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History of the ICSID Convention

Documents Concerning the Origin and the Formulation of the
Convention on the Settlement of Investment Disputes
between States and Nationals of Other States

Documents in English

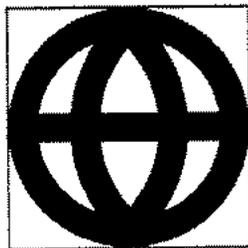
Volume II-2

International Centre for Settlement of Investment Disputes
Centre International pour le Règlement des Différends Relatifs aux Investissements
Centro Internacional de Arreglo de Diferencias Relativas a Inversiones

**Convention on the Settlement of Investment Disputes between States
and Nationals of Other States**

Documents Concerning the Origin and the Formulation of the Convention

**VOLUME II, PART 2
DOCUMENTS 44-146**



**International Centre for Settlement of Investment Disputes
Centre International pour le Règlement des Différends Relatifs aux Investissements
Centro Internacional de Arreglo de Diferencias Relativas e Inversiones**

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RULES FOR THE CONDUCT OF PROCEEDINGS OF
LEGAL COMMITTEE

(approved by the Executive Directors on November 17, 1964)

The following Rules shall apply to the conduct of proceedings of the Legal Committee of experts representing member governments of the Bank which has been convened by the Bank to assist the Executive Directors in the formulation of 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.

1. The Legal Committee will consider the Draft of a Convention on the Settlement of Disputes between States and Nationals of other States (Bank Doc. Z-12)¹ which has been presented to the Executive Directors (hereinafter called the "First Draft") and will prepare a final Committee text for submission to the Executive Directors.
2. (a) The General Counsel, as representative of the President of the Bank, will be the Chairman of the Legal Committee.
(b) In addition to exercising the powers conferred upon him elsewhere by these rules, the Chairman will direct the discussion at all meetings of the Legal Committee, accord the right to speak, ascertain the sense of the meeting or, if necessary, poll the members and announce the results, and in general ensure the orderly progress of the proceedings of the Legal Committee.

¹ Doc. 43

3. (a) The provisions of the First Draft will be taken up by the Legal Committee in the order determined by the Chairman.

(b) Proposals for modification of the provisions of the First Draft or for additions thereto or deletions therefrom, and amendments to such proposals, may be introduced in writing by any member of the Legal Committee and will normally be handed to the Secretariat in time for circulation to all members of the Committee not later than the day preceding the meeting at which the relevant provisions of the First Draft are to be taken up by the Legal Committee.

(c) The Chairman may permit the introduction and consideration of minor proposals, or amendments to proposals, which have not previously been circulated.

(d) The Chairman may of his own motion, and shall at the request of any member, poll the members present on any specific question before them.

4. (a) The Chairman will appoint from among the members of the Legal Committee a Drafting Sub-Committee of nine persons which will be responsible for review and any necessary revision of the English, French and Spanish texts of the Convention. The Drafting Sub-Committee will choose its own chairman.

(b) If a consensus is reached in the Legal Committee on the substance of any provision under consideration, the provision will be referred to the Drafting Sub-Committee.

(c) If no consensus is reached, the provision will be referred to a working group appointed by the Chairman from among the members of the Legal Committee who expressed diverging or conflicting views, for the purpose of formulating a provision generally acceptable in substance. The working group will choose its own chairman.

(d) The provisions formulated by the working groups will be

referred to the Drafting Sub-Committee.

(e) If no consensus can be reached in a working group on a provision referred to it the matter will be reported to the Legal Committee and, in the discretion of the Chairman, to the Executive Directors for their direction.

(f) A consensus shall be deemed to have been reached if, at the end of the discussion, no member present raises any objection.

(g) The texts prepared by the Drafting Sub-Committee shall be submitted to the Legal Committee for report thereon to the Executive Directors.

5. (a) Any point of order arising during meetings of the Legal Committee, the Drafting Sub-Committee or any working group will be decided forthwith by the chairman of the meeting in accordance with these rules. Rulings of the Chairman of the Legal Committee shall be subject to appeal to the Executive Directors; rulings of the chairmen of the Drafting Sub-Committee and working groups shall be subject to appeal to the Chairman of the Legal Committee in the first instance and from him to the Executive Directors. Pending a decision on the appeal, the ruling of the chairman will stand.

(b) The Chairman of the Legal Committee may of his own motion, or shall, when requested to do so by the Legal Committee, submit to the Executive Directors for their determination any question arising in the course of the proceedings of the Legal Committee or the Drafting Sub-Committee or any working group.

6. (a) The Bank will provide the Secretariat of the Legal Committee, the Drafting Sub-Committee and all working groups.

(b) The Secretariat will be responsible for the registration, custody, translation and reproduction of documents, circulation of

copies to the members of the Legal Committee, and for assisting the Legal Committee, the Drafting Sub-Committee and the working groups. The members of the Secretariat may make oral or written statements concerning questions under consideration at any meeting to which they are assigned.

(c) The working languages of the Legal Committee, the Drafting Sub-Committee and working groups will be English, French and Spanish. The Secretariat will provide simultaneous interpretation of proceedings at the plenary meetings of the Legal Committee. The Secretariat will endeavor to provide consecutive interpretation at meetings of the Drafting Sub-Committee and working groups.

(d) The Secretariat will prepare a summary record of the meetings of the Legal Committee and will keep a record of the texts agreed upon in the Drafting Sub-Committee and in the working groups.

7. (a) The meetings of the Legal Committee, the Drafting Sub-Committee and working groups will be open only to members of the Legal Committee, the Secretariat, Executive Directors, Alternate Executive Directors and senior officers of the Bank.

(b) The Legal Committee, the Drafting Sub-Committee and working groups will meet at the times and places allotted from time to time by the Secretariat.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

COMMENTS AND OBSERVATIONS OF MEMBER GOVERNMENTS
ON THE DRAFT CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN STATES AND NATIONALS OF OTHER STATES

NOTE

The attached comments and observations on the Draft Convention for the Settlement of Investment Disputes between States and Nationals of other States (Document Z-12) have been received by the Bank from member governments and are circulated for the information of the members of the Legal Committee.

* * *

The Government of CYPRUS has informed the Bank that it has no specific comments to offer on the provisions of the text of the Draft Convention and has restated that it has no objection in principle to the basic idea of establishing facilities for international conciliation and arbitration through inter-governmental agreement.

The Government of GABON has informed the Bank that it has no particular comment to make on a preliminary examination of this question.

The Government of GUINEA has informed the Bank that it has no comments to make on the Draft Convention.

The Government of SUDAN has informed the Bank that the Draft Convention is as a whole acceptable to it, but has requested that, if a fundamental change is made in any of the articles, the Government be given the opportunity to express its views.

Some governments have conveyed informally to the General Counsel of the Bank their observations which are not reproduced here.

TRANSLATION

ORIGINAL: French

BELGIUM

Source: Letter addressed to the Bank by the Ministry of Finance of Belgium on October 30, 1964.

- 1) With regard to the financing of the Center (Article 17) the Belgian Government would like that the excess in the operating expenditures

¹ See also Doc. 46
¹ Doc. 43

be borne by the Bank itself and not by the contracting States which are members of the Bank.

- 2) With regard to the tax immunity created by Article 24 (3), the Belgian Government would consider it very important that it be clearly specified, at least in an official commentary attached to the Convention, that conciliators and arbitrators will remain liable to taxation by reason of the income mentioned in said Article in the country in which they are resident (country of fiscal domicile).
- 3) The drafting of Article 55 (4) ought to be revised:
 - a) Paragraph (4) of that Article mentions by mistake an "application for revision", while as a matter of fact it should be an "application for annulment";*
 - b) The time limit of 3 years after the Award has been run which is mentioned in the last sentence of the same paragraph can apply only to the case where annulment is requested on the ground of corruption. Therefore the words "dans tous les cas" [in all cases] are not justified.**.
- 4) The provisions of Article 69 concerning amendments encounters a difficulty of a constitutional nature in Belgium. The Government cannot admit that Belgium be bound by new provisions introduced through an amendment to a Convention accepted by Belgium which could obligate the State or bind Belgians individually without the legislative Chambers having given their consent.

REPUBLIC OF CHINA

Source: Letter addressed to the Bank by the Minister of Finance of the Republic of China on November 9, 1964.

1) Jurisdiction of the Center:

The jurisdiction of the Center as stated in Article 26 of the Draft is too broad, especially in view of the loose definition given to the word "investment" under Article 30. While it may be difficult to provide a clear-cut definition for "investment" in this Convention, it is nevertheless clear that the purpose of this Convention is to encourage international private investment and not to protect foreign property as such. Capital importing countries seek foreign investments either by special investment promotion legislation or through investment agreement with the foreign investor. It is therefore only reasonable that the jurisdiction of the Center to be created by this Convention should not extend to legal disputes that arise out of "investments" other than those made pursuant to an

* Note of Secretariat: This comment refers to the French text of the Draft; the same mistake does not appear in the English or Spanish texts.

** Note of Secretariat: The French text on this point differs from the English and Spanish texts.

investment agreement with the host State or in response to special investment promotion legislation. It is suggested that the wording of Article 26-(1) be amended accordingly.

It may be argued that since the jurisdiction of the Center is limited by the overriding condition of consent, the desired exclusion may always be effected by a refusal of consent. Such an argument would deny the need for a provision on the jurisdiction of the Center at all. The unacceptability of this argument is obvious. Furthermore, under Articles 31-33, 40-42, a Conciliation Commission or a Arbitration Tribunal may be constituted, as the case may be, if the Secretary-General of the Center, who is supposed to be a purely administrative officer, is satisfied that there is prima facie evidence to establish that the dispute is within the jurisdiction of the Center, despite the fact that one of the parties may still claim that the dispute is not within the scope of its consent. Such claim then will be dealt with by the Commission or Tribunal, as the case may be, either as a preliminary question or as a merit of the dispute. In other words, the jurisdiction of the Center may be set in motion even before the question of whether the parties have consented to such proceedings with respect to a particular dispute is ascertained, and such question is to be decided first at the discretion of the Secretary-General and then by interpretation of the Commission or Tribunal. The consent power as a means of limiting the jurisdiction of the Center is weak, indeed, in view of the above provisions. It is therefore suggested that in case one of the parties claims that the dispute is not within the scope of its consent, an ad hoc Committee should be formed to ascertain the scope of the consent. The constitution of the ad hoc Committee may be in the similar manner as is in the case of request for annulment of the arbitration award provided under Article 55 of the Draft. Relevant provisions should be amended to that effect.

It is also suggested that since this Convention deals only with private investments, paragraph 1 of the Preamble be amended to read: "1. Considering the need for international cooperation for economic development, and the role of international private investment therein;"

2) Applicable Law:

Article 45 of the Draft adopts a rule of applicable law which may be acceptable in a commercial arbitration but is not satisfactory in an investment arbitration as envisaged by this Convention. An investment arbitration is peculiar in that it deals with disputes between a government and a national of another country, and that such disputes arise from an investment which implies the investor's reliance on the laws of the host country with respect to such investment, in the absence of an express agreement to the contrary. Such peculiar nature of investment arbitration should be recognized by this Convention and the wording of the Convention should be so couched. It is therefore suggested that paragraph 2 of the Preamble be amended to read:

"2. Bearing in mind that the act of investment by a national of a Contracting State in another Contracting State implies his reliance on the laws of such other Contracting State in connection with such investment, and the possibility that from time to time disputes may arise"; and Article 45 should be amended to the effect that the law of the host country shall first apply in the absence of an agreement between the parties to the contrary.

To insure the application of the applicable law, it is suggested that the arbitral award should expressly state the law applied (Article 51) and failure to so state may be a ground for annulment of the award (Article 55). The relevant provisions should be amended accordingly.

3) Signatories to the Convention:

Article 70 of the Draft, which provides that the Convention shall be open for signature on behalf of States other than members of the Bank as well, appears to have lost sight of the purpose of this Convention and the functions of the Bank. The purpose of this Convention is to encourage international private investment from the procedural aspect by providing facilities for international arbitration. In order to "promote private foreign investment", which is one of the purposes of the Bank, there is good reason that such facilities be established under the auspices of the Bank. However, a reading of the Articles of Agreement of the Bank reveals that the Bank shall operate and function only among its member States. In view of the very close tie between the Bank and the Center to be established under the Convention and in view of the limitations on the Bank, it would be more appropriate that such facilities for international arbitration be available to States members of the Bank only. Indeed, it would be very difficult to explain why a Center for international arbitration should be established under the auspices of the Bank unless the Center is established to further the Bank's purpose, such as the promotion of private foreign investments, and its activities do not extend beyond those of the Bank. It is therefore suggested that Paragraph 5 of the Preamble be amended to read: "5. Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development to be available to States Members of the Bank." and Article 70 of the Draft be amended to read: "This Convention shall be open for signature on behalf of States members of the Bank."

Furthermore, since the Convention should be open for signature on behalf of States members of the Bank only, Conciliators and Arbitrators appointed to the Panels should also be limited to nationals of States members of the Bank. It is suggested that Article 12 of the Draft be amended accordingly.

4) Entry into Force:

Article 7 of the Draft provides that the Convention may enter into force if ratified or accepted by 12 States. This required number of ratification or acceptance is unusually small as compared to the total membership of the Bank. It needs no argument that the success of this Convention depends upon the support of both the capital exporting and capital importing countries. In this respect, the Draft as it stands now is vastly inadequate in that it may be possible for the Convention to enter into force without the ratification or acceptance by one single State which imports rather than exports capital, or vice versa. It is therefore suggested that the Preamble be amended to include a statement to the effect that no useful purpose will be served unless this Convention receives the support of a sufficient number of both the capital exporting countries and capital importing countries, and that Article 72 be amended to require ratification or acceptance by at least a majority of States members of the Bank or by a certain number of both the capital importing and capital exporting States.

At this point the Government of the Republic of China wishes to reiterate its belief that a Convention of such significance and magnitude as this should not be submitted forthwith to the Governments for signature and ratification or acceptance without first being formally discussed by the Governments. As a matter of fact, it is not without instances that a draft convention prepared by some legal committee of an international organization is submitted to the Governments for further discussion. It is therefore suggested that the Draft Convention prepared by the Bank with the assistance of the legal committee should be submitted to the Governments for further discussion, NOT for signature or ratification.

5) Legal Dispute:

Article 30-(ii) of the Draft defines "legal dispute" as any dispute concerning a legal right or obligation or concerning a fact relevant to the determination of a legal right or obligation. While an adjudication of a dispute concerning a legal right or obligation must necessarily be based upon fact as well as law, the latter part of this definition, i.e. "or concerning a fact relevant to the determination of a legal right or obligation;" seems to permit an ascertainment of the existence or non-existence of a fact without determination of a legal right or obligation. There are, however, serious doubts as to whether an ascertainment of the existence or non-existence of a fact alone may be a subject for conciliation or arbitration. It is, therefore, suggested that the phrase "or concerning a fact relevant to the determination of a legal right or obligation" be deleted from Article 30-(ii).

6) Provisional Measures:

Article 50 of the Draft provides that the Arbitration Tribunal may "prescribe" provisional measures necessary for the protection of the rights of the parties, and that it may fix a penalty for failure to comply with such provisional measures. Underlying this provision is the theory that provisional measure, having the nature of "interim award", should be enforceable on the same basis as a final award. Leaving open the question of whether the Tribunal shall have the power to render "interim award", it may nevertheless be pointed out that a "provisional measure" is different from an "interim award" in that the former deals with matters not yet certain and may be revoked at any time during the proceedings while the latter is rendered with respect to matters already ascertainable during the proceedings. As such, provisional measures should not and need not be enforceable on the same basis as final awards. It is therefore sufficient that the Tribunal be empowered to "recommend" rather than "prescribe" provisional measures.

Neither does the nature of investment arbitration require the Tribunal's power to "prescribe" provisional measures. The fear that a foreign private investor has no way to obtain specific enforcement of the provisional measures against the host government will not arise if the government may be held, in the final award for the investor, liable to pay damages for failure to conform to recommendations of provisional measures. It is therefore suggested that the word "recommend" be used instead of the word "prescribe" in Article 50 and that paragraph 2 of said Article relating to penalty be deleted completely.

7) Enforceability of Arbitral Award:

Article 57 of the Draft provides that each Contracting State shall enforce an award rendered pursuant to this Convention within its territories as if it were a final judgment of the courts of that State. It requires the enforcement of the award by a Contracting State regardless of whether or not that State or a national of that State is a party to the dispute. It may be reasonable to require the State who is, or whose national is, a party to the dispute to enforce the award as if it were a final judgment of the courts of that State. But in case neither the State nor its national is a party to the dispute, it would be asking too much to require the enforcement by that State of the award on the same basis as a final judgment of its courts. It is therefore suggested that in case neither the State nor its national is a party to the dispute, the award shall be recognized and enforced by that State within its territories, if such enforcement is requested, as if it were a final judgment of a foreign court, and that Article 57 of the Draft be amended accordingly.

8) Other comments will be presented by the delegate orally during the discussion.

LEBANON

Source: Letter addressed to the Bank by Mr. André Tuéni, Director General of Finance, on November 10, 1964.

- 1) I am of the opinion expressed at Bangkok Meeting by Mr. Raja Himadeh (Summary Record of Proceedings' pp. 16 & 17), as regard the addition of an advisory function to the principal functions of the Center. And I believe the Center rather than the Bank should give such advice, for it is the Center that would eventually be in charge of arranging for conciliation and arbitration of investment agreement disputes.
- 2) The modification made in the new draft' (Article 10) which provides that the Chairman may propose one or more candidate for each of the posts of Secretary General and Deputy Secretary General does not seem to improve much the original text. The Chairman would not usually propose more than one candidate except when it is difficult for him to make a choice. Consequently, the modification should provide that the Chairman proposes a certain minimum number of candidates (at least three, in my opinion), so as to ensure always to the Council some choice.
- 3) Reference should be made in Article 75 not only to the obligations but also to the rights of the denouncing State, for both rights and obligations of the State concerned should be preserved with respect to proceedings for conciliation or arbitration.

* Doc. 31

* Doc. 43

TRANSLATION
ORIGINAL: French

MALAGASY REPUBLIC

Source: Letter addressed to the Bank by the Ministry of Finance of the Malagasy Republic on November 7, 1964.

OBSERVATIONS ON THE DRAFT CONVENTION FOR THE SETTLEMENT OF
INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER
STATES.

1) Article 15 of the Convention provides that members of the Panel of Conciliators and of the Panel of Arbitrators shall serve for four years. However, the question arises whether Panel members who have been appointed to a conciliation commission or arbitral tribunal must cease to serve as members of the commission or tribunal at the end of their four-year period. In our opinion it would be necessary, in order to ensure continuity in the proceedings, to provide that "Panel members who are members of a conciliation commission or arbitral tribunal shall continue to serve until the conclusion of pending proceedings, notwithstanding the expiry of their term of service."

2) Article 26, paragraph 1:

In our opinion it would be preferable to limit the jurisdiction of the Center to disputes between a Contracting State and nationals of other Contracting States and to exclude disputes involving political subdivisions and agencies. By providing that disputes involving these two categories of juridical persons could be submitted to the Center, one runs the risk of extending the jurisdiction of the Center to controversies which should rather be solved at the strictly municipal level.

It is true that an agency may refuse its consent and the State its approval. But in that case the purpose of the Convention will not be fulfilled as the refusal by the agency and the State would destroy the climate of confidence which the authors of the Convention have endeavored to create.

On the other hand, this principle, to the extent that it grants political subdivisions and agencies an international personality, is in conflict with the concept of Malagasy public law that the juridical personality granted to political subdivisions and agencies is a personality under municipal law and not international law. At the international level, only the State can represent them.

3) Article 21, paragraph 1:

A second criterion should be added to the one suggested for the immunity from legal process, i.e. the interest of the Center, as opposed to personal or other interests. "This immunity shall apply only with respect to acts performed in an official capacity and in the interest of the Center." This additional criterion would exclude from the scope of the immunity all acts performed in the pursuit of a personal interest.

4) Article 30, paragraph 3:

The definition of the term "national of another Contracting State" raises three problems:

First, it does not eliminate the problem of dual nationality, at least in the French text.

The principle that a dual national would be allowed to bring a case before the Center can be justified only to the extent that there has been a compulsory grant of nationality of the State where the investment takes place.

It would be indeed paradoxical to give this right to a person who has voluntarily acquired the nationality of the State in which he has invested. In most cases this acquisition would have been motivated by tax reasons or reasons of convenience. There is therefore no reason why a person who voluntarily acquired the nationality of the State party to the dispute should not bear the possible risks of this acquisition of a nationality of convenience.

On the other hand, in the case of a physical person, the definition refers to two dates: the date on which the parties have consented to accept the jurisdiction of the Center and the date on which proceedings under the Convention are started.

This reference creates a major difficulty particularly in the case of consent given at the time of stipulation of an investment agreement in accordance with Article 26, paragraph 2.

In practice those two dates may be far apart and in the meantime the "national of another Contracting State" may have become a national of the State party to the dispute. This would lead to the first problem mentioned above, that is recourse to the Center by a dual national.

So in order to avoid all controversies it would seem preferable to fix only one date, i.e. the date on which proceedings are started.

Finally, a third observation: in our view the last definition of national of another Contracting State as any juridical person which the parties have agreed shall be treated as a national of another Contracting State ought to be omitted. As far as we are concerned it is superfluous and might have no practical use.

Consequently, it would appear that a definition of a national of another Contracting State should be:

- a) any physical person possessing the nationality of a Contracting State except the nationality of the State party to the dispute (unless this latter nationality was compulsorily granted) on the date on which proceedings under the new Convention are initiated.

5) Article 57.

With regard to the enforcement in third countries, it would seem desirable to allow them a minimum of discretionary judgment with respect to their own public policy.

On the other hand, in addition to the duly authenticated original award or a duly certified copy thereof, the applicant should submit to the competent national authority a certificate of the Secretary-General to the effect that no application for annulment on grounds other than corruption is pending.

Such a provision seems necessary to avoid the enforcement of awards which are not yet final.

6) On questions of form, it seems necessary, at least for the French text, to recast certain articles (7, 29 and 30) which have been drafted in a manner not conducive to a clear understanding of their contents.

PAKISTAN

Source: Cable addressed to Mr. Muntaz Mirza, Executive Director of the Bank, by the Government of Pakistan on November 17, 1964.

I

Our comments on the provisions of the Draft Convention are:

Second sentence of Clause (2) of Article 2 might be deleted as redundant, because there is nothing to compel the Permanent Court of Arbitration or any other international institution to provide accommodation or other facilities to the Centre. Even in absence of this sentence making of such arrangements would not be barred.

In Article 6, after item (vi), new residual clause gives sweeping powers and functions to Administrative Council by allowing it to do not only what is necessary but also what is useful. This may have the effect of allowing the Council to act beyond its jurisdiction or beyond what is intended by the Convention. This residual clause may therefore be deleted or made more restricted and specific.

Under Article 22 as it stands each Contracting State may grant different degrees of immunity to agents counsels advocates witnesses experts etc., according to its own conception as to what would be necessary for independent exercise of their functions. A uniform degree and extent of immunity may be indicated, as has been done in Article 21.

Article 29 appears to be redundant, though not objectionable. Since submission of a dispute to jurisdiction of the Centre would depend on a specific provision in each investment agreement, there is no meaning in furnishing a statement indicating class or classes of disputes as contemplated by this Article. Hence this provision may be deleted.

If an arbitrator is disqualified under Article 61, it would suffice if he is merely replaced by another duly appointed arbitrator. A disqualified arbitrator should not be required to tender formal resignation.

In Article 66 Clause (1) the words "or of such other . . . Article 2(2)" may be deleted in view of our comments on Article 2(2) above.

According to Article 69, amendment of the Convention making fundamental alteration will require approval of all members of the Council while other amendment will require 2/3 majority. Who will decide whether the amendments are of a fundamental or minor nature? This requires clarification. Since Convention itself would be signed by all Contracting States we think all amendments should be approved by all members of the Council.

II

Attempts may be made to provide the following in the Draft Convention:

- (A) The membership of the Administrative Council should be restricted to countries which are or may hereafter become members of the Bank.
- (B) The value of the dispute which may be taken cognisance of by the Centre should be dollars 25,000, except in cases where it is not possible to determine value of the dispute and in important cases which warrant proceedings under auspices of the Centre.
- (C) The cost of the Centre and Conciliation Commission/Arbitration Tribunal should be borne by Bank and by contributions of member Governments in proportion to their subscription to the Bank. Expenses incurred by parties in participating in proceedings should only be borne by the parties concerned.

THAILAND

Source: Memorandum from Mr. E. Ozaki, Alternate Executive Director of the Bank, dated November 12, 1964, quoting a cable received from the Government of Thailand.

"Firstly, jurisdiction of Center in Article 26 and 30 is too broad even though contracting state may specify classes of dispute to be submitted to Center as provided in Article 29. In practice this would discourage prospective foreign investors.

Secondly, national law applicable in Article 45 should be limited to municipal law of host state since act of investment in country implies consent of investors to application of law in host state.

Finally, enforcement of arbitral award in Article 57 should be in accordance with municipal procedural law of each country, so that law amendment is not needed and convention more acceptable."

REPUBLIC OF SOUTH AFRICA

Source: Letter addressed to the Bank by the Secretary for Finance of the Republic of South Africa on November 6, 1964.

Article 1(2)

The second sentence seems very wide in its scope and it may be desirable to circumscribe the powers of the Center more narrowly.

Article 30(i)

The definition of "investment" seems unsatisfactory. Is capital appreciation covered? What would be the position of a national of country A who buys from another national of country A shares in a company incorporated in country B?

Article 30(ii)

The last part of the definition of "legal dispute" appears to open up a wide field and its implications are not clear.

Article 30(iii)

The definition of "national of another Contracting State" raises many difficult questions, e.g.

- (1) What is the position of persons with dual nationality?
- (2) What meaning is to be attached to "juridical person" (since this term has different meanings in different countries)?
- (3) Why is there no reference in para. (iii)(b) to the date on which proceedings were instituted pursuant to the Convention?

Article 57(1)

Would this Article apply where an award might be contrary to public policy in a Contracting State?

TRANSLATION
ORIGINAL: French

TURKEY

Source: Letter addressed to the Bank by the Ministry of Finance of Republic of Turkey on October 27, 1964.

OPINION OF THE CHIEF LEGAL ADVISER TO THE MINISTRY OF FINANCE
(REPUBLIC OF TURKEY) CONCERNING THE DRAFT CONVENTION ON THE
SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS
OF OTHER STATES.

The present draft consisting of 78 short articles and which follows the usual form of similar conventions seems to us more practical and satisfactory than the Preliminary Draft⁵ which consisted of 11 rather long Articles divided in several Sections, Sub-Sections and paragraphs.

As to the substance, the new draft does not contain essential modifications affecting its fundamental principle. Therefore, our comments, which are in addition to those already made at the meeting of legal experts held in Geneva from the 17th to the 22nd of February, 1964, shall only concern the few minor innovations of the new draft

⁵ Doc. 24
⁶ Doc. 29

as well as the few issues already raised but on which we feel it necessary to insist.

- 1) a) It seems desirable to us to invert the provisions of the last part of paragraph 4 of Article 7, pursuant to which "unless replies are received from a majority of the members of the Council, the motion shall be considered lost"; inverse terms would be more in line with the evident purpose of the paragraph. The possibility of waiving meetings would be justified only by the desire to save time and to avoid unnecessary formalities in matters of minor importance. Bearing this intention in mind, we think that it would be more correct to interpret the silence of the majority of the members in a positive rather than in a negative way, and to modify the text as follows:

". . . in the case of a vote taken pursuant to such procedure, the motion shall be considered carried unless negative replies are received from a majority of the members of the Council."

b) In any case and whatever might be the interpretation given to the attitude of the majority, it would be advisable to provide for a waiting period, to be determined in advance, in order to avoid the risk of decisions being modified by late replies, which might create undesirable uncertainties.
- 2) The second paragraph of Article 13 concerns the right of the Chairman to designate persons to the panels of conciliators and arbitrators. At the Geneva meeting, we had already tried to indicate that the conferring of such right upon the Chairman, who is not a member of the Administrative Council and who, as a rule, is not allowed to vote, does not appear justified to us. This comment, which incidentally was supported at the same meeting by the expert for Austria, was apparently made by other experts at the regional meetings of Addis-Ababa and Santiago (see records concerning such meetings, pp. 20 - 24, 19 respectively). It has been argued that such right of the Chairman would make it possible to ensure a balanced representation if the principal legal systems and the main forms of economic activity were inadequately represented on the panels. In our opinion, this reason would only justify the Chairman to have a relative right, limited to the mentioned situation, but not an absolute one. As the expert for Austria correctly stated, "a balanced representation of the legal systems 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".
- 3) With respect to Article 15 (1), we still think that a term of 4 years is too short and this opinion was shared by the expert for the Federal Republic of Germany who invoked the corresponding provisions of the Hague Convention.

Consequently, we believe that a term of 6 to 8 years would not be too long and that, at least, the Contracting Parties should be authorized to reappoint their nominees for another term.

- 4) The legal personality of the Center being defined in Article 18, the enumeration in Article 19 of the capacities arising out of such personality might, in our opinion, appear unnecessary, since the meaning of the term

¹ Docs. 25 and 27 respectively

² Hague Convention for the Pacific Settlement of International Disputes of 1907

"legal personality", as universally accepted, fully covers the capacities enumerated.

We would, therefore, be inclined to suggest the deletion of Article 19.

5) With respect to Article IV (Section 16) of the Preliminary Draft, which corresponded to the first paragraph of Article 27 of the present draft, pursuant to which consent to have recourse to arbitration, unless otherwise stated, should be considered as a consent to exclude local remedies, we had, at the Geneva meeting, suggested the following modification: "The consent to have recourse to arbitration . . . unless otherwise stated, does not exclude the necessity of prior exhaustion of all local remedies."

In our opinion, this principle, although apparently not essentially different in substance, would have the advantage of being more in line with reality. We do not think that the present provision may be considered as the normal interpretation since, pursuant to the principle generally recognized in international law, local remedies should as a rule be exhausted before action may be brought before an international tribunal. Since immediate recourse to international arbitration is an exceptional procedure contrary to the general rule, the silence of the contracting parties could not be logically interpreted in the negative way as excluding local remedies.

This opinion had been confirmed at the regional meeting at Bangkok by the representatives of Israel, India, Jordan, Ceylon and Nepal. (See record of proceedings).

6) One may also question the provision of Article 43 (1), concerning the exclusion of national arbitrators as well as of arbitrators designated by the States parties to the dispute. Apparently, this clause is only intended to ensure the impartiality of the arbitrators. Since, however, Article 44 (1) provides that "persons designated to serve on the Panels shall be persons . . . who may be relied upon to exercise independent judgment", wouldn't it be too invidious to cast doubts on their impartiality? We do not think that such qualms should be sufficient to deprive the parties of the services of persons who may be the best qualified by their knowledge and experience.

Consequently, it would be most useful to carefully consider the opinions expressed in this respect by the representatives of Yugoslavia, the Federal Republic of Germany, Egypt, Portugal and China at the regional meetings and to adopt the most satisfactory solution which seems to be that of relying in this respect upon the will of the parties.

7) We had tried to explain that the national law to be applied by the tribunal pursuant to Article 45 (1) could only be the national law of the capital-importing country. This opinion was shared by the representative of Spain at the same meeting and by those of several countries (such as Iran, India, Thailand and China) at the Bangkok meeting and implies that the provision should be drafted more clearly.

8) Pursuant to Article 46, the parties shall have the right to agree that the tribunal will not call upon the parties to produce documents or visit the scene connected with the dispute in order there to conduct such inquiries as it may deem appropriate. We are wondering about the juridical reason for such right. If the tribunal is of the opinion that it is necessary for the parties to produce certain documents as evidence, how could the parties be able to agree on the contrary - without waiving their claim.

¹ Doc. 31

- 9) a) Since the provisional measures which may be prescribed by the tribunal during the proceedings pursuant to Article 50 (1) might be such as to harm the defendant, it would be advisable also to provide for compensation to be given to such party, should the claim of the other party be rejected. In such a case, the Turkish legislation requires that a pecuniary guarantee be given beforehand by the party in favor of which such measures are prescribed.

It would therefore be advisable to add a clause along these lines to the Article in question.

- b) With respect to the penalty provided for in the next paragraph for failure to comply with the provisional measures, such penalty should be limited to the case where the failure would have harmed the other party and the amount of the penalty should be based upon the damages suffered.

10) Article 51 (3 a) provides that the award shall state the reasons upon which it is based unless the parties otherwise agree. In our opinion, in the cases of judicial or arbitral decisions the reasons are of such importance to the interested parties that it would be hardly conceivable that parties might willingly waive their right of knowing such reasons. Consequently, we do not think that this conditional clause, which might have been suggested at the Santiago meeting, has any practical value and we would be inclined to suggest its deletion.

11) It would be advisable that a special article dealing with cases concerning contradictory provisions of awards as well as claims and allegations which may not have been decided by the tribunal, be inserted in Title 5 concerning the interpretation, revision and annulment of the award.

12) With respect to Article 44 (4), we wish to insist on the fact that the period of 60 days provided for in the case of an application for revision should not start from the date of the award but from the date of the notification thereof.

This remark, although confirmed at the regional meetings of Santiago and Bangkok by several other delegations and each time approved by the Chairman seems to have been overlooked by the draftsmen of the present draft.

13) Pursuant to Article 59 (2), should a conciliator or arbitrator resign "without the consent of the Commission or Tribunal of which he was a member", the Chairman would appoint a person to fill the resulting vacancy. We are wondering what might be the reason for making in this case an exception to the general rule set forth in the first paragraph pursuant to which the method prescribed for the original appointment should be followed.

14) Article 61 does not envisage the situation where a challenge might be directed to all the members of the Commission or the Tribunal, in which case also the Chairman should be empowered to decide.

S/ Samim BILGEN

Chief Legal Adviser

UGANDA

Source: Letter addressed to the Bank by the Office of the Minister of Finance of Uganda on October 27, 1964.

Article 2 (2)

"Suggest an alteration to enable such arrangements to be made not only with "other public international institutions" but with any institutions private or public. The reason for the suggested alteration is that in a country such as Uganda it may well happen that there are no public international institutions, but there are other institutions, e.g. Makerere, which have facilities which the Centre can use. It also saves us possible disputes as to what is an international public institution."

Article 29.

"This is all right."

UNITED KINGDOM

Source: Memorandum of Alternate Executive Director of the Bank for the United Kingdom to the Secretary of the Bank dated November 10, 1964.

OBSERVATIONS OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND ON THE DRAFT CONVENTION ON THE
SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS
OF OTHER STATES

Preamble

Paragraph 2

The phrase "in accordance with international law" which in the Preliminary Draft" followed the phrase "in exercise of their sovereignty" has in the revised draft disappeared. In the view of the United Kingdom it would be undesirable to leave this reference to "sovereignty" unqualified and they would prefer the words "in accordance with international law" to be reinstated.

Paragraph 7

It is considered that the preamble is not a suitable place for the inclusion of substantive provisions such as these. If, however, they are retained either in the preamble or in the text of the Convention itself, it is suggested that the language used should be consistent with Article 26, which bases jurisdiction on "consent" rather than on "specific undertaking"

¹⁹ See Doc. 24

as in paragraph 7. Moreover, paragraph 7 as at present drafted might be construed in an unduly restrictive sense, i.e. as excluding consents of a general character, such as a promise, contained in an investment agreement, to submit all disputes arising out of the interpretation or application of such agreement to the Centre. Such an interpretation would not be consistent with the second sentence of Article 26.

(2) It is, therefore, suggested that if paragraph 7 is retained the last two lines be amended to read as follows:

". . . obligation to submit any dispute to conciliation or arbitration in the absence of its consent to that effect,".

Article 22

The drafting of this provision is not sufficiently specific to enable its implementation in the United Kingdom:

- (1) The position of the parties to the proceedings and their representatives is not clear.
- (2) The phrase "other persons participating in proceedings" is too imprecise.
- (3) The grant of "immunities" and "facilities for residence and travel" is related to a quite indefinite criterion. In particular, the text should specify whether immunity from legal process is or is not to be accorded.

In general, a draft based more closely on Article I, Section 18, of the previous version of the Convention would be preferred.

Article 23

Paragraph 2

This provision should be changed to take account of the fact that the only organisations entitled to benefit from "government" privileges in the matter of telecommunications are those listed in Annex 3 to the International Telecommunications Convention (Geneva, 1959). The provision in the Articles of Agreement of the Bank itself is explained by the fact that the Bank was established before the Atlantic City Telecommunications Convention of 1947. The Government of the United Kingdom have consistently opposed the extension of the privilege to other specialised agencies. A preferable text would be that recently adopted in the Protocol on the Privileges and Immunities of the European Space Research Organisation (Article 12): "With regard to its official communications and the transfer of all its documents, the Organisation shall enjoy treatment not less favourable than that accorded by the Government of each Member State to other international organisations".

Article 24

Paragraph 1

It is not the practice of the Government of the United Kingdom to accord relief from that part of local taxes (known in the United Kingdom as "rates") which covers services from which actual benefit is derived -

the "beneficial portion". The Government of the United Kingdom would interpret the paragraph in accordance with this practice.

Paragraph 2

The Government of the United Kingdom are opposed to the change from the corresponding provision of the previous draft which has the effect of limiting the exclusion in terms of nationality to officials or employees of the Secretariat. If the expense allowances of the Chairman and members of the Council should prove to be taxable, local nationals should not be exempt from the payment of tax.

Article 26

The United Kingdom agree with the inclusion in paragraph (1) of the reference to the political subdivisions and agencies of a State as possible parties to disputes, but do not agree that consent by such a subdivision or agency should require the prior approval of the parent State. If the political subdivision or agency of a State holds itself out as competent to promise an investor that any dispute shall be submitted to the Centre, and the investor acts on such a promise, it ought not subsequently to be possible for the jurisdiction of the Centre to be denied on the ground that the State had not in fact approved the original promise.

Moreover, once a State (or its subdivision or agency) has promised to arbitrate, and an investor has accepted that promise and acted upon it by making or continuing his investment, it should not be possible for that State (or its subdivision or agency) subsequently to withdraw its consent.

For these reasons it is suggested that the last sentence of Article 26 (2) be deleted and replaced by the following text:-

"When all parties to a dispute have given such consent, no party may thereafter withdraw its consent unilaterally".

Further, some machinery is needed to enable investors to decide what is a political subdivision or agency of a State in which he wishes to make his investment. For example, each State could deposit with the President of the Bank an official list.

Finally, it would be most desirable to have a model arbitration clause prepared by the Centre for the guidance of parties to contracts who desire to provide for the submission of disputes to the Centre.

Article 28

In order not to exclude the possibility of diplomatic assistance in the friendly settlement of a dispute, the term "diplomatic protection" ought to be defined by adding a second paragraph stating that "Diplomatic protection shall not, for the purpose of this Article, include diplomatic exchanges intended solely to assist a voluntary settlement of the dispute at any stage of the proceedings".

Article 30 (1)

The United Kingdom considers that it is very difficult to define the word "investment", and the result of including such a definition may be to

create difficulties for the arbitrators, when deciding whether they have jurisdiction in any particular case. For example, the parties might wish to arbitrate, and the arbitrators might consider that the particular dispute before them was an investment dispute, but nevertheless the latter might feel obliged to refuse to exercise jurisdiction because the facts did not come within the particular definition of "investment" contained in the convention. For this reason the United Kingdom would prefer to have no such definition in the convention.

Article 50 (i)

The United Kingdom suggests that it would be preferable to follow more closely the words used in Article 41 of the Statute of the International Court of Justice. Paragraph (i) could then read:

"Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, prescribe any provisional measures which ought to be taken to preserve the respective rights of either party."

Article 55

(2) A further ground of ineligibility for membership of the reviewing Committee should be possession of the same nationality as any member of the Tribunal which rendered the award.

Article 61

In order to cover the possibility that the person concerned may refuse to resign we would prefer to amend the second sentence by substituting for the words:

"resign, and the resulting vacancy shall be filled", the words:

"be replaced".

TRANSLATION

ORIGINAL: French

REPUBLIC OF VIET NAM

Source: Letter addressed to the Bank by Banque de Nationale du Viet Nam on November 9, 1964.

- 1) Article 30, paragraph 1, defines the term "investment" as "any contribution of money or other asset of economic value for an indefinite period or, if the period to be defined for not less than five years".

In our opinion this definition should be made more explicit in order to avoid any difficulty concerning the scope of the competence of the Center and the determination of the kind of disputes which would fall under its jurisdiction. For instance, we would like to know if under the term investment there would be included, as seems logical, contributions in foreign exchange and in local currency;

on the other hand, should the definition be limited to investments made by a non-resident foreigner or should the Center have jurisdiction also on investments made by a resident foreigner?

Finally, in order to further clarify the concept of foreign investment, it would be also desirable to specify the criteria by which the nationality of the foreign investor would be determined when the investor is a juridical person (headquarters, capital or nationality of the members of the Board of Directors).

- 2) In accordance with the legal principle of non-retroactivity and with the respect due to vested rights, we believe that all disputes concerning investments made before the date of ratification of the Convention ought to be excluded from the jurisdiction of the Center.
- 3) Moreover, pursuant to Article 30, paragraph 2, any dispute must concern "a legal right or obligation or a fact relevant to the determination of a legal right or obligation" (Article 30, paragraph 2). This brings us to the question of determination of the grounds on which jurisdiction is based. The aforesaid Article is not very enlightening on this important point, for instance, in the case of expropriation -- a case most likely to cause the reluctance of foreign investors -- what would the right of the foreign investor consist of? Would it be only the right to ask for a fair indemnity? Would it also be the right to question before the Center the very right of expropriation of State?

Given the great difficulty in determining this jurisdictional ground, it seems necessary to admit that the parties be empowered to limit the problems that can be submitted to the jurisdiction of the Center should a dispute arise.

- 4) It would be also desirable to fix the minimum value of the subject matter of a dispute that could be brought before the Center so as not to overload unnecessarily the Center itself.
- 5) Finally, as far as applicable law is concerned, Article 45 provides that, in the absence of agreement between the parties, the Tribunal will decide the dispute submitted to it in accordance with such rules of national and international law as it determines to be applicable. Should the words "national law" be understood as meaning the national law of the country of the investor or the national law of the State where the investment is made?

This point should be more precisely defined.

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SID/LC/8 (November 24, 1964)
Comments and Observations by the Republic of Austria on the Draft Convention¹

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

REPUBLIC OF AUSTRIA

Source: Letter addressed to the Bank from the Federal Ministry of Finance of the Republic of Austria dated November 13, 1964.

The Federal Ministry of Finance has the honor to submit the following

¹ Doc. 43

comments on the draft of a Convention for the Settlement of Investment Disputes:

As the Austrian delegate to the regional meeting in Geneva last February already stated, Austria welcomes the efforts of the World Bank to foster private investment and to improve the investment climate and considers the creation of an international Center for the Settlement of Investment Disputes a possible tool to help reach these goals.

As to the Convention itself, the Federal Ministry of Finance would like to state first that according to Article 18, the Center is supposed to have international legal personality, with all rights and obligations pertaining thereto. This idea appears feasible since States are free to create, by way of international treaties, new subjects of international law in the form of international organizations. The Center would, however, be the first example of constituting an international forum of arbitration in the form of a subject of international law. The existing international arbitration and judicial institutions are exclusively organs of such subjects of international law (e.g. the International Court of Justice, the Court of the European Community, the OECD, etc.). Even the Permanent Court of Arbitration does not have legal personality under international law.

The fact that the Center as a subject of international law is furnished with special privileges and that counsel, witnesses and experts, during the course of a proceeding, as well as the actual organs of the Center themselves are supposed to have far-reaching immunities, is in line with the present international practice (in particular, Council of Europe).

With respect to the provisions of Article 26, it may be stated that the definition "legal disputes arising out of or in connection with any investment" is rather vague. It will, of course, be difficult to define precisely the disputes which would fall within the jurisdiction of the Center. Pursuant to Article 26, paragraph 2, the jurisdiction of the Center depends on the consent of both parties to the dispute, and in particular also the consent of the defendant State (same as in the first draft). The new draft, however, no longer provides explicitly the possibility of general statements of submission, as contained in Article 2, paragraph 2 of the first draft. It is doubtful whether the new formulation is an improvement since it should be the goal of the Convention to allow as general an application as possible.

One of the principles of the present draft Convention (as expressed in Article 26, paragraph 1) is that investment disputes between a Contracting State and a national of another State, according to existing prorogation agreements shall fall under the (apparently exclusive) jurisdiction of the Center. This apparently is a renunciation of the idea that investment disputes, arising ex-contractu between a Contracting State and a national of the same Contracting State, could be settled before an international forum. However, it is not apparent that any precaution has been taken for the unrestricted realization of this principle. It would be welcome therefore if special attention could be given this problem during the coming conference.

With reference to Article 27, it is suggested to consider if it would not be practical to submit an investment dispute first to the local courts to provide a possibility that cases of breach of contract are remedied on

¹ See Doc. 29

² See Doc. 24

the level of local law and that private persons have the right to submit a dispute to the International Arbitration Center only after they have exhausted the legal remedies of the state which is party to their contract.

The problem of double nationality has now been considered in Article 30, but the question remains still open according to which criteria the nationality of a juridical person is to be decided.

The provisions of Article 57 give rise to certain questions. According to these provisions the competent authority is authorized only to review the authenticity of the award. Since the right - which is only natural and self-evident anyway - to review the authenticity is mentioned in the Convention, the Convention should also mention the no less evident right of the competent authority to check whether the award is one within the meaning of the Convention. Furthermore, under the present wording, each Contracting State has to execute awards of the Center in its area without review of the question if the award is compatible with the *ordre public*. Here arises the problem of the execution of such an award within the area of a Contracting State which is not a party to the current dispute, but in which e.g. the losing State owns property. This property could be attached by the executing private individual, although the norms relating to the immunity of States would have to be complied with (Article 58). In States which, as does Austria, acknowledge the concept of relative immunity, under certain circumstances an award could be executed, whereas in other States which believe in the concept of absolute immunity, such an execution could not be carried out. This could lead to unintended unequal treatment and therefore to difficulties. In this context, it may be stated again, that Austria would prefer to see the Convention abstain from making its own rule for the recognition and execution of awards, and that the United Nations Convention of June 10, 1958 concerning the recognition and execution of foreign arbitration awards should be declared applicable.

It may also be stated that according to Article 57, paragraph 2, the application for execution has to be submitted to the "Competent Authority" of the State in which execution is desired and that each Contracting State shall notify the Secretary General of the designation of the "Competent Authority". In this context it should be clarified if "Competent Authority" is supposed to refer to a single authority identified by its name, or whether the designation of a certain type of authority is sufficient.

With respect to Chapter VI which deals with the cost of proceedings, it may again be suggested, as has been suggested by the Austrian delegate to the regional meeting at Geneva, to consider a general rule that the losing party would be responsible for the entire cost of the proceedings, to restrain unfounded use of the Center (with the cost resulting therefrom for the defendant party).

There are still certain misgivings with respect to Article 69, paragraph 3 according to which each amendment of the Convention shall become effective at the end of 12 months following its adoption, irrespective of whether the amendment has been ratified according to local law within this period.

The Federal Minister of Finance lastly wishes to state that the comments are intended only as a contribution to the coming conference and that they do not constitute an official opinion of the Austrian Government.

Statement by the Delegation of Peru

The delegation of Peru expressly places on record, for the purposes of its participation in the Legal Committee, the text of the precepts contained in its Constitution, which are transcribed below:

"Article 17.- Domestic or foreign mercantile companies shall be subject without reservations to the laws of the Republic. Any contract between the State and foreigners, or any concessions granted by the former in the latter's favor, shall contain the submission of the latter that they expressly submit to the laws and to the courts of the Republic and that they waive all recourse to diplomatic protest."

"Article 23.- The Constitution and the laws shall protect and be binding on all inhabitants of the Republic equally. Special laws may be enacted because the nature of things so requires, but not because of a difference of persons."

"Article 31.- Property, by whomsoever owned, shall be governed exclusively by the laws of the Republic and shall be subject to such taxes, encumbrances and limitations as are thereby established."

"Article 32.- Foreigners shall be on equal terms with Peruvians in respect of property and may in no case claim exceptional status in respect thereto nor appeal to diplomatic protest."

The Peruvian delegation requests that the text of this document be included in the official documentation of the meetings of the Legal Committee for consideration of the Draft Convention on the Settlement of Investment Disputes between States and Nationals of other States, prepared by the International Bank for Reconstruction and Development and contained in its Report No. Z-12 of September 11, 1964.¹

¹ Doc. 43

The meeting was opened with the following welcoming remarks by
Mr. WOODS:

Ladies and Gentlemen:

It is a great pleasure for me in my capacity as Chairman of the Executive Directors of the World Bank to welcome you to this meeting. As you know, the Executive Directors and the staff of the Bank have been working for over two years on proposals for the estab-

¹ Legal Committee on Settlement of Investment Disputes, hereinafter referred to as Legal Committee

² This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

lishment of 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 or arbitration. Some of you have attended the consultative meetings which were held during the past year for the purpose of examining and exchanging views on a preliminary draft of a convention establishing such facilities and procedures. As President of the Bank I have on many occasions expressed my strong support for such a convention. It has received widely favorable comment in the press. You will understand, therefore, that I was gratified that the Board of Governors at its meeting in Tokyo last September approved a recommendation of the Executive Directors that they be instructed to work out a final text for submission to governments. The Executive Directors wisely decided that in carrying out this mandate which involves decisions on difficult legal points they would wish to be assisted by a committee of legal experts designated by interested governments. I want to assure you that the Executive Directors and I are delighted that so many experts have come here to help us.

I am grateful to our member governments for the cooperation which they are giving us. I am grateful to those governments which have found it possible to make available important officials for a long period at a time when the General Assembly of the United Nations is about to convene and many other international meetings are taking place. I can readily understand why some member governments, especially those with limited staff, have not found it possible to be represented here, and I express thanks and appreciation to those who have sent us comments or otherwise signified their interest.

We thought it important that this meeting of the Legal Committee should be open to all interested governments including those who have had reservations or who, for whatever reason, do not now envisage joining any convention which may emerge. It is our clear understanding that no government will be regarded as committed by its participation in this meeting of the Legal Committee. The text which will be presented -- I hope early in 1965 -- to governments will be the sole responsibility of the Executive Directors of the Bank.

Ladies and gentlemen, you are here for a working meeting and I do not want to take up your time with a lengthy address. Nor do I want to discuss or give you my views on the merits of the proposals before you. It is indeed we who will be interested in learning your views. However, I did not want you to start your sessions without a word of welcome and our best wishes for the success of your deliberations.

* * * * *

I now turn the meeting over to Mr. BROCHES, General Counsel of the Bank, who was designated by the Executive Directors to be the Chairman of the Legal Committee.

* * * * *

MR. BROCHES (Chairman) opened the meeting by adding his welcome to that extended by Mr. Woods, and explained the task of the Committee and the ways it should discharge those tasks as described in Doc. SID/LC/1. In contrast to the regional meetings, the present meeting was no longer concerned with the question of the desirability of creating machinery for facilitating the settlement of investment disputes since that question

¹ Doc. 44

had already been decided in the affirmative. The major task of the present Committee was to assist the Executive Directors in the formulation of a Convention which would then be submitted to governments by the Executive Directors. With respect to the contents of the Convention, the present meeting had broader tasks than those pertaining at the regional meetings since its aim was to formulate a detailed text of a Convention. The task of the Committee, however, was advisory and the Executive Directors would naturally be free to depart from any recommendation. However it was assumed that in view of the subject-matter of the Convention, the Executive Directors would rely heavily on the work of the Committee. In explaining the program and provisional schedule of work of the Committee as outlined in Doc. SID/LC/1 and Doc. SID/LC/2, the Chairman noted the composition of the Drafting Sub-Committee which would consist of 9 persons, and which would take up the review and drafting of provisions on which there appeared to be agreement in substance. When a substantial difference of opinion appears on any provision, the Chair would appoint an ad hoc working group to study the matter further. This group would report its findings back either to the main Committee or to the Drafting Sub-Committee depending on the outcome of its deliberations. The procedure envisaged could however be changed by the Executive Directors if the need arose and in the light of the experience gained during the first few days of the meetings. The discussion would generally be limited to reviewing one Article at a time, but experts who wished to make observations on other Articles because they had to leave the meeting before the Committee began discussing them would be given an opportunity to do so on Wednesday morning when the discussion on Chapter II, which was the most important part of the Convention, would commence. In addition written comments received by the Secretariat would be circulated. The report of the Committee to the Executive Directors would, in his opinion, consist of an agreed text, or where agreement on a particular Article was not reached, possibly the text of alternative provisions and their explanation. In addition, the final report might also include an interpretative commentary which the Executive Directors could append to the draft Convention when they in turn submit it to governments. This would explain the meaning of the provisions which might not always lend themselves to a clear definition.

Mr. LARA (Costa Rica) stated that, although his country had voted against the proposed Convention in the Tokyo meeting, after further study they had concluded that the Convention would be very useful. They had some comments on the draft but had had no opportunity to send them in writing. However, Paragraph 3(c) of the Rules for the Conduct of Proceedings seemed to limit discussion only to those who had sent written statements, or only to matters of small importance. It seemed that substantive matters could not be discussed at this meeting.

Mr. BROCHES (Chairman) stated that although the rules might not be entirely clear on this point there was no objection to the discussion of substantive amendments or remarks at any time. It was intended that specific proposals would be made in writing, and then circulated to other delegates before they were discussed at the meeting.

Mr. PEÑEZ (Ecuador) asked whether suggestions concerning drafting or translation should be taken up at the plenary sessions or referred to the Drafting Sub-Committee.

Mr. BROCHES (Chairman) stated that the Chair would be flexible. Matters of drafting and coordination of the three languages should be

* Schedule of Sessions of the Legal Committee of November 19, 1964, not reproduced

* See Doc. 41

* Doc. 44

left to the Drafting Sub-Committee. However, if during the plenary sessions specific problems should arise, they would be noted and referred specifically to the Drafting Sub-Committee. The delegates could also hand specific suggestions to the Secretariat.

Mr. LOKUR (India) thought that with respect to Rule 3(h) there ought to be a general discussion on each Article before amendments can be submitted.

Mr. BROCHES (Chairman) replied that this would probably depend on the type of provision under discussion. In some cases it might be useful to have comments on the form of specific amendments but this would not mean that amendments would have to be then formally accepted. The term "amendment" can be taken in two senses, first the defining and setting out how one thinks a provision could or should be improved, and second, the making of a formal proposal for a change. There should be free and full discussions, essentially a process of consultation, and the voting procedure should be limited to ascertaining the different views.

Mr. van SANTEN (Netherlands) asked for some clarification on the function of the working groups and whether Rule 4(g) read in conjunction with Rule 4(d) implies that problems referred to working groups could not be discussed again in the Legal Committee. This would be undesirable when points of substance are involved.

Mr. BROCHES (Chairman) agreed that on this point the Rules might require further clarification. In some cases, the working groups might find it expedient to refer the provisions to the Drafting Sub-Committee but should the point of substance which divided the members still persist after review by such Drafting Sub-Committee, there ought to be a further discussion in the Legal Committee and, if necessary, a second session of the working group.

Mr. KROGNON (Dahomey) after requesting that the previous draft⁷ of the Convention be made available to the experts for comparison with the draft now under discussion, suggested the creation of three drafting Sub-Committees for each of the official languages instead of the single one now envisaged. He did not think the Committee should bear general observations since governments had already had an opportunity of addressing themselves to this problem at the regional meetings.

Mr. BROCHES (Chairman) stated that a limited number of copies of the previous preliminary draft were available at the documents distribution desk. Furthermore a document-SID/LC/3⁸ listing the provisions of the earlier draft against those of this present one was circulated to facilitate a comparison between the two drafts. The present draft also included notes referring back to the earlier draft. As to the Drafting Sub-Committee it should in his opinion have 3 English, 3 French and 3 Spanish experts on it. The most progressive system of multilingual drafting appeared to indicate the preference of a simultaneous operation over that of translating from one guiding language into other languages. Consequently he thought it more advisable to proceed with one Drafting Sub-Committee.

Mr. GHACHEM (Tunisia) requested that the report (Bank Report Z-11)⁹ of the Chairman of the Regional Consultative Meetings to the Executive Directors of the Bank summarizing the outcome of the regional meetings which was only issued in English be made available in French and Spanish as well, so that

⁷ Doc. 24

⁸ Not reproduced

⁹ Doc. 33

all the experts present could judge the outcome of their observations at the regional meetings. By way of example he had in mind the question of the definition of the term "investment" and the creation of a guarantee fund which would encourage investments in the developing countries which was suggested at the Addis Ababa Meeting." As regards the Drafting Sub-Committee he thought the ideal composition would be of delegates who had an expert knowledge of all three languages.

Mr. BROCHES (Chairman) responding said that the last request would be the most difficult to meet. As to his report to the Executive Directors (Z-11) it was only due to the shortage of time in July that translations were not then prepared, but these would now be undertaken and submitted to the Committee as soon as possible.

Mr. SELLA (Secretary) referred to various administrative arrangements for the meeting.

/The meeting then recessed for ten minutes/

Article 1"

Mr. LARA (Costa Rica) stated that his country had no objection to Paragraph (1). However, concerning Paragraph (2) they thought it necessary to refer to an authorization of the Administrative Council adopted by at least two-thirds of the votes of all its members. He also suggested that the word "establish" be substituted for the word "provide" in the first sentence of Paragraph (2), and that the word "distribution" be substituted for the word "dissemination" in the second sentence of this Paragraph, which would improve the Spanish version.

Mr. BROCHES (Chairman) stated that the word "all" had been omitted from the Spanish text by mistake. The other suggestions would be recorded in the summary records and would be considered by the Drafting Sub-Committee.

Mr. MELCHOR (Spain) suggested that the members of the Drafting Sub-Committee be appointed as soon as possible, since they would have to review also some inconsistencies between the existing English, French and Spanish texts; and that the meeting be continued in the afternoon. Concerning the second sentence of Paragraph (2) of this Article he suggested that the words "including research" should be replaced by the words "including the study of the manners and ways in which international investments are made". This would express more clearly what is intended in the text.

Mr. BROCHES (Chairman) stated that for administrative reasons it was impossible to continue the meeting that afternoon. At a later stage, however, plenary meetings could be held in the afternoons if necessary.

Mr. ESPINOSA (Venezuela) explained that the suggestion of the Costa Rican delegate to substitute the word "establish" for the word "provide" might fundamentally modify the purpose of this Article. The original meaning of this Article should be maintained, namely that only facilities are made available to governments for settling investment disputes.

* See Doc. 25
" Cf. Doc. 49

Mr. FUNES (El Salvador) shared the views expressed by the Costa Rican and Spanish delegates and added that Paragraph (2) should refer to "related" or "connected" activities instead of "ancillary" activities.

Mr. BERNARD (Liberia) suggested that Article 1(2) read: "The Center shall provide facilities ..." and that, if it were decided that the Center should have a wide latitude, the words "but not limited to" be inserted after the word "including" in the second sentence.

Mr. UKAWA (Japan) suggested that the second sentence of Article 1(2) read: "The Center may undertake such ancillary activities as the Administrative Council may authorize in the field of international investment disputes". The purpose of his suggestion was to remove doubts as to the work of the Center which was to be set up with the specific aim of settling investment disputes.

Mr. KPOGNON (Dahomey) thought Article 1(1) would be clearer if it read: "There is hereby established under the terms of this Convention an ...". He then suggested the deletion of the words "the collection" from Article 1(2) and its redrafting in the following manner: "The Center may in addition, upon authorization of the Administrative Council taking its decision by a majority of not less than two-thirds of the votes of all members, undertake such ancillary activity, including research and the dissemination of information in the field of international investment."

Mr. van SANTEN (Netherlands) defended the text of Article 1(1) and particularly the use of the word "established" which he thought conveyed the nature of the proposition to which the Convention sought to give expression.

Mr. SAPATEIRO (Portugal) suggested deferring discussion on the name of the Center until such time as the scope of its activities was determined by the Committee. As regards Article 1(2) it should be more clearly defined and the correlation between arbitration and conciliation and these ancillary activities more clearly stated.

Mr. LOKUR (India) suggested that the Center be named "International Center for Facilities for Settlement of Investment Disputes", since the Center is not intended to settle the disputes itself. With respect to the ancillary activities of the Center, he agreed that the term was vague and wondered whether the research, collection and dissemination of information would not go beyond the mere purpose of the Center. This would be most important in view of the financial burden involved. He would therefore prefer to delete reference to other facilities, at least at this time.

Mr. HIMADEH (Lebanon) said he did not share the Indian delegate's views regarding the change of the name of the Centre. Although it is true that the Centre does not always settle disputes, it is at least intended to do so and the prefix "for" indicates only this intention. He also believed that some ancillary activities could actually serve the purpose of reducing expenses rather than increasing them. He mentioned as example that if the activities of the Centre should be made to include giving advice on new investment agreements with the object of insuring clarity and fairness of terms, investment disputes would be reduced

and their settlement would be facilitated if they did arise.

Mr. BROCHES (Chairman) elaborating on Mr. HEMADEH's statement mentioned the possibility of the Center fulfilling some sort of a technical assistance function and of undertaking the publication of investment agreements, if not secret, which he thought would serve a useful purpose. However, the Administrative Council would have to decide these matters. In so far as the financial aspects were concerned he thought it would be more advisable to discuss them in the context of Article 17.

Mr. ONG (Malaysia) stated that the scope of the second phrase of Article 1(2) might be restricted by inserting the words "to that end" at the beginning.

Mr. BROCHES (Chairman) said that this suggestion could be examined by the Drafting Sub-Committee, but added that he had some doubts as to the usefulness of this expression in view of the very narrow scope of the first phrase of Article 1(2).

Mr. FUNES (El Salvador) thought it would not be necessary to specify in this Article the ancillary activities, and that their determination should be left to the Administrative Council.

Mr. CUNHA RIBEIRO (Brazil) indicated that the reference to "research" in Paragraph (2) was satisfactory.

Mr. BROCHES (Chairman) stated that those delegates who had not arrived yet would be given an opportunity to give their comments on Article 1 the next morning.

Article 2

Mr. BROCHES (Chairman), before calling on the speakers, indicated that Pakistan, which was not yet represented at the meeting, had in its written comments suggested the deletion of the second sentence of Paragraph 2. He assumed that there was no objection to the provision but mentioned that Pakistan thought it unnecessary since the Center would always be free to make such arrangements.

Mr. HELLNERS (Sweden) thought that Article 2(2) which is a new provision and Articles 65-66 are somewhat overlapping.

Mr. PINTO (Deputy Secretary) explained that the intention of Article 2(2) was to empower the Administrative Council to make permanent arrangements for the conduct of proceedings at particular institutions under the conditions laid down in Article VII.

Mr. BROCHES (Chairman) added that the new provision of Article 2(2) was added to remove the impression, expressed at some of the regional meetings, that all proceedings would have to be held at the seat of the Bank. He agreed that improvements could be discussed.

Mr. OUMA (Uganda) suggested a modification of Paragraph (2) to enable the arrangements referred to therein to be made not only with public international institutions, which might not exist in certain countries, but also with domestic institutions, private or public.

Mr. van SANTEN (Netherlands) considered Article 2(2) very

¹² See Doc. 45

useful in view of the fact that some countries might prefer proceedings to be held at a venue other than the seat of the Center. He then requested a clarification on the role of the Center where proceedings were held outside its seat. He also thought the Convention omitted mentioning the functions of the Secretary General beyond registration and thought this might be elaborated as the Secretary General should provide assistance as a secretary to the tribunals in cases of arbitration and conciliation. This observation would certainly apply to proceedings which were held at the Permanent Court of Arbitration in which case the Secretary-General of that Court should act as Secretary to those proceedings. For this reason he thought it advisable to delete the words "offices" and "administrative" from the second sentence of Article 2(2) so as not to narrow down the type of services which might be made available to parties who chose to submit disputes to other institutions through the Center.

Mr. BROCHES (Chairman) replied that the question of secretarial services was to be covered by the rules which were to be adopted by the Administrative Council pursuant to Article 6. In the case of cooperation with other institutions it would depend on the arrangements made. They could merely cover physical facilities or procedural ones also. The language incidentally corresponds to that of the Hague Convention of 1907¹³ which authorizes the Permanent Court to place "its offices and staff" at the disposal of the Contracting Parties.

The meeting adjourned at 1.30 p.m.

¹³ Hague Convention for the Pacific Settlement of International Disputes of 1907

SID/LC/7 (November 24, 1964)

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PROPOSAL OF MR. RATSIRAHONANA (Malagasy Republic)

Article 1 (1). The purpose of the Center is to provide the parties to an investment dispute with facilities for conciliation or arbitration of such a dispute in accordance with the provisions of this Convention.

[The rest of the paragraph is unchanged.]

The Legal Committee reconvened at 10:35 a.m.

Article 2

Mr. BIGAY (Central African Republic) suggested the creation of regional seats of the Center and the amendment of Article 2(1) to attain this aim. The jurisdiction of the regional seats would be compulsory unless otherwise agreed by the parties. Replying to a question by the Chairman Mr. BIGAY explained that in determining the location of proceedings the geographic location of the State which was party to the dispute, and not of the investor, would control the question of venue.

Mr. LOKUR (India) questioned whether Article 2(2) was necessary in view of what was stated in chapter VII of the Convention. At any rate in his view all matters concerning the place of the proceedings should be dealt with in that chapter. He then suggested the deletion of any reference to specific or specific types of institutions referred to in the second sentence of Article 2(2). He would then leave a general empowering provision stating that where proceedings were held at a place other than the seat of the Center, the Center would make the necessary arrangements.

Mr. KPOGNON (Dahomey) requested that the Drafting Sub-Committee be appointed as soon as possible. With respect to the drafting of this Article, he suggested that paragraph (1) read as follows: "The seat of the Center is that of the International Bank for Reconstruction and Development. The Center shall make all arrangements with the Bank for the use of its offices and administrative services." In the third sentence, the word "lieu" should be substituted for the word "endroit" in the French version. The last part of this sentence should read "by a majority of two thirds of its members"; and in paragraph (2) the word "a" should be substituted for "dans" after the expression "de conciliation et d'arbitrage" in the French version.

Mr. BROCHES (Chairman) then read the names of the members of the Drafting Sub-Committee: Messrs. Belin (USA), Burrows (UK), Kpognon (Dahomey), Lokur (India), Malaplate (France), Mantzoulinos (Greece), Melchor (Spain), Perez (Ecuador) and Pinto (Guatemala).

Mr. LARA (Costa Rica) suggested that the second sentence of paragraph (1) of this Article be deleted because it covers administrative and not institutional arrangements. Since these administrative arrangements are of a temporary nature they should not be included in the organic law of the Center. He suggested that the following be added to Article 6: "the Center is empowered to take all administrative measures which might be necessary for the good functioning of this institution."

Mr. BERTRAM (Germany) suggested that the discussion about the moving of the seat of the Center in the last sentence of paragraph (1) be postponed until Article 69 concerning amendments of the Convention is discussed. With respect to the last sentence of paragraph (2), he thought that the reference to "public" interna-

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

tional institutions was too restrictive, since there were other institutions of recognized authority dealing with arbitration, like the International Chamber of Commerce, which are non-governmental. Therefore, he proposed that the word "appropriate" be substituted for the word "public."

Mr. BOMANI (Tanzania) suggested that the word "may" be used instead of "shall" in the second sentence of Article 2(1). As to the second sentence of Article 2(2) he proposed deletion of the specific mention of the Permanent Court of Arbitration as well as the deletion of the word "public" preceding international institutions.

Mr. ROUHANI (Iran) proposed that Article 1(2) be amended and that the Administrative Council's authorization refer to the Secretariat rather than to the Center itself since the Council was an organ of the Center, and a part could hardly authorize the operation of the whole.

Mr. BROCHES (Chairman) suggested that drafting comments henceforth be made directly to the Drafting Sub-Committee which had been established using Mr. CANCIO as the channel of communication. He then requested a show of hands on the proposal to change the name of the Center which showed a majority in favor of having the name as it now was. He then proposed to refer the first sentence of Article 1(2) to the Drafting Sub-Committee to consider the various drafting suggestions which were made.

Mr. MELCHOR (Spain) suggested that in connection with the name of the Center, a better word be substituted for the word "dispute" in the Spanish version.

Mr. PINTO (Guatemala) agreed with the Delegates who at the previous meeting had suggested that the ancillary activities referred to in Article 1(2) be limited. The Center should not be empowered to investigate or do research in any subject it wishes to. He proposed that this provision be modified accordingly or that it be deleted altogether, since there are other organizations that could undertake this kind of research.

Mr. BROCHES (Chairman) summarized the discussion and stated that no question of substance had been raised with respect to the first sentence of Article 1, paragraph (2). This provision could therefore be transmitted to the Drafting Sub-Committee. With respect to the second sentence of this paragraph, however, several comments of substance had been made and it would be advisable to have it examined by a working group. This working group, which would consist of the delegates from Liberia, Guatemala, India, Japan, Lebanon, Spain, Portugal, Australia, Germany and Brazil would meet that afternoon at 3 p.m. in Room 647.¹

With respect to Article 2, Mr. BROCHES asked Mr. LARA (Costa Rica) to explain whether he thought that his suggestion to delete the second sentence of paragraph (1) and to have this question included in Article 6 should be dealt with by the Drafting Sub-Committee, or be considered as a point of substance.

Mr. LARA (Costa Rica) said that he thought it more prudent to consider this as a point of substance, and suggested that the Chairman request a show of hands in this respect. The majority

¹ For its report see Docs. 69 and 70

² See Report Working Group I, Doc. 31

agreed with Mr. LARA's suggestion to delete the second sentence of Article 2, paragraph 1, and to have the substance moved to Article 6.

Mr. MELCHOR (Spain) objected to the proposal to move the sentence dealing with the change of the seat of the Center to Article 6.

Mr. BROCHES (Chairman) decided that the question would be taken up by the drafting Sub-Committee when it came to deal with Article 6. He then took up the proposal to defer discussion on the provision relating to the possibility of removal of the seat of the Center until the question of amendments (Article 69) had been discussed.

Mr. LOKUR (India) saw no advantage in postponing discussion on this question until Article 69 had been reviewed,

Mr. BROCHES (Chairman) said that he tended to agree with Mr. LOKUR. He indicated that in the previous draft there were different provisions on amendments, making them easier. But in the light of objections made on constitutional grounds by several participants at the regional meetings a somewhat different system had been tried which is patterned in part after the UNESCO charter. He soon intended to appoint a Working Group on the question of amendments to the Convention. The removal of the seat, which he still did not regard as an amendment, might be a typical example of action that should not require the formality of an amendment. And other examples might be found during the discussions. It would be difficult to agree on an amendment procedure without making clear which provisions could be changed by a majority vote and which could not, for political or constitutional reasons. This should be kept in mind while going through the draft.

Mr. MELCHOR (Spain) stated that on the question of the change of seat he disagreed with Mr. BERTRAM. First, although the change of seat is a very important fact in the life of a juridical entity, it should not require an amendment of its charter. Secondly, it was logical after establishing the domicile of the Center, to indicate the manner of changing it. And there would be a sufficient safeguard in the requirement of a two-thirds majority of all the members of the Council. On the other hand, he agreed with Mr. BERTRAM that the word "appropriate" be substituted for the word "public" with reference to international institutions in Article 2 (2).

Mr. BERTRAM (Germany) explained that his suggestion was at this stage merely one of form, and not of substance, i.e. a matter of rational arrangement of the subject matters with which the Convention dealt.

Mrs. VILIGRATTNER (Austria) suggested that as the question of moving the seat of the Center was one of substance, it ought to be decided by a unanimous vote rather than a two-thirds majority.

Mr. KPOGNON (Dahomey) suggested that decisions on the question of moving the seat of the Center require a majority of three-quarters.

Mr. LOKUR (India) suggested that the majority required for moving the seat of the Center be identical with that required for amendments of the Convention.

Mr. BROCHES (Chairman) requesting a show of hands announced that there seemed to be a general consensus on the substance of the last sentence of

Article 2 (1) as it now stood, which he therefore suggested be submitted to the Drafting Sub-Committee. The matter however might be reviewed again when the question of amendments was taken up. He then requested comments on the suggestion of having regional sub-seats of the Center and the further suggestion that disputes submitted to the Center be dealt with at the regional sub-seat in which the State which was party to the dispute was located.

[The meeting then recessed for 15 minutes.]

Mr. ORTIZ (Peru) requested clarification of the meaning of the second part of Article 2.

