be limited to questions of "denial of justice".

43. In reply to suggestions of the kind enumerated above, I pointed out that since the jurisdiction of the Center is limited by the overriding condition of consent, the exclusions desired by the one or the other delegation could be achieved by a refusal of consent in those cases in which in their view there was no proper case for use of the facilities of the Center. Refusal of consent would be an adequate safeguard for host States which did not want to become involved in proceedings sought to be excluded under (i), (ii) and (iii) above. With respect to the points mentioned under (iv), (v) and (vi), it was to be noted that agreements to have recourse to the facilities of the Center could be entered into either before or after a dispute had arisen. In both cases the parties had the fullest freedom to define the dispute which they regarded as "justiciable", the conditions to be fulfilled before access to the Center could be had and the law to be applied by the tribunal. With particular reference to nationalization, the question of the validity of an act of nationalization could only be dealt with by the tribunal if a host State had agreed not to nationalize or, in the absence of such an agreement, had specifically consented that the validity of this act could be examined by the tribunal.

44. The purpose of Section 1 is not to define the circumstances in which recourse to the facilities of the Center would in fact occur, but rather to indicate the outer limits within which the Center would have jurisdiction provided the parties' consent had been attained. Beyond these outer limits no use could be made of the facilities of the Center even with such consent. The question might be asked why, if consent is required and can be refused, the Convention need put any limit at all to the jurisdiction of the Center whether as to parties, subject-matter or otherwise. The answer to this question is that the jurisdiction of the Center should be limited in accordance with the purposes sought to be achieved by the Convention, that is, to provide new procedures for the settlement of investment disputes between States and private parties. Admitting this, some delegations maintained their view that further limitations were justified on the ground that refusal of consent might place Contracting States in an invidious position and would leave them open to "adverse inference" and criticism by the investing community (IV). These delegations pointed out, in that connection, that Section 2(iii) of Article II indicated that an investor could initiate proceedings against a host State without having obtained the latter's consent. While the host State could refuse its consent, in which case the proceedings could not continue, the fact that the machinery of the Center had been set in motion could cause serious damage to the reputation of the host State. On reflection I agreed that Section 2(iii) could have that effect, which had not been intended by the drafters, and that it should therefore be deleted. For the rest, I felt that there was no basis for the fear expressed by these delegations that refusal of consent would give rise to damaging "adverse inferences". Several other delegations shared my view and felt that the reluctance of some States to submit particular classes of

disputes to arbitration was no reason to narrow the scope of the Convention for all Contracting States many of whom had no objection to its present scope (IV). The consensual nature of the Convention enabled each Contracting State to apply it within the scope it thought appropriate. I believe that this essential element can be further underscored by strengthening the language of Clause 6 of the Preamble and by permitting Contracting States to make declarations under the Convention in which they could define in advance, if they so desired, the scope within which they would be willing to consider, always subject to specific consent on their part in any specific case, making use of the facilities of the Center.

45. One further point should be mentioned in connection with the discussions on the jurisdiction of the Center. Several delegations addressed themselves to the problem of avoiding access to the Center in insignificant cases. In a draft preceding the Working Paper[6] a lower limit ($100,000) had been fixed for the subject-matter of the dispute. That provision had not been retained in the Working Paper, because disputes involving small amounts could be important as test cases, whereas there would be other cases in which it would be impossible to place a pecuniary value on the subject-matter of a dispute. One delegation felt that a lower limit for the value of the subject-matter of the dispute should nevertheless be retained in order to avoid frivolous claims (I). Another delegation proposed that the limit be expressed in terms of the value of the investment with respect to which the dispute had arisen (IV). It was also suggested that the lower limit should apply only with respect to pecuniary claims (I). Still another suggestion would not express a limit in the Convention, but would give the Chairman of the Administrative Council or the Secretary-General discretion to refuse access to the Center with respect to insignificant disputes (I). Another delegation thought that insignificant disputes could be kept from the Center by requiring the investor to obtain his government's consent before seeking access to the Center (IV).

46. Preliminary questions. Some comments of a technical nature were made regarding Section 3(2) at all the meetings. It was thought by some that the list of questions of jurisdiction to be dealt with by a commission or tribunal in preliminary proceedings was incomplete and ought to be supplemented, while others pointed out that this provision should be redrafted to make it clear that the list was not exhaustive. In this connection it was suggested that it might be best (a) to avoid listing specific questions, and to substitute a provision empowering commissions and tribunals to decide questions of jurisdiction in preliminary proceedings and (b) not to compel commissions or tribunals to decide questions of jurisdiction as preliminary questions, but to leave it to them whether to do so, or whether to join such questions to the merits of the dispute.

47. The comments made on Section 3(3) will be taken up in connection with the subject of Nationality under Article X.

[6] Doc. 6

ARTICLE III

Conciliation

48. Several comments and suggestions were made about the provisions of this Article, which will be useful in redrafting the Working Paper but no issues of policy arise except with respect to the constitution of conciliation commissions and the adoption of conciliation rules. Comments on those two subjects are reported below under Article IV, Sections 2 and 3 and Article IV, Section 5.

ARTICLE IV

Arbitration

Request for Arbitration (Section 1)

49. The comments reported below apply equally in relation to requests for conciliation (Article III, Section 1).

50. Some delegations pointed out that there was an apparent inconsistency between Section 1 and Article II, Section 2(iii). The latter provision appeared to contemplate that an investor or a State might address a request for arbitration to the Secretary-General before the other party had given its consent to the proceedings, whereas Section 1 provides that the party making the request "shall state that the other party has consented to the jurisdiction of the Center" (I, IV).*

51. Several delegations expressed the view that the party requesting arbitration should submit to the Secretary-General evidence of the consent of the other party (I, II, IV). In my opinion such a requirement would be a useful safeguard against a party setting the machinery of the Center in motion without having satisfied the Secretary-General that there was at least *prima facie* evidence of consent to the jurisdiction of the Center.

Constitution of the Tribunal (Sections 2 - 3)

52. The two principal issues discussed under this heading concerned the circumstances (if any) in which arbitrators could be selected from outside the Panel and the exclusion of national arbitrators.

53. The Working Paper, although the drafting is not wholly clear on the point, intended to give parties freedom to choose arbitrators from outside the Panels only when they were in agreement on all matters relating to the constitution of the tribunal. In all other cases arbitrators would have to be selected from the Panel. Some delegations would have preferred that arbitrators should without exception be selected from the Panel (I, II, III). One delegation felt, on the other hand, that in the interests of flexibility even the Chairman should be empowered to make a selection from outside

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* See, however, the comments on the desirability of Article II, Section 2(iii) in paragraph 44 above.

the Panel (II), and some delegations considered that at least the parties should be free in their selections to go outside the Panel (I, IV).

54. The discussion on the constitution of conciliation commissions (Article III, Sections 2-3) showed a similar variety of views.

55. The Working Paper excludes arbitrators who are nationals of the State party to the dispute or of a State whose national is a party to the dispute. Several delegations found this innovation an improvement over the traditional system of "national" arbitrators or stated that they had no objections (I, II, III). Two delegations pointed out that since States were permitted to designate foreigners as well as their own nationals to the Panel, the exclusion should extend as well to arbitrators designated to the Panel by the State party to the dispute or by the investor's State (I, III). Some delegations objected to the provision in the Working Paper and suggested a return to the traditional practice of appointing "national" arbitrators (I, III, IV). Two delegations expressed the view that parties should be protected against the possible designation of arbitrators who might be _personae non gratae_ on political grounds, whereas one delegation would have the third arbitrator appointed by a drawing of lots among Panel members (IV).

56. In connection with the discussion on Article III, Sections 2-3, it was noted that while the Working Paper excluded "national" arbitrators, "national" conciliators were permitted. In explaining the reasons which had led the drafters to distinguish between conciliation and arbitration in this regard, I stated that the issue was essentially one of weighing the relative advantages and disadvantages of participation in the proceedings by "nationals". The advantage claimed for having "nationals" participate was to ensure that knowledge of local conditions and laws and familiarity with the views of the respective parties would be represented on the commission or tribunal. The alleged disadvantage was that "nationals" would be less likely to be impartial or to be so regarded. In my view there is a case for arriving at different conclusions in the case of conciliation and that of arbitration. In conciliation the main task of the commission is to bring the parties together and for that purpose the familiarity of at least two of the three members of the commission with the respective views of the parties may be helpful rather than harmful. In the case of arbitration the balance would in my view go the other way. As for familiarity with local conditions and laws, the arbitral tribunal could seek expert information and advice. For the rest, the tribunal's task is to decide disputed questions and I do not consider it desirable that in a three-man tribunal (which would be the rule) two out of the three members should be identified at least by nationality with the interests of the parties.

<u>Applicable Law</u> (Section 4)

57. This provision of the Working Paper drew comments from several delegations. In order to give relief to some of the comments made, it may be useful to recall the purpose and meaning of the provision.

58. Section 4(1) is based on the premise, which is in keeping with the consensual character of the Convention and generally accepted in international arbitration, that the parties can control the rules by

which an arbitral tribunal is to arrive at a decision of the dispute which they have submitted to it. If the parties have agreed on the law to be applied by the tribunal, or have agreed that the tribunal shall decide the dispute *ex aequo et bono*, the tribunal is bound by that agreement. The rule stated in Section 4(1) is accordingly qualified by the words "in the absence of agreement between the parties concerning the law to be applied, and unless the parties shall have given the tribunal the power to decide *ex aequo et bono*". When these qualifications do not apply, the tribunal must decide the dispute in accordance with rules of law, and it must determine the law which is applicable, "whether national or international". If the tribunal is faced with a choice between several national laws, it will choose the "proper law" by the application of generally accepted principles of the Conflict of Laws or Private International Law, as it sometimes is called. In some cases the tribunal may be faced with a claim that international law should prevail over national law, e.g., where one of the parties claims that a particular action taken under national law, or a particular provision of national law, violates international law.

59. Several delegations spoke in support of the text as it stood. Several other delegations, while in agreement with the substance of the provision, offered comments and questions. Two delegations asked whether "agreement" between the parties regarding applicable law meant an agreement entered into for the specific purpose of determining the law applicable in the arbitral proceedings, or whether that term would include an implicit agreement which could be deduced from the facts and circumstances of the relationship between the parties (I, III). On being informed that the drafters understood the term in the latter, broader sense, it was suggested that the wording might be clarified. One delegation pointed out that a tribunal which had been given the power to decide *ex aequo et bono*, thus being permitted to decide without reference to rules of law, should not necessarily be prevented from applying rules of law. If there were any doubts on this score, the text might be clarified (III). Two delegations thought it might be desirable to give a tribunal the power to decide *ex aequo et bono* of its own motion (II), and one of these delegations suggested the desirability of including in the provision a definition of "international law" along the lines of the U.N. International Law Commission's Model Rules on Arbitral Procedure. Some delegations suggested the desirability of including in the Working Paper some basic rules of international law which should be applied by arbitral tribunals, such as prohibition of discriminatory treatment, the obligation to act in good faith, and prohibition of measures contrary to international public policy or general principles of law (III). I expressed doubt as to the wisdom of trying to include in the Convention, which was a procedural document and should be kept flexible in order to meet the needs of a great variety of possible cases, specific substantive rules of general international law.

60. Two delegations asked whether, where a dispute arising out of nationalization was submitted to arbitration and the parties had not previously agreed on the applicable law, the tribunal could test the legality of the sovereign act of nationalization against international law standards (I). I replied that if the parties had agreed that the tribunal could look into the legality of the act of nationalization

(as distinguished from the question of compensation) the tribunal would be free to apply international law. One delegation suggested that the Working Paper should specify that, regardless of the agreement between the parties, a tribunal should apply international law only to the international aspects of the dispute (III). Two delegations expressed the view that where national law was to be applied, this had to be the law of the host State (III). I pointed out in reply that while the national law of the host State might be applicable in most cases there might well be situations in which other national laws governed all or part of the questions in dispute; a mandatory provision declaring the law of the host State to be always applicable unless the parties had otherwise agreed, would be at variance with normal practice.

61. One delegation had objections to the provision as stated in the Working Paper (IV). In the opinion of that delegation the act of making an investment in a host country normally implied that the investor had consented to the jurisdiction and application of the law of the host State in all respects. Therefore, a tribunal should apply the law of the host State and should not be permitted to apply international law in the absence of a specific agreement empowering it to do so, and the Working Paper should contain provisions substantially to this effect. This view was supported by one other delegation on the ground that the Convention should contain provisions which covered the majority of cases and that in the majority of cases most of the aspects of the investment were in fact intended to be governed by the law of the host State (IV).

62. Although the overwhelming majority of delegations addressing themselves to Section 4(1) found the provision fundamentally acceptable as drafted, it may be useful to state why the proposal of the two delegations referred to above would not be acceptable. Where a choice has to be made between different national laws, there are rules of law to guide the tribunal. There is no reason to require the parties specifically to authorize the tribunal to do something that every court and arbitral tribunal is called upon to do in every case involving an international transaction. As regards the issue of national _vs._ international law two points should be noted. In the first place, the basic feature of the Working Paper is the establishment of an international jurisdiction and it is reasonable to provide that an international tribunal will have the power to apply international law, unless specifically restricted. Secondly, even an international tribunal would in the first place have to look to national law, since the relationship between the investor and the host State is governed in the first instance by national law, and it would only be in those instances in which national law was in violation of international law that the tribunal would, in the application of international law, set aside national law. Therefore, it can be said with justification that the rule stated in Section 4(1) in fact covers not just a majority but all the cases which may be submitted for arbitration under the auspices of the Center.

Rules of Procedure (Section 5)

63. Section 4 of Article III and Section 5 of Article IV provide, respectively, that the conciliation rules and arbitration rules to be applied (in the absence of a contrary agreement between the parties) are the Rules adopted by the Administrative Council under Section 6(v) of Article I. Under Article I, Section 6 above this Report has recorded

the views of delegations on the majority which in their opinion should be required for the adoption by the Administrative Council of conciliation and arbitration rules. Some delegations proposed that the rules of procedure be stated in the Convention or an Annex thereto, rather than left to be adopted by the Administrative Council (II, IV). I expressed serious misgivings about these proposals on the ground that they would impart an undesirable and possibly impracticable degree of rigidity. The Working Paper as it stood already dealt nearly exclusively with procedure. If delegations felt that specific points were so important as to require inclusion in the Working Paper, those points should be considered on their merits. The purely operational details of proceedings did not, however, in my opinion require this treatment. It would nevertheless be useful if draft rules of procedure would be available by the time a definitive text of the Convention was considered and I undertook to have such a draft prepared.

64. One delegation suggested that tribunals should be given the power to hold inquiries and require production of documents (I). Such powers are provided for, e.g., in the Model Rules on Arbitral Procedure adopted by the International Law Commission. If this suggestion found general support, such powers should be specifically provided for in the Convention.

<u>Decisions; Awards</u> (Sections 6 - 7)

65. Several delegations addressed themselves to Section 7. They were in general agreement that the award should state the reasons on which it was based, that all arbitrators (including those dissenting from the majority decision) should sign the award, although refusal of a dissenting arbitrator to sign should not invalidate the award, and that dissenting arbitrators should be permitted to file a dissenting opinion (I, II, IV). A number of drafting suggestions were made regarding these points as well as with regard to notification of the award to the parties. In that connection it was noted that the date of such notification rather than the date of the award should be the relevant date for purposes of calculating periods of time within which certain action in connection with the award must be taken (Article IV, Sections 11 to 14) (IV).

<u>Procedure on Default</u> (Section 8)

66. Several delegations suggested that Section 8 should be expanded to assure that parties receive due notice of proceedings and to provide safeguards for parties who fail to appaar without fault on their part (I, II, III).

67. Several delegations correctly pointed out that Section 8 was drafted in terms of a default by the defendant only, and that it should be redrafted to take account of default by the plaintiff (II). Some of these delegations also suggested that Section 8(2) as presently drafted goes too far and that the words "appears to be well-founded" should be changed to "is well-founded" thus requiring the tribunal to weigh the evidence presented (II). I agree with this suggestion which would bring the provision in line with the Model Rules on Arbitral Procedure prepared by the International Law Commission.

68. Two delegations thought that the default procedure was a

departure from the consensual nature of the Convention, but several other delegations strongly opposed this view, pointing out correctly that the default procedure would only operate in the context of a voluntary agreement between the parties to have recourse to arbitration (II).

Incidental Claims; Counterclaims (Section 9)

69. In reply to a question whethar Section 9 was intended to extend the competence of the tribunal I explained that this was not the intention, that no issue could be brought before a tribunal unlesa the parties had agreed that it could be submitted to arbitration and that the drafting would be clarified (I). One delegation suggested thet the power given a tribunal by Section 9 should be possessed by it only if the parties had agreed to confer that power on the tribunal rather than, as provided in the Working Paper, in all cases except those in which the parties had excluded thet power (II).

Provieional Measures (Section 10)

70. Several delegations addreseed themselvee to the question of provisional measures. The Working Paper givae an arbitral tribunal the power, unless the parties heve otherwise agreed, to preecribe provisional meaeures at the requeet of aither party to tha proceedings. One delegation thought that the tribunal should, in addition, have the power to prescribe provisional measures of its own motion (I).

71. Two delegations saw a danger in provisional measuras which might be in conflict with local law (I, IV) and one of these delagations suggested, therefore, that a tribunal ought only to heve power to "recommend" rather than "prescribe" provisional measures (IV). I expressed as my own view thet there is no reaeon to distinguish between the final award and provisional maaeuree, as regards a posaible conflict with local law. Two other delegations, agreeing with the substance of the provision in the Working Paper, suggested that it be made clear that a decision prescribing interim meaeuraa (or, as one delegation would have described it, an "interim award") waa enforceable on the same basis as a final award (II, IV). I agree with these suggestions.

72. The provision in the Working Paper defines the meaeures which a tribunal may prescribe as those which are "neceeeary for the protection of the rights of the parties". Several delegations thought the criterion might be spelled out in more detail (by spacifying such matters as avoidance of frustration of an aventual award, irreparable damage and urgent necessity and clarifying the term "righta of the parties") and an indication might be given in general terms of what the provisional measures would be (II, IV). While the latitude given to arbitral tribunals by the Working Paper is in accordance with generally accepted custom, I undertook to examine whether the provision could be givan more precision.

Interpretation, Revision and Annulment of the Award; Final and Binding Character of the Award (Article IV, Sections 11 - 14)

73. The examination of these provisions of the Working Paper gave

rise to a considerable number of detailed suggestione of a technical character. Since no controversial iesues of policy appeared to be involved, they will not be discussed in thie Report.

Enforcement of the Award (Section 15)

74. Article IV, Section 14 of the Working Paper providss that the award shall be final and binding on the parties and that each perty shall abide by the award and comply with it. If the Convention had dealt with disputee between States, no further provieion on enforceability of the award would have been necessary, eince the parties to a dispute would be directly bound by the Convention and could be expected to comply with their obligations thereunder. In any event, the relationships established would be entirely in the sphere of public international law. However, the proposed Convention deals with disputes between States, or State agencies, on the one hand, and investors on the other. It was therefore felt eseential to include in the Working Paper a provision regarding the binding force and enforceability of awards in the municipal sphere. Such a provision would, moreover, be justified as establishing equality not only of rights, but also of obligatione, between Statee and inveetors. If a State lost an arbitral proceeding it was under direct international obligation to comply with the decieion; if a State won in a proceeding against en investor, it should be able to secure compliance by the investor who was not a party to the Convention.

75. Section 15 seeks to achieve the objective outlined in the previous paragraph. It provides in substance that an award shall be recognized as binding in each Contracting State, whether or not it was a party to the dispute, and that it shall be snforceable as if it were a final judgment of the courts of that State. Various aspects of the provieion were extensively discussed at all four meetings.

76. A firet group of comments was addressed to the question whether the provision ae drafted would achieve ite purpose, with which the delegations making the comments were in full agreement. Several delegations pointed out that implementing legislation would be required on the part of Contracting States and opinions differed on whether the Working Paper should contain more detailed provisione ae to the epecific measures to be taken by the Contracting Statee, or whether it was sufficient to rely on the obligation of States expressed in Article XI, Section 2 to take all neceseary action to carry out their obligations under the Convention. A majority was inclined to the former view. I offered the suggestion that provieions along the lines of Articls 192 of the Rome Treaty might offer an effective and precise means for the enforcement of awards through domestic procedures of each State.

77. Some delegations sxpreseed concern about the legal and political effects of tha enforcement provisions on the position of "third States", i.e. Statee which neither directly, nor through their nationsle, had any connection with the dispute. They wondered why any obligations ehould be imposed on such States in connection with awarde rendered regarding disputes to which they were strangers. I replied that recognition of awards in third States was not basically new since it was already provided for in the Geneva (1927) and New

York (1958) Conventions on the recognition of foreign arbitral awards. The Working Paper admittedly went further than those Conventions, by excluding a number of grounds of attack on the award permitted under the earlier Conventions, but this was a difference of degree rather than of kind.

78. A third group of comments dealt with the effect of Section 15 on existing law with respect to sovereign immunity. I explained that the drafters had no intention to change that law. By providing that the award could be enforced as if it were a final judgment of a local court, Section 15 implicitly imported the limitation on enforcement which in most countries existed with respect to enforcement of court decisions against Sovereigns. However, this point might be made explicit in order to allay the fears expressed by several delegations. One delegation felt that consent to submit a dispute to arbitration should carry with it a waiver of sovereign immunity with respect to the enforcement of the award (II). Another delegation felt that failure by a State to comply with an award should expose that State to possible sanctions by the Security Council by analogy with Article 94 of the United Nations Charter (I).

79. A fourth group of comments dealt with the problems which might arise if local procedural law did not provide the type of enforcement measures which might appear to be required in order to give full effect to the award. The answer given by some delegations, with which I agree, is that, once again on the lines of the Rome Treaty, the Working Paper should provide explicitly that enforcement will be governed by the rules of civil procedure in force in the State in whose territory it takes place.

80. In addition, the following miscellaneous comments may be mentioned. Several delegates felt tha need to prevent conflicts between decisions of arbitral tribunals and local law and suggested that exceptions to enforceability ought to be provided for in those cases (II, III). Some delegations were willing to accept that awards would not be enforceable if they violated the public policy of the country where enforcement was sought, or if they concerned issues which under the law of that country were not arbitrable (II, IV). One delegation suggested that although awards should be enforceable in all Contracting States, enforcement should first be sought in the States which, or whose nationals, were parties to the proceedings (III).

<u>Interpretation of Consent to Arbitration</u> (Section 16)

81. Section 16 attempts to set forth a simple rule of interpretation. While some delegations had no difficulty in understanding and agreeing with the provision as drafted, several delegations found the provision unintelligible without reference to the comment or read it as reversing the existing rule of international law on the exhaustion of local remedies, which is the opposite of what the drafters intended (II, III, IV). It is my impression that the intention of the prevision is generally acceptable, but its text (and possibly its location in the Working Paper) need to be reconsidered.

Consent to Arbitration as Excluding Diplomatic Protection and International Claims (Section 17)

82. Section 17(1) of Article IV of the Working Paper provides that where an investor has agreed with a host State to have recourse to arbitration for the settlement of a dispute, his national State may not give him diplomatic protection, or bring an international claim, in respect of that dispute, unless the host State fails to perform its obligations under the Convention, e.g. if it refuses to comply with the award of the arbitral tribunal.

83. Several delegations, while agreeing that it was reasonable to require waiver of the right of the investor's State to bring an international claim, suggested that the reference to "diplomatic protection" should be deleted (III). "Diplomatic protection" was a broad concept which would cover any State-to-State communication with respect to the dispute and these delegations thought that diplomatic contacts might be helpful in connection with arrangements for the arbitration proceedings.

84. Some delegations felt that Section 17(1) was superfluous, since it was self-evident that no Contracting State whose national had agreed to have recourse to arbitration could espouse the case of that national, unless the State party to the dispute had failed to abide by the arbitration agreement (II). Two of these delegations pointed out that in many countries in the Western Hemisphere diplomatic protection of foreign investors was accepted only in case of denial of justice, and that Section 17(1) which proceeded on the assumption that a more general right of diplomatic protection or espousal existed, might be offensive to public opinion in such countries. One delegation thought that Section 17(1) would be useful provided it was amended to make clear that its provisions did not mean a limitation of the sovereign right of each State to include in its Constitution provisions prohibiting foreigners from having recourse to their States for the purpose of making claims through diplomatic channels (II).

85. Section 17(2) deals with the case in which the same facts give rise at the same time to a dispute between an investor and a host State and between the investor's national State and the host State. The example which the drafters had in mind was a dispute arising under an investment agreement between an investor and a host State on the one hand and under an inter-governmental agreement on the other. For that case Section 17(2) declares that the investor's national State may proceed against the host State notwithstanding the fact that the investor and the host State have agreed to submit the dispute to arbitration under the Convention. However, as between the investor and the host State the decision of the arbitral tribunal under the auspices of the Center prevails. The provision was included in the Working Paper at the suggestion of one of the European capital-exporting countries in order to avoid Section 17(1) being construed as excluding proceedings under the inter-governmental agreement. In that connection it may be noted that Section 17(1) deals with the right of espousal, i.e., the right of a State to bring an international claim based on an alleged injury done to that State in the person of its national, whereas Section 17(2) contemplates a situation in which a dispute arises with

respect to one of the rights or obligations of the State itself under the inter-governmental agreement. Although from the wording of Section 17(2) it could be implied that it was intended as an exception to the general rule in Section 17(1), Section 17(1) in fact deals with an entirely different case. The rule in Section 17(2) migbt be regarded as self-evident and the specific provision as unnecessary.

86. Several delegations thought that the possibility of two proceedings regarding the same facts, with the attendant risk of conflicting decisions, was undesirable (I, II, III, IV). Some of these delegations foresaw difficulties especially in the case of investments which were covered by investment guaranteee (I, IV). These difficulties ought properly to be solved in tbe context either of specific inter-governmental agreements or the particular arbitration agreements between investors and host States. Section 17(2) does not by itself solve these difficulties. Moreover, the discussions at the consultative meetings have indicated that Section 17(2) could give rise to widespread misunderstanding. Since the provision hae had the positive support of only one delegation, I believe that it would be wiser to drop it.

ARTICLE V - Replacement and Disqualification of Conciliators and Arbitrators

ARTICLE VI - Apportionment of Costs of Proceedings

ARTICLE VII - Place of Proceedings

87. All comments on theee Articles were of a technical nature and did not raise any major issuee of policy.

ARTICLE VIII

Interpretation

88. Some delegations remarked that, if Article VIII was intended to give compulsory jurisdiction to the International Court of Justice, several States might be unwilling to accede to the Convention (I, III) and two of those delegations suggested that recourse to the International Court be left to the mutual agreement of the parties (I, III).

89. Several delegations, however, expressed themselves strongly in favor of making it compulsory for Contracting States to submit all disputes on the interpretation or application of the Convention to the International Court, unless they had agreed on another mode of settlement (I, III).

90. Two delegations pointed out that while Article VIII provided for international adjudication by the International Court of all disputes or questions on the interpretation of the Convention arising between the Contracting States, no provision had been made to permit an individual party to arbitral proceedings under the Convention to have

a question of interpretation of the Convention brought before the International Court (I).

91. The Secretariat prepared a tentative draft of an additional provision which would permit an arbitral tribunal under the Convention, should a question of interpretation of the Convention iteelf arise during arbitral proceedings, to suspend the proceedings in order to permit the interested Contracting States to bring the matter before the International Court if they so wiehed (Doc. COM/AF/8, reproduced on page 52 of the Addis Ababa Summary Record,[7] and distributed at the three subsequent meetings).

92. Several delegations welcomed the additional provision as being in line with the basic principles of the Convention (I, II, III and IV).

93. Some delegations, on the other hand, felt that the proposed amendment would have the consequence of permitting dilatory proceedings by the parties or to exclude from the jurisdiction of an arbitral tribunal its primary function of interpretation of the international instrument under which it would have been established (I, II, III and IV). Some delegatione also wondered whether a decision of the International Court would be binding upon an arbitral tribunal (I, III and IV).

94. I replied that in practice one could be sure that an arbitral tribunal would feel bound to follow a decision of the International Court on a matter of interpretation of the Convention.

95. One delegation criticized the additional provision as likely in fact to permit an appeal against arbitral awarde (I). Some delegatione also criticized the additional provision as drafted, because it would permit the arbitral tribunal to pre-judge, as it were, the matter to be brought before the International Court by deciding whether the question "had merit and might affect the outcome of the proceedings" (I, III).

96. Several delegations stressed that, if the additional provision were adopted, the Convention should make it absolutely clear that the arbitral tribunal would not be relieved from ite duty to be the judge of its own competence (III, IV).

97. One delegation strongly opposed the additional provision and, to a less extent, the original Article VIII because, in ite opinion, it ran contrary to the spirit and purpoee of the Convention which was to insulate investment disputes from the level of inter-State disputes (III).

98. Several delegatione offered euggeetions to improve and clarify the language of Article VIII and of the additional provision.

99. Some delegations asked whether the Center, directly or through the Bank, could not be allowed to obtain advisory opinions from the International Court of Justice (I, IV). I pointed out that under the present Charter of the United Nations, it seemed unlikely that the Center itself or the Bank on behalf of the Center could obtain such advisory opinions.

[7] Doc. 25

ARTICLE IX

Amendment

100. The Working Paper permits amendments of the Convention by action of the Administrative Council taken by a majority of four-fifths of the members of the Council and dissenting States may withdraw from the Convention before the amendment becomes effective.

101. One delegation suggested that, in view of the administrative character of the Council, any amendment ought to be approved or ratified by the Contracting States themselves (I).

102. Several delegations expressed their reluctance to accepting the possibility of an amendment of the Convention by a majority vote and indicated that such a system might be constitutionally or politically unacceptable in their countries (I, II and III). Some of those delegations proposed that, although an amendment could be adopted by a qualified majority of the members of the Administrative Council, it should not be binding on the dissenting Contracting States or, alternatively, these States could make reservations to the amendment (I, II and III). On the other hand, some delegations expressed their strong support for maintaining flexibility in the Convention so as to introduce the necessary changes if some provisions were found in practice unworkable (II).

103. One delegation pointed out that to permit reservations to amendments would create a very complicated legal situation since different provisions would apply to different Contracting States (III). An intermediate proposal was made by one delegation, which would permit reservations by dissenting Contracting States to an amendment adopted by the majority vote of the Administrative Council but the other Contracting States might require the dissenting States to withdraw from the Convention (IV).

104. In my opinion, the only practical alternatives are either to permit amendments by majority vote of the Adminietrative Council (or approval by a majority of the Contracting States) on the one hand, or to exclude the possibility of amendments except by unanimous action of all Contracting States on the other hand.

ARTICLE X

Definitions

105. Nationality. The nationality of the investor is significant within the framework of the Convention in that the capacity to bring disputes to the Center is confined to Contracting States and their nationals. It was recognized that a State would be likely to agree to assume obligationa in relation to other States only if it or its nationals were to have an effective means of implementing awards through the procedural machinery of a Contracting State, and if the principle of reciprocity could be relied upon as an additional safeguard. It should be noted (1) that the nationality of the investor

is not here of significance in the traditional sense of the link conferring the right of protection on his State - a right withheld in any event by Section 17(1) - and (2) that consequently the definitions in Article X are of "national of a Contracting State" and "national of another Contracting State", and not of the essence of nationality itself - a matter left to be determined ae a rule by the tribunal in the light of domestic and international law.

106. The definitions cover both private individuals and "companies" broadly defined to include private companies and wholly or partially government-owned corporations. The method of definition used is that of indicating examples of entities which a State could if it so desired, agree to treat as foreign investors for the purposes of the Convention. It must be emphasized that the definitions do not compel Contracting States to recognize any and all the entities within the definition as having the capacity to bring Contracting States before the Center, although such an interpretation of Article X wae proposed by one delegation (II).

107. The Convention implicitly recognizes the principle that the relationship between the Contracting State and its own nationals is entirely a matter for regulation by that State alone, and excludes from the jurisdiction of the Center disputes between the Contracting States and its own nationals. That rule is, however, subject to the exception provided for in paragraph 2 of Article X that a Contracting State is expressly permitted (but not required) to regard one of its nationals as a "national of another Contracting State" for the purposes of the Convention where he at the same time possesses the nationality of some other Contracting State; that paragraph also permits a Contracting State to regard a national of a non-contracting State as a "national of another Contracting State" were he to poeeess concurrently the nationality of a Contracting State.

108. There was considerable discussion of Article X at all four meetings. Most of the criticism seemed to result from confusion regarding the significance of nationality in the context of the Convention, the type and purpose of the definitions, as well as of the fundamental consensual nature of recourse to the Center. For instance, some experts objected to paragraph 2 which, in their opinion, could have a variety of undesirable results. Thus, companies with the nationality of the host State as well as that of another Contracting State might take advantage of their foreign nationality to bring the host State before the Center (I, III). It was also suggested that recognition of a local company as possessing foreign nationality as well, could give some sort of advantage to the foreign State whose nationality was claimed (I, III).