Mr. BROCHES (Chairman) explained that the first sentence of Article 2 referred to the "administrative" seat of the Center. This seat may be moved by a decision of a large majority of the Administrative Council. The question of the place of proceedings was an entirely independent one. It was subject to the agreement of the parties. Failing an agreement between the parties proceedings would be held at the seat of the Center but as aforesaid the parties were entirely free to choose a different venue, and for this reason the two questions should be clearly distinguished. Article 2 (1) dealt exclusively with the seat of the Center.

Mr. BERNARD (Liberia) objected to the creation of regional centers, since this would mean duplication of work, additional staff and probably an increase in the financial burden.

Mr. KPOGNON (Dahomey) agreed with the suggestion to create regional centers and did not believe that this would increase the financial burden since the World Bank already had offices in various continents, which might serve as regional centers.

Mr. Van SANTEN (Netherlands) did not favor the proposal on regional centers because the work of the Center was to be distinguished from that of the individual Commissions and Tribunals which could clearly convene anywhere. But the work of the Center should in his opinion remain at one place.

Mr. CHACHEM (Tunisia) did not consider the creation of regional centers as necessary in view of the provisions of Article 66 and agreed with the present version of Article 2.

Mr. BROCHES (Chairman) stated that the two issues involved should be dealt with separately. The first one, concerning the creation of regional centers and which was of an administrative nature, should be examined now. The second, which dealt with the location of proceedings, could be examined later and a provision along the lines suggested by Mr. BIGAY could be inserted in the Article dealing with location of proceedings. The majority agreed that Article 2 should not contain references to the creation of regional centers.

Mr. BIGAY (Central African Republic) agreed that his suggestion to make the location of proceedings dependent upon the geographical location of the States involved be discussed when reviewing the Article on location of proceedings.

Mr. BROCHES (Chairman) wished to know whether there were any more questions of substance on Article 2(2) as the discussion on Article 2(1) was now closed. He thought the first sentence was not controversial and that the comments made related to drafting. The second sentence, however, appeared to raise three groups of comments. First, that the sentence was

completely redundant. Second, that it unnecessarily duplicated the provisions of Chapter VII and that it should consequently be deleted in Article 2(2). Third, and that applied whether the provision remained in Article 2(2) or in Chapter VII, that the word "public" or "international" or both be omitted or that specific mention of the Permanent Court be omitted. After requesting a show of hands the Chairman announced that the majority of delegates appeared to favor the use of broad terms, e.g., "any appropriate institution whether public or private" leaving the exact drafting to be decided by the Sub-Committee. An additional show of hands indicated that the majority were in favor of retaining the mention of the Permanent Court in the text.

Mr. DA CUNHA (Brazil) suggested that, irrespective of the creation of regional centers, the Convention should stipulate that the meetings of specific arbitration tribunals should take place in countries which were not directly or indirectly connected with the subject of the dispute. This would avoid undue interferences.

Mr. BROCHES (Chairman) suggested that this matter be discussed under Chapter VII.

Mr. MALAPLATE (France) suggested that Article 2(2) could refer to institutions such as the Permanent Court of Arbitration.

Mr. BROCHES (Chairman) thought that if this were done, after the words "Permanent Court of Arbitration" it should be said "and any other appropriate institution", since these might be of a different kind than the Permanent Court.

Mr. LOKUR (India) suggested that there should be omitted from the second sentence of Article 2(2) the statement "with the Permanent Court of Arbitration and other public international institutions."

Mr. BROCHES (Chairman) indicated that if this were done, it might be necessary to give illustrations of the type of arrangements contemplated in the comment which will accompany the draft Convention. Mr. BROCHES then requested a show of hands on whether the suggested deletion would be acceptable and the response was negative.

Mr. O'DONOVAN (Australia) requested the canvassing of views on the qualification of the words "services and facilities" which he favored, but which some delegates wished broadened, since it might prove to be a matter of substance.

Mr. BROCHES (Chairman) explained that the type of facilities would generally depend on the institution which would be requested to assist in the conduct of proceedings. He did not consider the question as one of substance but he would invite the special attention of the Drafting Sub-Committee to this point, and if they discovered that a question of substance did after all arise they would send it back to the plenary meeting.

Mr. O'DONOVAN (Australia) agreed with the Chairman's proposal provided the Sub-Committee directed their attention to the similar wording in sub-paragraph (1) as well as sub-paragraph (2).

Mr. van SANTEN (Netherlands) requested that the interpretive comments accompanying the final text of the Convention clearly indicate that where proceedings were held at the headquarters of another institution it could be asked to provide Secretarial functions also.

⁴ For its report see Doc. 69

Article 3

Mr. BROCHES (Chairman) had some doubts about the necessity of this Article and about the reference to the Panels, but since in his opinion no question of policy was involved, he suggested that the matter be dealt with by the Drafting Sub-Committee.

Mr. LOKUR (India) suggested that provision be made for the creation of an Executive Committee to be in charge of the day-to-day business of the Center. Such Executive Committee would perform such functions as the Administrative Council might delegate to it.

Mr. LARA (Costa Rica) suggested that, as a matter of drafting, the present or the imperative tense rather than the future be used in the Convention. He added that since Panels cannot be considered as organs, he would suggest that the provision read along the following lines: "The Center is composed of an Administrative Council, a Secretariat, and a service of Conciliators and Arbitrators, according to lists to be presented separately to that end."

Mr. BROCHES (Chairman) suggested that Mr. LOKUR's comment be examined when discussing Article 4, and that the provision of Article 3 be referred to the Drafting Sub-Committee. The Drafting Sub-Committee should take particular note of Mr. LARA's specific suggestion concerning the organs of the Center.

Article 4

Mr. BERNARD (Liberia) declared that he had no objection to the creation of an Executive Committee and that Article 4(1) and 4(2) were acceptable to him both in substance and in form.

Mr. van SANTEN (Netherlands) preferred to defer discussion on the creation of an Executive Committee until Article 6 was discussed and the functions of the Council were more clearly defined.

Mr. BROCHES (Chairman) agreed with the delegate of the Netherlands that it would be preferable to defer discussion on this matter until such time as Articles 4, 5, 6 and possibly also 7 were discussed. He then invited comments on the suggestion made by Pakistan⁷ to restrict membership of the Administrative Council to members of the Bank.

Mr. LARA (Costa Rica) suggested that the words "Council shall be composed" in Article 4(1) be changed to "Council is composed." He also suggested that the second sentence of said Paragraph (1) be modified to read: "No alternate representative shall be able to vote or act in that capacity unless there is a case of absence or incapacity to act of the representative."

Mr. FUNES (El Salvador) stated that, concerning Article 4(1), the Administrative Council was composed of one representative of each State, and that therefore it was not correct to use the second sentence of this paragraph (1). He would prefer that said second sentence state in a more affirmative manner that the alternate representative would be able to act and vote in the case of absence or incapacity of the representative.

Mr. KPOGNON (Dahomey) suggested that the name of the Administrative Council be changed since this body would deal with matters of policy also. He would accept the proposal to create an Executive Council provided it did

⁵ See Doc. 52

⁶ For its report see Docs. 69 and 70; cf. Austrian Amendment, Doc. 53

⁷ See Doc. 45

not entail any financial obligations, e.g., its members would not receive any remuneration. He then considered the word "absence" redundant in the second sentence of Article 4(2). "Inability" in his opinion covered absence also. Continuing his remarks he requested a clarification of the meaning of the words "otherwise act as a representative" in that sentence. Finally he suggested the redrafting of Article 4(2) to read: "Unless there is an explicit designation, the Governor and Alternate Governor of the Bank appointed by a State which is a party to the Convention, shall be ex officio representative and alternate representative of that State on the Council."

Mr. BROCHES (Chairman) explained that the words "otherwise act" etc., referred to matters such as participation in the discussions of the Council, and that the drafting might be improved to reflect this intention.

Mr. TSAI (China) supported the suggestion of limiting membership of the Council to members of the Bank. In fact he thought the Convention should not be open to signature by States which were not members of the Bank.

Mr. MALAPLATE (France) suggested improvements of the text and in particular the French version which would remove doubts as to the composition of the Administrative Council and clearly indicate whether the State would be represented by one or two representatives.

Mr. BROCHES (Chairman) explained the origin of the language adopted in Article 4(1) and 4(2) which should certainly be looked into by the Drafting Sub-Committee.

Mr. van SANTEN (Netherlands) regretted that Pakistan had not stated the reasons for its suggestion and thought that it would be undesirable to have member countries participating in the financing of the Center without being able to participate in the works of the Administrative Council.

Mr. BROCHES (Chairman) said that since Pakistan had not raised the issue in connection with the problem of membership, he would think that the suggestion was made as a matter of convenience, under the assumption that the Council would consist of Governors and Alternate Governors of the Bank.

Mr. van SANTEN (Netherlands) asked whether the observation of Mr. KPOGNON concerning the tasks of the Council as to the determination of the policy of the Center, would be discussed under Article 6.

Mr. BROCHES (Chairman) agreed to this question being discussed under the residual clause of Article 6, but noted that it was also somewhat related to the provision of Article 1(2).

Mr. van SANTEN (Netherlands) mentioned that Article 7(4) provided for voting by mail and that, in this case, the provision on absenteeism could not apply.

Mr. BROCHES (Chairman) explained the procedure used in the Bank and expected that if used, the procedure of voting by mail would apply to the entire Council. He then said that in view of the slow progress of the meeting, he would propose that a plenary session be held on Wednesday afternoon also. He hoped the discussion on Chapter I would be concluded on Wednesday morning so that discussion on Chapter II could commence at the afternoon meeting. He suggested that the Drafting Sub-Committee meet at 9:00 a.m. Wednesday morning.

Mr. MELCHOR (Spain) suggested that, as some delegates would have to

leave the meeting soon, the discussion of Chapter II, which was of great importance, should start in the afternoon of the next day, even if the discussion of Chapter I was not concluded at that time, so as to allow them to submit their comments.

Mr. BROCHES (Chairman) agreed and suggested that henceforth remarks⁴ on drafting and translation be submitted to the Drafting Sub-Committee⁵ and not to the plenary meeting.

[The meeting adjourned at 1:30 p.m.]

⁴ See Doc. 54

⁵ For its report see Docs. 69 and 70

SID/SC/D/1 (November 24, 1964)

WORKING GROUP I

Chairman: Mr. Melchor de las Heras

Report on Article 1(2), second sentence.

1. At the request of the Legal Committee the second sentence of Article 1(2) was considered on November 24, 1964 by a Working Group consisting of Mr. Melchor de las Heras (Spain) (Chairman), Messrs. Bernard (Liberia), Bertram (Germany), Cunha Ribeiro (Brazil), Himadeh (Lebanon), Lokur (India), O'Donovan (Australia), Pinto (Guatemala), Ratsirahonana (Malagasy Republic), Sapateiro (Portugal), Ukawa (Japan).
2. With the exception of the delegates of Lebanon and Liberia, the Working Group felt that this provision as drafted at present was unsatisfactory and would be unacceptable to the majority of states. It lacked precision and seemed to give the Center new functions, such as research and the collection and dissemination of information, which were not in fact ancillary to its main purpose of providing facilities for the settlement of investment disputes, and would, in addition, involve considerable expense. Moreover, constitutionally states would be reluctant to accept a Convention which imposed obligation not precisely spelled out therein and capable of being broadened merely by the vote of a qualified majority of the principal organ of the entity created.
3. Two proposals were made by way of compromise. The delegate of Japan said he might be able to support the provision if "ancillary activities" were precisely defined as relating solely to the settlement of investment disputes. The delegate of Lebanon proposed that the Center might be permitted to undertake ancillary activities only with the unanimous approval of the Administrative Council.
4. It was the conclusion of the majority of the Working Group that, for the reasons stated, the second sentence of Article 1(2) should be deleted. In supporting this conclusion the delegate of Guatemala pointed out that even if the Convention did not confer on the Center any specific

power to undertake "ancillary activities", it might well give advice and supply information, as did the secretariat of the ICJ and some provision on the matter might be included in its internal regulations.

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SID/LC/17 (November 27, 1964)
Proposals of Mr. B. N. Lokur (India) to Legal Committee

1. Article 3

After the words "an Administrative Council", add the words
", an Executive Committee".

2. New Provision

After Article 7, add a new Title as follows:

" Title 2A

The Executive Committee

Article 8A

(1) The Executive Directors of the Bank shall be ex officio members of the Executive Committee.

(2) The President of the Bank shall be the ex officio Chairman of the Executive Committee but shall have no vote. During the President's absence or inability to act and during any vacancy in the office of the President of the Bank, the person for the time being acting as President of the Bank shall act as Chairman of the Executive Committee.

Article 8B

In addition to the powers and functions vested in it by other provisions of this Convention, the Executive Committee shall

- (a) have general control and supervision over the activities of the Centre;
- (b) deal with urgent matters relating to the activities of the Centre; and
- (c) deal with such other administrative matters as may be referred to it by the Secretary-General or as may be directed by the Administrative Council.

Article 8C

(1) The Executive Committee shall meet at least once a month.

(2) Each member of the Executive Committee shall have one vote and all matters before the Executive Committee shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Executive Committee shall be a majority of its members.

Article 8D

The Chairman and members of the Executive Committee shall serve as such without remuneration."

3. Article 10(1)

Omit the words "and Deputy Secretaries-General" and make consequential amendments.

4. New Provision

After Article 10(1), add the following paragraph:

" (1A) The Deputy Secretaries-General shall be elected by the Executive Committee by a majority of not less than two-thirds of its members upon nominations made by the Chairman."

5. Articles 31(3) and 40(2)

At the beginning of Article 31(3) and Article 40(2), add the following:

" If the Executive Committee is prima facie satisfied that the dispute is within the jurisdiction of the Centre,"

6. Articles 63 and 64

For the words "Administrative Council", substitute the words "Executive Committee".

7. The arrangements to be made with the Bank, the Permanent Court of Arbitration and other institutions for the use of their offices and their administrative services and facilities should be with the approval of the Executive Committee.

SID/LC/25 (December 1, 1964)

Amendment to Article 3 of texts prepared by the Drafting Sub-Committee (SID/LC/19)¹ submitted to the Legal Committee by Mrs. Villgratner (Austria)

"Article 3

The organs of the Centre shall be the Administrative Council and the Secretary General; the Centre shall also have a Secretariat and maintain a Panel of Conciliators and a Panel of Arbitrators."

¹ Not reproduced, see Doc. 69

SID/LC/11 (November 25, 1964)

Comments by Mr. da Cunha (Brazil) to Legal Committee

Comments and Suggestions on Article 4

Notwithstanding the link between the Bank and the Center, which to some extent is easy to understand, in organizing the Center we should not lose sight of the fact that it is a tribunal; that is, an organ having as one of the basic reasons for its existence the security and independence of its members.

In view of the foregoing, we suggest that Article 4 be drafted to read as follows:

"The Administrative Council shall be composed of one representative and one alternate representative, freely elected by each Contracting State. The alternate representative will be able to act and vote only in the case of absence or incapacity of the representative".

Also, it is suggested that paragraph (2) of the same Article be deleted. We feel it would be desirable to avoid too close a link between the Bank and the Center concerning the decision-making organs of the Center.

Furthermore, once the rule contained in the aforementioned paragraph is established, and the proposal that the Governor of the Bank be designated ex-officio as the representative of his State on the Administrative Council of the Center, except of course in the possible case of a different designation, we believe that the governments of the Contracting States would find their freedom of action hampered by the natural inhibition that could arise should it be desirable to appoint a person other than the Governor of the Bank already appointed. In fact, the appointment of a third person could appear to indicate distrust in the Governor, which could place him in an embarrassing situation.

The Legal Committee reconvened at 10:37 a.m.

Mr. BROCHES (Chairman) announced that Mr. BURROWS of the U.K. had been asked to chair the Drafting Sub-Committee. He then reported that the special working group had decided to omit the second sentence of paragraph (2) of Article 1 from the text of the Convention.

Article 5

Mr. BROCHES (Chairman) suggested that the words "absence or inability to act" in this Article should be dealt with by the Drafting Sub-Committee in a manner similar to the manner they would treat this term in other parts of the Convention.

Mr. LARA (Costa Rica) suggested that the no voting provision be qualified to take into account circumstances where the Chairman's vote was called for as, e.g., in Article 61.

Mr. BROCHES (Chairman) replied that Article 5 dealt exclusively with the Administrative Council and with the role of the Chairman in that organ whereas Article 61, and other Articles, imposed certain specific tasks on the Chairman. In his opinion there was no inconsistency between Article 5 and Article 61.

Mr. LOKUR (India) suggested that the Chairman be elected by the Council *inter alia* because the President of the Bank might find it difficult to attend the Council's meetings if the seat were at some future date to be transferred from the headquarters of the Bank.

Mr. BROCHES (Chairman) did not see any particular difficulties insofar as attendance in meetings was concerned. He thought it desirable for the President to act as Chairman of the Council so that he might perform his functions under the Convention in this latter capacity.

Mr. KPOGNON (Dahomey) supported the text which gave the Chairman no voting rights and welcomed the proposal to amalgamate the office of Chairman with that of President of the Bank.

Mr. LARA (Costa Rica) reiterated that in his views there was a conflict between Article 5 which denied the Chairman the right of vote and Article 61 which empowered him to make certain decisions.

Mr. BROCHES (Chairman) suggested that the Drafting Sub-Committee see whether they could clarify the provision further to avoid any impression of inconsistency.

Mr. GHACHEM (Tunisia) wished to know whether there would be any incompatibility between membership on the Council and membership on one of the Panels? He did not think such an incompatibility should exist.

Mr. BROCHES (Chairman) after ascertaining the sense of the meeting with regard to incompatibility announced that there did not appear to be any objection to the provisions as they now stood.

Mr. LOKUR (India) asked whether the Chairman should not have a right

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

of vote in the case of tie?

Mr. BROCHES (Chairman) thought it advisable to leave this matter as it stood. Most of the decisions required a two-thirds majority and there might be some misapprehension on this matter in view of the Chairman being the President of the Bank.

Article 6 (1)

Mr. BROCHES (Chairman) referred the delegates to the last part of document SID/LC/4¹ which contained the type of rules which the Administrative Council might possibly consider and on which he would welcome general comments. The text required that these rules be adopted by a simple majority only.

Mr. FUNES (El Salvador) asked if the various rules referred to in Article 6 would be submitted to the Contracting States for ratification and the States would have an opportunity to discuss them prior to the adoption by the Council. The rules of procedure would constitute a system of law as important as substantive law. He thought it difficult for States to ratify a Convention that empowers the Administrative Council to adopt such rules, unless the rules have been previously approved by the States.

Mr. BROCHES (Chairman) thought this question was inspired by Article 5 (iii), and not 6 (i) which merely concerns the internal administration of the Centre. Those rules would be binding by the mere fact of their adoption by the Council. The same was not true of subparagraph (iii) which postulated that the procedural rules would not be obligatory. They were model rules which the parties were free to adopt or not.

Mr. BERTRAM (Germany) pointed out that the first sentence of Article 19 of the draft Administrative Rules, implied that the Administrative Council has the power to approve "schedules of charges". This was important enough to necessitate a two-thirds majority for the approval of such schedules.

Mr. VAN SANTEN (Netherlands) suggested that the limitations of the powers of the Council be more precisely indicated by adding the words "and in accordance with" the Convention, in the opening sentence of Article 6.

Mr. BROCHES (Chairman) suggested that the Drafting Sub-Committee take note of this point and then asked Mr. BERTRAM to indicate whether in his opinion all rules under subparagraph (i) should be adopted by a two-thirds majority or only the approval of the schedule of charges.

Mr. BERTRAM (Germany) said that he had in mind only the approval of the schedule of charges.

Mr. SAPATEIRO (Portugal) suggested that the matters contemplated under subparagraphs (i) and (ii) be subject to a two-thirds majority since the decisions involved were important and might clash with the provisions of the Convention. On the other hand he did not consider the insertion of the expression "and in accordance with" as necessary since the limitations were already included in subparagraphs (i), (ii) and (iii).

Mr. BROCHES (Chairman) summarizing the discussion on subparagraph (i) mentioned that two suggestions had been made, one requiring a two-thirds majority for fixing the table of charges and the other to extend the two-

¹ Of November 23, 1964, entitled "Draft Rules for Proposed Centre", not reproduced because of interest only for the history of the Regulations and Rules of the Centre (ICSID/4)

thirds majority to the adoption of all the rules and regulations covered by subparagraph (i). He added that he saw no objection to the extension envisaged in the second suggestion and requested a show of hands. The majority of the Committee agreed with the second suggestion and the Drafting Sub-Committee was asked to take note of it.

Mr. BROCHES (Chairman) moving to subparagraph (ii) mentioned the suggestion to increase the required majority to two-thirds.

Mr. ROSENNE (Israel) suggested the separation of subparagraph (ii) and (iii) from the other provisions of Article 6 as they dealt with the question of proceedings and were to be distinguished from the general administrative powers of the Council.

Mr. BROCHES (Chairman) proposed that the question of whether this Article was to be broken down into two distinct groups be examined by the Drafting Sub-Committee. He took it that there was no objection to making a requirement in subparagraph (ii) of a two-thirds majority.

Mr. ORTEZ (Peru) proposed that subparagraphs (ii) and (iii) be dealt with in the context of Chapter IV of the Convention (Articles 45 and 46) concerning the powers of the Tribunal and the law to be applied by them.

Mr. BROCHES (Chairman) explained that this might be looked into by the Drafting Sub-Committee. The reason these provisions appeared in Article 6 was not only because they were to be adopted by the Council but also because in this way there would be no need to repeat the same provisions with respect to Conciliation as well as Arbitration.

Mr. HELINERS (Sweden) suggested that subparagraph (ii) and (iii) be merged into one.

Mr. BROCHES (Chairman) saw a noticeable difference between the subject matter of paragraph (ii) and (iii). The one - on the procedure governing the institution of proceedings - was not left to the free will of the parties, the other was. For this reason it was desirable to give them a separate identification.

Mr. PEREZ (Ecuador) did not think the Drafting Sub-Committee was competent to determine whether paragraphs (ii) and (iii) should be dealt with in conjunction with Articles 45 and 46 because the question involved the powers of the Administrative Council and consequently requested the chair to make a ruling on this suggestion.

Mr. ROSENNE (Israel) considered that in view of what was said in Article 47 the rules of procedure actually had a binding force of some kind. In that case there was some force to the suggestion that subparagraphs (ii) and (iii) be amalgamated into one, because the difference between the procedure for introducing proceedings and the rules governing the proceedings themselves was not great.

Mr. MELCHOR (Spain) said that Articles 45 and 46 were not related to Article 6. Only Article 47 was so related. The apprehension concerning the Administrative Council approving rules of procedure should be satisfied by increasing the majority to two-thirds. Article 6 should also deal with the matter of the arrangements the Center would make for the use of the Bank's facilities which was now dealt with in Article 2.

Mr. LOPEZ (Panama) thought Article 47 did not specify which were the

rules of procedure that the Tribunal would follow in case there was no agreement to the contrary between the parties, and therefore suggested that the parties be provided with a set of model rules or that the Tribunal be specifically empowered to establish the rules.

Mr. BROCHES (Chairman) thought there was a misunderstanding because the Arbitration Rules referred to in Article 47 were those mentioned in Article 6, namely the rules which would be adopted by the Administrative Council.

Mr. LARA (Costa Rica) agreed that Article 6 was clear and contemplated (a) rules for institution of proceedings and (b) rules for the conduct of the proceedings. These latter rules apply only if the parties so agree. If they did not agree they would formulate the rules of conduct.

[The meeting recessed from 11:45 to 12:00.]

The Meeting reconvened at 12 Noon

Mr. PEREZ (Ecuador) wished to clarify his previous remarks. In discussing paragraphs (ii) and (iii), Mr. ORTIZ had suggested that the powers referred to therein, of adopting procedural rules, be removed and be included in Title 3 of Chapter IV, among the powers and functions of the Arbitral Tribunal. He thought this would imply a restriction of the powers of the Administrative Council and that therefore it was a matter of substance to be decided by the meeting and not by the Drafting Subcommittee.

Mr. ORTIZ (Peru) made a distinction between procedural and administrative matters. Concerning the former, he thought it more advisable to entrust them to the Panels or to the specific Conciliation Commissions or Arbitral Tribunals. As the members of the Administrative Council would not be necessarily lawyers, they might not be the best qualified to adopt procedural rules.

Mr. BROCHES (Chairman) asked for comments on the alternative to the provision in Article 6, being that the adoption of Conciliation and Arbitration rules should be left to the specific Commission or Tribunal or to the Panels, rather than to the Administrative Council.

Mr. O'DONOVAN (Australia) disagreed with the suggestions of Messrs. ORTIZ and LOPEZ. He thought that to make it necessary to insert in the Consent Clause the draft of rules of procedure to be adopted by the Tribunal would introduce unnecessary complexity. He also noted, in connection with Mr. ORTIZ's remarks, that the members of the Tribunal would not necessarily be jurists.

Mr. BERTRAM (Germany) thought that it would be difficult to have the Panels adopt the rules of procedure in view of the large number of members. He therefore submitted the possibility of having the Administrative Council adopt the rules of procedure with the advice of legal experts.

Mr. VAN SANTEEN (Netherlands) was of the opinion of retaining paragraph (iii) as it was, because it constituted a balanced whole with Article 47. The parties would still have complete freedom to adopt the procedural rules if they preferred. He did not think that paragraphs (ii) and (iii) of Article 6 should be unified. Paragraph (iii) dealt with the rules referred to in Article 47, which could be changed by the parties. The rules referred to in paragraph (ii) however, were a substantive part of this Convention.

They governed the institution of proceedings and were important for the application of Chapter IV.

Mr. HELLNERS (Sweden) stated that it was the practice of international bodies dealing with arbitration to have rules of procedure, which the parties to a dispute can modify. He thought that there was no reason to depart from this practice in this Convention, and that these rules could well be adopted by the Council. However, he still thought that paragraphs (ii) and (iii) could be merged, to avoid having too many administrative and procedural regulations.

Mr. SAPATEIRO (Portugal) stated that paragraph (iii) should be retained as it was. The procedural rules would in fact be drafted by the staff of the Center, who would be fully qualified, and submitted to the Administrative Council for approval. Members of the Council could also consult legal experts in their countries. Therefore, the fear that the Council would not be qualified to adopt these rules was not well-founded. He was of the opinion that paragraphs (ii) and (iii) should be kept separate, since it was not conceivable that the rules adopted under (ii) be questioned by the parties to a dispute.

Mr. MELCHOR (Spain) pointed out that subparagraph (ii) referred to rules to be applied before the Tribunal was constituted while subparagraph (iii) refers to the procedural rules which the Tribunal would apply and that consequently these two provisions should be kept separate. He also pointed out that with respect to procedural rules, the parties had the possibility of modifying them by agreement. In no case should tribunals have to waste time with the preparation of procedural rules and consequently these rules should be either drafted by this meeting, which was impossible, or by the Administrative Council, which should then be empowered thereto. In this connection he mentioned that entities such as the International Court of Justice and the International Chamber of Commerce also have similar regulations which were obviously adopted by administrative organs.

Mr. LOPEZ (Panama) repeated that he was concerned by the fact that the Administrative Council, as envisaged under this Convention, would not be qualified for undertaking a task as complex as the drafting of the rules in question and could not be compared to the institutions mentioned by Mr. MELCHOR.

Mr. BROCHES (Chairman) considering the discussion closed on this point requested a show of hands to determine whether the responsibility for adopting the rules of procedure should be transferred from the Administrative Council either to the Panels or to the Conciliation Commissions or Arbitral Tribunals. The majority of the Committee agreed that the provision of subparagraph (iii) should remain unchanged.

With respect to observations that the proposed rules should be given proper study before being adopted by the Administrative Council, Mr. BROCHES said that while this meeting would not be a suitable place for framing recommendations to the future Administrative Council, it might nevertheless be possible for the delegates to have informal talks to elucidate some questions on the various rules prepared by the staff. These talks could be somewhat similar to the regional consultative meetings held on the Convention itself. The Secretariat would see how these could best be organized.

Mr. HELLNERS (Sweden) stated that he did not want to insist any further on his suggestion to have subparagraphs (ii) and (iii) merged in one single clause and agreed to leave the matter to the Drafting Sub-Committee.

Mr. BROCHES (Chairman) then moved to subparagraph (iv) and stated that in a way this provision was linked with Article 10.

Mr. KPOGNON (Dahomey) suggested, in connection with Article 10, that it would be preferable for Deputy Secretaries-General to be elected upon nomination by the Secretary-General rather than by the Chairman.

Mr. BROCHES (Chairman) suggested to discuss this question when dealing with Article 10 and, no further comment having been made, proposed to move to subparagraph (v).

Mr. BERTRAM (Germany) suggested that the budget be approved by a two-thirds majority as was usually the case in international organizations.

Mr. ROSENNE (Israel) asked what was meant under the term budget.

Mr. BROCHES (Chairman) indicated that it referred to expenditures.

Mr. VAN SANTEN (Netherlands) said that Mr. BERTRAM's suggestion that the budget be approved by a two-thirds majority might create difficulty in case such majority could not be reached.

Mr. LARA (Costa Rica) mentioned that in his opinion it would be improper to use the term budget if it were to mean expenditures only, and stated that in any case a matter as delicate as the approval of the budget should require a two-thirds majority.

Mr. KPOGNON (Dahomey) agreed that a two-thirds majority might lead to difficulties and incidentally suggested that the budget be adopted rather than approved.

Mr. SAPATEIRO (Portugal) indicated that since the Working Group No. I had recommended the deletion of the provision of Article 1(2) concerning the ancillary activities of the Center, the problem of the approval of the budget was no more so important as to require a two-thirds majority. He also realized that it would be extremely difficult to give in the budget a statement of the estimated revenues since those would depend on the cases submitted to the Center.

Mr. BERTRAM (Germany) indicated that since pursuant to Article 17 expenditures of the Center may have to be borne by the Contracting States, he wished to maintain his suggestion that the budget be approved by a two-thirds majority.

Mr. ROSENNE (Israel) asked whether Mr. BERTRAM had in mind two-thirds of all members of the Council or only two-thirds of the members present and voting.

Mr. BERTRAM (Germany) said that he was thinking of two-thirds of the members present and voting.

Mr. BROCHES (Chairman) requested a show of hands with respect to Mr. BERTRAM's suggestion. The majority of the Committee agreed that the provision of subparagraph (v) should be kept in its present form and that the budget should be approved by an ordinary majority. Mr. BROCHES then asked Mr. BERTRAM whether he wished that a working group be appointed to further discuss this matter.

Mr. BERTRAM (Germany) said that he would not consider it necessary,

provided the discussion could be reopened when dealing with Article 17.

Mr. BROCHES (Chairman) agreed.

Mr. NEDI (Ethiopia) asked that the meaning of the word "budget" be precised in the draft.

Mr. LOKUR (India) and Mr. LARA (Costa Rica) concurred.

Mr. BROCHES (Chairman) invited comments on subparagraph (vi).

Mr. LOKUR (India) proposed that the word "approve" be substituted by "consider and adopt".

Mr. BROCHES (Chairman) invited comments on the residual clause of Article 6 reminding the delegates of the previous suggestion to include in this Clause some reference to the power of Council to establish the policy of the Center.

Mr. VAN SANTEN (Netherlands) proposed to strike the words "and for the achievement of its purposee" from the sentence. He thought this deletion would follow the decision of omitting the second sentence of Article 1(2).

Mr. PINTO (Guatemala) supported Mr. VAN SANTEN's suggestion to delete the words "and for the achievement of its purposee".

Mr. DODOO (Ghana) supported the suggestion of the two previous speakers because he thought the words were superfluous.

Mr. BERNARD (Liberia) supported the views of the Delegate of the Netherlands.

Mr. BROCHES (Chairman) received an affirmative response from the Delegate of Dahomey that the suggestion of the Delegate of the Netherlands would meet his proposal.

Mrs. VILLGRATTNER (Austria) suggested that in view of the provision in Article 18 that the Center will have a legal personality, Article 6 include a provision stating that the Center acts through its Administrative Council.

Mr. BROCHES (Chairman) thought it more appropriate for the Center to be represented by the Secretary-General acting under the general direction of the Administrative Council since, in his opinion, the personality of the Center referred mainly to questions such as acquisition and disposal of property.

Mrs. VILLGRATTNER (Austria) said she had in mind the question of making agreements with other international personalities which she therefore considered should be covered by specific provision as to who represents the Center.

Mr. BROCHES (Chairman) suggested that the matter be taken up by the Drafting Sub-Committee which might consider broadening Article 6 in the suggested manner.

Mr. TSAI (China) requested the clarification of the words "other powers and functions" with which the Council would be vested.

Mr. BROCHES (Chairman) replying by way of example cited the elaction of the Secretary-General. Amendments would be another example.

Mr. LOKUR (India) further called attention to Articles 21, 63, 64, 69 as matters which may concern the Administrative Council.

Mr. FULES (El Salvador) wished to know whether these other "functions" would require a simple or two-thirds majority.

Mr. BROCHES (Chairman) replying stated that no special majority is provided for these other acts which would be acts of implementation of the Convention and should not be regarded as ancillary activities.

Mr. GHACHEM (Tunisia) wondered whether the residual paragraph of Article 6 should not be deleted since he thought it unnecessary. The least said the better.

Mr. BROCHES (Chairman) canvassed the views of the meeting and then announced that it was in agreement with the provisions of subparagraph (vi) and the residual paragraph except for the deletion of the words "and for the achievement of its purposes" which would therefore be removed. He then suggested that the Drafting Sub-Committee reconvene at 6:00 p.m.

[The meeting adjourned at 1:37 p.m.]

³ For its report see Docs. 69 and 70, cf. Doc. 56

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SID/LC/12 (November 25, 1964)
Comments by Mr. da Cunha (Brazil) to Legal Committee

Comments and Suggestions on Article 6 (iii)

I suggest that the following be added to Article 6 (iii):

"... observing, whenever possible, the same rules established by the International Court of Justice for the performance of their duties".

The proposal tends to establish a similarity between the methods of action of the Center and those of the International Court of Justice, removing from the Administrative Council the discretionary power to subordinate the conciliators and arbitrators to the procedural rules prescribed by the Council. The importance of Adjective Law is undoubtable. The conduct of the proceedings and their order are as important as the provisions of Substantive Law which define the merits of the case.

The Legal Committee reconvened at 3:00 p.m.

Mr. BROCHES (Chairman) informed the meeting that the delegate from Venezuela has asked for an opportunity to express his ideas on various points concerning the Convention, before he left on official business.

Mr. ESPINOSA (Venezuela) asked permission to restate what he had said at the Santiago meeting with respect to Venezuela's position. Conciliation was fully recognized in Venezuela both in public and private law, without limitation, but arbitration was subject to certain limitations established by the constitution and laws of the Republic. In Venezuela, a compromissory clause did not become obligatory unless it had been ratified before the competent Court and arbitration was not permitted in respect of matters connected with public policy or good morals. Under the Venezuelan Constitution and laws there was established a definite difference between treaties, agreements and conventions made by the State with other States or international entities, and contracts of public interest which the government in its administrative capacity might enter into with private persons. Disputes concerning the former were subject to means of settlement recognized in international law or previously agreed to by the parties such as arbitration, but the Constitution reserved the solution of the latter strictly to the jurisdiction of Venezuela's Courts in accordance with its own laws. Those constitutional precepts were within the domain of public policy and could not be derogated from, even with the consent of the parties. Foreign judgments or arbitral awards could not be enforced in Venezuela if they were contrary to the public policy of Venezuela. These comments reflected his own views as a lawyer on this matter but he wished to reserve his Government's complete freedom on the text that the Committee would formulate.

CHAPTER II - JURISDICTION OF THE CENTER

Mr. BROCHES (Chairman) said that Mr. WANASUNDERA of Ceylon had asked to make some general remarks on Chapter II (Jurisdiction of the Center) as a whole.

Mr. WANASUNDERA (Ceylon) stressed the importance and significance of the provisions of Chapter II and was anxious to state in a general way the views of his Government on the draft Convention. He wished to mention that any criticism against the draft Convention was not intended to be destructive. He merely wished to bring to the Committee's notice certain features of the draft which he considered unsatisfactory and capable of being used against the interests and freedom of the capital-importing States, especially newly independent States. His delegation had no objections to the settlement of investment disputes by conciliation but felt that there should not be a close link between the Bank and the Center. The provisions relating to arbitration were not acceptable to his delegation in their present form. In particular the jurisdiction of the Center was not delimited with any precision. For example, the definition of the word "investment" was not satisfactory. The term "legal dispute" was intended to be antithetical to the expression "political dispute", but was still insufficient to exclude disputes of a political or vital nature which no State would submit

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² See Doc. 27

to adjudication by a third party. The jurisdiction of the Center extended not only to disputes arising out of the investment, but also to disputes connected with any investment. Such words were capable of the widest possible meaning, particularly as Article 44 made an arbitral tribunal the sole judge of its competence. A tribunal appeared to be entrusted with very wide and indefinite authority over the affairs of a sovereign state, including competence over additional or counter claims, and the power to prescribe provisional measures against a sovereign state. The power of the parties to agree otherwise was of no consequence as no capital-importing State would be in a position to dictate terms to an investor.

In addition the Convention marked a departure from the principle that international arbitration is dependent on the continuing consent of the parties, by creating a form of compulsory or quasi-compulsory arbitral procedure. No capital-importing State which had accepted the Convention could refuse consent to arbitration which investors would invariably require and capital would stop flowing to countries that did not accede to the Convention. In his opinion, it would be in the best interest of the capital-importing countries to have no Convention at all rather than to have a Convention in the form of the proposed draft. If, as he thought, the drafters had only intended to remedy some shortcomings of the law as it now existed with respect to foreign investments, the draft was too sweeping. It attempted to put the individual on the same level as the State under international law as presently constituted, while international law still required some modification to accommodate the legitimate needs of the newly independent States.

He also mentioned that the proposed Convention would require legislative action in his country and the political situation did not make this feasible. He hoped that the Committee would be able to eliminate the unacceptable features of the draft and formulate a Convention generally acceptable to capital-importing countries.

Mr. BROCHES (Chairman) suggested that, since Chapter II involved many problems to be examined, the first round of discussion be concentrated on specific items, namely paragraph (1) of Article 26 and Article 30. He then stressed that in the context of this Convention, the term "jurisdiction" does not mean compulsory jurisdiction, but rather the outer limits within which use can be made of the facilities provided for by the Center. In other words, one is here only concerned with a limitation of the scope of the Convention. Such a limitation is necessary in spite of the fact that the submission of disputes was subject to the consent of the parties concerned, since this Convention was intended to deal, first with a specific field, namely investments, and second with a particular category of disputes, namely disputes between Contracting States and nationals of other Contracting States. This explained why some of the definitions might lack the precision which would be quite essential if one dealt with a case of compulsory jurisdiction.

Mr. TSAI (China) stated that he considered the jurisdiction of the Center as too broad, in the sense that the definition of the term "investment" was too imprecise and that the condition of consent was too weak to exclude certain undesirable matters from submission to the Center. The Convention must protect investments from the procedural aspect, but not foreign property as such. The jurisdiction of the Center should be limited to legal disputes arising out of investments made pursuant to investment agreements or in response to investments promotion laws. In addition, the definition of legal dispute should not imply that the Center might be authorized to ascertain the existence or non-existence of a fact without determination of a legal

right or obligation. Finally, the condition of consent was too weak since, when there was doubt as to whether a party has consented to the jurisdiction of the Center, the question would be decided first by the Secretary-General and then by the Tribunal itself.

Mr. BROCHES (Chairman) asked whether Mr. TSAI meant that a State, after having given its consent, would be free to withdraw it subsequently.

Mr. TSAI (China) replied that this should not be the case and that the State should be bound by its consent, but only within the scope of such consent. For instance, if an investor were to make an investment in response to an investment promotion law which did not provide for tax immunities and if the State concerned were to give its consent subject to the provisions of such investment law, a problem might arise if the investor wished to submit a subsequent dispute concerning tax immunities to the jurisdiction of the Center; in such a case, the provisions of the Convention concerning the determination of the consent would appear weak.

Mr. MANIRAKIZA (Burundi) suggested the deletion of the parenthesis "or one of its political subdivisions or agencies" from the text of Article 26 (1).

Mr. BROCHES (Chairman) gave the background for including those words in the draft. He said it was suggested at the Addis Ababa Meeting because of the possibility of agreements being concluded with parties which had an existence separate from that of the State. He did not think that omitting the words would change the substance of the provision because these separate entities would be acting on behalf of the contracting State.

Mr. ROSENNE (Israel) shared the doubts which were expressed by the delegates from Ceylon and China with respect to the departures from traditional and accepted practice in the present draft. He accepted the principle stated in Article 26 but said that in view of what was said in Articles 29, 35 and 44 he thought Article 26 was not entirely clear with respect to the question of the consent of the State to submit certain disputes to conciliation or arbitration. Although the discussion was limited to Article 26 (1) he thought it impossible to disregard Article 26 (2) in this connection. He suggested Article 26(2) be omitted entirely. In its place he would add the words "in writing" after the word "consent" in Article 26 (1). He thought Article 30 (iii) did not take account of cases of statelessness. He did not consider the definition of "legal dispute" useful. He thought it was advisable to avoid attempting such a definition. However, if there was a definition of "dispute" he felt it should run closely to that adopted by the International Court of Justice as nothing would be gained by changing that definition or by attempting to add to it.

Mr. BROCHES (Chairman) explaining the text said the intention was not to define dispute in the larger sense. It was done for the sole purpose of restricting the jurisdiction of the Center so as to exclude certain issues which many States wished to preclude from the scope of the Convention. The exclusion for example would apply to the renegotiation of existing agreements between States and foreign investors.

Mr. LARA (Costa Rica) believed that since arbitration under the auspices of the Center was voluntary, being based on the respective arbitration clause, the matter of the jurisdiction of the Center did not have the importance attributed to it by Messrs. WANASUNDERA and TSAI, since its scope would be limited by the provisions of the arbitration clause and these would bind the Arbitration Tribunal. He noted that in his country certain matters required

¹ See Doc. 25

legislative authorization for their submission to arbitration. Concerning the definition of "legal dispute" in Article 30(ii), he thought that in conciliation there should not be reference to "law" since this might destroy its friendly character. He suggested that there be a definition of "dispute" - deleting the word "legal".

Mr. KPOGNON (Dahomey) shared some of the misgivings of Mr. WANASUNDERA. Disputes were not always well defined, and most of them had two aspects: one legal and other political. Therefore, it was necessary to ascertain how these disputes would be handled by the Center. He did not think that disputes having said mixed character should be taken away from the jurisdiction of the Center. The fact that the basis of this jurisdiction is consent should dispel any misgivings on this subject. He then asked the Chairman whether the Center could refuse to examine a dispute which the parties themselves described as being of a legal character.

Mr. BROCHES (Chairman) replied that if two parties agreed to submit a dispute to an arbitral tribunal constituted in accordance with the Convention, the tribunal would probably not of its own motion refuse to take cognizance of the dispute if the parties did not raise the question of competence themselves except perhaps in extreme cases, as for instance if one of the parties were not a Contracting State. If, however, the Tribunal did refuse to decide the dispute that would be the end of the case.

Mr. BURROWS (United Kingdom) thought that the main provision in Article 26 (1) was that jurisdiction was based upon the consent of the parties. The parties should not be prevented from making arrangements to submit disputes to the Center, and therefore he would prefer not to confine the jurisdiction of the Center to "legal" disputes. However, if the majority would prefer to retain the phrase "legal dispute" it would be essential to have a definition along the lines of Article 30 (ii). Concerning the reference to "political subdivisions or agencies" in Article 26 (1), he thought that it really meant parts of a State, since one of the parties to a dispute under this Convention had to be a State. These political subdivisions and agencies would be acting on behalf and in the name of the State. He also thought that there might be disputes as to whether a particular organization was or not a "political subdivision", and suggested that each State party to the Convention could deposit a list indicating the bodies regarded by it as "political subdivisions" for the purposes of this Convention. Finally, concerning the word "investment" defined in Article 30 (i), he referred to his Government's written Comment (Doc. SID/LC/5) where there was pointed out the difficulty of defining this term. For example, the word "contribution" used in the text suggested in English a charitable donation. He also thought that the time limit in the last part of the definition would exclude large investments that could be made for less than five years, in construction projects for example. He thought, therefore, that the most satisfactory solution would be to delete the definition of "investment".

Mr. OUMA (Uganda) thought that the phrase "all legal disputes" in Article 26 (1) was not clear and suggested that there be added to it the words "provided that such disputes do arise out of an investment contract or agreement."

[The meeting then recessed for 12 minutes.]

Mr. PINTO (Guatemala) proposed that the reference to "political subdivisions or agencies" in Article 26(1) be deleted. The determination of

⁴ Doc. 45

what was understood by these terms might cause disputes. He also proposed that there be excluded from the scope of this Convention any investments which were covered by the benefits of an investment promotion law. He thought that the definition of "investment" in Article 30(i) was too vague and that an attempt should be made to make it more specific. Concerning the definition in Article 30(ii), he thought it was better to refer to "legal" disputes since disputes of any other kind should not reach the Center. However, he suggested the deletion of the second part of that definition ("or concerning a fact relevant to the determination of a legal right or obligation"), since a fact could not be disputed and would be brought before the Commission or Tribunal as part of the proof.

Mr. BELIN (USA) expressed his misapprehension with regard to some of the earlier remarks which appeared to indicate a basic disagreement with the draft Convention. He hoped the meeting would improve the Convention and make it acceptable to as wide a number of countries as possible without however trying to introduce fundamental changes into the document. He thought the addition of the word "instrumentalities" into the parenthetical phrase in Article 26(1) might be helpful. This might remove doubts as to the meaning of "a political subdivision". He also had certain doubts as to the word "contribution" appearing in the definition of "investment" in Article 30. He proposed that the word "transfer" might be more meaningful. As to the limitation of time in the definition of "investment" he thought it might be helpful to add the words "or as the parties may otherwise agree" at the end of the definition. The most troublesome question in his mind rose in Article 30(iii)(b). He thought the previous draft which stated that a juridical person controlled by nationals of another Contracting State would be taken to have the nationality of that State was a far better solution than relying on the consent of the parties.

Mr. GHACHEM (Tunisia) referring to those delegates who considered it unnecessary to qualify the jurisdiction of the Center by the various definitions, thought that once the Center was created most investors would insist on including a clause in their contracts which would make it mandatory to apply to the Center in the event a dispute arose. For that reason, he thought it essential that the terms or reference of the Center be as accurately defined as possible. In his opinion the definition of "legal" dispute was not superfluous because it would exclude disputes of a political nature from coming before the Center. By way of example he thought this would prevent the Center from inquiring into an act of expropriation and would limit an issue brought before the Center to the question of compensation only. However, he suggested that the definition be improved by adding the following paragraph to the text:

"Legal dispute means any action imposing a debt on the State or on a national of another Contracting State which is subject to the jurisdiction of the Center under this Convention".

Mr. QUILL (New Zealand) supported the suggestion to omit a definition of the term "investment" from the Convention. He thought it might be possible to obtain a list of the types of investment and the kinds of disputes which might be anticipated for consideration by the Center, and that this list should accompany the Convention when it was submitted to the governments for ratification. Similarly, he considered the phrase "political subdivisions or agencies" as one which might give rise to certain difficulties and he therefore suggested that some empirical process be adopted to clarify the meaning of that phrase.

Mr. O'DONOVAN (Australia) had some doubts whether the phrase "political subdivisions or agencies" expressed the intention that one party to the dispute would invariably be a Contracting State. He thought that the procedure suggested by the Delegate from the UK for the registration of bodies which the Contracting State regards as political subdivisions would be a convenient way of overcoming difficulties which this provision might entail for Federal States. For his own part, he thought it desirable to include a definition of "investment". He thought the one in the text was inadequate. He proposed that it be substituted for something along the following lines:

"Investment means every mode or application of money which is intended to return interest for profit".

Mr. BROCHES (Chairman) drew the attention of the meeting to the comments submitted by the Malagasy Republic on Articles 26 and 30 which were included in document SID/LC/5¹ circulated to the delegates.

Mr. BERTRAM (Germany) thought that from a practical point of view it would be desirable to have a provision dealing with political subdivisions, although the definition might be somewhat difficult. It should at least be provided that the Contracting States expressly recognize the power of these entities to act on its behalf and even in such a case it might be useful or even necessary to have the Contracting States be made parties to the proceedings. With respect to the definition of "investment" he mentioned that some earlier treaties refer to the term "property, rights and interests". It would perhaps be possible to find along those very general lines a definition which might be acceptable to all.

Mr. BROCHES (Chairman) said that it might be useful for further discussions on the question of definitions that some definitions in the possession of the Secretariat be circulated: These definitions had convinced the draftsmen that they could hardly use them as models since they were always directed towards particular facts or situations which the parties or governments had in mind while the matter envisaged by this Convention was more fluid.

Mr. MELCHOR (Spain) reminded the Committee that the problem of offering additional guarantees to foreign investors was not a brand new one but had been the object of many studies and proposals in recent years as countries and international organizations became aware of the need to ensure the flow of capital from industrialized countries to developing ones. The proposed Convention would offer the guarantee of an impartial forum consisting of outstanding personalities both to investors in search of security and to host countries which would be able to receive foreign capital on more favorable terms.

That States would accept to submit to the rule of law their relationship with nationals of other States and would discuss any difference on a plane of equality was nothing to be feared as long as the main lines of this Convention were clearly defined.

He therefore agreed with the delegate of Tunisia that the definitions in Article 30 be more accurate and specific, because although the jurisdiction of the Center was entirely voluntary, it was natural to expect that once a few States had declared in accordance with Article 29 their willingness to submit to the jurisdiction of the Center certain disputes, their example would be followed in similar cases that might arise between other States and foreign investors.

¹ Doc. 45

² See Doc. 107

He would be interested in looking at the several possible definitions of "investment" which the Chairman had promised to circulate; he was afraid that economic definitions which certain delegates had suggested could not be effectively translated into legal terms but agreed that money, capital goods and other goods required for the industrial development of a country ought to be included in any definition.

He also thought that the reference to political subdivisions and agencies of a State ought to be deleted from Article 26.

On the definition of "legal dispute" he was in favor of a better definition but could not at the time offer one.

Mr. BROCHES (Chairman) remarked that it was past 5:30 p.m. and the meeting had to be adjourned until Friday, November 27 at 10:30 a.m. Mr. MELCHOR would be able to complete his statement then.

[The meeting adjourned at 5:37 p.m.]

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SID/LC/SR/5 (December 21, 1964)
Summary Proceedings of the Legal Committee Meeting, November 27, Morning¹

The Legal Committee reconvened at 10:35 a.m.

Mr. MELCHOR (Spain) wanted to complete some points he had raised in the previous meeting. He felt that the provisions of Article 27 (2) would destroy the principle established in the Convention since the Convention should not cover disputes between States. He was against the idea of the subrogation of States to the rights of investors. This would create a complicated problem about the capacity in which the State would be acting. Therefore he thought that this paragraph should be deleted. He then referred to the question of double nationality, stating that the concept of nationality had to be determined by internal law. It was a prerogative of the sovereign State to determine who its nationals are. However, if for any reason a State imposed its nationality on a person in order to avoid being sued by that person, such granting of nationality should not be an impediment for that person to seek redress before the Centre. He then referred to the concept of direct investment, and thought that only "direct" investors should be permitted to appear before the Centre. A State should know by whom it can expect to be sued in connection with specific investments. And the investments to be covered by this Convention should be those direct investments that facilitate the economic development of the country. The reference to direct investments would have the advantage of preventing shareholders of a company from suing the foreign State where the company's investment was made. He did not think it appropriate to put a time limitation to the investments covered by the Convention as proposed in Article 30 (1). Passing to another subject, he believed that there were values in this Convention that should be defended and that therefore the initiative of the World Bank deserved to be supported with enthusiasm. If it was admitted that there was a need for additional international investment, it was logical to expect

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

that the States receiving the investments would give them fair and equitable treatment, without discrimination. At the same time, the investor was expected to respect the laws of the host country. He felt that together with the principle of pacta sunt servanda there existed implicitly the principle rebus sic stantibus, in the cases where conditions and circumstances since the investment was made had changed completely. He also thought that the Centre should take up disputes between an investor and a State even if there was no previous agreement to submit such dispute to the Centre. He felt it was appropriate to retain paragraph (2) of Article 26. Finally, he proposed that, in order to expedite the completion of the work, in the future the meeting discuss whole Chapters and not separate Articles.

Mr. BROCHES (Chairman) stated that experience showed that taking up entire Chapters instead of single Articles would not save any time and would make it harder to frame the issues for discussion. He felt that this Chapter was the central element of the entire Convention and it was worth being considered at length. Later Chapters could be discussed more briefly since no important policy issues were involved.

Mr. LOKUR (India) said that as far as his country was concerned all foreign investors had adequate facilities for settling their disputes. Umpires or tribunals were appointed by mutual consent or by the Chief Justice or by the President of the International Chamber of Commerce. In his Government's opinion, therefore, the Convention was not really necessary. However, since it was decided to draft a Convention he would try to the best of his ability to make it as perfect and acceptable as possible. He thought the Convention should not undermine the sovereignty of States or question the supremacy of their legislation or jurisdiction. He submitted, therefore, that disputes covered by the Convention should not include differences relating to the interpretation of the domestic legislation of Contracting States nor should they include disputes for the settlement of which other arrangements are in force. He then said that only "substantial" investments should come under the regime of the Convention. He thought they should relate to the total value of the investment rather than to the duration of it. As to the definition of "nationals of another Contracting State" he thought it was not quite adequate. Who would decide whether a natural person possessed the nationality of a Contracting State? He thought such a determination should have the assent of the Contracting State. Insofar as juridical persons were concerned they could not claim or possess nationality according to Indian law. He would also advocate the omission of the last sentence of Article 30 (iii) (b). He also thought the question of double nationality should be dealt with. Insofar as the parenthetical sentence of Article 26 (1) was concerned he thought the expression relevant in connection with federal states and suggested the present phrase be replaced by the following: "The Contracting State or any of its constituent divisions, such as States or Republics." Finally, he requested clarification of the word "agency" in the parenthetical phrase.

Mr. HELLMERS (Sweden) speaking on behalf of the five Nordic delegations indicated that he was generally in agreement with the present structure of Chapter II. In view of the condition of consent, he did not agree with observations made by some delegates who considered a broad jurisdiction of the Centre as undesirable. Parties could always exclude undesirable matters by refusing their consent. Likewise, because of the condition of consent, there would be no need for complicated definitions. With respect to the term "investment", the examples circulated by the Secretariat proved how futile it would be to attempt a definition. Since the parties would be free to submit their disputes to the Centre, he did

not think that difficulties would arise in practice and that, should difficulties arise, they should be dealt with by the tribunal. Therefore, he would prefer that no definition of the term "investment" be provided for in the Convention. In any case, he thought that the definition included in the present draft suffered from various defects, being both too wide (for instance, seems to include portfolio investments) and too narrow (provides for time limits). Moreover, an embarrassing situation might arise if the definition were to be different from the one which might be included in the proposed Convention on Investment Guarantees. Concerning the definition of the term "legal dispute", he also did not consider it necessary, but would not object to its introduction provided it would not become too narrow. The definition provided for in Article 30 (iii) was the most satisfactory although it might still raise some problems, such as the question of dual nationality. In his opinion, questions of dual nationality should be decided in each particular case by the tribunals.

Mr. UKAWA (Japan) indicated that while he was in agreement with the basic ideas underlying the provisions of Articles 26 and 30, and also Chapter II, he shared the concerns which had been expressed with respect to the definitions of the terms "investment" and "legal dispute". In connection with the definition of the term "investment" prepared by the Secretariat, he thought that a list of typical types of investment might be attached to it as an illustration, but not as a limitation. With respect to Article 26, he agreed that the word "agencies" would create for Japan difficulties similar to those which had been mentioned in the case of New Zealand. Finally, he mentioned that while his delegation was in favor of the jurisdiction of the Centre being as broad as possible, this might create some difficulties for investors if the recipient country wished to submit disputes to the jurisdiction of the Centre while such investors might have the possibility of using existing facilities in their own countries.

Mr. BIGAY (Central African Republic) mentioned that the definitions must be precise in order that the States may determine exactly the extent of their commitment. With respect to Article 26, he suggested that the words "or in connection with" which were translated in the French version by the word "indirectement" be deleted since disputes indirectly related to investments should be excluded. He thought that the definition of the words "legal dispute" was of a somewhat specious character and that the term be defined as meaning "any dispute concerning a right or obligation arising directly from the implementation of an agreement concerning an investment". With respect to Article 30 (iii), he mentioned that a dual national having the nationality of a State in which he invested should not be allowed to submit disputes to the Centre, and therefore suggested to redraft the beginning of sub-paragraph (a) as follows: "Any natural person who possess the nationality of a Contracting State, provided such person does not possess, even as dual nationality, the nationality of the State party to the dispute,..."

Mr. BROCHES (Chairman) noticed that nearly all the definitions which had been proposed were in fact definitions of what the delegates concerned believed their governments would in fact wish to submit to the Centre. Since the views differed widely, it would hardly be possible to arrive at a proper definition. Therefore, he underlined again the difference to be made between the scope of the Convention and the scope of consent. Moreover, definitions should not be patterned too much after precise circumstances which might not exist in all countries and as an example he mentioned that a large number of countries do not follow the practice of

entering into investment agreements.

Mr. SAPATEIRO (Portugal) considered the definition of "investment" in Article 30 inadequate - both from the economic and the legal angle. In particular he was disturbed by the word "contribution" which he thought was too broad. A contribution should be qualified by the recipient of the contribution or the purpose it was applied to. The term "investment" in the Convention should only apply to (1) financial operations between States and nationals of other States, (2) governmental guarantees and (3) "productive" investments to which the State was not a party. With respect to the third category, the jurisdiction of the Centre ought to be limited to disputes concerning actions of the State which affected the relationships established between private parties in the course of the investment. But actions of the State which expressed its sovereign powers should not properly be the subject of disputes under the Convention. He agreed with the comments of the delegate of Tunisia on this problem. He did not think the Centre should question the fiscal, economic and financial policies of a Contracting State and, therefore, disputes arising out of investment should be limited to the question of indemnification of the investor for acts of the State. But he suggested a further limitation. The implementation of general legislation existing at the time the investment, or enacted later but which neither reduced nor suppressed the benefits granted by a State to foreign investors, should not be questioned by an international Tribunal. Only where new legislation was introduced which was discriminatory or acts were performed which denied certain benefits expressly granted to the investor, should recourse to the Centre be allowed. He suggested that a Working Group examine his proposals which he summarized as follows. The jurisdiction of the Centre should be confined to disputes of a legal character arising directly out of investments which have formed the subject of an agreement with a State, or have been guaranteed by the State, or have been guaranteed by the State, or of investments in respect of which the investor asks for indemnification of the damage caused to him by a particular action of the State directed at him in particular. Jurisdiction, however, would be limited insofar as domestic legislation was concerned so as not to impair the sovereignty of States unless discrimination or annulment or reduction of benefits expressly granted to the investor were involved. If all these limitations were included within Article 26 one could dispense with the definition of investments in Article 30. He agreed that the words "political subdivisions or agencies" should be deleted from Article 26. He also wished the words "in connection with" deleted from that Article. With regard to the definition of "legal dispute" he thought the definition should end after the word "obligation" as he could not conceive of adjudication merely limited to facts.

[The meeting recessed from 11:45 to 12:00 noon.]

Mr. SAPATEIRO (Portugal) resumed his comments on Sections 26 (1) and 30. With regard to the problem of nationality he remarked that, in his opinion, the nationality of the investor should be determined also by reference to the time of making the investment. He thought a definition along the following lines "any natural person who does not possess the nationality of the State party to the dispute" would improve the present text. Insofar as double nationality of physical persons was concerned he was in full agreement with the remarks made by the delegate of Spain. He would allow a person possessing the nationality of a Contracting State (in the case of dual nationality) to initiate proceedings against it in two cases only, i.e., in the case of specific agreement with the State and in the case of a nationality of convenience.

Mr. KFOGNON (Dahomey) requested that the delegate of Portugal circu-

late his remarks in writing in view of the complexities of the issues involved.

Mr. BRINAS (Philippines) stated that his country adopted a negative attitude towards the proposed Convention in Tokyo but that that stand, in his opinion, was not irreversible. He found the proposed jurisdiction of the Centre too broad. He would divide investment disputes into two categories: first those arising from expropriation and second those arising on account of restrictions being placed on the remittance of profits or repatriation of capital. With regard to expropriation it would be unthinkable for a State to abdicate its authority to decide whether there were grounds for expropriation. With regard to transfer of profits and capital these too he believed were within the competence of the State concerned. The jurisdiction of the Centre should therefore be carefully qualified with respect to these two matters.

Mrs. VILGRATTNER (Austria), after mentioning that her Government strongly favored the Convention, said that the jurisdiction should be defined so as to avoid conflicts with other multilateral instruments and to prevent disputes not contemplated by the Convention from being brought before the Centre through the mechanism of consent. She further stated that the Convention should also provide for those cases where States might be plaintiffs. She agreed that it would probably be very difficult to have a precise definition of the term "investment" but she nevertheless thought it desirable for the Convention to indicate the meaning of this term in order to define which disputes could be brought before the Centre. A descriptive list might be suitable. In her opinion public loans or bonds should not be included -- but on the other hand, the Convention should cover guarantees given by States to contracts of investment. She further stated that the words "political subdivisions" and "agencies" would create difficulties. In particular, she pointed out that the word "agencies" used in the multilateral instruments of 1953 on the German external debts had been interpreted broadly and she did not think that this should be the case here. With respect to the definition of nationality, she referred to the problem of dual nationals and said that in this connection, disputes between a State and one of its nationals should in all cases be excluded. This should also apply to juridical persons. With respect to juridical persons, however, it might be desirable that shareholders who might possess a different nationality be able to defend their rights even if the corporation of which they were shareholders was considered a national of the State party to the dispute. She also thought that a time limitation should be introduced into the Convention in order to avoid old disputes from being brought before the Centre.

Mr. BERNARD (Liberia) said that the jurisdiction of the Centre should be limited to disputes arising out of particular investments. He added that, in his opinion, the provisions of Article 26 (1) and (2) could be combined. With respect to investment, the definition should be improved and a better term should be used for the word "contribution". Concerning the term "legal dispute" he suggested that the definition be modified, that the words "arising out of an investment" be added after the word "obligation" and that the last part of the definition ("concerning a fact ...") be deleted. Finally, with respect to Article 30 (iii) he suggested that the words "and any juridical person which the parties have agreed ..." be deleted.

Mr. WRIGHT (Niger) stressed the need for precise definitions and did not agree with the observations made earlier by the delegate of Sweden. In his opinion, the jurisdiction of the Centre should be limited to disputes between nationals and States and therefore the reference to political subdivisions and agencies should be deleted from Article 26 (1). Consequently

¹ See Doc. 49

the last sentence of Article 26 (2) should also be deleted. He also suggested that the words "or in connection with" be deleted from Article 26 (1). Since, in his opinion, the submission of disputes to the Centre should be governed by clear provisions of investment contracts, he did not consider Article 29 as necessary. With respect to Article 30 (i) he stressed the need for a precise definition and suggested that the approximate amount of the investments be taken as criterion. Concerning the definition of the term "legal dispute", he agreed with the suggestion made by the delegate of the Central African Republic. Finally, turning to paragraph (iii), he suggested the following definition of the expression "national of another contracting State": "national of another Contracting State means any natural person who possesses the nationality of a Contracting State other than that of the State party to the dispute on the date on which the proceedings are instituted pursuant to this Convention". The final part of subparagraph (b) ("and any juridical person ...") should be deleted.

Mr. ROUHANI (Iran) stated that his Government welcomed any additions to the facilities for the settlement of international investment disputes, provided they did not affect in any way the freedom of the Government to resort to other means of settlement of disputes. It was clear from the provisions of the Draft that such freedom of choice was not affected. He felt that it was not imperative to elaborate too much on the definition of the various terms used. In connection with Article 28, he felt that the Convention should not modify the legal position of States under the existing rules of international law. The result of the provisions in that Article appeared to be that if a Contracting State failed to comply with an award, the State of which the other party was a national could forthwith exercise diplomatic protection or bring an international claim on behalf of its national. This seemed to make non-compliance with an award equal to a denial of justice under international law. He felt that the concept of denial of justice should not be made any wider than it is under the existing rules of international law. Finally, he stated that the country which agrees to the investment of foreign capital with the national of another country should have to deal only with that national. He did not favor the subrogation of the State for that national, and even less his substitution by an institution which might have purchased his claim. He then suggested that the words "as they may consent" be substituted for the words "have consented" in the last phrase of Article 26 (1); that paragraph (2) of Article 27 be deleted; that Article 28 be either deleted or changed in the sense he had suggested; and that the word "contribution" in Article 30 (i) be deleted.

Mr. BROCHES (Chairman) referred to two objectives of the Convention, the promotion of foreign investments and the security that once an investor had obtained the right to address himself to the Centre, that right could in fact be exercised. There was then the question of what, in a given situation, a country considered a suitable subject for arbitration and conciliation or what it might, in general, regard as unsuitable. The legitimacy of expropriation was an example of the latter category, with the possible exception of cases where Governments agree not to expropriate during a certain period of time. Except for this specific case, he thought that there would be no occasion for considering in an arbitral tribunal whether an act of expropriation was legitimate in itself. Countries could be left free to decide what classes of disputes are suitable or unsuitable for conciliation or arbitration and, at the same time, could be assured that when the parties have agreed to have recourse to the Centre that agreements would be given effect. In this sense, a reference could be made in the Convention to the general field of investments, leaving the rest to be taken care of by the agreement of the parties. In theory, this would be the simplest way of handling this matter. However, in view of the doubts expressed by some

experts, an attempt had been made to narrow this by making it impossible to put into motion the machinery of the Centre without the existence of a written consent. Furthermore, Article 29 was added to enable countries to exclude classes of investments, thereby narrowing the scope of the Convention as far as they were concerned. He was not very much concerned by the technique that was used to achieve the desired purpose, provided that it was not made impossible for parties to submit a dispute to the Centre if they wished to. He thought that it would be inadvisable to narrow the scope of the Convention along the lines of the several definitions that had been proposed. At the same time, there were other ways to avoid the embarrassment of having to refuse to give consent in specific cases. He thought that at that state of the discussion it was necessary to break it down into specific points. He suggested that the topics of nationality, legal dispute, political subdivisions and the scope of the Convention could be discussed by working groups which might do useful preparatory work. When the meeting reassembled the following Monday it would have some more concrete suggestions to discuss. He suggested that a working group on nationality meet on Saturday morning, one on political subdivisions and on legal disputes could meet on Saturday afternoon, and on Sunday another working group could discuss the scope of the Convention. He did not think it feasible to appoint the members of these groups and hoped that those who were willing and able to participate would do so. In answer to a question he indicated that there would be no plenary session that afternoon and announced that it was planned to have morning and afternoon sessions the following week on Monday, Wednesday and Friday.

The Meeting adjourned at 1.30 p.m.

¹ See Report Working Group II, Doc. 107

² See Report Working Group III, Doc. 105

³ See Report Working Group IV, Doc. 87

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SID/LC/SR/6 (December 21, 1964)

Summary Proceedings of the Legal Committee Meeting, November 30, Morning¹

The Legal Committee reconvened at 10:35 a.m.

Mr. BRUGHES (Chairman) reported that on Saturday morning a working group had dealt with the problem of nationality, and would continue its work later in the week. In the afternoon a second working group discussed the subject of political subdivisions; and on Sunday another working group discussed the definition of investment dispute, i.e., the scope of the jurisdiction of the Centre. The task of these would also have to be completed in future sessions. He also reported that the Drafting Sub-Committee had completed its work on Articles 1 through 6 of the Convention. He then indicated that the pace of work was not very satisfactory if the work on the Draft was to be completed by the 11th of December. He was afraid that if it were not possible to make more progress it would be necessary to hold evening meetings. He suggested that the next day's morning meeting start at 10 o'clock. He reminded the delegates that if possible amendments were to be submitted in writing in advance, which would considerably speed up the work of the Committee. He then suggested that the meeting continue the discussion of Chapter I in view of the fact that the working group on Chapter II had not completed its task yet. He indi-

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

cated that Mr. da CUNHA (Brazil) had proposed amendments of Articles 4 and 6.¹ However, since these Articles had been referred to the Drafting Sub-Committee he suggested that these amendments be discussed after the report of the Drafting Sub-Committee had been produced.

Article 7

Concerning this Article, no comments had been made concerning paragraphs (1), (2) or (3). With respect to paragraph (4) some questions had been raised in the written comments submitted by Turkey and the Malagasy Republic.²

Mr. FILGEN (Turkey) referred to paragraph (4) and thought that the proposed procedure to obtain votes from the Administrative Council without calling a meeting thereof was appropriate for minor questions, but that concerning major decisions the meeting should not be dispensed with. He would have preferred a provision stating that an express refusal would be necessary, and that silence would indicate consent. He also felt that it was necessary to establish a time limit for the submission of votes by mail. Therefore, he suggested that the second part of the paragraph be modified to read as follows: "provided, however, that in the case of a vote taken pursuant to such procedure, the suggestion submitted, if it is not answered within X days, will be considered accepted."

Mr. BROCHES (Chairman) agreed that the paragraph as it was drafted omitted an essential point, namely the necessity for establishing a time limit. Therefore, he suggested that after the word "unless" in the text there be added the words "within the time limit established for such a vote".

Mr. BILGEN (Turkey) stated that this would be acceptable to him. Mr. RATSIRAHOMANA (Malagasy Republic) was also satisfied with this proposal.

Mr. LARA (Costa Rica) suggested to the other delegates that in order to accelerate the discussion they should not take the floor for more than ten minutes. Proposals of a general nature should be submitted in writing, to give time to the delegates to study them before the discussion. Concerning Article 7(4) he felt it was dangerous to deem approved a proposal which might have great importance due to the mere fact that no answers had been received. He thought that it would be appropriate that a second request be made before considering the matter as approved; and he suggested that this paragraph be modified accordingly.

Mr. BROCHES (Chairman) indicated that actually no decision could be taken, whether at a meeting or by a written vote, without the required majority. The restriction in Article 7(4) dealt exclusively with the question of quorum.

Mr. LOKUR (India) wished to know how the two-thirds majority was to be reconciled with the provisions of Article 7(4).

Mr. BROCHES (Chairman) replying said that Article 7(4) had no bearing on the question of the necessary majority needed for any particular point. It merely stated a rule of "quorum" for a written vote. He thought the language water-tight. It had been used in the Bank

¹ See Doc. 54
² Docs. 69 and 70
³ See Doc. 45

from its earliest days and no difficulties had been experienced. The "quorum" provision only relates to the question of whether it is proper for the motion to be discussed, and the Article provides that unless replies are received from a majority of members of the Council that in itself would suffice to defeat the motion. Once the majority has replied, however, the particular majority for carrying the motion in question would have to be inquired into. Nevertheless, the Drafting Sub-Committee may wish to improve this language.

Mr. van SANTEN (Netherlands) suggested that the language may be improved in the following manner: "Provided, however, that in the case of a vote taken pursuant to such procedure the vote will only be valid when replies are received from a majority of the members of the Council." This in his opinion would remove the confusion arising from the phrase "the motion shall be considered lost," in the Article under discussion.

Mr. KPOGNON (Dahomey) wished to know whether the Convention included a provision for proxies.

Mr. BROCHES (Chairman) replied that the Convention included no provision for proxies but that in his opinion it would be quite possible to follow the Bank practice whereby States could designate certain persons as temporary alternate delegates where both the representative and his usual alternate are incapacitated.

Mr. GUARINO (Italy) suggested that the Rules of Procedure adopted pursuant to Article 7(4) include a provision for the case of conditional replies.

Mr. BROCHES (Chairman) said that in a question of voting a qualified answer would not be counted as one favoring the proposition on which the vote was solicited.

Mr. AWOONER-RENNER (Sierra Leone) requested a clarification on the last sentence of Article 7(1).

Mr. BROCHES (Chairman) explained the current procedure with respect to the Annual Meetings of the Bank and Fund, and stated that the Convention envisaged that the Administrative Council convene within that same period which was subject to annual review.

Mr. ORTIZ (Peru) wished to know what would happen if, when a written vote was solicited, one-tenth of the members of the Council requested a meeting to discuss the subject which was submitted for a written vote.

Mr. BROCHES (Chairman) replying said that if the request to convene a meeting were received within the time limit for the reply on the written vote the Chairman would probably notify the members of this fact, and cancel the request for a vote. He said that paragraph (4) merely authorized the Administrative Council to establish the procedure and that the Council might adopt regulations to provide for this contingency.