109. In answer to the first question I pointed out that it wae entirely within the discretion of the State, taking into account all the relevant legal and political factors, to decide whether to treat the investor as a foreign national and to agree to have recourse to the Center, or to treat the investor as its own national and as being subject to its local courts alone. As to the second question, Section 17(1) would operate to prevent the foreign State from affording diplomatic protection or bringing an international claim in respect of the dispute so that a claim of nationality by

the investor could hardly give the foreign State any advantage in that respect.

110. Notwithstanding these explanations, the delegations which had raised the first question felt that in the case of privete individuals to provide, in effect, that a host Stata might egree to have recourse to the Center with e person whom it considered as its own national (regardless of any other nationality that person might possess) would be hard to justify politically. Moreover, a situation in which a host State would wish so to egree was so unlikely to arise in practice, that the provision could be dropped without significant practical effect.

111. With respect to companies the Working Paper recognizes "control" by foreign nationals as conferring foreign nationality, thus opening the possibility that a company which was e netional of the host State under its law might concurrently possess foreign nationality by virtue of foreign control. One group of delegations felt that many States would be opposed to recognizing that poesibility (I, II). Another group pointed out that hoet States frequently required foreign-owned companies to be locally incorporated. If such companiee could not be treated as "foraign", e large and possibly growing proportion of foraign inveetment would be kept outside the scope of the Convention (I, II).

112. Other delegations expressed dissatisfaction with the criterion of "controlling interest" becausa they felt that it was insufficiently precise besides being virtually impossible to apply in practice without complicated and inevitably protracted investigation of tha ownership of shares, nominees, trusts, voting arrangements and other forms of disguised ownership (I, II, III, IV). In this connection it was suggested that the "control" test should be eliminated since the Convention would in any event permit a Contracting State to enter into an investment agreement with foreign individuals having an interest in the company, rather than with the company itself - thus avoiding the many complicated problems connacted with internal corporate relationships (I, II). Some delegations, however, while admitting that this would be e workable solution where e company incorporatad in the host State is owned by a holding company incorporated abroad, pointed out that this would not cover the case where the company in the host State was owned by a large number of individual foreign shareholders. They therefore urged that the "control" teet be ratained (III).

113. At all four consultative meetings Article X gave rise to considerable confusion and on reflection it would appear that the terms "national of e Contracting Stata" and "national of another Contracting State" may be used without furthar elaboretion in the Convention and consequently that the definitions in Article X could be delated without serious disadvantage. Each State may be relied upon to ascertain to its own satisfaction whether an individual or association of individuals (incorporated or unincorporated) is (a) one which from a legal and practical point of view is capable of assuming and diecharging contractual obligations and (b) one which should be treated es a national of another Contracting State. In this way the element of fraedom of contract obviates the need to lay down in the Convention detailed rules for treatment of problems

like dual nationality, nationalities of convenience, effective nationality, minority ehareholders nationality, etc. One delegation suggested that all that was needed was a rule of interpretation to the effect that consent to proceed under the Convention implied recognition by the host State of the foreign nationality of the other party (III).

114. Certification of nationality. Article II, Section 3(3) of the Working Paper, which providee that a written affirmation of nationality by the Minieter of Foreign Affaire of the State whose nationality was claimed by the investor would be regarded as "conclusive proof" of nationality, was criticized by eeveral delegations at all four meetings. Some delegatione urgee that as this provision left the issue of nationality entirely in the hands of the investor's State, it was weighted too heavily in favor of the investor (I), besides encouraging investors to assume nationalities of convenience so as to enable them to bring the country of their effective nationality before the Center (III).

115. On the technical side some delegationa thought (1) that the complex legal nature of the status of nationality and the amount of investigation required to support it might make it difficult if not impossible in some cases to reach a definite conclusion on the issue and, therefore, to grant a certificate of this type (III); (2) that the certificate ought to relate to "citizenship" which was an internal etatus which the authorities of a country could be expected to verify, rather than "nationality" which was a status having international legal implicatione (IV); (3) that the nationality of a party might be relevant in determining the law applicable in the dispute, and, therefore, ought not to be determined by the unilateral act of one interested party (I); and (4) that in any event this provision ought not to specify the Minister of Foreign Affairs as being the one authority who could iseue the certificate, since in some countries other authorities might be designated as competent in that respect (II, III).

116. There seemed to be a consensus at all four meetings that the certificate of nationality should be regarded merely as prima facie evidence rather than "conclusive proof" and that it should be left to a tribunal ultimately to decide questions of nationality. While I agreed that, on balance, it would be preferable to regard such a certificate as prima facie evidence of nationality, it ehould be noted that the significance of nationality in traditional instances of espousal of a national's claim should be distinguished from its relatively unimportant role within the framework of the Convention. In the former case, the issue of nationality is of eubstantive importance as being crucial in determining the right of a State to bring an international claim, while under the Convention, it ie only relevant ae regards the capacity of the investor to bring a dispute before the Center.

117. When nationality is to be determined. Under the Working Paper nationality is to be determined at the time when an agreement to eubmit disputee to the Center was concluded. Fixing of nationality at the time consent to jurisdiction became effective was intended to minimize the possible unjust reeults of involuntary changes of nationality - either to the nationality of the State party to the dispute or to that of a non-contracting State. Some delegatione, however,

felt that on balance the poseibility that injustice might be caused in such cases was of relatively less weight in comparison with the danger, inherent in the rule as stated, that an investor earlier recognized as foreign might later voluntarily change his nationality to that of the host State and still be at liberty to bring that State before the Center as his "foreign-ness" at the time of contracting would prevail. In this connection one delegation proposed that the Convention should require proof of foreign nationality both at the time of contracting as well as immediately prior to the award (IV).

118. Two delegations suggested procedures which might serve to avoid controversies regarding nationality: the investor might stipulate his nationality at the time of contracting, and if for any reason he changed his nationality thereafter, the agreement would be terminated unlees re-negotiated between the parties concerned (II); where the investment was made in reliance on a law of the host State, the nationality of the investor would be that possessed by him at the time he registered the introduction of his capital into the host country under that law (III).

ARTICLE XI

Final Provisions

119. The main substantive issue raised during the meetings concerned Section 1 which provides that the Convention would be open to members of the Bank and "all other sovereign States". Several delegations suggested that the Convention, in accordance with the recent practice, should instead refer to "State members of the United Nations or specialized agencies" (II, III). One delegation suggested that only members of the Bank should be permitted to sign the Convention (IV).

ANNEX 1

Survey of Aspects of the Link between the Center and the Bank

General

1. The seat of the Center would be at the headquarters of the Bank (Article I, Section 2(1)).

2. The Center might make arrangements for use of the Bank's offices and administrative services and facilities (Article I, Section 2(2)).

3. The President of the Bank would be *ex officio* Chairman of the Administrative Council (Article I, Section 5).

4. The Governors of the Bank might act *ex officio* as members of the Administrative Council (Article I, Section 4(2)).

5. The annual meeting of the Administrative Council would be held in conjunction with the Bank's annual meeting (Article I, Section 7(2)).

6. Employment by the Bank would not be incompatible with tha offica of Secretary-Genaral (Article I, Saction 9(2)).

7. The possibility that the Bank might bear the overhead costs of the Center (implicit in Article I, Section 16).

Powers and Functions of the President of ths Bank as ex officio Chairman of tha Administrative Council

1. To call meetings or obtain a vota of tha Administrative Council (Article I, Saction 7(1)).

2. To cast a deciding vota in the caee of an aqual division in the Administrative Council (Article I, Section 5).

3. To nominate the candidate or candidates for tha offics of Secretary-General (Article I, Section 9(1)).

4. To designate persons to the Panals of conciliators (Articla I, Saction 11(3)) and arbitratora (Article I, Section 12(3)).

5. In the absencs of a contrary agreement between tha parties, to appoint conciliators (Articla III, Section 3) or arbitrstors (Article IV, Section 3) in cases of failure by either party to do so.

6. To appoint a parson to fill a vacancy occurring upon rasignation of a conciliator or an arbitrator without tha consent of the other membars of the commisaion or tribunal, or upon disqualification of s conciliator or an arbitrator (Articla V, Section 1).

7. To take e deciaion on a proposal to disqualify a aingla conciliator or arbitrator (Article V, Section 2(2)).

Powers and Functions of the Secretary-General

1. To be the principal administrative officer of the Center (Article I, Section 10(1)).

2. On the instructions of the Chairman to consult with partias in order to assist the Chairman in appointing conciliators (Article III, Section 3(1))or arbitrators (Article IV, Section 3) when that function was assigned to the Chairman.

3. To fix the charges payable by tha parties for the use of the facilities of the Center within tha limits fixed by the Administrative Council (Article VI, Section 2).

4. To be availabla in certain circumstances for consultation with a commission or tribunal in tha matter of fixing the faes and expenses of conciliators and arbitrators (Article VI, Saction 3).

5. To determina tha placa of procaedings after consultation with the parties and with the commission or tribunal concernsd, in cases whare tha parties hava been unable to agree to hold procsadings in Wsshington or The Hague (Article VII, Section 1) and to ba available for consultation with a commission or tribunal when it has been asked to approve a placa for holding proceedings agreed upon by the partias (Article VII, Section 2).

SID/64-7 (July 20, 1964)
Memorandum of the meeting of the Committee of the Whole, July 14, 1964, not an approved record.

1. **There were present: omitted**

2. Mr. Wilson invited attention to the two documents before the Committee relating to the settlement of investment disputes viz. SID/64-3 dated June 10,[1] a memorandum from the President on further action to be taken on the proposal, and SID/64-6 dated July 10,[2] a report by Mr. Broches summarizing the principal points raised at the four regional consultative meetings. Mr. Broches would introduce the subject.

3. Mr. Broches recalled that, in addition to the two documents mentioned by Mr. Wilson, there had been distributed during May and June summary records of the proceedings of four regional consultative meetings. These summary records (Z7,[3] Z8,[4] Z9[5] and Z10 - Provisional)[6] together with the Chairman's Report referred to,[7] formed the background for Mr. Woods' memorandum. A decision on the matter had been deferred last year pending the regional meetings and it was now time to formulate definitive views. In his memorandum, Mr. Woods had taken the view that the Executive Directors should, in response to the resolution adopted by the Board of Governors in 1962,[8] recommend to the Board of Governors that the Executive Directors be instructed to formulate a final text of the Convention with the help of legal advisers from member countries, taking into account the comments made at the various meetings and the views of governments;[9] that text should then be submitted to governments as a proposal of the Bank for such action as governments would wish to take.[10] In the course of the Committee's discussions of these documents, he would try to find appropriate language for the resolution which Mr. Woods hoped could be submitted to the Board of Governors at its Tokyo meeting.

4. He thought that it would be useful to bear in mind that the subject for discussion at the present series of meetings of the Committee of the Whole was the procedure for further consideration of the proposal rather than the draft Convention itself. He had, however, begun a review of the draft in the light of discussions at the regional meetings and hoped within the near future to produce a revised draft[11] which would serve as the working document for further consideration of the proposal which would take place after the Annual Meeting.

5. Mr. Chen said that his government would continue to support in principle the proposal to establish an Arbitration and Conciliation Center for the settlement of investment disputes between governments and private investors. He believed that the Center, if established, would encourage private investors or stimulate the import of foreign capital into developing member countries of the Bank. The summary records of the four consultative meetings, which represented the considered opinions of legal experts from 86 member countries of the Bank, were very useful and constructive, and it now remained to crystalize those opinions into a working formula and to draft an agreement for submission to governments as requested by the Board of Governors at its Annual Meeting in 1962.

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[1] Doc. 32
[2] See Doc. 33
[3] Doc. 25
[4] Doc. 27
[5] Doc. 29
[6] See the definitive summary record, Doc. 31
[7] Doc. 33
[8] Doc. 11
[9] See Docs. 37-41
[10] See Doc. 145
[11] See Doc. 43

6. In his memorandum of June 10, 1964 Mr. Woods, while rightly pointing out that the language of the resolution of the Board of Governors left it open whether the draft agreement to be prepared by the Executive Directors would be submitted to governments for signature or for further discussion, had expressed the opinion that the draft should be transmitted for signature and ratification or acceptance. However, he favored a more cautious approach and believed that the spirit of the resolution implied that the agreement should be submitted to governments for further discussion. For that reason, while he fully supported Mr. Woods' proposal to establish a legal subcommittee to give technical guidance and advice for the preparatory work on the Convention, he felt that the resulting draft should be referred to governments not for signature or ratification, but for further discussion. That procedure could produce a perfect agreement which would be satisfactory and acceptable to the greatest number of member countries.

7. Mr. Broches pointed out that it was precisely because the Board of Governors' resolution in 1962 was not clear as to what further action should be taken that one had now to consider how to proceed, and Mr. Woods' proposal was intended to solicit a new decision by the Board of Governors that the Executive Directors, after further consideration of the proposal assisted by legal experts, adopt a draft which would then be submitted to governments not for further discussion, but as the last stage. Thus, the final decision would be taken within the Bank rather than at an intergovernmental conference. That did not mean, however, that the decision would be taken in a hurry or in order to meet a particular deadline. In any event, governments would be entirely free to sign the Convention or not as they wished.

8. Mr. Chen asked for further information regarding the terms of reference of the proposed legal subcommittee.

9. Mr. Broches said that no attempt had as yet been made to work out any detailed terms of reference pending the discussion of the matter by the Committee of the Whole and by the Executive Directors. He envisaged that the subcommittee would meet in Washington and would assist the Executive Directors in working out a draft which would represent the widest possible consensus, but that it would act as an advisory body rather than constitute a conference in its own right. For instance, the subcommittee might be asked to deal with a particular article or section which was the subject of controversy and to report their conclusions to the Executive Directors who would decide questions of policy.

10. Mr. Garland asked how large the subcommittee would be.

11. Mr. Broches said that, as Mr. Woods had indicated in his memorandum, that would be a matter for the membership of the Bank to decide. He thought that each member of the Bank which wished to be associated directly with the drafting of the Document should have an opportunity to be represented on the subcommittee. While, in theory, this might mean that the subcommittee could consist of some 102 experts, in practice the number would probably be much smaller. Since the membership of the Bank was represented by only 19 Executive Directors, they and their constituents might feel easier if, during preparation of the draft, they were to have ready access to legal experts from the countries whose views they wished to canvass.

12. However, the approach to the composition of the subcommittee should remain flexible. Some countries might not be interested in participating directly, and might be satisfied that a legal expert from another country in their group would adequately represent their general views.

13. Mr. Chen said he would like to clarify his statement in which he had given his support to the idea of a legal subcommittee. He did not favor a subcommittee of representatives of all member countries, which would prove to be unwieldily, but would support the idea of having a small group of not more than, say, 25 persons charged with formulating a draft for submission to the Executive Directors and eventually to the Board of Governors.

14. Sir Eric Roll recalled that when the proposal under review was first made several Executive Directors and members of the Board of Governors had concluded that here was the germ of a very good idea. His reading of the records of the consultative meetings had convinced him that the idea was in fact a very good one and if brought to fruition would prove a very useful contribution to international economic development. As Mr. Broches had clearly pointed out during the regional meetings, the proposal did not seek to impose a new legal structure and stringent legal obligations on member countries, but to provide a facility available to countries which wished to use it. He was sure it would be used in course of time, and that it would be highly conducive to facilitating capital investment and thereby, indirectly, the work of the Bank and its sister institutions.

15. While there had been a favorable response to the idea of such a facility, the task of actually creating it was beset with many difficulties, and could easily be frustrated by perfectionism. It would be simple, for instance, for the perfectionist to attack, say, the proposal for a legal subcommittee by referring to various complicated questions of composition, organization and efficient management. But those same problems would arise whatever further steps were taken, and it would be a pity to allow the trap of perfectionism to lead to complete frustration of all further action.

16. The one way to avoid such a trap would be for the Directors to act without excessive regard to political issues or individual predilections of Governors, treating the proposal as a matter to be decided within the Bank. The alternatives before the Directors were for them (1) to take the risks and attendant responsibility of proceeding along the path outlined by Mr. Woods - organizing the next steps primarily through the Bank but with the advice of several legal experts who would represent a kind of link with the wider community of the Bank's membership - or (2) to hand the proposal to governments to proceed by way of an intergovernmental conference. While he was not against intergovernmental conferences per se, the organization of such a conference was a formidable undertaking, and while the Bank might render every assistance as far as preparatory work was concerned, the outcome would, in his opinion, be very much in doubt.

17. For those reasons he would suggest that if it were still felt that the proposal was worthwhile and ought to be pursued without regard to its ultimate success or failure, the Bank should retain the initiative

regarding its implementation. To do so, it should secure the support of a sufficient number of countries through the method outlined in Mr. Woods' memorandum. This method was probably less fraught with risk to the ultimate objective than any other he could visualize.

18. He wished to make two further points: (1) governments might feel less committed if the Bank were to proceed in the way proposed, taking upon itself the task of preparing a Convention which it would be open to governments to accept or reject, rather than by way of elaborate diplomatic consultations which, if organized on the initiative of one country or group of countries, would immediately create hesitation in others; and (2) it would be entirely open to governments even after the Convention had been submitted to them by the Bank on a take-it-or-leave-it basis, if there was a fairly widely felt need, to make the Convention at that stage the subject of intergovernmental discussion in the manner suggested by Mr. Chen.

19. Mr. Mejia-Palacio said that before discussing how to proceed with implementing the proposal he would welcome clarification of the answers to three questions. (a) The first was whether there was a general consensus on the desirability of establishing machinery to settle investment disputes. The answer to that seemed to be in the affirmative, and he himself had always urged that the Bank establish such machinery immediately. (b) The second question was whether the machinery had to be established by intergovernmental agreement. He would answer that question in the negative and suggest that it would be sufficient for the Bank itself to establish machinery which countries could use or not as they wished. (c) The third question was whether the Executive Directors possessed the authority under the Articles of Agreement of the Bank to set up a system of international conciliation and arbitration. He would answer that question in the negative, and if the Directors were eventually to establish such a system, they would to that extent be acting not as Executive Directors of the Bank, but as a group of distinguished citizens. If the latter interpretation were accepted, however, the weighted voting system prescribed in the Bank's Articles ought not to be applied, and each member of the group should have only one vote.

20. Mr. Broches said that as to the question whether the machinery should be established by intergovernmental agreement or by corporate action within the Bank, he himself had raised the issue at all four consultative meetings. In that connection he had pointed out that while the Executive Directors could conceivably establish the institutional framework of the Center that facility would not be of real value unless certain other aspects of the system were capable of implementation through a binding intergovernmental agreement. While a few delegates had opposed the entire idea of facilities for conciliation and arbitration of disputes between governments and private investors, none that he could recall had taken the view that if the facilities were to be established that should be done by corporate action and not by way of an intergovernmental agreement. From this it would be fair to deduce substantial support both for the establishment of facilities and for their establishment within the framework of a Convention.

21. On the question of the Bank's power to deal with a proposal of the kind under review, he thought the Bank had that power, and that the Bank's powers were not limited to the specific transactions enumerated

in its Articles of Agreement. He recalled that the majority of the Executive Directors (not just those exercising the majority of the voting power) had felt very strongly that it was entirely appropriate for the Board to sponsor IFC and IDA as being important steps in the promotion of economic development, and the interest of the Executive Directors in the present project was similarly oriented.

22. On the other hand, if the Executive Directors met qua Executive Directors and not as a committee, the only voting rules applicable would be those laid down in the Articles. In practice, the difference between applying those rules and the one-member-one-vote rule would be more apparent than real, as it would be difficult to conceive that a small group of Directors exercising the majority of the voting power would use that power in the face of strong opposition from the numerical majority to set up facilities which would be completely valueless without the participation of other member countries.

23. Mr. Garland asked whether the voting rules laid down in the Articles applied to voting in committee, or whether a committee could make its own voting rules.

24. Mr. Broches supported by Mr. Mendels pointed out that no vote was ever taken in committee, where the practice was to ascertain either a consensus or a balance of views. Opinion polls were, however, taken from time to time.

25. Mr. Garland thought that Mr. Mejia's fears might to some extent be allayed if, in the discussions of the detailed provisions of the draft in committee, polls could be taken of the views of the Directors and the final draft prepared on that basis. That draft could then be submitted to the Executive Directors for decision.

26. Mr. Wilson recalled that that procedure had been followed when drafting and adopting the Charter of IDA.

27. The meeting adjourned at 11:25 a.m.

35

SID/64-8 (August 4, 1964)
Memorandum of the meeting of the Committee of the Whole, July 23, 1964, not an approved record. Continuation of the discussion started in Document 34

1. There were present: omitted

2. Mr. Woods welcomed Mr. Belin, General Counsel of the U.S. Treasury, as temporary alternate to Mr. Bullitt, and invited him to speak.

3. Mr. Belin wished to associate his government in the strong support of Mr. Woods' proposal (document SID/64-3 of June 10, 1964)[1] for further development of the draft Convention on the settlement of investment disputes. From his experience as an expert at the Santiago meeting[2] he

[1] Doc. 32
[2] See Doc. 27

thought it extremely doubtful that a multilateral diplomatic conference could deal effectively with e Convention of such ecope and complexity. Notwithstanding the care and skill that had gone into preparetion of tbe draft, a number of troublesome problems still remained end it would be exceedingly difficult to deal with them properly in a diplomatic negotie-tion. On the other hand, Mr. Woods' proposal that the draft be consider-ed by the Executivs Directors assisted by a subcommittee of legal experts (which could be flexible enough to include enybody) seemed to him the most eppropriate way to make progrese toward a Convention while still giving full scope for discussion of the problems, questions and reserva-tions that varioua countries might heve.

4. Mr. Lieftinck seid he wes fully in favor of the recommendations conteined in Mr. Woods' memorandum. After numerous discussione of the draft Convention by the Executive Directors es wsll as by legal experts at the regional meetings, it wes cleer that e large majority of the Board end of the legel experts wes in favor of teking ection in the matter. The course of action proposed in the memorandum would have the full support of himself and his government. He had on many occaeions express-ed support not only for establishing a Center for concilietion and erbitration of investment disputes, but elao for its esteblishment by maans of e Convention. However, beering in mind the possible deley in securing ratification of the Convention he had suggested thet the Centar be established even without a Convention which would cover the rights and obligations of participents. The majority of Executive Directors had now concluded in favor of setting up the Center by means of a Convention, and he was etrongly in favor of the procedure recom-mended by Mr. Woods which sought to reducs deley, viz., to constitute the Executive Directors both a negotiating and a drafting body which would prepare e draft Convention in finel form for submission to govern-ments.

5. It would not be too difficult for the Executive Directore to obtain sufficient inetructione, and he believed they were better equipped than a diplomatic conference for resolving the more technical problems involved in a Convention of this type. He would restrict the advisory group to legal advisers and perhaps to other experts designated by governments for specific purposss. Beyond designating their experte, governments ought to leave further deliberations in the hands of those whose primary purpose was to reech proper conclusions on tha technical problems. In the circumstences he wae in favor of all the recommendetions contained in Mr. Woods' memorendum and hoped that after the conclusions of the Executive Directore had been reported to the Boerd of Governors et its meeting in Tokyo, the Executive Directore would, as early as possible, undertake the task of preparing e definitive text.

6. Mr. Illanes recelled that he had on previous occaeions expreesed himself es being in favor of a mechanism for the eettlement of investment disputes through a facility for conciliation and erbitration. He had not, howsver, been in fsvor of estsblishing that facility by means of e Convention. That approsch involved some issues that were still matters of controversy in internetionel prectice, and most Latin American countries would find it diffioult to heve such e Convention approved by their legieletures.

7. While most Latin Americen countries offered incentivee to private

[1] Doc. 24

investors, auch as apecial benefits in the matter of taxea, foreign import dutiea, amortization and transfer abroad of dividends, they had taken no initiative regarding submiaaion of disputea to international adjudication for two important reaaons, viz., (1) it wes a basic principle in theae countriea that any claim of a foreign private psrty must, prior to submission to an international tribunal, be brought before the nationsl courts, i.e.,that local remediea must be exhausted, and (2) to offer a foreign investor a forum which would not be available to locsl investora would run contrary to the principla eatsblished in the constitutions of these countries guaranteeing equal trestment to nationals and non-nationale alike. In that connection he recalled that st the Ssntiago meeting aome delegationa had expresaed themselvss as fundamentally oppoaed to the idea of international erbitrstion of investment disputes, and he had the impresaion that most of the delegstes there had indicatsd that their countries would find it difficult in tha near future to overcome thet attitude which, deriving ae it did from precedent or trsdition, waa firmly anchored in the netionsl mentalitiea of theae countriea.

8. Two courses of action had been open to the Board: the first which was aimple, practical and non-controveraial, was for the Bsnk to establish immediately a mechanism for conciliation and arbitration which would permit the partiea themselvea to apply their own rulea and procedures and which would allow the partias to aeek the cooperation or tha advice of the Bank if they deaired it; the eecond wea to create the facilities by a Convention approved by parliaments of membar countries. In his opinion the latter procedure would in Latin American countrias prove long and difficult and perhaps not completely auccessful. Moraovsr it had to be borne in mind that aven if the parliaments of theae countriaa were to approve the Convention they would evsntually find that their constitutions did not permit them to aubmit disputaa to the Centsr.

9. Mr. Illanee recalled that he had earlier urged that the idea of creating e Center be aepareted from that of establishing it by meana of a Convention, end that the Bank ehould itself establish the Csnter by corporate action. Whila it now appeared that the conaensus of the Board waa in favor of a Convention and that hia point of view was that of the minority, he would atill urge that tha two viewa wera not ao far apart, and propoaed that the Bank aatsblish the Canter snd, concurrently puraue the idae of a Convantion.

10. Mr. Brochas rsferring to Mr. Illanes' statement that there existed in Latin American countries constitutional proviaions (or at the very least a strong tradition) requiring that all local remedies must be exhausted before there could be any question of international proceedings, pointed out that that position wsa not at all inconaistant with the Convention which left partias sntirely free to require the previous exhauation of local remediea.

11. On the question of aqusl treatment for foreigners and citizens alike, it was to be noted that the constitutions not only of Latin American countries but of other countries sa well guaranteed such treatment to foreigners. In Latin American countries that constitutional provision had aometimea bsen given a apecial meaning in thet it was held to prohibit grant of apecial privilegs's to foreigners. However, as Mr. Illanes had pointed out, quits eubstantial privileges were in fact given to foreign inveetors in the form of tax benefita, immunity from

import duty, etc. so that the prohibition aeemed to be applied only to any possibility of special treatment for foreigners in the field of claims and of international settlement of disputes generally. While this wss admittedly the view of some Latin American countries at the present time, s number of delegates at Santiago hsd recognized that view as unfortunate and welcomed the opportunity afforded by discussion of the Bank's propossl to re-evaluate their traditional attitude. While these delegates had reslized that their governments might not at the moment be able to ratify the Convention, and that if they did, thst they might not be able to make very active use of the Center, they welcomed the fsct thst such a Convention was in ths process of being worked out.

12. As to the distinction made between establishing the Csnter by action of the Executive Directors and making its creation dependent on the conclusion of a Convention, hs agreed that one ought not to lose sight of the fact that the Center could (although in a much less satisfactory way) fulfil some function in the absence of a Convention. The feeling had already been expreased in the Board that if sufficient action were not taken on the Convention for two or three years, it would at such stage be useful to consider ths desirability of establishing the Center by corporate sction within the Bank pending receipt of the ratifications needsd for bringing the Convention into force. But he had difficulty in accepting Mr. Illanes' characterization of the proposal to establish the facilities as non-controversial, and of the proposal to have a Convention ss controversial. Public opinion in some Latin American countries was opposed not merely to the idea of a Convention but to the very notion of international adjudication of disputes between invsstors and States, snd he could not see how the politicsl opposition envisaged by Mr. Illanes could be reduced through establishing the Center (whose functions would be repugnant to those aegments of Latin American public opinion) through corporate action rather than by a Convention.

13. Mr. Illanes said that in his visw if the Csnter were established immediately by corporste action within the Bank, its existence would encourage some Latin American countries to submit to it their disputes with private investors under rules and procedures agreed upon between them. By thia means it would also be possible to avoid to some extent the delays inherent in adoption of a Convention as well as the political opposition - based on traditional or constitutionsl grounds - which s Convention of the type proposed would arouse.

14. Mr. Broches pointed out by way of clarification that even under a Convention it would be open to the partiss to a disputs to agree upon their own rulea and procedures.

15. Mr. Hudon said thst the issue before the committes was whether the Board, with the help of legal sdvisers, should proceed to draft a convention and submit it to governments for signature or other action, or to draft a convention which would be discussed at some kind of intsrgovernmental meeting. As between these two alternatives he fsvored ths former for the following reasons. Most of the controversial issuss had been identified in the course of extensive discussion in the Board and at the regional meetings, and the tssk of resolving those isaues and formulating articles of a convention could be left to General Counsel who would receive ths help of the Board and such advisers as might be invited to participate in the preparatory work. Questions such as whether

or not to establish a Center, whether recourse to the Center should be on a voluntary basis, or again whether an agreement to have recourse to the Center should be binding on the parties, were in a sense so simple thst they were not susceptible to solution in terms which could be formulated in compromise language, snd were thus not questions which a large intergovernmental conference could rssolve. Another consideration was that a large intergovernmental conference would entsil unnecessary delay and would in effect prevent those countries which were sstisfied with the provisions of the Convention from signing it. Finally, the Bank was familisr with the field of investment disputss, snd the Board ss a result of its discussions of the draft Convention had become increasingly acquainted with it, so that it seemed to him that the Bank snd the Board were best equipped to carry on further work on the subject.

16. However, he had some misgivings about the size of the advisory group now contemplated. In theory the group might consist of 102 representatives, but a realistic estimate of sttendance might be nearer 50-75. While he felt that even that number would be unwieldy it might, in the circumstances, be difficult to reduce it.

17. Mr. Donner ssid that his government shared Mr. Woods' opinion that it could now be concluded that there was adequate support for the bssic festures of the proposal to establish an arbitration and conciliation Center. While he was aware that a number of governments still had difficulties with the proposal, and that there still remained issues requiring clarification, he supported Sir Eric's view that a search for perfection in matters of substance and a desire to counter every foreseeable risk ought not to be allowed to become obstacles to progress. In his opinion it was clear that the project could be brought to a successful conclusion and that the time had come to invite governments to instruct the Board to prepare a draft Convention.

18. After weighing the merits of possible alternative courses of action, his government had concluded that the draft Convention should be worked out by the Executive Directors with the help of legal advisers, and should be presented to governments for acceptance or such other action as they might deem appropriate. However, such a course would not, as Sir Eric had pointed out, prevent governments from deciding subsequently that they should themselves establish the text of the Convention. His government had, in part, been led to this conclusion by the emphasis placed in Mr. Woods' memorandum on the sdvice to be obtained from the committee of legal experts. Due weight should be given to the views of the legal experts on whom the Board should rely not merely for opinions but for definite conclusions on the many issues involved, and the Board should be slow to decide important controversial issues over the heads, so to spesk, of the experts. He was aware that it was not the practice in the Board to ram decisions through by a majority of the voting power but on the contrary to try to achieve a consensus on any issue, and he felt confident that the Board would in this cooperative effort with the legal experts adhere to its normal practice in this regard.

19. Mr. Broches agreed with Mr. Donner's characterization of the role of the legal experts.

20. Mr. Mirza said that most member countries might be expected by now to have given careful considerstion to the Bank's proposal and he doubted

whether any further intergovernmental or other discussion of the subject outside the Board would be likely to throw further light on the issues involved. The idea behind establishment of the Center, viz., that developing countries, if they wanted to inspire confidence among foreign investors, had to create the proper atmosphere, had been appreciated by a majority of the members of his group and, subject to any special points of view they had expressed at the regional meetings, been accepted by them.

21. He felt that it would now be reasonable to assume that member countries had given their agreement in principle to the idea, and to proceed further on the basis of that sssumption. While certain issues still remain outstanding, those could be settled through discussion in the legal committee to be convened as envisaged in Mr. Woods' memorandum. Although he had not obtained the reactions of all the countries in his group, ss far as he could see, every one of them would wish to be represented on the committee and he could see no objection to permitting this. He hoped that the legal experts would be regarded as travelling on the business of the Bank and treated in the same way as were experts designated to attend the regional meetings.

22. Mr. Woods referring to Mr. Mirzs's last point, ssid that if the Board were in favor of having legsl experts from every country sttend, one way to assure this would be to pay their expenses. As to the fscilities for holding the meeting the Eugene R. Black Auditorium seemed well suited to the purpose.

23. Mr. Broches said he had not resched a conclusion ss to a desirable number of experts to form the committee. While it was to be hoped that all 102 members might not feel it necessary to be represented, it would not be possible to discourage particular countries from attending. On the other hand, it was clearly desirable that attendance be limited ss far as possible to experts who planned to make a contribution. He thought that after the Committee of the Whole had reached decisions on questions of principle they might work out some schedule of the desirsble number of advisers per group of countries, and take up the question of remuneration of experts.