Mr. BUEROVS (United Kingdom) wondered whether it was wise to write into the Convention a treaty obligation that the Annual Meeting must be held in conjunction with the Annual Meeting of the Bank. He thought that the best solution would simply be to delete the last

sentence of Article 7(1).

Mr. BROCHES (Chairman) replied that the main purpose for inserting the provision was to insure the contracting parties that no separate requirements of attendance at Annual Meetings would be necessary. He therefore thought that the words "would normally be held in conjunction" might best meet the point raised by the delegate of the United Kingdom.

Mr. MELCHOR (Spain) wished to associate himself with the remarks of the delegate of the United Kingdom. He said it was evident that the meeting would normally take place in conjunction with the Annual Meeting of the Bank but he thought it rather strange to have the provision included in the basic statute.

Mr. BROCHES (Chairman) canvassing the views of the meeting declared that the large majority appeared to be in favor of deleting the sentence from the Convention. He said, however, that in view of the statements made on this point he did not interpret this as precluding the Administrative Council from taking a decision to this effect in its Rules and Regulations. The Chairman then summarized the discussion on Article 7. He said there was agreement in substance subject to a time limit being inserted into the provision of Article 7(4) which would state the limit within which the question of whether a majority of replies had been received would be calculated. There was also a drafting suggestion by the representative of the Netherlands.

Mr. LOKUR (India) proposed that the Rules of Procedure envisaged by Article 7(4) require a majority of two-thirds for their adoption.

Mr. BROCHES (Chairman) ascertaining the sense of the meeting announced that as the suggestion had no opponents the Rules of Procedure under Article 7(4) would require a two-thirds majority of the votes of all the members of the Administrative Council for their adoption.

Mr. MALAPLATE (France) requested a clarification of the meaning of the phrase "a specific question" in Article 7(4). He thought the French text on this point was meaningless and that the phrase should be omitted.

Mr. BROCHES (Chairman) explained that this meant a question to which a "yes" or "no" answer was applicable and that the matter be referred to the Drafting Sub-Committee as, in his opinion, no matter of substance was involved.

Mr. BURROWS (United Kingdom) requested that the Chair ascertain the views of the plenary meeting on this question rather than refer it to the Drafting Sub-Committee.

Mr. BROCHES (Chairman) submitted the proposal to a vote, and announced that the majority appeared to favor a deletion of the phrase "on a specific question" from the text. He then referred Article 7 to the Drafting Sub-Committee.

⁵ For its report see Docs. 69 and 70; cf. Doc. 60

Article 8

Mr. FUNES (El Salvador) thought that the corresponding provision of the preliminary draft was more clear since it stated expressly that the Chairman and the members of the Administrative Council would not receive any remuneration "from the Centre". Referring to Article 4(2), he considered it natural that persons who would not be simultaneously governors of the Bank receive a remuneration.

Mr. PIDTO (Deputy Secretary) said that the word "remuneration" had been substituted to the expression "compensation from the Centre" in order to state more precisely that the Chairman and the members of the Administrative Council would not receive regular salaries.

Mr. BROCHES (Chairman) saw no objection to reintroducing the expression "from the Centre". The Committee agreed.

Mr. LOKUR (India) thought it desirable to state whether travel and other expenses would be borne by the Centre or by the respective governments.

Mr. BROCHES (Chairman) thought that a specific provision might give the impression that such expenses would be rather high or that there would be additional expenses. In fact, since the annual meetings are expected to take place in conjunction with those of the World Bank and of the International Monetary Fund, the expenses would be borne by these institutions. He therefore suggested not to be too specific on this point and added that in his opinion the Administrative Council was amply authorized to provide for expense allowances.

Mr. TSAI (China) said that paragraph 24(2) implied that the members of the Administrative Council could receive such allowances.

Mr. BROCHES (Chairman) agreed but pointed out that Article 24(2) merely provided for tax immunities in case allowances would be paid, without, however, specifically authorizing such allowances. He added that the financial obligations which Contracting States might incur would be determined by the budget and by Article 17 and advised against dealing with this question in Article 8.

Mr. GHACHEN (Tunisia) said that this matter should be left to the Administrative Council to decide.

Mr. BROCHES (Chairman) agreed and added that since no expenses were expected in connection with annual meetings, the decision might even be held up until the convening of a special meeting would be envisaged. The Administrative Council might then decide, as part of the decision to hold a special meeting, how to deal with travel and other allowances.

Mr. MELCHOR (Spain) thought that Article 8 should not be modified since everyone seemed to agree that the Chairman and the members of the Administrative Council should not receive any remuneration. The question of allowances was a separate problem and should, if considered necessary, be dealt with in another Article, although he would prefer not to do so.

Mr. LARA (Costa Rica) concurred.

Mr. MALAPLATE (France) objected to the expression "Conseil Administratif" in Article 8 as well as in other provisions of the Convention. The matter had already been discussed by the Drafting Sub-Committee in connection with Article 2 and he wanted to know the opinion of the full Committee.

Mr. BROCHES (Chairman) said that the expression had been taken from the Hague Treaties of 1899 and 1907¹ but he did not see any objection to using another expression. He suggested however that the discussion on this point be deferred until the Committee has examined Mr. LOKUR's proposal concerning the creation of an Executive Committee.

[The meeting then recessed for a short period.]

Mr. BROCHES (Chairman) asked the Committee to examine Document SID/LC/17² concerning Mr. LOKUR's proposal to create an Executive Committee.

Mr. LOKUR (India) said that he was proposing the creation of an organ to be situated between the Administrative Council and the Secretary-General, which would enable the activities of the Centre to be carried out efficiently and relieve the Administrative Council from a part of its burden, in particular with respect to the administrative matters. A small committee would be in a better position to deal with these questions than the Administrative Council which would be a large body consisting of representatives of all the Contracting States. The Executive Committee would supervise the operations of the Centres and guide the Secretary-General when important decisions were to be taken. The existence of this Executive Committee would also avoid delays due to voting by mail. He drew the attention of the Committee to the additional functions mentioned in paragraphs 3 to 7 of his proposal.

Mr. BROCHES (Chairman) reminded the Committee that the provision on the ancillary activities of the Centre had been deleted and that consequently the term "activities" should probably be considered as meaning "administration". He added that in his opinion the Executive Committee would work under the general control of the Administrative Council except in the case where the Convention would give it specific powers.

Mr. O'DONOVAN (Australia) objected to the addition of further administrative machinery to the Centre since it was not clear at this stage whether any substantial administrative work would be necessary. The creation of an Executive Committee would also involve additional expenditures. He admitted that these expenditures would probably be small since it was expected that the Executive Committee would be composed of the Executive Directors of the Bank, although he was not sure that all Contracting States would wish to be represented by the Bank's Executive Directors. Should the meeting consider the creation of an additional organ as desirable, he would rather suggest that the Administrative Council be authorized to establish an Executive Committee and to delegate to such Committee such of the functions of the Administrative Council as the members of the Administrative Council would decide by a two-thirds majority.

¹ Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907
² Doc. 52

Mr. PINTO (Guatemala) also objected to Mr. LOKUR's suggestion since it would link the Centre too closely with the Executive Directors of the Bank. In addition, he pointed out that some of the powers and functions which were set forth in Article 3 B of Mr. LOKUR's proposal could be fulfilled by the Secretary-General and the Deputy Secretary-General.

Mr. KPOGNON (Dahomey) after mentioning that a multiplication of organs should be avoided, said that the creation of an Executive Committee might create conflicts of competence. He also noted that the proposed Executive Committee would link the Centre too closely with the Bank and that some of the functions of the Executive Committee were now entrusted to the Administrative Council. The Executive Committee might also involve additional expenditures, particularly if the seat of the Centre were to be removed from Washington.

Mr. LARA (Costa Rica) considered Mr. LOKUR's proposal as premature. For the time being, administrative matters should be entrusted to the Secretary-General and his assistant.

Mr. SAPATEIRO (Portugal) agreed that it was not necessary to multiply the organs of the Centre, particularly since the Centre had no competence to engage in ancillary activities. However, he thought it advisable to provide for the possibility of creating such a committee at a later stage, along the lines suggested by the delegate of Australia.

Mr. BOHANI (Tanzania) thought that since the Centre would have purely administrative functions, these could be fulfilled by the Chairman and the Secretary-General. Should the need for an intermediary body appear at a later stage, the Convention could always be amended or revised.

Mr. MANIRAKIZA (Burundi) said that the position of the Executive Committee in the hierarchy of the organs of the Centre was not clear to him and added that in his opinion, the proposed functions of the Executive Committee could be fulfilled by the Secretary-General.

Mr. BPOCHES (Chairman) noted that no member of the Committee seemed in favor of creating an Executive Committee.

Mr. LOKUR (India) said that the creation of the Executive Committee should not lead to additional expenditures since the members would be stationed in Washington and would not receive any remuneration. Should the close link between the Centre and the Bank be considered undesirable, he would not insist on his suggestion that the Executive Committee be composed of the Executive Directors of the Bank. Finally, should the meeting consider the creation of an Executive Committee as premature, he would not object to the suggestion made by the delegate of Australia.

Mr. BERNARD (Liberia) asked whether under the present Draft Convention the Administrative Council would be authorized to establish an Executive Committee.

Mr. BROCHES (Chairman) did not think that this was clear and thought that one should avoid problems concerning amendments or questions of interpretation should the need for an Executive Commit-

tee appear at a later stage.

Mr. KPOGNON (Dahomey) thought that a possibility for the Administrative Council to create at a later stage an Executive Committee would be contrary to the Convention since the Administrative Council would then be granted a power to establish organs, which in his view, could only be created by the Convention itself.

Mr. SAPATEIRO (Portugal) did not agree with Mr. KPOGNON's comment since the Administrative Council could only delegate administrative powers and not the fundamental powers conferred upon it by Article 6. He nevertheless thought that a special provision would be necessary.

Mr. van SANTEN (Netherlands) agreed in substance with Mr. SAPATEIRO, but did not think it necessary to have the question dealt with by a special provision.

Mr. BROCHES (Chairman) felt that the question appeared to be a matter of formulation and suggested that the Secretariat prepare some drafts for the afternoon's discussion.

Article 9

Mr. HANDEKIZA (Burundi) suggested that the wording of this Article be modified by substituting the word "four" for the words "one or more". He felt it was important to set a limit to the possible proliferation of Deputy Secretaries-General. He also thought it might be advisable to have four continents represented in the Secretariat, which would give to it a better understanding of regional problems.

Mr. BROCHES (Chairman) stated that two possible approaches resulted from this suggestion. One was that for reasons of economy there might be either one Deputy or no Deputy at all. He thought that one Deputy would be desirable because the Secretary-General might be absent or prevented from acting. The other alternative was that if there were more than one Deputy, it would be advisable to have a number that would enable the Secretariat to have persons familiar with conditions in various parts of the world. He then enquired the sense of the meeting as to an amendment of Article 9 which would provide for only one Deputy Secretary-General. The show of hands indicated a large majority for this view.

Mr. HETH (Israel) thought that it would be preferable to provide for one or more Deputy Secretaries-General and to let the Administrative Council decide this matter when appropriate, since in the future more than one Deputy might be required.

Mr. BROCHES (Chairman) stated that in part it was a question of title only because the staff could be sufficiently large if there was much work and still there could be only one person with the title of Deputy Secretary-General. He then suggested another possibility, which was to leave the text of this Article as it was and state in the Commentary that would accompany the Draft Convention that although the text provided for one or more Deputy Secretaries-General, the Executive Directors were opposed to overstaffing and did not at that time foresee the possibility of having more than one Deputy Secretary-General. A show of hands indicated that this possibility

was less satisfactory.

Mr. van SANTEN (Netherlands) suggested that this proposal would come also under Article 10, where it was already stated that it was up to the Administrative Council to elect the Deputy Secretaries-General. He suggested that there could be added to Article 10 a restriction to their number by saying "if necessary, one to four Deputy Secretaries-General".

Mr. TSAI (China) agreed with Mr. HETH that the possibility of having more than one Deputy Secretary-General should be provided for. He asked the Chairman what the functions of the Deputy Secretary-General were going to be.

Mr. BROCHES (Chairman) stated that in his view the Deputy Secretary-General, at least in the first years would be somebody appointed merely to act in the place of the Secretary-General while the latter was away, and that in the normal course of affairs the Deputy Secretary-General would have no duties to fulfil. There would probably be staff, but not of the calibre required for a Deputy Secretary-General. He then requested a show of hands concerning the proposal to leave the text as it stood, with a Commentary to be recommended to the Executive Directors for use in their reports to the Governments along the lines of his previous suggestion. Twelve delegates were in favor of this proposition and six against. Mr. BROCHES indicated that the Executive Directors would note that many delegates had no strong views one way or the other, although the consensus was that no unnecessary proliferation of high officials should take place.

Article 10

Mr. BROCHES (Chairman) stated that two amendments of this Article had been suggested in writing. Mr. da CUNHA^{*} had suggested that members of the Administrative Council should have a veto power against one or more nominees suggested by the Chairman without the need for explaining the reasons for their position. In connection with the second sentence of paragraph (1), Lebanon had suggested that the Chairman should have to offer a multiple choice of nominees to the Administrative Council."

Mr. PINTO (Guatemala) suggested that, as proposed by Mrs. VILLAGRATTNER at a previous meeting, there should be a provision designating the person who will be the legal representative of the Centre. In connection with Article 10(1) he suggested that the Chairman select the nominees from lists submitted by member Governments or, if this suggestion were rejected, that a provision be inserted establishing that the Secretary-General would not have the nationality of the Chairman.

Mr. MANTZOULINOS (Greece) supported this proposal.

Mr. BROCHES (Chairman) indicated that Mr. O'DONOVAN had proposed an amendment[†] which, being of a drafting nature, had been referred to the Drafting Sub-Committee.

Mr. FUNES (El Salvador) agreed with the suggestion submitted by Lebanon. He indicated that Article 10(1) states that the Secretary-General and Deputy Secretaries-General shall be "elected" by

* See Doc. 128

† Not reproduced since proposal contained in summary record

‡ See Doc. 45

§ See Doc. 61

the Administrative Council, and that election implied the possibility of choosing among several persons. If the Chairman could propose only one candidate it would be a case of "ratification" and not of election by the Administrative Council. He felt that it would be far more logical to provide that the Chairman would have to propose several names among which the Administrative Council could make its selection.

Mr. BROCHES (Chairman) summarized the four suggestions that had been made on this subject and enquired whether there was support of the proposal made by Mr. da CUNHA. A show of hands indicated that there was no support for that proposal. Referring to the first proposal made by Mr. PINTO, he indicated that suggestions of candidates for the office of Secretary-General could be made in any event by member Governments, but the proposal considered it desirable to provide expressly that the Chairman, before making his nomination would take into consideration suggestions made by members of the Administrative Council. A show of hands indicated a majority in favor of this proposal.

Mr. van SANTEN (Netherlands) said that he had opposed this proposal because he felt that it would be time consuming. All the delegates respected the President of the Bank and could rely on him to make a proper nomination. Besides, there were always means of making suggestions to the President of the Bank.

Mr. GUARINO (Italy) opposed this proposal because he felt that the procedure should be as flexible as possible. In fact he thought that the present wording referring to nomination by the Chairman could be deleted altogether.

Mr. BROCHES (Chairman) thought that the spirit of Mr. PINTO's suggestion was that no very formal procedures would be established but that the Convention would mention the fact that the President would invite views from members of the Council.

Mr. PINTO (Guatemala) did not feel that there would necessarily be delays caused by the procedure he proposed. He felt that the Charteries of the member countries could act quickly in presenting their views.

Mr. BROCHES (Chairman) suggested that possibly there could be added at the end of the second sentence of Article 10(1) the words "after having solicited the views of the members of the Administrative Council".

Mr. van SANTEN (Netherlands) enquired whether the Administrative Council could be called into session without there being a Secretary-General.

Mr. BROCHES (Chairman) answered that there was a provision to that effect in the final Articles of the draft.

Mr. LOKUR (India) enquired whether the Chairman could still propose only one name even though members of the Council had suggested five or six candidates.

Mr. BROCHES (Chairman) thought that his suggestion would not affect the right of the Chairman to propose only one candidate.

He stated that the meeting seemed to agree that the Chairman would nominate one or more candidates, but before making such nomination he would consult the members of the Administrative Council. He then referred to the suggestion of Lebanon, which had been supported by Mr. FUNES, that the Chairman should in all circumstances present the Administrative Council with a multiple choice rather than a single nominee.

Mr. SAFATEIRO (Portugal) did not think that there should be provided a minimum number of candidates to be proposed by the Chairman, because it might not always be easy to find a qualified person for the functions envisaged and therefore it might be impossible to find more than one candidate. Therefore he believed that the second sentence of paragraph (1) should not be modified.

Mr. BROCHES (Chairman) agreed with this, and indicated as an additional reason that it might be particularly difficult to find candidates if they would have to participate in a contest. This was not a political position and the type of person who might be interested in it might not like to appear to be in a campaign for election.

Mr. BOHANI (Tanzania) thought that the difficulty might be solved if the second sentence of Article 10(1) were deleted altogether. The first sentence referred to an election by the Administrative Council. The word "elected" presupposed the existence of an element of choice and would make it necessary for the Chairman to give that choice to the Administrative Council.

Mr. BROCHES (Chairman) agreed that in the word "elected" there was such an element of choice. He did not agree with Mr. FUNES' use of the term "ratification" for the case where the Chairman presented only one candidate. That candidate could still not receive the required number of votes and so there would still be an election. A show of hands indicated that a majority was in favor of leaving the text of the provision as presently drafted. Mr. BROCHES indicated that if an individual delegation wanted to be on record on this subject he would take a roll call, but no request to that effect was made.

Mr. LOKUR (India) stated that if only one candidate was submitted by the Chairman and he failed to secure the two-thirds majority the Chairman would have to search again for another candidate. But if there were a list of more than one candidate the selection of the Council would be facilitated.

Mr. BROCHES (Chairman) stated that there was obviously a risk involved for the Chairman in presenting only one nominee and he was sure that he would not do so unless he had ascertained that the candidate he proposed to nominate was acceptable, since it would be an embarrassing situation if the candidate did not get the required number of votes.

Mr. PDMO (Guatemala) stated that in view of the decision taken, he wished to withdraw his alternative proposal that the Secretary-General and the Chairman could not be of the same nationality.

Mr. BROCHES (Chairman) stated that the meeting would reassemble that afternoon at 3 o'clock.

[The meeting adjourned at 1:35 p.m.]

60

SID/LC/27 (December 2, 1964)
Proposals by Mr. R. Beauvoir (Haiti) to Legal Committee

Article 7 - Paragraph (1) might be replaced by the following sentence:

- 1) "The Administrative Council shall meet once a year and other meetings may be called by the Council, the Chairman or the Secretary-General at the request of not less than one-tenth of the members of the Council."

To simplify the procedure, it might be better to interpret the silence of the Governments as tacit consent rather than a negative vote. Therefore I take the liberty of suggesting the following wording of the last part of paragraph (4):

"... 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 within a given time, the motion shall be considered passed."

Article 10 - No mention is made of the manner of election or of the term of service of the Secretary-General and the Deputy Secretaries General. Nor do we know whether or not they may be reelected. It would therefore be desirable to amend paragraph (1) as follows:

"The Secretary-General and Deputy Secretaries-General shall be elected by secret ballot of the Administrative Council upon the nomination of the Chairman for a term of years and may be reelected."

Article 15 - The term of 4 years seems too short.

Article 17 - It would be desirable to have the expenditure attaching to the operation of the Centre borne jointly by the Bank and the contracting parties.

Articles 31 and 40 (2)

Delete the last sentence "... to establish prima facie that the dispute is within the jurisdiction of the Centre."

Articles 53 and 54

(Last sentence). For the sake of clarity it would perhaps

be desirable to amend this sentence as follows:

"In both cases, the Tribunal may, if it considers that the circumstances ..."

Article 55 (4)

"Any application for annulment" instead of "any application under review".

Article 72 - It seems to me that ratification or acceptance by only 12 States is clearly insufficient to justify the entry into force of the Convention. It would perhaps be better to fix a higher number of from 40 to 60 States.

61

SID/LC/6 (November 23, 1964)
Amendments proposed by Mr. O'Donovan (Australia) to Legal Committee

Article 10

After sub-clause 1 insert additional sub-clause 1(A) as follows:-

"Upon the election of a second and each subsequent Deputy Secretary-General, the Administrative Council shall declare the order of seniority of the Deputy Secretaries General for the purposes of Article 11(2)."

Article 11

In sub-clause 2 delete the concluding sentence and insert the following in its stead:-

"If there shall be more than one Deputy Secretary General, the senior Deputy Secretary General who is available shall act as Secretary General."

Article 15

It would be desirable to redraft sub-clause 2 to make it quite clear that it is not "the Chairman who had designated the (deceased or resigned) member" who has the right to appoint a successor.

Clearly enough, the intention is that it is the Chairman at the time the vacancy occurs who is to fill the vacancy but the draft in its present form does not say so.

Article 19

It may be desirable to include, either in the Convention itself or in rules to be adopted by the Administrative Council in pursuance of Article 6, a provision to the effect that all things done in the name of the Centre by or with the authority of the Secretary General shall be deemed to be acts of the Centre.

Articles 20 and 21

- (a) In relation to these Articles, consideration might be given to providing expressly for waiver by the Administrative Council of the immunity conferred on the Centre and on the Chairman and staff. In this connection, attention is invited to the provisions of Sections 4, 16 and 24 of the Convention on the Privileges and Immunities of the Specialised Agencies.
- (b) Because it may be necessary for a Contracting State to give effect to the provisions of Article 21 by domestic legislation, it would seem to be desirable that the immunities provided for in this Article should be more explicitly defined.

Perhaps it would be desirable for the matters referred to in subparagraphs (i) and (ii) to be dealt with in separate clauses.

Clause (1) could conveniently deal with immunity from legal process with respect to acts done by the Chairman etc., in their official capacity and the waiver of that immunity.

Clause (2) might provide somewhat as follows:-

"The Chairman, members of the Administrative Council, persons acting as conciliators and arbitrators and such officers of the Secretariat as the Administrative Council has designated as High

Officers, 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 diplomatic representatives of other Contracting States. Other officers and employees of the Secretariat, 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 members of the staff of diplomatic missions of other Contracting States who are not themselves diplomatic representatives."

62

SID/LC/SR/7 (December 22, 1964)
Summary Proceedings of the Legal Committee Meeting, November 30, Afternoon¹

The Legal Committee reconvened at 3:00 p.m.

Mr. QUILL (New Zealand) referring to the second sentence of Article 10(2) thought the emphasis might be placed a little differently, at least in relation to the Deputy Secretary-General, so that the Article would indicate that he would normally be engaged in other employment but that that other employment should have the approval of the Administrative Council.

Mr. BROCHES (Chairman) thought the language was fairly neutral and well suited for the purpose in mind.

Mr. QUILL (New Zealand) said that he really made an observation for the Drafting Committee to keep in mind.

Mr. FUNES (El Salvador) requested to know whether the provision of

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

incompatibility with the exercise of any political function would mean incompatibility with any public office.

Mr. BROCHES (Chairman) replied that that indeed was the intention. He then announced that as there was no difference of substance with respect to Article 10(2), he would refer this provision to the Drafting Sub-Committee.

Article 11

Mr. BROCHES (Chairman) referred to the Australian proposal for the elimination of some words from Article 11(2) and their transfer to Article 10, circulated to the Committee in Document SID/LC/6.¹ He then said there was a suggestion to express in Article 11 the idea that the Secretary-General would represent the Center. He thought the latter proposal may have some merit. If that was agreeable he would ask the Drafting Sub-Committee to take account of that point.

Mr. PINTO (Guatemala) suggested that the term of office of the Secretary-General and the duration of his post be included in Article 11.

Mr. BROCHES (Chairman) stated that this was to be taken care of by the administrative rules to be adopted by the Administrative Council.

Article 12

Mr. MALAPLATE (France) suggested the deletion of the entire Article. In his opinion it was redundant since the subject matter was already covered by other provisions of the Convention.

Mr. BROCHES (Chairman) stated that in his opinion the inclusion of Article 12 dealing with conciliation as well as arbitration had in effect resulted in a shorter Convention. However, he did not preclude the possibility of the Drafting Sub-Committee looking into this matter.

Mr. LARA (Costa Rica) wished to know the reason for the making of two lists and two Panels as the qualifications for service on either Panel seemed to be identical. He thought there might be a reason to distinguish between the qualifications for serving as a conciliator from those required for an arbitrator. Conciliators should perhaps possess a greater degree of experience in the field of public relations. However, since the Convention did not require different qualifications in the case of conciliators he did not understand the reason for having two Panels.

Mr. BROCHES (Chairman) said that although the requirements for the two Panels were the same it would still be possible to make a personal distinction and to nominate persons who were particularly suitable to act as conciliators to that Panel. Article 16(1) left the Contracting States a certain amount of flexibility which would allow them to designate or not designate the same people to both Panels.

Mr. TSAI (China) recalling the written comments² submitted by his country relating to limiting the Convention to members of the Bank, stated that the members appointed to the Panels should also be nationals of the member States.

Mr. KPOGNON (Dahomey) stated that he did not share the views of the French delegate. He thought Article 12 played a useful role and that it should be left as it stood.

¹ For its report see Docs. 69 and 70
² Doc. 61

³ For its report see Docs. 69 and 70
⁴ See Doc. 45

Mr. BROCHES (Chairman) canvassing the views of the meeting stated that Article 12 could now be sent to the Drafting Sub-Committee.

Article 13

Mr. BROCHES (Chairman) drew the meeting's attention to two written comments on this Article. The first was a Brazilian suggestion to limit the number of persons designated by the Chairman to four, which was the number to be designated by Contracting States. The second was a proposal by Turkey, which was not in favor of having the Chairman designate anyone to the Panels.

Mr. BILGEN (Turkey) explained his Government's comment and stated that the right of the Chairman to designate Panel members should at least be limited to the specific purpose of ensuring that a balance of the various judicial systems was represented on the Panels.

Mr. AGORO (Nigeria) thought that the number of persons to be designated to the Panels should be reduced to two, both in the case of designation by the States as well as by the Chairman.

Mr. van SANTEN (Netherlands) recalled the experience of the Permanent Court of Arbitration according to which arbitrators were never chosen from the available panels. He therefore thought it more advisable to have large Panels which would give the parties as wide a choice as possible.

Mr. BROCHES (Chairman) indicated the reasons which would, in his opinion, favor the designation of four persons to each Panel.

Mr. LOKUR (India) suggested that a list of qualifications and experience of every person designated to the Panels be made available.

Mr. BROCHES (Chairman) stated that the regulations might provide that the Secretariat keep and circulate a curriculum vitae of the Panel members, as it did not seem a suitable matter for the Convention itself to deal with.

Mr. GUARINO (Italy) thought that parties should have as much freedom as they desired in the selection of arbitrators. Consequently, he would suggest that the use of the Panels be limited for the choice of the umpire and that the parties be left to choose the other two arbitrators from wherever they wished.

Mr. BROCHES (Chairman) requested the views of the meeting on the Turkish proposal relating to the right of the Chairman to designate persons to the Panels only in cases where there was a need to balance the legal systems and forms of economic activity on these Panels.

Mr. BERTRAM (Germany) stated that he was against the proposed limitation on the powers of the Chairman.

Mr. BROCHES (Chairman) requested a show of hands and announced that a large majority of the meeting was opposed to the Turkish proposal. He then requested a show of hands on the Brazilian proposal which would limit the powers of the Chairman to designate no more persons to the Panels than were designated by each Contracting State. He announced that a showing of hands resulted in a 22 - 10 vote in favor of leaving the provision as it now was.

* For its report see Docs. 69 and 70

† Not reproduced since suggestion contained in summary record

• See Doc. 45

Article 14

Mr. AGORO (Nigeria) said he was puzzled by the qualification "high moral character". He thought one should rely on the discretion of the States and eliminate this explicit reference from the text.

Mr. TSAI (China) requested clarification of the phrase "principal legal systems" in the text.

Mr. BROCHES (Chairman) said that the phrase came out of one of the documents concerning the International Court of Justice and would probably refer to the various groups of the prevailing legal systems, without taking into account whether the countries included within these groups spoke in one or many languages.

Mr. SAPATEIRO (Portugal) stated that he had no objection to Article 14 as it now stood.

Mr. LOKUR (India) said that in view of the disqualification provisions of Article 60 it might be more advisable to delete the phrase "high moral character". He also had grave doubts on the other qualifications mentioned in Article 14 and he thought that a cryptic provision would be the most adequate. One could rely on States to designate persons of integrity and honesty. He thought however that the knowledge of law, should be a mandatory qualification for persons designated to serve as arbitrators.

Mr. BROCHES (Chairman) stated that with respect to disqualification under Article 60 a very manifest lack of the qualities enumerated in Article 14 would be necessary for challenging a member of a panel. He thought the Panels should include commercial experts and not be limited to lawyers.

Mr. KPOGNON (Dahomey) thought that Article 14 may give rise to many problems as it was not clear who would pass judgment on the question of whether any member designated by a Contracting State met the qualifications there mentioned.

Mr. BROCHES (Chairman) replied that the designation of Panel members was entirely at the discretion of the States and that no one could challenge the designation of the members. Only when a member of a Panel was designated to serve on a tribunal could his competence be challenged in accordance with Article 60. But that was a different matter.

Mr. MELCHOR (Spain) supported the provisions of Article 14 of the Draft.

Mr. ORTIZ (Peru) associated himself with the remarks of the Spanish delegate supporting Article 14.

Mr. HETH (Israel) doubted whether the representation on the Panels of the principal legal systems was really relevant in connection with this Convention as it was with regard to the composition of the International Court of Justice, from whose Statute the idea was borrowed. This was so because a wide representation could not be assured in every individual case.

Mr. BROCHES (Chairman) explained that as arbitration clauses sometimes referred to principles of law common to a certain group of countries, it was advisable to include something along these lines in the Convention.

Mr. LOKUR (India) restated his objection to the phrase "high moral character".

Mr. BROCHES (Chairman) canvassed the views of the meeting and announced that the majority appeared to favor the retention of this phrase in the Draft. He then canvassed the views of the meeting on whether a qualification with respect to legal competence should be introduced for membership on the Panels.

Mr. van SANTEN (Netherlands) remarked that Article 55 should be borne in mind when deciding the qualification of Panel members. He thought it important that a sufficient number of legal experts were represented on the Panels so that when an ad hoc committee under Article 55 was appointed the choice of the Chairman would not be too narrow.

Mr. BROCHES (Chairman) then announced that there seemed to be a consensus on the question of legal qualifications with respect to the Panel of arbitrators. He would therefore refer the matter to the Drafting Sub-Committee which would now have to separate the provisions dealing with conciliation from those dealing with arbitration since this particular legal qualification was limited to the Panel of arbitrators.

Mr. LARA (Costa Rica) stated that if there were going to be two Panels, the requirements for their members should be different, since the procedures for conciliation and arbitration were different. He pointed out the differences between the provisions in Article 37 and those in Article 45, particularly the fact that in the latter the arbitrators were to decide the dispute in accordance with rules of law. For conciliation it was not necessary to have experts in the field of law. But this was not so in the case of arbitration.

Mr. BURROWS (United Kingdom) requested, in his capacity as Chairman of the Drafting Sub-Committee, that the result of the last vote be clarified. He had noted that the decision had been that in the case of arbitrators legal competence should be given some kind of preponderance, and he requested that a specific text approved by the Committee be referred to the Drafting Sub-Committee which could then be reviewed as a matter of drafting.

Mr. LOKUR (India) stated that his proposal had been that the arbitrators should be competent in the field of law, but he had not suggested that any preponderant element be considered. Arbitrators had to be lawyers aside from other qualifications because they were going to interpret and apply the law.

Mr. BURROWS (United Kingdom) enquired whether a specific text could be prepared.

Mr. BROCHES (Chairman) stated that Mr. LOKUR's idea would be that the arbitrators would have to have recognized competence in the field of law and that competence in other fields would be optional.

At the request of Mr. BURROWS, Mr. BROCHES stated that the Secretariat would attempt to formulate a text on the basis of Mr. LOKUR's suggestion, but that first he wanted to know whether there was a consensus in favor of requiring that members of the Panel of Arbitrators be competent in the field of law as an absolute requirement.

Mr. MELCHOR (Spain) felt that since there was agreement in maintaining the provisions of the draft concerning the Panel of Conciliators, there was only need to make a separate reference to the Panel of Arbitrators, with an indication that arbitrators would have to have the same

* For its report see Docs. 69 and 70

qualifications as conciliators, and that in addition they would have to have sufficient knowledge of law, so that they would be able to render the award. He did not believe that non-lawyers should be prevented from being arbitrators. However, they should have sufficient knowledge of law to enable them to render an award.

Mr. BROCHES (Chairman) requested a show of hands on this proposal, and the majority of the delegates indicated their support for it.

Article 15

Mr. BROCHES (Chairman) stated that on paragraph (1) there had been a written comment by the Malagasy Republic¹⁰ to the effect that conciliators or arbitrators should continue to serve beyond the period of four years while actually engaged as members of a Commission or Arbitral Tribunal.

Mr. BILGEN (Turkey) reaffirmed the written comments submitted by his country¹¹ to the effect that the term of service of conciliators or arbitrators should be longer than four years as proposed, or that the members' countries should be authorized to extend their term of service.

Mr. BROCHES (Chairman) thought that this should be dealt with by the Drafting Sub-Committee.

Mr. BERTRAM (Germany) thought that the term of four years was too short. He preferred a term of six years, as provided in Article 44 of the Hague Convention of 1907.¹²

Mr. PINTO (Guatemala) thought that members of the Panels would not actually serve four years. It would be only an expectation of serving because they would serve only when they had been called for specific cases. It might then be better to state that the Panels would be renewed every four years.

Mr. LOKUR (India) thought that the members of the Panel should not be appointed for fixed terms, and that Panel members should continue in their functions as long as the States who designated them wanted them to remain. There might be some reasons for a State to desire to withdraw the designation, since Panel members might become incapacitated. On the other hand, the four-year term could expire while he was acting as an arbitrator.

Mr. BROCHES (Chairman) thought that there would be a restriction or qualification to Mr. LOKUR's proposal in that once a person had been designated as a conciliator or arbitrator, the State could no longer withdraw him.

Mrs. VILGPATNER (Austria) felt that the term of four years was rather short, and would not help the Panel members to become entirely conversant with the cases that might be entrusted to them. A longer period of office would give more independence to Panel members. She was in favor of any proposal tending to extend their term of service or eliminating a fixed term and leaving only voluntary termination and disqualification. There should also be provision permitting Governments or the Chairman to extend the terms of service of members of Panels appointed by them.

Mr. PINTO (Guatemala) suggested that the words "or other impediment" be added after the word "resignation".

¹⁰ See Doc. 45

¹¹ See Doc. 45

¹² Hague Convention for the Pacific Settlement of International Disputes of 1907

Mr. BROCHES (Chairman) summarized the discussion and said that the following suggestions had been made: First, there seemed to be general agreement that whatever term of service was prescribed for a panel member, such term would be extended once the member had been appointed to a commission or tribunal; second, reappointment appeared to be acceptable; and third, a term of four years was regarded as too short and there seemed to be a preference for a term of six years, one delegate having proposed an indefinite term.

Mr. BERTRAM (Germany) thought that should an indefinite term be accepted, a minimum term should be provided in order to enable the arbitrators and conciliators to retain their independence.

Mr. MELCHOR (Spain) said that while the term should be longer, it should not be indefinite and that the removal of names from the panels should not be made too easy.

Mr. BROCHES (Chairman) then took the sense of the meeting. The Committee rejected the proposed amendment to Article 15 (1) that the names of panel members remain on the list for a period to be determined by the authority designating them. The majority of the Committee approved the proposal that panel members serve for a term of six years and that such term be extended once they have been appointed to a commission or tribunal. The Committee also accepted that panel members may be redesignated after their period of service has ended.

[The Meeting recessed for a short period]

Mr. SELLA (Secretary) announced that the Working Group No. 2 on the definition of "national of another Contracting State" would convene tomorrow at 3 p.m. in Room 647 and that proposals for amending paragraph (iii) of Article 30 should be submitted in writing.

Mr. BROCHES (Chairman) announced that the Drafting Sub-Committee would meet immediately after this meeting in Room 847. He then referred to his proposal made at the end of the morning session that the Secretariat present some language concerning the power of the Administrative Council to create an Executive Committee should the need arise. He suggested that a paragraph 3 be added to Article 6 as follows: "The Administrative Council may appoint such Committees as it considers necessary." The Committee accepted this suggestion.

Mr. BERTRAM (Germany) requested that the report¹² accompanying the Convention make clear that the Administrative Council could not delegate to the Sub-Committee matters which can only be decided by a qualified majority.

Mr. BROCHES (Chairman) agreed.

Mr. LOKUR (India) recalled his suggestion to add to Article 15 a provision to the effect that a Contracting State or the Chairman may withdraw from the panel any person designated to the panel by the Contracting State or the Chairman if in the opinion of that State or the Chairman, the panel member has ceased to possess the qualifications required by Article 14.

Mr. van SANTEN (Netherlands) said that while this clause would in a

¹² See Doc. 145

way be logical, it would endanger considerably the independence of the panel's members.

Mr. LOKUR (India) said that since the persons would be designated under the assumption that they possess the prescribed qualifications, it should be the duty of the authorities having made the appointment to inform the other Contracting States if they learn that the person in question has ceased to possess the required qualifications.

Mr. LOPEZ (Panama) agreed with the observations made by Mr. van SANTEN.

Mr. TSAI (China) also agreed with Mr. van SANTEN and added that should a member of the panel cease to possess the required qualifications, he could be challenged by either party. Consequently, the suggestion concerning withdrawal from the panel did not appear necessary.

Mr. BROCHES (Chairman) requested a show of hands and the Committee rejected the proposed addition to Article 15.

Mr. PEREZ (Ecuador) proposed that a new sentence be added to Article 15 (1) to the effect that the term of office of panel members be also extended until they are actually replaced.

Mr. PINTO (Guatemala) thought that this was a procedural matter which could be covered in the rules to be adopted by the Administrative Council pursuant to Article 6.

Mr. PEREZ (Ecuador) said that this was more than a mere procedural matter and that Mr. PINTO's suggestion would mean that the terms could be renewed or extended merely by a decision of the Administrative Council. He therefore thought it desirable that the Convention provide that panel members continue in office until their successors have been designated.

Mr. ORTIZ (Peru) agreed with the views expressed by Mr. PEREZ, particularly with respect to actual proceedings, since resignation from the panel would affect proceedings in which the member of the panel was participating.

Mr. BROCHES (Chairman) requested Mr. ORTIZ to submit a text of his proposal which might be inserted in Article 15 and which, if approved, could be submitted to the Drafting Sub-Committee."

Article 16

Mr. van SANTEN (Netherlands) thought it advisable to include a provision on the duty of the Secretary-General to notify the Contracting States of the designations or of any change in a designation to the panels.

Mr. BROCHES (Chairman) said that the draft Administrative Rules include such a provision but that a suggestion along these lines which might take into account Mr. LOKUR's proposal on the curriculum vitae of the members of the panels might be worked out for submission to the Drafting Sub-Committee. The Secretariat could prepare this draft for approval by the Committee.

Mr. LOKUR (India) said there might be some difficulty in the application of paragraph (2) of this Article were two States to designate the same person on the same day.

Mr. BROCHES (Chairman) thought that the provision stating that in such

¹⁴ Doc. 63

¹⁵ For its report see Docs. 69 and 70; cf. Docs. 60 and 61

¹⁶ Doc. SID/LC/4 of November 23, 1964, entitled "Draft Rules for Proposed Centre", not reproduced because of interest only for the history of the Regulations and Rules of the Centre (ICSID/4)

a case the designation of the State of which the person was a national prevails solved the difficulty.

Mr. LOKUR (India) suggested that specific language to this effect be used.

Mr. HETH (Israel) thought that as a member is deemed to have accepted his designation only after having given his consent, there would be no question of confusion since a person would not give consent to more than one nominating party.

Mr. BROCHES (Chairman) said that some persons might not be aware that they could not be designated by more than one party and therefore suggested that the Article be redrafted by the Secretariat."

Article 17

Mr. BROCHES (Chairman) referred to his note SID/LC/18¹⁷ which was circulated earlier in the day. He said it was in response to a written suggestion from Belgium."

Mr. ANDRE (Belgium) restated the reasons for his proposal that any deficit of the Center be financed by the Bank rather than by the Contracting States. He thought *inter alia* that since the Administrative Council would decide the question of charges by a simple majority it may decide to reduce those charges to a minimum and saddle the other Contracting States which were members of the Bank with considerable financial burdens. He then mentioned the fact that as all members of the Bank would not accede to the Convention at exactly the same time, the rate of contribution by the States which first acceded to the Convention would have to be modified every time a new member ratified the Convention. In addition there might be a constitutional problem for Belgium if the Article were maintained in its present form.

Mr. BROCHES (Chairman) reiterated the arguments and facts set forth in Document SID/LC/18.

Mr. LARA (Costa Rica) thought that the words "out of other receipts" referred to the assistance which the Bank might grant to the Center. He suggested that the Drafting Sub-Committee "redraft the Article to make it quite clear that it was only the excess of expense over revenue which would be covered by the Contracting States.

Mr. BERTRAM (Germany) recalled that when Article 6 was examined the Committee decided that the question of the necessary majority for approval of the budget would be taken up in conjunction with Article 17. He now returned to his original proposal that Article 6 include a provision with respect to the approval of the annual budget of the Center by a two-thirds majority.

Mr. BROCHES (Chairman) requested a vote and announced that the majority appeared to favor a two-thirds majority for approval of the budget. He then announced that the morning meeting would commence at 10:00 instead of 10:30 and expressed the hope that the discussion on Chapter I could be concluded by 10:30.

[The meeting adjourned at 5:50 p.m.]

¹⁷ Doc. 64; cf. discussion by Legal Committee on December 3, 1964, Doc. 73

¹⁸ Doc. 65

¹⁹ See Doc. 45

²⁰ For its report see Docs. 69 and 70; cf. Doc. 60

Article 15 (Addition)

Basis:

1. Basically any tribunal that has begun to consider a question should, once the review of the case begins, remain intact with the same members until the award is rendered or issued.
2. Since, in order to serve on an arbitral tribunal, a member may in his turn be a member of the panel, his exclusion from the latter might invalidate his jurisdictional capacity.
3. For the foregoing reasons, it is suggested that the voluntary removal from the panel be made subject to certain requirements and that sufficient justification for resignation be required when the member of the panel is serving on a tribunal that has begun to review a question.

Conclusion

The following paragraph should be added to Article 15:

"Any member of a panel who submits his resignation when he is serving on a tribunal that has begun to review a matter, shall be required to justify his resignation on one of the grounds for disqualification. The resignation shall be decided upon by the Chairman of the tribunal and, should there be any difference of opinion between the resigning member and the Chairman, the decision shall rest with the full tribunal. The resolution shall be adopted by the majority established for the final rendering of the award."

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Text proposed by the
Secretariat for addition to Article 16

(1)

(2)

(3)

(4) The Secretary-General shall keep Contracting States currently informed of the composition of the Panels and of the qualifications and experience of all persons designated thereto.¹

¹ See Legal Committee meeting of December 3, Doc. 73

SID/LC/18 (November 30, 1964)
Note from the Chairman to the Legal Committee

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

NOTE FROM THE CHAIRMAN

Article 17

In its written comments (SID/LC/5)¹ Belgium has suggested that the Bank should pay that portion of the expenditure of the Centre that cannot be met out of charges for the use of its facilities. At the Regional Consultative Meetings as well as in comments made directly to me since that time similar suggestions have been advanced on behalf of a number of delegations.

These suggestions raise two principal questions, viz. (i) whether the Bank would be prepared to make a contribution towards financing the overhead costs of the Centre and (ii) whether the Bank would be prepared to undertake a binding obligation to make such contributions in perpetuity and in whatever amount might be necessary to cover the excess of expenditure over receipts.

Both of these questions are, of course, matters for decision by the appropriate organs of the Bank. The first question would be within the province of the Executive Directors, whereas the second might require action by the Board of Governors. I had an opportunity to discuss the subject with the President of the Bank, Mr. Woods, just before his departure for Africa and Europe and in the light of that discussion I can inform the Committee as follows:

(a) Mr. Woods would be prepared to recommend to the Executive Directors that the Bank make a contribution to the overhead costs of the Centre

¹ See Doc. 45

along the lines indicated under letter (d) below, but he believes that it would not be possible for the Bank to undertake an open-ended commitment in the Convention itself.

(b) To explain the difference between the two suggestions, it may be useful to note that the second suggestion would mean an amendment of Article 17 of the Convention to read more or less as follows:

"To the extent that expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, it shall be borne by the Bank."

Since the parties to the Convention could not impose an obligation on a third party, i.e. the Bank, without its consent, it would be necessary for the Bank to accept the obligations imposed on it before the Convention entered into effect. Once having accepted these obligations, the Bank would be bound thereby as long as Article 17 of the Convention remained unchanged.

(c) It would seem unsound on general principle for one institution to undertake an obligation in perpetuity to meet the excess of expenditure over income of another institution. To do so would be particularly unsound in the case of the Bank and the Centre, since the Bank would have no control over the budget of the Centre. Pursuant to Section 19 of the Bank's By-Laws, the budget of the Bank is prepared by the President and presented to the Executive Directors for approval. In approving the budget the Executive Directors vote in accordance with the weighted voting formula prescribed in the Bank's Charter. The budget of the Centre, on the other hand, would be approved by the Administrative Council of the Centre (Article 6 of the Convention). These two bodies, the Bank's Executive Directors and the Centre's Administrative Council, would not only have a different composition but in addition the Administrative Council would follow the one-member-one-vote system rather than the weighted voting formula of the Bank. The only way in which this difficulty could be cured would be to give the Bank a formal veto power over the budget of the Centre, but this would place both the Bank and the Centre in an utterly undesirable position.

(d) Coming now to what the Bank might do to assist the Centre, Mr. Woods would be prepared to recommend to the Executive Directors that the Bank agree in principle to make a contribution towards the Centre's expenditure as long as the Centre had its headquarters at the Bank. He would further be prepared to recommend to the Executive Directors that the Bank would furnish the Centre for a fixed period to be determined (for instance 5 or 10 years) with office space, including furniture, equipment and supplies, and a contribution towards staff and other expenditures subject to some ceiling which could, however, be reviewed from time to time. Such an arrangement would assure the Centre for the agreed upon period of a source of revenue, leaving it up to the Administrative Council to increase the budget beyond that amount and to assess the Contracting States for the differences. The arrangements outlined in this paragraph would not necessitate any amendment to the present text of Article 17. If approved by the Executive Directors, the Executive Directors would adopt a suitable resolution and mention their willingness to contribute towards the expenditures of the Centre in their Report submitting the Convention to Governments.

The Legal Committee reconvened at 10:05 a.m.

Article 18

Mr. UKAWA (Japan) thought the expression "international legal personality" went beyond the precedent of other United Nations Specialized Agencies. He thought "full judicial personality" should be used instead.

Mr. BROCHES (Chairman) stated that the most recent charters of international organizations, as e.g. the African Development Bank, employed this term which was meant to draw a distinction between the capacity to act on the international level and capacity to act on the municipal level.

Mr. LARA (Costa Rica) suggested that the word "international" be eliminated.

Mr. van SANTEN (Netherlands) thought it was important to indicate who would represent the Center in its capacity to act.

Mr. BROCHES (Chairman) said that the question of representation had already been taken care of by the Drafting Sub-Committee in one of the earlier Articles. He then took a vote on the suggestion of the Japanese delegate and announced that the majority of the meeting was in favor of retaining the text as it now stood.

Mr. LARA (Costa Rica) said he still had some difficulty in understanding the meaning of "international" juridical personality. He did not see any reason for distinguishing between a national and an international personality. However, he would accept the decision of the majority.

Mrs. VILIGRATTNER (Austria) explained that in her opinion the meaning of the phrase was to endow the Center with a personality under international law.

Article 19

Mr. BROCHES (Chairman) in response to earlier comments² suggested the opening sentence of this Article be reworded as follows: "The Center shall possess full juridical personality in each Contracting State, and in particular the capacity "...

Mr. HELLNERS (Sweden) said that he would prefer Article 19 to remain unchanged as he saw some difficulty in accepting the idea of two kinds of personality. He also wished to know what was the model for Article 19.

Mr. BROCHES (Chairman) said that Article 19 was modelled on various international agreements including in particular the Convention on Privileges and Immunities of the United Nations. He then restated the grounds for distinguishing between the international personality and the local municipal personality of the Center.

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² Cf. Doc. 46

³ Cf. Comments by Turkey in Doc. 45, and Doc. 61

Mr. TSAI (China) said that he too would prefer that Article 19 remain unchanged because a national legal person might be required to comply with the duties of registration under municipal law.

Mr. BERTRAM (Germany) stated that he was in favor of the amendment proposed by the Chairman. In states which applied international law directly as internal law without the need for implementing legislation, this type of provision would save the need of introducing special legislation.

Mr. MELCHOR (Spain) wished to tie the provisions of Article 19 to those of Article 18 so that it would be clear that the capacity of the Center to act would be the consequence of its juridical personality.

Mr. LOKUR (India) thought that the proposed amendment for the first sentence in Article 19 was unnecessary. The fact that Article 18 endowed the Center with a legal personality made it unnecessary to add again that it was a juridical person.

Mrs. VILIGRATTNER (Austria) thought it would not be wise to qualify the opening sentence of Article 19 with the words "In each Contracting State" because the Center might have to deal with States which were not parties to the Convention.

Mr. BROCHES (Chairman) indicated that there were two proposals. One was to leave the text as it was, and the other was to use the words "the Center shall have the capacity in each Contracting State". He pointed out that while under the Advisory Opinion of the International Court of Justice and the present state of learning it was agreed that a group of States could bring into being a new international person, he had some doubt whether a group of States could endow such an institution with legal capacity which would be necessarily effective in dealings on the national level in another State. It was only by international comity that legal entities with certain powers in the States which had created them were frequently recognized as having the same powers abroad. A show of hands indicated that the majority favored the existing text.

Mr. MELCHOR (Spain) agreed with the existing text, but on condition that Article 19 start by saying that "as a consequence of its juridical personality the Center shall have the capacity..."

Mr. LOKUR (India) would have started Article 18 with the words "the Center shall have international legal personality and shall have the capacity to contract ..." and then Article 19 would state "to enable the Center to fulfil its functions ...". He enquired whether Article 19(iii) should not state "to institute and defend legal proceedings".

Mr. BROCHES (Chairman) stated that in English the words in the Draft were the only ones used and included both meanings. He asked what the practice was in India.

Mr. LOKUR (India) stated that they always said "institute and defend".

Mr. BROCHES (Chairman) then referred to Mr. MELCHOR's suggestion to open Article 19 with the words "as a consequence of its juridical personality the Center shall have capacity". A show of hands indicated a majority in favor of this proposal.

Mr. BROCHES (Chairman) thought that the suggestions made by

⁴ Reparation for Injuries Suffered in the Service of the U.N.; Advisory Opinion; ICJ Reports 1949, p. 174

Messrs. MELCHOR and LOKUR were substantially along the same lines, in that they wanted to bring closer the capacity as a consequence of the international legal personality.

Mr. BURROWS (United Kingdom) thought that Articles 18 and 19 referred to two entirely different things. Article 18 provided for personality in international law, a capacity to make international agreements, whereas Article 19 conferred upon the Center the private law capacity to enter into certain defined kinds of legal relationships. One did not follow as a consequence of the other.

Mr. BROCHES (Chairman) was in agreement with this. He then suggested that Article 18 could be reworded as follows: "(1) The Center shall have international legal personality. It shall have the capacity in the territories of each Contracting State (i) to contract, (ii) to acquire and dispose of movable and immovable property, and (iii) to institute legal proceedings. (2) To enable the Center to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges hereinafter set forth."

Mr. LARA (Coste Rica) suggested the following wording of Article 18: "The Center shall have full international legal personality, and for the due fulfilment of its function shall enjoy in the territories of each Contracting State the immunities and privileges set forth hereinafter." And Article 19 would read "The Center shall in addition have capacity ...", with paragraph (i), (ii) and (iii) remaining as in the present text.

Mr. BURROWS (United Kingdom) felt that there was a difference in substance between the two proposals. In Mr. LARA's proposal the reference to the due fulfilment of its functions was a limitation imposed on the Center. He hoped that the Committee would make its choice between the two alternatives before sending a text to the Drafting Sub-Committee.

Mr. BERTRAN (Germany) opposed the addition of the words "in addition" to Article 19 because it limited the effect of the status of international legal personality. He restated that he was in favor of adding the words "shall possess full juridical personality in each Contracting State".

Mr. MELCHOR (Spain) thought that it had been agreed that the Center would have full juridical personality, which would give the Center its capacity to act and to function. If no reference was made to such full legal personality then the powers provided in Article 19 would be too limited. He was in favor of starting Article 19 with the words "as a consequence of such legal personality the Center has full capacity..."

Mr. BROCHES (Chairman) repeated that there were before the meeting two distinct propositions, one submitted by Mr. LARA and the other submitted by himself.

Mr. LARA (Coste Rica) explained that he had not referred expressly to "capacity" in his proposal because the term adopted, "international juridical personality", implied the capacity to act.

Mr. PEREZ (Ecuador) found the Chairman's proposal most clear, but suggested that the words "international legal personality" be preceded by the word "full", and that the expression "... to incur obligations and acquire rights and in particular the capacity ..." be added after the word "capacity".

Mr. KPOGNON (Dahomey) suggested to combine Articles 18 and 19 in one provision containing two elements. In the first part, there should be stated that "the Center shall have the status of any international institution". This statement would be followed by a sentence drawing the consequences, such as immunities and privileges. The second part should contain a statement that the Center "shall have full legal personality", to be followed by a sentence drawing the consequences, such as contracting, etc. This would show clearly that the Center would enjoy immunities and privileges because it is an international institution and that it may contract, etc. because it has a legal personality.

Mr. BROCHES (Chairman) noticed that his proposal had the advantage of covering in the same provision both the international juridical personality and the capacity without stating however whether one concept is a consequence of the other. He added that he would not object to the addition of the word "full". On the other hand, he advised against inserting the words "to incur obligations and acquire rights", on the grounds that the shorter formula had been used in the Privileges and Immunities Convention of the United Nations and other specialized agencies and that a departure from such formulation might open the door to numerous further suggestions.

Mr. GUARINO (Italy) suggested that the whole question be referred to the Drafting Sub-Committee.

Mr. GHACHEM (Tunisia) stated that in his opinion, the previous shows of hands had indicated that the meeting agreed in substance and he did not think that the several proposals now discussed were different in substance.

Mrs. VILLOTTNER (Austria) did not think that the word "full" was necessary since the international legal personality cannot be qualified.

Mr. SERB (Yugoslavia) thought it desirable that the capacity of the Center to contract, etc. be granted only to enable it to fulfill its functions and assumed that such capacity was intended to be exercised within the framework of the national legislations.

Mr. BROCHES (Chairman) said that the whole provision was qualified by the words "to enable it to fulfill its functions" and did not consider the exercise of the personality as being in conflict with national legislations. He then took the sense of the meeting on the several questions and proposals which had been discussed. The meeting agreed that the limitation imparted on the capacity of the Center by the words "in each Contracting State" should be deleted. With respect to the proposal to insert a general statement to the effect that the Center would have the capacity to "incur obligations and acquire rights", the meeting came to a tie. It was agreed that the matter would be referred to a Working Group.⁵ The meeting then approved by a large majority the Chairman's proposal as amended by the deletion of the reference to the words "in each Contracting State". Two delegates supported Mr. LARA's proposal. The Committee objected to leaving the text as it now stood as well as to the proposal of Mr. KPOGNON. The Chairman summarized the results by saying that his proposal as amended would be referred to the Drafting Sub-Committee,⁶ subject to the directions of the Working Group concerning the insertion of a general statement on the capacity of the Center to incur obligations and acquire rights.

The meeting then recessed for a short period

⁵ See Report Working Group V, Doc. 67
⁶ For its report see Docs. 69 and 70

Article 20

Mr. BROCHES (Chairman) amended the text by including the phrase "except when the Centre waives this immunity" at the end of the existing sentence in response to a suggestion made by the Australian delegate.⁷

Mr. da CUNHA (Brazil) requested a clarification of the scope of the judicial immunity attributed to the Centre under this Article.

Mr. BROCHES (Chairman) stated that Article 20 followed the usual provisions with respect to the immunity enjoyed by the vast majority of public international institutions. The Bank had a slightly different provision but the reason for this was to be found in the fact that the Bank borrowed money in the financial markets of the world. It was for that reason that the drafters of the Bank's Charter decided to subject it to legal process.

Mr. GUARINO (Italy) suggested that the immunity be related to member states and not to the juridical personality of the Centre.

Mr. BROCHES (Chairman) replied that the opening clause of Article 18 took care of this point.

Mr. FUNES (El Salvador) stated that the Spanish text of this Article was faulty. The word "bienes" in Spanish includes assets and therefore it would be sufficient to say that the "Centre and its property shall enjoy immunity from legal process".

Mr. BROCHES (Chairman) states that this was a matter for the Drafting Sub-Committee to look into.

Mrs. VILLGRATTNER (Austria) suggested that an addition be made to Article 20 to the effect that the Centre will not enjoy any immunity with respect to a counter-claim relating to a claim instituted by it.

Mr. BROCHES (Chairman) said that in his opinion the institution of a claim would always operate as a waiver of immunity in respect to direct counter-claims. Since there was no clear consensus for or against the Austrian suggestion, he thought it might be best to refer this proposal to a working group.⁸

Mr. LOKUR (India) wished to know who would waive the immunity of the Centre, the Administrative Council or the Secretary-General?

Mr. BROCHES (Chairman) replying said that in view of the fact that the Centre would be represented by the Secretary-General it would probably be necessary to provide in the Administrative Rules⁹ that a Council decision on this point would be required.

Article 21

Mr. BROCHES (Chairman) following the amendment in Article 20 suggested the inclusion of the words "except when the Centre waives this immunity" after the phrase "in their official capacity" which appeared at the end of sub-paragraph (i) of this Article.

Mr. VAN SANTEN (Netherlands) proposed that the members of ad hoc committees mentioned in Article 55 should also be included within the scope of this provision.

⁷ See Doc. 61

⁸ See Report Working Group V, Doc. 67

⁹ Regulations and Rules of the Centre (ICSID/4)

Mr. BROCHES (Chairman) concurring suggested the Drafting Sub-Committee¹⁰ take note of this proposal.

Mr. KPOGNON (Dahomey) thought the scope of the immunity was too extensive.

Mr. BROCHES (Chairman) referred the delegates to the fact that the immunity was qualified by the words "in their official capacity". He then mentioned a proposal by the delegate of Australia to draw a distinction between high officials and other employees of the Centre with respect to the immunities enumerated under (ii).¹¹ He was personally opposed to the Australian proposal in view of the small number of employees that the Centre would have.

Mr. O'DONOVAN (Australia) said that the purpose of his proposal was to enable Australia to give effect in its own internal legislation to the obligations of the Convention in precise terms. Since not all employees of the Centre could be equated with diplomatic representatives proper, he thought a distinction should be drawn between high officials and other employees of the Centre.

Mr. BURROWS (United Kingdom) said the United Kingdom faced a similar problem of translating these privileges and immunities into domestic legislation but that they had come to the conclusion that the present text raised no real difficulties. He thought the present text would in balance raise less problems.

Mr. BROCHES (Chairman) taking a show of hands announced that the meeting seemed to be in agreement with the text of Article 21 as amended by him. He stated, however, that the working group, looking into the question of counter-claims, might also consider this Article in their deliberations.¹²

Article 22

Mr. SELLA (Secretary) read the redraft of that provision circulated in document SID/LC/10.¹³

Mr. BURROWS (United Kingdom) stated that the redraft of this article was entirely satisfactory to his government.

Mr. GOUREVITCH (United States) thought that the deletion of the phrase "and other persons participating in proceedings pursuant to this Convention" in the redraft may raise difficulties. It may exclude corporate officers from the scope of the article.

Mr. BURROWS (United Kingdom) said that on the contrary the present proposal seemed less ambiguous than the original wording of the article and that the words "parties" and "agents" would be sufficient to take care of the problem raised by the delegate from the United States.

Mr. BROCHES (Chairman) taking a vote on the new text of Article 22, announced it was approved and referred it to the Drafting Sub-Committee.¹⁴

¹⁰ For its report see Doc. 69

¹¹ See Doc. 61

¹² See Report Working Group V, Doc. 61

¹³ Doc. 68

¹⁴ For its report see Docs. 69 and 70

Article 23

Mr. BROCHES (Chairman) said this article had also been redrafted to take account of certain proposals "emanating from the international telecommunications Convention." Accordingly, paragraph (2) would now read as follows.

"with regard to its official communications and in the transfer of all its documents the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organisations".

Mr. BURROWS (United Kingdom) stated that he found the redraft entirely acceptable.

Mr. LOKUM (India) said that a reference to international organisations might create some difficulty for India because they enjoyed a varying degree of benefits and there was no established standard accorded to all.

Mr. BURROWS (United Kingdom) said that the amount of latitude accorded to individual governments was to be commended. He thought that in practice the Centre would enjoy diplomatic benefits except in the question of the priority in transmission of official communications

Mrs. VILLAGRATTNER (Austria) thought that the text might be improved by adding that the archives would be inviolable wherever they may be as was provided for in the Vienna Convention on diplomatic immunities.

Mr. O'DONOVAN (Australia) wished to associate himself with the difficulties mentioned by the Indian delegate.

Mr. da CUNHA (Brazil) suggested that the provision with regard to inviolability should be softened to make sure that interested parties would have access to the archives and would be able to obtain certain information from them.

Mr. BROCHES (Chairman) said that in his opinion the question of inviolability of the archives was separate from that referred to by the delegate of Brazil. The question of information and publication was taken into account elsewhere and in practice would be dealt with by the Administrative Rules. The issue should, however, be borne in mind. He then requested the sense of the meeting on the addition of the words "at any time and wherever they may be" to the end of the sentence in Article 23(1). This was the exact language of the Vienna Convention.

Mr. NEDI (Ethiopia) referred to Article 18 and suggested that the words "provided for in this title" be inserted after the word "privileges" at the end of the article.

Mr. BROCHES (Chairman) ascertaining the sense of the meeting, instructed the Drafting Sub-Committee to rephrase the end of Article 18 in the following manner: "immunities and privileges hereinafter in this section set forth".

¹⁸ See United Kingdom comment in Doc. 45

¹⁹ Geneva International Telecommunication Convention of 1959

Mr. LARA (Costa Rica) proposed that Article 23(1) state that the archives of the Centre shall be inviolable wherever they may be. He thought that it would be unnecessary to refer to "documents" since they would be included in the term "archives". He proposed that Article 23(2) state "with regard to its official communications and its documents in transit the Centre shall be accorded by each Contracting State treatment not less favourable than that granted to official communications of other Contracting States".

Mr. BROCHES (Chairman) wished to ascertain the sense of the meeting on paragraph (1). The majority favoured leaving a reference only to "archives" without referring to "documents". There was also a majority in favour of adding at the end of paragraph (1) the words "wherever they may be"; and there was agreement not to include the words "at any time".

Mr. MALAPLATE (France) indicated that in French there was no distinction between the words "archives" and "documents".

Mr. BROCHES (Chairman) stated that in his proposal concerning paragraph (2) of Article 23 there should be deleted the phrase "and the transfer of all documents", which would be substituted by the words "and documents in transit" suggested by Costa Rica.

Mr. SARATEIRO (Portugal) thought that the delegates should vote on the need to mention documents in transit explicitly in this paragraph, without binding themselves to a definite wording.

Mr. BROCHES (Chairman) requested a show of hands on whether there should be such a reference to "documents in transit", and the majority was opposed. He then requested a show of hands on the proposal that paragraph (2) state "with regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations." The majority of the delegates approved this proposal.

Article 24

Mr. BROCHES (Chairman) stated that concerning paragraph (1) the United Kingdom had submitted a written comment reflecting their interpretation of tax immunities in relation to the so-called "beneficial portion of rates". This problem was not new for the Bretton Woods institutions and had not led to any difficulties. These institutions had always accepted the interpretation of the United Kingdom of these words.

Mr. UKAWA (Japan) requested a clarification of the words "its operations and transactions authorized by this Convention", which he felt were too vague and thought would not really be necessary in this Article.

Mr. BROCHES (Chairman) stated that the Centre might want to enter into various contracts, and that the proposed language had been copied from the IBRD and IMF Articles of Agreement.

¹⁷ See Doc. 45

¹⁸ Respectively International Bank for Reconstruction and Development, and International Monetary Fund

Mrs. VILGRATTNER (Austria) suggested that the word "immunity" be substituted by the word "exempt" in this Article.

Mr. BROCHES (Chairman) stated that the word "immunity" was used in the Bank Articles of Agreement whereas the word "exemption" was used in the Vienna Convention.

Mr. LOKUR (India) requested a clarification of the meaning of the words "its operations".

Mr. BROCHES (Chairman) stated that in institutions like the Bank the word "operations" could refer to lending or borrowing.

Mr. BURROWS (United Kingdom) proposed that if the phrase "operations and transactions" were used as a matter of practice in other conventions of a similar type it would be better to follow the standard drafting, unless there was some good reason not to do so.

Mr. BROCHES (Chairman) stated that this phrase was peculiar to the four institutions which directly or indirectly originated in the Bretton Woods Conference, and to the regional institutions which were patterned after them. A show of hands indicated that a majority favoured retaining the existing text on this point. He then enquired views about the proposal to substitute the word "exemption" for the word "immunity".

Mr. MELCHOR (Spain) stated that in the Spanish text the word "exempt" was already used.

Mr. TSAI (China) preferred the word "immunity" since it was connected more directly with a diplomatic privilege.

Mr. BROCHES (Chairman) felt it was not necessary to have a show of hands on this point because the French and Spanish text had been agreed already and the English text could be dealt with by the Drafting Sub-Committee.

Mr. LOKUR (India) requested a clarification of the meaning of the immunity from liability for the collection or payment of any taxes or customs duties.

Mr. BROCHES (Chairman) indicated as an example the liability for withholding taxes from salaries, which many countries imposed upon employers.

Mr. PEREZ (Ecuador) suggested that in paragraph (1) the words "import duties" be substituted for the words "customs duties", since there were others, like consular duties for example, that also applied to import.

Mr. NEDI (Ethiopia) thought that the Centre should be liable for collection of taxes of local employees and therefore suggested the deletion of the second sentence of Article 24 (1).

Mr. BURROWS (United Kingdom) stated mainly for the record, that in the United Kingdom, the provision of Article 24 (1) would be interpreted as applying only to the importation of goods which would be strictly necessary for the official use of the Centre. Secondly, this

¹⁹ Vienna Convention on Diplomatic Relations of 1961

²⁰ For its report see Docs. 69 and 70.

provision would not be interpreted as saying that internal taxes such as purchase tax or excise duties levied on goods purchased by the Centre should be refunded to the Centre if such taxes or duties had been levied at the time when the goods in question were not the property of the Centre.

Mr. BROCHES (Chairman) requested a show of hands on the deletion of the second sentence of paragraph(1). The Meeting agreed that the sentence should be maintained and then approved paragraph(1) as a whole. Mr. BROCHES then asked Mr. PEREZ whether he wished to maintain his suggestion to substitute an expression such as "duties imposed in connection with importation or exportation" for the words "custom duties". In his opinion, the issue involved was of minor importance, but on the other hand, the introduction of novelties in provisions already accepted in previous cases might lead to difficulties.

Mr. PEREZ (Ecuador) agreed to withdraw his suggestion.

Mr. BROCHES (Chairman) then moved to paragraph(2) and indicated that the draft contained an error. The last words of this paragraph, namely the expression "who are not local nationals" should be replaced by the expression ", except in the case of recipients who are local nationals".

Mr. BURROWS (United Kingdom) said that this correction answered the question which had been raised by the United Kingdom and that the new version was satisfactory.

Mr. GUARINO (Italy) suggested that expense allowances be mentioned in connection with officials or employees of the Secretariat since otherwise they might be considered taxable.

Mr. BROCHES (Chairman) agreed and suggested that the draft be modified to refer to "... salaries, expense allowances or other emoluments ..."

Mr. TSAI (China) said that he preferred the version of the draft Convention since the possibility of taxing expense allowances for nationals might create difficulties or confusion in the States concerned.

Mr. BROCHES (Chairman) stated that the original language unintentionally provided for an absolute tax exemption for the Chairman and the members of the Administrative Council and thought that such an exemption would be undesirable. He then requested a show of hands. The meeting objected to Mr. TSAI's suggestion and approved paragraph(2) as reworded. Mr. BROCHES then moved to paragraph(3) and pointed out that the Belgian delegation wanted to be sure that the exemption did not mean that an arbitrator or conciliator could not be taxed by the country of his normal tax domicile." He said that the purpose of the provision was to prevent that taxation be based solely on the location of the Centre or on the place where proceedings are conducted or where fees or allowances are paid and that consequently, paragraph (3) would not apply if there were another basis of taxation such as, for instance, tax domicile. The Committee then approved paragraph (3).

Article 25

Mr. LOKUR (India) proposed that this provision be moved to the end of the Convention and apply not only to the provisions of Title 6 but to other provisions of the Convention as well.

²¹ See United Kingdom comment in Doc. 45

²² See Belgium comment in Doc. 45

Mr. GOUREVITCH (United States) and Mr. HETH (Israel) concurred.

Mr. BURROWS (United Kingdom) also agreed, but added that he did not see any need for this kind of provision since, if a treaty imposes an obligation on a State, such State must necessarily bring its own law in conformity with the treaty.

Mr. HELLMERS (Sweden) concurred.

Mr. PINTO (Guatemala) considered this provision necessary because in certain States, treaties would not be applied without implementing legislation although they might have been signed and ratified. This was particularly important in connection with tax immunities.

Mrs. VILGRATTNER (Austria) thought the provision desirable for it might facilitate implementation for several States.

Mr. da CUNHA (Brazil) did not consider the provision necessary since the agreement, once accepted would become internal law.

Mr. BROCHES (Chairman) said that one should take into account the existence of different national systems but in order to save time, suggested to defer a final decision until later, since other provisions of the Convention such as, for instance, the enforcement provisions, might necessitate implementing legislation. He, nevertheless, requested a show of hands merely for the purpose of the work of the Drafting Subcommittee. The Committee approved Article 25.

Mr. BROCHES then said that there would be two plenary meetings tomorrow at 10.30 a.m. and 3 p.m. respectively. In view of the fact that drafts were being prepared by several delegations on Articles 26, 29 and 30, he suggested discussion of Articles 27, 28 and then of conciliation. Mr. SELLA reminded the delegates that the Drafting Subcommittee would meet at 3 p.m. in Room 846 and that the working group on the definition of "national of another Contracting State" would meet at 3 p.m. in Room 647.

The meeting adjourned at 1.36 p.m.

SID/SC/D/2 (December 3, 1964)

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WORKING GROUP V

Report on "capacity" of the Center and limitations on immunity from legal process

1. A Working Group consisting of Mr. Perez-Serrano (Ecuador) (Chairman), Messrs. Lara (Costa Rica), O'Donovan (Australia), Thesleff (Finland), van Santen (Netherlands) and Mrs. Villgrattner (Austria) considered on

December 2, 1964, the questions of the "capacity" of the Center and of possible limitations to the immunity of the Center, officers and employees, members of the Administrative Council, conciliators and arbitrators etc., from legal process in the case of counterclaims directly connected with the principal claim in a proceeding instituted by the Center itself or a person enjoying immunity.

2. On the first question it was agreed by the Working Group that in Section 18 of the text of the Convention as drafted by the Drafting Subcommittee (SID/LC/35), the second sentence should read as follows:

"The legal capacity of the Centre shall include the capacity:

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
and
- (c) to institute legal proceedings."

It was agreed that no mention of counterclaims need be made in the text of the Convention in connection with immunity from legal process, but that the report of the Legal Committee should include a statement that it was the understanding of the Committee that the Centre would not invoke the immunity from legal process in the case of counterclaims directly connected with the principal claim in legal proceedings instituted by the Center or by a person enjoying immunity from legal process under the Convention.

† Not reproduced because contained in Doc. 70

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SID/LC/10 (November 24, 1964)

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Amendment submitted by the Secretariat

Substitute for Article 22 the following:

"Article 22

The provisions of Article 21 shall apply to persons appearing, in proceedings pursuant to this Convention, as parties, agents, counsel, advocates, witnesses or experts; but sub-paragraph (ii) thereof shall only apply in connection with their travel to and from, and their stay at, the place where the proceedings are held."