24. Mr. Woods agreed that the question of remuneration of experts might be left until the end of the discussion.

25. Mr. Garland said that in general his countries regarded the Bank's proposal and its objectives as desirable. Much had been achieved on the technical side through investigation and full discussion, and the remaining problems might be dealt with by s widely representative committee of legal experts as now contemplated. While he wss in agreement with the strategic objectives, he was, however, concerned about the tactics to be employed at this particular time in implementing the Bank's proposal.

26. In the past in order to bring about an international agreement, voluntary agreement on certain issues and preliminary discussion had served to build up the essential impetus toward the desired conclusion. He did not feel that sufficient impetus had as yet been achieved for the Bank's proposal even though a vote in the Board would show an overwhelming majority in support of it. It was important, however, to determine whether that would represent balanced support for the proposal. It sppeared to him that while the capital-exporting group would support it, the cspital-

importing countries - which the proposal was designed to benefit - were divided on the issue. Mr. Illanes' comments, for instance, had seemed to him to echo the doubts that had been expressed in Santiago[4] and Bangkok[5].

27. While paragraph 4 of Mr. Woods' memorandum suggested that there had been general support for the proposal at the policy level, it had to be recognized that this view was based on the regional meetings which had been attended by legal experts who had discussed questions mainly of legal interest. It did not follow that those experts were briefed to express their governments' agreement to the proposal.

28. In the absence of broader and more enthusiastic support for the proposal, in particular from the capital-importing countries, he would be reluctant to place before the Board of Governors a memorandum which suggested or carried the implication that member governments had decided that the procedure now proposed was practical and desirable at this stage. He would, on the other hand, prefer the more cautious approach of first doing more canvassing of countries at the policy level and then reconsidering the position. Considerable time had thus far been devoted to study and discussion of the proposal, and he felt that as a matter of tactics it would be best to take a little more time to persuade countries to support the proposal.

29. Mr. Woods said he could not agree with Mr. Garland's view on how to proceed. It was abundantly clear that quite a fair preponderance of the Bank's membership felt that it would be desirable to set up tbe facilities. The Board was not required, in order to go ahead, to determine that any particular percentage of the membership beld that view, and it was certainly not necessary to have anything approximating unanimity (however desirable thst might be) in order to create the facilities. It was important to bear in mind that no member country, capital-exporting or capital-importing, would be bound to participate in setting up the machinery. The proposal was to create a facility; governments would be entirely free to decide whether, and if so when, they would make use of it. The comments of Mr. Illanes to which Mr. Garland had referred related not to whether it was generally considered desirable to set up the facilities, but rather to the question whether the facilities ought to be set up immediately (ss urged by Mr. Illanes) or established within the framework of a convention.

30. Mr. Garland said that in his view it would be desirable to postpone a decision on the matter for a few months in order to try to obtain approximate unanimity in support of the proposal.

31. Mr. Woods saw no indication that anything approaching unanimous support could be achieved within the next few months. He agreed with Mr. Mirza's view that nothing could be gained by further discussion of the basic elements of the proposal.

32. Mr. Garland asked whether the attitudes of governments were fairly well known.

33. Mr. Broches replied that the attitudes of governments were in fact well known. It was quite clear that a number of delegates to the regional meetings had been under instructions from their governments, and this was

[4] See Doc. 27
[5] See Doc. 31

particularly true of delegates from governments that had hesitstions regarding the proposal. As the discussions at the meetings had not been limited to mere approval or rejection of particular provisions but had covered broad issues of policy as well, it wss likely that the Board hsd heard all the objections that were to be raised.

34. Mr. Garland had referred to the creation of impetus ss being the way in which the Bank normally sought to bring about an international agreement, snd he would like to point out that that was precisely the method now being followed. After the first mention of the subject in the President's address at the Annual Meeting in 1961,[6] the Executive Directors had discussed the general principles of the propossl. Subsequently the Executive Directors had again discussed general principles and the policy aspects of the proposal on the basis of s draft prepared by the staff,[7] one of the main objectives being to decide whether the proposed machinery was desirable. Throughout those discussions governments had been aware of the basic principles of the proposal. Finally, the subject had been discussed at a series of consultative meetings, and he agreed entirely with Mr. Mirzs when he said that the Board had now ample knowledge of the issues involved. While he agreed with Mr. Garland that it was desirable to proceed with caution and to create an impetus, he believed that the objective should be to achieve not unsnimity but merely the greatest possible support and consensus. It wss also importsnt to remember that an excess of caution might serve to stifle impetus.

35. In his view the only way to compel governments to come to grips with both the policy and the technical aspects of the propossl would be to do as Mr. Woods had proposed in his memorandum and have the Board consider the draft with the advice of legal experts. Governments could then, if they so desired, take a position on the matter and thereby make their attitude clear if they had not slready done so through the Executive Directors or through their delegates st the consultative meetings.

36. Mr. Garland asked Mr. Broches whether in the light of his knowledge of the views of various governments he could estimate the number of capital-importing countries which would accede to the Convention.

37. Mr. Broches said that while he could not answer that question, he could say that there was a fair preponderance of opinion among the capital-importing countries sympathetic to the purposes of the Convention. These, however, ranged from countries who were in favor of the proposal embodied in the draft as it stood, to countries whose support was qualified by reservations as to one or more substantive features of the draft. He believed that these differences of opinion were negotiable; on the other hand, the only way to ascertain whether that was true would be to try to negotiate them, snd that was precisely the aim of the procedure proposed in Mr. Woods' memorandum.

38. Mr. Woods, referring to Mr. Garland's emphasis on the attitudes of the capital-importing countries, pointed out that the Bank's propossl ought not to be characterized as being essentislly and primarily in the interests of the capital-importing countries. In his view it was equally in the interests of the citizens of the capital-exporting countries.

39. Mr. Larre said that as a representative of a cspital-exporting country he believed it was essential to ascertain the views and reactions

[6] Doc. 2
[7] See Docs. 6 and 21

of the governments of capital-importing countries regarding the Bank's proposal. He recalled that with that end in view he had long ago proposed that the Bank, after preparing a draft, should undertake to canvass directly the viewe of member governments. Another means of ascertaining the views of governments was the seriee of consultative meetings which had just been completed, but it now appeared that the main objective of these meetings had been to elicit comment on the technical legal aepecte of the draft prepared by the staff rather than to explore the attitudes of member States. The French delegation to the Geneva consultative meeting[*] had suggested that the views of governments could be obtained moat efficiently by convening a diplomatic conference but that method had been rejected as being too cumbersome. He eaw no objection to the procedure now proposed by Mr. Woods and hie government would support it.

40. Mr. Woods pointed out that a government, if it were asked whether it would accede to a Convention of this type would probably respond by wanting to study the document. With such a reaction in mind what the Bank was seeking to do was first to have legal experts formulate a clear and legally precise text. Had he been in the Chair when Mr. Larre had suggested canvassing the views of governments, hia reaction would have been that it would not be practicable to approach governmenta until after a precise document had been formulated.

41. The Convention as now conceived was not a treaty which would on signature make it mandatory for the parties to take certain action. All it did waa to create a house; the door of the house would be open and governments would be free to enter - to accede - with respect to a given controversy. The proposal had been discussed at the consultative meetings, over a period of eome 9 months and had come to be widely known. He therefore felt that the meeting of the Board of Governors in September 1964 would be an appropriate occasion for the Executive Directore to ask the Governors for authorization as to the next step. He hoped it would be posaible to recommend to the Governors that the Bank'e proposal was desirable and request instructions to work out any remaining mattere of detail and then submit the text to governments for such action as they might deem appropriate.

42. Mr. Machado said that as he was speaking in the Committee of the Whole and not as a member of the Board the views he would express would be his own and would not necesaarily be those of any of the governments he represented.

43. He believed that of the various alternative recommendations that the Board could present to the Governore that suggested by Mr. Wooda was the best. He had been surprised when at the meeting in Santiago, which was attended by distinguished jurista, there had been recognition of and praise for the idea of the Center, and many of the delegates had become intrigued with the solution offered by the Bank. Many of them had supported it primarily because of the essentially voluntary nature of recourae to the facilities which permitted the conclusion of *ad hoc* agreements in every case - either for conciliation or arbitration - and insured respect for the principle of sovereignty of Stetes. Indeed one important Latin American country which had refused the Bank's invitation to participate in the Santiago meeting had, after hearing of the proceedings at that meeting and analyzing the Bank's proposal, become

[*] See Doc. 29

interested in it and even asked to be invited to the Geneva meeting.

44. On the question whether first to formulste a convention, or to set up the Center, he had felt that the Convention method would result in inordinate delay. He had always been in favor of creating the Center forthwith and letting it sell itself to member countries through successfully settling a few disputes. However, he felt that the recommendation in Mr. Woods' memorandum represented s practical approsch to speedy crestion of the Center. He was convinced that once the Center wss created s number of countries would use its facilities.

45. Mr. Rajan said that many capital-importing countries had doubts regarding the principles embodied in the Convention which represented s radicsl and important departure from the accepted norms of internationsl relations and international law. While there was s general apprecistion of the problems with which the Convention sought to deal and the feeling that it should be pursued with all expedition, it would be desirable to have as large a consensus as possible on crucial provisions such as the jurisdiction of the Center. In particular, it would be desirable to obtain the enthusiastic support of the cspital-importing countries.

46. He appreciated that no country would be compelled to sccede to the Convention, and that even if a country did so accede it need not bring sll its investment disputes within the Convention. However, in practice, after a few countries had joined there would be pressure on other countries to do so and in future every investor would ask that his investment should be brought within the jurisdiction of the Center.

47. It was his view that it would be helpful to convene a diplomatic conference or a conference of government representstives. While it had been argued that such a conference would entail delay, he felt that a delay of possibly three or six montha would be justified in order to obtain the consensus and support of the large majority. If the Board were to accept the course of action proposed in Mr. Woods' memorandum, he hoped that decisions would be made in the manner envisaged by Mr. Donner, viz., on the basis of a consensus of views rather than s vote. In conclusion he would strongly support Mr. Mirza's suggestion that each member should be invited to send its legsl expert to the proposed committee and that the Bank should pay the expenses of the expert.

48. Mr. Woods said that if it were decided at the end of the present series of discussions that the Bank should pay the expenses of delegates, the question would arise for what period of time the Bank should pay those expenses. If no period were fixed the Bsnk would be committed to an indetsrminste obligation while if a time limit were imposed those who were rather less sympsthetic to the crestion of the Center might with some justification say that this was an attempt to limit the discussion.

49. Mr. Suzuki said that while the instructions he had received were not clear ss to whether his government had withdrawn its earlier proposal that an intergovernmental conference be convened, his government felt that the time had come for an exchange of views at the official level, snd that the Board snd the legsl committee envisaged in Mr. Woods' memorandum could be the channels through which that exchange could take place.

50. As to the composition of the legal committee, he felt that it should comprise at least representatives of those countries that were interested in the Convention. He noted that prohlems could arise for those Directors who represented more than one country, as they would have to secure experts who were approved by their countries and authorized not only to apeak for those countries but also to discusa the technical legal aspects of the draft. Among the technical questiona of which he had heen advised were a determination of the kind of dispute to he referred to the Center, and a possihle duplication of functions as between the proposed Convention and those of the Permanent Court of Arhitration and international arrangements for protection of foreign property and investment insurance now under discussion.

51. Mr. Broches said that in considering the question of the composition of the legal committee countries might be divided into three groups, viz., (1) countries that were definitely interested in working on the proposal hecause they believed it was a good one or that it could he developed into something worthwhile or because they wiahed to study it with a view to participating; (2) those who were not really interested or whose present interest was not so active that it would induce them to send experts whom they might otherwise have employed on other projects; and (3) those countries which were hasically opposed. One could invite (1) all countries and encourage them to attend; or (2) only countries which shared at least the view that the proposal was in principle a good one giving them, however, all freedom to suggest changea; or (3) all countriea with the exception of those which were opposed, since the object was to draft a Convention and not to decide whether to draft one.

52. The legal experts would he expected to speak on policy issuea as well, so that their participation would simplify, for Directors repreaenting more than one country, the task of sounding out the views of those countries. In this way it would he posaible to achieve the main henefits of a broad exchange of views without becoming involved in the technical and political complexities of an intergovernmental conference.

53. Mr. Gutierrez Cano said his countriea were hasically in favor of the procedure proposed in Mr. Woods' memorandum. He wished, however, to invite attention to two aspects of the matter. The first was his concern with the position in those countries which were not legally ahle to accede to the Convention and the effect of such a position on their future relations with investora from capital-exporting countries. Secondly, he would like to support the views expreaaed hy some Directors that the Bank should aasist member countries - or at least those which had taken part in the regional conferencea - to aend legal experta, as otherwise there might be room for doubt as to whether the proposal had received adequate support or whether all the opinions expreased on various occasions had been taken into consideration.

54. Mr. Larre said that regarding invitations to participate in the legal committee, he would prefer them to he restricted to countries which had expressed some intereat in the proposal. Attendance at the meeting would then give aome preliminary idea of who might eventually become parties to the Convention.

55. Mr. Woods said that Mr. Larre seemed to share with Mr. Garland

an uncertainty regarding the number of capital-exporting and capital-importing countries that had shown interest in the proposal. He had the feeling that there had been a very clear indication of broad interest. It was true that there were countries which were prevented under their constitutions from participating, but even they were interested in the sense of wanting to find out how the Center might work if it came into being. As Mr. Broches had pointed out there might also be a number of countries which just could not spare personnel to attend the meeting, and which might take the position that they would decide whether or not to participate only after the Center had been brought into existence.

56. Mr. Broches agreed that there seemed no doubt regarding the existence of broad interest in the proposal. The proposal was not, however, one on which a final view could be obtained at the present stage. One had first to compel countries to focus on the issues involved, and that would not be practicable unless they were presented with a clear and legally precise draft. While the basic principle underlying the proposal was a simple one, countries would be reluctant to give an opinion on it until they had seen how it had been worked out in the draft.

57. At Addis Ababa[9] and Geneva no objections of principle at all had been voiced, whereas at Santiago and Bangkok opinion was divided. In Santiago some countries - Argentina, Brazil and Bolivia - had categorically objected to the principle underlying the draft. Other countries - e.g., some of Mr. Machado's constituents - were very sympathetic to the proposal although some of them made it clear that their present constitutional provisions would make it very difficult for them to join the Convention and that they would have to study the matter further. Among the latter had been Venezuela, probably the only country in the world which had a specific constitutional prohibition against arbitration of international claims by foreign investors. At Bangkok, while the Indian delegation felt very strongly about certain points of jurisdiction, they had expressed agreement with certain other features of the draft. As he understood it, the position regarding the questions they had raised was one of having to meet certain points which in the view of the Indian delegation were essential. To summarize, he had no doubt that there was wide interest in the proposal and that there was a majority in favor of some kind of Convention. However, the procedure outlined in Mr. Woods' memorandum was designed to ascertain whether in fact a Convention could be agreed upon.

58. Mr. Chen said that his previous statement (SID/64-7,[10] paragraphs 5 and 6) ought not to be understood to mean that he was in favor of intergovernmental discussion of the proposal. He fully supported the idea of convening a legal subcommittee to work in conjunction with Mr. Broches and the Board and wished to make it clear that he was not in favor of an intergovernmental conference as such. He quite agreed that such a conference would be unwieldy and would, in addition, take a long time. Once the text of the Convention had been established the Board could transmit it to members indicating that it was open to them to accept or not as they pleased.

59. As to the composition of the legal committee he would like to suggest that it consist of 19 members. There were many lawyers on the Board who could sit as members of the subcommittee while Directors who were not lawyers would have to depend on legal experts. Directors representing several countries might be asked to select a qualified expert

[9] See Doc. 25
[10] Doc. 34

from among them - perhape one who had attended a regional meeting. He would like to eee the legal committee meet as soon ee possible and would even suggest a time limit for its deliberations so as to avoid undus delay. He hoped that before the end of the year they might work out the text of a convention for submission to governments.

60. Mr. Woods said that further thought should be given to the question of the number of experts to be on ths legal committee, and no decision needed to be taken et the present meeting. The idea that each Executive Director should have onlv one legal edviser did not, however. particularly appeal to him in view of the fact that some Directors represented a number of countries with a variety of shades and gradations of differences of viewpoints. Mr. Broches would probably be eble to work out an acceptsble echeme which would provide ths Board not merely with ample, but with a gensrous amount of legal advice.

61. What the present meeting did have to consider was the recommendation the Executive Directors would make to the Board of Governors. While the present diecussions were informal, he hoped that befors the recess in mid-August the Directors would vote formally on e recommendation which wes now being drafted.