[Note: If this text were adopted a small consequential amendment would be required in Article 21(i) i.e., "their official capacity" should be changed to "the exercise of their functions". This is because it would be inappropriate to talk about "official capacity" in relation to witnesses.]

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

DRAFTING SUB-COMMITTEE

Interim Report

CHAPTER I

Document SID/LC/39¹ contains the text of Chapter I, International Centre for the Settlement of Investment Disputes, as agreed by the Drafting Sub-Committee, and consolidates the texts already circulated in documents SID/LC/19, SID/LC/28 and SID/LC/35².

It will be noted that the term "Section" has been substituted for "Title" throughout the draft. With regard to the English text, the Committee decided to use English rather than American spelling.

The Committee decided to postpone discussion of the drafting and location of Article 2(2) until its consideration of Chapter VII.

¹ Doc. 70

² Not reproduced because contained in Doc. 70

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Texts prepared by the Drafting Sub-Committee

CHAPTER I

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Section 1

Establishment and Organisation

Article 1

(1) There is hereby established the International Centre for the Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

Section 2

The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor or alternate governor of the Bank appointed by a Contracting State shall be ex officio its representative and its alternate respectively.

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 his 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 Administrative Council.

article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of the Centre;
- (g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

- (1) The Administrative Council shall hold an annual meeting

and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than one-tenth of the members of the Council.

(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, by a two-thirds majority of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(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 any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, 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.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted 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.

Section 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.

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.

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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the 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.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same 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.

Section 5

Financing the Centre

Article 17

If expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by 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.

Section 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed in accordance with paragraph (2) of Article 55, and the officers and employees of the Secretariat

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy 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.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings pursuant to this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

Article 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed in accordance with paragraph (2) of Article 55, in proceedings pursuant to this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

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SID/LC/SR/9 (December 28, 1964)
Summary Proceedings of the Legal Committee Meeting, December 2, Morning¹

The Legal Committee reconvened at 10:40 a.m.

Mr. BROCHES (Chairman) referred the meeting to Document SID/LC/26² which contained an addition to Article 16 in response to the proposals adopted by the meeting. After ascertaining that there were no objections to the proposed addition, he referred it to the Drafting Sub-Committee.

Article 27(1)

Mr. BROCHES (Chairman) explained the meaning of the provision. He said it did not have any bearing on the rule with respect to exhaustion of local remedies. It was merely interpretative and reflected the position of most modern jurists on the problem of waiving the competence of local courts where a dispute between a private individual and a State was referred by agreement to an international tribunal.

Mr. LOPEZ (Panama) thought that the Spanish translation of the word "remedy" in this provision was ambiguous.

Mr. BROCHES (Chairman) said the Drafting Sub-Committee might wish to consider the Spanish translation when it dealt with the Article.

Mr. BOMANI (Tanzania) wished to know whether the working group dealing with Article 26(1) was supposed to consider Article 26(2) also.

Mr. BROCHES (Chairman) said that the working group was entirely free to deal with Article 26(2) also.

Mr. BILGEN (Turkey) suggested that Article 27 (1) be recast in different terms so that it would take an express agreement to rule out local remedies rather than the presumption being the other way.

Mr. BROCHES (Chairman) reiterated that the Convention did not express any view with regard to the desirability or undesirability of exhausting local remedies. All the Convention said was that where there was consent to submit a dispute to the Centre, this would mean that the exhaustion of local remedies has been waived. It, e.g., clarified that where a State included a unilateral provision in the legislation for encouraging investments that investment agreements would be

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² Doc. 64

³ Working Group IV; for its report see Doc. 87

subject to international arbitration, such a provision would be taken to exclude local remedies unless a contrary intention was expressed.

Mr. BRINAS (Philippines) mentioned that the third paragraph to the preamble to the Convention acknowledged the fact that the usual method of settlement of disputes was through national legal processes. In his opinion Article 27(1) ran counter to the preamble because it expressed a presumption of the unusual. He therefore suggested that the logical thing to do would be to include an opposite presumption, namely, that in the absence of a statement to the contrary, disputes could only be brought before the Centre after the exhaustion of local remedies.

Mr. LARA (Costa Rica) said he was in agreement with the Chairman but thought that the Article might be redrafted so as to avoid confusion produced by the words "recourse" and "remedy". He then asked whether an agreement to arbitrate a dispute would exclude the possibility of its being referred to conciliation.

Mr. BROCHES (Chairman) replied that conciliation would indeed be excluded unless the parties agree to refer the matter to conciliation. The parties were always free by mutual agreement to change the terms of their original consent.

Mr. LOKUR (India) thought that the words "unless otherwise stated" may lead to confusion. They were unnecessary because consent implied a meeting of the minds. He thought that once consent was given it should be irrevocable and unconditional and that those words may lead to difficulties in that respect. He would also like the Article to provide for the possibility of withdrawing consent before or after the proceedings had already commenced. Otherwise, and subject to certain drafting improvements, he considered the Article satisfactory.

Mr. LOPEZ (Panama) wished to associate himself with the observations made by the delegates from Turkey and the Philippines. The presumption should be in favor of the duty to exhaust local remedies rather than in the other way.

Mr. GUARINO (Italy) suggested that in order to give effect to the irrevocability of the consent, an idea which he fully accepted, the words "and could not be revoked" be added at the end of the first sentence of Article 26(2) of the present text.

Mr. BURROWS (United Kingdom) wished to draw attention of the working group dealing with Article 26(2) to the written comments of his Government according to which consent once given could not be withdrawn unilaterally. This proposal was slightly different from the Italian one because it envisaged the possibility of withdrawing from arbitration by mutual agreement.

Mr. HETH (Israel) wished to associate himself with the remarks of the Philippine delegate. The provision should state that the usual recourse for an investor should be to exhaust local remedies, and that the opposite should be the exception rather than the rule, i.e., the reverse of what the present draft seems to postulate.

Mr. BROCHES (Chairman) thought there might be a misunderstanding. He thought that Article 27(1) did not change any rule of law. The position would be exactly the same if the Article did not exist in situations where the choice of a tribunal clause was included in an agreement. This,

* See Doc. 45

however, was not the case insofar as unilateral provisions which may be included in investment legislation were concerned, and it was for this reason chiefly that the Article was included.

Mr. OUMA (Uganda) stated that he was in agreement with the Chairman but suggested that the inclusion of a provision stating that Article 27(1) did not in any way affect the local remedies rule might remove the difficulties to which some of the previous speakers addressed themselves.

Mr. TSAI (China) said that he was in favor of maintaining Article 27(1). If this provision did not exist, the question of exhaustion of local remedies would, in his opinion, be examined under the various national laws, and this might create difficulties. He considered Article 27(1) in line with the nature of arbitration which means that if the parties agree to arbitration, then arbitration should be the sole recourse. The Convention was intended to afford procedural protection to foreign investors and a condition on prior exhaustion of local remedies would be too burdensome on such investors. Finally, exhaustion of local remedies would imply that decisions of national courts could be reviewed by arbitral tribunals, which would be undesirable.

Mr. van SANTEN (Netherlands) thought that Article 27(1) was declaratory and therefore superfluous. In addition, the existence of this provision might create difficulties with respect to remedies provided for under other international treaties. Article 27(1) seemed to narrow down the possibilities of choice given to the signatories of this Convention to submit disputes to other international tribunals. For those reasons he felt it might be better to omit Article 27(1) or at least include in it a provision along the lines suggested by Uganda.

Mr. BROCHES (Chairman) did not share the view that the Article narrowed the freedom of choice of parties to make use of other tribunals. All the Convention said was that where the parties agreed to submit themselves to the Centre, this submission would stand.

Mr. PEREZ (Ecuador) supported the rule implicit in Article 27(1) that where consent existed to waive local or other remedies the parties should be bound by their agreement. However, he strongly advocated the inclusion of a provision to the effect that the investor would first have to exhaust local "administrative" procedures so that the claim could not be instituted before all available local administrative measures have been exhausted.

[The meeting recessed for a short break].

Mr. BERTRAM (Germany) thought that Article 27 (1) was necessary as he had some doubts whether an agreement to submit a dispute to an international tribunal implied the waiver with respect to the rule of exhaustion of local remedies. He was therefore in support of retaining Article 27 (1) in the text.

Mr. COUREVITCK (United States) wished to say that although in his opinion the provision was merely declaratory, he supported its inclusion in the text in order to remove any doubts about the matter.

Mr. BURROWS (United Kingdom) associated himself with the remarks of the previous speaker and said that he would not support the proposal made by the delegates of Uganda because in his opinion the phrase "unless otherwise stated" expressed that very same idea.

Mr. MELCHOR (Spain) thought the Article as it stood entirely satisfactory. In his opinion, the Ecuadorian proposal could lead to confusion and he therefore requested the delegate of Ecuador to reconsider the matter.

Mr. BROCHES (Chairman) said that the Secretariat would try to revise the text of Article 27 (1) in the light of the discussion at which time the debate may be resumed.

Article 27 (2)

Mr. BROCHES (Chairman) said that the text of this provision had been revised to read as follows: "notwithstanding the provisions of Article 26 (1) a Contracting State when consenting to the submission of any dispute with a national of another Contracting State to the Center may 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 satisfied the claim of such national under an investment insurance scheme, has been subrogated to its rights." The Chairman explained the revised text.

Mr. TSAI (China) said the revised text was satisfactory in his opinion except that he would condition the right of subrogation to cases where the subrogee had renounced the right to pursue the inherited claim in any manner except arbitration before the Center.

Mr. van SANTEN (Netherlands) thought the text might be improved to make clear that the consent to subrogation might be made at any time before or after the dispute had arisen.

Mr. BROCHES (Chairman) agreed to review the language to take the point into account.

Mr. ORTIZ (Peru) said he was opposed to any provision relating to subrogation. He saw great difficulties in allowing a State to inherit the rights of a private investor in the manner suggested.

Mr. BROCHES (Chairman) replying stated that it should be borne in mind that the State inheriting the rights of a private investor would not be acting as a sovereign State and would have no more rights than its national had in the case.

Mr. BERTRAM (Germany) wished to include a provision to the effect that the consent to the substitution of the private investor could be given at any time and not only at the time of consent to the submission to arbitration. He also thought the words "under an investment insurance scheme" were too restrictive and he wished them eliminated or changed.

Mr. BROCHES (Chairman) replying said that on the contrary he thought it desirable to limit the provision to subrogation by virtue of an investment insurance.

Mr. AGOHO (Nigeria) thought that paragraph (2) could be misused since the Contracting State could not participate in negotiations between an investor and his national State on payments under insurance schemes. He therefore suggested that, should paragraph (2) be maintained, a proviso be added to the effect that such Contracting State be brought into the picture before any payment is made to the investor.

¹ See Summary Proceedings of the Legal Committee Meeting, December 4, Doc. 79

Mr. GEACHEM (Tunisia) considered the new version more satisfactory but in view of the fact that the aim of the Convention was to put private persons and States on an equal footing, suggested that the scope of the subrogation be more clearly defined in order to prevent States as such from replacing private persons.

Mr. MELCHOR (Spain) thought that enabling the national State of an investor or an international organization to intervene directly, would modify the purpose of the Convention which is intended to deal with disputes between States and nationals of other States. He realized that difficulties could arise in view of the existence of certain bilateral agreements. However, the very objective of this Convention was to create facilities which the investor could fully trust and through which he would wish to settle any disputes. In other words one could say that the need for international investment guarantees existed because there was no Convention such as this one. He therefore thought that this Convention should exclude the possibility that two States litigate directly, even by way of subrogation, and consequently suggested the deletion of paragraph (2).

Mr. GOUREVITCH (United States) considered paragraph (2) as amended satisfactorily. He assumed that the expression "investment insurance scheme" would cover the investment guarantee contracts included under the United States' scheme. With respect to Mr. MELCHOR's comment, he pointed out that the subrogated State would obtain no greater rights than those which the investor had himself.

Mr. BROCHES (Chairman), in connection with the comment made by Mr. TSAI, agreed that a claim inherited by a State by way of subrogation should only be brought before the Center if such State would not concurrently have recourse to other remedies such as those provided in bilateral agreements.

Mr. BOHANI (Tanzania) said that he had misgivings with respect to Article 27(2), particularly in view of the importance of the identity of the parties. He was also concerned by the reference to public international institutions and thought that the deletion of the words "under an investment insurance scheme" as suggested by Mr. BERTRAM would create even more difficulties.

Mr. BROCHES (Chairman) explained that the reference to public international institutions had been considered desirable since it had been pointed out at the meeting of Addis Ababa, that plans were being made for the creation of a multilateral investment guarantee institution, possibly with specific reference to investments in Africa. Besides, this matter was also being discussed in the Council of Europe. Technically, unless a provision were included in the Convention, such institutions could not appear before the Center.

Mr. O'DONOVAN (Australia) had no objection to the principle of subrogation but pointed out that when referring to Contracting States in connection with consent, reference should also be made to political subdivisions or agencies. Otherwise this provision could not become effective in all countries. In addition, he mentioned that one should also take into account the situation where investment insurance guarantees would be given not by a State but by an authority, agency or other instrumentality. In this connection he asked whether consent given by an investor and agreed to by a host country would remain effective if

* See Doc. 25

the investment would be acquired by another person having the same nationality as the original investor.

Mr. BROCHES (Chairman) said that this would depend on the circumstances under which consent was given.

Mr. LOPEZ (Panama) shared the apprehensions of some delegates and particularly agreed with the observations made by Mr. MELCHOR. Subrogation would be undesirable under the Convention since a private person would be replaced by a subject of international law. This would be particularly undesirable after proceedings had actually started.

Mr. LOKUR (India) agreed with the suggestion to delete Article 27(2). In the first place, he considered this paragraph as going beyond the scope of this Convention. Secondly, the fact that a dispute between a State and a national of another State could become a dispute between two States might impair the diplomatic relations between those States. In addition, paragraph (2) seemed to imply that a State might compensate his national without considering the merits of the claim. Finally, the independence of the arbitrators might be affected by the fact that in a way the claim would already have been settled. He also agreed with the observation made by Mr. BERTRAM concerning the moment when the consent to subrogation should be given.

Mr. RATSIRAHONANA (Malagasy Republic) said he was particularly unhappy with respect to the reference to "public international institutions" in this Article which he wished to see deleted.

Mr. GUARINO (Italy) said that on the basis of his own experience the provision was entirely acceptable to him. The misapprehensions expressed by some of the previous delegates were in his opinion somewhat exaggerated.

Mr. OUMA (Uganda) thought the provision contradicted paragraphs (2), (3) and (6) of the Preamble to the Convention and was unacceptable to most of the capital-importing countries.

Mr. MALAPLATE (France) said that he was opposed to the provision because it would contribute to transforming private disputes into disputes between States.

Mr. KPOGNON (Dahomey) supported the provision. He saw no reason why States should not be entitled to pursue subrogated claims. He thought its elimination from the Convention may also deter the establishment of a multilateral investment guarantee fund which would certainly encourage the flow of private capital into the developing countries.

Mr. MELCHOR (Spain) wished to explain his opposition. He said that the investor who had been compensated by insurance should be the proper party to pursue the claim notwithstanding the fact that his loss might already have been covered.

Mr. DODOO (Ghana) associated himself with the remarks of the delegates of India, Nigeria, Uganda and Spain. With respect to Article 27(1) he thought it would be better to restate it in a positive fashion so that it would stipulate that access to the Center was available only after local remedies had been exhausted except where an express agreement to the contrary existed.

Mr. BERTRAM (Germany) defended the provision. He said that a private investor would not usually press his claim after obtaining compensation through an insurance program, and that the very fact that his State could then inherit a legal claim was a commendable thing because otherwise the settlement of the issue would be confined to the political plane.

Mrs. VILLGRATTNER (Austria) suggested the provision be replaced or amended to clarify that where an investor had been paid under an insurance guarantee this would not cancel his claim or his right to proceed with arbitration or conciliation.

Mr. AWOONER-RENNER (Sierra Leone) supported the proposals to delete Article 27(1) and (2) from the Convention.

[The meeting adjourned at 1:30 p.m.]

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SID/LC/SR/10 (December 28, 1964)
Summary Proceedings of the Legal Committee Meeting, December 2, Afternoon¹

The Legal Committee reconvened at 3:03 p.m.

Mr. da CUNHA (Brazil) requested a vote on Article 27(2).

Mr. POREZ (Ecuador) thought the provision might be acceptable to some of the opposing delegates if an express provision were included to the effect that the State representing a subrogated claim was acting strictly as a person under private law and that an additional provision along the lines suggested by China be also included.

Mr. LARA (Costa Rica) warmly supported the provision which he urged upon the meeting to accept.

Mr. TSAI (China) commenting on the Austrian proposal said it would be unsatisfactory to allow the original claim to persist after subrogation had already taken place because then the responding State would be faced with two claims.

Mr. BERNARD (Liberia) proposed the deletion of the provision from the Convention.

Mr. ROUHANI (Iran) said he would prefer to see the provision (which was a considerable improvement over the original wording) omitted. He thought nothing would be lost by eliminating the provision because its omission would not preclude agreements on subrogation and where these existed, they could be brought before the Center.

Mr. BROGHES (Chairman) said that he did not share the view

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

just expressed. He thought that in the absence of a specific provision to that effect, the Center would probably not entertain subrogated claims because the Convention only envisaged disputes between States and individuals. He then re-explained the provision. He would now put the question of its retention or exclusion to a vote under the assumption that those voting in favor of retention would do so with reference to any particular amendment that they would like to see included in it. The Chairman then called for a roll vote which showed 23 delegates against the deletion of the provision, and 22 in support of deletion. In view of the close division, he proposed to refer the matter to a Working Group which could try and make the provision acceptable to a larger number of delegates. He then restated in response to a question that all that had been decided was not to delete the provision. A vote in favor of retaining the provision did not necessarily refer to its present form.

Article 28

Mr. BROCHES (Chairman) wished to explain this provision so as to avoid any possible misunderstandings. In reply to a previous comment, he wished to state that the closing phrase of this provision did not introduce a right of intervention by the investor's State but merely permitted such a right (if it existed) to revive if the State party to the dispute failed to comply with an award.

Mr. ROUHANI (Iran) suggested that the wording be altered. He would only exclude diplomatic protection during the period when proceedings were actually in progress.

Mr. TSAI (China) wished the Chairman to clarify the relation between this Article and Article 58.

Mr. BROCHES (Chairman) said these Articles were unrelated. Article 28 should be read in conjunction with Article 56 which declares that the parties shall abide by and comply with an award. In response to a further question from Mr. TSAI, he reiterated that the obligation to comply with an award was a separate question from that relating to the inability of a private investor to enforce through the courts a decision against an unwilling Sovereign State.

Mr. HETH (Israel) agreed with Mr. ROUHANI and thought that diplomatic protection should not be excluded until a dispute is actually brought before the Center, since diplomatic means might be used to prevent litigation between the parties.

Mr. LARA (Costa Rica) suggested that the last part of Article 28 be replaced by a provision saying in substance: "In case the other Contracting State has failed to comply with its obligations pursuant to this Convention or has not complied with the award rendered in such dispute."

Mr. BURROWS (United Kingdom) assumed that Article 28 was not intended to exclude diplomatic protection by the State of which an investor is a national if a State, after having consented to arbitration, would refuse to go to arbitration, thus preventing the Center from rendering an award. Secondly, he referred to the written comments submitted by the United Kingdom suggesting to add a provision to the effect that "diplomatic protection shall not for

¹ See Summary Proceedings of the Legal Committee Meeting, December 4, Doc. 79

² See Doc. 45

the purpose of this Article include diplomatic exchanges intended solely to assist a voluntary settlement of the dispute at any stage of the dispute." In his opinion, Article 28 was not intended to exclude informal contacts but only formal diplomatic protection.

Mr. BROCHES (Chairman) said that the breach by a State of its contract by refusing to go to arbitration would not prevent arbitration proceedings from taking place and an award from being rendered, if necessary by default. He thought, however, that Mr. LARA's suggestion would cover the point. With respect to the meaning of the words "diplomatic protection" he agreed in substance but not necessarily with the specific language suggested.

Mr. UKAWA (Japan) agreed with the United Kingdom on the meaning of the words "diplomatic protection" and felt that the expression as used now in Article 28 might be interpreted in too wide a sense.

Mr. LOPEZ (Panama) was concerned by the fact that Article 28 provides for diplomatic protection in case a State fails to comply with the award, while no provision is made for the case where the investor himself would fail to comply with the award.

Mr. BROCHES (Chairman) pointed out that the Convention provided means by which non-State parties could be forced through courts to comply with the award while there was no such possibility of enforcement against States.

Mr. KPOGNON (Dahomey) suggested that there be added to this Article that diplomatic protection means a diplomatic endorsement by a Contracting State of the claims made by one of its nationals.

Mr. ORTIZ (Peru) thought that the purpose of this Article was to avoid a diplomatic claim being brought forth at the same time the arbitration proceedings were held. He did not think that in order to enforce the award it was necessary or convenient to have diplomatic protection, since the authority of the award should derive from the Convention. He suggested that this Article state: "In no case will the Contracting State give diplomatic protection or bring forth an international claim with respect to any dispute between one of its nationals and another Contracting State if they have consented to arbitrate according to this Convention, and while the arbitration procedure is still open to them." In the case where the State involved in the dispute had complied with the award all diplomatic claims of the State of the investor should be ended.

Mr. BROCHES (Chairman) referred to the proposal submitted by the United Kingdom of excluding from the scope of "diplomatic protection" diplomatic exchanges intended solely to assist a voluntary settlement of the dispute. He thought that this proposal coincided in substance with that of Mr. KPOGNON. He then suggested that the following words could be added to this Article: "Diplomatic protection for the purposes of this Article shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute pursuant to this Convention". A show of hands indicated that the majority favored this proposal. He then requested a show of hands on the proposal by Mr. KPOGNON and the response was negative.

Mr. HETH (Israel) enquired why there was need to add the word "informal" to "diplomatic exchanges".

Mr. BROCHES (Chairman) stated that informal exchanges would fall short of espousal, and that was what the majority of the delegates seemed to prefer.

Mr. SAPATEIRO (Portugal) thought that any intervention of the State of which the investor is a national before the award is rendered was not in conformity with the spirit of this Convention. Even if informal, any such action would be an intervention tending to force a State in which the investment had taken place to give satisfaction to the investor.

Mr. BROCHES (Chairman) stated that 24 delegations had approved the suggestion by the United Kingdom as presented to the meeting by the Chairman, and he then enquired whether there were delegations opposed to any change or further elucidation of the term "diplomatic protection". A show of hands indicated that there were 14 delegations opposed to such a change. He then suggested that there be a discussion of the proposal by Mr. ROUHANI.

Mr. ROUHANI (Iran) objected to the proposal made by Mr. LARA that the last sentence should be expanded to cover also cases in which arbitration is not resorted to, since the basis of the Convention was the consent of the parties to go to arbitration. He proposed that Article 28 start with the words "while proceedings are in progress under the provisions of this Convention ...", and that the words after "Convention" in the existing text be deleted.

Mr. BROCHES (Chairman) requested a show of hands which indicated no clear majority in favor of or against the proposal. Mr. BROCHES stated that under Mr. ROUHANI's proposal the right of diplomatic protection and the right to bring an international claim would be suspended during any proceedings, but they would be in effect prior to and after the proceedings.

Mr. BURROWS (United Kingdom) stated that another effect of this proposal would be that if the proceedings were conducted in an improper way and contrary to the provisions of the Convention, the State of which the national was a party would be prohibited during the course of those proceedings from complaining about that conduct.

Mr. BROCHES (Chairman) stated that this was correct and that it was also true under the existing wording of Article 28.

Mr. SAPATEIRO (Portugal) thought that the only difference would be that according to this proposal no diplomatic exchanges would take place during the proceedings whereas the original text provided that such diplomatic exchanges could not be started from the time a consent was given, even before proceedings were started.

Mr. BROCHES (Chairman) requested another show of hands on the proposal made by Mr. ROUHANI, which indicated that a majority was against it.

Mr. GHACHEM (Tunisia) requested a clarification about voting

procedures concerning amendment proposals. He stated that in some cases the delegates were asked to vote on amendments without having a chance to vote on the existing text, which they might find satisfactory.

Mr. BROCHES (Chairman) stated that when amendments were proposed, it was customary first to vote on the amendments, and if the existing text was acceptable it was assumed that the delegates would vote against the proposed amendments.

Mr. MALAPLATE (France) stated that there were cases where suggested amendments were not contrary in spirit to other suggested amendments, and in some cases it would be possible to combine them. He thought that it should be stated whether the discussion concerned the final text or only some suggestion that could be incorporated in the final text.

Mr. BROCHES (Chairman) stated that when there were a number of amendments proposed, which were all intended to achieve the same purpose, a vote was requested to determine which one was preferred. Although not incompatible in substance, one of the proposals had to be chosen and therefore he tried to find out which expression was more acceptable to the meeting.

He then stated that there were formal proposals by Messrs. ORTIZ and LARA. The first part of Mr. ORTIZ's proposal started with the same language as Mr. ROUHANI's and for that reason he thought it should be regarded as having been rejected by the meeting. He said that the second part of Mr. ORTIZ's proposal would be to delete the existing words after "Convention" and to state instead "after the other Contracting State has complied with the award there will be no diplomatic protection whatever".

Mr. HELLNERS (Sweden) enquired whether there could really be a question of diplomatic protection when the other party had fulfilled its obligations according to the award.

Mr. BROCHES (Chairman) stated that in his opinion the answer was negative, but that he had been asked to put it to a vote.

Mr. ORTIZ (Peru) felt it was important to provide that in no case would there be a linking of the diplomatic claim to the execution of awards. Diplomatic intervention should be excluded during the time the proceedings were held as well as after the award had been complied with.

Mr. BROCHES (Chairman) enquired whether Mr. ORTIZ meant to exclude diplomatic protection even after the host State party refused to comply with the award.

Mr. ORTIZ (Peru) stated that the authority of the award should be imposed by the moral standing of the international organization and not by a diplomatic claim. Otherwise it would become a conflict between States.

Mr. SAPATEIRO (Portugal) wished to clarify his view that there should be no diplomatic protection from the time the parties had consented to submit their investment disputes to the Center until the time when the award was rendered. After the rendering of

the award, however, and with regard to its enforcement, he would accept diplomatic intervention if a State did not comply with it.

Mr. BROCHES (Chairman) requested a show of hands on the proposal to exclude diplomatic protection even in the case where a Contracting State would fail to abide by an award, which indicated a negative response. He then requested a show of hands on the proposal by Mr. LARA and the response was also negative.

Mr. LOKUR (India) requested a clarification of the words "unless such other Contracting State shall have failed to abide by". It was possible that an investor himself would not abide by the award.

Mr. BROCHES (Chairman) stated that the discussion was only about diplomatic protection on behalf of the national. The host State could do whatever it desired since there was no curtailment of its freedom to act.

Mrs. VILGRATTNER (Austria) asked that the Chairman recommend to the Drafting Sub-Committee that there be avoided any wording that may lend itself to an interpretation that in those cases which are excluded from the exclusion of Article 28 there shall be obligation on the part of the State to give diplomatic protection.

Mr. BROCHES (Chairman) referred this suggestion to the Drafting Sub-Committee.

[The meeting then recessed for 15 minutes.]

Mr. BROCHES (Chairman) in view of some confusion due to votings on several proposals and counter-proposals took the sense of the meeting on Article 28 as amended by the addition of the sentence "Diplomatic protection for the purposes of this Article shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute pursuant to this Convention".

Mr. TSAI (China) asked whether this sentence implied that the conciliatory efforts of the Centre were considered as insufficient.

Mr. BROCHES (Chairman) said that the amendment was merely intended to prevent Article 28 from excluding diplomatic exchanges as long as they do not have the character of formal representations espousing or endorsing the case of a national. The Committee then approved Article 28 as amended.

Article 29

Mr. LOKUR (India) thought that if Articles 26(1), 29 and 30 all dealt with the question of the jurisdiction of the Centre they should be referred to the Working Group already dealing with Articles 26 and 30 to see if they could combine them;

Mr. BROCHES (Chairman) thought there was merit to this suggestion but thought some delegates might wish to discuss the Articles from the floor.

Mr. SAPATEIRO (Portugal) supported the Indian proposal.

* Working Group IV; cf. Docs. 87 through 100

Mr. BROCHES (Chairman) then referred the Articles to the Working Group declaring, in response to a comment from the United States delegate, that such reference had no bearing on the question of the desirability of maintaining or of amending the provision included in the draft. The report of the Working Group would come to the floor and delegates could then address themselves to whatever came out of the group. He then announced the composition of the Working Group on "Privileges and Immunities" as follows: Ecuador, Austria, Costa Rica, Australia, Netherlands and Finland.

After discussing the question of when the various working groups would meet, the Chairman announced that in view of the late hour the meeting should stand adjourned. He would propose that the first item on the next meeting should be Article 40 and that the meeting would start at 10:00 a.m.

The meeting adjourned at 5:28 p.m.

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SID/LC/SR/11 (December 29, 1964)
Summary Proceedings of the Legal Committee Meeting, December 3, Morning¹

The Legal Committee reconvened at 10:15 a.m.

Mr. BROCHES (Chairman) made a few announcements regarding the program of work. He said that the Working Group on Chapter II would meet in the afternoon. Concerning the problem of enforcement of awards, he said that to save time, he intended to appoint a Working Group before the relevant provisions were discussed in the plenary meetings. He suggested that delegates wishing to take part in this Working Group contact Mr. Sella and added that it would be desirable that the different legal systems be represented. He also suggested that concrete suggestions be filed with the Secretariat not later than Friday afternoon in order that the discussions of the Working Group be more fruitful. With respect to the provisions of Chapter VI relating to the cost of proceedings, the experience at the consultative meetings had shown that although no question of policy was involved, much time had been devoted to discuss the practically unlimited number of possible solutions. He therefore proposed a different system than the one followed until now and asked delegates to submit proposals for amendments in writing not later than Friday afternoon. The Committee would then merely vote on such amendments without discussing the provisions as such.

Mr. MALAPLATE (France) mentioned that the approved addition of a paragraph(4) to Article 16¹ had created difficulties to the Drafting Sub-Committee particularly with respect to the French version. The Drafting Sub-Committee thought it preferable that the obligation of the Secretary-General to keep Contracting States informed of the qualifications and experience of the members of the Panel be mentioned in the Rules of Procedure² rather than in the Convention itself.

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² Cf. Doc. 64 and Summary Proceedings of the Legal Committee Meetings, November 30 and December 2, Docs. 62 and 71 respectively

³ Regulations and Rules of the Centre (ICSID/4)

Messrs. BURTONS (United Kingdom) and GOUREVITCH (United States) concurred, since this was a matter of detail which could be better handled in the Rules of Procedure.

Mr. LOKUR (India) thought that the deletion of the latter part of paragraph (4) might give the impression that only the names of the members of the Panel are to be circulated. On the other hand, he would not object to the deletion of the whole paragraph (4) and to the matter being dealt with in the Rules.

Mr. van SANTEN (Netherlands) agreed that points of detail should be left to the Rules but mentioned that he attached a great importance to the circulation of the names of the panel members.

Mr. BROCHES (Chairman) said that the Rules could provide for the circulation of both the names and the qualifications and experience of the panel members and suggested that the Committee decide upon deletion of the whole paragraph (4), although, if desired, the Committee could also vote on Mr. MALAPLATE's proposal to delete the latter part of such paragraph only. The Committee agreed to delete the whole paragraph (4). Mr. BROCHES confirmed that the matter would be covered in the Rules which would also contain a provision on the information to be provided by the appointing authorities.

Articles 31 and 40.

Mr. BROCHES (Chairman) said that these provisions were identical except that Article 31 referred to conciliation while Article 40 referred to arbitration. He added that the delegation of Haiti had suggested to delete the words "sufficient to establish *prima facie* that the dispute is within the jurisdiction of the Centre" from paragraph (2) of these Articles.

Mr. LARA (Costa Rica) agreed in principle with the provisions of these Articles but thought that, to avoid undue delays and difficulties, the text should be more precise with respect to the information to be contained in the request. In his opinion, the request should contain a clear presentation of the facts on which the parties agree, a clear presentation of the facts on which they disagree with the reasons therefor, a mention of what the parties wish to obtain, an exact indication of the procedure for the arbitrators and an express indication of consent.

Mr. AWOONER-RENNER (Sierra Leone) suggested to add at the end of paragraph (1) of Article 40 the words "a copy of which should be addressed to the other contracting party". This might give the parties a last opportunity for settling their dispute before conciliation or arbitration proceedings actually start.

Mr. OUMA (Uganda) desired a clarification on the relation between Articles 41 and 44.

Mr. BROCHES (Chairman) replying said that the basic provision was Article 44 which states that the Tribunal is the sole judge of its competence. The provision in Articles 31 and 40 were unusual; they introduced what might be described as a screening process prior to setting the machinery of arbitration or conciliation into motion. They were inserted in response to a desire expressed by certain delegates to have some kind of safeguard against entirely unfounded claims which could embarrass States. The Secretary-General would of course only prevent the access of a claim which had no foundation whatsoever.

⁴ See Doc. 60

Mr. ORTIZ (Peru) thought there should be some difference between the requirements in the case of arbitration and the requirements in the case of conciliation. He therefore suggested that the words "sufficient to establish prima facie that the dispute is within the jurisdiction of the Centre" be omitted in Article 31 which referred to conciliation.

Mr. HETH (Israel) thought that a decision by the Secretary-General preventing access to arbitration or conciliation should be subject to review since the Secretary-General would in effect be exercising a judicial power.

Mr. NEDI (Ethiopia) supported the Article in general but thought that it should provide for a joint request because a unilateral right to institute proceedings would be open to abuse by persons who wished to embarrass States. In reply to an explanatory comment from the Chair, he stated that he did not envisage the necessity of a second consent but merely wished to provide for the case where consent had not existed prior to the institution of proceedings.

Mr. LOKUR (India) supported the suggestion that the Convention provide for a joint request except where one of the parties does not want to come to the Centre notwithstanding his previous consent. He also wished the expression "issues in dispute" to replace the phrase "the subject-matter of the dispute" in paragraph(2) of the Article. Finally, he also wished that the screening powers of the Secretary-General be made subject to some form of appeal or review.

Mr. BROCHES (Chairman) said he saw no objection to providing for a joint request where both parties were not disputing their consent.

Mr. TSAI (China) drew the attention of the meeting to the proposal of his Government, circulated in Document SID/LC/5, that the decision of the Secretary-General not to entertain a claim be subject to appeal by some other body. He then proposed that the last sentence of paragraph(2) commencing with the word "sufficient" be deleted.

Mr. HELLMERS (Sweden) was disturbed by the adverse comments directed against the system embodied in Articles 40 and 44 of the present draft which he found entirely acceptable. He did not want to see a proliferation of bodies which would be the direct result of subjecting a decision by the Secretary-General to review. He also felt that if the Article spoke in terms of a joint request it would in effect mean that parties were to consent not once but twice. He thought the Rules for the institution of proceedings should elaborate more than they do at present on the type of information referred to in paragraph (2).

Mr. BIGAY (Central African Republic) was in favor of maintaining the existing wording of Article 40. He thought it would be quite normal for the Secretary-General to have the power to set aside requests which in all evidence could not be entertained. This would not prevent the tribunal from being judge of its own competence. He was against providing for a joint request for the constitution of the tribunal because it was tantamount to asking the defendant to give a second consent. He suggested that in paragraph (3) the words "the above provisions of this Article" be substituted for the words "the provisions of paragraph (2) of this Article."

Mr. FUMES (El Salvador) was also in favor of maintaining the text of Article 40 as it was, since he thought it provided for the logical procedure to follow. He agreed to maintain the powers granted to the Secretary-General in the last part of paragraph (2). He thought that the Secretary-General would

¹ See Doc. 74

² Cf. Doc. 52

³ Doc. 45

examine the petitions without considering matters of substance, and that he would only ascertain whether the formal requirements had been complied with. He also thought that it would be proper to provide that the other party receive a copy of the petition.

Mr. BERTRAM (Germany) was in favor of maintaining the system laid down in Article 40 (1) of the Draft. If a joint petition were required, it would in fact result in the necessity of a second consent of the parties and such method would jeopardize the aims of the Convention. In principle, he was in favor of the so-called screening power of the Secretary-General, but thought that its formulation in the text was perhaps too strong. He suggested that the word "appears" be substituted for the words "is found" in paragraph (3).

Mr. BROCHES (Chairman) explained that the word "found" had been used because all that would have to be ascertained were the requirements of paragraph 2 and probably paragraph(1).

Mr. MELCHOR (Spain) thought that Article 40 was clearly drafted, and was in favor of maintaining it in the text. He thought that there should be no special conditions for the institution of proceedings because this might occasion litigation as to whether or not the formal requirements had been complied with. He thought that the powers of the Secretary-General established in paragraph(2) should be maintained since the substantive matter would always be decided by the tribunal.

Mr. AGORO (Nigeria) thought that if there was to be any screening at all it should be left to the tribunal itself, since it would have power to decide its own jurisdiction. However, if the meeting felt that there should be an intermediate body to prevent frivolous actions being brought before the Centre, he suggested that a committee composed of the Chairman, the Secretary-General, and the Deputy Secretary-General be constituted to determine whether or not the dispute was prima facie within the jurisdiction of the Centre.

Mr. SAPATEIRO (Portugal) opposed the proposal that the request be made by both parties, since this might eliminate any possibility of starting a procedure. He thought that there should be a distinction between arbitration and conciliation on this matter. Conciliation required the agreement of both parties, without which it could not take place. Therefore, he suggested that it would be useful to provide that conciliation could be started only if both parties signed the request. If one party refused to sign, it would also refuse to conciliate and there would be a consequent loss of time and money.

Mr. BROCHES (Chairman) stated that the discussion would deal first with arbitration and then the meeting could take up the possibility of a different treatment for conciliation.

Mr. PEREZ (Ecuador) suggested that there could be cases where Contracting States, in granting their initial consent for the submission of certain disputes to arbitration, would make it a condition for the holding of arbitration proceedings that the local administrative remedies be exhausted first. Pursuant to the existing wording of the Article it would not be possible to determine through a prima facie examination of the request by the Secretary-General whether this condition had been complied with. It would therefore be necessary for the tribunal itself to consider that matter at the first stage, and this could lead to difficulties. Therefore, he suggested that a new paragraph be added after paragraph(2) stating:

"For a petition of arbitration to be considered it must contain sufficient information indicating that the administrative remedies in the State party to the dispute have been previously exhausted, or that more than three months have passed after the administrative claim was presented without having had any resolution from the competent authorities".

Mr. GUARINO (Italy) stated that in practice one of the parties could state that it had not given its consent to accepting the jurisdiction of the Centre in a particular case. There would then be a question on the competence of the tribunal, and he felt that the Secretary-General should not be given the power to render a final decision on this subject because it was a jurisdictional question. For this reason, he proposed that the Secretary-General should inform the other party of any request for arbitration and said party would have a certain number of days to express its formal opposition. If there was opposition, a commission would be appointed as proposed by Mr. TSAI, with a view to establishing prima facie the competence of the tribunal. If this Commission would declare that the tribunal is not prima facie competent, the question would be closed.

Mr. BROCHES (Chairman) stated his unequivocal opposition to this point of view. When two parties agreed to submit future disputes to a certain tribunal, it would be likely that if one of them did in fact submit a specific dispute, the other might refuse to cooperate. The screening procedure had been inserted because it had been suggested that Contracting States might be afraid that certain investors would bring unfounded proceedings without having obtained consent for the sole purpose of intimidation. But to take away more from the competence of the arbitration tribunal would be completely inconsistent with the whole purpose of the Convention. The Secretary-General's power would apply where there was not the slightest doubt that the party was in bad faith or misinformed. For example, a claim could be submitted by the national of a country that was not a party to the Convention. This was the type of formal requirement that the Secretary-General would screen. He also felt that it was unfounded for the capital-exporting countries to fear that the Secretary-General would prevent an investor from having access to the Centre merely because the Secretary-General thought that it was not a good case.

Mr. DODOO (Ghana) felt that under Article 40 (2), the Secretary-General should act like a registry official of a court. Concerning paragraph (1), he supported the proposal of Messrs. LOKUR and AWOONER-RENNER. In the majority of cases both parties meant well in the transaction and should be encouraged to establish a large measure of mutual confidence. That being so, they should be given the opportunity to make a joint request. If that should fail, however, the other alternative would still be open to the injured party.

[The meeting then recessed for 15 minutes]

Mr. NEDI (Ethiopia) explained that he did not advocate a second consent and to avoid any confusion on the subject he would suggest that Article 40, paragraph (1), be reworded as follows:

"Unless consent has been given previously, the Contracting State and a national of another Contracting State who are parties to a dispute and who wish to submit their dispute to arbitration pursuant to this Convention shall address a joint request to that effect to the Secretary-General in writing."

He would also add the following prefix to paragraph (3) "where consent has been previously given".

Mr. LARA (Costa Rica) wished to explain his previous proposal. He accepted most of the explanations made by the Chair but he still insisted that paragraph (2) be amended and that the scope of the information which the request included be expanded to cover the facts which are in agreement, the facts which are in dispute, the nature of the claim, the procedural details and the arbitrators nominated by agreement.

Mr. MANIRAKIZA (Burundi) asked whether the Convention provided that parties should first go to conciliation before arbitration, and proposed that if this was not the case a provision be inserted to that effect.

Mr. BROCHES (Chairman) answered that the Convention did not contain such a provision but that of course the matter was left to the freedom of the parties. He then polled the members of the Committee on the various proposals which had been discussed. The Committee approved the suggestion made by Sierra Leone, that Articles 31 and 40 provide for copies of the request to be sent to the other party. The Committee rejected the proposal of Haiti to delete the words "sufficient to establish..." from paragraph (2) of both Articles 31 and 40. The Committee also rejected a similar amendment proposed by Peru in connection with Article 31. The suggestion of Mr. LOKUR to replace in paragraph (2) the words "the subject matter of the dispute" by the words "issues in dispute" was not considered as a matter of substance by the Chairman of the Drafting Sub-Committee and was therefore not voted upon. The Committee rejected the proposal made by Mr. NEDI of Ethiopia to modify paragraph (1) of Articles 31 and 40 in order to provide for a joint request unless consent has been given previously. It also rejected the proposal made by the same delegate to modify paragraph (3) of Articles 31 and 40 accordingly. The Committee rejected Mr. LOKUR's proposal to the effect that a request should normally be made jointly, but that if one of the parties refused to join in the request the most diligent party might then file a request with the Secretary-General.

On the problem of the review of the decisions of the Secretary-General, the Committee rejected the proposal made by Mr. LOKUR that "a finding of the Secretary-General that the request is not in conformity with the provisions of paragraph (2) of this Article shall be subject to the approval of the Administrative Council or a committee appointed by the Administrative Council for this purpose." Secondly, it rejected Mr. TSAI's proposal that "in case either party disagrees with the finding of the Secretary-General, the finding of the Secretary-General shall be subject to the approval of the Administrative Council or a committee appointed by the Administrative Council for this purpose." Finally, it also rejected Mr. HETH's proposal that "if the Secretary-General finds that the request does not conform to the provisions of paragraph (2) of this Article, the party who wished to institute proceedings will have the right to demand nomination of an ad hoc committee in the form mentioned in Article 55 to review the decision of the Secretary-General." Mr. BROCHES then requested a show of hands on the question as to whether, as a general principle, the Convention should provide for possibilities to appeal or otherwise review negative decisions made by the Secretary-General. The Committee took a negative stand.

Mr. MELCHOR (Spain) explained his negative vote by the fact that he assumed that the powers of the Secretary-General would be limited.

Mr. BROCHES (Chairman) ascertained that there was also no support in favour of the possibility of review of a finding by the Secretary-General that a request does conform to the provisions of paragraph (2). The Committee then rejected the proposal made by the delegate of Nigeria that requests be screened by a bureau consisting of the Chairman of the Centre, the Secretary-General and the Deputy Secretary-General.

Mr. BERTRAM (Germany) suggested to add to paragraph (3) a clause to the effect that if the Secretary-General finds that the request does not conform to the provisions of paragraph (2), he has, before taking a decision, to consult the party which has made the request.

Mr. BROCHES (Chairman) said that the Draft Rules¹ provided that should the dossier be incomplete or inadequate, the Secretary-General would inform the party and give it the possibility to supplement such dossier as necessary. The Committee rejected Mr. BERTRAM's proposal. The Committee also rejected Mr. PEREZ's proposal to the effect that the request should include appropriate information on the steps which have been taken to obtain administrative decision or relief or a statement that after a period of 90 days no decision or relief was obtained. With respect to Mr. LARA's proposal that the information to be contained in the request be more detailed, Mr. BROCHES ascertained that no delegate objected to this problem being dealt with in the Rules and indicated that Mr. LARA had agreed to provide the Secretariat with a list of the proposed requirements.

Mr. BROCHES (Chairman) noted for the record that, pursuant to Mr. LARA's suggestion, the Rules of Procedure should provide in more detail for a more extensive dossier to be submitted at the time of the request. Mr. LARA agreed to give the Secretariat a copy of the list he had prepared.

Mr. GHACHEM (Tunisia) shared the misgivings of those who had submitted amendments providing for a recourse of some sort against the serious decision that might be made by the Secretary-General under Article 40(2). It was feared that his screening power would take the character of a jurisdictional authority. Those fears stemmed from the positive manner in which the second half of Article 40(2) was worded. He suggested that perhaps a negative wording would better convey the intention of giving to the Secretary-General power for only a formal screening.

Mr. BROCHES (Chairman) suggested that in order to request a show of hands on this matter, Mr. GHACHEM's suggestion could be formulated as follows: In paragraph (2) the words after "arbitration" would be deleted, and paragraph (3) would state "the Secretary-General shall forthwith notify the other party to the dispute of the request unless he finds the dispute to be manifestly outside the jurisdiction of the Centre". Mr. GHACHEM agreed to this formulation.

Mr. TSAI (China) feared that if this wording were adopted it would be even easier to constitute an arbitral tribunal.

Mr. BROCHES (Chairman) requested a show of hands on this proposal, which indicated that a majority was in favour of adopting it.

¹ Doc. SID/LC/4 of November 23, 1964, entitled "Draft Rules for Proposed Centre", not reproduced because of interest only for the history of the Regulations and Rules of the Centre (ICSID/4)

² Doc. 75

Mrs. VILGRATNER (Austria) suggested that, since there had been added to paragraph (1) that a copy of the request should be sent to the other party, there should be an obligation on the Secretary-General to inform that party that the request had been found to be outside the jurisdiction of the Centre and that in any case both parties should be informed of the findings of the Secretary-General.

Mr. BROCHES (Chairman) in reply to a question from the floor stated that the proposal that had been agreed upon included the deletion of the words following "arbitration" in paragraph (2).

Mr. FUNES (El Salvador) thought that when a petition was submitted to the Secretary-General, it was he who would send the copy of the request to the other party and not the claimant. Consequently, the Secretary-General would only send the copy to the other party if he had admitted the request.

Mr. BROCHES (Chairman) stated that it was the claimant who would send the copy of the petition to the other party in the dispute. He added that it was not possible to provide a text for Mrs. VILGRATNER's suggestion at that time, and asked her to propose one after the meeting.

Mr. TSAI (China) stated that the modification of Article 40(2) that had been adopted changed the whole picture because formerly the burden of proof was on the party requesting arbitration to prove to the satisfaction of the Secretary-General that there was a prima facie case. Now the burden of proof was on the Secretary-General to prove that the case was outside the jurisdiction of the Centre. He wondered whether the meeting should not reconsider the possibility of providing for an additional screening procedure by a separate body.

Mr. BROCHES (Chairman) requested a show of hands on whether there would be support for some additional screening procedure, and the response was negative. In view of the fact that certain delegates had the impression that paragraph (2) would not be modified when they voted on Mr. GHACHEM's proposal, and after reading again the proposed new wording of Article 40, Mr. BROCHES requested a show of hands which indicated that the majority approved it.

After a discussion of the time and place for the meetings of the working groups, the Chairman announced that the next meeting would be held the next morning at 10.30 a.m., and would continue at 3.00 p.m.

The meeting adjourned at 1.44 p.m.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Proposal of Mr. Nedi (Ethiopia)
for Article 40

Article 40(1)

Unless consent has been given previously, a Contracting State and a national of another Contracting State who are party to a dispute and who wish to submit their dispute to arbitration pursuant to this Convention shall jointly address a joint request to that effect to the Secretary-General in writing.

Article 40(3)

Where consent has been previously given,

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Proposal by Mr. LARA (Costa Rica) on the Form of the Petition

The petition shall be drawn up in the following form:

- (1) A clear and accurate statement and list of the facts on which the parties are in agreement;
- (2) A statement and list of the facts on which the parties are not in agreement, giving the reason or reasons for dissent;
- (3) Exact statement of the contentions of the parties;
- (4) Indication of the procedure for appointing the arbitrators; and
- (5) A categorical and clearly expressed statement of their consent to submit to arbitration for the purpose of establishing prima facie the jurisdiction of the Centre.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES
(November 23 - December 11, 1964)

REPORT ON ATTENDANCE

(as of December 3, 1964)

Countries participating 61
Advisers and others attending 74

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES
(November 23 - December 11, 1964)

REPORT ON ATTENDANCE
(as of December 3, 1964)

Member	Name	Position
Australia	B. J. O'Donovan	Sr. Asst. Secretary Attorney-General's Dept.
Austria	Christins Villgratner	Legationsrat
Belgium	Karl Andre	Asst. Adviser, Dept. of the Treasury and Public Debt, Ministry of Finance
Brazil	Francisco da Cunha Ribeiro Wilson do Egito Coelho	Legal Consultant, SUMOC Lawyer, SUMOC
Burundi	Eric Manirakiza	Vice President, Bank of Burundi
Central African Republic	Jacques Bigay	Conseiller a la Presidence de la Republique
Ceylon	R. S. Manasundera	Crown Counsel
Chile	Hugo Vigorena	Minister-Counselor, Embassy of Chile
China	Paul Chung-teeng Tsai	Counselor, Council for Int'l. Economic Cooperation and Development, Executive Yuan
Congo(Brazzaville)	Wlie Dinga	First Counselor, Embassy of Congo (Brazzaville)
Costa Rica	Rodolfo Lara	Vice President, Board of Directors Banco Central de Costa Rica
Dahomey	Stanislas Kpognon	General Director, Development Bank of Dahomey
Denmark	Svend Hartlev	Assistant Head of Division, Ministry of Commerce
Ecuador	Jorge Perez-Serrano	Embajador-Abogado, Ministry of Foreign Affairs
El Salvador	Rafael Ignacio Funes Ruben Ventura Armando Napoleon Albenez	Director, Banco Central de Reserva Member, Board of Directors, Banco Central de Reserva Deputy Director, Banco Central de Reserva
Ethiopia	Bekels Nadi	A/Deputy Managing Director, Development Bank of Ethiopia

Secretary's Office
December 3, 1964

Member	Name	Position
Finland	Alexander Theleff	Director, Legal Affairs, Foreign Ministry
France	Serge R. Chevrier	Financial Adviser, Ministry of Finance
	Jean Malaplate	Alternate Director, IBRD
Germany	Wilhelm Bertram	Federal Ministry of Justice
Ghana	N. M. C. Dadoo	Senior State Attorney
	C. C. Y. Onny	Principal Assistant Secretary, Ministry of Finance
Greece	Dionyssios Mantzoulinos	Lawyer, Ministry of Coordination
Guatemala	Victor Salomon Pinto J.	Consjero, Ministerio de Economia
Haiti	Raymond Beauvoir	First Secretary, Delegation of Haiti to OAS
Honduras	Ricardo Midance	Ambassador of Honduras
Iceland	Halldor Jonatansson	M.L. and Chief of Division Ministry of Commerce
India	B. N. Lokur	Law Secretary Government of India
Iran	Fusd Rouhani	General Council to the Prime Minister
Israel	Shabtai Rossne	Legal Adviser, Ministry for Foreign Affairs
	Meir Heth	Senior Economist, Bank of Israel
Italy	Giuseppe Guarino	Professor, University of Rome
Ivory Coast	Jean Florenzano	Consulting Economist and Financial Adviser
Japan	Hidetoshi Ukawa	Third Secretary, Embassy of Japan
Korea	Moon Young Rhie	Director Bureau of Int'l. Relations Ministry of Foreign Affairs
	Pyong Whi Min	First Secretary Embassy of Korea

Member	Name	Position
Lebanon	Raja S. Himadeh	Govt. Commissioner to BCAIF Ministry of Finance
Liberia	Estrada Bernard	Chief Counsel Treasury Dept.
Malagasy Republic	Ratsirahonana	Civil Administrator, Ministry of Justice
Malaysia	M. S. Ong	Solicitor-General
Morocco	Ali Bengalloun A. Tadlaoui M. Mzabi	Ambassador of Morocco First Secretary, Embassy of Morocco Commercial Attache, Embassy of Morocco
Nepal	H. M. Shrestha	Under Secretary of Finance
Netherlands	C. W. van Santen	Legal Adviser Ministry of Foreign Affairs
New Zealand	Albyn J. Quill	Senior Crown Counsel
Nicaragua	Guillermo Sevilla-Sacasa	Ambassador of Nicaragua
Niger	Andre Wright	First Secretary, Embassy of Niger
Nigeria	Idowu O. Agoro	Principal State Counsel (Acting)
Norway	Asbjorn Sand	Chief of Division, Foreign Exchange Department Ministry of Commerce and Shipping
Panama	Carlos Lopez Tejada	Lawyer, Ministry of Finance
Peru	Gonzalo Ortiz de Zavallos	Lawyer, c/o Ministry of Foreign Affairs
Philippines	Amado R. Brinas Antonio V. Roxas	Deputy Governor Central Bank of the Philippines Financial Attache, Embassy of the Philippines
Portugal	Jose Luis Sapateiro	Lawyer, Ministry of Finance
Sierra Leone	R. Awooner-Renner	Senior Crown Counsel Constitutional and International Law Division
Spain	Antonio Melchor de las Heras J. Gonzales Bueno	State Lawyer, Jefe Asesoría, Ministry of Foreign Affairs Lawyer, Ministry of Finance

Secretary's Office
December 3, 1964

Member	Name	Position
Sweden	Vidar Hellners	Asst. Head of Division Ministry for Foreign Affairs
Syrian Arab Republic	Dia Allah El-Fattal	Second Secretary, Embassy of Syrian Arab Republic
Tunisia	Hedi Ghachem	Chef du Contentieux de l'Etat
Turkey	Samim Bilgen	Chief Legal Adviser and Director General of Disputed Claims Ministry of Finance
Uganda	A. O. Ouma	State Attorney, Ministry of Justice
United Kingdom	F. Burrows	Assistant Legal Adviser Foreign Office
United Republic of Tanganyika and Zanzibar	Mark Romani	Solicitor General
United States	T. J'Andelot Belin	General Counsel Treasury Department
	Harry Gourevitch	Assistant General Counsel Treasury Department
Uruguay	Francisco Guido	Lawyer, Ministry of Finance
Venezuela	Alfonso Espinosa	Executive Director Int'l. Monetary Fund
Yugoslavia	Ledislav Serb	Asst. Chief Legal Adviser, Secretary of State for Foreign Affairs
	Djordje Prasic	Legal Advisor, Yugoslav Investment Bank

Secretary's Office
December 3, 1964

The Legal Committee reconvened at 10:33 a.m.

Mr. BROCHES (Chairman) said that Article 40 as approved at the previous meeting still raised some difficulties. The Secretariat had therefore prepared a new draft which would probably be circulated in the course of the morning. If approved, this new text could be submitted to the Drafting Sub-Committee. He then referred to the observation made at the previous session by Mr. SAPATEIRO that conciliation essentially rests on the cooperation and good faith of the parties, and that consequently, the provisions of Article 31 should not necessarily be identical to those of Article 40. He said that the setting forth of identical rules had been intentional since experience had shown that parties, once forced in a way to be brought together had often been willing to come to an agreement and to abide by the recommendations of the Commission. In other words, conciliation could in certain cases be a disguised form of arbitration.

Mr. AMOONER-RENNER (Sierra Leone) said that since the main objective was to provide for a freedom of choice between arbitration and conciliation, the provisions should not be different.

Mr. BROCHES (Chairman) requested a show of hands as to whether Article 31 should be identical to Article 40 except for the word "conciliation" instead of "arbitration". The Committee agreed.

Mr. BOMANI (Tanzania) said that Working Group IV on the scope of the Centre's jurisdiction had met on Thursday afternoon and that the several points of view appeared to fall within three categories. Consequently, three different drafts were being prepared for subsequent discussion in the Working Group.

Mr. BROCHES (Chairman) assumed that the Working Group would meet during the weekend and suggested to defer discussion of the reports on the nationality problem and on the question of political subdivisions since these matters could hardly be settled before the main problem of jurisdiction has been decided.

Article 32

Mr. BERNARD (Liberia) suggested that the words "as soon as possible" in paragraph (1) be replaced by the words "within a period not exceeding four months."

Mr. BROCHES (Chairman) thought that in fact the words "as soon as possible" might not even be necessary since the question of timing was dealt with in the next Article. The majority of the Committee agreed not to modify the present version of paragraph (1).

Mr. BERNARD (Liberia) explained that he had suggested a period of four months in view of the period provided for in Article 33. He then asked for some clarification on the purpose of paragraph 32 (2)(b).

Mr. BROCHES (Chairman) said that this provision merely provided for rules to be applied in the absence of agreement between the parties with

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² For its report see Doc. 104

respect to the number of conciliators and the method of their appointment. On the other hand, Article 33 provided that if the Commission could not be constituted within three months because the parties could not agree on the president of the Commission, or because a party would fail to appoint its conciliator, then, the Chairman of the Centre could appoint the conciliator or conciliators not yet appointed.

Mr. GUARINO (Italy) suggested that the president of the Commission be appointed by the two other conciliators and not by the parties.

Mr. BERTRAM (Germany) did not agree with Mr. GUARINO's proposal in view of the special nature of conciliation.

Mr. GOUREVITCH (United States) thought that an express statement should be introduced, either in Article 32(2)(b) or in Article 34, that the parties would be free to choose conciliators from outside the Panel of Conciliators.

Mr. SAPATEIRO (Portugal) noticed that under the present version, conciliators appointed pursuant to Article 32(2)(b) must be selected from the Panel of Conciliators and considered this undesirable. The selection from the Panel should be limited to the case where the conciliators are selected by the Chairman.

Mr. LOKUR (India) concurred.

Mr. BROCHES (Chairman) requested a show of hands of Mr. GUARINO's proposal that the president of the Commission be appointed by the two other conciliators. The Committee rejected this proposal. He then noticed that Mr. SAPATEIRO's proposal would consist in deleting the reference to Article 32(2)(b) contained in Article 34(1), and requested a show of hands. The Committee approved the proposed deletion. Mr. BROCHES then ascertained that there was no objection to the substance of both Article 32 and Article 34 as amended.

Article 33.

Mr. ORTIZ (Peru) proposed the deletion of Article 33 since conciliation is strictly a voluntary matter.

Mr. BROCHES (Chairman) briefly repeated the observation he had made in connection with Article 31 and requested a show of hands. The Committee rejected the proposed deletion of Article 33.

Mr. SAPATEIRO (Portugal) explained that he had voted against the deletion in view of the fact that the Committee had previously agreed to have identical systems for conciliation and for arbitration.

Articles 35 and 36.

Mr. BROCHES (Chairman) suggested that these provisions be examined when discussing the corresponding provisions relating to arbitration.¹

Article 37.

Mr. UKA'YA (Japan) thought that, unless the parties would object, the report of the Commission should mention the content or substance of the agreement reached in order to avoid new disagreements at a later stage or the recurrence of the dispute.

¹ See Summary Proceedings of the Legal Committee Meetings, December 7, Docs. 81 and 82 respectively

Mr. PINTO (Deputy-Secretary) said that Article III, Section 5 (3) of the preliminary draft contained a provision which precluded the conciliators from mentioning the terms of settlement in their report unless the parties had agreed to it. This provision had been deleted in the new draft in view of objections raised by several delegates at the consultative meetings.

Mr. BROCHES (Chairman) added that in fact there had been as much opposition to a provision under which the terms of settlement would normally be published as to the opposite provision that the terms of settlement would normally not be published.

Mr. TSAI (China) thought that the facts in issue should not be mentioned in the report since conciliation often leads to compromises and since facts cannot be compromised upon. The absence of such a requirement might make it easier for the parties to reach an agreement.

Mr. SAPATEIRO (Portugal) suggested that the word "may" in the second sentence of paragraph (2) be replaced by the word "shall".

Mr. LOKUR (India) asked for some explanation on the meaning of the expression "clarify the issues in dispute" referred to in paragraph (1). With respect to paragraph (2), he suggested that the expression "facts in issue" be replaced by the expression "questions in issue", agreed with Mr. SAPATEIRO's proposal and thought that the last sentence of paragraph (2) should expressly state that if one party fails to appear or participate in the proceedings, the Commission shall close such proceedings.

Mr. BROCHES (Chairman) mentioned that the expression "clarify the issues" had been used in the Bogota Pact but considered this as a drafting point.

Mr. ONG (Malaysia) suggested the deletion of the words "upon mutually acceptable terms" from paragraph (1) and proposed that the expression "recommend terms of settlement" be replaced by the words "make recommendations for settlement". He agreed with Mr. LOKUR that the proceedings should be closed if a party failed to appear or participate in the proceedings.

Mr. LARA (Costa Rica) said his proposal of yesterday to include in the request detailed information would have removed the necessity of employing the phrase "issues in dispute" which some delegates found difficult to understand.

Mr. SAPATEIRO (Portugal) thought that if the Commission were to clarify the "issues in dispute" and not merely the issues raised by the parties, the function they would be performing would be broader than conciliation proper. This, in his opinion, was a matter of substance and not merely one of drafting. He would suggest that the phrase be redrafted to read "the issues in dispute raised by the parties."

Mr. HETH (Israel) suggested that the words "or if one of the parties is not acting in good faith" be added in paragraph (2) after the words "that there is no likelihood of agreement between the parties". He would also like the provision to provide that where one of the parties fails to appear or participate in the proceedings, the other party should have the right to ask the Commission to decide in its report whether it had jurisdiction over the matter referred to it.

⁴ Doc. 24

⁵ Charter of the Organization of American States of 1948

⁶ See Summary Proceedings of the Legal Committee Meeting, December 3, Morning, Doc. 73

Mr. BROCHES (Chairman) referred the various proposals for a vote. The Malaysian proposal to delete the words "upon mutually acceptable terms" in paragraph (1) was defeated by a majority of 20 to 5. He then stated that as there was no objection he would substitute for the words "facts in issue" in paragraph (2) the words "questions in issue". This would take care of the point raised by China as well. He then declared that the Portuguese proposal to substitute the word "shall" for the word "may" in the fifth line of paragraph (2) was adopted by a majority of 19 to 6. He then declared that the two Israeli proposals were defeated. He further declared that another vote indicated the majority in favor of including the words "will close the proceedings" in the last part of the last sentence of paragraph (2) after the word "Commission".

Article 38.

Mr. LOPEZ (Panama) thought that the words "except as the parties to the dispute shall otherwise agree" in the second sentence of this Article ran counter to the voluntary character of conciliation and he therefore advocated their omission.

Mr. SAPATEIRO (Portugal) supported the Panamanian delegate.

Mr. LOKUR (India) thought the entire Article should be omitted because the first sentence stated the obvious while the second sentence was objectionable on the grounds stated by the previous speaker.

Mr. FUNES (El Salvador) defended the text. He thought conciliation would sometimes really be arbitration in disguise and that the Convention should state that an agreement to abide by a compromise should be binding.

Mr. BROCHES (Chairman) pointed out that the Article in no way changed the principle that the recommendations are not normally binding.

Mr. GUARINO (Italy) thought that the relationship between conciliation and arbitration be stated and that the Commission be required to make a statement under Article 37(2) if a party during any time in the conciliation procedure requested settlement by arbitration.

Mr. PINTO (Guatemala) supported the proposal by the delegates of Panama and Portugal.

Mr. BROCHES (Chairman) then put the various proposals to a vote. He announced the Indian motion to delete the entire Article defeated by a majority of 26 to 15. A later show of hands indicated a majority of 23 to 5 in favor of retaining the words "in good faith" in the first sentence of that Article. He said the words were inserted to contrast conciliation procedures with arbitration procedures and were in no way meant to suggest the possibility of acting in bad faith. Replying to a question from Mr. LOKUR, the Chairman announced that a Commission probably would declare the proceedings closed because there was no likelihood of an agreement if it saw that the various compromises it was recommending from time to time were unacceptable.

[A short recess was then taken]

Mr. BROCHES (Chairman) announced that he consulted some of the delegates on the various proposals which were still pending and had come up with the following suggestion which he thought might be acceptable to the meeting.

He suggested the Article be redrafted to read as follows: "The parties shall cooperate in good faith with the Commission in order to enable it to carry out its functions. The parties shall give their most serious consideration to the recommendations but they shall not be required to accept them." In this way the question of what would happen where the parties agreed to accept the recommendations would be left out of the scope of the Convention.

MR. ORTIZ (Peru) wished to associate himself with the comments of Panama and Portugal.

MR. DODOO (Ghana) said that if Article 37(2) were amended along the lines suggested by the delegate from Japan, i.e. that the terms of settlement be spelled out in the Commission's report, the difficulties experienced in the second sentence of Article 38 would not have arisen. He thought Article 38 should be omitted although something along these lines may be included in the Rules. He further wished to comment in a general way on the expression "except as the parties shall otherwise agree" appearing in this Article and throughout the Convention. He thought private investors would always bring themselves within this exception so that the exception would in effect become the rule in most cases.

MR. LARA (Costa Rica) defended the Article in its entirety. He thought that if the second sentence were deleted, the regime envisaged by the Convention would be distorted.

MR. BROCHES (Chairman) summarizing the debate suggested the following solution: The words "the parties shall cooperate in good faith with the Commission and shall give serious consideration to those recommendations", which were the essence of the first sentence of Article 38, would be added at the end of paragraph (1) of Article 37. The second sentence of Article 38 would disappear but its substance would in effect already be covered by the second paragraph of Article 37. He wished to know whether this would take care of the various proposals.

MR. LARA (Costa Rica) said that in such a case the heading of Title 3 of this chapter would have to be changed accordingly.

MR. BROCHES (Chairman) said that would be done. He then declared an overwhelming majority in favor of this proposal.

Article 39

MR. BROCHES (Chairman) replying to a question from MR. ORTIZ with reference to the agreement of the parties referred to in the first sentence of this Article said such agreement could be concluded at any time.

MR. O'DONOVAN (Australia) proposed that the words "the same dispute" be followed by the words "or a dispute relating to the same investment" in the third line of this Article because there might be different disputes arising from one investment.

MR. TSAI (China) suggested the addition of the word "facts" to the scope of things which could not be invoked or relied upon in other proceedings.

MR. BROCHES (Chairman) thought that if the Article would exclude the possibility of reliance on the Committee's report that should take care of the matter.

MR. BERTRAM (Germany) thought that would not be sufficient and that the reference to exclusion should refer to "the report of the Commission or the recommendations, if any".

MRS. VILLAGRATNER (Austria) thought the word "later" in the third line should be omitted as proceedings concerning the same investment may be going on simultaneously.

MR. BROCHES (Chairman) suggested that in order to take care of all the points raised the Article be redrafted as follows: "Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceedings, whether before arbitrators ... conciliation proceedings or the report or any recommendations made by the Commission".

MR. LARA (Costa Rica) thought that the word "later" should be retained because it indicated the connection between the subject-matter of this Article and the failure to reach a compromise under conciliation.

MR. BERTRAM (Germany) said he thought the main purpose of the Article was to reinforce the preparedness of the parties to reach a compromise.

MR. BROCHES (Chairman) replying to a question from MR. LOKUR said that where the parties had reached an agreement to accept a recommendation of a conciliation commission that agreement would not be excluded by virtue of the provision of Article 39 but that what was said during the proceedings of the commission probably would. He then announced that the vote taken on his proposal for amending the text had produced a majority of 28 in favor to 2 against.

Article 40

MR. BROCHES (Chairman) invited the attention of the meeting to Document SID/LC/43* which was prepared by the Secretariat and incorporated the various amendments adopted by the Committee.

* "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, and shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issue in dispute, the identity of the parties and their consent to arbitration in such detail as shall be prescribed by the rules for the institution of conciliation and arbitration proceedings adopted by the Administrative Council.

(3) The Secretary-General shall register the request unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties to the dispute of registration of the request or refusal of registration.

Article 41

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 40.

(2) (Unchanged)"

MR. PEREZ (Ecuador) expressed his doubts with regard to the practice by which the party instituting proceedings had to transmit a copy of his request to the adverse party. He thought this ran counter to the normal practice and that the duty to transmit documents should be placed with the Secretary-General.

MR. BROCHES (Chairman) thought the question had been decided in this manner at yesterday's meeting.

MR. TSAI (China) sympathized with the remarks made by the Ecuadorian delegate since it was not now clear what would happen in the event that a party refused or failed to transmit a copy of his documents to the other party.

MR. BROCHES (Chairman) asked the delegate from Sierra Leone whether he would accept the substitution of the word "and" for the word "who" in the closing phrase of the provision in question. Upon receiving an affirmative reply, the text was amended accordingly.

MR. MELCHOR (Spain) thought the reference to conciliation proceedings in paragraph (2) should be omitted as there might be different procedures envisaged in cases of arbitration than in cases of conciliation.

MR. BROCHES (Chairman) referred this comment to the Drafting Sub-Committee.

MR. ONG (Malaysia) proposed that a party be under the duty to furnish the Secretary-General with a copy of his documents for transmission to the other party. He agreed that the Rules rather than the Convention should so provide.

MR. DODOO (Ghana) thought that the words "adopted by the Administrative Council" in the end of paragraph (2) should be omitted as they may give rise to doubts as to the existence of any alternative rules for the institution of proceedings.

MR. BROCHES (Chairman) referred this matter to the Drafting Sub-Committee.

MR. LOPEZ (Peru) thought the last sentence of the third paragraph in the Spanish text was unclear.

Article 41

MR. BROCHES (Chairman) again referred the delegates to Document SID/LC/43⁷ in which the first paragraph of this Article had been amended to make it conform to the provisions of Article 40 as redrafted by introducing the term "registration". He requested the Drafting Sub-Committee⁸ to take note that the consequences of these changes be reflected in Chapter III also.

MR. TSAI (China) wished to know whether a decision by the Secretary-General to register a request would imply that it had not been a frivolous request within the meaning of Article 62.

⁷ See Doc. 73

⁸ For its report see Doc. 104

⁹ Not reproduced; for text see preceding page

¹⁰ For its report see Doc. 104

MR. BROCHES (Chairman) said that registration would have no such effect. Referring to the remainder of Article 41, he wished to consider it in conjunction with Articles 42 and 43 which raise the question of "national" arbitrators. He said Report Z-11¹¹ had summarized the various arguments for or against the question of national arbitrators. He thought there was no point in having a long debate on this issue which was fairly clear and he therefore proposed to ascertain the general orientation of the meeting on the various possibilities that existed with respect to this problem. He said the present text recognized no exception to the principle of excluding national arbitrators.

MR. LARA (Costa Rica) defending the text stated that he thought a provision should also be included to exclude anyone who has served as a counsel to the party in the dispute from being an arbitrator.

MR. BILGEN (Turkey) said there was something to favor national arbitrators because their knowledge of local conditions would be valuable and therefore suggested that national arbitrators be allowed where the parties so agree.

MR. SERB (Yugoslavia) explained his opposition to any limitation on the right to appoint national arbitrators.

MR. BROCHES (Chairman) requested a show of hands solely for the purposes of orientation. He announced that a vote of 16 to 10 indicated the majority as being against the total exclusion of national arbitrators. On a recount, the majority increased to 29. He then requested a show of hands on the question of whether a limitation should be imposed so as to assure that national arbitrators would never constitute a majority on a tribunal and announced that this appeared accepted by a majority of 15 to 11. A revote on the same question indicated a majority of 20 to 14. He would now request a show of hands on whether the exclusion of a majority of national arbitrators should not apply where the parties specifically agreed to appoint national arbitrators.

MR. PEREZ (Ecuador) wished to know whether this meant that the parties would agree to the actual identity of the persons to be nominated as arbitrators or merely referred to an agreement in general terms. In his opinion, the principle in the text assured impartiality and any exclusion should be limited only to the case where the identity of the person to be nominated as arbitrator had been agreed upon in advance.

MR. BROCHES (Chairman) thereupon requested a show of hands on the Ecuadorian proposal, i.e., that the exception (with respect to the majority of non-national arbitrators) be recognized only where the agreement between the parties referred to the identity and person of the arbitrators and announced that this appeared to have been accepted by a majority of 22 to 5.

The Committee recessed at 1:35 p.m.

¹¹ Doc. 33

CHAPTER III

CONCILIATION

Section 1

Request for Conciliation

Article 31

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect to the Secretary-General in writing, who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the Rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Conciliation Commission

Article 32

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request 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 do not agree upon the number of conciliators and the method 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.

Article 33

If the Commission shall not have been constituted within three months after notice of registration of the request has been dispatched by the Secretary-General pursuant to paragraph (3) of Article 31, or such other period as the parties may agree, the Chairman shall, at the

request of either party, and, after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 34

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments pursuant to Article 33.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualifications stated in paragraph (1) of Article 14.

Section 3

Conciliation Proceedings

Article 35

(1) The Commission shall be the judge of its own competence.

(2) The Commission shall be constituted notwithstanding any objection by a party to the dispute that that dispute is not one in respect of which conciliation proceedings can be instituted pursuant to this Convention, or is not within the scope of its consent to such proceedings. Such objection shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 36

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, 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 this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 37

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour 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. 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.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in 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 shall close the proceedings and shall draw up a report noting the sub-

mission 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 close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 38

[deleted]

Article 39

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, 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 report or any recommendations made by the Commission.

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SID/LC/SR/13 (December 30, 1964)
Summary Proceedings of the Legal Committee Meeting, December 4, Afternoon¹

The Legal Committee reconvened at 3:07 p.m.

Mr. BROCHES (Chairman) made several announcements concerning the meetings of working groups. The working group headed by Mr. BOMANI would meet at 10:00 a.m. next Sunday. The working group on enforcement, composed of delegates from Germany, Greece, Sweden, Malagasy Republic, United States, El Salvador, Nigeria and Malaysia, would meet at 2:00 p.m. on Sunday; and a working group on amendment, composed of delegates from Belgium, United States, China, Ghana, Norway and Ecuador would meet at 5:00 p.m. on the same day.

He then stated that after the last vote that had been taken that morning it was necessary to prepare a text reflecting the agreement reached by the meeting. The Secretariat was going to prepare the draft, and in the meanwhile the meeting could discuss again Article 27. He invited the attention of the meeting to document SID/LC/42 which contained a redraft of Article 27(1).*

* "Article 27

(1) Consent of the parties to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to such proceedings to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration pursuant to this Convention.

(2)"

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² See Summary Proceedings of the Legal Committee Meeting, December 2, Doc. 71

Mr. DODOO (Ghana) inquired which of the two sentences of Article 27(1), as redrafted, prevailed.

Mr. BROCHES (Chairman) stated that the two sentences were not in any order of superiority. They were two separate statements.

Mr. HELINERS (Sweden) inquired whether the Chairman meant that both sentences were unrelated. He found that the second sentence was an indication of what could be meant by the words "unless otherwise stated" in the first sentence. Mr. BROCHES replied that this was true, but it was not the only example.

Mr. LOPEZ (Panama) agreed in principle with the new wording of Article 27 and suggested that the word "recurso" ("remedy") in the Spanish text could be deleted, as had been suggested by Mr. LARA.

Mr. LARA (Costa Rica) requested a clarification of the second sentence of the proposed paragraph (1).

Mr. BROCHES (Chairman) stated that this sentence made it clear that an arbitration clause included in an investment agreement could say that no recourse would be had to arbitration unless local remedies, either of an administrative nature or a judicial nature, had been exhausted. The reason why it was stated specifically that one of the conditions might be the prior exhaustion of local remedies was not because it was desirable or undesirable, but merely to make it clear that by providing what had been stated in the first sentence it was not meant to exclude what States could do under the second sentence.

Mr. LARA (Costa Rica) stated that the word "recurso" ("remedy") had been badly used in the Spanish text because it might cause confusion, and that this confusion would be increased by the use of the word "internos" ("internal"). He thought that the word "national" should be used instead.

Mr. LOKUR (India) enquired whether this Article would permit having arbitration after a final court decision.

Mr. BROCHES (Chairman) stated that this was correct, but that in practice he thought it would not happen. However, some States wanted to include this provision.

Mr. TSAI (China) had some doubt about using the word "remedy". He felt that this might have the connotation that there could not be any possibility of revision or annulment of the award, or of giving diplomatic protection if a State did not abide by the award. He felt that the word "proceedings" would be more appropriate.

Mr. BURROWS (United Kingdom) stated that the word "remedy" was well understood and was commonly used, and that in his view it should be retained.

Mr. BROCHES (Chairman) thought that there was no ambiguity since the opening language referred to "arbitration pursuant to this Convention", and that included all the remedies which were provided by the Convention.

Mr. BERTRAM (Germany) enquired about the timing of the exhaustion of local remedies referred to in the second sentence.

Mr. BROCHES (Chairman) thought that the parties were entirely free to make any agreement they liked, and that normally it would be a condition to be fulfilled before commencing arbitration proceedings.

Mr. PEREZ (Ecuador) felt that the reference to "judicial" remedies in the second sentence presented problems, because if there were a decision of the Supreme Court of a country, which in its nature was final and irrevocable, it would be contrary to the universal principles of legislation to permit the decision of the highest court to be revised by an arbitral tribunal. Therefore, he suggested that reference be made only to "administrative" remedies. This would not prohibit any State from stipulating that judicial remedies would also be exhausted, but the draftsmen of the Convention would avoid criticisms for providing something contrary to the general rules of juridical order.

Mr. BROCHES (Chairman) stated that he doubted whether any State would want to open this possibility. On the other hand, this was a very sensitive field and the draftsmen had tried not to interfere with what many States believed was a proper statement of the law. The proposed wording merely stated what States could do, and gave States complete liberty to do what they thought was right.

Mr. HELINERS (Sweden) stated that he did not oppose this addition, because he thought it was already implied in the first sentence, but he wanted to be on record as being in disagreement with its addition because in his view it would lead to an unnecessary use of this clause. It was very difficult to know when local remedies were exhausted, and this could lead to a waste of time that would undermine the whole of the arbitration procedure.

Mr. BROCHES (Chairman) stated that the experience of looking at many contracts with arbitration clauses made him believe that this fear was unfounded, since reservations of exhaustion of local remedies were generally not included. On the other hand, if States felt that this was a protection to them, no damage was being done in attempting to get the greatest possible agreement.

Mr. BURROWS (United Kingdom) shared the opinion of Mr. HELINERS and suggested that a vote be taken on the two sentences separately.

Mr. BROCHES (Chairman) requested a show of hands on whether the second sentence should be added, which indicated that 19 delegations were in favor and 17 against. He then requested a show of hands on the Article with the two sentences as stated in document SID/LC/L2. Twenty-three delegations were in favor and none against.

Referring to Article 27 (2), Mr. BROCHES recalled that there had been a show of hands on the question of subrogation which had indicated that 23 delegations were in favor of referring to subrogation in principle and 22 were opposed. In view of that vote the Secretariat had prepared a new text of Article 27 (2), which was embodied in document SID/LC/L1* and had been

* "Notwithstanding the provisions of Article 26(1), a Contracting State which has consented to the submission of a dispute with a national of another Contracting State to the Centre may, at the time of such consent or at any time thereafter, consent to the substitution of such national in proceedings pursuant to this Convention by its State or by a public international institution in the event that such State or institution, having satisfied the claim of such national under an investment insurance scheme, is subrogated to the rights of such national, provided, however, that such consent shall not become binding, and may be withdrawn, until the State or institution which has been, or may become, subrogated to the rights of such national shall have accepted such consent in writing and, in turn, shall have consented in writing (a) to be bound by the provisions of this Convention in the same manner as such national, (b) to waive recourse to any other remedy to which it might otherwise be entitled, and (c) to waive any substantive or procedural rights which it might claim as a State or public international institution and which could not have been claimed by such national."

distributed to the delegates. He indicated that in the French text there was a typographical error in the tenth line, where the word "ne" should be deleted.

Mr. BROCHES (Chairman) said that the intention had been to make sure that the subrogee State or public international institution would not have an option to proceed either under a bilateral agreement which might have been concluded with a host State or under this Convention. As long as such State or institution had not made up its mind, the consent of the host State would not become binding. This clause would thus provide more flexibility in cases where capital importing and capital exporting countries would consider it desirable to remove a dispute from the political level to a quasi private law level.

Mr. GOUREVITCH (United States) agreed in substance but asked for some clarification. He assumed that sub-paragraph (a) meant that the subrogee State would have no greater rights than its national. With respect to sub-paragraph (b), he wondered how a State could waive any rights under an agreement concluded with another State and asked whether this was really the intention of such sub-paragraph (b). He also asked for a clarification of the meaning of sub-paragraph (c).

Mr. BERTRAM (Germany) considered sub-paragraph (a) acceptable but thought that sub-paragraphs (b) and (c) might refer more precisely to concrete claims.

Mr. BROCHES (Chairman) replied that when redrafting this clause, the Secretariat had in mind a situation where bilateral agreements would contain a provision under which a capital exporting State, after having compensated one of its nationals, would be recognized as subrogated to the rights of such national and have the right to go to arbitration, should diplomatic negotiations not lead to a settlement. The only intention of sub-paragraph (b) was to make sure that the consent of the capital importing State would only become effective after the capital exporting State would have waived any other methods for settlement which might be open to it.

Mr. BIGAY (Central African Republic) pointed out that sub-paragraph (b) had been incorrectly translated into French.

Mr. BURROWS (United Kingdom) considered the substance of the redraft satisfactory. In simple terms, this clause meant that after having compensated one of its nationals, a capital exporting State would be permitted, if the capital importing State so agreed, to "step in the shoes" of its national but that in such case it should then "play the rules of the game." In his opinion, this was the right way to deal with the problem.

Mr. LOKUR (India) expressed some concern that this clause might enable a capital exporting State to unilaterally modify bilateral agreements by choosing to proceed under this Convention.

Mr. BROCHES (Chairman) replied that the capital importing State had first to declare its acceptance of a subrogation.

Mr. BERTRAM (Germany) suggested to add the words "with regard to this claim" at the end of sub-paragraph (b) and to delete sub-paragraph (c). Mr. BROCHES thought that the words "with regard to this claim" could probably be inserted in the first part of the clause. He agreed that sub-paragraph (c) might be redundant but might be desirable in view of the concern expressed by some delegates who were opposed to the principle of subrogation.

Mr. LARA (Costa Rica) proposed that the clause be simplified by dividing it in two parts. The first one would end with the words "is subrogated to the rights of such national". The second part would deal with the conditions under which the consent of the host State become effective. He also suggested that a better expression be used in the Spanish version instead of the words "hasta el momento".

Mr. MELCHOR (Spain) proposed that the Committee be asked to vote as to whether the new draft prepared by the Secretariat should or should not be inserted in the Convention.

Mr. BROCHES (Chairman) agreed, but said that on the day before, the Committee had agreed by a one vote majority to maintain the principle of subrogation in the Convention. The Committee agreed by a three vote majority to insert the substance of the new draft in the Convention.

Mr. BERNARD (Liberia) explained that he had abstained since it was not entirely clear to him whether the appearance of two States as parties before the Centre would, in fact, correspond to an extension of the scope of the Convention.

Mr. BROCHES (Chairman) repeated that subrogee States would not appear as States as such but thought that each delegate should decide whether, in his opinion, the objections against States appearing instead of their national still remained notwithstanding the existence of sub-paragraphs (a), (b) and (c).

Mr. MELCHOR (Spain) suggested that a vote be made by roll call in view of the importance of the principles involved.

Mr. BROCHES (Chairman) said that he did not consider the small majority of the previous vote as entirely satisfactory and agreed to proceed with a roll call. He said that since this provision did not affect the other provisions of the Convention, the matter could, in the absence of a clearer decision, be referred to the Executive Directors for further consideration. Twenty-three delegates accepted the substance of the new Article 27 (2), 19 objected and 3 abstained.

The delegates voting for were: Australia, Austria, Belgium, Central African Republic, China, Costa Rica, Denmark, Finland, France, Germany, Israel, Ivory Coast, Japan, Korea, Malagasy Republic, Malaysia, Netherlands, New Zealand, Norway, Sweden, Turkey, United Kingdom, United States.

Those voting against were: Brazil, Ceylon, El Salvador, Ghana, Greece, Guatemala, Honduras, India, Iran, Italy, Nigeria, Panama, Peru, Philippines, Sierra Leone, Spain, Uganda, Uruguay, Yugoslavia.

Ethiopia, Lebanon and Liberia abstained.

Mr. BROCHES (Chairman) said that he would try to canvass the absent delegations in order to see whether a clearer position could be obtained.

Mr. PEREZ (Ecuador) announced that he was absent when the vote was taken, and wished his vote to be added to those in favor of retaining the provision.

Mr. BROCHES (Chairman) then read the following text of Article 43 (1) which he thought embodied the results of the morning vote:

"The majority of the members of any arbitral tribunal constituted pursuant to this Convention shall be

¹ See Doc. 77

nationals of States other than the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute; provided, however, that the provisions of this paragraph shall not apply where the tribunal as a whole had been appointed by the mutual agreement of the parties to the dispute."

Mr. TSAI (China) said that he did not object to the principle just read but he would like a vote taken on the question whether there should be no nationality restriction whatsoever.

Mr. GUARINO (Italy) suggested that national arbitrators be allowed in all cases except where the Chairman made an appointment pursuant to Article 42.

[A short recess was taken.]

Mr. BROCHES (Chairman) proposed that the proviso to the amended text of Article 43(1) which he read before the recess be redrafted since it did not accurately reflect the Ecuadorian proposal as he earlier assumed it did. The proviso would now read as follows:

"provided, however, that the provisions of this paragraph shall not apply where a national of the State party to the dispute or of the State whose national is a party to the dispute has been appointed by the mutual agreement of the parties."

Mr. GUARINO (Italy) proposed that Article 43(2) be changed to read as follows:

"Any arbitrator appointed pursuant to Article 41(2)(b) or Article 42 shall be elected from the panel of arbitrators and shall not have the nationality of a party to the dispute."

Mr. BROCHES (Chairman) said that it would be a useful alternative to the proposal he had put before the meeting in case that proposal was defeated.

Mr. SERB (Yugoslavia) proposed that the exclusion of national arbitrators apply only in the case of appointment pursuant to Article 42.

Mr. BROCHES (Chairman) announced that it now appeared that there was a joint Italian-Yugoslav proposal in the terms just set out by the Yugoslav delegate.

Mr. LOKUR (India) requested that the words "and after consultation with both" be added to the end of the last sentence of Article 42 to precede the act of appointment by the Chairman.

Mr. BROCHES (Chairman) then submitted the amended text of Article 43(1) to a vote and announced that it was adopted by a majority of 26 to 6. The Yugoslav-Italian proposal was defeated by a majority of 12 to 8. The proposal to have no restriction on national arbitrators was also defeated by a large majority. He then wished to know whether there was

* See Doc. 80

any objection to the insertion of the consultation phrase proposed by the Indian delegate in Article 42.

Mr. O'DONOVAN (Australia) said he was not at all sure that in every case it would be practicable for the Chairman to consult both parties.

Mr. BROCHES (Chairman) thought that the qualification "to the extent practicable" would take care of this point, whereupon it was decided by a majority of 19 to 3 to add the qualified consultation phrase in Article 42 and also in Article 33. He then announced that as no further speakers wished to address themselves to Article 41(2) and 42 they could be referred to the Drafting Sub-Committee; and he requested comments on the second and third paragraphs of Article 43.

Mr. LOKUR (India) proposed that these paragraphs be redrafted on the lines of Article 34 which would allow the parties to select arbitrators from outside the panel at all times with a result that it would only be the Chairman who would have to appoint arbitrators from the panel.

Mr. TSAI (China) wished to associate himself with this proposal.

Mr. BROCHES (Chairman) thereupon put the proposal to a vote and announced that it was adopted by a majority of 14 to 3. He thought the adoption of this proposal could now be reflected in Article 42 and he requested the Drafting Sub-Committee to take note of this.

Mr. GUARINO (Italy) suggested that paragraph (3) of Article 43 be eliminated entirely. The parties should be free to choose whoever they wished to act for them, and should not be furnished with a possible ground of attacking the competence of each others arbitrators.

Mr. BROCHES (Chairman) disagreed with this proposal, *inter alia* because one of the grounds for challenging an arbitrator was a manifest lack of the qualifications required by Article 41(1). The proposal was then defeated by a majority of 23 to 2.

Mr. BROCHES (Chairman) then announced that there would be two sessions a day at least during the first few days of the coming week so as to enable the meeting to complete its work. He repeated his hope that the delegates would be available during the entire week including Friday.

The meeting adjourned at 5:25 p.m.

⁵ For its report see Doc. 104

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Amendments Proposed by Mr. L. Serb (Yugoslavia)

Article 42

Add the following phrase:

"Such arbitrator or arbitrators shall not be nationals of the State party to the dispute or of a State whose national is a party to the dispute."

Article 43

Delete paragraph (1).

Article 70

Delete and replace by the wording of Article 1, Section 1 of the Preliminary Draft.

The Legal Committee reconvened at 10:32 a.m.

Article 44

Mr. QUILL (New Zealand) thought paragraph (1) of this Article was unnecessary inter alia in view of what was said in Article 55(1)(a).

Mr. BROCHES (Chairman) did not think there was any inconsistency between the two provisions which often co-existed in international agreements. Article 55(1)(a) did not deal with the question of reviewing the competence of the Tribunal by another body.

Mr. LARA (Coste Rica) defended the provision in general but suggested that the words "or is not within the scope of its consent" be replaced by the words "or that the party has not consented".

Mr. BROCHES (Chairman) taking note that there were no other objections to the Article referred it to the Drafting Sub-Committee whom

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

he requested to take account of the comment made by the delegate from Costa Rica. He then invited the Committee to turn to Article 35 which was couched in the same terms but dealt with conciliation.

Mr. ONG (Malaysia) thought that the words in the text "such claim shall be submitted" implied a definite procedure, and therefore thought that the words "the claim shall be dealt with" would be a better way of expressing the idea embodied in the provision.

Mr. BROCHES (Chairman) thought that the words "dealt with" or "considered" might indeed be better in the context of Article 35 as well as 40 and referred the matter to the Drafting Sub-Committee. He explained that the major point to bear in mind was that the Convention did not include a time limitation within which any such claim had to be made.

Article 45

Mr. BROCHES (Chairman) mentioned that the reference to national law was not specifically restricted to the law of the host State because the rule of conflict of laws might sometimes bring a different law into operation.

Mr. BRINAS (Philippines) thought that the reference to international law should be qualified and that it be made applicable only in the case where discrimination is alleged. In other cases, the law applicable should be that of the country where the investment was made because it was on the basis of that law that the investment agreement was signed.

Mr. BROCHES (Chairman) pointed out that as one could not foresee all the cases in which international law might be applicable the citation of examples such as "discrimination" might not be very useful. He thought the provision was an accurate reflection of the considerations an arbitral tribunal would have to go through where the parties failed to make a specific agreement on the choice of law, and at one of the regional consultative meetings he had been supported in this view by a member of the International Law Commission.

Mr. TSAI (China) invited the attention of the meeting to the written comments submitted by his Government and circulated in Document SID/LC/5.¹ He reiterated the views expressed in that document. He thought that in the absence of an agreement the national law of the host State and not another national law or international law would be the first law to apply. He thought the principle embodied in the provision went beyond the statement of the President of the Bank made when first introducing the idea of the Convention to member governments, namely, that the problem of solving investment disputes would be tackled from the procedural angle only. In his Government's opinion, the preamble to the Convention should actually state that a foreign investment implies reliance by the investor on the laws of the host State.

Mr. BROCHES (Chairman) thought there was some inconsistency in the various proposals just made. It was quite clear that the laws of the host country would be of primary importance and that international law itself would in the first place refer to them. The principles of international law which might be brought into play would be such as pacta sunt servanda. He further wished to point out that the earlier draft of the Convention referred to "national or international law". The present draft uses the word "and" so as to avoid the impression that international law would always apply or that it was necessarily a question of alternatives.

¹ For its report see Doc. 104

² Doc. 45

³ See Doc. 2

Mr. TSAI (China) wished to clarify his position. He was not for the total exclusion of international law. He merely wished to state that in the absence of a specific agreement between the parties the national law of the host State should be the first to apply.

Mr. BILGEN (Turkey) was also of the opinion that the phrase "national law" should be limited by reference to the law of the host State in which the investment was made.

Mr. SERB (Yugoslavia) thought that the reference to international law should be omitted. The Tribunal should not be authorized to review the domestic legislation of sovereign States.

Mr. da CUNHA (Brazil) objected to the application of any law other than the law of the State in which the investment was made. This should be the principle and not even the parties should be allowed to deviate from it by express agreement.

Mr. GONZALEZ (Spain) thought it was difficult to define a position with respect to Article 45 at that time since the matter of applicable law was intimately related to the problem of jurisdiction, which had not been settled yet. In principle he thought that provision should be made for the application of the national law of the country where the investment takes place with only one exception, namely, that the national legislation would not be applied when it would clearly violate admitted principles of international law.

Mr. BROCHES (Chairman) stated that whether there was a challenge to the validity of the local law would depend on what question was submitted to arbitration. For example, a concession agreement could be terminated by a law of the host State and not by action under the concession itself. In that case the issue in dispute would be whether a State was acting in good faith, and the question of pacta sunt servanda would arise.

Mr. BERTRAM (Germany) indicated that there are many countries in which the national courts must apply national law as well as international law, and it would seem strange if a tribunal which was admittedly international would be precluded from the application of international law. The question of the exhaustion of local remedies would require the application of certain rules of international law. He pointed out that the initial words of Article 45, indicating that the parties could agree otherwise, should dispel the doubts that had been expressed. For this reason, he was strongly in favor of the present wording of this Article.

Mr. van SANTEN (Netherlands) mentioned that in cases of State succession there would be another occasion for the arbitral tribunal to apply international law.

Mr. WANASUNDERA (Ceylon) stated that he agreed with the statement made by Mr. SERB. Article 45 was objectionable to Ceylon because of its radical departure from existing principles of law. Contracts between private persons and States had not been governed by customary international law. If such a development of the law was necessary, he thought the proper body to achieve it was the International Law Commission. He felt that in any event it would be insufficient merely to say that a contractual relationship would be subordinated to international law. It would be necessary to work out in detail the principles, the rights and obligations that would be acceptable to the parties before any country was asked to sign the Con-

vention. Otherwise, the full implications of the Convention would not be revealed to the signatories. He thought that the adoption of this provision could result in the actions of a State of a purely domestic or internal nature being tested by an uncertain set of principles. This would run counter to the doctrine of sovereignty of States. The newly independent States of Asia and Africa were always willing to accept and abide by the principles of public international law, but were not in favor of expanding the scope of their application. In fact, there had been a persistent demand by these States for the modification of some of the principles of international law which had been created solely to protect the interests of the industrial and colonial powers. The arbitral tribunals would continue to apply the existing law with its imperfections. So long as these imperfections existed, and they could be solved by a balance of forces and not by judicial action, agreeing to this Convention would be reaffirming the present system.

Mr. BROCHES (Chairman) replying said that the discussion should be limited to the scope of Article 45 which dealt exclusively with the question of applicable law. With respect to that question, he noted Mr. WANASUNDERA's views but thought that far from being unprecedented the proposed text did not go beyond what many arbitral tribunals had regarded as existing law.

Mr. GUARINO (Italy) thought that the Committee would be in a better position to examine the problem of applicable law after having defined the jurisdiction of the Centre. He therefore suggested to defer discussion until Article 26 had been examined.

Mr. BROCHES (Chairman) replying said that even the most restrictive proposals on the jurisdiction of the Centre still left the question of applicable law unsolved and that consequently no time would be saved by deferring discussion.

* The meeting then recessed for a short period

Mr. ORTIZ (Peru) said that he agreed with the proposal made by Mr. da CUNHA that the applicable law should be the national law of the host country and he did not see why an agreement governed by such law should simultaneously be governed by another legal system, namely, international law. He agreed that a foreign law or international law might be applicable to a particular dispute, but only when the national law of the host country provides for the application of foreign or international law. He further pointed out that the general principles of international law are generally embodied in the national laws and that these principles would be applied to the cases of discriminatory action.

Mr. KPOGNON (Dahomey) said that the national law should prevail but that one should not deny international conciliators or arbitrators the possibility of taking international law into account. International law should of course not be the point of departure when settling a dispute but should be used to complement or supplement national law. He then asked for additional information on the second sentence of Article 45(1).

Mr. BROCHES (Chairman), after having read the provisions of Article 38 of the Statute of the International Court of Justice, said that the second sentence of paragraph (1) had been added to take into account suggestions made at regional meetings.

Mr. LOKUR (India) expressed some concern that the provisions of Article 45 might give to the Tribunal a complete freedom to apply either national or international law. In his opinion, investments are governed by

the national law of the host State and he did not think that international law should be applicable, even more so since the arbitrators would probably not be experienced in this field. He added, however, that he might accept the application of international law in those cases where the national law of the host country would be absolutely silent on the issue in dispute.

Mr. GOUREVITCH (United States) said that he considered Article 45 satisfactory and pointed out that national law would usually be applied. He added that it was important to provide for the possibility of applying international law since, under Article 28, Contracting States would have to waive diplomatic protection.

Mr. BURROWS (United Kingdom) pointed out that the most important part of Article 45(1) was the opening sentence under which the parties are free to determine the applicable law. Consequently, the remaining part of this paragraph was only of a supplementary nature and in his opinion, this part of the provision should be drafted as broadly as possible.

Mrs. VILGRATTNER (Austria) said that the possibility of applying international law was also desirable in view of the provisions of Article 57. She added that some countries such as Austria would not have difficulties with respect to the application of international law since international law is embodied in the national law.

Mr. LOPEZ (Panama) wished to associate himself with the remarks made by the delegates of Spain and Peru. He objected to the principle which allowed the parties to agree on the applicable law and which was supported by the delegates of the United Kingdom and United States. His criticism of the freedom of contract was not limited to this Article only. He thought it would enable private investors to obtain much more power than was envisaged by the regime of the Convention.

Mr. BROCHES (Chairman) thought that the misapprehension with respect to the power of foreign investors might have been justified in the past but he was doubtful whether it was justified under present conditions. He thought the parties should be free to tell the Tribunal which issues required its solution and which had already been solved by agreement between them. He thought the text might be improved so as to convey this idea and he would propose that the first part of the first sentence of paragraph (1) be replaced by the following sentence: "The Tribunal shall decide disputes submitted to it in accordance with such rules of law as shall have been agreed upon between the parties". That would indicate that in the normal case one would expect the parties to choose the applicable law and would reflect the normal practice in the field of foreign investment agreements.

Mr. LARA (Costa Rica) thought international law should only be applied in the case of a lacuna in domestic law. He then said he thought it absolutely indispensable to limit the application of "national" law to the legislation in effect at the time of investment, so that any later legislation would be excluded.

Mr. FLORENZANO (Ivory Coast) wished to associate himself with the remarks of the delegate of Dahomey and would in addition restrict the application of international law to cases of obscurity or lacunae in the domestic legislation of the State in which the investment was made.

Mr. BROCHES (Chairman) noting that the meeting appeared to be concerned with two problems, said the first one was which was the applicable

"national law" and the second, under what circumstances, if any, should international law be applicable. Taking these views into consideration, he would propose that the provisions following that dealing with an express choice of law agreement be redrafted to read as follows: "Failing such agreement, the Tribunal shall apply the law of the State party to the dispute (including its rules on the conflict of laws) and such principles of international law as may be applicable".

Mr. TSAI (China) wished to know whether the phrase "law of the State party to the dispute" would not apply in the case of subrogation and was assured that that was so. He then wanted to limit the application of international law to cases where it was inconsistent with national law introduced after the investment was made.

Mr. BROCHES (Chairman) then submitted the redraft for a vote. The first sentence dealing with an express choice of law agreement was approved by a majority of 35 to one. The first part of the second sentence referring to the "national" law applicable was adopted by a majority of 31 to one. The final provision relating to international law (which would bring it into play both in the case of a lacuna in domestic law as well as in the case of inconsistency between the two) was adopted by a majority of 24 to 6.

Mr. TSAI (China) wondered whether there might not have been a misunderstanding in the minds of some of the delegates with respect to the third and last vote. He thought that it would be better to clearly state that international law would only be applied after the national law of the host State had been enquired into. He therefore suggested that the word "first" be instituted in the phrase dealing with application of national law and requested that the Drafting Sub-Committee consider the possibility of such an amendment.

Mr. BROCHES (Chairman) then re-stated the principles adopted and explained the advantages of the present draft over a text couched in terms whereby international law would become applicable where the domestic legislation of the host State was "inconsistent" with it.

Mr. KPOGNON (Dahomey) requested that his proposal which would replace the final part of the second sentence of the text as adopted with the words "with due regard to the general principles of international law" be put to a vote, whereupon this was done and defeated by a majority of 4 to 2.

Mr. LOKUR (India) then requested a vote on a suggestion to limit the application of international law to cases where the domestic legislation of the host State was silent, whereupon a vote was taken and the motion defeated by a majority of 19 to 7.

The meeting adjourned at 1:36 p.m.

The Legal Committee reconvened at 3.05 p.m.

Mr. BROCHES (Chairman) requested comments on paragraphs (2) and (3) of Article 45. The delegates made no comments and these paragraphs were referred to the Drafting Sub-Committee.

Article 46

Mr. BROCHES (Chairman) stated that this Article was not included in the preliminary draft and had been introduced according to a suggestion made at the Addis Ababa Meeting² by Mr. BIGAY.

Mr. GONZALEZ (Spain) suggested that the words "except as the parties otherwise agree" should be deleted from this Article, since the powers provided therein might be considered by the Tribunal as an indispensable element in rendering the award.

Mr. TSAI (China) enquired whether the provision in paragraph (i) was mandatory, and whether in case of failure to produce documents or other information there would be an inference drawn to the disadvantage of the party involved. He also enquired whether the power in paragraph (ii) to conduct enquiries implied a power to compel witnesses to appear before the Tribunal, and whether this power would be exercised through local courts.

Mr. BROCHES (Chairman) stated that the parties could not be forced to do things that might be asked by the Tribunal, and thought that failure to produce a document would probably lead to an inference on the part of the Tribunal. Concerning the second question, he thought there was no way in which the Tribunal could force its way to the scene connected with the dispute, except to the extent permitted by the immunities which arbitrators would have from restrictions on travel. He added that the arbitral tribunals would have no power to compel the appearance of witnesses.

Mr. QUILL (New Zealand) noted that there was no provision enabling a Contracting State to claim privilege in respect of any information which it might be called upon to give or any documents it might be required to produce. In some cases, States might deem it prejudicial to their national security to give such information or to produce such documents. He suggested that there could be added to Article 46(i) "provided that a Contracting State may decline to produce any documents or give any information when to produce such documents or give such information might in its opinion be prejudicial to its national security".

Mr. BILGEN (Turkey) felt that the proviso at the beginning of Article 46 should be deleted, since in his opinion the Tribunal should at all times and in any case be in a position to order that the parties submit or produce the documents and information that are necessary.

Mr. BURROWS (United Kingdom) felt that the opening words in this Article were perhaps the most important, since they restated the philosophy

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² For its report see Doc. 104

³ See Doc. 25

of the Convention that the parties could make their own agreements, and for that reason he was in favor of retaining these words. He suggested that in fact this proviso should eliminate the difficulty suggested by Mr. QUILL since any government could take care of this problem at the time of giving its consent to arbitration.

Mr. HETH (Israel) thought that the decision to request the submission of documents should be left to the Tribunal. The voluntary nature of the Tribunal could not justify the exclusion of evidence if the Tribunal thought that such evidence would be essential to its decision. Article 49 of the Statute of the International Court of Justice stated that the Court may, even before the hearing begins call upon the agents to produce any documents or to supply any explanation. Formal note is taken in cases of refusal.

Mr. BROCHES (Chairman) stated that the except clause had been inserted to take care of points like the one raised by Mr. QUILL.

Mr. TSAI (China) thought that the Convention should not grant to States the privilege suggested by Mr. QUILL, and was in favor of deleting the except clause.

Mr. LOKUR (India) noted that there was no specific provision in this Article for the testimony of witnesses, which might be required by the Tribunal.

Mr. BROCHES (Chairman) stated that witnesses had been included in the same category as other evidence which the parties would have to bring to prove their case. It had been taken for granted that witnesses were included, but there was no reason for not including them specifically.

Mr. O'DONOVAN (Australia) thought that matters relating to witnesses would be dealt with in the arbitration rules. He understood that it was not intended that any compulsory process would be used to require the production of documents or the attendance of witnesses. This being so, it seemed to him convenient that the matters in Article 46 be dealt with in the arbitration rules.

Mr. LOKUR (India) felt that the arbitral tribunal should have the power to call for witnesses.

Mr. BROCHES (Chairman) indicated that there were three proposals concerning this Article. One was to delete it. Another was to delete the except clause but to give the right to a Contracting State to withhold information if to give the information would in its opinion endanger national security. And the third was to expand it to include the power to call for the appearance of witnesses. On the other hand, Mr. O'DONOVAN had suggested that the entire Article should be relegated to the rules.

Mr. HETH (Israel) suggested that the except clause be deleted and that the words "formal note shall be taken of any refusal" be added.

Mr. BROCHES (Chairman) responding to a question said he took the reference to a "Contracting State" in the proposed national security exception to refer exclusively to the Contracting State which was a party to the dispute and not to the home State of the investor. Referring to another question he said that the Tribunal would not have the power to compel parties to supply the evidence nor would it act in any way except through parties directly. He then suggested that the word "information" be replaced by the phrase

"other evidence" which would take care of some of the suggestions made. He then announced that a vote on deleting the words "except as the parties otherwise agree" and adding the words "formal note shall be taken of any refusal" at the end of the Article was defeated by a majority of 16 to 10. The vote on omitting the Article entirely and relegating its substance to the Rules was adopted by a majority of 15 to 9 but a re-vote on this question showed 17 in favor of retaining the provision and 15 for omitting it. A proposal to give the Tribunal the right to call witnesses directly and not through the parties was defeated by a division of 7 to 6. A vote to enlarge the scope of (i) which would give the Tribunal the right to call upon the parties to produce evidence in every form was then adopted by 28 votes in favor and none against. The exclusion on grounds of national security proposed by New Zealand was then defeated by 13 to 8. The Chairman then proposed a final re-vote on the question of omitting or retaining the provision in the light of the results of the previous votes which showed 12 in favor of retaining Article 46 in the text and 6 for relegating it to the Rules whereupon the Chairman referred Article 46 with the change of the word "evidence" for the word "information" in (i) to the Drafting Sub-Committee;

Article 47

Mr. LOKUR (India) suggested that there should be stated that arbitration proceedings shall be conducted in accordance with the provisions of that title, in addition to the Arbitration Rules.

Mr. BROCHES (Chairman) thought that this would be useful, and that the reference should in fact be to the Chapter. He agreed with Mr. LOKUR that the same change should be made in Article 36¹.

Mr. O'DONOVAN (Australia) suggested that the words "have been" be substituted for the word "be" in the second sentence of this Article, to avoid any suggestion that there might be changes.

Mr. BROCHES (Chairman) thought that this would be acceptable. He stated that there were three possibilities. The parties may have established their own rules, which would be applied by the Tribunal. If they had not, then the rules established by the Administrative Council would apply. If the parties should have agreed that the Arbitration Rules of the Administrative Council should not apply and should not have made their own rules, then the Tribunal would have to adopt specific rules.

Article 48

Mr. BROCHES (Chairman) stated that he had been asked the question whether the words "the Tribunal shall satisfy itself ... that the submissions are well founded in fact and in law" implied that the Tribunal would ask for evidence if necessary even though the other party had not appeared, and that his answer had been that the Tribunal would ask for such evidence if necessary.

Mr. LARA (Costa Rica) thought that this Article should be drafted in such a manner that there should be no doubt as to the situation of the person who fails to appear before the Tribunal, since this might result in a denial of justice or in the annulment of the award. He suggested that the words "having been duly summoned" be inserted after the words "before the Tribunal" in paragraph (1); and that the words "when it is obligated to do so" after the words "present its case" in the same paragraph. He also thought that the second sentence of paragraph (1) and paragraph (2) were difficult to understand in Spanish and suggested that their drafting be improved.

¹ For its report see Doc. 104

² See report Drafting Sub-Committee, Doc. 78

Mr. BRINAS (Philippines) suggested that the Tribunal should in all cases request evidence sufficient to determine its jurisdiction and to support the award that it might render.

Mr. BROCHES (Chairman) stated that the language used in the Draft was unconditional, and that the Tribunal had to be satisfied separately, first on the question of competence and then on the fact that the conclusions were well-founded both in fact and in law.

Mr. BRINAS (Philippines) suggested that the language should be made clearer to that effect.

Mr. BROCHES (Chairman) suggested that the Drafting Sub-Committee could take care of this suggestion and Mr. BURROWS suggested that a proposal be made to the Drafting Sub-Committee in writing.

Mr. LOKUR (India) stated that this Article seemed to be a copy of Article 53 of the Statute of the International Court of Justice. He enquired the reason for having substituted the words "failed to present its case" for "or fails to defend its case". He thought that it would be better to say "if one party fails to appear or participate in the proceedings".

Mr. BROCHES (Chairman) explained that the change pointed out by Mr. LOKUR was made because to say "defend its case" sounded as if consideration was given only to a default by the defendant whereas in fact the plaintiff might also default. The words used in the draft were taken from the model rules of the International Law Commission:

Mr. LOKUR (India) suggested that paragraph (1) be worded "if one of the parties does not appear or fails to participate in the proceedings, the Tribunal shall proceed to adjudicate on the claim and render its award".

Mr. ORTIZ (Peru) thought that there was a question of selecting one of two different legal systems. Under one, the Tribunal must solve according to the evidence submitted by the parties. Under the other, the Tribunal could solve the case even without evidence, if one of the parties failed to appear. Each sentence of Article 48(1) seemed to follow a different system.

Mr. BROCHES (Chairman) stated that in certain countries, if a fact was not contradicted before a court, it constituted a confession and no further evidence was necessary. It was intended to avoid this in the Convention.

Mr. TSAI (China) felt that this Article should not exclude the possibility of an award being rendered against the party who appears in the proceedings. He also suggested that the words "submissions are" in the second sentence of paragraph (1) be substituted by the words "award is", since in certain cases there might not be submissions.

Mr. LOKUR (India) stated that according to the amendment he had proposed the second sentence of paragraph (1) was not necessary.

Mr. BERTRAM (Germany) thought that the rules of procedure should provide in detail for the case of default.

Mr. FUNES (El Salvador) did not like the wording of this paragraph because it seemed to combine the default of one of the parties with the fact that the award might or might not be in its favor, which was a totally independent fact. He referred to Mr. LARA's suggestion that there be added

* "Model Rules of Procedure" of 1955

the reference to summons and felt that it might have been omitted since Article 55(d) stated that there would be annulment when there had been a serious departure from a fundamental rule of procedure. He understood that the lack of summons or time to answer the claim would constitute such a serious departure.

Mr. BROCHES (Chairman) stated that there was no doubt that failure to notify a party was just about the most fundamental violation of rules of procedure.

Mr. van SANTEN (Netherlands) suggested that it was necessary to be cautious in granting powers to the Tribunal as suggested by Mr. LOKUR. The Permanent Court of Arbitration rules and the United Nations Arbitration rules did not grant to the Tribunal such a broad power. He thought it would be logical to give to a party the right to start or continue the proceedings, but not to give that right to the Tribunal itself.

Mr. BROCHES (Chairman) stated that the reason why the statute of the International Court of Justice and the International Law Commission's draft had been followed was because they were both drafted with different legal systems in mind and they constituted a departure from the normal rules in civil proceedings, where the defaulting party necessarily loses its case to the extent that it depends on the facts.

Mrs. VILIGRATTNER (Austria) defended the text of the Article and objected to the Indian proposal which would force the Tribunal to render an award (when one of the parties failed to appear before it) even if it was not requested to make a decision by the adverse party.

Mr. BERTRAM (Germany) had some hesitation whether the words "grant a period of grace" in the second paragraph were clear enough. He had no objection to laying down general principles in the Convention but thought that some reference should be included in this Article to the effect that the details would be contained in the Rules of Procedure.

Mr. TSAI (China) would accept the draft provided it included a reference to the possibility of a decision being taken against the party which made an appearance.

Mr. BROCHES (Chairman) thought that this was really implicit in the text and obtained a confirmation from the Austrian delegate that she did not disagree with this conclusion. He then explained that the word "submission" was used rather than the word "claim" so that the provision would apply in the case where the applicant as well as where the respondent failed to appear.

Mr. ONG (Malaysia) thought that the Indian proposal which would shorten the present text would actually affect the substance of the provision because it would narrow the need of the Tribunal to inquire into its own competence.

Mr. BROCHES (Chairman) then put Mr. LARA's proposal to add the words "having been duly summoned" into the first part of the first sentence of Article 48(1) to a vote which was defeated by a majority of 17 to 10. He then explained that the result of this vote did not mean that the parties should not be summoned to appear but that it merely showed the majority to be against stating the obvious.

[A short recess was then taken.]

Mr. BRINAS (Philippines) proposed that the second sentence of Article 48 (1) be redrafted to read as follows: "The Tribunal shall then call upon such other party to present evidence in support of the jurisdiction of the Tribunal and of those submissions, and shall render its decision in accordance with the facts adopted and law applicable". He would also use the words "an award" instead of "the award" in the second line of paragraph (2).

Mr. BROCHES (Chairman) then submitted this proposal to a vote adding that it appeared to differ in form, although not in substance, from the language of the International Court which served as a model for this Article. The proposal was defeated by a majority of 17 to 3. He then announced that there was still a further proposal of Mr. LARA's to insert the words "where it was under an obligation to do so" after the words "which has failed to present its case" in the second part of the first sentence of paragraph (1) which had to be voted on. He himself disagreed with this proposal because it seemed to imply that the constitution of the Tribunal did not in itself impose an obligation of appearance. This proposal was then defeated by a majority of 13 to 2 and the Article was then referred to the Drafting Subcommittee.

Article 49

Mr. GONZALEZ (Spain) suggested that the word "shall" replace the word "may" in the first line of this Article.

Mr. TSAI (China) proposed that the words "as well as the scope of consent of the other party" be added at the end of the Article.

Mr. BROCHES (Chairman) ascertaining that there was no objection to the Chinese proposal announced that the Article was amended accordingly. He then requested comments on the Spanish proposal.

Mr. GOUREVITCH (United States) thought the word "may" appropriate since the Tribunal could only act where such claims or counter-claims were made.

Mr. BROCHES (Chairman) announced that he thought the proposal was merely a question of drafting.

Mrs. VILLGRATTNER (Austria) was of the opinion that it was a matter of substance because the word "may" gave the Tribunal an option whereas the word "shall" would be mandatory.

Mr. ONG (Malaysia) suggested that the words "shall be competent" would be a better way of conveying the mandatory approach.

Mr. LARA (Costa Rica) suggested that a provision be added to Article 49 which would set a time limit upon the right of a party to engage in delaying tactics.

Mr. PEREZ (Ecuador) thought the provision should be couched in mandatory terms so as to avoid two separate proceedings where one only would really suffice.

Mr. IPOGHON (Dahomey) agreed with Mr. PEREZ and thought that if the Tribunal only had an option, denials of justice might be committed.

Mr. ALBANEZ (El Salvador) also agreed with Mr. PEREZ. The words "incidental, or additional claims or counter-claims arising directly out of the subject-matter of the dispute" were intended in his opinion to determine

⁷ For its report see Doc. 104; cf. Doc. 83 and, for further discussion of Article 48, see Summary Proceedings of the Legal Committee Meetings, December 8 and 10, Docs. 86 and 113 respectively.

the framework within which the Tribunal would exercise its powers and it would be logical that the Tribunal be compelled to exercise such powers in order to avoid the need for another Tribunal.

Mr. BROCHES (Chairman) requested a show of hands as to whether a Tribunal should be compelled to deal with such claims or whether it should merely have an option. The majority of the Committee agreed to make the provision compulsory.

Mr. PEREZ (Ecuador) suggested that Mr. LARA's proposal be dealt with in the Procedural Rules rather than in the Convention itself.

Mr. LARA (Costa Rica) agreed.

Mr. LOKUR (India) asked for clarification with respect to additional claims, particularly in the light of the provisions of Article 40.

Mr. HELLNERS (Sweden) also mentioned that the terms "incidental" and "additional" caused him some difficulty and added that the concept of incidental claim was unknown in Swedish law. He suggested that reference to incidental and additional claims be deleted.

Mr. BROCHES (Chairman) quoting a comment made by the Secretariat of the United Nations said that the terms incidental and additional claim somewhat correspond in some systems of civil procedure to what is described in the Anglo-American system of procedure as "amending the pleadings". He added that there were precedents of additional claims having been admitted by arbitral tribunals and by the Permanent Court.

Mr. HETH (Israel) considered that the two terms would in fact mean the same claims and should consequently be merged in one single expression.

Mr. GUARINO (Italy) said that under Italian law, the expression "incidental claim" has two meanings, namely, a counter-claim but also a claim which is subordinated to the principal claim. The term "additional claim" on the other hand refers to new claims which might be submitted in view of changing circumstances. He therefore suggested that a distinction be made under which the Tribunal should be compelled to consider incidental claims and counter-claims but should only have an option to consider additional claims.

Mr. BROCHES (Chairman) requested a show of hands on the several suggestions made. There was no support in favor of the proposal to delete both the word "incidental" and the word "additional". The majority of the Committee also rejected the proposals to delete either the word "incidental" or the word "additional". The suggestion of Mr. GUARINO was also rejected.

Mr. BROCHES (Chairman) implied from the negative votes that the expressions used in Article 49 were considered as acceptable, and then announced that on Tuesday the delegates were invited at a luncheon offered by the Executive Directors of the Bank at 1:00 p.m., consequently the morning session would start at 10:30 a. m., while the afternoon session would start at 2:30 p.m. instead of 3:00 p.m.

[The meeting adjourned at 5:54 p.m.]

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Proposal by the Secretariat

Article 48

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case the party appearing may call upon the Tribunal to accept his submissions and to render an award. The Tribunal shall, before rendering an award, grant a period of grace to the party failing to appear, unless it is satisfied that that party does not intend to appear.

The Legal Committee reconvened at 10:36 a.m.

Mr. BROCHES (Chairman) announced that during the morning there would be distributed the report of Mr. BOMANI's committee, and that in the afternoon the Legal Committee would discuss again Chapter II.

Article 50

Mr. HELLMERS (Sweden) inquired what the force of the "provisional measures" referred to in this Article was and whether they could be enforced in the States concerned. He also asked what would be the force of the "penalty" referred to in paragraph (2) and whether it would be included in a final award.

Mr. BROCHES (Chairman) stated that there were three types of devices which might sometimes be described as penalties. Under one system, a "penalty" would be a sum to be forfeited to a court. This was not intended in this Draft. Another system was to provide that an amount is forfeited to a party, for instance for every day another party fails

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

to abide. The third system was closer to a system of liquidated damages, whereby an amount is fixed in advance of the damage which will be caused by the other party if it does not abide by the order of provisional measures and loses its case. Concerning the question of how the penalty would be collected, he thought it would be included in the final award and collected in connection therewith. He indicated that at the regional meetings some delegations felt that the provision in paragraph (2) should not be included and that the term "recommend" be used instead of "prescribe" in paragraph (1), to indicate that there was no direct sanction for not following the recommendation of the Tribunal. However, it could be assumed that in connection with the final award the fact of not having accepted the recommendation would be taken into account since it would most likely have increased the damages.

Mr. BURROWS (United Kingdom) referred to the written comments submitted by his country, whereby they recommended that this Article follow more closely the words used in Article 41 of the Statute of the International Court of Justice as follows: "except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, prescribe any provisional measures which ought to be taken to preserve the respective rights of either party." They found the existing wording of paragraph (1) rather restrictive because of the word "frustrate", which would mean that before provisional measures could be ordered, the Tribunal had to be satisfied that the whole purport of the award would be completely frustrated unless said provisional measures were ordered.

Mr. LARA (Costa Rica) suggested that this provision state "except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, prescribe such necessary measures to prevent or halt any action by either party which might frustrate an eventual award."

Mr. BILGEN (Turkey) referred to the written comments submitted by his country, particularly with respect to money guarantees. He suggested that after the word "prescribe" in paragraph (1) there be added the words "against prior money guarantees in an amount to be determined by the Tribunal"; and to add at the end of paragraph (2) that the penalty would be established after considering the damage incurred by the party.

Mr. LOPEZ (Panama) thought it was not logical to prescribe provisional measures that would depend on a future and uncertain fact such as the eventual award. Therefore he was in agreement with the proposal of the United Kingdom.

Mr. TSAI (China) referred to the written comments submitted by his Government: A provisional measure was different from an interim award and should not necessarily have the same effect. He felt that the word "prescribe" was too strong and was not necessary, since if there was any damage it could be included in the final award. He suggested that the word "recommend" be used instead of "prescribes". The reference to a penalty in paragraph (2) was too vague and could also be deleted. The amendments were proposed to avoid any possible difficulties that could arise with respect to their internal courts or their legislature when this Convention was presented for acceptance or ratification.

Mr. O'DONOVAN (Australia) proposed that paragraph (2) be deleted, since it would be impossible to enforce a provisional measure, and that

¹ See Doc. 45
² See Doc. 45
⁴ See Doc. 45

the proposal of the United Kingdom be adopted as paragraph (1), but using the word "recommend" instead of the word "prescribe".

Mr. GUARINO (Italy) suggested that Article 50 be deleted since it would create constitutional difficulties. He indicated that the words "to prevent or halt any action by either party which might frustrate an eventual award" might lead to an attempt to prevent legislative or administrative acts of the Government. He thought that no State would accept such limitation. In addition, he felt that this Article was superfluous because the question of damages and indemnities could be dealt with in the final award.

Mr. LOKUR (India) was opposed to including Article 50 in the Convention. In his view when a provisional measure is prescribed it tends to delay or protract the proceedings. The wording proposed by Mr. BURROWS was not satisfactory because it was not clear what rights would be preserved and who would decide what these rights were. It could be that the effect of a provision like that would be to give power to the Tribunal to undo an action which might have been taken even before the proceedings had started. If any action was taken by a State or an investor before the proceedings started, that action should be maintained and the only remedy to the injured party should be to claim damages. For this reason he thought that it should be said "to prevent any further action" instead of "to prevent any action". He also suggested that the Tribunal should have the power to reduce an order from time to time. Otherwise when an order was made it would continue to be in force until the conclusion of the proceedings. He strongly objected to paragraph (2) which would give the Tribunal power to impose a penalty on a Contracting State.

Mr. GONZALEZ (Spain) stated that under Spanish legislation they had the same problem mentioned by Mr. GUARINO. He suggested that this Article should state that none of the parties will take any action during proceedings which might impede the normal execution of the award, and that at the time of rendering the award, the Tribunal should establish the indemnity payable to one party for actions taken by the other party which had caused damage. He felt that the Tribunal should not be granted any power which it could not enforce. He was in favour of deleting this Article.

Mr. LARA (Costa Rica) inquired to whom the Tribunal would make recommendations. Mr. BROCHES stated that the recommendations would be made to the parties.

Mr. HETH (Israel) suggested that if paragraph (2) was maintained, it was substituted by a statement that the Tribunal in its final award could take into account the refusal to comply with the recommended provisional measures.

Mr. MANTZOUKINOS (Greece) agreed with the proposal to delete paragraph (2) and proposed that paragraph (1) be drafted along the following lines: "The Tribunal may, if it considers that the circumstances so require, recommend" (or advise, or suggest) "such provisional measures as it deems useful to avoid any action by either party which might frustrate the award".

Mr. BROCHES (Chairman), in view of the several suggestions made, first requested a show of hands as to whether Article 50 should be entirely deleted. This proposal was rejected by the Committee. The

Committee then agreed by a nearly unanimous vote to delete paragraph (2). By a large majority the Committee also accepted to use the word "recommend" as opposed to "prescribe" or "indicate".

Mr. KPOGNON (Dahomey) thought that if the Tribunal only had the power to recommend provisional measures, it would be preferable to delete the provision altogether since the parties would then be free to carry out or not the recommendations of the Tribunal. This might lower the prestige of the Tribunal.

Mr. BROCHES (Chairman) said that the prestige of the Tribunal might be more impaired if the Tribunal had the power to prescribe provisional measures without being able to enforce them. On the other hand, he still considered the provision desirable since if the recommendations were not carried out, the Tribunal would undoubtedly take that fact into account when rendering its award.

Mr. GUARINO (Italy) said that the use of the word "recommend" had removed the constitutional difficulties which he had mentioned earlier.

Mr. BROCHES (Chairman) then requested a show of hands with respect to the kind of provisional measures which could be recommended by the Tribunal. The Committee accepted the formulation of Article 41 of the Statute of the International Court of Justice providing for "measures which ought to be taken to preserve the respective rights of either party". One delegate supported the formulation presently contained in paragraph (1) of Article 50. The Committee then agreed that the word "provisional" be maintained.

Mr. GHACHEM (Tunisia) suggested the replacement of the expression "s'il assiste qua les circonstances l'exigent," which seems to give too much discretion to the Tribunal, by the expression "e'il y a urgence ou péril en la demeure".

Mr. BROCHES (Chairman) then put the Tunisian proposal to a vote and announced that the motion was defeated by a majority of 19 to 1. Another vote to eliminate the clause "except as the parties otherwise agree" was defeated by 19 to 9. Consequently, the only proposal which still required a vote was along the line suggested by Israel to add a provision to the effect that "the Tribunal shall take into account in its award the consequence of a failure to comply with the provisional measures". Whereupon a vote was taken and the proposal defeated by a majority of 16 to 6. The Chairman then announced that he assumed the majority was opposed to any specific mention of the effect of non-compliance with the recommendation, but that naturally the Tribunal would normally have to take account of this fact when it came to make its award.

[The meeting then recessed for 10 minutes]

Article 51

Mr. LARA (Costa Rica) suggested that paragraph (1) be qualified by inserting the words "when it is a collegiate tribunal" after the words "the Tribunal".

Mr. BROCHES (Chairman) referred this to the Drafting Sub-Committee.

Mr. HELLNERS (Sweden) wondered whether it would not be useful to

¹ See also Doc. 83
² For its report see Doc. 104

add a provision which would indicate what would happen where the Tribunal was not able to reach a majority decision with respect to the amount of damages to be awarded.

Mr. BROCHES (Chairman) replying, thought it would be better to leave the question open.

Mr. KPOGNON (Dahomey) thought that the requirement that the award be "in writing" was superfluous.

Mr. LOKUR (India) thought the provision not entirely clear in cases where the minority consisted of more than one person and at least one dissenting arbitrator refused to sign the award.

Mr. CHEVRIER (France) thought there was a contradiction between the first and second sentences of paragraph (2) as the first part imposed an obligation of signature whereas the second envisaged the possibility of the minority refusing to sign the award.

Mr. BROCHES (Chairman) thought the last comment was due to a faulty translation in the French text and referred the matter to the Drafting Sub-Committee.

Mr. GONZALEZ (Spain) supported the proposal to eliminate the phrase stating that the award should be "in writing". He was also concerned with the lack of any provision dealing with the question of what would happen where the Tribunal was unable to reach a majority decision on any issue.

Mr. BROCHES (Chairman) then submitted the proposal to delete the words "in writing" to a vote and announced that the proposal was defeated by a majority of 26 to 10. He then requested a show of hands on the question whether express provision should be made for the contingency that no majority could be found, and announced that this proposal was defeated by a majority of 15 to 9.

Mr. BERTRAM (Germany) explained that he voted against the proposal on the understanding that the matter would be dealt with by the Rules.

Mr. BROCHES (Chairman) putting the question of whether the problem should be dealt with in the Rules to a vote, announced it was adopted by a division of 16 to none. He then referred the meeting to the first part of paragraph (3) of the Article.

Mr. LOPEZ (Panama) thought that the prefix "except as the parties otherwise agree" should be omitted.

Mr. BILGEN (Turkey) also proposed the deletion of this prefix.

Mr. BROCHES (Chairman) put the proposal to a vote and announced that it was adopted by a majority of 28 to 3 with respect to the first part of paragraph (3).

Mr. LOPEZ (Panama) proposed that those words be eliminated with respect to the second part of paragraph (3) also.

Mr. FUNES (El Salvador) associated himself with the remarks of the delegate of Panama. He would, however, be in favor of applying the principle to a concurring decision as well as to a dissenting one.

Mr. BROCHES (Chairman) then put the Panamanian proposal to a vote and announced it adopted by a majority of 24 to one. A further vote on the El Salvador proposal which would give the right to a concurring arbitrator to state the particular reason motivating his decision was adopted by a majority of 23 to one.

Mr. LOKUR (India) suggested that the word "shall" replace the word "may" in the second part of paragraph (3) and that the duty of a dissenting arbitrator be broadened by the elimination of the words "or a bare statement of his dissent" in the paragraph.

Mr. BROCHES (Chairman) then put these proposals to a vote and announced that they were defeated by a majority of 18 to 2.

Mr. TSAI (China) thought that Article 51(3)(a) should provide that the award shall state the facts found, the law applied and the reasons upon which it was based.

Mr. BROCHES (Chairman) thought that this was not the proper place to deal with this matter, and that it would be more appropriate to discuss it in connection with the annulment procedure.

Mr. GOUREVITCH (United States) inquired whether the Centre would have the authority to publish arbitral awards. There was nothing stated to that effect, but he assumed it would have that authority.

Mr. BROCHES (Chairman) stated that this was not his understanding. The Convention was silent on this point and he thought the Centre could not publish the award without the consent of the parties.

Mr. GOUREVITCH (United States) stated that in that case it would be desirable so to provide and suggested that a new paragraph (4) be added to this Article stating "except as the parties otherwise agree, the Centre may publish arbitral awards".

Mr. GUARINO (Italy) thought that the parties should be given the right to object to the publication of the award.

Mr. LOKUR (India) suggested that the text presented by Mr. GOUREVITCH be modified to state that "the Centre shall not publish the award except with the consent of the parties".

Mr. BROCHES (Chairman) requested a show of hands on Mr. GOUREVITCH's proposal to add a new paragraph (4). Eleven delegations were in favor and 17 opposed. He then asked a show of hands on Mr. LOKUR's suggestion, and 12 delegations were in favor and 5 opposed. In reply to a question, Mr. BROCHES stated that the paragraph that had been voted had no relation to the provision in Article 52.

Mr. TSAI (China) thought that it would be more appropriate to discuss at that time whether the award should include a statement of the facts found and the law applied.

Mr. BROCHES (Chairman) requested a show of hands on Mr. TSAI's proposal, which indicated that the majority was opposed to its adoption.

Mr. DODOO (Ghana) inquired whether, in connection with the new paragraph (4) of this Article, the decisions of arbitral tribunals would become precedents in other cases, even if they were not published.

Mr. BROCHES (Chairman) thought that quite a few of the decisions would in fact be published. When an arbitral award becomes relevant in court proceedings, it would become a matter of public knowledge as part of the documents of the case.

Mr. TSAI (China) requested a clarification concerning the negative vote on his proposal to modify paragraph (a). He wanted to know whether this negative vote implied that the facts and the law would not be included in the award.

Mr. BROCHES (Chairman) inquired whether the meeting accepted that when reasons were given for the award, they would include the facts found and the law applicable. The majority agreed.

[The meeting adjourned at 12:55 p.m.]

¹ See also Summary Proceedings of the Legal Committee Meeting, December 9, Doc. 102

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SID/LC/54 (December 9, 1964)

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Comments by Mr. da Cunha (Brazil) on Certain Articles of Chapter IV

Article 50

We propose that paragraph (2) of this Article be eliminated. The measure authorized may give rise to unnecessary difficulties. The duty to abide by the decisions of the Centre, whether they be final or interlocutory, is a moral duty and, as such, incompatible with material penalties.

Article 53(2)

The last sentence of the paragraph should be replaced with the following sentence:

"The Tribunal shall stay enforcement of the award pending its decision."

It seems to us that the obligatory suspensive effect of the recourse provided for is very desirable. It is inadmissible that any decision subject to review or interpretation which may be restrictive or extensive, should be enforced before its terms are ratified or clarified.

Article 54(2)

It seems to us that the periods for the decisions of the Tribunal to become res judicata are too long.

We believe that only when it is impossible for the parties, because of the lapse of time, to file any protest against the award may the award be enforced. We therefore propose that the paragraph be worded as follows:

"The application for revision must be made within 60 days after the discovery of the new fact."

The last sentence of the paragraph mentioned should be replaced by another one similar to the one proposed for Article 53(2).

Article 55(h)

We propose that the reference to the period of three years, provided for in this Article, be eliminated, the period of 60 days set for making the request for annulment to prevail in all cases. We consider it of great importance for a definite period, not too long, but, in any case, reasonable, to be fixed, after which the award shall acquire the authority of res judicata so that it may then be enforced. Moreover, the fixing of the two periods provided for in the draft, without any explanation of how one or the other may be used by the parties, appears to us to be contradictory.

Article 56

For obvious reasons, we propose that this Article be worded as follows:

"The award shall be final after it acquires the authority of res judicata. Each of the parties shall abide by and comply with the award in accordance with its terms."

Article 57

Jurisdiction - the power of the State to apply the law to a specific case - involves a dual concept: notio, the authority to hear the case, and judicium, the authority to judge, or to declare the law applicable to the specific case.

Unless it affects the process of hearing (notio and judicium) as Professor Carnelutti maintains, there is no logical hindrance to a judge deciding in any litis, whether the litigants be nationals or foreigners, whether or not the assets that are the object of the action are in the national territory, and regardless of the place in which the decisive facts of the dispute have occurred. The jurisdictional power of hearing is independent of time and space.

One result of the exercise of jurisdiction is enforcement, in which process jurisdictional limits are defined and established. Indeed, the possibility of enforcement is conditional upon the location within the territory of the State of the assets that are the object of the enforcement process, the steps of which are subject to the procedure specifically established under the authority of a competent power.

In order, therefore, for it to be possible to complete the exercise of jurisdiction, it will be necessary to have recourse to the executory process, which will only reveal its effectiveness through an appeal requiring assistance of an enforcement and coercive nature. In States politically organized under the representative republican system, based on the remarkable

concept of American Constitutional law of harmony and independence of the state powers, only the judicial power is competent to order the coercive assistance mentioned above.

Therefore, in order for the decisions of the arbitrators to be effective, as we stated before, and to be able to be carried to their ultimate effects, it would be of the utmost importance that disciplinary rules be established in the Convention, by virtue of which contested decisions of the Centre would be subject to homologation by the competent power in States in which any decisions of the Arbitration Tribunal are to be enforced by coercive jurisdictional means.

By means of such judicial homologation - and only by this - would the award be enforced in the territory of the State "as if it were a final judgment of the courts of that State" as required by Article 57(1) of the draft.

If this suggestion is adopted, it would be in order to eliminate the last sentence of paragraph 3 of the Article.

We would therefore propose the following text to be inserted in Article 57 where, in the opinion of the Drafting Sub-Committee, it would fit:

"Whenever any decision of the Centre, of a contentious nature, is to be enforced through coercive jurisdictional action in a Contracting State, whether or not it be a party to the dispute, the award must be homologated by the competent power of that State through the procedure established in its internal legislation."

Article 61

We propose that provision be made in this Article for the disqualification to be considered accepted in case of a tie in the voting, and furthermore, that, if the parties do not reach agreement on a single arbitrator or conciliator, the procedure followed shall be in accordance with the pertinent regulations of Chapter IV.

Article 62

We propose that this Article state that "the charges payable for the use of the Centre, as well as the fees and expenses of the members of the Conciliation Commission or Arbitral Tribunal, shall be borne by the unsuccessful party to the dispute, but that each party respectively shall bear such other expenses as it may incur in connection with any conciliation or arbitration proceedings", and that the rest of the Article be eliminated.

Article 75

We propose that the reference to the term of six months be eliminated from this Article. Denunciation is an act of sovereignty which must not therefore be subject to time limits in order to have effect. The consequences of the denunciation must be immediate, with due respect, of course, for the exceptions provided for in the remainder of the Article.

The Legal Committee reconvened at 2:35 p.m.

Articles 26 and 29

Mr. BROCHES (Chairman) stated that the delegates had in front of them the report of Mr. BOMANI's committee and a further proposal, embodied in documents LC/48 and LC/49 respectively.

Mr. BURROWS (United Kingdom) stated that the Working Committee on Article 26 had produced two alternative solutions. In an attempt to assist the Committee he had prepared a third (Doc. SID/LC/49*) which closely resembled one of the Working Group drafts and which was sponsored by 25 countries, and four additional countries had asked to be added to the list of co-sponsors: Costa Rica, Lebanon, Iran and the Malagasy Republic. He stated that a number of delegates who co-sponsored this proposal would have liked to make slight modifications in the text in order to meet their own particular points of view. They had not done so in order to forward a proposal acceptable to a large number of delegates and constituting a reasonable compromise. In paragraph (1) of their proposal the Centre was given fairly wide jurisdiction. However, States could limit that jurisdiction insofar as it concerned disputes to which they were a party under paragraph (2). He thought that those delegations who joined Spain in sponsoring a different proposal, which appeared in paragraph (2) (b) of document LC/48, could achieve a satisfactory solution by limiting their acceptance to the disputes referred to in said paragraph (2) (b). The merit of the proposal in LC/49 was that States would not be obliged to accept restrictions which certain delegations wished to impose.

Mr. BROCHES (Chairman) noted that the word "accession" was a typing error in document LC/49 and should be replaced by the word "acceptance".

Mr. GONZALES (Spain) inquired whether Article 30 would still define the meaning of dispute relating to investments.

Mr. BURROWS (United Kingdom) stated that in his view, if the text

* "Proposal of the United Kingdom, Tanzania, Uganda, U.S.A., Netherlands, Sierra Leone, Denmark, Norway, Finland, Sweden, Nepal, Malaysia, New Zealand, Turkey, Australia, Nigeria, Yugoslavia, Korea, Japan, Liberia, Greece, Germany, Austria, Ivory Coast, Belgium, India.

- (1) The jurisdiction of the Centre shall extend to investment disputes between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
- (2) Any Contracting State may at the time of ratification or accession or at any time thereafter notify to the Centre the class or classes of investment disputes in respect of which it would in principle consider submitting or not submitting to the jurisdiction of the Centre. Such notification shall not constitute the consent required by paragraph (1).

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² See Report Working Group IV, Doc. 87, and, for the proposals underlying their report, Docs. 88 through 100

sponsored by his delegation were adopted, it would not be necessary or desirable to attempt a further definition of "investment disputes".

Mr. BOMANI (Tanzania) stated that there had been discussion on whether the words "investment dispute" and "juridical dispute" should be used and that it was up to the Legal Committee to decide on this subject:

Mr. GONZALEZ (Spain) stated that the purpose of their proposal was not to limit or restrict the jurisdiction of the Centre but to define it as precisely as possible. The consent of the parties, which would be a rule, should come under a precise definition of the jurisdiction of the Centre. It would be undesirable if neither party knew exactly what differences they would be actually submitting to arbitration. For example, there would be doubt on whether labour disputes affecting an investment would come under that jurisdiction. He felt that a reference to "legal disputes" would make clearer the jurisdiction of the Centre. He considered the new proposal in document LC/49 to be exceedingly broad since it did not specify what the jurisdiction of the Centre would be.

Mr. LOPEZ (Panama) wanted the record to show that he personally was of the opinion that conciliation and arbitration were the most appropriate ways of settling disputes between States.

The Convention, however, was intended to submit to the jurisdiction of an international organization investment disputes between a State and a national of another State. Obviously these disputes have been normally settled before the local courts and in accordance with local laws, as the Preamble points out. This system has been confirmed by the constitution of certain countries and any attempt to withhold from the jurisdiction of local courts these disputes and submit them to an international jurisdiction, even of the highest standing, would imply a diminution of the jurisdictional power of the States. If the Convention were to incorporate a definition of the jurisdiction of the Centre along the lines of Document SID/LC/49 his country, also for constitutional reasons, could only accede to it with reservations. He was therefore in favour of the proposal of Spain and Guatemala. The possibility given to States under the proposal in Document LC/49 to limit the jurisdiction of the Centre could in fact adversely affect the confidence of the capital exporters.

Mr. AWOONER RENNER (Sierra Leone) said that in his opinion the British proposal was in substance similar to the proposal made in Document SID/WG/IV/8¹ which itself had been based on a proposal made by the Philippines in Document SID/WG/IV/1². The only addition was the statement that when the parties have consented, no party may withdraw its consent unilaterally.

Mr. BRINAS (Philippine) agreed with the comment of Mr. AWOONER-RENNER and assumed that under paragraph (2) of the British proposal any State would be permitted to define the jurisdiction of the Centre along the lines of the Spanish proposal.

Mr. BROCHES (Chairman) said that this would be clearly permissible and that, moreover, a State even when limiting the categories of disputes which could be submitted to the Centre, would still be considered as having joined the Convention in full. In fact, the substance of the provision now contained in paragraph (2) of Document SID/LC/49 had originally been intended to give countries the possibility to accede to the Convention while at the same time fully observing their constitutional limitations.

Mr. GUARINO (Italy) referring to investments made under general investment legislations without the conclusion of specific investment agreements, wondered

¹ See Summary Report, Working Group IV, Doc. 88

² Doc. 95

³ Doc. 89

whether disputes arising out of such investments could be brought before the Centre in case of a modification of such investment legislation. In this connection, he considered the Spanish proposal more satisfactory since, in his opinion, it provided expressly that such disputes would fall within the jurisdiction of the Centre. He also asked for information with respect to the deletion of the reference to political subdivisions or agencies and with respect to the meaning of the expression "national of another Contracting State". As a whole, he preferred the approach of the Spanish proposal which consisted in listing a large number of situations in some detail rather than the approach of the British proposal leaving it to each State to define which categories of dispute could be submitted to the Centre.

Mr. BROCHES (Chairman) said that the definition of the term "national of another Contracting State" and the question of political subdivisions or agencies had both been referred to Working Groups and that these problems would be examined at a later stage. With respect to the question as to whether or not disputes arising out of modifications of investment legislations could be brought before the Centre, he said that in his opinion, this appeared possible under both proposals.

Mr. GONZALEZ (Spain) said that paragraph (c) of the Spanish proposal merely provided that a dispute arising out of a modification of an investment legislation could in principle be submitted to the Centre but added that in any case the parties to the dispute should expressly give their consent to the submission of such dispute to the Centre. In other words, paragraph (c) did not create a kind of compulsory arbitration.

Mr. GUARINO (Italy) thought that a Contracting State would be unlikely to consent to the jurisdiction of the Centre after having modified its investment legislation. He therefore suggested that the Committee examine his proposal contained in Document SID/LC/33¹ which would now correspond to amending the last sentence of paragraph (2) of the British proposal to the effect that the notification would constitute the consent required by paragraph (1).

Mr. OUMA (Uganda), referring to the written comments of his Government² on Article 29, said he would oppose any amendment to this Article.

Mr. BROCHES (Chairman) thought that the essence of this latest Italian proposal would run counter to both the English and the Spanish sponsored suggestions.

Mr. GUARINO (Italy) said he might have been misunderstood. He had no intention of making recourse to arbitration compulsory.

Mr. BROCHES (Chairman) said that he thought that in that event there was no need to introduce the amendment because the proposals mentioned the need for the parties consent and that was sufficient to cover the case without explaining the various ways in which the (written) consent might be made.

Mr. LARA (Coata Rica) wished to state that he had no intention of under-rating the Spanish proposal, but he was unclear as to the exceptions enumerated under Article 26(1)(c) as he found it difficult to reconcile the substance of those exceptions with the scope of the competence of the Centre. In general he supported the British proposal because he thought that any attempt to define the limitations in detail would probably lead to confusion.

Mr. BIGAY (Central African Republic) commenting on the British proposal, said he was disturbed by the omission of the qualification "of a legal charact-

¹ See Summary Proceedings, Legal Committee Meetings of December 10, Doc. 106, and December 9, Doc. 103, respectively

² Doc. 99

³ See Doc. 45

er" to the term "investment dispute". He was also unhappy with the idea of leaving the limitations to the procedure of notification rather than embodying the limitations in the text because the procedure of notification would result in a comparison being drawn between the advantages given by one capital-importing country as against another capital-importing country. Finally, he was unhappy with the words "in principle" appearing in paragraph (2) of the British proposal. In the light of these observations he would best be satisfied by a compromise proposal which would go further than the British one, and perhaps not as far as the Spanish one.