62. Mr. Rajan eaid he did not think thet invitations to be represented on the preposed legal committee should be limited to thoee who eccepted the Convention in principle. In his opinion countries in all of the three categoriee enumerated by Mr. Broches ought to be invited with a view to having ae many as possibls (even those who now had doubts) adhere to tha Convention sventually. He did not think it would be appropriate or desirable to sxclude any country from ettending and having their say.

63. Mr. Woode eaid thet the object wae to eet up machinery which would benefit the preponderance of the Bank'e membership and which cleerly had thsir eupport. It wae therefore mors important to go ahead and create ths mechinery rether then epend a disproportionate amount of time persuading those who had doubte. However, he agreed with Mr. Rajen that it would be desirable to have the final draft reflect the viewpointe of the greetest possible number of countries. It would be helpful if countries wsre able to feel that the document reflected their views to the maximum extent feaeible. That would leave the door open for them to sign in course of time.

64. Mr. Belin seid that on the basis of his experience at the Santiago meeting he would like te eupport Mr. Broches' and Mr. Woode' observations that, although the regional meetings were unofficial and no one had been required to exprese his government'e view, one could not help but receive e strong indication of what in fact the views of governments were.

65. Mr. Tazi eeid that epeaking not only as an Executive Director but also es a repreeentative of hie constituents, he believed that the course of action outlined by Mr. Woods' memorandum was the most constructive one for two reasons. First, he doubted that a diplomatic conference on the proposel would reach any agreement within a reasonable time having regard to the nature of the iseues involved. Secondly, it was important te set up ths proposed machinery because it was certainly the best means of attracting foreign capital. In connection with his eecond point he would like to mention by way of example that one of his constituente had created

a very encouraging atmosphere for foreign investment, but that despite the incentives provided, investors were still reluctant to bring in capital. He hoped that the Bank's proposal would be implemented without delay and that the matter could be put on the agenda of the next Annual Meeting.

66. Mr. Woods asked Mr. Broches whether it would be possible at the present stage to outline to members of the Committee the steps they might take when the Board next met to consider further action.

67. Mr. Broches said that the first step would be for the Executive Directors to make a recommendation to the Board of Governors. He was now preparing a draft of that recommendation which would, in answer to the questions asked by the Governors (Resolution 174 adopted at the Annual Meeting in 1962)[11], say that in the view of the Executive Directors it was advisable to draft a Convention, and ask the Governors to instruct them to do so as soon as possible taking into account the views of governments.

68. Meanwhile, a revised version of the Working Paper[12] would be in preparation and would be ready by the end of August. The Board of Governors would, he believed, vote on the recommendation of the Executive Directors on September 10,[13] whereupon the Working Paper would be dispatched so as to be in the hands of governments within 10 days. He thought that two full months would be ample time to study the document which had already become familiar to at least a few experts in most member countries as a result of its discussion at the regional meetings, so that the Executive Directors could start their round of deliberations - perhaps interspersed with meetings of the legal committee - about November 20.

69. As to the working of the legal committee, as he visualized it the Executive Directors might, for instance, take up Article I of the revised Working Paper and state their positions on important questions. That Article would then be referred to the legal committee which would be instructed to resolve differences, to seek a compromise. Among the matters to be discussed after the Executive Directors had completed their deliberations would be the note of transmittal which ought to reflect the consensus and the general tone with which the Directors would want to submit the document to member countries.

70. Mr. Woods said that if the Executive Directors made a recommendation to the Board of Governors and the Governors approved it, the Executive Directors might be expected to commence consideration of the draft with the assistance of the legal committee between November 15-20 and he hoped that all questions could be resolved by the end of the year. In January and February of next year the Board would consider the kind of communication which would transmit the draft to member countries.

71. Mr. Tazi said it was important that the legal experts be able to make statements in languages other than English, and that therefore appropriate arrangements should be made for simultaneous interpretation.

72. Mr. Lieftinck asked whether he was correct in assuming that there would be two more sets of meetings on this subject before the Annual Meeting, i.e., one before the recess to agree upon the recommendation to be made to the Governors and another after the recess to discuss the new draft of the Convention.

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[11] Doc. 11
[12] See Doc. 43
[13] See Doc. 41

73. Mr. Broches thought that the new draft of the Convention would simply be a matter to be handled by the staff who would be ready to circulate it to the Executive Dirsctors and their governments as soon as the Board of Governore had approved the Directors' recommendations. There would therefore be only one meeting of the Executive Directors on this subject prior to the Annual Meeting.

74. Mr. Donner recalled that the selection and composition of the legal committee had been left open earlier in the discussion, and he wondered whether they might now reach agreement on the matter.

75. Mr. Woods thought that question could be taken up when the Board met to consider the drafts of the recommendation and resolution to be eubmitted to the Board of Governors. Essentially, their object would be to get the best legal experts in the countriee that were sufficiently interested to send experts and could spare them.

76. Mr. Garland asked whether there would be any advantage, in connection with the question of selecting legal experts, if it were to be suggested to each member country that the Directors would welcome a memorandum setting forth their views on the Bank's proposal. In his opinion it would be useful in this way to leave the impreesion that each member had direct access to the Board.

77. Mr. Broches thought that when the draft was circulated, governments might be encouraged (although he was frankly doubtful as to the results) to send either through their Directors or, if they preferred it, directly to the staff, any views which would be helpful in further consideration of the matter.

78. Mr. Mejia eaid that he would prefer it if the proposed committee were to be composed of government officiale of member countries rather than of legal experts. He also had misgivings es to the effect of the system of weighted voting in the decisions of the Board on issues raised in connection with the draft, particularly as it could happen that e Director with, say, 24 experts to advise him, would not have a frection of the voting power of another Director with but one legal adviser. In the circumstances he felt that that system would be inappropriate and that some other method ought to be adopted.

79. Mr. Woods suggested that the Executive Directore and particularly those representing severel countriee give some thought to the probleme of the composition and working of the legal committee and let Mr. Broches heve the benefit of their views.

80. The meeting edjourned at 12:50 p.m.

R 64-105 (August 5, 1964)
Note from the President to the Executive Directors concerning the Legal Committee

SETTLEMENT OF INVESTMENT DISPUTES

1. At the meeting of the Committee of the Whole on Settlement of Investment Disputes on July 23, 1964[1] I undertook to give further consideration to the composition of the Legal Committee to be established to advise the Executive Directors, as well as to the question of the expenses incurred by the persons serving on that Committee.

2. I have considered whether it would be possible to limit in some way the size of the Committee, bearing in mind problems of organization of the work of a group which could in theory number 102 persons, as well as the expense which this might impose on the Bank. However, there appears to be no practicable formula which would guarantee a balanced composition of a committee with limited membership, since very few of the Executive Directors representing more than one country represent homogeneous groups. I have therefore concluded that we should give every member government the right to send a representative to serve on the Committee.

3. There is attached a draft letter to member governments[2] which, in accordance with the foregoing, informs each government that it may, if it so desires, designate a representative to the Legal Committee and explains the purpose for which the Committee is established. It will be noted that the letter does not urge governments to send representatives and it is possible that a number of countries will, for various reasons, not send representatives. The Executive Directors might also, in appropriate cases, suggest that governments designate a joint representative. However, I feel that we should be willing to accept the possibility of a large attendance.

4. As regards expenses, I have concluded that we should pay the transportation expense of representatives incurred solely for the purpose of serving on the Committee and that we should also pay a per diem. The details of these arrangements can be worked out after the Annual Meeting.

5. If the Executive Directors agree, arrangements would be made to dispatch the attached letter and its enclosures immediately after the decision of the Board of Governors.[3]

George D. Woods

[1] Doc. 35
[2] Not reproduced: substantially similar to Doc. 42
[3] See Doc. 41

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M 64-9 (August 18, 1964)
Excerpt from the minutes of the meeting of the Executive Directors, August 6, 1964

SETTLEMENT OF INVESTMENT DISPUTES

9. The Executive Directors approved, with minor changee, for eubmission to the Board of Governors, the draft report[1] and the attached draft resolution of the Board of Governore[2] on the formulation of a convention on the eettlement of inveetment dieputee (R64-101).

10. The Executive Directore aleo approved the report (R64-105)[3] recommending (upon the approval by the Board of Governore of the above draft resolution) the dispatch of an invitation to Governmente to deeignate representatives to eerve on a Legal Committee to advise the Executive Directors on the drafting of the proposed convention.

[1] Not reproduced: substantially similar to Doc. 40
[2] Not reproduced: substantially similar to Doc. 41
[3] Doc. 36

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(September 7, 1964, Tokyo)
Excerpt from the address by the President to the Board of Governors

The foreign investor, made to feel welcome, can be a most effective instrument of economic growth, not only because of the capital and technology he can provide, but equally because of the help he can extend in training the labor force and developing local managerial and supervisory skills. Consequently, we regard it as one of the important responsibilities of the Bank and IFC to do what we can to facilitate such investment.

One possible measure to that end is multilateral investment insurance, the feasibility of which we have studied in the past and to which, at the request of the recent United Nations Conference on Trade and Development, we shall again be turning our attention. Another approach, which we have actively sponsored, is the establishment of international machinery which would be available to deal on a voluntary basis with investment disputes between governments and nationals of other states. This is proposed in the draft Convention on the Settlement of Investment Disputes on which the Executive Directors have submitted a report to you.[1] If you agree, the Executive Directors, assisted by a committee of legal experts designated by interested governments, propose to work out a final text for submission to governments in 1965 and I hope, early in 1965. This proposal, in my view, holds great promise. I recommend it and urge your unanimous approval of it.

[1] See Doc. 40

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Press Release No. 57 (September 9, 1964, Tokyo)
Excerpt from the statement by Felix Ruiz, Governor for Chile

III

I should particularly like to strees the opinion of ths countries whom I here represent with respect to the draft Agrsement on Conciliation and Arbitrstion.[1]

We considsr undesirable the reeolution submitted to ths Board of Governors[2] which recommends, and entruete to the Board of Directors of the Bank, the drsfting of an international sgreement to create a center for conciliation and srbitrstion to which foreign private invsstors could have recourse for the ssttlement of their disputee with governments of tbe member countries, without nsecessarily having to exhsust tbs formalities and procedures of the national tribunals. It is believed that this would stimulate private investment in the underdeveloped countriee.

Ths lsgel and constitutional systems of all the Latin American countries that are membsrs of the Bank[3] offer ths foreign invsstor at the present time the same rights and protection ss their own nationale; they prohibit confiecation and discrimination and require thst any expropristion on juetifiable grounds of public interest shall be accompanied by fair compensation fixed, in the final resort, by the law courte.

The new eyetem that has been suggssted would givs ths foreign invsstor, by virtue of the fact that he is s foreigner, the right to sue s sovereign etate outside its national tsrritory, dispeneing witb the courts of law. Thie provision is contrary to the accepted legal principles of our countries and, ds facto, would confsr s privilsgs on the foreign investor, plscing the nationals of the country concsrnsd in a poeition of inferiority.

I must stste, Mr. Preeident, thst the procedure suggeeted does not meet with the approval of our countriss becauss it contrsvenes constitutional principles relating to this question that cannot bs ignorsd.

[1] See Doc. 43
[2] See Doc. 41
[3] See, e.g., Doc. 47

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(September 10, 1964)
Report of the Executive Directors to the Board of Governors

August 6, 1964

REPORT OF THE EXECUTIVE DIRECTORS

SETTLEMENT OF INVESTMENT DISPUTES

1. At its Seventeenth Annual Meeting in September 1962 the Board of Governors adopted the following Resolution:[1]

"RESOLVED:

THAT the Executive Directors are requested to consider the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through con-

[1] Doc. 11

ciliation and arbitration of investment disputes between governments and private parties and, if they conclude that such action would be advisable, to draft an agreement providing for such facilities for submission to governments."

2. During 1962-63 the Executive Directors studied the subject-matter on the basis of a staff paper in the form of a convention for the settlement of investment disputes.[2] At the end of that fiscal year the Executive Directors, on the recommendation of the President, decided to convene informal consultative meetings of legal experts designated by member countries, to consider the subject-matter in more detail. The working document for these meetings was a Preliminary Draft of a Convention[3] for the Settlement of Investment Disputes between States and Nationals of Other States, prepared by the Bank's staff in the light of the discussions of the Executive Directors during 1962-63 and the views of governments. The consultative meetings were held on a regional basis in Addis Ababa (December 16-20, 1963),[4] Santiago de Chile (February 3-7, 1964),[5] Geneva (February 17-21, 1964)[6] and Bangkok (April 27-May 1, 1964)[7] with the administrative support and assistance of the United Nations Economic Commissions and the European Office of the United Nations. They were attended by legal experts designated by 86 countries and proved valuable not only in identifying and elucidating technical problems but also in supplementing the Bank's information regarding the attitudes of some governments.

3. Reviewing the results of the work done over the past two years, the Executive Directors have concluded that it would be desirable

(a) to establish institutional facilities, sponsored by the Bank, for the settlement through voluntary conciliation and arbitration of investment disputes between governments and foreign investors; and

(b) to provide for such facilities within the framework of an inter-governmental agreement.

4. The Executive Directors are further of the opinion that as a result of the discussions and consultations which have taken place over the past two years, the issues of policy as well as the technical problems arising in connection with such an agreement have been adequately identified and elucidated and that the time has come to seek to resolve these issues and problems with a view to arriving at a broad consensus.

5. In that connection the Executive Directors have concluded that it would be advisable at this time for the Executive Directors to undertake the formulation of a convention on the settlement of investment disputes between States and Nationals of other States, assisted in this task by legal experts representing member governments which wish to participate in the preparation of a text.

6. In recommending that such a convention be formulated by the Executive Directors and submitted to governments, it is the understanding of the Executive Directors that the formulation, and submission to governments, of a convention would be an act of the Executive Directors which would not commit governments. The Executive Directors would submit the text to governments with such recommendations as they may deem appropriate.

7. The Executive Directors recommend that the Board of Governors approve this report and adopt the . . . resolution.[8]

This Report was approved and its recommendations were adopted by the Board of Governors on September 10, 1964.

[2] Doc. 6
[3] Doc. 24
[4] See Doc. 25
[5] See Doc. 27
[6] See Doc. 29
[7] See Doc. 31
[8] See Doc. 41

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(September 10, 1964)
Resolution No. 214 of the Board of Governors

RESOLUTION NO. 214

SETTLEMENT OF INVESTMENT DISPUTES

RESOLVED:

(a) The report of the Executive Directors on "Settlement of Investment Disputes," dated August 6, 1964,[1] is hereby approved.
(b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.
(c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.
(d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate.

(Adopted September 10, 1964)[2]

[1] Doc. 40
[2] Voted against: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Iraq, Mexico, Nicaragua, Panama, Paraguay, Peru, the Philippines, Uruguay, and Venezuela

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(September 11, 1964)
Letter from the President to all members of the Bank, transmitted to the Executive Directors

Sir:

The following resolution[1] was adopted by the Board of Governors at its 1964 Annual Meeting in Tokyo:

"Settlement of Investment Disputes

RESOLVED:

(a) The report of tbe Executive Directors on "Settlement of Investment Disputes", dated August 6, 1964,[2] is hereby approved.

(b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and nationals of other contracting States through conciliation and arbitration.

(c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be

[1] Doc. 41
[2] Doc. 40

accepted by the largest possible number of governments.

(d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate."

Pursuant to this resolution the Executive Directors have decided to undertake the drafting of the text of a convention on the settlement of investment disputes with the assistance of a committee of legal experts representing member countries (the Legal Committee). Each member government may, if it so desires, designate one representative to serve on the Legal Committee, and your government is hereby requested to notify the Secretary of the Bank whether it wishes to do so.

The purpose of the establishment of the Legal Committee is to provide the Executive Directors with technical advice as well as to enable member governments which sre not represented by an Executive Director of their own nationality to psrticipate directly in the preparstion of the convention.

There is enclosed herewith the text of a Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States in English, French and Spanish (Document Z-12)[3]. The Draft is a revision of the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated October 15, 1963 (Documents COM/AF/1, COM/WH/1, COM/EU/1 and COM/AS/1)[4] which served as the working paper for the regional consultative meetings of legal experts[5] held over the period December 1963 - May 1964 and reflects the discussions at those meetings.

The Executive Directors intend to begin consideration of the Draft on November 17, 1964. The Legal Committee will convane November 23, 1964 at the Bank and it is hoped that it will conclude its work within a period of three weeks. The Bank will pay the transportation expense of representatives of member governments incurred for the purposa of service on the Legal Committee as well as a *per diam*. Details of these arrangements will be worked out in the near future.