Mr. BOMANI (Tanzania) said he would have no objection to the first and third proposals voiced by the delegate of the Central African Republic if they met with the approval of the Committee.

Mr. BROCHES (Chairman) drew the Committee's attention to the various difficulties encountered with respect to a definition of the term "legal dispute" or "legal character". He did not have any strong views on the desirability of adding or omitting such a qualification, but thought it was probably due to the difficulty of defining the term that the British proposal omitted it. He thought the omission of the words "in principle" in paragraph (2) should raise no particular difficulty.

Mr. GONZALEZ (Spain), responding to the comments of Mr. LARA, said he could not see any inconsistency between the scope of the jurisdiction as outlined in his proposal and the various exceptions enumerated with respect to the outer limit of this jurisdiction. The tribunal would have to decide whether it did not or did not have jurisdiction by applying the rules referring to its outer limit in every particular case. He then wished to know what would be the result under the British proposal of a conflict between a specific consent and a notification to exclude the types of dispute covered by the specific agreement from those disputes which a State was willing to submit to the jurisdiction of the Centre?

Mr. BURROWS (United Kingdom) thought that general statements under paragraph (2) of his proposal were entirely separate from the question of specific consent referred to in paragraph (1). Since the jurisdiction was based on consent the specific and particular consent would govern.

Mr. KPOGNON (Dahomey) thought that the Committee was given the task of drawing a precise and detailed document and he thought the Spanish proposal more in line with that assignment than the United Kingdom proposal which was couched in general terms. Furthermore he thought the British proposal over-ran the narrow boundaries of the type of investment dispute which should have been the proper subject matter of the Convention. In view of this unclarity of the British proposal he could not support it. Answering a question from the Chairman he said he would not be satisfied by a mere qualification of the phrase "investment disputes" by the phrase "of a legal character". He would like to have a number of illustrations indicating the concrete examples to which the text referred.

Mr. GONZALEZ (Spain) said he would accept the proposal of the delegates of Dahomey that the enumeration in his text would not be exhaustive but that any other disputes could be referred to the Centre by express agreement.

Mr. KPOGNON (Dahomey) thought this would be a good compromise.

He would combine paragraph (1) of the British proposal with the second part of the Spanish proposal with the addition that the Centre would have jurisdiction in other cases also if the parties so agreed.

Mr. BURROWS (United Kingdom) thought he could not qualify the words "investment dispute" in the proposal which came to be known as the British proposal without consulting the other 30 co-sponsors, and he would therefore request such an amendment to be voted on as a separate issue. He would suggest that the same procedure be applied with respect to any other amendment. On his own behalf, he would not support the suggestion to add the list appearing in the Spanish proposal as an amendment even if only by way of example. He found some difficulties in the drafting of the Spanish proposal which was not precise, and he envisaged much time spent in an effort to clarify it.

Mr. GHACHEM (Tunisia) reviewing the progress of the debate expressed his deep concern with respect to the British proposal which would lead to a competition between the capital-importing States who would then be compelled to present a comparative list of advantages to private investors. He thought the suggestion to combine the U.K. proposal (with a qualification pertaining to the term "investment dispute") together with an illustrative list, as now suggested by Spain, may resolve the impasse into which he feared the Committee was getting.

Mr. BROCHES (Chairman) did not share the fear expressed by the previous speaker. He thought some amendments in language might be acceptable in the British proposal and thought the only issue which kept the meeting divided was the question of whether the article should include or should exclude specific examples of disputes which might be submitted to the Centre.

Mr. LARA (Costa Rica) reiterated his difficulties with respect to the Spanish proposal and said they might disappear if paragraph (c) was deleted.

Mr. GONZALEZ (Spain) responding expresses the opinion that if paragraphs (a), (b) and (c) of his proposal were redrafted, the difficulties of Mr. LARA might disappear.

Mr. BELIN (United States) strongly supported the U.K. proposal which he thought more in keeping with the assignment of the Committee than the other proposals. He would move an amendment adding to paragraph (1) the words "of a legal character" after the words "investment dispute", and omitting the words "in principle" in paragraph (2), so that they could be debated by the Committee.

Mr. GUARINO (Italy) wished to associate himself with the remarks of the delegate of Dahomey in support of the more precise language of the Spanish draft.

Mr. PEREZ (Ecuador) thought that the Spanish proposal, which now merely listed examples of the type of disputes which would be within the jurisdiction of the Centre and did not include an exhaustive list of such disputes, was a great step forward in the direction of compromising the conflicting views. He thought there was merit in some of the particular examples listed because they would defeat arguments which may try to limit the right of reviewing national legislation. He thought that with a little effort a combination of both proposals should now be acceptable to all.

Mr. BROCHES (Chairman) taking a vote announced that it was decided to add the qualification "of a legal character" to the first paragraph of the British text by a division of 26 to none, and to delete the words "in principle" from the second paragraph by a division of 25 to 1. He would now request the sense of the meeting with respect to a suggestion to add the word "directly" as an additional qualification to the words "investment dispute of a legal character" in paragraph (1). Whereupon a debate ensued indicating that some difficulty with respect to this matter arose from the French equivalent of the English text in which the qualification would probably be redundant. In view of the differences, however, a vote was taken and a decision adopted by a majority of 26 to 8 to add the word "directly" as an additional qualification to the British proposal as now amended. Mr. BROCHES then requested a show of hands with respect to the British proposal as amended and with respect to a combination of the British proposal and the Spanish proposal. 27 delegates accepted the British proposal as amended; 6 delegates voted against. 12 delegates voted in favor of a combination of the two proposals by adding to the British proposal the special categories provided for in the Spanish proposal as well as a fourth paragraph along the lines suggested by Mr. KPOONON. 19 delegates voted against such combination. Mr. BROCHES ascertained that no delegate expressed the wish that a roll call be made for the record and said that the best way would then be to work on the British proposal and to mention in the report to the Executive Directors the categories of the Spanish proposal in favor of which several delegates had spoken.

Article 52.

Mr. BROCHES (Chairman) explained that the word "delivered" was intended to mean "pronounced" or "read" and that the Secretary-General had been authorized to read such award in order to avoid the inconvenience and additional expenses which would occur if the Tribunal had to reconvene for the mere purpose of reading the award. He also stressed the importance of the second sentence of paragraph (1) with respect to the starting point of periods provided for in other provisions of the Convention.

Mr. LARA (Costa Rica) suggested that the word "delivered" be replaced either by the word "read" or by the expression "will be made known by the Tribunal", and that the second sentence of paragraph (1) be amended accordingly.

Mr. BELIN (United States) questioned the advantages of the act of reading the award and suggested to amend Article 52 along the following lines: "The Secretary-General shall promptly transmit certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which it was so transmitted".

Hr. BERTRAM (Germany) considered that the reading of the award by the Secretary-General was an unusual procedure and suggested that this be subject to the consent of the parties.

Mrs. VILIGRATTNER (Austria) agreed with the suggestion made by Mr. BELIN but thought that the award should be deemed to have been rendered on the date when the parties have received the copies. Otherwise the periods provided for in other provisions of the Convention might be shortened.

Mr. BROCHES (Chairman) said that this would create other difficulties since there would be different dates of receipt.

* See Doc. 124

¹⁰ See also Summary Report of the Legal Committee Meeting, December 10, Doc. 113

Mr. PEREZ (Ecuador) pointed out that the parties would probably be most reluctant to be brought together on the day the award would be read to them and therefore agreed in substance with the proposal made by Mr. BELIN.

Mr. BROCHES (Chairman) requested a show of hands on Mr. BELIN's proposal which was accepted by the Committee. He then briefly mentioned some of the problems which are still to be examined by the Committee before next Friday, among which he noted the definition of the term "national of another Contracting State", the question of political subdivisions or agencies, interpretation, revision and annulment, recognition and enforcement, replacement and disqualification, place of proceedings and costs. On the latter question, one written comment has been submitted.

Mr. PEREZ (Ecuador) said that difficulties had arisen in the Drafting Sub-Committee with respect to Article 48. According to one interpretation, if a party fails to appear before the Tribunal, the award could only be rendered in favor of the person who had appeared. According to another interpretation, the Tribunal could also render an award in favor of defaulting parties. The matter should therefore be submitted to the Committee for further discussion.

Mr. BROCHES (Chairman) noticed that this problem raised several difficulties and suggested that the Secretariat submit a proposal to the Committee."

Mrs. VILIGRATTNER (Austria) mentioned that the questions raised by Article 25 also remained to be discussed.

The meeting adjourned at 5:40 p.m.

¹¹ See Doc. 83 and Summary Reports of the Legal Committee Meetings, December 7 and 10, Docs. 82 and 113 respectively

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Report on Scope of Jurisdiction of the Centre (Articles 26 and 29)

1. The Working Group consisting of Messrs. Bomani (Tanzania) (Chairman), André (Belgium), Awooner-Renner (Sierra Leone), Bertram (Germany), Bigey (Central African Republic), Brinas (Philippines), Burrowe (United Kingdom), Florenzano (Ivory Coast), Gonzales Bueno (Spain), Gourevitch (United States), Hartlev (Denmark), Hellners (Sweden), Kpognon (Dahomey), Lokur (India), Lopez (Panama), Mantzoulinos (Greece), Nedi (Ethiopia), O'Donovan (Australia), Ortiz de Zevallos (Peru), Ouma (Uganda), Pinto (Guatemala), Quill (New Zealand), Sand (Norway), Shrestha (Nepal), Thesleff (Finland), Ukawa (Japan), and van Santan (Netherlands) concluded on December 6, 1964 consideration of the scope of jurisdiction of the Centre.

2. The several proposals¹ before the Working Group were finally reduced to two proposals:

- (a) to maintain Article 26 of the Draft Convention and, if necessary, to include a provision substantially along the lines of Article 29 of the Draft Convention either as a separate Article or as part of Article 26;
- (b) to substitute for Articles 26 and 29 of the Draft Convention the following:

"Article 26

- (1) The jurisdiction of the Centre shall extend to the settlement of any legal dispute between a Contracting State and a National of another Contracting State which directly refers to an investment and has as its object
 - (a) compliance with obligations arising out of a contract between that State and a National of another State;
 - (b) compliance with guarantee obligation which a State may have given to specific investments;
 - (c) to determine the indemnity to be granted for acts taken by the State in violation of rights lawfully acquired by the National of the other State, provided however, that such acts do not result from
 - (i) the correct application of the laws in force in the territories of the State at the time the investment was made or
 - (ii) the correct application of laws of a general character enacted after that time which do not annul or reduce the benefits expressly recognized to the national investor.
- (2) Notwithstanding what is stated in paragraph (1) above any Contracting State may at the time of ratification or accession or at any time thereafter notify to the Centre the class or classes of investment disputes in respect of which it would in principle consider submitting or not submitting to the jurisdiction of the Centre. Such notification shall not constitute the consent required by paragraph (3).
- (3) The submission of any dispute to the Centre shall be in writing and shall state that both parties have

¹ See Docs. 88 through 95

consented. Consent may be given before or after the dispute has arisen." *

* The proponents of the above text did not reach final agreement among themselves on whether consent could be given before [or only after] the dispute had arisen, and reserved their respective positions on this point.

3. The Working Group felt that there was no possibility of reconciliation of the two proposals within the Working Group itself and therefore decided to submit both proposals to the Legal Committee for its decision.

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SID/WG/IV/2 (November 30, 1964)

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Summary Report on Views Expressed on Jurisdiction of the Center

(Prepared by the Secretariat at the Request of the Working Group)

1. At the request of the Legal Committee the question of the scope of the jurisdiction of the Center was considered on November 29, 1964 by a Working Group consisting of Mr. Bomani (Tanzania) (Chairman), Messrs. Awooner-Renner (Sierra Leone), Bertram (Germany), Bigay (Central African Republic), Brinas (Philippines), Gourevitch (United States), Hartlev (Denmark), Jonatansson (Iceland), Kpognon (Dahomey), Lokur (India), Lopez (Panama), Mantzoulinos (Greece), O'Donovan (Australia), Ortiz de Zavallos (Peru), Ouma (Uganda), Pinto (Guatemala), Quill (New Zealand), Sapateiro (Portugal), Serb (Yugoslavia), van Santen (Netherlands) and Mrs. Villgratner (Austria).

2. Mr. BRINAS (Philippines) suggested that in order to ensure respect for the sovereignty of capital-importing States, the Convention should expressly exclude from the jurisdiction of the Center disputes concerning the legality of expropriation in the public interest, the implementation of non-discriminatory exchange restrictions and such other State actions as the delegates might decide ought to be excluded from review by an arbitral tribunal.

Mr. ORTIZ (Peru) agreed with the principles underlying Mr. BRINAS' proposal and urged the delegates to arrive at a draft that would on the one hand guarantee the investors' legitimate interests and on the other safeguard the prerogatives and sensitivities of capital-importing countries.

Mr. van SANTEN (Netherlands) pointed out that consent to arbitration by a State had never been and should never be considered as an abdication of sovereignty. He questioned the use in the title of Chapter II and in Article 26(1) of the word "jurisdiction" which did not reflect the true nature of the Center. The Center would only maintain facilities which could be made available to States which wished to use them and would have no "jurisdiction" in the sense of the word. He therefore urged that a better term be substituted for the word "jurisdiction". He also suggested that, in order to meet some of the fears expressed by some capital-importing countries, States be allowed to declare not only the classes of disputes they were willing in principle to submit to conciliation or arbitration but also the classes of disputes they would not consider suitable for such settlement.

Mr. PIKTO (Guatemala) suggested that the word "jurisdiction" fairly reflected the intended purpose of the Center. To safeguard the vital interests of capital-importing countries against abuses by investors he suggested the following redraft of Article 26:

"Article 26(1). The Center shall have jurisdiction over all legal disputes between a Contracting State and another Contracting State relating to investments and arising directly out of:

- (a) non-performance of a contract entered into with that State for the purpose of making an investment;
- (b) non-performance of obligations arising out of a guarantee granted by the State for the repatriation of the value of the investment;
- (c) the right to an indemnity, or its amount, for acts of the State carried out in violation of legally acquired rights of the investor, if such acts are not based on: 1) the application of the legislation in force in the territory of the State at the time of the investment; or 2) the application of new general legislation which does not reduce the benefits expressly granted by the State to the investor."

Mr. MANTZOULINOS (Greece) agreed with the suggestion to eliminate the word "jurisdiction" and recommended that the Center's facilities be available only for disputes arising out of contracts between a foreign investor and a State or of an investment made in reliance on the laws of that State.

Mr. CUMA (Uganda) thought it important to protect host States against political interference by foreign investors by providing that the jurisdiction of the Center be limited to "disputes arising out of investment agreements, provided that such disputes do not affect the security of the State concerned".

Mr. KPOGNON (Dahomey) agreed that the word "jurisdiction" was improperly applied to the Center which would have no judicial functions but only administrative ones. For lack of a better word, he thought that perhaps "competence" would be satisfactory. He thought it essential to define this competence as comprising legal disputes between a Contracting State and a national of another Contracting State directly relating to an investment.

Mr. LOPEZ (Panama) agreed with the delegate of Guatemala that it would be important to indicate specifically the types of disputes that could

be brought before the Center in order to prevent undue pressures by foreign investors.

Mr. GOUREVITCH (United States) pointed out that the proposals to limit the scope of the Center only to disputes specifically listed would unduly limit the free choice of States. States which did not wish to submit certain disputes to conciliation or arbitration could freely do so by withholding their consent. As to the proposal to exclude disputes "affecting the security of the State", he felt that the exception was too vague and would lend itself to conflicting interpretations.

Mr. AWOONER-RENNER (Sierra Leone) reviewing the whole Chapter II expressed himself against the inclusion of political subdivisions or agencies of States as possible parties to a proceeding. He questioned the rule contained in Article 27(1) which did not seem to be in line with the purpose of settling disputes in the most efficient manner. He also remarked that consent could not in his opinion be given but at the time the investment was made. He doubted that the words "legal dispute" were necessary: "investment disputes" would seem preferable.

Mr. LOKUR (India) offered the following redraft of Article 26:

"Articles 26 and 29 should be combined to read as follows:

'The jurisdiction of the Center shall extend to investment disputes between a Contracting State and a national of another Contracting State. Each Contracting State shall notify to the Center the class or classes of investment disputes which it would in principle consider submitting to the jurisdiction of the Center. The Center shall exercise jurisdiction only over such dispute of the class or classes so notified only if the parties thereto have in writing consented to submit the dispute to the Center either before or after it has arisen.'

(Reference to political subdivisions and agencies may be inserted after a decision has been taken on this question)."

By way of comment thereon, he pointed out that, in addition to the safeguard afforded by the requirement of consent, States ought to be able to define precisely the kind of disputes they could conceivably consent to submit to the Center and exclude disputes which could not under any circumstances be subject to arbitration. If this were done, there seemed to be no need to limit the jurisdiction of the Center to "legal disputes" or to define the term "investment".

3. The Chairman said that two main trends had emerged; one favored a broad and flexible definition of the scope of the jurisdiction of the Center and would leave it to each State to determine the kind of disputes it would consent to submit to the Center; the other one was in favor of limiting the jurisdiction of the Center only to certain specific types of disputes.

4. It was decided to postpone the discussion of the matter in the Working Group until delegates had had the time to submit concrete proposals reflecting one or the other trend or offering a reconciliation of both.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Scope of the Center's jurisdiction

Amendments proposed by Mr. A.R. Brinas (Philippines)

"Article 26

(1) . . .

(2) . . .

(3) Notwithstanding the foregoing provisions of this Article, any State may, at the time it ratifies or accepts this Convention, specify the class or classes of disputes which it places within, or excludes from, the jurisdiction of the Center. In respect to the said State, disputes not falling within the jurisdiction of the Center, as delimited by such State under the preceding sentence, shall not be the subject of any conciliation or arbitration proceedings under this Convention, or of the consent referred to in the next preceding paragraph."

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Scope of the Center's jurisdiction

Drafts submitted by Mr. Bigay (Central African Republic)

Article 26 (1). The competence of the Center shall extend to any legal dispute between a Contracting State (or any juridical person of public law controlled by that State) and a national of another Contracting State, relating directly to an investment, which the parties have agreed to submit to it.

Article 30(ii). "legal dispute" means any dispute concerning a right or an obligation arising of the application of an agreement or legislation concerning investments".

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Proposals by Mr. Kpognon (Dahomey)
on the Wording of Chapter II - Articles 26 and 30 (ii)

This proposal attempts to draw together the various tendencies that have been revealed on the basic question of the area of competence of the Centre.

CHAPTER II - Area of Competence of the Centre

- Article 26 - 1) The area of competence of the Centre shall extend to all disputes of a strictly legal nature, arising out of investments, between a Contracting State (or any part thereof) and a national of another Contracting State, which the parties have consented to submit to the Centre.
- 2) Consent relating to submission of disputes shall be in writing. Consent may be given either before or after the dispute has arisen.
- 3) Any Contracting State may at any time notify the General Secretariat of the Centre, for purposes of information a statement indicating the classes of dispute contemplated in paragraph (1) that may be decided by the Centre.

N.B. Article 29 becomes Paragraph 3 of Article 26.

Definition of Dispute of a Legal Nature

Article 30 (ii) - "Any dispute relating to an investment giving rise to a claim that having been instituted by one of the parties is demanded and refused on the basis of law."

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Scope of the Center's jurisdiction

Draft submitted by Mr. Bomani (Tanzania)

Article 26 (1).

(a) The functions of the Centre shall consist in providing facilities for the settlement of investment disputes between a Contracting State (or a constituent Subdivision thereof or any agency of that Contracting State that has been designated to the Centre by that Contracting State) and a national of another Contracting State provided that the parties shall have by agreement consented to submit such disputes to it.

(b) A Contracting State may at the time of ratifying the Convention stipulate any class or classes of disputes that it shall exclude from the scope of the facilities of the Centre.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Scope of the jurisdiction of the Center

Suggestions submitted by A. O. Ouma (Uganda)

Article 26(2), second sentence

I suggest that the provision of Article 26(2), second sentence, should be made mandatory, that is to say, the sentence should read as follows:

"Consent shall be given after the dispute has arisen."

If this suggestion is acceptable to this Committee, I suggest that we amend the sentence by substituting for the words "It may be given either before or" the words "consent shall be given."

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Scope of the Centre's Jurisdiction

Proposals submitted by R. Awooner-Renner (Sierra Leone)

Article 26(1)

The jurisdiction of the Centre shall extend to investment disputes between a Contracting State 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 in writing.

(2) Any Contracting State may at the time it becomes a signatory to this Convention submit to the Secretary-General a statement indicating in general or specific terms the class or classes of disputes which fall within the jurisdiction of the Centre and which in principle it considers submitting to conciliation or arbitration pursuant to this Convention.

Article 30 (ii)

"Investment Dispute" means any dispute connected with an investment from which a legal right or obligation arises.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP IV

Articles 26 and 29

Proposal of Sierra Leone, Philippines,
Tanzania, Uganda, Central African Republic, Nepal and India

1. The jurisdiction of the Centre shall extend to investment disputes between a Contracting State and a national of another Contracting

State, which the parties to the disputes consent in writing after the disputes have arisen.

2. Any Contracting State may at the time of ratification or accession or at any time thereafter notify to the Centre the class or classes of investment disputes in respect of which it would in principle consider submitting or not submitting to the jurisdiction of the Centre. Such notification shall not constitute the consent required by paragraph (1).

(Note "Investment disputes" will be defined in Article 30, specifying categories of disputes relating to investment, after the joint Spanish and Guatemala text of Article 26¹ is seen).

¹ See Doc. 87 Section 2 sub (b)

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SID/LC/45 (December 7, 1964)

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Alternative to Articles 26 and 29

Prepared by the Secretariat

CHAPTER II

Proceedings Before the Centre

Article 26

- (1) Proceedings pursuant to this Convention shall be limited to conciliation and arbitration of legal disputes between a Contracting State (or any body or bodies designated in that behalf by that Contracting State) and a national of another Contracting State arising out of an investment and which the parties thereto have consented in writing to submit to conciliation or arbitration, as the case may be, through the facilities of the Centre.
- (2) The consent required by paragraph (1) may be given either before or after a dispute has arisen. When all the parties to the dispute have given their consent, no party may thereafter withdraw it unilaterally.
- (3) Any Contracting State may at the time of ratification or acceptance of this Convention or at any time thereafter transmit to the Secretary-General, for purposes of information, a statement indicating the classes of disputes which such Contracting State would in principle consider suitable for submission to the Centre and the classes of disputes which it considers unsuitable for such submission. The Secretary-General shall promptly inform all Contracting States of any such statement and any modifications thereof.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

AMENDMENTS PROPOSED BY MR. BELIN (UNITED STATES)

Article 26

(1) The jurisdiction of the Center shall extend to all legal disputes between a Contracting State (or one of its agencies, instruments or political subdivisions) and a national of another Contracting State

Article 30

(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 except as may be otherwise agreed by the parties.

Article 30

(iii) "national of another Contracting State" means (e) 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 other juridical person in which the controlling interest on said date is directly or indirectly in the nationals of a Contracting State other than the State party to the dispute, or in such Contracting State itself.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Comments by Mr. da Cunha (Brazil) on Chapter II

In considering the Draft under discussion, the main point of which is stated in Chapter II, it is necessary to seek a common denominator, or,

more precisely, a minimum that can be favorably considered by the countries here represented. It is probably correct to state that the more the jurisdiction of the Centre is restricted, the closer we shall be to a satisfactory result, that is, to the realization of the proposed plan.

The excessive breadth given by the Chapter in question to the range of disputes that may possibly be submitted to the Centre creates various kinds of obstacles that will be difficult to overcome. Among these are the obstacles arising from the very sovereignty of the States. The Centre cannot of course be transformed into a body to review the legislation of the various countries. It is understandable that a country may agree to submit to an international tribunal a dispute that arises by chance, regarding investments made in its territory by a national of another State. It is nevertheless inadmissible to expect that State to agree to the Centre's using, in settling a given dispute, legislation other than that of the host country.

Article 26

Along these lines, we propose that Article 26 be worded as follows:

"(1) The jurisdiction of the Centre shall extend to legal disputes between a Contracting State and a national of another Contracting State, arising out of or in connection with an investment, which the parties to such disputes have consented to submit to it.

(2) The provisions of the foregoing paragraph do not include controversies that refer or may refer to the validity and application of the domestic law of the State that is a party to the dispute.

(3) Consent to the submission of any dispute to the Centre shall be given in writing after the dispute arises."

In the amendment we eliminate certain expressions used in the draft so as to avoid contradictions of other principles supported by us in considering other Articles. Thus, we prefer to define the jurisdiction of the Centre as extending to disputes (and not to all disputes) arising out of an investment (and not out of any investment), as the Draft reads. Elimination of those words which suggest too broad a definition, is in accordance with the rules stated in paragraph 2 which we drafted and the reasons on which we based the proposal to eliminate Article 29.

The reason for paragraph 2 is that it would be inadmissible for the Agreement to attempt to raise the Arbitral Tribunal to a super-power capable of changing the internal legislation of the Contracting States or of discussing the validity and application of that legislation, the drafting and enforcement of which are unequivocally an act of sovereignty.

The phrase "or one of its political subdivisions or agencies" was eliminated from our amendment because it makes provision for something which is obvious. Indeed, the political subdivisions of States have no juridical personality in international law, and therefore cannot, for obvious reasons, assume international commitments except through, or by express authorization of, their respective national State. The same would

be true of official agencies, whose international legal personality is that of the States that established them. (This same argument is defended by the Malagasy Republic in a letter to the Bank - Document SID/LC/5).

Article 29

There is no reason for the existence of the provisions of this Article, especially as regards the last sentence, and in view of the provisions of Article 26(2).

We believe that it will be necessary to make it quite clear and explicit that only when the two parties are agreed to submit the dispute to the jurisdiction of the Centre, may conciliation or arbitration proceedings, as the case may be, take place. This agreement cannot be expressed before the dispute arises, but afterwards. This, to us, seems really important. Only after the conflict arises will it be possible for the parties to decide on whether or not they agree to submit it to the jurisdiction of the Centre.

Prior agreement is shown to be incompatible with the voluntary nature it is intended to attribute to the Centre's jurisdiction, in accordance with the principles, and in view of the objectives, of the Convention.

Article 30(1)

We propose the following wording for Article 30(i):

"Investment means a contribution of money or other capital assets intended for an economic enterprise regarded as being of public interest in the country in which the investment has been made."

It is necessary to give a clearer definition of the concept of investment. The amendment that we offer attempts to clarify that definition. The care with which we are trying to surround the question will certainly help to prevent future interpreters of the Convention from facing insuperable difficulties in determining which cases may remain within the scope of its provisions.

Article 30(iii)

Nationals of a State are those persons subject to its direct authority, and whose civil and political rights are recognized by the State which also undertakes to protect them outside of its borders.

Nationality is the quality inherent in those persons which places them in a position that situates and identifies them in the community.

The responsibility for establishing the rules relating to nationality lies with the internal legislation of each State, despite the fact that these rules must be in accordance with international public law, conventional or traditional, and with the general principles of law relating to the matter, in order that the standards set by each State in this matter may be recognized by the other States.

¹ See Doc. 45

It should also be stipulated in the definition of nationality inserted in this Article, that no person, physical or juridical, who exhibits dual nationality before the internal law of the country with which he maintains any dispute on account of investment, as described in the Convention, may submit that dispute to the jurisdiction of the Centre.

In addition, the definition of nationality in the physical or juridical person (Article 30(iii)(a)) requires to be changed as the Malagasy Republic suggests (SID/LC/5) so that a national of a Contracting State shall be considered to be any physical person who being one, does not show dual nationality on the date on which the jurisdiction of the Centre is accepted by the other Contracting State.

Also, the definition of nationality of a juridical person (Article 30(iii)(b)) requires to be changed so that the verb to possess in the main clause will appear in the present subjunctive. The definition would then read:

"any juridical person which possesses 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 Centre in respect of that dispute."

The last clause "and any juridical person which the parties have agreed", etc., should be eliminated as being entirely unnecessary, as the Malagasy Republic also suggests (SID/LC/5).

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SID/LC/33 (December 2, 1964)

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Amendment Proposed by Mr. GUARINO (Italy)
Article 29

"Any Contracting State may at any time transmit to the Secretary-General a note indicating in general or specific terms the class or classes of disputes within the jurisdiction of the Centre that it will submit to conciliation and arbitration within the framework of the present Convention. Such note constitutes the consent required by Article 29."

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

New wording of Article 26

Proposal submitted by the Delegation from Spain

The delegation which signs the present proposal has carefully studied the wording of article 26 of Chapter II of the draft Convention dealing with the jurisdiction of the Centre, and understands that the problems raised in this article are fundamental to the Convention and that an effort should be made to find a means of compromise that will satisfy both the investing countries and those in which the investment is to be made.

In the discussions held thus far, very divergent viewpoints have been observed, for, whereas some understand that the questions to be submitted to the Centre should be exclusively those arising out of contracts entered into directly between a State and nationals of other States, other delegations wish to give a very general nature to the questions to be submitted to the Centre, by inserting in the Convention a definition that would make submission to the Arbitration Centre very general in nature, without excluding specific points that should be avoided for reasons of respect for the domestic law, of course, and even, in many cases, because they might affect constitutional provisions.

The delegation submitting this proposal understands that to define the concept of investment, in view of the multiple legal economic and financial aspects that it may contain, is a well-nigh impossible task, and it thinks it would be more logical to delimit the action of the Centre, not on a definition of investment, but rather on a definition of competence, as is done in this proposal in the wording of the first paragraph of Article 26.

The proposal that we are presenting is broader than the one made in the meetings with the distinguished delegate from Guatemala, since the competence of the Centre is extended to the disputes arising from the application of legislation in force on the date of the investments, to the extent that such application annuls or reduces benefits expressly granted to the investor.

It is also broader than the one submitted by the distinguished delegate from Uganda, who appears to wish to limit the jurisdiction of the Centre exclusively to disputes relating to investments resulting solely from contracts entered into with the State, for we cannot forget that many of the laws now in effect on investments in intermediate countries have been liberalized, enabling foreign groups to participate directly in domestic companies and in various businesses in the country without any restriction whatever, or with partial restriction in certain

¹ See Doc. 93

cases, but, in many cases, without authorization and even without the knowledge of the government itself.

In contrast, the proposal that we submit does not accept the opinion of certain delegations that would extend the jurisdiction of the Centre in such a way as to make it general in nature and to embrace all disputes resulting from or arising in connection with the investment, later giving this word vague and abstract conceptions that may bring to the Centre matters and questions on which many domestic laws would really encounter difficulties that would be difficult to overcome in order to accept this Convention.

We therefore believe it wise to seek a compromise, and we wish to state clearly that we desire not to have this particular formula accepted, but any other formula based on these same reasons of compromise, which both the capital-investing countries and those that need assistance for their economic development could accept.

The legal text that we propose would be as follows:

CHAPTER II

JURISDICTION OF THE CENTRE

Article 26

(1) The jurisdiction of the Centre is extended to the solution of all legal differences between a Contracting State and a national of another Contracting State when it refers directly to an investment and is intended to achieve:

- (a) fulfilment of commitments arising out of a contract entered into between the State and the national of another State;
- (b) fulfilment of guarantee commitments that may have been given by a State to specific investments;
- (c) decision, even in the cases of investments made without the intervention of the State, but in observance of the provisions of law, on the reestablishment of the legal status and, should this be impossible or should the State not agree to such reestablishment, on the indemnity that is in order as a result of measures adopted by the said State which violate the rights of the national of the other State, provided that such measures do not arise out of the application of laws of a general nature and should they arise from laws of such a nature, when they annul or reduce benefits of the investor that have been expressly recognized by the said State.

(2) Submission of all differences to the Centre shall be in writing and with the consent of both parties which may be given before or after the difference has arisen.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

DEFINITIONS OF "INVESTMENT"

1. Investment promotion and protection agreement between Federal Republic of Germany and Pakistan.

The term "investment" shall comprise capital brought into the territory of the other Party for investment in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. The term "investment" shall also include the returns derived from and ploughed back into such "investment".

Any partnerships, companies or assets of similar kind, created by the utilisation of the above mentioned assets shall be regarded as "investment".

2. Investment promotion and protection agreement between Federal Republic of Germany and Federation of Malaysia.

The term "investment" shall comprise every kind of asset and more particularly, though not exclusively:-

- (a) movable and immovable property as well as any other rights in rem, such as mortgage, lien, pledge, usufruct and similar rights;
- (b) shares or other kinds of interest in companies;
- (c) title to money or to any performance having an economic value;
- (d) copyright, industrial property rights, technical processes, trade-names, and goodwill; and
- (e) such business concessions under public law, including concessions regarding the prospecting for, or the extraction or winning of, natural resources, as give to their holder a legal position of some duration.

3. Definition suggested by Mr. GHACHEM (Tunisia) at the Addis Ababa Consultative Meeting' on the basis of Tunisian investment promotion legislation.

¹ See Doc. 25

The term "investment" comprises all categories of goods and includes but is not limited to:

- (a) the ownership of movables and immovables as well as all other rights in rem such as mortgages, pledges etc.;
- (b) the right of participation in companies and all other participations;
- (c) credits [pecuniary obligations] and rights to a performance having an economic value;
- (d) copyrights, industrial property rights, technical processes, goodwill;
- (e) concessions under public law, including exploration and extraction concessions.

4. United States Legislation on investment guarantees (22 U.S.C.A. 2183).

The term "investment" includes any contribution of capital commodities, services, patents, processes, or techniques in the form of

- (1) a loan or loans to an approved project,
- (2) the purchase of a share of ownership in any such project,
- (3) participation in royalties, earnings, or profits of any such project, and
- (4) the furnishing of capital commodities and related services pursuant to a contract providing for payment in whole or in part after the end of the fiscal year in which the guarantee of such investment is made.

5. Definition prepared by the Secretariat.

The term "investment" means the acquisition of (i) property rights or contractual rights (including rights under a concession) for the establishment or in the conduct of an industrial, commercial, agricultural, financial or service enterprise; (ii) participations or shares in any such enterprise; or (iii) financial obligations of a public or private entity other than obligations arising out of short-term banking or credit facilities.

NOTE OF SECRETARIAT. The definitions under 1,2,3 and 4 above appear to have been drafted principally for the purposes of the substantive provisions of the respective agreement or legislation and not for jurisdictional purposes.

The Legal Committee convened at 10:37 a.m.

Mr. BROCHES (Chairman) stated that there would be a discussion of the provisions dealing with interpretation, revision and annulment of the award.

Article 53²

Mr. BROCHES (Chairman) explained that originally there was a provision for a time limit for making requests for interpretation. It had been deleted because there could be cases where the award might require a course of conduct which could extend over a long period of time, and in that case a party should not be precluded from seeking an interpretation on the execution of the award. This was also the reason why the Tribunal was given the power to suspend execution; but that suspension was not made mandatory.

Mr. LOPEZ (Panama) thought that it would be more appropriate to use the word "aclaración" ("clarification") instead of the word "interpretación" ("interpretation") in the Spanish text.

Mr. BROCHES (Chairman) suggested that this issue be dealt with by the Spanish speaking members of the Drafting Sub-Committee.

Mr. GOUREVITCH (United States) thought that in order to prevent the possibility of undue delay in complying with the award, it would be desirable to establish a time limit in this provision. It might be difficult always to foresee within what period of time a problem of interpretation could arise. Therefore, in order to allow sufficient flexibility, he suggested that there be a time limit of 90 days unless the parties should agree otherwise.

Mr. BROCHES (Chairman) noted that the question of interpretation did not by itself entitle a party not to carry out an award. Only the bringing of proceedings could conceivably stay enforcement or execution. What he had in mind was that if the dispute had been on the interpretation of a long-term contract, and if the award had not provided for payment of a sum of money but for a party to provide certain facilities or to abstain from certain action, then at any time while the award was being executed or being complied with a question could arise on interpretation. That was the reason why it was difficult to provide a time limit.

Mr. O'DONOVAN (Australia) thought it would be desirable to include in this Article a provision to the effect that an interpretation once given shall have effect as part of the award itself. He noted also that as presently drawn this Article provided that only the parties to the dispute could seek an interpretation of the award. However, it was conceivable that a Contracting State which was asked to execute an award could have difficulty in interpreting it. He wondered whether consideration had been given to the possibility of enabling that State to seek an interpretation of the award.

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

² Cf. Haitian proposal, Doc. 60

Mr. BROCHES (Chairman) thought that in most cases one of the parties would be involved and that therefore that effect could probably be achieved indirectly by means of the arbitrating procedure.

Mr. LOKUR (India) inquired whether the second sentence of paragraph (2) meant that the agreement referred to therein had to be made when the first Tribunal was constituted.

Mr. BROCHES (Chairman) stated that the intention was to say that the new Tribunal would be constituted in the same manner as the parties contemplated for the first Tribunal.

Mr. LOKUR (India) thought that in certain cases it would not be possible to refer the matter to the Tribunal which rendered the award, and in that case the parties might wish to enter into an agreement for constituting a new Tribunal.

Mr. BROCHES (Chairman) stated that it was thought that the same provisions that governed the constitution of the earlier Tribunal would be applied in this case, because there was presumably no reason why that would not be satisfactory again. To the extent that there was no such agreement or to the extent that the agreement would be incomplete, then the supplementary provisions of the Convention would apply. The parties could also change an earlier agreement if they wished to.

Mr. LOKUR (India) thought that this provision was still not clear with respect to the case where the first Tribunal was not in a position to function, for example if the arbitrators were not available.

Mr. BROCHES (Chairman) stated that if the persons were no longer available, then the residual provisions of the Convention would apply, unless the parties made a new agreement.

Mr. BERTRAM (Germany) thought that a period of three months would be too short, and pointed out as an example that the rules of procedure of the European Court of Human Rights provided for a delay of three years.

Mr. LOPEZ (Panama) suggested that the Tribunal should be given the power to interpret or correct the award on its own initiative. For example, the Tribunal might incur any arithmetical error, and should be able to correct its mistake.

Mr. ORTIZ (Peru) inquired whether the terms suggested meant that the execution of the award would be suspended during their time.

Mr. BROCHES (Chairman) stated that the Tribunal would have discretion to decide this question under the first sentence of paragraph (2).

Mr. da CUNHA (Brazil) inquired whether it would be truly impossible to entrust that task to the Tribunal itself.

Mr. BROCHES (Chairman) stated that it could happen that members of the Tribunal were unavailable. He stated that there were two proposals, one for a fixed term of one year, and the other for a term of three months for a unilateral request and no term for a bilateral request.

Mr. LOKUR (India) stated that he was not in favor of any time limit and requested that a vote be taken as to whether or not there should be a time limit.

Mr. GUARINO (Italy) suggested that the term should run from the time of the award.

Mr. BROCHES (Chairman) requested a show of hands on whether there should be any time limit. Twenty-four delegations were against providing for a time limit and thirteen in favor. He then referred to the proposal to add to this Article a statement to the effect that the interpretation given to the award by the Tribunal shall have effect as part of the original award. The majority of the delegates indicated its opposition to this proposal. Concerning the point raised by Mr. LOPEZ, of a mistake in the award which the Tribunal could correct ex officio, he suggested that it might be dealt with in the regulations rather than in the Convention. Mr. LOPEZ agreed.

Mr. LOKUR (India) referred to the last sentence of paragraph (2) and enquired how the Tribunal would enforce a stay. He suggested that it be said that a Tribunal may "recommend" the stay of enforcement of the award.

Mr. BROCHES (Chairman) stated that the enforcement was not effected by the Tribunal but through court procedures. If there was voluntary compliance with the award such a stay meant that the party could interrupt its compliance. Where compliance was sought to be enforced through court action, he thought that a stay by the Tribunal would operate as a valid ground for the party which was supposed to comply to suspend its compliance. The order of the Tribunal would be an adequate defense against a court order.

Mr. LARA (Costa Rica) suggested that there should be provided a term for the Tribunal to decide this matter, because it would not be convenient for the parties to have a long period of uncertainty as to how they were going to comply with the award.

Mr. BROCHES (Chairman) requested a show of hands on the suggestion made by Mr. LOKUR to add the word "recommend" to the last sentence of paragraph (2). Nine delegations were in favor and twenty-seven against. He then requested a show of hands on Mr. LARA's proposal to fix a time limit within which the Tribunal is to give its decision on the question of interpretation, which indicated that the majority of the delegates were opposed.

Article 54

Mr. BROCHES (Chairman) explained that to say in paragraph (2) that the application must be made within three months after the discovery and in any case within three years, meant a double test. If the discovery takes place after three years, no application would be possible since three years would be the outside limit. The second limit was the term of three months after discovery of the fact. He also stated that the term "the date on which the award was rendered" should be related to the Article dealing with the award, where there was now stated on which date the award is deemed to have been rendered.

Mr. LOKUR (India) stated that this Article provided for revision when there was discovery of a new fact. He thought that there should be provision for revision also in the case where the award was manifestly erroneous in law.

Mr. BROCHES (Chairman) thought that the question of erroneous appli-

cation of the law could be properly dealt with, if at all, under Article 55.

Mr. O'DONOVAN (Australia) inquired whether the proviso in paragraph (1) stating "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" imposed a duty on the Secretary-General.

Mr. BROCHES (Chairman) stated that the issues referred to in that proviso would be decided by the Arbitral Tribunal.

Mr. FUNES (El Salvador) suggested that there might be added to this Article an additional reason for revision of the award, namely, the cases where the Tribunal did not adjudicate on certain matters submitted for its consideration. In Article 55 there was provision for the case where there was excess of jurisdiction, but there was no provision for a "defect" of jurisdiction. In the last cases he would not consider appropriate a recourse for annulment, since it would not be known what the Tribunal would decide with respect to that specific subject. He felt that the logical thing would be to request that the Tribunal itself solve those matters and complete its award.

Mr. BROCHES (Chairman) agreed that this issue should not be dealt with under annulment. However, he did not think it was quite in the same class as a revision, and if it should be necessary to deal with this, it might be done in a separate Article.

Mr. FUNES (El Salvador) suggested that an Article could be added stating: "Revision of the award will also be possible when the Arbitral Tribunal did not decide some of the matters submitted for its consideration, in which case the records will be returned to the Tribunal so that it will pronounce itself with respect to the above-mentioned matters, proceeding in the same manner indicated in the previous Article. This request for revision shall be submitted within the term of x months, starting from the date of the rendering of the award."

Mr. BURROWS (United Kingdom) stated that it was possible that the Tribunal would refuse to adjudicate upon an issue submitted to it because the issue did not fall within the jurisdiction of the Centre as defined by Article 26. In that case it would be wrong to adopt the procedure now proposed.

Mr. BROCHES (Chairman) stated that it was probably a question of wording, but that Mr. FUNES' proposal was to cover the case where the Tribunal did not deal with the matter and not the cases where the Tribunal dealt with the matter and decided it was not within its competence.

Mr. BIGAY (Central African Republic) thought that the problem raised by an award deciding infra petita must be solved in the same way as that raised by an award ultra petita. Annulment is remedy provided for this case by Article 55 (1) (b).

Mr. BERTRAM (Germany) doubted whether this problem could be solved within the general concept of the Convention. There was first the question of how such failure could be ascertained, whether by examining the motivations of the award or by considering the operative clauses of the award. It seemed to him that in practice this would amount to a sort of appeal.

Mr. QUILL (New Zealand) agreed with Mr. BERTRAM, and thought that the possibility of a case where the Tribunal might neglect to pronounce

itself on some provision was so remote as not to warrant giving any further attention to it.

Mr. BIGAY (Central African Republic) inquired whether it could not be argued that this event would be a serious departure from a fundamental rule of procedure, covered by Article 55(1)(d).

Mr. BROCHES (Chairman) stated that there could be some doubt on this, which could be removed by requiring the Tribunal to pass on all the points submitted to it. A failure to do so would then become a violation of a fundamental rule of procedure.

Mr. van SANTEN (Netherlands) agreed with the suggestion of the Chairman and thought that it could be done in Article 51, stating clearly what exactly the award should comprise. He did not like to have a special provision for revision on this matter, because it would encourage claims by the party which is unhappy about the award.

The meeting then recessed for a short period

Mr. BROCHES (Chairman) suggested that Article 51 be amended to provide for a duty by the Tribunal to rule on every issue submitted to it and that a consequent change be made in Article 55 which would state that the failure to comply with this duty could be a ground for annulment. The exact wording would be left to the Drafting Sub-Committee. Whereupon a vote was taken on the question whether arbitrators should be required to rule on every issue presented, with 32 delegates voting in the affirmative and none against. The meeting then voted on the question whether a failure to comply with this duty would give the parties the right to seek annulment and the motion was defeated by 8 to 6. Thirty delegations, however, then voted in favor of there being some kind of remedy where the Tribunal has failed to discharge its duty. A majority of 32 to none then indicated that the remedy should be in the nature of a supplemental review which was not identical with the revision of the award, and the Chairman announced that the Secretariat would try and prepare a draft provision giving effect to the sense of the meeting. The Chairman then submitted the Brazilian proposal² which would couch the "stay enforcement" provisions found in Articles 53, 54 and 55 in mandatory rather than discretionary terms. Whereupon a vote was taken and the Brazilian proposal defeated by a majority of 20 to 7.

Article 55

Mr. MANTZOULINOS (Greece) suggested that the discussion on this Article be postponed until the question of enforcement under Article 57 was taken up. He thought that as an alternative to the annulment procedure one could provide that these objections be taken up before the Courts through which enforcement of the award was sought.

Mr. BROCHES (Chairman) stated that he did not share this view. He thought the mechanism of the Convention would be a more appropriate vehicle to employ. Enforcement would not always be effected through national courts. Often they would be respected voluntarily and there was the question of State immunities to consider.

Mr. HELLNERS (Sweden) said that the Working Group in discussing Article 57 had already devoted some attention to the problem raised by Mr. MANTZOULINOS and that its report contained in Document SID/LC/50³ has already taken some of his points into account. In his recollection the

² Cf. Summary Proceedings of the Legal Committee Meeting, December 8, Doc. 84

³ For its report see Doc. 104

⁴ See Doc. 85

⁵ Doc. 115

only major difference between the new Article 57 and Mr. MANTZOULINOS' proposal was that Mr. MANTZOULINOS thought the grounds listed for annulment could be broadened and this he thought could conveniently be done within the scope of Article 55.

Mr. BROCHES (Chairman) thought there were two distinct questions. Mr. MANTZOULINOS' proposal involved the principle of restricting attacks against awards to the procedure of enforcement through the national courts. The further question was whether the grounds enumerated for annulment in Article 55 should be enlarged or modified. He would, therefore, propose a vote on the first question independently from the other. Whereupon a vote was taken on the question of maintaining the system embodied in the draft, which was carried with no opposition. He then said the question of the grounds for annulment were now to be inquired into bearing in mind the views expressed with respect to the possibility of Article 55(1)(d) having some relation to cases where the award failed to rule on all the issues raised.

Mr. LOKUR (India) suggested to add the words "or any part of it" after the word "award" in the first line of paragraph (1) since there might be cases where it would not be necessary to annul the entire award.

Mr. BROCHES (Chairman) pointed out that the expression "or any part thereof" was mentioned in paragraph (2) and that he would not object to Mr. LOKUR's suggestion.

Mr. NEDI (Ethiopia) asked for clarification of the expression "not properly constituted" in sub-paragraph (a) and wondered whether it was not contradictory to provide in the Convention that the Tribunal would be sole judge of its competence while at the same time providing for excess of power as a ground for annulment.

Mr. PINTO (Deputy-Secretary) said that the expression "not properly constituted" was intended to cover a variety of situations such as, for instance, absence of agreement or invalid agreement between the parties, the fact that the investor was not a national of a Contracting State, that a member of the Tribunal was not entitled to be an arbitrator, etc.

Mr. BROCHES (Chairman) said that the expression "manifestly exceeded its powers" concerned the cases referred to earlier as *ultra petita*, namely, where the Tribunal would have gone beyond the scope of agreement of the parties or would have decided points which had not been submitted to it or had been improperly submitted to it. He added that the *ad hoc* Committee would limit itself to cases of manifest excess of those powers.

Mr. LOPEZ (Panama) thought it desirable that in some cases requests for annulment be made before the final award has been rendered. He thought, however, that this point could probably be dealt with in the Rules of Procedure.⁷

Mr. BROCHES (Chairman) agreed that such cases might occur for instance on rulings on a preliminary objection or exception concerning the constitution of the Tribunal or in case of a departure from a fundamental rule of procedure. He considered that Mr. LOPEZ's suggestion would amount to provide for the annulment of "the award or of any interim decision made by the Tribunal". He agreed however that this problem could be dealt with in the Rules.

⁷ Regulations and Rules of the Centre (ICSID/4)

Mr. AGORO (Nigeria) suggested that sub-paragraph (e) be deleted.

Mr. PINTO (Deputy-Secretary) said that in the commentary attached to the "Model Rules of Procedure" of 1955 drafted by the International Law Commission, failure to state the reasons for the award was considered as a serious departure from the fundamental rules of procedure.

Mr. DODOO (Ghana) said that objections concerning the proper constitution of the Tribunal should be raised as preliminary objections and that the parties should not be allowed to wait until the final award before raising the question. He also suggested that the words "or otherwise" be added after the word "nullity" in paragraph (2).

Mr. TSAI (China) suggested that the word "manifestly" be deleted in sub-paragraph (b). In sub-paragraph (c) corruption should be limited to cases where corruption has been evidenced by a judgment of a court having jurisdiction over the particular member of the Tribunal. Otherwise, the accusation of corruption would be made too easy, which would be undesirable. With respect to sub-paragraph (e), he wondered whether the sub-paragraph meant that the Tribunal should include in its "reasons" a statement of the facts found and the law applied. He further assumed that failure to apply the proper law would be considered as an excess of power, which was made a ground of annulment of the award under sub-paragraph (b).

Mr. BROCHES (Chairman) said that failure to apply the right law would constitute an excess of power if the parties had instructed the Tribunal to apply a particular law. With respect to the meaning of the word "reasons", he ascertained that no delegate objected to the understanding recorded earlier, that both fact and law were implied.

Mr. BERTRAM (Germany) opposed the proposal to omit the word "manifestly" in (b). He was also against the proposal to introduce into the introductory clause of paragraph (1) the possibility of a partial attack against the award because most of the grounds listed in the Article would jeopardize the entire award. In his mind, the reference to annulling a part of the award in paragraph (2) was sufficient.

Mr. GONZALEZ (Spain) thought the drafting of (b) in the Spanish equivalent unprecise and would prefer it to be couched in terms of ultra petita only. (c) also gave him trouble and he would like to see it amended to read "if there is reasonable proof that corruption might exist". He also had some doubts as to the Spanish equivalent of "fundamental" appearing in (d). He would like to see a stronger adjective used.

Mr. LOKUR (India) did not disagree that some of the grounds for annulment would jeopardize the entire award and could not apply to only part of it, but thought that for certain other grounds such a distinction could perhaps be made. With regard to (a) he thought it should not be necessary for a party to await until the final award was rendered but that an opportunity to refer such an objection to an ad hoc Committee should be given at any stage of the proceedings. He also thought that (a) should be enlarged to embrace objections based on the grounds mentioned in Article 44(2). With regard to (b) he would omit the word "manifestly", the meaning of which he failed to see. With respect to (c) he would replace the word "corruption" with the word "misconduct". Finally, he would add a provision making annulment possible on the grounds of an error in the application of the proper law by the Tribunal.

Mr. HETH (Israel) suggested that an objection to the constitution of the Tribunal ought to be raised always as a preliminary objection. Only where the facts upon which the opposition rested were unknown to the objecting party at the early stages of the proceedings should there be a possibility of attacking the award on the ground that the Tribunal was not properly constituted, as provided for in Article 55(1) (e).

Mr. van SANTEN (Netherlands) was a little disturbed by the various suggestions directed at relaxing the terms of annulment. In his opinion, they should be confined to very rare cases because in the ordinary course of events the award should be treated as final. For the same reason he was against opening the possibility of applying for annulment for only part of an award. He was also against any suggestion which would put (a) into operation at any stage prior to the award because that in effect would not amount to an annulment but to an appeal. He would even go to the length of saying that (a) was entirely unnecessary.

Mr. BURROWS (United Kingdom) wished to associate himself with the remarks made by the previous delegate. He thought it would be unfortunate to open endless possibilities for one party to frustrate or delay the proceedings.

Mr. BROCHES (Chairman) then put the various suggestions to a vote. The proposal to permit a request for annulment of only a part of the award was defeated by a majority of 22 to 6. The proposal to delete the word "manifestly" from (b) was defeated by 23 to 11. The proposal to replace the word "corruption" by the word "misconduct" in (c) was defeated by 23 to 3.

Mr. CHEVRIER (France) proposed the addition of seeking annulment on the grounds that a member of the Tribunal lacked the qualities listed under Article 14(1).

Mr. BROCHES (Chairman) then requested a vote on substituting for the language in (c) the following language: "That there exist reasonable grounds to believe that there was corruption" which would soften the present text. This motion was defeated by 20 to 6. A Chinese proposal which would only bring (c) into operation if there had been a conviction of an arbitrator by a Court was defeated by 20 to 4.

Mr. CHEVRIER (France) explained that when he made reference to Article 14 he meant specifically a lack of "integrity" or "a defect in moral character" which could be in lieu of "corruption" and would refer to events occurring after the person in question had been appointed to serve as a member of a tribunal.

Mrs. VILLOPATTNER (Austria) thought the French proposal was already covered by (a).

Mr. BROCHES (Chairman) then put the French proposal to a vote which was defeated by 16 to 4.

The meeting recessed at 1:40 p.m.

The meeting reconvened at 3:02 p.m.

Mr. BROCHES (Chairman) requested the sense of the meeting with respect to the proposal that (a) of Article 55(1) be deleted entirely because the point would undoubtedly have been raised in the proceedings and there might be grounds for objecting to a double attack on the same grounds. A vote was then taken and the motion defeated by 18 to 2. A proposal that the objections covered by (a) should not be advocated for the first time in annulment proceedings but that a party should be required to state any such objection in the actual proceedings before the Tribunal had no support. The proposal that the parties be given an immediate right of redress after a tribunal had decided that it was properly constituted without having to wait for the award was defeated by a majority of 9 to 3.

Mr. LARA (Costa Rica) proposed an additional amendment to (b), namely that the Tribunal had made a decision beyond the scope of the submissions.

Mr. GONZALEZ (Spain) referred to his earlier statement which expressed a similar concern.

Mr. BROCHES (Chairman) put the proposal to a vote and, after announcing that it had been defeated, requested the Drafting Sub-Committee to consider the Spanish equivalent of the English text which seemed to give rise to these proposals. He then referred to the earlier Spanish proposal to couch (d) in a more restricted or specific terminology.

Mr. ROUHANI (Iran) indicated that sub-paragraph (d) referred to a serious departure from the fundamental rule of procedure. However, there were also fundamental rules which were not of procedure but of substance, like the rule referred to in Article 45(2). He suggested in this paragraph reference be made also to rules of substance.

Mr. BROCHES (Chairman) asked Mr. LOKUR, who had suggested the addition of a category of erroneous application of the law, whether he would regard that as being covered by the language suggested by Mr. ROUHANI. Mr. LOKUR agreed.

Mr. BROCHES (Chairman) requested a show of hands on the suggestion to make sub-paragraph (d) refer specifically to a requirement that both parties must have a fair hearing, rather than using the existing language. Eighteen delegations were against and four in favour.

Mr. van SANTEN (Netherlands) stated that he was against the suggestion which would add the words "or substance" after the word "procedure". It was still necessary to decide in Article 51 what exactly the Tribunal would rule about and therefore it would be better to wait until there was such a definition in Article 51. He was not in favour of adding arguments for annulment, the meaning of which was not very clear.

Mr. BROCHES (Chairman) requested a show of hands on the proposal to have as a ground for annulment a "manifestly incorrect application

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

of the law". Seventeen delegations were opposed and 8 in favour.

Mr. LOKUR (India) wondered whether the suggestion of Mr. ROUHANI could be taken care of by referring to a serious departure from the substantive or procedural rules of the Convention regarding the proceedings.

Mr. BROCHES (Chairman) thought that if reference was made to the Convention, they could not be called "rules of substance", since this might be confusing.

Mr. BERTRAM (Germany) inquired whether the word "principle" could be used instead of "rule" to make it clear that these rules should be other than the rules of procedure adopted by the Administrative Council. He thought that reference should be made only to principles of procedure.

Mr. BROCHES (Chairman) stated that by spelling "rule of procedure" without capital letters and referring to a "fundamental" rule of procedure there was a clear reference to principles.

Mr. LOPEZ (Panama) stated that the delegates from Spain and Costa Rica had made recommendations that would clearly indicate that the causes for annulment would be exceptional. Other delegates had expressed the same idea. However, the Spanish and Costa Rican proposals, which tried to clarify this point, had been voted against.

Mr. LARA (Costa Rica) stated that the discussion was about a recourse for annulment, which could not cover substantial violations. These would normally be covered by a recourse of appeal. He was in favour of approving the sub-paragraph in its present wording, with the substitution in the Spanish text of the word "violacion" for "apartamiento".

Mr. BROCHES (Chairman) requested a show of hands on whether paragraph (1) would be acceptable with only the deletion of the words "unless the parties have agreed that reasons need not be stated". Thirty-nine delegates were in favour and none against.

Mr. BROCHES (Chairman) then referred to paragraph (2) of Article 55. There had been a suggestion to add after the words "declare the nullity" the words "or otherwise". There was also a written suggestion by the United Kingdom.

Mr. BURROWS (United Kingdom) stated that their suggestion was that a further ground of ineligibility for membership of the Reviewing Committee should be possession of the same nationality as any member of the Tribunal which rendered the award. The reason was that these nullity proceedings were only for very extreme cases of serious misconduct, and it seemed right to exclude from the Reviewing Committee nationals who had been concerned in some way or another with the original award.

Mr. van SANTEN (Netherlands) proposed that the words "from the Panel" be deleted. He thought that the question of annulment was a purely legal question. The members of the Panel would not necessarily be jurists and this might make it difficult for the Chairman to choose the members of the Committee. The qualifications of the persons that would serve on these ad hoc Committees were different from the qualifications of the persons included in the Panels.

Mr. BROCHES (Chairman) did not agree with this suggestion. The Panel of Arbitrators would consist of persons in whose election their

* See Doc. 45

competence in law would be given primary consideration. He did not agree that these Panels would consist of people entirely different from the type of person that would be expected to deal with a question of annulment. If it was intended to open the possibility of an ad hoc Committee outside the Panel, the language could remain the same but the parties could be given the right to select three persons by common agreement.

Mr. LOKUR (India) stated that he also wanted to propose that the parties should have first the right to appoint a Committee of their own choice.

Mr. BROCHES (Chairman) inquired whether the parties should be given that possibility, and the majority of the delegates was opposed. He then asked whether the first sentence requiring appointment from the Panel was satisfactory and should be retained. Thirty delegations were in favour of retaining this sentence. At the suggestion of various delegates Mr. BROCHES referred the question of adding the words "or otherwise" after the words "declare the nullity" to the Drafting Sub-Committee. He then requested a show of hands on the proposal by the United Kingdom to insert after the words "member of the Tribunal which rendered the award" the words "or of the same nationality as any such member".

Mr. BROCHES (Chairman) announced that the British amendment was adopted by a majority of 23 to 4. Ascertaining there were no objections to paragraph (3), he invited comments on paragraph (4) mentioning there was a Brazilian proposal which would limit the right of objection to a period of 60 days, omitting any reference to the time limit of three years. He wondered, however, whether this proposal was not due to a misunderstanding because the provision in no way gave a concession to impromptness. There was also a Belgian comment referring to an error in the French text, but that could be referred to the Drafting Sub-Committee. The Chairman then again referred to the Brazilian proposal which he thought could be effected by a change in the Spanish text to make it absolutely clear that the provision imposed two time limits.

Mr. BERNARD (Liberia) said the provision was generally acceptable but he would like the word "must" in the first line replaced by the word "shall" and the word "right" inserted between the words "made" and "within" in the same line.

Mr. BROCHES (Chairman) referred both these suggestions to the Drafting Sub-Committee.

Mr. LOKUR (India) thought the period of sixty days too short and wished it increased to 120 days.

Mr. BROCHES (Chairman) then put this proposal to a vote, announcing that it had been adopted by a majority of 27 to 4.

Mr. LARA (Costa Rica) thought the overall time limitation of three years too extensive and wished it reduced to one year, whereupon a vote was taken on this suggestion and defeated by a majority of 17 to 10.

Mr. CONZALEZ (Spain) commented that the reference to a time period did not specify whether holidays would be taken into account in calculating the various time limits.

¹ See Doc. 85

⁴ See Doc. 45

⁶ For its report see Doc. 104

Mr. BROCHES (Chairman) said that certain provisions with respect to this matter were postulated in the Rules⁴ but that they would have to be ~~expanded~~ into greater detail.

Mrs. VILLGRATTNER (Austria) thought it might be necessary to clarify that the time limits run from the moment of discovery by the party requesting annulment and not of discovery by someone else.

Mr. BROCHES (Chairman) requested a show of hands on Mrs. VILLGRATTNER's proposal, which was rejected by the Committee.

Mr. GOUREVITCH (United States) suggested to introduce in paragraph (5) a statement to the effect that the Committee may, pending its decision, recommend a continuation of provisional measures recommended by the Tribunal.

Mr. BERTRAM (Germany) thought that such a statement would not be necessary since it is the nature of provisional measures to end after the award has been rendered.

Mr. BRINAS (Philippines) pointed out that the ad hoc committee would only examine the matter in the light of grounds for annulment.

Mr. BROCHES (Chairman) requested a show of hands on Mr. GOUREVITCH's proposal. This proposal was rejected by a majority of 14 to 4. The Committee also rejected, by a majority of 12 to 4, a proposal authorizing the Committee, pending its decision, to recommend provisional measures. No delegates supported the suggestion to authorize the Committee to revive provisional measures recommended earlier by the Tribunal. Mr. BROCHES then ascertained that there were no objections with respect to paragraph (6).

Mr. BROCHES (Chairman) then proposed to examine the report of the Working Group on political subdivisions contained in Document SID/LC/21. By way of introduction he said that he would prefer the shorter formula proposed in paragraph 4 provided the word "body" could be interpreted as including political or constituent subdivisions.

Mr. O'DONOVAN (Australia) said that in his opinion the word "body" would not include constituent subdivisions such as the States of Federations. He also thought that Central Governments might feel somewhat embarrassed to designate constituent States to the Centre for the purposes of this provision. However, he considered it desirable that such States be allowed to have resort to the Centre.

Mr. LOKUR (India) said that he considered the illustrative words "such as a State, Republic or Province" desirable since it was not the intention to include constituent subdivisions of a lower level.

Mr. BOMANI (Tanzania) said that he had proposed the word "body", but he now agreed with the interpretation given by Mr. O'DONOVAN. He added that the illustration "such as State . . ." would be rather confusing and was in effect unnecessary. On the other hand, he agreed that the words "designated in that behalf" should be maintained.

Mr. LOKUR (India) pointed out that the expression "such as a State, Republic or Province" had been used in other international conventions.

Mr. LARA (Costa Rica) said that he preferred the original text of Article 26 of the Draft Convention.

⁴ Regulations and Rules of the Centre (ICSID/4)

⁵ Doc. 105; cf. for a general discussion, Summary Proceedings of the Legal Committee Meetings, November 25 and 27, Docs 57 and 58 respectively; cf. also Docs. 97 and 98 for proposals by the U.S. and Brazil

Mr. GOUREVITCH (United States) said that under certain circumstances agreements could be concluded with municipalities which would in effect be a subdivision of a subdivision. He therefore did not consider it desirable to qualify or illustrate the expression "constituent subdivisions".

Mr. NEDI (Ethiopia) asked whether the expression "that had been designated" referred to both constituent subdivisions and to agencies.

Mr. O'DONOVAN (Australia) said that in his opinion the expression was intended to qualify agencies only.

Mr. BOMANI (Tanzania) disagreed and said that in his opinion the expression also covered constituent subdivisions and that this was the reason why he did not think it necessary to further illustrate the expression "constituent subdivisions".

Mr. GOUREVITCH (United States) thought that the designation by Central Governments of a list of constituent subdivisions such as States might in some cases not be practical.

Mr. BURROWS (United Kingdom) referred to the written comments of the United Kingdom on this point. He considered it most desirable that investors have the possibility of knowing the political subdivisions or agencies which may appear before the Centre.

Mr. BROCHES (Chairman) agreed but did not think that a complete list should necessarily be furnished in advance. After having pointed out that the French and Spanish versions of Document SID/LC/21 contained some translation errors, he requested a show of hands on the problems discussed. By a majority of 16 to 4 the Committee agreed that the expression "that had been designated" should refer to both constituent subdivisions and agencies. By a majority of 8 to 4 the Committee considered that the illustrative expression "such as a State, Republic or Province" should not be retained.

Mr. GOUREVITCH (United States) asked whether the words "constituent subdivisions" would refer only to subdivisions such as constituent States or would also include subdivisions of a lower level.

Mr. BROCHES (Chairman) said that the matter was not absolutely clear but he did not think that difficulties would arise in view of the fact that all subdivisions would have to be designated by the Contracting States. He then added that the question of finding equivalent terms for constituent subdivisions in the French and English texts would be dealt with by the Drafting Sub-Committee.

Mr. LOKUR (India) asked for clarification of the expression "designated in that behalf".

Mr. BROCHES (Chairman) thought that this expression meant "for the purpose of this Convention" and said that the problem should be examined by the Drafting Sub-Committee.

Mr. DODOO (Ghana) asked whether the term "agency" meant that such agency should be acting for or on behalf of the Contracting State.

Mr. BROCHES (Chairman) thought that this was the case and added that in his opinion a State would not designate an agency unless that agency would act on its behalf.

* See Doc. 45

* For its report see Doc. 112

Mr. O'DONOVAN (Australia) assumed that this would not apply to constituent subdivisions and that in this case, the party to the dispute would be the constituent subdivision and not the Contracting State.

Mr. BROCHES (Chairman) agreed but added that the Contracting State would assume direct obligations under the Convention, such as those concerning enforcement of awards. He thought that these questions should be solved by the Contracting States themselves.

Mr. BURROWS (United Kingdom) asked whether the designations should be made for a particular purpose or in general.

Mr. BROCHES (Chairman) said that this should be left entirely to the Contracting States concerned.

Mr. BERTRAM (Germany) referred to the question of enforcement of awards and wondered whether it would be desirable to include in the rules of procedure provisions with respect to cases where constituent subdivisions or agencies are parties to a dispute.

Mr. BROCHES (Chairman) said that this problem should be solved by the Contracting States concerned and pointed out that the purpose of the provision presently under discussion was merely to prevent the exclusion of bodies which are of a lower order than Contracting States, from appearing before the Centre.

Mr. GOUREVITCH (United States) asked whether the approval of the Contracting States which was provided for in paragraph (2) of Article 26 had been deleted. In his opinion, this approval would still be necessary since a designation would not necessarily imply approval in specific cases.

Mr. HELLNERS (Sweden) asked whether the term agency included governmental organs, such as for instance the Swedish Board of Commerce.

Mr. BROCHES (Chairman) replied that if such organs were acting in their own name they would probably be considered as agencies.

Mr. BOMANI (Tanzania) stated that in some countries it would be unconstitutional to compel the agencies or political subdivisions to seek the approval of the State. This is why he maintained that it was unnecessary to require that approval in the Convention. This should be an internal affair in each State.

Mr. BROCHES (Chairman) stated that this would place a burden on the investor, who would have to inquire whether an agency with which it wanted to deal had the required approvals. He then requested a show of hands on whether approval should be required in the Convention as provided in the original text. Twenty-seven delegations were in favor.

Mrs. VILLGRATTNER (Austria) stated that in her country if a political subdivision was empowered to do something it would be unconstitutional if the approval of the State would be required. Therefore, she suggested that it could be said "if a State finds it necessary to have an approval for agencies or political subdivisions, then this approval will be required."

Mr. NEDI (Ethiopia) suggested that the necessity of consent be qualified by making a provision also for constitutional procedures within each State.

Mr. BROCHES (Chairman) thought that in view of the last vote the approval should be required except where the Contracting State has indicated that under its constitution the approval is either not required or would not be proper.

Mr. GOUREVITCH (United States) inquired whether in a case where the approval of the Contracting State was for some reason legally not possible, that Contracting State would nevertheless be bound by an international obligation created by the award.

Mr. BROCHES (Chairman) stated that it would be bound under the Convention to carry out the award.

Mr. HETH (Israel) stated that this would be a Convention between States. It seemed inconceivable that a State would not designate a constitutional subdivision if such subdivision was entitled to enter into contracts; but unless such designation was made he could not see how a party that was not a Contracting State could be included in the jurisdiction.

Mr. BROCHES (Chairman) stated that the delegates were discussing two different things. One was designation, without which the body concerned was completely outside the scope of this Convention. Then they were talking about consent, which in some countries would be improper.

Mr. TSAI (China) stated that in Article 55 the annulment of the award could be requested only by the parties. Under Article 26(2) if a constituent subdivision gave consent without the approval of the State which was required under its own law, the Contracting State might also want to request the annulment of the award. Therefore, he suggested that this possibility be included in Article 55.

Mr. BROCHES (Chairman) stated he would be opposed to that since it would be really unnecessary. If an agency was acting on behalf of the State, then there was no distinction any more between the agency and the State. If it was a case where it was not acting on behalf of the State in a legal sense, where a State was not really a party, then the consent requirement would apply. If a State did not want to run the risk of consent by a political subdivision, it had always the possibility of not designating that political subdivision at all.

Mr. LOKUR (India) stated that agencies of the State should have to obtain the State's approval before consenting.

Mr. GUARINO (Italy) stated that in Italy there were many subdivisions that had legislative powers and could function directly by their own means and through their own agencies, although they did not have international powers. In that case it would be unconstitutional to require that the consent of the Federal State be given, since the same rules applied to the State should be applied to those political subdivisions. He suggested then that in these cases there be required the consent of the region or of the political subdivision.

Mr. BROCHES (Chairman) stated that several problems had been presented. In the first place, the proposition that none of these bodies should have the capacity to be a party to proceedings before the Centre unless they have been designated. Secondly, there was the question of approval. And thirdly, the question whether agencies of political subdivisions should be included as suggested by Mr. GUARINO. He requested a show of hands on the question whether the Contracting State must designate a body of a lower order before

the latter can be a party to proceedings under the Convention. Twenty-four delegations were in favor and two against.

Mr. PEREZ (Ecuador) thought that if political subdivisions were to operate in the field of international law they would need some delegation or power from the State, which is the person subject to international law. He thought that any such political subdivision would have to prove its power to refer to arbitration at the moment it was contracting, it would have to show that it had been authorized by the State. And the State would be free to give or refuse its authorization. He felt that this was an internal problem.

Mr. BROCHES (Chairman) noted that some delegations had stated that their State had neither the power to approve nor to disapprove, and that therefore this could be solved by requiring approval except where the Contracting State notifies the Centre that no approval is required. He requested a show of hands on this proposal, which indicated that thirty-four delegates were in favor and none against.

Mr. BROCHES (Chairman) then referred to the kinds of bodies that should be covered by the Convention. There were terminological difficulties in how to describe uniformly what were referred to as constituent subdivisions, territorial subdivisions, political subdivisions and agencies. Mr. GUARDINO had proposed to include as another category the agencies of political subdivisions. It was true that in some cases these agencies of political subdivisions would have certain responsibilities in the field of investments but it would be impossible to cover all the cases. An exception was already being made, but for the sake of simplicity it should not be extended.

Mr. TSAI (China) inquired who would decide the question of whether there was approval of the State in a dispute between the constituent subdivision and the private investor, where the private investor claimed there had been a valid approval. The Contracting State would have no way of expressing his objection in the proceedings since he would not be a party thereto.

Mr. BROCHES (Chairman) thought that the question implied a fear of collusion between the political subdivision and the investor, and against that there would be no redress. The dispute as to whether there existed a valid approval would be solved by the Tribunal like any other dispute. If the Contracting State did not want to be exposed to that risk, it should not designate anyone.

Mr. BROCHES (Chairman) then stated that the Drafting Sub-Committee would meet that night at 7:30 p.m. and that the next day the Legal Committee would discuss the question of nationality. There would also be a special session on enforcement. The Committee would discuss the questions of place of proceedings, cost of proceedings and the disqualification of conciliators and arbitrators.

The meeting adjourned at 5:34 p.m.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Sixth Interim Report

CHAPTER IV - ARBITRATION

The Drafting Sub-Committee transmits herewith its Sixth Interim Report. This document reproduces the text previously issued in the Committee's Third Interim Report (SID/LC/58) with the addition of the text of Articles 48 and 52(2). Articles 56, 57, and 58 are in preparation.