In order to facilitate the preparation of the work of the Executive Directors and of the Legal Committee, it will be appreciated if your government, whether or not it will be represented on the Legal Committee, will submit written comments on the Draft, preferably by November 1, 1964 and in no event later than November 15, 1964, addressed to the General Counsel of the Bank.

Sincerely yours,

Gaorge D. Woods

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[3] Doc. 43
[4] Doc. 24
[5] See Docs. 25, 27, 29, 31, and 33

DRAFT CONVENTION

on the

SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

September 11, 1964

NOTE

1. The attached draft Convention has been prepared by the Staff of the Bank in the light of the discussion of the working paper entitled "Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States"[1] at the four regional Consultative Meetings held at Addis Ababa (December, 1963)[2], Santiago de Chile (February, 1964)[3], Geneva (February, 1964)[4] and Bangkok (April, 1964)[5]. The Comment which follows each provision of this revised text indicates whether and if so to what extent it differs from the corresponding provision of the Preliminary Draft (P.D.).

2. Background documentation for this draft consists of the Preliminary Draft, the Summary Records of the discussion at the four regional Consultative Meetings (Reports Nos. Z-7, Z-8, Z-9 and Z-10), and the Chairman's Report on issues raised and suggestions made with respect to the Preliminary Draft[6] (Report No. Z-11).

[1] Doc. 24
[2] See Doc. 25
[3] See Doc. 27
[4] See Doc. 29
[5] See Doc. 31
[6] Doc. 33

PREAMBLE

The Contracting States

1. CONSIDERING the need for international cooperation for economic development, and the role of international investment therein;

2. BEARING IN MIND the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States and bearing in mind the desirability that such disputes be settled in a spirit of mutual confidence, and with due respect for the principle of equal rights of States in the exercise of their sovereignty;

3. RECOGNIZING that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

4. ATTACHING PARTICULAR IMPORTANCE to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

5. DESIRING to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

6. RECOGNIZING that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes an agreement to be observed in good faith which requires in particular that due consideration be given to any recommendation of conciliation, and that any arbitral award be complied with; and

7. DECLARING that no Contracting State shall by the mere fact of its ratification or acceptance of this Convention be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration in the absence of a specific undertaking to that effect,

HAVE AGREED as follows:

CHAPTER I

INTERNATIONAL CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Title 1

Establishment and Organization

Article 1

(1) There is hereby established the International Center for the Settlement of Investment Disputes (hereinafter called the Center).

(2) The purpose of the Center is to provide facilities for conciliation and arbitration of investment disputes in accordance with the provisions of this Convention. The Center may in addition undertake such ancillary activities, including research and the collection and dissemination of information in the field of international investment, as the Administrative Council may, by a majority of not less than two-thirds of the votes of all its members, from time to time authorize.

> Comment. Article 1(1) corresponds to P.D. Art. I, Sec. 1. The title of the Center has been changed and provision reworded. No change of substance. Article 1(2) is new.

Article 2

(1) The seat of the Center shall be established at the headquarters of the International Bank for Reconstruction and Development (hereinafter called the Bank). The Center shall make arrangements with the Bank for the use of the Bank's offices and administrative services and facilities. The seat may be moved to another location by decision of the Administrative Council adopted by a majority of not less than two-thirds of the votes of all its members.

(2) Conciliation and arbitration proceedings pursuant to this Convention shall be held at the seat of the Center or elsewhere as may

be determined in accordance with the provisions of Chapter VII. In order to facilitate the conduct of proceedings at places other than the seat of the Center, the Center may make arrangements with the Permanent Court of Arbitration and other public international institutions for the use of their offices and their administrative services and facilities.

Comment. Corresponds to P.D. Art. I, Sec. 2. The provision has been reworded and, in addition, now includes the substance of P.D. Art. I, Sec. 6(vi) concerning removal of the seat. The two-thirds majority required for arrangements with "other public international institutions" has been deleted.

Article 3

The Center shall have an Administrative Council, a Secretariat, a Panel of Conciliators and a Panel of Arbitrators.

Comment. Corresponds to P.D. Art. I, Sec. 3 reworded.

Title 2

The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative and one alternate representative of each Contracting State. No alternate may vote or otherwise act as a representative except in case of the absence or inability to act of his principal.

(2) In the absence of a contrary designation, each governor and each alternate governor of the Bank appointed by a Contracting State shall be *ex officio* the representative and alternate representative of that State on the Administrative Council.

Comment. Corresponds to P.D. Art. I, Sec. 4. In paragraph (1) the words "or otherwise act as a representative" have been added.

Article 5

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During the President's absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Council.

> Comment. Corresponds to P.D. Art. I, Sec. 5. Provision for the casting vote of the Chairman has been deleted and the second sentence reworded.

Article 6

In addition to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

(i) adopt such administrative rules and regulations, including financial regulations, as may be necessary or useful for the operation of the Center;

(ii) adopt rules governing the procedure for the institution of proceedings pursuant to this Convention;

(iii) adopt procedural rules applicable to conciliation and arbitration proceedings instituted pursuant to this Convention (hereinafter called the Conciliation Rules and the Arbitration Rules, respectively) by a majority of not less than two-thirds of the votes of all its members;

(iv) approve the terms of service of the Secretary-General and of any Deputy Secretary-General;

(v) approve the annual budget of the Center;

(vi) approve the annual report on the operation of the Center;

and shall exercise such other powers and perform such other functions as it shall determine to be necessary or useful for the implementation

of the provisions of this Convention and for the achievement of its purposes.

> Comment. Corresponds to P.D. Art. I, Sec. 6. Clause (ii) is new and a residual clause has been added.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be provided for by the Council, called by the Chairman, or convened by the Secretary-General at the request of not less than one-tenth of the members of the Council. The annual meeting of the Administrative Council shall be held in conjunction with the annual meeting of the Board of Governors of the Bank.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish a procedure whereby the Chairman may obtain a vote of the Council on a specific question without calling a meeting of the Council; provided, however, that in the case of a vote taken pursuant to such procedure, unless replies are received from a majority of the members of the Council, the motion shall be considered lost.

> Comment. Corresponds to P.D. Art. I, Sec. 7. Provision has been made for meetings at the request of members. The previous provision for a vote without meeting has been elaborated.

Article 8

Members of the Administrative Council and the Chairman shall serve as such without remuneration.

Comment. Corresponds to P.D. Art. I, Sec. 7(5), reworded.

Title 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Comment. Corresponds to P.D. Art. I, Sec. 8, unchanged.

Article 10

(1) The Secretary-General and Deputy Secretaries-General shall be elected by the Administrative Council upon the nomination of the Chairman. The Chairman may propose one or more candidates for each such office. A majority of not less than two-thirds of the votes of all members of the Council shall be required for their election.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor a Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

Comment. Corresponds to P.D. Art. I, Sec. 9. Para. (1) now opens the possibility of a list of candidates, and requires a two-thirds majority for election. Para. (2) no longer gives the Administrative Council discretion to permit exercise by the Secretary-General or a Deputy Secretary-General of any political function and now leaves decision on other employment or occupation (including employment by the Bank and the Permanent Court) solely to the discretion of the Council.

Article 11

(1) The Secretary-General shall be the principal officer of the Center and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention

and the rules adopted thereunder by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

(2) During any absence or inability to act of the Secretary-General, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

> Comment. Corresponds to P.D. Art. I, Sec. 10, elaborated.

Title 4

The Panels

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

> Comment. Corresponds to P.D. Art. I, Secs. 11(1) and 12(1) combined.

Article 13

(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

> Comment. P.D. Art. I, Secs. 11(2) and 12(2) are combined in Article 13(1); P.D. Art. I, Secs. 11(3) and 12(3) are combined in modified form in Article 13(2).

Article 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law,

commerce, industry or finance, who may be relied upon to exercise independent judgment.

(2) The Chairman, in designating persons to Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Comment. Corresponds to P.D. Art. I, Sec. 15. The second sentence of Sec. 15(1) has been deleted and its provisions reworded and elaborated. Section 15(2) is substantially unchanged.

Article 15

(1) Panel members shall serve for four years.

(2) In case of death or resignation of a member of either Panel, the Contracting State or the Chairman, as the case may be, which or who had designated the member, shall have the right to designate another person to serve for the remainder of that member's term.

Comment. Corresponds to P.D. Art. I, Sec. 13.

Article 16

(1) Designation to serve on one Panel shall not preclude designation to serve on the other.

(2) If a person shall have been designated to serve on a Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

Comment. Para. (1) corresponds to P.D. Art. I, Sec. 14(1), unchanged; para. (2) corresponds to Sec. 14(2) modified; para. (3) is new.

Title 5

Financing the Center

Article 17

To the extent that expenditure of the Center cannot be met out of charges for the use of its facilities, or out of other receipts, it shall be borne by the Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

> Comment. Corresponds to P.D. Art. I, Sec. 16, unchanged.

Title 6

Status, Immunities and Privileges

Article 18

The Center shall have international legal personality. To enable the Center to fulfil its functions, it shall have in the territories of each Contracting State the capacity, immunities and privileges hereinafter set forth.

> Comment. This Article and Article 19 are an elaboration of P.D. Art. I, Sec. 1.

Article 19

The Center shall have the capacity

(i) to contract;

(ii) to acquire and dispose of movable and immovable property; and

(iii) to institute legal proceedings.

Article 20

The Center, its property and assets shall enjoy immunity from all legal process.

> Comment. Corresponds to P.D. Art. I, Sec. 17, elaborated.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators, and the officers and employees of the Secretariat

(i) shall be immune from legal process with respect to acts performed by them in their official capacity;

(ii) not being local nationals shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Comment. Corresponds to P.D. Art. I, Sec. 18(1) extended to apply to conciliators and arbitrators.

Article 22

The agents, counsel, advocates, witnesses, experts and other persons participating in proceedings pursuant to this Convention shall be accorded in any Contracting State where their presence is required in connection with such proceedings such immunities and facilities for residence and travel as may be necessary for the independent exercise of their functions.

Comment. Corresponds to P.D. Art. I, Sec. 18(2), redrafted.

Article 23

(1) The archives of the Center shall be inviolable.

(2) The official communications of the Center shall be accorded by each Contracting State the same treatment as is accorded to the official communications of other Contracting States.

Comment. Corresponds to P.D. Art. I, Sec. 19, unchanged.

Article 24

(1) The Center, its assets, property and income, and its operations and transactions authorized by this Convention shall be immune from all taxation and customs duties. The Center shall also be immune from liability for the collection or payment of any taxes or customs duties.

(2) No tax shall be levied on or in respect of expense allowances paid by the Center to the Chairman or members of the Administrative Council, or on or in respect of salaries or emoluments paid by the Center to officials or employees of the Secretariat who are not local nationals.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators or arbitrators in proceedings pursuant to this Convention for their services in such proceedings, if the sole jurisdictional basis for such tax shall be the location of the Center or the place where such proceedings are conducted or the place where such fees or allowances are paid.

> Comment. Para. (1) corresponds to P.D. Art. I, Sec. 20(1), unchanged; paras. (2) and (3) correspond to Secs. 20(2) and 20(3), reworded.

Article 25

Each Contracting State shall take such action as may be necessary in its own territories for the purposes of making the provisions of this Title effective in terms of its own law.

> Comment. Article 25 is new. It is based on Art. VII, Sec. 10 of the Articles of Agreement of the Bank.

CHAPTER II

JURISDICTION OF THE CENTER

Article 26

(1) The jurisdiction of the Center shall extend to all legal disputes

between a Contracting State (or one of its political subdivisions or agencies) and a national of another Contracting State, arising out of or in connection with any investment, which the parties to such disputes have consented to submit to it.

(2) Consent to the submission of any dispute to the Center shall be in writing. It may be given either before or after the dispute has arisen. Consent by a political subdivision or agency of a Contracting State shall require the approval of that State.

> Comment. Combines P.D. Art. II, Secs. 1 and 2(i), modified. Secs. 2(ii) and 2(iii) have been deleted. Article 26 permits a political subdivision or agency of a Contracting State, under the conditions stated, to be a party to a dispute before the Center.

Article 27

(1) Consent to have recourse to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to have recourse to such proceedings to the exclusion of any other remedy.

(2) Consent by a Contracting State to the submission of any dispute with a national of another Contracting State to the Center shall, unless otherwise stated, be deemed consent to the substitution of that national in proceedings pursuant to this Convention by its State or by any public international institution if that State or institution, having compensated such national for its claim, has been subrogated to its rights.

> Comment. Article 27(1) corresponds to P.D. Art. IV, Sec. 16, reworded. The idea formerly expressed in the parenthetical clause of P.D. Art. II, Sec. 1 is now elaborated in Article 27(2) and extended to cover an international investment guarantee fund.

Article 28

No Contracting State shall give diplomatic protection or bring an international claim in respect of a dispute which one of its

nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration pursuant to this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

Comment. Corresponds to P.D. Art. IV, Sec. 17(1), reworded.

Article 29

Any Contracting State may at any time transmit to the Secretary-General for purposes of information a statement indicating in general or specific terms the class or classes of dispute within the jurisdiction of the Center which it would in principle consider submitting to conciliation or arbitration pursuant to this Convention. Such statement shall not constitute, or be deemed to constitute, the consent required by Article 26.

Comment. Article 29 is new.

Article 30

For the purpose of this Chapter

(i) "investment" means any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years;

(ii) "legal dispute" means any dispute concerning a legal right or obligation or concerning a fact relevant to the determination of a legal right or obligation;

(iii) "national of another Contracting State" means (a) any natural person who possessed the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to jurisdiction of the Center in respect of that dispute as well as on the date on which proceedings were instituted

pursuant to this Convention; and (b) any juridical person which possessed the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to the jurisdiction of the Center in respect of that dispute, and any juridical person which the parties have agreed shall be treated as a "national of another Contracting State".

Comment. Paras. (i) and (ii) of Article 30 are new. Para. (iii) replaces P.D. Art. X.

CHAPTER III

CONCILIATION

Title 1

Request for Conciliation

Article 31

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings pursuant to this Convention shall address a request to that effect to the Secretary-General in writing.

(2) The request shall contain information concerning the subject-matter of the dispute, the identity of the parties and their consent to conciliation sufficient to establish *prima facie* that the dispute is within the jurisdiction of the Center.

(3) The Secretary-General shall forthwith notify the other party to the dispute of the request, if it is found to conform to the provisions of paragraph (2) of this Article.

Comment. Para. (1) corresponds to P.D. Art. III, Sec. 1. Paras. (2) and (3) are new.

Title 2

Constitution of the Conciliation Commission

Article 32

(1) A Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after the request made pursuant to Article 31.

(2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.

(b) Where the parties have not agreed upon the number of conciliators and the mode of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Comment. Para. (1) is new. Para. (2) corresponds to P.D. Art. III, Sec. 2, elaborated.

Article 33

If the Commission shall not have been constituted within three months after notice of the request has been dispatched by the Secretary-General pursuant to Article 31(3), or such other period as the parties may agree, the Chairman shall, at the request of either party, and after consultation with both, appoint the conciliator or conciliators not yet appointed.

Comment. Corresponds to P.D. Art. III, Sec. 3(1), modified.

Article 34

(1) Any conciliator appointed pursuant to Article 32(2) (b) or Article 33 shall be selected from the Panel of Conciliators.

(2) Any conciliator appointed from outside the Panel of Conciliators shall possess the qualifications stated in Article 14(1).

Comment. Article 34(1) combines provisions for appointment from the Panel of Conciliators formerly contained in P.D. Art. III, Sec. 2(2) and P.D. Art. III, Sec. 3(2). Article 34(2) is new.

Title 3

Powers and Functions of the Commission

Article 35

(1) The Commission shall be the judge of its own competence.

(2) The Commission shall be constituted notwithstanding any claim of a party to the dispute that that dispute is not one in respect of which conciliation proceedings may be instituted pursuant to this Convention, or is not within the scope of its consent to such proceedings. Such claim shall be submitted to the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Comment. Corresponds to P.D. Art. II, Secs. 3(1) and 3(2), to the extent applicable to conciliation proceedings. The new text leaves it to the discretion of the Commission whether or not to deal with objections to its competence as preliminary questions. P.D. Art. II, Sec. 3(3) has been deleted.

Article 36

Except as the parties shall otherwise agree, any conciliation proceeding shall be conducted in accordance with the Conciliation Rules in effect on the date on which the consent to conciliation was given. If any question of procedure arises which is not covered by the Conciliation Rules or such other rules as may be agreed by the parties, the Commission shall decide that question.

Comment. Corresponds to P.D. Art. III, Sec. 4, modified to conform to the corresponding provisions in Chapter IV.