CHAPTER IV

ARBITRATION

Section 1

Request for Arbitration

Article 40

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect to the Secretary-General in writing, who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Tribunal

Article 41

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request in accordance with the provisions of 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 do not agree upon the number of arbitrators and the method 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.

Article 42

If the Tribunal shall not have been constituted within three months after notice of registration of the request has been dispatched by the Secretary-General in accordance with the provisions of paragraph (3) of Article 40, or such other period as the parties may agree, the Chairman shall, at the request of either party, and, after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed.

Article 43

(1) The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this paragraph shall not apply if the parties, by agreement, appoint one or more nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

(2) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments in accordance with the provisions of Article 42.

(3) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualifications stated in paragraph (1) of Article 14.

Section 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 object-

ion by a party to the dispute that that dispute is not one in respect of which arbitration proceedings can be instituted in accordance with the provisions of this Convention, or is not within the scope of its consent to such proceedings. Such objection shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 45

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) The provisions of paragraph (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

Article 46

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 47

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, 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 this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 48

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 49

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any 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 Centre and within the scope of the consent of the parties.

Article 50

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Section 4

The Award

Article 51

- (1) The Tribunal shall decide 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 the members of the Tribunal who voted for it.
- (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.
- (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

Article 52

- (1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.
- (2) The Tribunal, upon the request of a party made within 45 days after the date on which the award was rendered, may, after notice to the other party, decide any question which it had omitted to decide in the award, in which case the periods of time provided for under paragraph 2 of Article 54 and paragraph 2 of Article 55 shall run from the date on which such decision is rendered, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award.

Section 5

Interpretation, Revision and Annulment of the Award

Article 53

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request 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 provisions of paragraph (2) of Article 41 and Articles 42 and 43. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 54

(1) Either party may request revision of an award by an application in writing addressed to the Secretary-General on the ground of 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 shall be made within three months after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request 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 provisions of paragraph (2) of Article 41 and Articles 42 and 43. The Tribunal may, if it considers that the circumstances so require, stay the enforcement of the award pending its decision.

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 Tribunal 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) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, 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. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 44-48, 51, 52, 56 and 57 shall apply mutatis mutandis to proceedings before the Committee.

(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 accordance with the provisions of paragraph (2) of Article 41 and Articles 42 and 43.

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SID/LC/21 (November 30, 1964)

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP III

Chairman: Mr. Wilhelm Bertram (Germany)

Interim Report on Parenthetical Clause in Article 26(1)

1. At the request of the Legal Committee the definition of "legal dispute" and the parenthetical clause in Article 26(1) was considered on November 28th 1964 by a Working Group consisting of Mr. Wilhelm Bertram (Germany) (Chairman), Messrs. Andre (Belgium), Bigay (Central African Republic), Bomani (Tanzania), Gourevitch (U.S.), Kpognon (Dahomey), Lokur (India), Nedi (Ethiopia),

O'Donovan (Australia), Ouma (Uganda), Quill (New Zealand), Sand (Norway), van Santen (Netherlands) and Mrs. Villgrattner (Austria).

2. The majority of members of the Working Group felt that, while it would have been preferable to discuss the definition of "legal dispute" as well as the parenthetical clause in Article 26(1) after the broader question of the jurisdiction of the Center had been determined, the parenthetical clause might be considered separately and that a preliminary discussion of "(or one of its political subdivisions or agencies)" would be a useful preparatory measure.

3. It was agreed that the clause now in parenthesis was inadequate and should be redrafted to cover as wide a range of entities as possible using terminology which could be universally understood. In this connection, Mr. Kpognon (Dahomey) suggested that, as far as the French text was concerned, words such as "personne morale de droit public" would achieve the desired purpose. Mr. O'Donovan (Australia) supported by Mr. Lokur (India) suggested that the parenthetical clause should read:

"(or a constituent subdivision, such as a State, Republic or Province, of a Contracting State, or any agency of a Contracting State that had been designated to the Center by that Contracting State)", .

and that, where the designated agency was abolished, the Contracting State would succeed to its obligations.

4. Mr. Bomani (Tanzania) proposed an even broader parenthetical clause as part of the following revised text of Article 26 (1):

"The jurisdiction of the Center shall extend to disputes between a Contracting State (or any body or bodies designated in that behalf by that Contracting State) and a national of another Contracting State which may arise out of investments, provided that the parties shall have by agreement consented to submit such disputes to it."

5. The opinion of the Working Group was divided on the question whether the parenthetical clause should specify that an entity covered possesses juridical personality distinct from that of the Contracting State.

6. The Working Group discussed whether, by analogy with the provisions of Article 29, there should be a system in the Convention whereby each Contracting State would notify to the Center a list of the entities permitted to accept the jurisdiction of the Center. No final agreement was reached on this point.

7. Some delegates thought that the requirement of the Contracting States' approval of consent to jurisdiction given by "entities" was unnecessary as this matter would better be left to the domestic legislation of each State.

8. The Chairman decided that a further meeting of the Working Group would be necessary in order to complete its task.

The Legal Committee convened at 10:34 a.m.

Mr. BROCHES (Chairman) stated that it was expected that the delegates would submit before their departure any comments on the provisional summary records issued through the previous day. Concerning the records for Thursday and Friday comments would be received until the first of January. With respect to the proceedings of that day, it was the wish of some delegations that some restrictions be put to the discussion. There was a role as to the submission of amendments in writing. And the speakers were asked to make reference to specific amendments or specific questions, and only add explanations if necessary.

The first item of business was the definition of "national of another Contracting State"; on which there were two reports of the Working Group II, Documents SID/LC/20² and SID/LC/38³ and an amendment submitted as SID/LC/53⁴ by Mr. TSAI. The question of national of another Contracting State had been discussed in two parts, one under the heading of natural persons and the other under the heading of juridical persons. Concerning natural persons the report SID/LC/38 contained in paragraph (2) a proposal on which there was consensus in the Working Group. This Working Group had expressed its unwillingness to deal in the Convention with the problem of involuntary acquisitions of nationality, feeling that it would be up to the Tribunals concerned to decide whether forced nationality would have to be taken into account or could be disregarded. Then there was the additional language suggested by Mr. TSAI in SID/LC/53. He requested a show of hands on the Working Group's proposed wording including the addition proposed by Mr. TSAI. Two delegations were in favor and 7 opposed. He then requested a show of hands on the provision as stated in paragraph (2) of SID/LC/38. Twenty one delegations were in favor and none opposed.

Passing to the question of juridical persons referred to in Article 30(iii)(b), Mr. BROCHES stated that the Working Group had not reached a consensus. There were five proposals that had been referred to the Legal Committee and were listed in paragraph (4) of Document SID/LC/38.

Mr. GOUREVITCH (United States) stated that one of the amendments referred to had been introduced by the United States delegation, and that in the interests of furthering the progress of the meeting they would be willing to withdraw their proposal provided that the present text was retained.

Mr. QUILL (New Zealand) inquired whether the nationality of the juridical person would be determined at the time at which the investment contract was entered into or the time when the investment dispute had arisen.

Mr. BROCHES (Chairman) stated that concerning juridical persons the only time relevant was the time when the parties consented to the jurisdiction of the Centre. He then requested a show of hands on the proposal that the juridical persons that do not have the nationality of any Contracting State should be excluded in paragraph (b). Twenty five delegations were in favor of excluding that type of juridical person and two were against.

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43.

² Cf. for a general discussion, Summary Proceedings of the Legal Committee Meeting, November 27, Doc. 58.

³ Doc. 108.

⁴ Final Report of Working Group II, Doc. 107; cf. Docs. 108 through 110 868

⁵ Doc. 111.

Thereafter, the restrictive view that would limit access to the Centre to juridical persons which are nationals of a Contracting State and would prevent such access to juridical persons which are nationals of the host State even if the latter consented, was submitted to vote. Two delegations were in favor of this view and 10 were opposed. Mr. BROCHES stated that then it was necessary to express the cases where juridical persons having the nationality of the host State would be permitted to appear before the Centre. The existing text stated "and any juridical person which the parties have agreed shall be treated as a 'national of another Contracting State'", to which there could be added as a matter of drafting the words "for the purposes of this Convention". And there was an alternative text expressed in paragraph (4)(s) of Document SID/LC/28.

Mr. van SANTEN (Netherlands) thought that the delegate who had proposed making a reference to incorporation and seat in the first part of paragraph (s) would not object to eliminate it, since it had been included to facilitate its acceptance by certain delegations.

Mr. BROCHES (Chairman) stated that then the alternative would be to state in the last part of Article 30(iii)(b) "and any juridical person which then possessed the nationality of the State party to the dispute, but which the parties have agreed shall be treated as a 'national of another Contracting State' for the purposes of this Convention".

Mr. GOUREVITCH (United States) suggested that instead of saying "which then possessed the nationality of the State party to the dispute" it could be said "which possesses the nationality of a Contracting State".

Mr. BROCHES (Chairman) stated that it would be necessary to refer to the past tense and suggested that "possessed" be used instead of "possesses".

Mr. TSAI (China) inquired what was the reason for a differential treatment between a natural person and a juridical person.

Mr. BROCHES (Chairman) stated that in the case of natural persons it had been decided that the possibility of a simultaneous possession of the nationality of the host State should under all circumstances be excluded. The double test of time of consent and time of bringing up proceedings was based on the fact that physical persons may change their nationality. In the case of juridical persons a change of nationality in that sense was most unlikely. In fact, a company incorporated under the laws of one country could not normally, without going through a dissolution proceedings, become a company incorporated in another country.

Mr. ORTIZ (Peru) suggested that the matter under discussion should not be left to the consent of the parties, and that nationality should be defined only in the way indicated in the first part of paragraph (b).

Mr. BROCHES (Chairman) stated that there had been a vote on the proposal to eliminate the second part of paragraph (b), and that it had been rejected.

Mr. QUILL (New Zealand) thought that the proposal made earlier by the Chairman focussed attention on the fact that it was the national of the Contracting State with whom they were concerned, and therefore it was better than the modification suggested by Mr. GOUREVITCH.

Mr. LOKUR (India) proposed that nationals of the host State be excluded by this amendment.

Mr. BROCHES (Chairman) stated that there had been a vote already which decided that juridical persons which were nationals of the host State should not be excluded. However, he would take another vote on that proposal. He restated that the vote was on the proposal that a juridical person which possessed the nationality of the State party to the dispute could not, under any circumstances, be a party to proceedings under the Convention. Fourteen delegations were in favor of this proposal and 15 were opposed. Mr. BROCHES noted that the law of the country of one of the persons voting in favor of that restriction specifically dealt with the possibility of treating as a foreign company a company established under that law if it was foreign-owned. He inquired why that delegate thought that a party should not even have a right to do what would probably be normal under the law of his country.

Mr. RATSIRAHONANA (Malagasy Republic) stated that in fact the Malagasy Company Law provides that if a company has its seat in the Malagasy Republic but is controlled directly or indirectly from abroad it remains a foreign company. However, he had voted for the restrictive approach because otherwise the provision might open the door to abuse on the part of not only foreign but even national investors. He could not agree to submit to the Centre a dispute between a State and a company which, under its legislation, was its own national. It would introduce a concept of fictitious nationality, which was not appropriate.

Mr. TSAI (China) thought that there was an inconsistency in voting against his proposal in SID/LC/53 and then voting against this restrictive proposal.

Mr. BROCHES (Chairman) stated that in the case of juridical persons it was frequently the requirement of the host State that in order to make an investment there they be organized under the laws of the host State. So it was not so much a question of dual nationality as of being required to have the nationality of the host State even though owned by foreigners.

Mr. ORTIZ (Peru) thought that it would be against the essence of the proposed draft Convention to permit a juridical person having the nationality of a State to appear before the Centre against the same State. In view of the importance of the matter, he requested a roll-call for this vote.

Mr. BROCHES (Chairman) agreed to do that. However, he thought this matter did not affect the essence of the Convention. It was rather the question of a foreign investment which was frequently required by the laws of the host State to take the form of a national company. It did not make it any less foreign in essence; and public opinion still considered it foreign. He thought that in submitting the question to a new vote it would be necessary to put in the foreground the element of foreign control.

Mr. LOKUR (India) felt that if a foreign national incorporates a company in a State it should not be allowed to appear before the Centre against that State.

Mr. GONZALEZ (Spain) inquired what the meaning was of the words "foreign control", since there might be different criteria for interpreting them.

Mr. BROCHES (Chairman) agreed that there was no uniform view of what constituted foreign control, but that would be left to the appreciation of each State. No issue would arise for the Tribunal because no such company would be entitled to appear before it as a matter of right.

He then stated that the proposal submitted to the vote of the delegates was to add to the first part of the definition in sub-paragraph (b) a provision along the following lines: "... and any juridical person which possessed the nationality of the State party to the dispute and which the parties have agreed to treat as a national of another Contracting State for the purposes of this Convention because of foreign control." Pursuant to the roll-call, 23 delegates voted in favor of the proposal, 20 voted against, and 3 abstained.*

Mr. LARA (Coste Rica) requested that he be added to those who voted in favor.

Mr. BROCHES (Chairman) then announced that as of the moment 24 voted in favor, 20 against and 3 abstained, and that both possibilities would be reported to the Executive Directors who would then take a decision on the exact text which would be proposed to governments.

Mr. GOUREVITCH (United States) requested a vote on the proposal of his Government contained in Document SID/LC/16 which was defeated by a majority of 25 to 7.

Mr. BROCHES (Chairman) then pointed out that the decision not to include the possibility of host State national companies within the scope of the Article would only mean that investment agreements would have to be made between the foreign shareholders of a nationally registered company and the host State, rather than between the local branch of the corporation and the State directly so that it was really more a question of method than of substance.

[A short recess was then taken]

Articles 59, 60 and 61

Mr. BURROWS (United Kingdom) referred to a drafting comment his Government had made on Article 61 which was referred to the Drafting Subcommittee.

Mr. TSAI (China) requested that the second sentence of paragraph (2) of Article 59 be qualified so that the appointment by the Chairman would be made from the Panels. Whereupon this proposal was adopted by a majority of 32 with no opposition.

Mr. ORTIZ (Peru) thought that Article 59 should state that an arbitrator would not be allowed to resign except for good reasons.

Mr. BROCHES (Chairman) replied that he thought that this was implicit in the language of the Article but that the Secretariat might try and improve the language when the final draft is submitted to the Executive

* The delegates of the following countries voted in favor: Australia, Austria, Belgium, Coste Rica, Denmark, Finland, France, Germany, Greece, Israel, Italy, Ivory Coast, Japan, Lebanon, Liberia, Malagesy Republic, Netherlands, New Zealand, Nigeria, Norway, Sweden, Turkey, United Kingdom, United States. The delegates of the following countries voted against: Brazil, Central African Republic, Ceylon, China, El Salvador, Ethiopia, Ghana, Haiti, India, Korea, Nepal, Panama, Peru, Philippines, Sierra Leone, Tunisia, Uganda, Tanzania, Uruguay, Yugoslavia. Dahomey, Malaysia and Spain abstained.

* See Doc. 124
† Doc. 97
‡ See Doc. 45

Directors. He then said in reply to a question from the floor that the Rules would state what would be the fate of the proceedings in the case of replacement.

Mr. HETH (Israel) proposed that where an arbitrator appointed by the State is to be replaced under Article 59(2), the appointing State should have the right to appoint his replacement in the first place. After hearing the explanation of the Chairman that this was designed to prevent collusion between parties and arbitrators appointed by them, he withdrew his proposal.

Mr. BERTRAM (Germany) thought that the first sentence of Article 60 should be drafted in the terms of Article 6 of the Rules of Procedure of International Law Commission rather than by reference to Article 14(1) which embodied attacks of a very personal nature but there did not appear to be very great support for this idea. He then said that in any event the second part of Article 60 would have to be changed to adapt it to the new numbering and new content of the provisions therein mentioned and this was agreed upon.

Mrs. VILLAGRATNER (Austria) thought that Article 59 should make reference to ad hoc committees.

Mr. BROCHES (Chairman) said that this would apply to this Article as well as to the other Articles immediately following it up to 66 and that the place to do that would be in Article 55(3).

Mr. BILGEN (Turkey) suggested that Article 61 provides in case of a proposal to disqualify all or a majority of the members, that the decision be taken by the Chairman. This suggestion was approved on a show of hands.

Mr. da CUNHA (Brazil) then requested a vote on his proposal^o to apply the procedure stated in Chapter IV to the provisions dealing with a disqualification of a sole conciliator or arbitrator which would mean that he would be replaced without having to decide whether the disqualification proposal was valid. The proposal was defeated by 11 to 6.

Mr. LARA (Costa Rica) thought that a provision should be added to Article 55 which would allow annulment of the award where a disqualification could have been possible had it been made before the award was rendered.

Mr. BROCHES (Chairman) replying said that he thought the Convention did not leave the problem unsolved since if the grounds for disqualification only became known after the award was rendered, this would be a new fact which would enable a revision of the award. He requested a show of hands which indicated that the Costa Rican proposal enjoyed little support.

Mr. PEREZ (Ecuador) thought that Article 60 should be amended to indicate (a) that the proposal for disqualification be made to the Tribunal hearing the case, (b) that there should be a time limitation within which the proposal for disqualification had to be made, and (c) that a provision be made expressing the effects of a proposal on disqualification on the proceedings.

Mr. BROCHES (Chairman) thought the first proposal could be taken care of by an appropriate short amendment in the language in Article 60. As to the other two proposals, since they would necessitate fairly extensive

^o Regulations and Rules of the Centre (ICSID/4)
¹⁰ See Doc. 85

language changes, it was felt more advisable to leave these details to the Rules.

Mr. TSAI (China) proposed that Article 60 be amended to prohibit a party from proposing the disqualification of a conciliator or arbitrator appointed by him. Whereupon a vote was taken and the proposal was defeated by a majority of 10 to 3.

Articles 60 to 64

Mr. BROCHES (Chairman) announced that there was a suggestion from Austria that the losing party should always bear the entire costs and expenses with the understanding that there might be an apportionment of the costs in the case where a party only lost its case partially." There was also an intermediate proposal by Brazil" which would make the losing party pay the cost of the Centre and the Tribunal but not the personal expenses of the winning party. In reply to a comment, he said that with the text as it stood there would be no point in giving the parties the right to agree "otherwise" but that if it was decided to adopt a different proposal, some such qualification would seem reasonable.

Mr. UKAWA (Japan) suggested that in the case of arbitration the responsibility for the costs of the proceedings should be determined by the Tribunal whereas the cost of each party should be borne by themselves, and that a conciliation commission also be permitted to assess costs against a party acting frivolously or in bad faith.

Mrs. VILIGRATTNER (Austria) then amended her proposal to allow the Tribunal to make the decision with respect to costs as it saw fit except where the parties had otherwise agreed.

Mr. BROCHES (Chairman) announced that 17 delegates were in favor and 4 against the Austrian proposal. The Brazilian proposal was defeated. A show of hands on the text of the First Draft showed 22 in favor and 11 against. Whereupon the Chairman announced that the amended Austrian proposal appeared to enjoy the largest acceptance and that the Article would therefore be amended accordingly. He then requested a show of hands on whether the same principle should apply to conciliation and the majority indicated that with respect to conciliation the rule embodied in the present text should be retained. He then said, in reply to a question from the floor, that in view of what had been decided with respect to the costs in the case of arbitration, Article 64 would have to be amended.

Mrs. VILIGRATTNER (Austria) thought that as the costs would now be part of the award, they would fall under the provisions of Article 57 dealing with enforcement.

Articles 65 and 66

Mr. BROCHES (Chairman) explained the provisions, the various proposals for their amendment, and particularly those of Mr. BIGAY requesting that proceedings should always be held in the territory of the State party to the dispute and of Mr. da CUNHA that proceedings should never be held in the territory of the State party to the dispute. He mentioned the fact that a comment proposed by Mr. van SALTEN would refer to the fact that where arrangements were made with any other institution they could cover use of services as well as of facilities, and that Article 66(i) would be amended to take into account the new language of Article 2 with respect to appropriate "private" institutions.

The meeting recessed at 1:35 p.m.

¹¹ See Doc. 46
¹² See Doc. 85

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP II

Chairman: Mr. C.W. van Santen (Netherlands)

Final Report on Article 30 (iii)

1. The Working Group consisting of Mr. van Santen (Netherlands) (Chairman), Messrs. Bertram (Germany), Brinas (Philippines), Gourevitch (United States), Guarino (Italy), Melchor (Spain), O'Donovan (Australia), Ortiz de Zavallos (Peru), Pinto (Guatemala), Quill (New Zealand), Ratsirahonana (Malagasy Republic), Sapateiro (Portugal) and Serb (Yugoslavia) and Mrs. Villgrattner (Austria) completed consideration of Article 30(iii) on December 1, 1964.

2. It was agreed that the following text concerning natural persons should be adopted, subject to review of the underlined clause after Article 26(1) will have been redrafted by the Legal Committee:

"(iii) 'National of another Contracting State' means:

(a) Any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties concerned consented to submit such dispute to conciliation or arbitration within the scope of this Convention, as well as on the date on which proceedings were instituted pursuant to this Convention, but does not include any person who on either date also had the nationality of the State party to the dispute."

3. On the question of involuntary acquisition of nationality, it was the sense of the meeting that no provision should be made in the Convention and the matter could be left to the decision of the arbitral tribunal or the conciliation commission.

4. On the question of juridical persons, the text as it stands was accepted with the exception of the last words "and any juridical person which the parties have agreed shall be treated as a 'national of another Contracting State'." On these words no vote was taken, but the following possible solutions emerged which the Working Group decided to submit for a decision by the Legal Committee:

- (a) delete these words in order to keep the Convention within strict limits;
- (b) add the following underscored words in order to exclude disputes with a juridical person which is a national of a non-contracting State:

"... and any juridical person which has the nationality of the State party to the dispute but which the parties have agreed shall be treated as a 'national of another Contracting State'."

- (c) leave the words first above quoted unchanged;
- (d) replace the words first above quoted with the following:

"and any other juridical person in which the controlling interest on said date is directly or indirectly in the nationals of a Contracting State other than the State party to the dispute, or in such Contracting State itself."

This amendment would cover companies owned by aliens regardless of their place of incorporation and would be based on the effective link with the shareholders' State. As to a definition of "control", a decision should be left to each arbitral tribunal.

- (e) add before the words first above quoted the following:

" ; the term 'national of another Contracting State' will not apply to juridical persons who were constituted under the laws of that State and have their seat in the territory of that State without prejudice to those cases in which the parties to the dispute have agreed that the juridical person shall be treated as a 'national of another Contracting State'."

5. One delegate suggested the omission of any definition of the words "national of another Contracting State".

6. The Working Group decided that the question of the possible need of a definition of "national of a Contracting State" should be referred until the Legal Committee has decided upon the choice of wording given above. However, it already appeared from a preliminary discussion that the Working Group would find it difficult and time-consuming to draft such definition.

The Working Group therefore would want an express instruction before considering the drafting of such disposition.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP II

Chairman: Mr. C.W. van Santen (Netherlands)

Interim Report on Article 30 (iii)

1. At the request of the Legal Committee Article 30(iii) was considered on November 28, 1964 by a Working Group consisting of Mr. C.W. van Santen (Netherlands) (Chairman), Messrs. André (Belgium), Bertram (Germany), Burrows (U.K.), Courevitch (U.S.), Hellners (Sweden), Lopez Tejada (Panama), C'Donovan (Australia), Ortiz de Zevallos (Peru), Ouma (Uganda), Pinto (Guatemala), Quill (New Zealand), Ratsirahonana (Malagasy Republic), Sapateiro (Portugal), Serb (Yugoslavia), and Mrs. Villgrattner (Austria).
2. Mr. Pinto (Guatemala) suggested that a definition of "nationality" in terms of effective nationality should be included in the Convention. After a preliminary discussion of this suggestion, the Chairman decided to defer further consideration of the question until after the text of paragraph (iii) had been examined.
3. It was agreed that the jurisdiction of the Center should not extend to disputes between a Contracting State and a national of another Contracting State who concurrently possessed the nationality of the Contracting State party to the dispute, and that an amendment along the lines of the following proposal made in the Legal Committee by Mr. Bigay (Central African Republic) should be adopted at the end of (a):

"provided he did not possess the nationality of the State party to the dispute, even by way of dual nationality, on the date on which the parties consented to jurisdiction. . ."
4. The question of involuntary changes of nationality of a physical person between the date of original consent to jurisdiction and the date of institution of proceedings was considered. Mr. Ratsirahonana (Malagasy Republic) suggested that if the nationality of the host State was imposed upon a foreign investor after that State had consented to submit disputes with that investor to the jurisdiction of the Center, this should not permit the State to evade its obligation to submit such dispute to the Center. Mrs. Villgrattner (Austria) suggested that, from the point of view of the systematic presentation of the content of the definition, disputes concerning events arising at a date on which the investor was not a national of a Contracting State, or was a national of the host State, should be excluded from the jurisdiction of the Center. To meet both suggestions Mr. André (Belgium) submitted, but did not press, the following amendment:

"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

¹ See Summary Proceedings of the Legal Committee Meeting, November 27, Doc. 58

to jurisdiction of the Center in respect of that dispute, and who did not after that date voluntarily acquire and retain the nationality of the State party to the dispute."

With the exception of Messrs. Ortiz (Peru), Pinto (Guatemala), Ratsirahonana (Malagasy Republic) and Sapateiro (Portugal), it was the sense of the meeting that such amendment would not be necessary.

Mrs. Villgrattner (Austria) withdrew her suggestion about inserting the date of the event giving rise to the dispute as a third critical date in the definition.

5. Mr. Bertram (Germany) took the position that the original text should stand, but in their report the Executive Directors could state that cases of forced acquisition of nationality could properly be dealt with by a conciliation commission or an arbitral tribunal under their power to judge their own competence.

6. The Chairman decided that the need of mentioning involuntary changes of nationality, nationality of juridical persons and the need for a definition of "nationality" were left over for a subsequent meeting of the Working Group.

SID/WG/II/1 (December 1, 1964)

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LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP II

Definition of "national of another State"

Proposal submitted by Mrs. Villgrattner (Austria)

Article 30

end text of iii) by semi-colon and add:

the term "national of another Contracting State" will not apply to physical persons who by way of double nationality also possess the nationality of that State nor to juridical persons who were constituted under the laws of that State and have their seat in the territory of that State and who exercise rights as nationals of that State.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP II

Chairman: Mr. C.W. van Santen (Netherlands)

Draft Article 30 (iii) under (a)

(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 concerned consented to submit such dispute to conciliation or arbitration within the scope of this Convention, as well as on the date on which proceedings were instituted pursuant to this Convention, unless he possessed or possesses at either date also the nationality of the Contracting State party to the dispute /by way of double nationality/; ..."

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Proposed Amendment to the Text in Document SID/LC/38 Relating to Article 30 (iii)

Submitted by Mr. Paul C. Tsai (China)

1. The text contained in Document SID/LC/38¹ on the definition of "nationals" precludes the possibility of treating a national of a Contracting State other than the State party to the dispute as a "foreign national" if he concurrently possesses the nationality of the State party to the dispute. While there is no objection to not treating such person as a "foreign national", I believe that the Convention should

¹ Doc. 107

not preclude the possibility of treating such person as "foreign national" if the State party to the dispute so desires.

2. It is therefore suggested that a proviso be added to the text as contained in the cited document, to the following effect:

"Provided, however, that such State may by a unilateral declaration treat such person as a 'foreign national' for the benefit of such person."

SID/LC/62 (December 11, 1964)

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LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Fourth Interim Report

CHAPTER II - JURISDICTION OF THE CENTRE

The Drafting Sub-Committee transmits herewith the English text of Chapter II.

CHAPTER II

JURISDICTION OF THE CENTRE

Article 26

(1) The jurisdiction of the Centre shall extend to any dispute of a legal character, arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(3) Any Contracting State may, at the time of ratification or

acceptance of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. Such notification shall not constitute the consent required by paragraph (1).

Article 27

(1) Consent of the parties to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration pursuant to this Convention.

(2) Notwithstanding the provisions of paragraph (1) of Article 26, a Contracting State which has consented to submit to the Centre a dispute with a national of another Contracting State may, at the time of such consent or at any time thereafter, consent to the substitution for such national, in proceedings in accordance with the provisions of this Convention, of the State of which he is a national or of a public international institution if such State or institution, having satisfied the claim of such national under an investment insurance scheme, is subrogated to the rights of such national; provided, however, that such consent may be withdrawn at any time before the State or institution shall have notified to the other State in respect of such dispute its written undertaking (a) to be bound by the provisions of this Convention in the same manner as such national and (b) to waive recourse to any other remedy to which it might otherwise be entitled.

Article 28

(1) 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.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 29

[deleted]

Article 30

For the purpose of this Convention "national of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered in accordance with the provisions of paragraph (3) of Article 31 or

paragraph (3) of Article 40, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to Conciliation or Arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

SID/LC/SR/21 (January 11, 1965)
Summary Proceedings of the Legal Committee Meeting, December 10, Afternoon¹

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The Legal Committee reconvened at 3:08 p.m.

Articles 65 and 66

Mr. BIGAY (Central African Republic) was not in agreement with the rephrasing of his proposal. He had suggested the possibility of creating regional Centres on the various continents. Proceedings would be held within the continent in which the State party to the dispute was located, in order to avoid excessive costs. Otherwise these Articles were appropriate, and he withdrew his proposals.

Mr. BROCHES (Chairman) referred to the proposal of Mr. da CUNHA that there be added a provision to this Chapter stating "provided, however, that in no case shall proceedings be held in the territory of the country which is a party to the dispute or in the territory of the country whose national is a party to the dispute". He requested a show of hands on this proposal, which indicated that 4 delegations were in favor and 14 were opposed.

He then referred to the question of the arrangements which the Centre would have to make with other institutions about the use of their facilities. He proposed that Article 66(i) state "at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether public or private, with which the Centre has entered into arrangements for that purpose". There would be no provision stating that these arrangements would have to be approved by the Administrative Council, and therefore they could be made by the Secretariat of the Centre. This wording would not prevent ad hoc arrangements in certain cases, where it would be more convenient for the parties to have the proceedings held at different locations.

Mr. LOKUR (India) inquired whether under Article 66(ii) the parties would make their own arrangements and why should the Secretariat be consulted.

Mr. BROCHES (Chairman) stated that under that paragraph (ii) the parties would make their own arrangements. They would have to consult with the Secretary-General because presumably somebody from the Secretariat would also have to attend. The arbitrators and conciliators would also have to give their consent. And there might be a question of privileges and immunities if proceedings were to be held in the territory of a State not a party to the Convention.

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43

Mrs. VILLGRATNER (Austria) inquired whether under Article 66 part of the proceedings could be held at a place other than the seat of the Centre.

Mr. BROCHES (Chairman) thought that the language was broad enough to cover that possibility.

Mr. van SANTEN (Netherlands) suggested that it would be more logical to say "may enter into" instead of "has entered into".

Mr. BROCHES (Chairman) agreed to this suggestion, and stated that since as there were no further comments on Articles 65-66 they could be considered accepted.

Mr. LOPEZ (Panama) requested a clarification of Article 45, as re-drafted by the Drafting Sub-Committee in Document SID/LC/58¹, where it was stated that, lacking agreement, the Tribunal would apply the legislation of the State which is a party to the dispute. He thought there might be some confusion in the case of subrogation by a State to the rights of its national as permitted by Article 27.

Mr. BROCHES (Chairman) stated that when reference was made to subrogation, it was meant substitution of that State for the national who is a party to the dispute, so that there would not be any ambiguity.

He then called the attention of the meeting to Document SID/LC/56¹, transcribing new wording for Article 48 prepared by the Secretariat. The effect of the changes made was first to remove any doubt about the need of the party which has appeared to prove its case just as if the other party were there, because the other party would not be regarded as having admitted or confessed the accuracy of the statements of its opponent. Second, the words "shall render an award" made it clear that the Tribunal could hold either for the appearing party or in favor of the other party, as the facts and the law should warrant.

Mr. BRINAS (Philippines) thought it would be preferable, in order to protect the interest of the party that does not appear, to say that "the party who does not appear will be deemed as having interposed a general denial of the submission of the party that is present".

Mr. BROCHES (Chairman) did not think it was justified to go that far in order to meet the points that were raised, since there were many different legal systems that would be affected.

Mr. BRINAS (Philippines) thought that the proposed language would run the risk of denials of justice and the possibility that an award might not be honored by a Contracting State if it was absent from the proceedings.

Mr. BROCHES (Chairman) stated that there was no such risk because the plaintiff had to prove his case. The facts had to be proven and would not be admitted simply because the other party was absent.

Mr. LARA (Costa Rica) requested a clarification of paragraph (2) of Article 48, where it was not clear whether reference was made also to a party that abandoned its case after having appeared.

Mr. BROCHES (Chairman) thought that this case was covered by the proposed wording of paragraph (2). He asked Mr. PEREZ, who had suggested the substance of this paragraph, whether he agreed with that interpretation. Mr. PEREZ answered in the affirmative.

¹ Contained in SID/LC/64, Doc. 104

² Doc. 83; cf., for an earlier discussion of Article 48, Summary Proceedings of the Legal Committee Meetings on December 7 and 8, Docs. 82 and 86 respectively

Mr. LARA (Costa Rica) was convinced by the explanation but still feared that this Article would be interpreted otherwise in the future. He suggested that the confusion could be eliminated by specifying the cases covered.

Mr. BROCHES (Chairman) suggested that this be taken care of by the Drafting Sub-Committee.

Mr. LOKUR (India) suggested that Article 48(2) be redrafted to state: "If a party fails to appear or to present its case at any stage of the proceedings, the other party may call upon the Tribunal to deal with the questions submitted to it and to render an award. The Tribunal shall, before rendering an award, grant a period of grace to the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so".

Mr. BROCHES (Chairman) requested a show of hands on Mr. LOKUR's proposal which indicated that the majority approved its adoption.

He then referred to paragraph (1) of Article 48 and to Mr. BRINAS's suggestion. The wording proposed in Documents SID/LC/56 was adequate to force the plaintiff to prove his case. On the other hand, a statement that failure to appear shall be regarded as a general denial, while normal in some systems of law, was unacceptable to others. That was the reason why he preferred the Secretariat's proposal.

Mr. BRINAS (Philippines) accepted that explanation and requested that these comments be shown in the Minutes of the proceedings and in the submission of the draft to the Executive Directors.

Mr. BROCHES (Chairman) then requested a show of hands on paragraph (1) as proposed in Document SID/LC/56. Twenty nine delegations were in favor and none opposed.

Mr. BROCHES (Chairman) then suggested to examine Document SID/LC/57¹ which concerned the addition of a third paragraph to Article 52 dealing with cases where the Tribunal might have omitted to decide a question of where the award might contain errors. He added that if the substance was agreeable to the Committee, the provision would be re-examined more closely after the Conference.

Mr. QUILL (New Zealand) suggested to replace the word "consultation" by the word "notice", since consultation might not always be necessary.

Mr. LOKUR (India) thought that this provision would rather belong to Title V, the title of which might become "Interpretation, Correction, Revision and Annulment of the Award". He agreed, however, that this might be left to the Drafting Sub-Committee.

Mr. BRINAS (Philippines) considered the period of 30 days as too short in view of possible delays due to the transmission of both the award and the request in question.

Mr. BROCHES (Chairman) proposed a period of 45 days, which was accepted by the Committee by a majority of 21 to 1. The Committee then approved the provision as amended.

Mr. HETH (Israel) inquired whether the procedure provided for in this new provision would affect the periods set forth in Articles 54 and 55, in other words, whether the periods would run from the moment a supplemental

¹ See Doc. 124

² Doc. 114; cf., for an earlier discussion of Article 52, Summary Proceedings of the Legal Committee Meeting, December 8, Doc. 86

³ For its report see Doc. 104

award is rendered pursuant to Article 52(3). In his opinion, this would be desirable since the Tribunal might take time in deciding questions which it had omitted to decide in its award.

Mr. van SANTEN (Netherlands) agreed.

Mr. BROCHES (Chairman) ascertained that no delegation objected to this consequence that when an additional decision is taken, the periods of time would be counted not from the time the original award was rendered, but from the time the supplemental award was rendered.

Mr. GOUREVITCH (United States) inquired whether as a consequence the period for requesting a revision of the award would generally be extended from the time of the supplemental award or whether the extension would occur only in cases where the supplemental award decides questions which had not been decided in the original award.

Mr. BROCHES (Chairman) replying said that since the two cases could probably not be distinguished in advance, it would be preferable that the extension apply generally.

Mr. BERTRAM (Germany) assumed that the other party would be allowed to make observations after having received the "notice" referred to in this provision.

Articles 56, 57 and 58

Mr. BROCHES (Chairman) said that it would be easier for the purposes of discussion to examine first the new draft of Article 57 submitted by the Secretariat in Document SID/LC/55*, under the assumption that the substance of Article 56 would be satisfactory. He explained that the purpose of paragraph (1) was to state the principle of recognition and enforcement, and stating that enforcement would be in accordance with the rules of procedure in force in the territory where enforcement is sought, but leaving the further specifications thereof to the following paragraphs. Paragraph (2) on the other hand, dealt with the mechanics available for seeking recognition and enforcement, and imposed an obligation on the Contracting States to inform the Centre of the places where the parties should address themselves.

* "Article 57"

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as well as any decision interpreting, revising or annulling such award, as final and binding on the parties and shall enforce them in accordance with the rules of procedure in force in its territory, under the conditions set forth in this Article.

(2) To obtain recognition and enforcement of an award or decision, the party applying for such recognition and enforcement shall furnish to the competent authority designated for this purpose by the Contracting State in whose territory the award is relied upon the duly authenticated original of the award or decision or a duly certified copy thereof. Each Contracting State shall notify the Centre of the designation of the competent authority in its territory and of any subsequent change in such designation.

⁷ Cf. Report Working Group VI on Article 57, Doc. 115, and Docs. 116 through 118

(3) Recognition and enforcement of an award shall be refused at the request of the party against whom it was rendered:

- (a) if the award has been annulled pursuant to Article 55; or
- (b) if enforcement of the award has been stayed under Articles 53, 54 or 55, but only for the duration of such stay.

(4) If an application for interpretation, revision or annulment of the award pursuant to Title 5 of this Chapter is pending before the Centre recognition and enforcement of an award may be refused at the request of the party against whom it was rendered until the tribunal or committee competent to decide on such an application shall have determined whether enforcement of the award shall be stayed.

(5) Recognition and enforcement of an arbitral award [in a Contracting State other than the State party to the proceedings and the State whose national was a party to the proceedings] may also be refused if the competent authority of the State in which recognition and enforcement are sought finds that such recognition or enforcement would be contrary to the public policy of that State."

Mr. BERTRAM (Germany) said that paragraph (2) should refer to "competent authority or authorities" since several courts or authorities might be competent and might be designated in a general way by the Contracting States.

Mr. BROCHES (Chairman) answering said that paragraph (2) was patterned in part after the New York Convention of 1958 which used the expression "the competent authority" although it was understood that the expression might include more than one court or authority.

Mr. GOUREVITCH (United States) suggested that the following words be added either as a separate paragraph or at the end of paragraph (2): "Where the rules of procedure referred to in paragraph (1) do not provide for direct execution by an enforcing court or other competent authority of foreign arbitral awards, the parties seeking enforcement shall be entitled to bring an action upon the award." This language was intended to make it clear that although in certain countries such as the United States there would be no direct or automatic execution of an arbitral award, a party would be able to enforce the award in a court proceeding. He agreed that the substance of this addition was implied in the draft of Article 57 in Doc. SID/LC/55 but would prefer to have it mentioned expressly. This provision would also be useful to the authorities who would later on be entrusted with enforcement of awards. For the record, he said that in the United States, it is contemplated that United States Federal District Courts would be the enforcing courts and that such courts would be designated to the Centre for this purpose.

Mr. BROCHES (Chairman) suggested to delete the word "foreign" since in his opinion there was no difference between foreign and domestic arbitral awards. He added that Mr. GOUREVITCH's proposal seemed to refer to the technique called in the United States "to reduce an award to judgment", which concept was unknown in several other legal systems. For example, several countries followed the technique of the "exequatur" which is unknown in the United States. Since the new version of Article 57 made it quite clear that the technical steps to be taken would be dealt with by the rules of procedure of each country concerned, he did not consider the proposed addition as necessary.

¹ New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958

Mr. GOUREVITCH (United States) agreed that the word "foreign" could be deleted, but repeated that the advantage of his proposal would be to make it quite clear that enforcement would not necessarily be automatic.

Mr. BROCHES (Chairman) replied that while the previous draft seemed to provide for automatic enforcement, this idea had been removed from the new version proposed by the Secretariat. He added that the addition proposed by Mr. GOUREVITCH might create confusion in countries which do not follow similar techniques.

Mr. GONZALEZ (Spain) noted that paragraph (2) stated that the parties could present the original of the award. He thought that the original of the award would be kept in the Centre and that the parties would not be able to have it available except in certified copies.

Mr. BROCHES (Chairman) agreed that it would be more appropriate to refer in this Convention only to duly certified copies. The language in the text was similar to the language of the 1958 New York Convention, which applied to a different range of arbitral awards.

Mr. HELLNERS (Sweden) thought that the amendment proposed by the United States delegation referred to paragraph (1) and was covered by it. It was an explanation of what was meant by "rules of procedure" in the United States. He suggested that this be incorporated in the comments to be prepared by the Secretariat, where specific examples could be given.

Mrs. VILLGRATNER (Austria) stated that there was some difficulty in paragraph (1), which referred to enforcement "in accordance with the rules of procedure in force in its territory, under the conditions set forth in this Article". She thought that in every case the rules of procedure of the territory should govern.

Mr. BROCHES (Chairman) thought that the words "under the conditions set forth in this Article" could be clarified by reversing the wording and stating "... shall enforce them under the conditions set forth in this Article, in accordance with the rules of procedure..."

Mr. BIGAY (Central African Republic) referred to paragraph (1) and stated that it would be surprising that a Contracting State could recognize as final any award, since the award only becomes final when all recourses have been exhausted.

Mr. BROCHES (Chairman) stated that the New York Convention used the term "binding" in the English text. The word "final" was not used in any of the authentic texts of that Convention.

Mr. BIGAY (Central African Republic) thought that to recognize the binding nature of the award was to recognize it as such, but to recognize it as final was to infer that all recourses had been exhausted.

Mrs. VILLGRATNER (Austria) suggested that the words "on the parties" be deleted, because third parties could also be involved in the enforcement.

Mr. BROCHES (Chairman) stated that to combine these two suggestions instead of saying "recognized ... as final and binding on the parties" it could be said "recognized ... as binding".

Mr. BERTRAM (Germany) suggested that the words "in force" be deleted since they could originate some ambiguity. They were not used in the New York Convention.

Mr. O'DONOVAN (Australia) suggested that the word "the" before the words "rules of procedure" be deleted because enforcement might be sought in a federal state through state courts, and the rules of procedure of state courts differed amongst themselves.

Mr. BROCHES (Chairman) stated that to take care of that case it would be necessary to state "in accordance with the applicable rules of procedure". He then requested comments on paragraph (3).

Mr. BIGAY (Central African Republic) thought that sub-paragraph (b) was rather vague because Articles 53, 54 and 55 referred thereto contained a number of provisions, and it was not clear whether reference was made to an order to stay enforcement or to a request for interpretation or revision. It was not clear whether there was a time limit for the award to become binding. He inquired whether there should be a reference to Article 52 in which a correction had been requested.

Mr. BROCHES (Chairman) thought that the reference to Articles 53, 54 and 55 in sub-paragraph (b) was clear because these provisions gave the Tribunal the power to stay enforcement of an award, and in this sub-paragraph (b) it was contemplated that if such a stay was granted that would be a basis to refuse recognition and enforcement. The submission itself of a request for interpretation, revision or annulment did not stay enforcement under the provisions of the Convention, and therefore it should not stay the proceedings before local courts under paragraph (3). Concerning Article 52, he thought that it may be necessary to introduce there the notion of suspension as well. Whether the introduction of a request for any of these proceedings should be a ground for refusal under paragraph (3) was a question of substance on which the Committee had to express itself.

Mrs. VILLGRATNER (Austria) thought that delivery of a certified copy of the award should not be enough for its recognition. There should at least be proof that the award was in conformity with the Convention, and that there was consent of the parties.

Mr. BROCHES (Chairman) stated that this was a substantive point because it was a suggestion that after review by the Tribunal itself, after all the procedures provided under Convention, a national court should review once again the jurisdiction of the Tribunal which rendered the award. He thought that this would delay proceedings and would be inconsistent with the procedures devised under the Convention.

Mrs. VILLGRATNER (Austria) stated that her observations referred to cases where the enforcement was sought in third States, and corresponded to procedures established by bilateral treaties concerning recognition and enforcement of national judgments. It would be necessary to submit only the original written agreement of the parties whereby they gave their consent to submit their disputes to the Centre. This would be in agreement with the proposal of Mr. MANTZOUKINOS in his draft of Article 57.

Mr. BROCHES (Chairman) suggested to defer discussion on this point until the Committee examines the question of what differences in treatment, if any, should be made between States immediately concerned and third States. He then moved to paragraph (4) and thought that this provision covered part of the point made by Mr. BIGAY.

Mr. BIGAY (Central African Republic) agreed but thought that paragraph (4) should be amended to the effect that if a request for interpretation, revision or annulment of the award is pending or if the period allowed for

the presentation of such requests has not elapsed yet, the national court should have the power to refuse recognition and enforcement without the necessity for a party to submit a request to that effect.

Mr. GONZALEZ (Spain) said that he would prefer the substance of this provision to be included under Title V. He also expressed some concern with respect to the words "may be refused".

Mr. BROCHES (Chairman) wondered how a court could be given discretionary powers without being given directives as to how to exercise such powers.

Mr. HELIERS (Sweden) pointed out that such discretionary powers were provided for in the New York Convention.

Mr. BROCHES (Chairman) agreed but thought that the cases referred to under (a) and (b) of Article 57(3) should be mandatory. He then proposed to examine paragraph (5).

Mr. BURROWS (United Kingdom) proposed to add at the end of paragraph (5) the words "or its laws relating to the enforcement of arbitral awards", since the new draft seemed to be more restrictive in so far as it referred to public policy only. The original version contained in Article 57 of the Draft Convention was more satisfactory since it stated that awards would be treated in the same way as judgments of the courts of the countries concerned. By way of illustration, he mentioned the case of fraud which would not be covered under public policy. He also said that public policy was not the only ground provided for in the New York Convention.

Mr. BROCHES (Chairman) said that the original version of Article 57 went further than the new draft, since treating awards in the same way as judgments of original courts implied that exceptional grounds only could be invoked to prevent recognition and enforcement. He added that awards should not be submitted to a second examination and in this connection he pointed out that there was a kind of parallelism between the desirability to prevent double consent and double examination of the dispute.

Mr. GHACHEM (Tunisia) thought that if the words presently in brackets were retained, the remainder of the provision would create an undesirable inequality between the State party to the dispute and the national of another Contracting State, in so far as awards rendered against a national could be examined again in the State where enforcement would be sought.

Mr. GUERINO (Italy) thought that one should take into account the requirements of each national legislation. He mentioned that in Italy, enforcement legislation was more restrictive than in other countries. He thought that one should either afford to the Centre's awards the same treatment as that given to national awards or else refer to Article 5 of the New York Convention. He also suggested that in view of the importance of this provision, a roll call be made.

Mr. BROCHES (Chairman) said that if certain countries had constitutional problems in permitting their Government to go to arbitration, conversely, other countries might have difficulties with respect to the enforcement of awards. In his opinion, the essential problem was to provide for a balance between the position of the parties. He thought that if enforcement of awards was to be governed by rules similar to those set forth in the New York Convention, one should then eliminate the provisions for annulment under the Convention since otherwise a double set of appeals might be created.

Mr. LARA (Costa Rica) said that the application of the concept of public policy should be restrictive and he suggested to delete the words presently in brackets. Turning to Article 56, he suggested to amend the first sentence to make it clear that the award would be final and without appeal, notwithstanding the right of the parties to submit requests for revision, interpretation and annulment and except if the enforcement has been stayed.

Mr. TSAI (China) said that the words presently in brackets had been suggested in order to take into account the fact that third States would not have been party to the dispute. On the other hand, he objected to States a national of which was a party to the dispute, being permitted to re-examine the award in the light of public policy, since this would subject the award to a double review and would also create an inequality between the State party to the dispute and the national of another State. In his opinion, there should be no escape clause to enforcement and he therefore proposed the deletion of paragraph (5).

Mr. BURROWS (United Kingdom) suggested to add at the end of paragraph (5), the words "or all its laws relating to the enforcement of the judgments of its own courts".

Mr. GOUREVITCH (United States) said that this language would require a further amendment to take into account the situation of countries such as the United States where there is a dual system of courts. In other words, it should be made clear that, in such cases, the awards would be subject to the laws relating to the enforcement in federal courts of the judgments of State courts.

Mr. BROCHES (Chairman) thought that both parties to a dispute should have the same rights and asked whether the Committee agreed that as a principle, any limits on enforcement set forth in Article 57 should necessarily apply to both parties.

Mr. GOUREVITCH (United States) wondered how a Contracting State would be able to review an award on the ground of fraud in cases where there would be no review by a court.

Mr. BURROWS (United Kingdom) mentioned that, taking the case of fraud as an example, the parties would not be on the same footing since a State could always invoke sovereign immunity. He therefore thought it necessary that an escape clause be provided for the investor. In his opinion, this should essentially apply to cases where enforcement is sought in States other than the State where the investment was made.

Mr. BERTRAM (Germany) referred to the case of a losing State in the territory of which execution was sought. In the law of civil procedure of many States there were already special provisions which dealt with cases of enforcement of judgments or awards against the State. It seemed to him that in all cases of enforcement the State should be allowed the possibility of examining the award in the light of its public policy.

Mr. BROCHES (Chairman) thought it was possible to solve the problems that had been raised. If a final judgement against a sovereign State could not be executed, then an award could not be executed either; and in the same way, if a final judgment was open to some extraordinary remedy in the case of fraud or similar occurrence, that would be true for the award as well. Concerning paragraph (3), the first sentence could be clarified and the second sentence could be taken out.

Mrs. VILLAGRATNER (Austria) inquired whether there would be inserted some rules for refusal of the State where execution is sought.

Mr. BROCHES (Chairman) thought that the rules of exclusion in paragraphs (3) and (4) could be made a qualification of what was meant by award in paragraph (1).

Mrs. VILLCRATTNER (Austria) noted the importance of the provision in paragraph (5) permitting a State where execution was sought to refuse recognition and enforcement when the award was against its public policy.

Mr. BROCHES (Chairman) felt that the question of ordre public and public policy really affected fields outside investments, generally questions of status connected with marriage, divorce and adoption.

Mr. TSAI (China) inquired whether it would be possible to provide for differential treatment with respect to the home State and the host State.

Mr. BROCHES (Chairman) was not in favor of this suggestion because it would introduce a further complication. There were so many possible situations that the text to be adopted should be applicable without distinction of the position of the country.

Mr. TSAI (China) inquired whether the words "public policy" meant public order and good morals.

Mr. BROCHES (Chairman) agreed, and stated that they referred to the enforcement of the award and not to the decision contained in the award. Mr. TSAI then inquired whether they would include foreign exchange considerations. Mr. BROCHES answered that in his view they would not be included.

Mr. BERTRAM (Germany) thought that the equalization of the award with a final judgment of a court would create great difficulties.

Mr. O'DONOVAN (Australia) thought that the solution proposed by the Chairman, subject to maintaining the reservations in paragraphs (3) and (4), would be acceptable to him. He suggested that instead of referring to a final judgment of the courts of the State, reference should be made to a final judgment of a "superior court" in that State.

Mr. BROCHES (Chairman) thought that perhaps the exceptions concerning annulment and revision of proceedings and suspension or stay of enforcement could be inserted in Article 56 rather than in Article 57. Article 56 would then establish exactly what was intended, which was that Contracting States and investors would be on the same footing, that a Contracting State would not become obligated in those cases to carry out the award pending the decision, nor would an investor.

Mr. GOUREVITCH (United States) stated that they had serious difficulty with the phrase "a final judgment of the courts of that State". He would prefer that the phrase be deleted but if it were to remain in the text, they would need a provision along the line of the amendment suggested in Document SID/IC/44:

Mr. BURROWS (United Kingdom) thought that the suggestions of the Chairmen were acceptable. He had some doubts, however, about introducing the reference to public policy, and felt that if it was introduced, it should be in a way that it was not the only manner in which the award could be challenged. He mentioned the case of fraud as an example.

Mr. BROCHES (Chairman) pointed out that in rules of civil procedure it was not necessary to mention fraud because even a final judgment could

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be attacked on the ground of fraud, whereas a final judgment could not be attacked on the ground of public policy.

Mr. LARA (Costa Rica) suggested that when the tribunal hears that one of the parties is acting with fraud, with intention to frustrate the award, the tribunal could use the powers given by Article 50 to adopt some provisional measures.

Mr. GUARINO (Italy) stated that paragraph (1) referred to the applicable rules of procedure, and inquired whether the State could refuse to recognize the arbitral award only in the case that it would be contrary to the public policy of that State. He thought that this should be stated expressly because if the text was not changed, it would be interpreted as meaning that any rule applicable to final awards could be used and not only the rule referring to public policy.

Mr. GOUREVITCH (United States) stated that it had been said that the United States had suggested in the Working Group that public policy should be available as a defense to enforcement. He wanted the record to show that this had not been suggested by the United States.

The meeting adjourned at 6:00 p.m.

SID/LC/57 (December 10, 1964)

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LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Draft of additional paragraph in Article 52 prepared by the Secretariat
Article 52

(1) . . .

(2) . . .

(3) The Tribunal, upon the request of a party made within 30 days after the date on which the award was rendered, may, after consultation with the other party, decide any question which it had omitted to decide in the award and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner.

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP VI

Chairman: Mr. Vidar Hellners (Sweden)

Report on Article 57

1. At the request of the Legal Committee, a Working Group consisting of Mr. Vidar Hellners (Sweden) (Chairman), Messrs. Agoro (Nigeria), Andre (Belgium), Bertram (Germany), Funes (El Salvador), Gourevitch (United States), Mantzoulinos (Greece), O'Donovan (Australia), Ong (Malaysia) and Tsai (China) considered the provisions of Article 57 on recognition and enforcement of awards.

Enforcement in third States

2. Substantial opinion was expressed in the working group, both for and against the rule in Article 57(1) requiring enforcement of an award in a State which was neither a party to the dispute nor one whose national was a party to the dispute. In support of the rule it was pointed out that it was intended to redress an imbalance in the relative positions of the State party to the dispute (which was bound directly under the Convention to comply with an award), and that of the investor. The rule would enable the State party to the dispute to follow the assets of the investor in whatever Contracting State they were located; although the investor would also have this right, the assets of the State party to the dispute would usually be protected by the rule of State immunity.

3. Against the requirement of enforcement in third States it was urged that such a provision would, instead of redressing an imbalance in the relationship between a State and an investor, place the State party to the dispute in an unduly privileged position. In the opinion of Mr. Funes (El Salvador) the rule would be inconsistent with the essential consensual basis of the machinery made available by the Centre.

4. Mr. Tsai (China) proposed that for the purposes of enforcement in a third State, the award should have the status not of a final judgment of a local court, but merely of a foreign judgment. Mr. Ong (Malaysia) proposed that execution against the assets of the State party to the dispute located in a third State ought to be permitted where the former had expressly consented to such execution, thereby in effect waiving its immunity.

System of "automatic" enforceability of awards.

5. The Working Group considered the need for qualifying the automatic enforceability of awards and in that connection discussed the proposal of Mr. Mantzoulinos (Greece) contained in document SID/LC/22'. It was noted that even in Article 57 enforceability was implicitly subject to there being in existence a valid and authentic award, i.e. one which had not been annulled by an ad hoc Committee under Article 55, or one in respect of which execution had been refused by a competent authority after review pursuant to Article 57(3).

6. Mr. Bertram (Germany) said that the mechanism for enforcement prescribed in Article 57 was more appropriate to a treaty establishing a supra-national authority.

7. It was pointed out that apart from "public policy", all the exceptions enumerated in Mr. Mantzoulinos' draft might be brought within one or other of the grounds for annulment of an award listed in Article 55, and might thus be considered superfluous.

8. While no decision was taken regarding the exception of public policy, Mr. Tsai (China) took the position that while that exception might apply as regards execution of awards in third States, it ought not to apply to execution either in the State party to the dispute or in the State whose national was a party to the dispute.

9. Mr. Gourevitch (United States) pointed out that there was no equivalent of a "Competent Authority" in the United States and that creation of such an authority with quasi-judicial powers would not be possible in his country as the function of a competent authority under Article 57 could only be performed by a court. Other delegates said that in their understanding the term "competent authority" both as used in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and in the draft under consideration could be interpreted as including courts.

10. Mr. Tsai said that he interpreted the reference to execution "governed by the rules of civil procedure" of the State in which execution was sought as covering situations in which objection by the party against whom execution was sought might in some cases lead to a judicial proceeding. Mr. Ong (Malaysia) suggested that this point could be met if the first sentence of Article 57(3) was changed to require the compliance with any constitutional requirement of the State in which execution was sought; he was for deletion of the last sentence of Article 57(3).

11. The working group discussed a proposal of Mr. Gourevitch (SID/LC/44)' which would permit a Contracting State which was a Federal State to provide that an award would be enforced only in or through the Federal courts and would be so enforced as if it were a final judgment of the courts of one of the constituent States.

¹ Doc. 116

² Doc. 117

Legal Committee on the
Settlement of Investment Disputes

Amendment proposed by

Mr. D. MANTZOULINOS (Greece)

to replace the entire text of Article 57 of the Draft Convention with the texts of the two articles worded in accordance with the principles of the New York Convention (1958).

Article 57

1. Each Contracting State shall recognize an arbitral award rendered pursuant to this Convention as binding and shall enforce it in conformity with the rules of procedure followed in its territory on the conditions hereinafter set forth.
2. To obtain recognition and enforcement as contemplated in the preceding paragraph, the party applying for them shall furnish to the competent domestic authority simultaneously with the application:
 - a) the duly authenticated original award or a copy of that original meeting the conditions required for its authenticity;
 - b) the original written convention of the parties, contemplated in Article 26 paragraph (2) of this Convention, whereby the parties shall have given their consent to submit to the Centre;
3. Each Contracting State shall notify the Secretary General of the domestic authority competent to recognize the award and to issue the writ of execution.
4. Execution of the award shall be governed by the rules of civil procedure in force in the State in whose territories the execution is sought.

Article 57 (a)

1. Recognition and enforcement of the award shall be refused upon request of the party against whom it is rendered only if that party furnishes to the competent authority of the State in which recognition and enforcement are sought proof that:
 - a) the parties to the convention contemplated in Article 26, paragraph (2) of this Convention were incapacitated under the law applicable to

them, or that the said convention is invalid under the law to which the parties have submitted it; or

- b) the party against whom the award is rendered has not been duly notified of the designation of the arbitrator or of the arbitration procedure, or that it has been impossible for some other reason to present its case; or
 - c) the award bears on a dispute not contemplated in the arbitration proceedings or not entering into the provisions of the arbitration clause or that it contains decisions that are not within the scope of the arbitration proceedings or of the arbitration clause; nevertheless, if those provisions of the award that deal with questions submitted for arbitration can be dissociated from those that deal with questions not submitted for arbitration, the former may be recognized and enforced; or
 - d) the constitution of the Arbitral Tribunal or the arbitration procedure has not been in accordance with the Convention of the parties or, in the absence of such a convention, has not been in accordance with the provisions of this Convention or of the regulations provided for in Article 6 hereof and adopted by the Administrative Council of the Centre.
 - e) the award has not yet become binding upon the parties or has been annulled or stayed by application of the provisions of Articles 53, 54 and 55 of this Convention.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority of the State in which recognition and enforcement are sought ascertains that recognition or enforcement of the award would be contrary to the public policy of the said State.

NOTE: Compare the text of Articles III-IV and V of the "Convention" on recognition and enforcement of foreign arbitral decisions, New York 10 June 1958.

SID/LC/44 (December 4, 1964)

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LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Amendment submitted by Mr. Gourevitch (United States)

Article 57

Add at the end:

"(5) A Contracting State which is a Federal State may provide that an award rendered pursuant to this Convention shall be enforced only in or through the Federal courts and shall be enforced in such Federal courts as if it were a final judgment of the courts of one of the constituent States."

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Proposed addition to Redraft of Article 57 (Doc. SID/LC/55)
submitted by Mr. Gourevitch (United States)

(6) Where the rules of procedure referred to in paragraph 1 do not provide for direct execution by an enforcing court or other competent authority of foreign arbitral awards, the party seeking enforcement shall be entitled to bring an action upon the award.

¹ Contained in Doc. 113

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Fifth Interim Report

CHAPTER V - REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS
AND ARBITRATORS

CHAPTER VI - COST OF PROCEEDINGS

CHAPTER VII - PLACE OF PROCEEDINGS

The Drafting Sub-Committee transmits herewith the English text of Chapters V, VI and VII.

CHAPTER V

REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS AND ARBITRATORS

Article 59

(1) After a Commission or a 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 in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(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 from the appropriate Panel to fill the resulting vacancy.

Article 60

A party may propose to a Commission or Tribunal 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 Tribunal in accordance with the provisions of paragraph (1) of Article 43.

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, or of a majority of the conciliators or arbitrators, 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 be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

CHAPTER VI

COST OF PROCEEDINGS

Article 62

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the rules and regulations adopted by the Administrative Council.

Article 63

(1) Each Commission and each 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.

Article 64

(1) The charges for the use of the facilities of the Centre, as well as the fees and expenses of members of a Commission shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) Except as the parties shall otherwise agree, a tribunal shall assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom these expenses, the charges for the use of the facilities of the Centre, and the fees and expenses of the members of the Tribunal shall be paid. Such decision shall form part of the award.

CHAPTER VII

PLACE OF PROCEEDINGS

Article 65

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 66

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate international institution, whether private or public, with which the Centre may enter into arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

The Legal Committee reconvened at 10:42 a.m.

Mr. BROCHES (Chairman) expressed the hope that the Committee could examine the remaining provisions which are particularly of a legal nature and on which the Executive Directors of the Bank would want advice. Among those, he mentioned Articles 56, 57 and 58, amendments, reference to the International Court of Justice and Article 25. He said that the preamble and the final provisions raised policy questions but no technical legal problems and would therefore be directly submitted to the Executive Directors. Thus, the Convention would have been nearly entirely reviewed by the Committee and he added that the Drafting Sub-Committee had agreed to review in the afternoon the provisions which would now be examined.

After the end of the Conference, the Secretariat would review the drafts prepared by the Drafting Sub-Committee and compare them with the summary records in order to ascertain that all decisions have been taken care of. He hoped that in about a week, a clean copy of the Convention could be sent to the delegates, with indications concerning the parts examined by both the Legal Committee and the Drafting Sub-Committee, those examined by the Legal Committee only and for which the Secretariat would have to assume the drafting task, and finally the parts which would not have been examined by the Legal Committee and which would therefore remain in their present version. In the meantime, the report to the Executive Directors would be prepared and he presumed that a month would then probably elapse until the Executive Directors would take up the matter.

Mr. GUIDO (Uruguay) expressed the wish to make a general statement and explain the reasons why the Uruguayan Government was opposed to the proposed Convention. He said that the reasons were of both a juridical and a constitutional nature. On the one hand, the Uruguayan constitution did not permit courts or tribunals other than the national courts to examine internal acts of the States. Moreover, both the local and foreign investors were treated with complete equality and the proposed Convention was considered as giving greater rights to foreign investors. In addition, arbitration was provided for especially for solving inter-state conflicts but not conflicts between States and private persons. On the other hand, he pointed out that in Uruguay, such investor was entitled to seek remedy in the local courts and that there were several cases in which the State has been the losing party.

Mr. BROCHES (Chairman) said that attendance at this Conference would in no way be regarded as an acceptance by the governments concerned of either the general principles of the Convention or of the detailed provisions. He then proposed, in view of the very short time left, to examine the provisions of Articles 56 and 57 as redrafted by the Secretariat and contained in Document SID/LC/61.*

* "Article 56

- (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the award in

¹ This summary record was sent to the members for clearance in provisional form and reflects their comments. The articles discussed, unless otherwise indicated, refer to the Draft Convention of September 11, 1964, Doc. 43.

accordance with its terms, except during any stay of enforcement under the provisions of this Convention.

(2) For the purposes of this Section the term "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 53, 54 or 55 respectively.

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 a court in that State. A Contracting State with a federal constitution may enforce awards in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.

(2) To obtain recognition and enforcement, the applicant shall furnish to the competent domestic court or other authority which each Contracting State shall designate for this purpose a duly certified copy of the award. Each Contracting State shall notify the Secretary-General of the designation of the domestic authority or authorities for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the law concerning the execution of judgments in force in the State in whose territories such execution is sought.

(4) A Contracting State other than the State party to the proceedings and the State whose national was a party to the proceedings may refuse recognition and enforcement of an award if the domestic court or other authority designated pursuant to paragraph (2) of this Article finds that recognition or enforcement of that award would be contrary to the public policy of that State."

Articles 56 and 57

Mr. BROCHES (Chairman) said that the main idea was that there should be a complete parallelism between the obligation to comply with the award and the possibility of seeking enforcement. In other words, as long as the parties would not be under an obligation to comply with the award, there should not be compulsory execution. In this connection, he suggested that the Committee reconsider its earlier decision on the consequences of requests for revision and annulment of the award, to the effect that such requests operate as a stay, at least until such time as the Tribunal or ad hoc Committee has decided the question. He thought, however, that this should apply only to the annulment and revision procedures but not to the case of interpretation. If a decision to this effect were taken, the situation would be entirely clear since one would know in each case whether the parties are under an obligation to comply with the award or not. With respect to Article 57, he pointed out that a clause had been introduced in paragraph (1) to take into account the particular problems arising in Federal States. Paragraph (2) was substantially similar to the previous version except that it now especially stated that authorities would include courts. Paragraph (3) was in part inspired by the memorandum submitted by Mr. da CUNHA¹ and was intended to remove the misunderstandings which the use of the term "rules of procedure" had previously created. Paragraph (4), finally, which dealt with the exception of public policy, had been inspired by the fact that awards should also be enforceable in third States, but that several delegations felt that such third States should have an opportunity

¹ See Doc. 85

to refuse enforcement if such enforcement would violate their public policy. On the other hand there seemed to be a fairly strong feeling that this right should not be given to the State party to the dispute or to the national State of the investor. He conceded that there did not seem to be unanimity on the problems raised by paragraph (4) and that a decision would probably have to be made by a vote, possibly a roll call.

Mr. OUMA (Uganda) expressed some concern with respect to Article 56 since the award would not be subject to appeal although the arbitrators might not necessarily be lawyers.

Mr. BROCHES (Chairman) replying said that this type of provision was inherent to arbitration and pointed out that the Convention provided not only for revision of the award but also for annulment in case the arbitrators would have gone beyond their powers.

Mr. QUILL (New Zealand) said that the new drafts of Articles 56 and 57 were satisfactory.

Mr. GONZALEZ (Spain) concurred.

Mr. GHACHEM (Tunisia) objected to paragraph (4) and developed the argument he had presented at the previous meeting. The general principle of this Convention was that all Contracting States should recognize awards rendered by arbitral tribunals. It would be undesirable that such awards could be re-examined in third States, particularly in the light of public policy which was a fairly elastic concept. He then gave as an illustration a case in which a tribunal had seen itself compelled to refuse the enforcement of an award in view of the fact that the enforcement would have been contrary to public policy. In this case, however, the court had provided for compensation of the requesting party. He therefore thought that at least a provision to that effect should be inserted in the Convention if paragraph (4) were to be retained and in this connection referred to the desirability of creating a multilateral insurance fund.

Mr. BROCHES (Chairman) replying said that the question of establishing an insurance guarantee fund was presently under study in the OECD in Paris and in the World Bank and that concrete proposals might be drafted in a relatively near future.

Mrs. VILGRATTNER (Austria) suggested that as a drafting point, the second sentence of Article 56(1) be modified as follows: "Each party shall abide by the award and comply with it ...". the following exception being applicable only to compliance. With respect to Article 57(1), she suggested that the terms "as if it were a final judgment of a court in that State" be deleted since there were several possibilities for annulling judgments even after they had been declared final. On the other hand, she considered Article 57(4) as necessary in view of the principle that foreign awards should not be enforceable in third States without being examined in the light of public policy. She pointed out, however, that in Austria, the concept of public policy was very restrictive.

Mr. BROCHES (Chairman) replying, said that in his opinion, by making an award the equivalent of a final judgment, one would have reached the limits one could hope to reach. Any other language would probably raise difficulties with respect to specific exceptions and he thought that one should take the risk inherent in using a general expression.

Mr. BERTHAM (Germany) asked whether paragraph (2) implied that national courts would have the possibility of ascertaining whether review or annulment procedures were pending. With respect to paragraph (3), he pointed out that the procedures set forth in Articles 53, 54 and 55 were supposed to replace the corresponding national procedures, and thought it desirable to insert the words "by analogy" in order to avoid possible misunderstandings.

Mr. BROCHES (Chairman) replying said that the first point was not decided in the Convention and that it would be governed by the national laws which would probably make inquiries possible. With respect to the second question, he thought that any reasonable interpretation would be to the effect that there should not be a double set of the same remedies. If necessary, special provisions to that effect could be included in the implementing national legislations.

Mr. BURROWS (United Kingdom) stated that Article 56 and the first three paragraphs of Article 57 were acceptable to him. Concerning paragraph (4) of Article 57 he thought it should be deleted. It did not provide a rule which would operate in the same way for all States in any given situation. The concepts of ordre public and public policy mean different things in the two languages, and even in different countries which speak the same language. He felt that awards should be assimilated to the judgments of the courts of the States in which enforcement is sought. On the question of staying the enforcement he stated that if the award was assimilated to a judgment of an English court, then the court would have power to enforce that award even though some proceedings may be pending for its annulment.

He inquired whether the proposed provision intended to say that when annulment or revision proceedings have been instituted there shall no longer be an obligation on States to execute within their territories, or whether it was intended to say that not only shall there be no obligation to execute, but that there should not be execution.

Mr. BROCHES (Chairman) stated that the reason for his proposal was that, unlike the situation in local courts, there was no quick way of obtaining a temporary stay because in the cases of annulment and revision it would be difficult if not impossible for an aggrieved party to seek a temporary stay within a short period of time. Therefore, if there was an application of stay of enforcement, it should itself operate as a temporary stay until the Tribunal has ruled on the point.

Mr. BURROWS (United Kingdom) inquired whether the Secretary-General would notify the local authority concerned of an application under the Convention to review or annul the award, and whether as from the date when the authority acting under Article 57 receives that notice, it must itself stay the execution. Mr. BROCHES stated that that was his understanding.

Mr. O'DONOVAN (Australia) stated that the text in its present form made no provision with respect to the examination of the authenticity of the award as delivered to the court. He thought it would be desirable to leave open to a party who alleges fraud in the documents produced purporting to be the award to argue the case. He also suggested that the word "review" be substituted for "remedy" in the second line of Article 56(1).

Mr. BROCHES (Chairman) stated that the first point could be solved by stating "certified by the Secretary-General", since he was given power by another provision of the Convention to certify copies. The second point would be looked into.

Mr. da CUNHA (Brazil) and Mr. TSAI (China) stated that their delegations were in agreement with the text of Articles 56 and 57 as redrafted by the Secretariat.

Mr. NEDI (Ethiopia) stated that Articles 56 and 57 were acceptable except for paragraph (4) of Article 57, which should be deleted. They did not have an equivalent of "public policy" in their own language.

Mr. BIGAY (Central African Republic) wondered whether there was some contradiction between provisions of paragraphs (3) and (4) of Article 57. The possibility of a judgment being prejudicial to public policy seemed a contradiction in itself. He suggested that paragraph (3) be deleted.

Mr. GOUREVITCH (United States) stated that Articles 56 and 57 were acceptable as redrafted by the Secretariat, and that they would have no objection to the deletion of paragraph (4) of Article 57.

Mr. BERTRAM (Germany) referred to the remarks by Mr. BIGAY and stated that the question of public policy affected foreign judgments and foreign arbitral awards and not the judgments of national courts. He suggested the deletion of the words "other than the State party to the proceedings and the State whose national was a party to the proceedings" in paragraph (4).

Mr. BROCHES (Chairman) stated that the delegates were speaking against the background of their own particular system. He suggested that the meeting should consciously accept something that was of necessity not precise, which each country in good faith would seek to translate into appropriate local law. He thought that it was necessary to leave some freedom to the Contracting States to interpret in good faith the principal concept laid down in the Convention.