Article 37

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavor to bring about agreement between them upon mutually acceptable terms. To that end, the Commission

may at any stage of the proceedings and from time to time recommend terms of settlement to the parties.

(2) If the parties reach agreement, the Commission shall draw up a report noting the facts in issue and the submission of the dispute, and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties it may declare the proceedings closed, and shall, in that event, draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall so state in its report.

Comment. Corresponds to P.D. Art. III, Sec. 5, reworded. P.D. Art. III, Sec. 5(3) has been deleted.

Title 4

Obligations of the Parties

Article 38

The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions and shall give their most serious consideration to its recommendations. Except as the parties to the dispute shall otherwise agree, the recommendations of the Commission shall not be binding upon them.

Comment. Corresponds to P.D. Art. III, Sec. 6, reworded.

Article 39

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any later proceeding concerning the same dispute, whether before arbitrators or in a court of law or otherwise, to invoke or rely

on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the recommendations, if any, made by the Commission therein.

> Comment. Corresponds to P.D. Art. III, Sec. 7, modified to permit the parties to waive the protection afforded by that section.

CHAPTER IV

ARBITRATION

Title 1

Request for Arbitration

Article 40

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings pursuant to this Convention shall address a request to that effect to the Secretary-General in writing.

(2) The request shall contain information concerning the subject-matter of the dispute, the identity of the parties and their consent to arbitration sufficient to establish *prima facie* that the dispute is within the jurisdiction of the Center.

(3) The Secretary-General shall forthwith notify the other party to the dispute of the request, if it is found to conform to the provisions of paragraph (2) of this Article.

> Comment. Para. (1) corresponds to P.D. Art. IV, Sec. 1. Paras. (2) and (3) are new.

Title 2

Constitution of the Tribunal

Article 41

(1) An Arbitral Tribunal (hereinafter called the Tribunal) shall

be constituted as soon as possible after the request made pursuant to Article 40.

(2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.

(b) Where the parties have not agreed upon the number of arbitrators and the mode of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Comment. Para. (1) is new. Para. (2) corresponds to P.D. Art. IV, Sec. 2(1) elaborated and reworded.

Article 42

If the Tribunal shall not have been constituted within three months after notice of the request has been dispatched by the Secretary-General pursuant to Article 40(3), or such other period as the parties may agree, the Chairman shall, at the request of either party, appoint the arbitrator or arbitrators not yet appointed.

Comment. Corresponds to P.D. Art. IV, Sec. 3, modified.

Article 43

(1) No arbitrator appointed pursuant to this Convention shall be a national of the State party to the dispute or of a State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute.

(2) Any arbitrator appointed pursuant to Article 41(2)(b) or Article 42 shall be selected from the Panel of Arbitrators.

(3) Any arbitrator appointed from outside the Panel of Arbitrators

shall possess the qualifications stated in Article 14(1).

Comment. Para. (1) which corresponds to the second sentence of P.D. Art. IV, Sec. 2(2), modified, now applies the rules precluding appointment of certain classes of persons from serving as arbitrators to all appointments of arbitrators under the Convention. The provisions of para. (2) correspond to the first sentence of P.D. Art. IV, Sec. 2(2) which was incorporated by reference in the second sentence of P.D. Art. IV, Sec. (3). Para. (3) is new.

Title 3

Powers and Functions of the Tribunal

Article 44

(1) The Tribunal shall be the judge of its own competence.

(2) The Tribunal shall be constituted notwithstanding any claim of a party to the dispute that that dispute is not one in respect of which arbitration proceedings may be instituted pursuant to this Convention, or is not within the scope of its consent to such proceedings. Such claim shall be submitted to the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Comment. Corresponds to P.D. Art. II, Secs. 3(1) and 3(2), to the extent applicable to arbitration proceedings. The new text leaves it to the discretion of the Tribunal whether or not to deal with objections to its competence as preliminary questions. P.D. Art. II, Sec. 3(3) has been deleted.

Article 45

(1) In the absence of agreement between the parties concerning the law to be applied, the Tribunal shall decide the dispute submitted to it in accordance with such rules of national and international law as it shall determine to be applicable. The term "international law" shall be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice.

(2) The Tribunal may not bring in a finding of _non liquet_ on the ground of silence or obscurity of the law to be applied.

(3) The provisions of this Article shall not prejudice the power of the Tribunal to decide a dispute _ex aequo et bono_ if the parties agree thereto.

Comment. Corresponds to P.D. Art. IV, Sec. 4, elaborated and re-drafted.

Article 46

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings

(i) call upon the parties to produce documents or other information, and

(ii) visit the scene connected with the dispute before it, and there conduct such enquiries as it may deem appropriate.

Comment. Article 46 is new.

Article 47

Except as the parties otherwise agree, any arbitration proceeding shall be conducted in accordance with the Arbitration Rules in effect on the date on which the consent to arbitration was given. If any question of procedure arises which is not covered by the Arbitration Rules or such other rules as may be agreed upon by the parties, the Tribunal shall decide that question.

Comment. Corresponds to P.D. Art. IV, Sec. 5, reworded.

Article 48

(1) Whenever one of the parties has not appeared before the Tribunal or has failed to present its case, the other party may call upon the Tribunal to accept its submissions and to render an award in its favor.

Before doing so, the Tribunal shall satisfy itself that it has jurisdiction and that the submissions are well-founded in fact and in law.

(2) The Tribunal shall grant to the party which has failed to appear a period of grace before rendering the award unless it is satisfied that the party in default does not intend to appear.

Comment. Para. (1) corresponds to P.D. Art. IV, Sec. 8, reworded. Para. (2) is new.

Article 49

Except as the parties otherwise agree, the Tribunal may hear and determine incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the jurisdiction of the Center.

Comment. Corresponds to P.D. Art. IV, Sec. 9, elaborated to make clear that Article 49 does not extend the competence of the Tribunal to disputes not already within the jurisdiction of the Center.

Article 50

(1) Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, prescribe such provisional measures as it deems necessary to prevent or halt any action by either party which might frustrate an eventual award.

(2) The Tribunal may fix a penalty for failure to comply with such provisional measures.

Comment. Para. (1) corresponds to P.D. Art. IV, Sec. 10, reworded. Para. (2) is new.

Title 4

The Award

Article 51

(1) The Tribunal shall decide all questions by a majority of

the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by all the members of the Tribunal. Refusal of a minority to sign shall be mentioned in the award but shall not invalidate it.

(3) Except as the parties otherwise agree:

(a) the award shall state the reasons upon which it is based; and

(b) any arbitrator dissenting from the majority decision may attach his dissenting opinion or a bare statement of his dissent.

> Comment. Para. (1) corresponds to P.D. Art. IV, Sec. 6, reworded. Paras. (2) and (3) correspond to P.D. Art. IV, Sec. 7(1), elaborated.

Article 52

(1) The award of the Tribunal shall be delivered by the Tribunal or by the Secretary-General, acting at the request and on behalf of the Tribunal, the parties or their agents or counsel being present or having been duly summoned to appear. The award shall be deemed to have been rendered on the date on which it was so delivered.

(2) The Secretary-General shall promptly transmit certified copies of the award to the parties.

> Comment. Article 52 is new and incorporates the provisions of P.D. Art. IV, Sec. 7(2), elaborated.

Title 5

Interpretation, Revision and Annulment of the Award

Article 53

(1) If any dispute shall arise between the parties as to the meaning and scope of the award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request for interpretation shall, if possible, be sub-

mitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with the terms of the agreement, if any, between the parties regarding the constitution of the Tribunal which rendered the award, and otherwise pursuant to the provisions of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Comment. Corresponds to P.D. Art. IV, Sec. 11, reworded.

Article 54

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of the discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application for revision must be made within three months after the discovery of the new fact and in any case within three years after the date on which the award was rendered.

(3) The request for revision shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with the terms of the agreement, if any, between the parties regarding the constitution of the Tribunal which rendered the award, and otherwise pursuant to the provisions of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay the enforcement of the award pending its decision.

Comment. Corresponds to P.D. Art. IV, Sec. 12, reworded.

Article 55

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribuanl was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) failure to state the reasons for the award, unless the parties have agreed that reasons need not be stated.

(2) Upon an application pursuant to paragraph (1) of this Article the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons which shall be competent to declare the nullity of the award or any part thereof on any of the grounds set forth in the preceding paragraph. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute.

(3) The provisions of Articles 44-48, 51, 52, 56 and 57 shall apply *mutatis mutandis* to proceedings before the Committee.

(4) An application pursuant to this Article must be made within sixty days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such appli-

cation shall be made within sixty days after discovery of the corruption and in any case within three years after the date on which the award was rendered.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in the manner specified in Articles 41-43.

Comment. Corresponds to P.D. Art. IV, Sec. 13, elaborated.

Title 6

Recognition and Enforcement of the Award

Article 56

The award shall be final and without appeal. Each party shall abide by and comply with the award in accordance with its terms.

Comment. Corresponds to P.D. Art. IV, Sec. 14, reworded.

Article 57

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce it within its territories as if it were a final judgment of the courts of that State.

(2) To obtain recognition and enforcement, the applicant shall furnish to the domestic authority which each Contracting State shall designate for this purpose (the Competent Authority) the duly authenticated original award or a duly certified copy thereof. Each Contracting State shall notify the Secretary-General of the designation of the Competent Authority and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the rules of civil procedure in force in the State in whose territories such execution is sought. The writ of execution shall be issued by the Competent Authority without other review than verification of the authenticity of the award.

(4) Each Contracting State shall take such action as may be necessary to enable it to carry out its obligations under this Article.

Comment. Para. (1) corresponds to P.D. Art. IV, Sec. 15. Paras. (2)-(4) are new.

Article 58

Nothing in Article 57 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Comment. Article 58 is new.

CHAPTER V

REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS AND ARBITRATORS

Article 59

(1) After a Conciliation Commission or an Arbitral Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled by the method prescribed for the original appointment.

(2) If a conciliator or arbitrator appointed by a party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person to fill the resulting vacancy.

Comment. Corresponds to P.D. Art. V, Sec. 1, reworded.

Article 60

A party may propose the disqualification of a conciliator or an arbitrator on account of any fact indicating a manifest lack of the qualities required by Article 14(1). A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Arbitral Tribunal under Article 43(1).

Comment. Corresponds to P.D. Art. V, Sec. 2(1). Sec. 2(1)(b), which contained special rules on disqualification of arbitrators and conciliators appointed by the Chairman, has been deleted.

Article 61

The decision on any proposed disqualification shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposed disqualification of a sole conciliator or arbitrator, the Chairman shall take that decision. If it is decided that the proposal is well-founded, the conciliator or arbitrator to whom the decision relates shall resign, and the resulting vacancy shall be filled in accordance with the procedure prescribed for the original appointment.

Comment. Corresponds to P.D. Art. V, Sec. 2(2), the last sentence of which has been modified.

CHAPTER VI

COST OF PROCEEDINGS

Article 62

The charges payable for the use of the facilities of the Center, as well as the fees and expenses of members of the Conciliation Commission or Arbitral Tribunal, shall be borne equally by the parties,

and each party respectively shall bear such other expenses as it may incur in connection with any conciliation or arbitration proceedings; provided, however, that if in any arbitration proceeding the Tribunal determines that a party has instituted proceedings or has conducted its defense frivolously or in bad faith, it may assess any part or all of such charges, fees and expenses against such party.

> Comment. Corresponds to P.D. Art. VI, Sec. 1, reworded.

Article 63

The charges payable by the parties for the use of the facilities of the Center shall be determined by the Secretary-General in accordance with the applicable rules and regulations adopted by the Administrative Council.

> Comment. Corresponds to P.D. Art. VI, Sec. 2, reworded.

Article 64

(1) Each Conciliation Commission and each Arbitral Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

(3) The fees and expenses of the members of the Arbitral Tribunal may be included in the award.

> Comment. Paras. (1) and (2) of Article 64 correspond to P.D. Art. VI, Sec. 3, redrafted. Para. (3) is new.

CHAPTER VII

PLACE OF PROCEEDINGS

Article 65

Conciliation and arbitration proceedings pursuant to this Convention shall be held at the seat of the Center except as hereinafter provided.

Article 66

Conciliation and arbitration proceedings may be held, if the parties so agree,

(i) at the seat of the Permanent Court of Arbitration or of such other public international institution with which the Center has entered into arrangements pursuant to Article 2(2); or

(ii) at any other place approved by the Conciliation Commission or Arbitral Tribunal after consultation with the Secretary-General.

> Comment. Chapter VII corresponds to P.D. Art. VII, redrafted.

CHAPTER VIII

DISPUTES BETWEEN CONTRACTING STATES

Article 67

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of either party to such dispute, unless the States concerned agree to another mode of settlement.

> Comment. Corresponds to P.D. Article VIII, modified to make clear that the provision establishes compulsory jurisdiction of the Court.

CHAPTER IX

AMENDMENT

Article 68

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than three months prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all Contracting States.

Comment. Corresponds to P.D. Art. IX, Sec. 1, modified by substituting the Secretary-General for the Chairman as the channel of communications.

Article 69

(1) Amendments involving new obligations for Contracting States or any fundamental alteration in the nature or scope of this Convention shall require for their adoption approval by all the members of the Council.

(2) All other amendments shall be adopted by a majority of not less than two-thirds of the votes of all the members of the Council.

(3) Each amendment shall become effective for all Contracting States at the end of twelve months following its adoption; provided, however, that such amendment shall not affect the rights and obligations of any Contracting State or of any national of a Contracting State under this Convention with respect to or arising out of proceedings for conciliation or arbitration pursuant to consent to the jurisdiction of the Center given prior to the effective date of the amendment.

Comment. Para. (1) is new. Paras. (2) and (3) correspond to P.D. Art. IX, Sec. 2. The majority required for adoption of amendments has been reduced to two-thirds.

CHAPTER X

FINAL PROVISIONS

Title 1

Entry into Force

Article 70

This Convention shall be open for signature on behalf of States members of the Bank, States members of the United Nations or any of its specialized agencies and States parties to the Statute of the International Court of Justice.

Comment. Corresponds to P.D. Art. XI, Sec. 1, modified.

Article 71

This Convention shall be subject to ratification or acceptance by the signatory States in accordance with their respective constitutional procedures. The instruments of ratification or acceptance shall be deposited with the Bank.

Comment. Corresponds to P.D. Art. XI, Sec. 2, modified.

Article 72

At any time after this Convention shall have been ratified or accepted by 12 States, the Executive Directors of the Bank, acting on the recommendation of the President, may declare that this Convention shall enter into force and this Convention shall enter into force 90 days after such declaration. It shall enter into force for each State which subsequently deposits its instrument of ratification or acceptance on the date of such deposit.

Comment. Corresponds to P.D. Art. XI, Sec. 3, modified.

Title 2

Territorial Application

Article 73

This Convention shall apply to all territories for whose international relations a Contracting State is responsible except those which are excluded by such State by written notice to the Bank either at the time of signature or subsequently.

Comment. Corresponds to P.D. Art. XI, Sec. 4, reworded.

Title 3

Denunciation

Article 74

Any Contracting State may denounce this Convention by written notice to the Bank.

Comment. Corresponds to P.D. Art. XI, Sec. 5(1).

Article 75

The denunciation shall take effect six months after receipt by the Bank of such notice; provided, however, that the provisions of this Convention shall continue to apply to the obligations of the State concerned with respect to or arising out of proceedings for conciliation or arbitration pursuant to consent to the jurisdiction of the Center given prior to such notice by that State, by any of its political subdivisions or agencies, or by any of its nationals.

Comment. Corresponds to P.D. Art. XI, Sec. 5(2), modified.

Title 4

Inauguration of the Center

Article 76

Promptly upon the entry into force of this Convention, the President of the Bank shall convene the inaugural meeting of the Administrative Council.

Comment. Corresponds to P.D. Art. XI, Sec. 6.

Title 5

Registration and Notifications

Article 77

The Bank shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Comment. Corresponds to P.D. Art. XI, Sec. 7, reworded.

Article 78

The Bank shall notify all signatory States of the following:

(i) signatures pursuant to Article 70 of this Convention;

(ii) ratifications and acceptances pursuant to Article 71 of this Convention;

(iii) exclusions from territorial application pursuant to Article 73 of this Convention;

(iv) declarations pursuant to Article 29 of this Convention;

(v) the date upon which this Convention enters into force in accordance with Article 72 hereof;

(vi) denunciations pursuant to Article 74 of this Convention.

Comment. Article 78 is new.

DONE at Washington, D.C. in the English, French and Spanish languages, all three texts being equally authoritative, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged by Articles 76 and 77.