Mr. RATSIRAHONANA (Malagasy Republic) inquired whether it would be possible for a State party to the dispute to raise the issue of public policy to oppose the execution of an award.

Mr. BROCHES (Chairman) stated that if in a given case the specific enforcement was considered impossible provision could be made for an alternative, namely, an indemnity which would be the equivalent of what the plaintiff would otherwise have been entitled to.

Mr. CHEVRIER (France) agreed with the proposed wording of Articles 56 and 57, but thought that paragraph (4) in Article 57 was redundant since it somewhat repeated paragraph (3).

Mr. HARTLEV (Denmark) stated that Articles 56 and 57 as redrafted were acceptable, and that they would have no objection to the deletion of paragraph (4) in Article 57.

Mr. TSAI (China) proposed that if paragraph (4) of Article 57 should be deleted, an award should not be treated by a third State as a final judgment of its own court but as the judgment of a foreign court.

Mr. GHACHEM (Tunisia) believed that paragraph (4) was superfluous since paragraph (3) already provided for the same case.

Mr. BROCHES (Chairman) requested a show of hands of those who were in favor of deleting paragraph (4), including those willing to accept the deletion of paragraph (4). Twenty five delegations were in favor and 9 were opposed.

In view of the fact that the agreement was to delete paragraph (h) he requested a show of hands on the proposal by Mr. TSAI to limit the scope of Article 57 only to the State party to the dispute and the State whose national is a party to the dispute. In all other Contracting States the award would be dealt with as a foreign judgment. Six delegations were in favor of this proposal and 7 against.

This vote did not seem quite clear to Mr. BROCHES since Mr. TSAI's proposal would introduce a distinction which would go even further than the distinction in paragraph (h), which was rejected. It would not impose any obligation on a Contracting State not directly involved, except to the extent of what its laws might provide with respect to foreign judgments.

Mr. TSAI (China) wished to clarify that he did not mean to say that a third State would not enforce the award but that it would enforce it as a foreign judgment and not as the judgment of its own courts. The only reason was that the State itself is not directly involved.

Mr. BROCHES (Chairman) stated that Mr. TSAI's proposal was made on the assumption, which could be correct for China but might not be true for all other countries, that a foreign judgment would normally be enforced. There were countries where, in the absence of some international agreement, it was necessary to bring suit to enforce a foreign judgment.

Mrs. VILLGRATTNER (Austria) thought that if the proposal of Mr. TSAI was adopted it would necessitate another Article which would deal with the enforcement of awards in States which are not involved directly.

Mr. BROCHES (Chairman) thought that Mr. TSAI's proposal would result in an extreme diversity of results.

Mr. GUARINO (Italy) suggested that concerning States involved in the dispute the award should be regarded as the judgment of a national court, but in the other States it should be regarded as a foreign arbitral award.

Mr. HELLNERS (Sweden) thought that the first vote had already implied acceptance of a certain position, which was not to make such distinction between States.

Mr. BROCHES (Chairman) requested a vote on Mr. TSAI's proposal. Eleven delegations were in favor and 16 were opposed.

Mrs. VILLGRATTNER (Austria) requested that a vote be taken on her proposal that in the first paragraph of Article 57 there be stated "each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce it within the territories pursuant to the conditions set forth hereafter". A show of hands on this proposal indicated that 5 delegations were in favor and 19 against.

Mr. BROCHES (Chairman) then requested a show of hands on Mr. GUARINO's proposal to say "as if it were an arbitral award rendered in that State". Eight delegations were in favor and 15 opposed.

Mr. TSAI (China) proposed that the words "of a court in that State" be deleted in the first sentence of paragraph (1) of Article 57. Mr. BROCHES requested a show of hands on this proposal, which indicated that there was no support for it.

Article 58

Mr. BROCHES (Chairman) then referred to Article 58. He explained that it had been inserted merely to make it clear that this Convention did not seek to change the law of the Contracting States with respect to immunity, and in that respect it was merely a clarification of the terms. In many countries a final judgment against a foreign State and even against the local State could not be enforced. Then the award should not be enforced either.

Mr. LARA (Costa Rica) suggested that the Article should also cover the cases where there were laws which, although not related to immunities, might limit the execution of the award against the State.

Mr. BROCHES (Chairman) thought that this was unnecessary because full recognition had been given to the laws of the State in Article 57(3). Article 58 dealt with one specific problem on which certain delegations had expressed concern.

Amendments (Articles 68 and 69)

As no further comments were made, Mr. BROCHES referred to the question of amendments, which had been dealt with in a Working Group headed by Mrs. VILIGRATTNER. This Group had submitted a proposal which was clear and seemed to meet the difficulties of a number of delegations. The existing text had been objected to on the grounds that it would be difficult to avoid controversy about what was an important amendment and what was an unimportant one, and that it would be preferable that all amendments be ratified by each Contracting State.

The Working Group's proposal, reflected in Document SID/LC/51, would replace the three paragraphs of Article 69. He thought, however, that the substance of the proviso in paragraph (3) should be retained. He then requested a show of hands on the proposal by the Working Group. Twenty seven delegations were in favor and none opposed. It was agreed that the proviso in paragraph (3) should be converted into a new sentence starting with the words "no amendments shall affect ...".

Mr. LARA (Costa Rica) stated that any amendments of substance would have to be ratified by the legislative power of his country.

Mr. BROCHES (Chairman) stated that the text suggested by the Working Group made it clear that there could be no amendment without the ratification of each Contracting State.

Article 67

Mr. BROCHES (Chairman) referred to Article 67. This provision had the effect of making the jurisdiction of the International Court of Justice compulsory in disputes of the kind referred to therein unless the parties agree to another mode of settlement. If such a dispute should arise then either party could by simple application go to the International Court of Justice and the Court would have jurisdiction. He wanted to stress that point to ensure that all the delegates would realize what the effect of the provision was.

Mrs. VILIGRATTNER (Austria) stated that she was in entire agreement with this Article, which confirmed the principles of international jurisdiction and of the equality of States.

¹ See Doc. 121

Mr. LOKUR (India) stated that he opposed this Article because he was opposed to the compulsory jurisdiction of the International Court of Justice.

Mr. ANOONER-RENNER (Sierra Leone) wished to know whether the submission to the jurisdiction of the International Court of Justice would automatically result in a stay of proceedings where a claim was pending against the State going to the International Court.

Mr. BROCHES (Chairman) replying said that there was an amendment by the United States which referred to that point. This would be to the effect that a State would not be able by way of appeal to the International Court or in any other manner to frustrate proceedings. In his opinion, however, such a specific amendment was unnecessary. The point was already covered by Articles 28 and 44 implicitly. Article 67 would relate to matters such as, for example, questions on privileges and immunities and disputes on the question of compliance with awards where all the remedies prescribed by the Convention had been exhausted but a Contracting State had still failed to carry out the terms of the award.

Mr. LOKUR (India) said that it would be impossible to give the International Court jurisdiction in connection with the actual proceedings because such a review would not be possible under the Statute of the International Court itself.

Mrs. VILIGRATTNER (Austria) supported this conclusion basing herself on the provisions of the Convention which state that the Tribunal is "the judge of its own competence" since the International Court would be bound by this very provision.

Mr. BELIN (United States) said he would not request a vote on his amendment to which he attached great importance provided the proceedings or the comments attached to the Convention make it quite clear that there is a general consensus of the delegates that Article 67 would in no case enable a State, party to proceedings pursuant to the Convention, to frustrate those proceedings by a referral of the matter to the International Court of Justice.

Mr. BROCHES (Chairman) ascertaining the consensus of the meeting announced this would be done as the entire meeting seemed to be in agreement over this problem. He then requested a show of hands on the question of whether the International Court should be given compulsory jurisdiction as stated in the text or merely open the possibility of such jurisdiction in cases of specific agreements, and then announced that only two of the delegates present appeared to oppose, whereas 21 were for, the language of the Article as it now stood. He said that countries which were absent would be able to express their views on this matter when the final text was considered by the Executive Directors.

Preamble and Final Provisions

Mr. BROCHES (Chairman) said that there were two areas of the Convention that the meeting had not yet dealt with. They were the Preamble and the last Chapter, respectively. They had one thing in common - they were largely lacking in specific juridical complexity and were more of a nature of matters to be decided by the Executive Directors in the light of governmental instructions.

* See Doc. 122

Article 25

Mr. LOKUR (India) wished to recall that Article 25 had still to be discussed and proposed a text, subsequently amended by the United States, and adopted with no objections to read as follows: "Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories".

Mr. BROCHES (Chairman) then announced that this Article would be inserted in the final provisions of the Convention.

Article 70

Mr. TSAI (China) referred to the written comments submitted by his Government in Document SID/LC/5¹ which suggested that the Convention not be open to countries which are not members of the Bank.

Mr. SERB (Yugoslavia) suggested that the Convention be open to "members of the Bank and all other sovereign states" which was the language of the preliminary draft.²

Mr. LOKUR (India) seconded the Yugoslav proposal.

Mr. BERTRAM (Germany) strongly supported the language in Article 70 and said that if the Yugoslav proposal was adopted the Convention would become unacceptable to his Government.

Mr. RHIE (Korea) seconded the Chinese proposal.

Mr. BROCHES (Chairman) then summarized the various proposals and said there was a fourth possibility, namely, member States of the Bank and such other States as may be invited to join by the Administrative Council acting through an adequate majority.

Mr. BELIN (United States) wished to associate himself with the remarks of Mr. BERTRAM.

Mrs. VILGRATNER (Austria) said that with respect to the last possibility mentioned by the Chairman an invitation by the Administrative Council should require a unanimous vote.

Article 73

Mr. BROCHES (Chairman) then announced in reply to a comment from the floor that these final Articles will be regarded as not having been dealt with by the Committee, and that the discussion was merely in the vein of an exchange of views. He then referred to Article 73 and said one had to distinguish between Conventions which were intended to establish new rules of behavior which generally required a ratification by a high number of States before becoming effective, and Conventions of a procedural nature, such as the one before the meeting, which have a very low number of ratifications required. The arguments in favor of this low number were meant to enable anyone who wished to avail himself of the services provided by the Convention to do so since the question of its general acceptability was not a real issue in these cases. The Convention used the number of 12 because the expenses involved in setting up the Centre would not be justified if only two or three States joined. He then explained that the discretion given to the Executive Directors of the Bank in this Article were really

¹ See Doc. 45

² See Doc. 24

a safeguard against making the Convention operational if the first 12 ratifying States did not include a certain balance between capital-importing and capital-exporting countries.

Mr. AGORO (Nigeria) advocated that the figure of 12 be increased to 60 which would assure a fair amount of capital-importing and capital-exporting representation.

Mr. BROCHES (Chairman) explained how slow States were in ratifying Conventions and the reasons for always employing a small number of ratifications as a condition for the entry of any treaty into force. He did not particularly insist on the number of 12, but he strongly advocated a small number so that the mechanism of the Centre could come into effect as soon as there were a reasonable number of States representing the various interests in the field who wished to avail themselves of this mechanism. In addition he thought that if one increased the number substantially, the pressure on those who did not join to climb on the bandwagon would be considerably greater.

Mr. AGORO (Nigeria) said that the question of delay could be dealt with by setting a time limit for ratification. He accepted some of the explanations of the Chairman, however, and would be willing to reduce the required number of required ratifications to 30.

Mr. BROCHES (Chairman) said the thought of setting a time limit, after which those who have ratified even if they do not meet the initial numerical ceiling could still make the Convention operative as between themselves, could be considered.

Mr. LOKUR (India) was unhappy with the discretion given to the Executive Directors or the Chairman's right of recommendation because it violated the principle of the independence of the Centre. He would also like to raise the number to 25 or 30 ratifications.

Mr. TSAI (China) similarly requested that the number of 12 be increased and that a sufficient number of capital-importing, as well as capital-exporting countries, ratify the Convention before it comes into force. He also wished to record that his Government desired this Convention to be discussed at a diplomatic meeting before inviting governments to join him.

Mr. AWOONER-RENNER (Sierra Leone) likewise proposed raising the number to 25 or 30 together with a time limit on the lines mentioned by the Chairman.

Mrs. VILGRATNER (Austria) defended the number of 12.

Mr. BERTRAM (Germany) thought that the powers given to the Executive Directors under the Article might cause some constitutional difficulties and that the desired aim of balance this provision meant to achieve might be obtained in a different manner.

Mr. LARA (Costa Rica) advocated that the number of 12 refer to capital-importing countries only, and that the Executive Directors should have no discretion in determining whether this group represented a sufficient balance between capital-importing and capital-exporting States.

Closure

Mr. BROCHES (Chairman) thanked the delegates and all those concerned

with the work of the Committee for their full cooperation and for the fruitful meeting.

Mr. LOKUR (India) replying in the name of the delegations expressed their gratitude to the Chairman and all concerned for all the courtesy and assistance they had received and for the great patience shown by the Chair.

The meeting then closed at 2:00 p.m.

SID/LC/51 (December 8, 1964)

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LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

WORKING GROUP VII

Chairman: Mrs. Christine Villgrattner (Austria)

Report on Chapter IX - Amendment

1. At the request of the Legal Committee, a Working Group consisting of Mrs. Christine Villgrattner (Austria) (Chairman), Messrs. Andre (Belgium), Bertram (Germany), Dodoo (Ghana), Gourevitch (United States) and Sand (Norway) considered the provisions of Chapter IX on amendment of the Convention.
2. The Working Group discussed several mechanisms for amendment of multilateral agreements. It was agreed that the procedure in Article 69, which did not provide for approval at any stage by the legislatures of States, would not be acceptable to the majority of Contracting States.
3. Mr. Andre (Belgium) favoured a procedure whereby amendments would come into force only after ratification or acceptance by all Contracting States.
4. Mr. Gourevitch (United States) proposed a procedure whereby an amendment would come into force only after it had been ratified or accepted by a qualified majority of Contracting States, for example, two-thirds. Under that procedure no State would be bound by an amendment unless it had itself ratified or accepted it. It was agreed that this system, while it might commend itself to many States, could result in the formation of two groups of States - one of which was bound by the original provisions of the Convention, and the other by the Convention as amended. In this connection the Working Group considered a

procedure whereby States not ratifying the amendment might be required to withdraw from the Convention.

5. The Working Group decided unanimously that an amendment procedure substantially along the lines of the following text would be most suitable for the present Convention, and recommends its adoption:

Article 68

(Unchanged)

Article 69

If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification or acceptance. Each amendment shall come into force sixty days after dispatch by the Secretary-General of a notification to Contracting States that all Contracting States have ratified or accepted the amendment.

6. The Working Group, having considered the possible need to mention in Article 6 the requirement of a two-thirds majority for a decision to circulate an amendment pursuant to Article 69, recommends against it.

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SID/LC/60 (December 10, 1964)

LEGAL COMMITTEE ON
SETTLEMENT OF INVESTMENT DISPUTES

Amendment to Article 67 submitted by Mr. Gourevitch (United States)

(New Matter Underscored)

Any dispute, other than a dispute with respect to which arbitration or conciliation has been requested or is pending pursuant to this Convention, 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] any party to such dispute, unless the States concerned agree to another mode of settlement.

LEGAL COMMITTEE ON SETTLEMENT OF INVESTMENT DISPUTES

Revised Draft

of

CONVENTION ON THE SETTLEMENT OF INVESTMENT
DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

December 11, 1964

NOTE BY THE SECRETARIAT

The Legal Committee on Settlement of Investment Disputes at its meeting from November 23 to December 11, 1964, discussed the text of the Draft Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Document Z-12, dated September 11, 1964)¹. The Committee considered the provisions of the Draft, modifying them where necessary. After adoption of the substance of these provisions, the Committee referred them to its Drafting Sub-Committee which settled the wording of the English, French and Spanish texts.

The numbering of the articles has been changed to take account of the deletion or merging of articles of the original text.

The Committee was unable in the time allotted to deal with the Preamble, and to complete its work on Chapter X, Final Provisions.

PREAMBLE ^{1/}

The Contracting States

1. CONSIDERING the need for international cooperation for economic development, and the role of international investment therein;

^{1/} Not dealt with by the Legal Committee. The text is that of the Preamble appearing on pp. 1-2 of Document Z-12².

¹ Doc. 43
² Doc. 43

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 conciliators, 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 CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Section 1

Establishment and Organisation

Article 1

(1) There is hereby established the International Centre for the Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter

called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

Section 2

The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor or alternate governor of the Bank appointed by a Contracting State shall be ex officio its representative and its alternate respectively.

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 his 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 Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;

(f) adopt the annual budget of the Centre;

(g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than one-tenth of the members of the Council.

(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, by a two-thirds majority of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(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 any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, 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.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered in accordance with the provisions of this Convention, and to certify copies thereof.

Section 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.

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.

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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the 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.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same 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.

Section 5

Financing the Centre

Article 17

If expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by 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.

Section 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed in accordance with the provisions of paragraph (2) of Article 52, and the officers and employees of the Secretariat

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy 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.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings in accordance with the provisions of this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organisations.

Article 24

(1) The Centre, its assets, property and income, and its operations and transactions authorised by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed in accordance with paragraph (2) of Article 52, in proceedings pursuant to this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

CHAPTER II

JURISDICTION OF THE CENTRE

Article 25

(1) The jurisdiction of the Centre shall extend to any dispute of a legal character, arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(3) Any Contracting State may, at the time of ratification or acceptance of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. Such notification shall not constitute the consent required by paragraph (1).

Article 26

(1) Consent of the parties to arbitration pursuant to this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration pursuant to this Convention.

(2) Notwithstanding the provisions of paragraph (1) of Article 25, a Contracting State which has consented to submit to the Centre a dispute with a national of another Contracting State may, at the time of such consent or at any time thereafter, consent to the substitution for such national, in proceedings in accordance with the provisions of this Convention, of the State of which he is a national or of a public international institution if such State or institution, having satisfied the claim of such national under an investment insurance scheme, is subrogated to the rights of such national; provided, however, that such consent may be withdrawn at any time before the State or institution shall have notified to the other State in respect of such dispute its written undertaking (a) to be bound by the provisions of this Convention in the same manner as such national and (b) to waive recourse to any other remedy to which it might otherwise be entitled.

Article 27

(1) 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.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 28

For the purpose of this Convention "national of another Contracting State" means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered in accordance with the provisions of paragraph (3) of Article 29 or paragraph (3) of Article 37, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to Conciliation or Arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

CHAPTER III
CONCILIATION

Section 1

Request for Conciliation

Article 29

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Conciliation Commission

Article 30

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request in accordance with the provisions of Article 29.

(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 do not agree upon the number of conciliators and the method 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.

Article 31

If the Commission shall not have been constituted within 90 days ^{2/} after notice of registration of the request has been dispatched by the Secretary-General in accordance with the provisions of paragraph (3) of Article 29, or such other period as the parties may agree,

^{2/} Formerly "three months". Changed by the Secretariat to maintain consistency.

the Chairman shall, at the request of either party, end, after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 32

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments in accordance with the provisions of Article 31.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualifications stated in paragraph (1) of Article 14.

Section 3

Conciliation Proceedings

Article 33

(1) The Commission shall be the judge of its own competence.

(2) The Commission shall be constituted notwithstanding any objection by a party to the dispute that that dispute is not one in respect of which conciliation proceedings can be instituted pursuant to this Convention, or is not within the scope of its consent to such proceedings. Such objection shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 34

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, 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 this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 35

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour 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. 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.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in 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 shall close the proceedings and shall 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 close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 36

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, 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 report or any recommendations made by the Commission.

CHAPTER IV

ARBITRATION

Section 1

Request for Arbitration

Article 37

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Tribunal

Article 38

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request in accordance with the provisions of Article 37.

(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 do not agree upon the number of arbitrators and the method 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.

Article 39

If the Tribunal shall not have been constituted within 90 days^{3/} after notice of registration of the request has been dispatched by the Secretary-General in accordance with the provisions of paragraph (3) of Article 37, or such other period as the parties may agree, the Chairman shall, at the request of either party, and, after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.^{4/}

Article 40

(1) The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this paragraph shall not apply if the parties, by agreement, appoint one or more nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

(2) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments in accordance with the provisions of Article 39.

(3) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualifications stated in paragraph (1) of Article 14.

Section 3

Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) The Tribunal shall be constituted notwithstanding any objection by a party to the dispute that that dispute is not one in respect of which arbitration proceedings can be instituted in accordance with the provisions of this Convention, or is not within the scope of its consent to such proceedings. Such objection shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

^{3/} Formerly "three months". Changed by the Secretariat to maintain consistency.

^{4/} The last sentence of Article 39 was not included in the text approved by the Drafting Sub-Committee.

Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

(3) The provisions of paragraph (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, 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 this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any 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 Centre and within the scope of the consent of the parties.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Section 4

The Award

Article 48

(1) The Tribunal shall decide 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 the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

Article 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal, upon the request of a party made within 45 days after the date on which the award was rendered, may, after notice to the other party, decide any question which it had omitted to decide in the award, in which case the periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which such decision is rendered, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award.

Section 5

Interpretation, Revision and Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request 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 provisions of paragraph (2) of Article 38 and Articles 39 and 40. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of 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 shall be made within 90 days ^{5/} after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request 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 provisions of paragraph (2) of Article 38 and Articles 39 and 40. The Tribunal may, if it considers that the circumstances so require, stay the enforcement of the award pending its decision.

Article 52

(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 Tribunal 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;

^{5/} Formerly "three months". Changed by the Secretariat to maintain consistency.

- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, 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. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII ^{6/} shall apply mutatis mutandis to proceedings before the Committee.

(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 accordance with the provisions of paragraph (2) of Article 38 and Articles 39 and 40.

Section 6

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except during any stay of enforcement in accordance with the provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

^{6/} The words "and of Chapters VI and VII" were added by decision of the Legal Committee.

Article 54

(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 a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent State.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55 1/

Nothing in Article 54 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.

CHAPTER V

REPLACEMENT AND DISQUALIFICATION OF CONCILIATORS AND ARBITRATORS

Article 56

(1) After a Commission or a 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 in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(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 from the appropriate Panel to fill the resulting vacancy.

1/ Adopted by the Legal Committee but not considered by the Drafting Sub-Committee.

Article 57

A party may propose to a Commission or Tribunal the disqualification of a conciliator or an arbitrator on account of any fact indicating a manifest lack of the qualifies 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 Tribunal in accordance with the provisions of paragraph (1) of Article 40.

Article 58

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, or of a majority of the conciliators or arbitrators, 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 be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

CHAPTER VI

COST OF PROCEEDINGS

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the rules and regulations adopted by the Administrative Council.

Article 60

(1) Each Commission and each 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.

Article 61 7a/

(1) The fees and expenses of members of a Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) Except as the parties shall otherwise agree, a Tribunal shall assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom these expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

CHAPTER VII

PLACE OF PROCEEDINGS

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may enter into arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

7a/ The order in which items of the cost of proceedings are mentioned has been changed by the Secretariat so that the introductory words in each paragraph of this Article make it clear that their provisions apply to conciliation proceedings and to arbitration proceedings respectively.

CHAPTER VIII ^{8/}

DISPUTES BETWEEN CONTRACTING STATES

Article 64

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.

CHAPTER IX ^{2/}

AMENDMENT

Article 65

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 90 days ^{10/} 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.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification or acceptance. Each amendment shall come into force 60 days after dispatch by the Secretary-General of a notification to Contracting States that all Contracting States have ratified or accepted the amendment.

(2) No amendment shall 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 Centre given prior to the date of entry into force of the amendment. ^{11/}

^{8/} Adopted by the Legal Committee but not considered by the Drafting Sub-Committee.

^{9/} Adopted by the Legal Committee but not considered by the Drafting Sub-Committee.

^{10/} Formerly "three months". Changed by the Secretariat to maintain consistency.

^{11/} Paragraph (2) of Article 66 is in substance identical with the proviso in paragraph (3) of Article 69 on pp. 40-41 of document Z-12. The opening phrase "such amendment shall not affect" has, however, been altered by the Secretariat to "No amendment shall affect", and in the last line, the phrase "effective date" has been changed to "date of entry into force".

CHAPTER X^{12/}

FINAL PROVISIONS

Title 1

Entry into Force

Article 67 (formerly 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.

Article 68 (formerly 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.

Article 69 (formerly 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.

Article 69A^{13/}

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

^{12/} Not dealt with by the Legal Committee. With the exception of Article 69A and appropriate changes in cross-references, the text of Chapter X is identical with that of Chapter X appearing on pp. 42-45 of document Z-12.¹

^{13/} By decision of the Legal Committee Articles 25 and 57(4) of the text in document Z-12¹ were deleted on the understanding that a similar provision of general application would be inserted requiring each Contracting State to take action to implement the provisions of the Convention. The text now tentatively included as Article 69A was adopted by the Legal Committee but not considered by the Drafting Sub-Committee.

¹ Doc. 43
² Doc. 43

Title 2

Territorial Application

Article 70 (formerly 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.

Title 3

Denunciation

Article 71 (formerly Article 74)

Any Contracting State may denounce this Convention by written notice to the Bank.

Article 72 (formerly 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.

Title 4

Inauguration of the Center

Article 73 (formerly 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.

Title 5

Registration and Notifications

Article 74 (formerly 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.

Article 75 (formerly Article 76)

The Bank shall notify all signatory States of the following:

- (i) signatures pursuant to Article 67 of this Convention;
- (ii) ratifications and acceptances pursuant to Article 68 of this Convention;
- (iii) exclusions from territorial application pursuant to Article 70 of this Convention;
- (iv) declarations pursuant to Article 25(3) of this Convention;
- (v) the date upon which this Convention enters into force in accordance with Article 69 hereof;
- (vi) denunciations pursuant to Article 71 of this Convention.

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 74 and 75.

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(December 23, 1964)

REPORT OF THE CHAIRMAN OF THE LEGAL COMMITTEE
ON SETTLEMENT OF INVESTMENT DISPUTES¹

Article 1

Article 1, paragraph 2, of the September 11, 1964 draft (Report Z-12, hereinafter called the First Draft) provided that the Centre, in addition to making available facilities for conciliation and arbitration, might undertake such ancillary activities as might be authorized by the Administrative Council. This provision was deleted by the Legal Committee.

Article 6

The Legal Committee decided to require a two-thirds majority vote for the adoption by the Administrative Council of administrative and financial regulations, rules of procedure for the institution of proceedings, rules of procedure for conciliation and arbitration proceedings and the annual budget of the Centre.

¹ The articles mentioned, unless otherwise indicated, refer to the Revised Draft Convention of December 11, 1964, Doc. 123
² Doc. 43

Article 7

The Legal Committee decided to delete the provision requiring the annual meeting of the Administrative Council to be held in conjunction with the Annual Meeting of the Board of Governors of the Bank. There was no dissent however from the suggestion that an identical provision should be written into the administrative rules.

Article 10

The Article as redrafted by the Legal Committee now requires the Chairman to consult the members of the Administrative Council before making nominations for the offices of Secretary-General and Deputy Secretary-General.

Article 14

The Legal Committee added to paragraph 1 of this Article (which describes the qualifications required for conciliators and arbitrators) a statement emphasizing the importance of competence in the field of law in the case of persons on the Panel of Arbitrators.

Article 15

The term of office of Panel members was increased from four to six years.

Article 17

This Article was approved without change of substance after I stated that it was the intention of the President of the Bank to recommend to the Executive Directors that the Bank make a contribution toward the overhead costs of the Centre.

Article 20 and 21

The new text of these Articles refers explicitly to the possibility that the Centre might waive its own immunity and that of the persons covered by Articles 21 and 22. In the opinion of the Legal Committee the Centre should not, however, itself invoke immunity, and should exercise its power to waive the immunity of any person covered by Articles 21 and 22, in the case of counterclaims directly connected with the principal claim in proceedings instituted by the Centre or such person.

Article 22

This provision was substantially redrafted.

Article 23

On the proposal of the United Kingdom expert the privileges with respect to the official communications of the Centre were restated in the form approved by the International Telecommunications Union.

Article 25 (First Draft)

The Legal Committee decided to delete this Article but to include its substance in the final provisions.

Article 25 (First Draft, Articles 26 and 29)

This Article combines in amended form Articles 26 and 29 of the First Draft. The question of the jurisdiction of the Centre or, otherwise stated, the scope of the Convention, gave rise to extended debate. There were two principal approaches to the problem of defining the scope of the Convention. The first, embodied in the First Draft and eventually retained in the Revised Draft, may be characterized as the "open" approach which would permit the parties to bring by agreement any investment dispute of a legal character between them before the Centre. The other, which may be characterized as a "closed" approach would have limited disputes which might come before the Centre to specific classes.

After lengthy discussions both in plenary sessions and in an ad hoc working group, two alternative drafts were prepared reflecting the "open" and "closed" approaches respectively.* Successive shows of hands in the Legal Committee on the two drafts indicated that the draft reflecting the "open" approach had obtained both the largest number of votes in favor and the smallest number of votes against. That draft, on which Article 25 of the Revised Draft is based, had been sponsored by the experts of the following 29 countries: United Kingdom, Tanzania, Uganda, U.S.A., Netherlands, Sierra Leone, Denmark, Norway, Finland, Sweden, Nepal, Malaysia, New Zealand, Turkey, Nigeria, Yugoslavia, Korea, Japan, Liberia, Greece, Germany, Austria, Ivory Coast, Belgium, India, Costa Rica, Lebanon, Iran and Malagasy Republic.

Article 26(1) (First Draft, Article 27(1))

As was the case at the regional meetings, there was considerable discussion in the Legal Committee regarding the question whether the provision in the First Draft was intended to change the rule of international law with respect to the exhaustion of local remedies prior to the presentation of an international claim. I explained that that provision was merely a rule of interpretation. To avoid any misunderstanding on this score it was decided to add to the provision a second sentence which would make it quite clear that a Contracting State could make its consent to arbitration conditional upon prior recourse to local administrative or judicial remedies.

* For the text of the proposal reflecting the "closed" approach see below, page 7.

Article 26(2) (First Draft, Article 27(2))

The possibility of subrogation of a State in the rights of its national gave rise to extensive discussion. The objections to the provision as drafted in the First Draft were twofold. In the first place, some experts felt that there was a danger in permitting the investor's national State to appear as a party before the Centre because to do so would open the possibility that a State would in effect have a choice between two or more remedies. That State might appear in proceedings under the auspices of the Centre as the successor to the rights of its national and might in addition make a direct claim against the host State under a bi-lateral agreement with that State or under general international law. The provision was extensively redrafted in order to make entirely clear that if a State wished to appear before the Centre as subrogee of its national it would have to obtain the consent of the host State and to waive recourse to any other remedy. This redraft met the objections of certain experts although some others were still doubtful about the desirability of the provision. In addition, another group of experts felt that since the Convention was intended to deal with disputes between States on the one hand and investors on the other, it would be inconsistent to open the possibility that the Centre would deal with a dispute both parties to which were States. In the end a small majority expressed itself in favor of including a provision on subrogation. I said that in view of the small majority, no firm decision could be reported to the Executive Directors. A roll call showed that 24 delegates wanted a provision on subrogation included, 19 opposed and three abstained. The delegates voting for were Australia, Austria, Belgium, Central African Republic, China, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Israel, Ivory Coast, Japan, Korea, Malagasy Republic, Malaysia, Netherlands, New Zealand, Norway, Sweden, Turkey, United Kingdom, United States. Those voting against were Brazil, Ceylon, El Salvador, Ghana, Greece, Guatemala, Honduras, India, Iran, Italy, Nigeria, Panama, Peru, Philippines, Sierra Leone, Spain, Uganda, Uruguay, Yugoslavia. Ethiopia, Lebanon and Liberia abstained.

Article 27 (First Draft, Article 28)

To this Article a second paragraph was added to make clear that the phrase "diplomatic protection" would not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 28 (First Draft, Article 30)

This Article, in the form in which it appeared in the First Draft, included definitions of "investment", "legal dispute" and "national of another Contracting State". The first two definitions were deleted. With respect to the third definition, a distinction was made between natural persons and juridical persons. As to natural persons, the provision was redrafted so as to exclude as a possible party to a dispute before the Centre a dual national one of whose nationalities was that of the State party to the dispute. With respect to juridical persons a difference of opinion arose regarding the question whether a company organized under the laws of the host State but controlled by nationals of another

Contracting State could be treated as a national of another Contracting State and thus be eligible to be a party to proceedings under the auspices of the Centre. After extended consideration a small majority expressed itself in favor of permitting the parties to a dispute to agree to treat as a national of another Contracting State a foreign controlled company organized under the laws of the host State. On a roll call 24 delegations voted in favor of the proposal, 20 voted against and three abstained. Those voting for were Australia, Austria, Belgium, Costa Rica, Denmark, Finland, France, Germany, Greece, Israel, Italy, Ivory Coast, Japan, Lebanon, Liberia, Malagasy Republic, Netherlands, New Zealand, Nigeria, Norway, Sweden, Turkey, United Kingdom, United States. Those voting against were Brazil, Central African Republic, Ceylon, China, El Salvador, Ethiopia, Ghana, Haiti, India, Korea, Nepal, Panama, Peru, Philippines, Sierra Leone, Tunisia, Uganda, Tanzania, Uruguay, Yugoslavia. Dahomey, Malaysia and Spain abstained. I did not consider it likely that further discussion would lead to a greater degree of consensus and stated to the Committee that the views expressed would be reported to the Executive Directors.

Article 32 (First Draft, Article 34)

Conciliators appointed by the parties may, under the revised provision, be selected from outside the Panel. (See also comment on Article 40(2) below).

Article 38 (First Draft)

The first sentence was transferred to Article 35 of the Revised Draft. The second sentence was deleted.

Article 40(1) (First Draft, Article 43(1))

The Legal Committee was not prepared to retain the existing provision which excluded entirely from service on a Tribunal nationals of the State party to the dispute and of the State whose national is a party to the dispute. The amended provision merely ensures that such persons would not form the majority of the membership of a Tribunal. There is, however, an exception to this prohibition, viz., where the parties to the dispute have agreed on the identity of the persons who are to serve as arbitrators. The Chairman, when appointing arbitrators, is limited to nationals of countries which are neither directly nor indirectly involved in the dispute.

Article 40(2) (First Draft, Article 43(2))

The provision in the First Draft restricted the selection of arbitrators to members of the Panel, except where the parties had agreed on the number of members of the Tribunal and the manner of their appointment. Many experts felt that this restriction went too far, and the provision as redrafted leaves the parties free to choose arbitrators from outside the Panel. The Chairman, however, will be limited to the Panel when called upon to appoint an arbitrator.

Article 42(1) (First Draft, Article 45(1))

The Legal Committee modified the substance of this provision by specifying that, in the absence of agreement between the parties as to the applicable national law, the Tribunal will apply the national law of the State party to the dispute unless that law refers to another law.

Article 45 (First Draft, Article 48)

This provision was extensively redrafted by the Legal Committee, but the substance remains largely unchanged.

Article 47 (First Draft, Article 50)

The Legal Committee limited the power of Tribunals by providing that they may only recommend (not, as in the First Draft, prescribe) provisional measures, and deleted the provision for penalties in case of non-compliance.

Article 48 (First Draft, Article 51)

The Legal Committee added the requirement that the award must deal with every question submitted to the Tribunal and broadened the provision regarding dissenting opinions to permit individual opinions by any member of a Tribunal, whether he dissents from the majority or not. In addition, the Legal Committee deleted the proviso which permitted the parties to exclude dissenting opinions or to waive the requirement that an award must state the reasons on which it is based.

Article 49 (First Draft, Article 52)

The Legal Committee deleted the requirement that the award be delivered in the presence of the parties.

Article 54 (First Draft, Article 57)

This provision was substantially redrafted by the Legal Committee in order to make it capable of application in unitary States as well as in federal or other non-unitary States and in legal systems related to the common law as well as those related to the civil law.

Article 61 (First Draft, Article 62)

The Legal Committee changed the existing provision and made a distinction between conciliation proceedings and arbitration proceedings. With respect to the former, the parties bear their own expenses and share equally in the expenses of the Commission and the Centre. With respect to arbitration proceedings, the Tribunal determines the apportionment of costs, unless the parties have otherwise agreed.

Article 63 (First Draft, Article 66)

The Legal Committee broadened the provision so as to permit proceedings to be held at the seat of any "appropriate institution, whether public or private" with which the Centre makes arrangements for that purpose.

The Committee, in the course of its discussion of the "arrangements" which the Centre might make for the purpose of holding conciliation or arbitration proceedings away from the seat of the Centre, agreed that they could include not only arrangements for the provision of physical facilities, e.g. use of building and equipment, but a variety of services, e.g. registry and secretariat, as well. The practice of the Centre should be flexible on this point and the nature and extent of the facilities made available by an institution would vary with the arrangements which would be worked out between the Centre and the institution concerned.

Article 64 (First Draft, Article 67)

This provision was approved without change on the understanding that it does not confer jurisdiction on the International Court of Justice with respect to disputes regarding the competence of Conciliation Commissions or Arbitral Tribunals since Articles 33 and 41 of the Convention make Commissions and Tribunals the judges of their own competence, or with respect to any international claim which is barred by Article 27 of the Convention.

Article 66 (First Draft, Article 69)

This provision now requires ratification or acceptance by all Contracting States before an amendment enters into force.

* This draft reflecting the "closed" approach read in part as follows:

- "(1) The jurisdiction of the Centre shall extend to the settlement of any legal dispute between a Contracting State and a National of another Contracting State which directly refers to an investment and has as its object
 - (a) compliance with obligations arising out of a contract between that State and a National of another State;
 - (b) compliance with guarantee obligation which a State may have given to specific investments;
 - (c) to determine the indemnity to be granted for acts taken by the State in violation of rights lawfully acquired by the National of the other State, provided however, that such acts do not result from

- (i) the correct application of the laws in force in the territories of the State at the time the investment was made or
- (ii) the correct application of laws of a general character enacted after that time which do not annul or reduce the benefits expressly recognized to the national investor."

(December 28, 1964)

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Mr. George D. Woods
International Bank for Reconstruction
and Development
Washington, D.C.

Dear Mr. Woods:

I herewith submit to you, as Chairman of the Executive Directors, my report on the work of the Legal Committee on Settlement of Investment Disputes.

The Committee held its first meeting on November 23, 1964 and concluded its deliberations on December 11, 1964. Sixty-one members of the Bank sent advisers, and in some cases designated alternates. The total number of legal experts attending for all or part of the three-week period was 74. The Legal Committee held 22 plenary sessions. In addition, the Drafting Sub-Committee met daily, including most weekends, and a number of ad hoc working groups met at irregular intervals, including weekends.

The Legal Committee completed consideration of Chapters I through IX of the Draft Convention on the Settlement of Investment Disputes (Document Z-12¹, dated September 11, 1964). Some aspects of Chapter X (Final Provisions) were briefly considered but there was no time for full consideration and no decisions were arrived at. The Preamble was not considered.

The results of the work of the Legal Committee are embodied in the Revised Draft of the Convention (Document Z-13)² which has been circulated to the Executive Directors. As noted in the introductory note to the Revised Draft, the Preamble and Chapter X are unchanged from the September 11, 1964 draft (except for necessary changes in numbering and cross references), while Chapters I through IX reflect the text approved in substance by the Legal Committee and, with some exceptions, drafted by the Drafting Sub-Committee. Document Z-14³, attached hereto, shows the old text as well as deletions therefrom and additions thereto made by the Legal Committee and the Drafting Sub-Committee, thus permitting a comparison between the two texts.

¹ Doc. 43

² Doc. 123

³ Not reproduced

In general, the provisions of the Revised Draft were adopted by the Legal Committee by a large majority of those voting. In a few instances, however, there were very close votes on important provisions. The attached Report on the Revised Draft Convention on the Settlement of Investment Disputes draws particular attention to those provisions in addition to giving a survey of the more important changes made in the September 11, 1964 draft by the Legal Committee.

The submission of this Report completes the work of the Legal Committee.

Respectfully submitted,

/signed/ A. Broches

A. Broches
Chairman, Legal Committee on
Settlement of Investment Disputes

⁴ Doc. 124

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SecM65-3 (January 4, 1965)
Memorandum of the President to the Executive Directors

SETTLEMENT OF INVESTMENT DISPUTES

1. There have been circulated to the Executive Directors
 - (a) Revised Draft of Convention on the Settlement of Investment Disputes between States and Nationals of Other States, dated December 11, 1964 (R64-153); and
 - (b) Report of the Chairman of the Legal Committee, dated December 28, 1964 (R64-155);
2. The General Counsel has informed me that after a review of that portion of the Convention which was dealt with by the Legal Committee he recommends that the Executive Directors accept the advice of the Legal Committee, subject only to minor changes of a technical character. A memorandum listing these changes will be circulated shortly.
3. There is now being prepared for circulation to the Executive Directors a draft of a Report to accompany the Convention when the latter is submitted to governments.¹
4. As the Executive Directors know, the Legal Committee was unable to deal with the Preamble and Chapter X (Final Provisions) of the Convention. The staff is reviewing those portions of the Convention in the light of written comments submitted by governments. I urge those Executive Directors who have comments or suggestions with respect to the Preamble and Chapter X to give them to Mr. Broches as soon as possible.
5. In order to give the Executive Directors ample time to consider the documents already circulated and those still to follow, I propose that the

¹ Doc. 123
² Doc. 124
³ Doc. 128

various documents be discussed by the Executive Directors sitting as the "Committee of the Whole on Settlement of Investment Disputes" during the week starting February 15, 1965 and I would hope that Committee deliberations could be concluded during that week. I would then expect final action by the Executive Directors to be taken in the first week of March after which the Convention would be submitted to member governments.

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R65-6 (January 8, 1965)

Memorandum from the General Counsel and List of Proposed Changes to the Revised Draft Convention transmitted to the Committee of the Whole¹

MEMORANDUM FROM THE GENERAL COUNSEL

With reference to the President's memorandum of January 4, 1965 (SecM65-3), there is attached hereto a list of proposed changes in Chapters I through IX of the English text of the Revised Draft Convention on the Settlement of Investment Disputes (R 64-153).

Since the plenary sessions of the Legal Committee continued until the adjournment of the Meeting on December 11, 1964, the Drafting Sub-Committee was unable to deal with some of the decisions on substance taken by the Legal Committee and lacked the time to review that portion of the text with which the Sub-Committee had dealt at successive stages during the Meeting. On a review of the text a number of minor technical changes were found to be desirable. Where necessary a short explanation of the changes is given in the attachment. Most of the changes are drafting changes only and in my opinion none of the changes raise issues of policy.

A list of corresponding changes, where appropriate, in the French and Spanish texts of the Revised Draft Convention will be distributed shortly.

CHAPTER I

Title and Article 1

Delete the word "the" from the name of the Centre, which would then read in the title of Chapter I and in Article 1: "International Centre for Settlement of Investment Disputes".

Article 4, paragraph (2)

Line 2. The reference should be to "each governor and alternate governor of the Bank" and not to "each governor or alternate governor..."

¹ The articles mentioned, unless otherwise indicated, refer to the Revised Draft Convention of December 11, 1964, Doc. 123

Article 11

Penultimate line. Replace the phrase "in accordance with the provisions of" by "pursuant to". 1/

Article 21, preambular paragraph

Line 3. The reference should be to "paragraph (3) of Article 52", and not to paragraph (2) of that Article.

Article 22

Line 2. Replace the phrase "in accordance with the provisions of" by the word "under". 2/

Article 24, paragraph (3)

Line 4. The reference should be to "paragraph (3) of Article 52", and not to paragraph (2) of that Article.

Line 4. Replace the phrase "pursuant to" by the word "under". 3/

CHAPTER II

Article 25, paragraph (1)

Lines 1-2. Replace the phrase "disputa of a legal character" by "legal dispute". The latter phrase is used in the English text of paragraph (2) of Article 36 of the Statute of the International Court of Justice, and corresponds to "différend d'ordre juridique" in French and "diferencia de naturaleza jurídica" in Spanish, which terms are used in the French and Spanish texts of the Convention.

Article 25, new paragraph (2)

Article 30 of the First Draft of the Convention (Z-12)¹ contained definitions of the terms "investment", "legal dispute" and "national of another Contracting State". The Revised Draft has retained only the definition

1/ Similar changes should be made in the following Articles: Article 21, preambular paragraph, line 3; Article 24, paragraph (3), line 3; Article 30 (to be re-numbered Article 29), paragraph (1), line 3; Article 32 (to be re-numbered Article 31), paragraph (1), lines 2-3; Article 38 (to be re-numbered Article 37), paragraph (1), lines 2-3.

2/ A similar change should be made in Article 57, penultimate line.

3/ Similar changes should be made in the following Articles: Article 26, paragraph (1), line 1 and last line; Article 27, paragraph (1), line 4.

¹ Doc. 43

of "national of another Contracting State" in Article 28. That definition, with a few minor drafting changes, could now conveniently be made a new paragraph (2) of Article 25 and read as follows:

(2) For the purpose of this Convention "National of another Contracting State" means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered ~~in accordance with the provisions~~ pursuant to paragraph (3) of Article 29 ~~28~~ or paragraph (3) of Article 37 ~~36~~, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

Article 25, paragraph (2).

To be re-numbered paragraph (3).

Article 25, paragraph (3).

To be re-numbered paragraph (4), and to be re-drafted so as to provide for the circulation of notifications to Contracting States. This involves the following change:

Line 4. After the end of the first sentence insert: "The Secretary-General shall forthwith transmit such notification to all Contracting States."

Article 26, paragraph (2).

Line 9. Replace the semi-colon by a full stop. Delete the words "provided, however, that" and commence a new sentence: "Such consent may be withdrawn ...", the remainder of the text being unchanged. This division of the text into two sentences makes for easier reading.

Article 28

To be deleted since its contents have been included in new paragraph (2) of Article 25.

CHAPTER III

Article 29 (To be re-numbered Article 28)

Paragraph (3). In order to reflect more adequately the sense of the Legal Committee that the Secretary-General's finding regarding the registrability or otherwise of a request for conciliation proceedings should be based solely upon the information furnished to him under paragraph (2) of this Article, insert in line 2 of paragraph (3) after the word "finds": ", on the basis of the information contained in the request,".

Article 30 (To be re-numbered Article 29)

Paragraph (1), line 3. The reference to "Article 29" should be to "Article 28".

Article 31 (To be re-numbered Article 30)

Line 4. The reference should be to "paragraph (3) of Article 28".

Article 32 (To be re-numbered Article 31)

Paragraph (1), line 3. The reference to "Article 31" should be to "Article 30".

Paragraph (2), line 2. Replace the word "qualifications" by "qualities" which more accurately covers the various attributes listed in paragraph (1) of Article 14.

Article 33 (To be re-numbered Article 32)

Paragraph (2). Since paragraph (1) of Article 30 of the Revised Draft requires the Commission to be constituted as soon as possible after registration of the request for conciliation proceedings, the first requirement of the present paragraph appears superfluous and may be omitted. As to the classes of objection contemplated, the intention was to cover any objection to the competence of the Commission, including objections to the jurisdiction of the Centre, and this idea could be expressed with greater clarity.

In view of the foregoing the present paragraph should be replaced by the following:

"(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

Article 34 (to be re-numbered Article 33)

Line 4. The words "date on which the consent to conciliation was given"

in the first sentence should be replaced by "date on which the parties consented to conciliation.", in order to make it clear that the date in question is the date by which both parties had given their consent.

Article 35

To be re-numbered Article 34.

Article 36

To be re-numbered Article 35.

Article 37 (To be re-numbered Article 36)

Paragraph (3), line 2. After the word "finds", insert the following: ", on the basis of the information contained in the request,". See note on paragraph (3) of Article 29 above.

Article 38 (To be re-numbered Article 37)

Paragraph 1, line 3. The reference to "Article 37" should be to "Article 36".

Article 39 (To be re-numbered Article 38)

Line 3. Delete the words "the provisions of".

Line 4. The reference to "Article 37" should be to "Article 36".

Line 5. Delete the second and third commas.

Line 7. After the word "appointed" insert "by the Chairman".

Article 40 (To be re-numbered Article 39)

Paragraph 1. The Legal Committee adopted a rule requiring that the majority of the members of a tribunal should not be "national" arbitrators, i.e. persons who are nationals of the State party to the dispute or of the State whose national is a party to the dispute, but sought to make an exception to this rule in the case where the members of the Tribunal had been appointed by agreement of the parties. Under the proviso to paragraph (1) of this Article as drafted, the rule would be inapplicable if even one arbitrator out of three or five were appointed by agreement of the parties, which was not the intention of the Legal Committee. It is therefore suggested that the proviso be redrafted as follows:

"provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties."

Paragraphs (2) and (3)

Paragraphs (2) and (3) of the present Article, which relate to the use of the Panels in the selection of arbitrators, should logically form a separate article to be numbered Article 40. The text of these paragraphs would, after minor changes, read as follows:

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman in accordance with pursuant to Article 39 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualifications qualities stated in paragraph (1) of Article 14.

Article 41, paragraph (2)

This paragraph should be re-drafted as follows:

"(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute".

See note on Article 33.

Article 44.

Line 4. The last words of the first sentence should be replaced by "on which the parties consented to arbitration". See note on Article 34.

Article 46

This Article permits consideration by the Tribunal of certain ancillary claims provided that they are "within the jurisdiction of the Centre and within the scope of the consent of the parties". This formulation may give the erroneous impression that the consent of the parties and the jurisdiction of the Centre are separate and distinct factors. It would, therefore, be preferable to re-phrase the proviso to Article 46 (last two lines) in the following way:

"provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre."

Article 48, new paragraph (5)

The Legal Committee, when discussing the formalities connected with an award, decided that a new paragraph dealing with publication of awards by the Centre should be added to the present Article. This decision is

not reflected in the text of the Convention reproduced in document Z-13. It is now proposed to add as paragraph (5) of the present Article the following text:

"(5) The Centre shall not publish the award without the consent of the parties".

Article 49, paragraph (2)

For the sake of clarity, the text may be recast as follows:

(2) The Tribunal, upon the request of a party made within 45 days after the date on which the award was rendered, may, after notice to the other party, decide any question which it had omitted to decide in the award, in which case the periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which such decision was rendered, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Article 50, paragraph (2)

Lines 3-4. Replace "the provisions of paragraph (2) of Article 38 and Articles 39 and 40" by the words "Section 2 of this Chapter".

Article 51

While paragraph (3) of this Article empowers the Tribunal which considers a request for revision of an award to stay enforcement of the award pending its decision on the request, nothing is said regarding enforceability of the award immediately following an application for revision and before the Tribunal has been able to act. This question might best be resolved by deleting the last sentence of paragraph (3) and adding the following new paragraph (4) to this Article:

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Lines 3-4. Replace "the provisions of paragraph (2) of Article 38 and Articles 39 and 40" by "Section 2 of this Chapter".

Article 52, paragraph (5)

For reasons similar to those given for the changes in the provisions on

stay of enforcement in Article 51, add the following sentence to paragraph (5):

If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

Article 52, paragraph (6)

Line 3. Replace the words "the provisions of paragraph (2) of Article 38 and Articles 39 and 40" by "Section 2 of this Chapter".

Article 53, paragraph (1).

Lines 4-5. The wording of the exception to the rule stated in the present paragraph seemed slightly ambiguous. It might be re-worded (making the necessary changes to maintain consistency as well) as follows:

"except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention".

Article 54

Last line. For "constituent State" read "constituent state".

CHAPTER V

Article 56, new paragraph (2)

On reflection it seemed desirable that Article 56 should deal explicitly with the position of a conciliator or an arbitrator who had for some reason ceased to be a member of the relevant Panel. It is proposed to introduce a new paragraph (2) reading as follows:

"(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel".

Article 56, paragraph (2)

To be re-numbered as paragraph (3).

Article 57

Line 2. Replace "a conciliator or an arbitrator" by "any of its members".

Line 3. For "qualifies" read "qualities".

Penultimate and last lines. Replace the words "paragraph (1) of Article 40" by "Section 2 of Chapter IV".

Article 58

Line 1. Replace the words "propoeed disqualification" by "proposal to disqualify a conciliator or arbitretor".

Line 4. Replace the words "proposed disqualification of" by the phrase "proposal to disqualify".

CHAPTER VI

Article 59

Line 3. Delete the words "rules and" to maintain consistency with paragraph (1)(a) of Article 6.

Article 61, paragraph (1)

Line 1. At the beginning of the paragraph insert the words "In the case of conciliation proceedings" to give an initial indication of the content of the paragraph. For "a Commission" read "the Commission".

Article 61, paragraph (2)

Lines 1-2. For greater clarity and consistency, re-drsft the first part of the paragraph as follows:

"(2) In the case of arbitration proceedings Except as the parties shall otherwise agree a the Tribuns1 shall, except as the parties otherwise agree, essess the expenses...."

Line 3. For "these expenses" read "those expenses".

CHAPTER VII

Article 63, sub-paragraph (a)

Line 3. For "enter into" reed "make".

CHAPTER VIII

Article 64

Line 4. Replace the word "either" by "any".

Last line. Replace the word "mode" by "method".

CHAPTER IX

Article 65

Since this Article provides that the Administrative Council shall consider any proposed amendment as a first stage in the amendment procedure the Secretary-General should transmit the proposal to members of the Council and not, as is required by the present wording of Article 65, to Contracting States. The words "Contracting States" at the end of the paragraph should therefore be replaced by "the members of the Administrative Council".

Article 66, paragraph (1)

No provision had hitherto been made for a depository of instruments of ratification or acceptance of amendments. It seems logical that the Bank, which would assume the role of depository in relation to the Convention as a whole, should also act as depository of instruments ratifying or accepting amendments and it is therefore proposed to insert after the first sentence and before the second sentence of this paragraph as it stands, the following sentence:

"Instrumenta of ratification or acceptance shall be deposited with the Bank".

Line 4. For "come" read "enter". Replace "Secretary-General" by "Bank", the Bank as depository being the proper authority to notify Contracting States.

Article 66, paragraph (2)

In the interests of clarity and consistency, the following changes should be made:

Line 4. Replace the phrase "pursuant to consent" by "of a dispute which the parties had consented to submit".

Penultimate line. Replace "given prior to" by "before".

28

R65-11 (January 19, 1965)

Memorandum from the General Counsel and Draft Report of the Executive Directors to accompany the Convention

MEMORANDUM FROM THE GENERAL COUNSEL

With reference to the President's memorandum of January 4, 1965 (SecM65-3), there is attached hereto a Draft Report of the Executive Directors to accompany

the Convention on Settlement of Investment Disputes' when it will be submitted to governments. As the Executive Directors will recall, the President has indicated in the past that he would recommend that the Bank make a contribution toward the overhead of the Centre. The President's recommendation on this subject is reflected in paragraph 16 of the Draft Report.

Paragraphs 17, 45 and 46 of the Draft Report dealing with Articles 9, 63 and 64, respectively, of the Revised Draft Convention, reflect the views of the Legal Committee on these Articles.

The French and Spanish texts of the Draft Report will be distributed shortly.

IV

The International Centre for Settlement of Investment Disputes

General

14. The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18-24). The purpose of the Centre is "to provide facilities for conciliation and arbitration of investment disputes * * *" (Article 1(2)). The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.

15. As sponsor of the institution the Bank will provide the Centre with premises for its seat (Article 2) and, pursuant to arrangements between the two institutions, with other administrative facilities and services (Article 6(d)).

16. With respect to the financing of the Centre (Article 17), the Executive Directors have decided that the Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank's headquarters and to underwrite, within reasonable limits, the basic overhead expenditure of the Centre for a period of years to be

² Parts I, II and III of the Report are not reproduced

³ The articles mentioned, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

determined after the Centre is established.

17. The structure of the Centre is characterized by the maximum of simplicity and economy compatible with the efficient discharge of the Centre's functions. The organs of the Centre are the Administrative Council (Articles 4-8) and the Secretariat (Articles 9-11). The Administrative Council will be composed of one representative of each Contracting State, serving without remuneration from the Centre. Each member of the Council casts one vote and matters before the Council are decided by a majority of the votes cast unless a different majority is required by the Convention. The President of the Bank will serve ex officio as the Council's Chairman but will have no vote. The Secretariat will consist of a Secretary-General, one or more Deputy Secretaries-General and staff. In the interest of flexibility the Convention provides for the possibility of there being more than one Deputy Secretary-General, but the Executive Directors do not now foresee a need for more than one or two full time high officials of the Centre. Article 10, which requires that the Secretary-General and any Deputy Secretary-General be elected by the Administrative Council by a majority of two-thirds of its members, on the nomination of the Chairman, also limits the extent to which these officers may engage in activities other than their official functions.

The Administrative Council

18. The principal functions of the Administrative Council are the election of the Secretary-General and any Deputy Secretary-General, the adoption of the budget of the Centre and the adoption of administrative and financial regulations, rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings. Action on all these matters requires a majority of two-thirds of the members of the Council.

The Secretary-General

19. The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal

officer of the Centre (Articles 7(1), 11, 16(3), 28, 36, 49(1), 50(1), 51(1), 52(1), 52(4), 54(2), 59, 60(1), 63(b) and 65). In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings if on the basis of the information furnished by the applicant he finds that the dispute is manifestly outside the jurisdiction of the Centre (Articles 28(3) and 36(3)). The Secretary-General is given this limited power to "screen" requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.

The Panels

20. Article 3 requires the Centre to maintain a Panel of Conciliators and a Panel of Arbitrators, while Articles 12-16 outline the manner and terms of designation of Panel members. In particular, Article 14(1) seeks to ensure that Panel members will possess a high degree of competence and be capable of exercising independent judgment. In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to appoint conciliators and arbitrators from outside the Panels but requires (Articles 31(2) and 40(2)) that such appointees possess the qualities stated in Article 14(1). The Chairman, when called upon to appoint a conciliator or arbitrator pursuant to Article 30 or 38, is restricted in his choice to Panel members.

Jurisdiction of the Centre

21. The term "jurisdiction of the Centre" is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Centre is dealt with in Chapter II of the Convention (Articles 25-27).

Consent

22. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

23. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a compromis regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

24. While ~~consent~~ of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of

the dispute and the parties thereto.

Nature of the dispute

25. Article 25(1) requires that the dispute must be a "legal dispute, arising directly out of an investment". The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

26. The Executive Directors did not think it necessary or desirable to attempt to define the term "investment", given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(l)).

Parties to the dispute

27. For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State (or a constituent subdivision or agency of a Contracting State) and the other party must be a "national of another Contracting State". The latter term as defined in paragraph (2) of Article 25 covers both natural persons and juridical persons.

28. It should be noted that under clause (a) of paragraph (2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.

29. Clause (b) of paragraph (2), which deals with juridical persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national

of another Contracting State because of foreign control.

Notifications by Contracting States

30. While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, some governments nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. These governments pointed out that there might be classes of investment disputes which they would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.

Arbitration as exclusive remedy

31. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26(1). In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion

of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies:

Subrogation

32. As has been noted, Article 25 limits the jurisdiction of the Centre to disputes in which one of the parties is a State (or a constituent subdivision or agency of a State) and the other an investor. Disputes between States would thus be excluded from the jurisdiction of the Centre even if the States concerned wished to submit such disputes to it. It appeared desirable, however, to permit an exception to this rule where a host State and an investor have consented to submit a dispute to the Centre and the investor has obtained investment insurance from his State. In such a case, if the investor's State has indemnified the investor and become subrogated to his rights with respect to the matters in dispute, Article 26(2) permits the substitution of the investor by his State in the proceeding, but only with the consent of the host State. Since the purpose of the provision is to permit the investor's State to stand in the shoes of the investor, that State is required to agree to be bound by the provisions of the Convention in the same manner as the investor and to waive recourse to any other remedy as, for example, remedies which might otherwise be available to it under a bilateral agreement with the host State.

33. The provisions of Article 25 would also exclude public international institutions as parties to proceedings under the auspices of the Centre. However, in view of recent proposals for the creation of regional or international investment insurance institutions, Article 26(2) has been worded so as to permit such an institution to be substituted for an investor insured by it in proceedings before the Centre under the same conditions as are applicable to the investor's State.

Claims by the investor's State

34. When a host State consents to the submission of a dispute with an

investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection or bringing an international claim in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute.

VI

Proceedings under the Convention

Institution of proceedings

35. Proceedings are instituted by means of a request addressed to the Secretary-General (Articles 28 and 36). After registration of the request the Conciliation Commission or Arbitral Tribunal, as the case may be, will be constituted. Reference is made to paragraph 19 above for the power of the Secretary-General to refuse registration.

Constitution of Conciliation Commissions and Arbitral Tribunals

36. Although the Convention leaves the parties a large measure of freedom as regards the constitution of Commissions and Tribunals, it assures that a lack of agreement between the parties on these matters or the unwillingness of a party to cooperate will not frustrate proceedings (Articles 28-29 and 37-38, respectively).

37. Mention has already been made of the fact that the parties are free to appoint conciliators and arbitrators from outside the Panels (see paragraph 20 above). While the Convention does not restrict the appointment of conciliators with reference to nationality, Article 39 lays down the rule that the majority of the members of an Arbitral Tribunal should not be nationals either of the State party to the dispute or of the State whose

national is a party to the dispute. This rule is likely to have the effect of excluding persons having these nationalities from serving on a Tribunal composed of not more than three members. However, the rule will not apply where each and every arbitrator on the Tribunal has been appointed by agreement of the parties.

Conciliation proceedings; powers and functions of Arbitral Tribunals

38. In general, the provisions of Articles 28-35 dealing with conciliation proceedings and of Articles 36-49, dealing with the powers and functions of Arbitral Tribunals and awards rendered by such Tribunals, are self-explanatory. The differences between the two sets of provisions reflect the basic distinction between the process of conciliation which seeks to bring the parties to agreement and that of arbitration which aims at a binding determination of the dispute by the Tribunal.

39. Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence and Article 32 applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration (see paragraph 19 above) is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.

40. In keeping with the consensual character of proceedings under the Convention, the parties to conciliation or arbitration proceedings may agree on the rules of procedure which will apply in those proceedings. However, if or to the extent that they have not so agreed the Conciliation Rules and Arbitration Rules adopted by the Administrative Council will apply (Articles 33 and 44).

41. Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.¹⁾

Recognition and enforcement of arbitral awards

42. Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). In addition, a party may ask a Tribunal which had omitted to decide any question submitted to it, to supplement its award (Article 49(2)) and may request interpretation of the award (Article 50).

43. Subject to any stay of enforcement in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires

1) Article 38(1) of the Statute of the International Court of Justice reads as follows:

"1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

every Contracting State to recognize the award as binding and to enforce it as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.

44. The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forcible execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 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.

VII

Place of Proceedings

45. In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services.

VIII

Disputes Between Contracting States

46. Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision is not intended to, and in the opinion of the Executive Directors does not, confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the prohibition laid down in Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.

IX

Entry into Force

47. In accordance with customary practice in the United Nations family (see, for example, the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards), the Convention is open to members of the United Nations or any of its specialized agencies and States parties to the Statute of the International Court of Justice. No time limit has been prescribed for signature and that signature is required both of States joining before the Convention entered into force and those joining thereafter. The Convention is subject to ratification or acceptance by the signatory States in accordance with their constitutional procedures (Articles 70 and 71).

48. The provision on entry into force (Article 72) is somewhat unusual in

requiring not only a specified number of ratifications or acceptances but, in addition, a declaration by the Executive Directors of the Bank. Since the Convention is mainly of a procedural character, precedent suggested that a small number of ratifications, possibly as few as three, should suffice to bring the Convention into force. On the other hand, the Convention creates an institution, the Centre, and this feature of the Convention argued in favor of requiring a larger number of ratifications. Finally, the subject-matter of the Convention, disputes between States and foreign investors, made it appear desirable that at the time of entry into force the Convention should have been ratified both by States which are likely to be host States and by States whose nationals are likely to be making foreign investments. The Executive Directors concluded that it would be appropriate to require ratifications or acceptances by at least 12 States and, after that number had been reached, to decide, on the recommendation of the President of the Bank, whether to declare immediately that the Convention will enter into force, or to await additional ratifications or acceptances if this would ensure that both groups of States were represented among the Contracting States at the time of entry into force.

49. The attached text of the Convention in the English, French and Spanish languages has been deposited in the archives of the Bank, as depositary, and is open for signature from the date of this Report.

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SID/65-2 (February 17, 1965)

Memorandum of the Meeting of the Committee of the Whole, February 16, 1965, not an approved record. Discussion of Chapters I and II of the Draft Convention ¹

1. There were present: omitted

2. Mr. Woods reminded the meeting that the Committee would review in the first instance Docs. R64-153² and R65-6³ which contain the draft Convention prepared by the Legal Committee and some changes suggested by the Bank's

¹ The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

² Doc. 123

³ Doc. 127

staff. After that review was completed the Committee would consider the draft report to the Executive Directors which would accompany the Convention when submitted to Governments (Doc. R65-11). He then asked Mr. Broches to introduce the documents under consideration.

3. Mr. Broches said that, in addition to the documents mentioned by the Chairman, a text of the draft prepared by the Legal Committee with the additional suggested changes written in had been circulated in English under R65-10¹ and in French and Spanish under R65-10/1. He thought that the work of the Committee would be facilitated if the members would use that document. He then suggested that the Committee consider the Draft Convention article by article starting with Chapter I. The Preamble could be considered after all the articles had been dealt with.

4. Mr. Mejia-Palacio asked whether the discussion in the Committee would deal with the three texts, i.e. the French, the Spanish and English texts or only with the English text at this point. The French and Spanish texts could be reviewed by the French-speaking and Spanish-speaking Directors respectively, and at that time any agreed changes in the English text could be introduced in the French and Spanish texts.

5. Mr. Broches replied that the suggestion of Mr. Mejia-Palacio would facilitate the work but stressed that it was the intention to have three equally authentic texts and not an English with French and Spanish translations.

6. Mr. Woods, in summing up, said that the Committee would deal in the first instance with the English text. After the first round of discussions on the English text had been completed and before the final round of discussions would start, the French and Spanish texts would be reviewed and made to conform with any modifications in the English text. If any discrepancies were to remain they could be discussed during the second round of discussions.

Section 1, Establishment and Organization of the Centre

Section 2, The Administrative Council

7. Mr. Broches asked for comments on Articles 1, 2 and 3 which were substantially in the form approved by the Legal Committee. There being no comments, Mr. Broches moved on to Section 2 (The Administrative Council), Articles 4 through 8, and pointed out that, with one minor exception, there were no changes from the text recommended by the Legal Committee.

8. Mr. Rajan recalled that his Government's representative had proposed that there should be some intermediate body, maybe an executive committee or something of that kind, for the administration of the Centre. The Administrative Council would meet only once a year and there might be matters which the Chairman and the Secretary-General might in the meantime want to refer to a small committee. While the Legal Committee had not accepted this proposal it had introduced a provision in Article 6 (2) permitting the Administrative Council to appoint "such committees as it considers necessary". He strongly supported this provision.

9. Mr. Donner remarked that under Article 6 (1) (c), the Administrative Council will adopt the rules of procedure of the institution of conciliation and arbitration proceedings. He stressed that his Government considered it very important that Governments be given an opportunity to express their

¹ Doc. 128
² Not reproduced

views on any proposed rules when the Administrative Council was called upon to deal with this matter.

10. Mr. Broches understood that in some countries there was a feeling that the Centre should avail itself of the experience gained by existing arbitral organizations such as the International Chamber of Commerce; the Administrative Council undoubtedly would want to take advantage of the experience of such organizations and the staff of the Centre in preparing drafts of those rules would certainly seek the advice of Governments and those organizations before submitting them to the Administrative Council.

11. Mr. Khoeropur referring to paragraph (e) of Article 6 asked whether any period of service for the Secretary-General or the Deputy Secretary-General would be set forth in the Convention.

12. Mr. Broches replied that the Convention itself did not fix any period of service in order to ensure sufficient flexibility. The Administrative Council would determine all conditions of service of those officials including their term of office, and could at the beginning make interim arrangements.

13. Mr. Lieftinck referring to Article 6 (1) (f) asked what was meant by the term "annual budget of the Centre". Would this be a budget of revenues and expenditures or only a budget of expenditures? He would prefer the first type of budget and would like to see this spelt out in the Convention.

14. Mr. Broches agreed that it might be best to spell out what was intended since the term "budget" meant different things to different people in different countries.

15. Mr. Woods pointed out in practice the revenues of the Centre would be of two kinds: contributions from the Bank and fees payable by the users of the Centre. The second kind would be difficult to estimate in the budget.

16. Mr. Lieftinck replied that all he wanted to ensure was that the Centre would not operate with a deficit but that budgeted expenditures would be covered by expected revenue. Mr. Woods agreed with Mr. Lieftinck.

17. Mr. Riley pointed out that it could not be possible to estimate receipts from fees for arbitration and conciliation proceedings because nobody could guess how many cases would come to the Centre. Therefore all the budget could do was to estimate the administrative cost of running the Centre.

18. Mr. Broches pointed out that revenues from fees paid by the parties would cover the out-of-pocket costs of the particular proceedings so that these revenues would in practice off-set the added cost.

19. Mr. Malaplate said that he did not find it absolutely necessary to provide in the Convention that the budget of the Centre be annual; he would leave this matter to the administrative and financial regulations of the Centre. As for the Centre incurring a deficit, under Article 17 such deficit would have to be borne by the Contracting States in a pre-determined proportion. Therefore he did not think it would be necessary to stress that revenues would have to cover expenses in the Convention.

20. Mr. Broches commented that the addition of the words "of revenue and expenditure" after the word "budget" would be useful to call the attention

of the Administrative Council to the amount of contribution, if any, which the Centre could expect from the Bank.

21. Mr. Woods concluded that the words "revenue and expenditure", should be added.

22. Mr. Hirschtritt referring to Article 7 (1) wondered whether it would not be preferable to use a provision similar to the Bank's by-laws which provides for a call of the meeting of the Board of Governors at the request of not less than five members or one-fourth of the voting power of its membership.

23. Mr. Broches agreed that a system similar to the one used in the Bank's by-laws would be preferable in view of the fact that, at least at the beginning, the number of the Contracting States might be rather low. At the request of Mr. Rajan and Mr. van Campenhout, Mr. Broches specified that what he had in mind was that a meeting of the Administrative Council would be called if it was requested by five members of the Council or one-fourth of its members whichever number was smaller.

24. Mr. Woods asked that language to that effect be prepared by the staff and circulated to the Committee by the next meeting. The Chairman then moved to Section 3 (Articles 9, 10 and 11) and asked for questions or comments.

Section 3; The Secretariat

25. Mr. Garba said that Article 9 left open the possibility of an unlimited number of Deputy Secretaries-General.

26. Mr. Broches replied that in the Legal Committee, after some discussion, it had been decided to leave the language as it is and to recommend that the report of the Executive Directors contain a statement to the effect that, in the opinion of the Directors, it was difficult to foresee any justification for a large staff. The draft report (Doc. R65-11) contained such a statement.

27. Mr. Garba referring to the statement in the draft report just mentioned by Mr. Broches wondered why the Convention itself did not limit the number of Deputy Secretaries-General to, say, two.

28. Mr. Broches replied that at the beginning two might not be necessary; in any case, the Executive Directors of the Bank, by controlling the Bank's contribution to the Centre, could prevent any proliferation of high officials.

29. Mr. van Campenhout asked whether the statement in the draft report was intended to indicate that at least one Deputy would be appointed in addition to the Secretary-General.

30. Mr. Broches replied that he thought that even at the beginning a Deputy Secretary-General would be required in order to perform administrative or ministerial acts during any absence of the Secretary-General but the Deputy need not be a full-time employee. Perhaps a Bank official could act as Deputy from time to time.

31. Mr. Kochman, in connection with Article 10, stressed that the questions of the term of office and re-eligibility of the Secretary-General were important questions which should be dealt with in the Convention itself.

* See Doc. 130
† Doc. 128

32. Mr. Khosropur pointed out that, since the Convention could enter into force after ratification by twelve States, the Secretary-General and Deputy Secretary-General could be initially elected by only eight States and the Convention did not make any provision for a re-election after a larger number of States had acceded to the Convention.

33. Mr. Woods remarked that Mr. Khosropur's point was well taken and would confirm the need to maintain flexibility in the Convention.

34. Mr. Broches said that the Administrative Council would most likely act in a reasonable manner and initially appoint somebody for one or two years if a large number of States was expected to join the Convention soon.

35. Mr. van Campenhout suggested that the Report of the Executive Directors contain a statement on the lines just mentioned by Mr. Broches.

36. Mr. Lieftinck thought that flexibility could be maintained while ensuring that the initial members of the Administrative Council would not pre-empt the rights of the majority of a provision was added in the Convention to the effect that the Secretary-General and any Deputy Secretary-General would be elected for a term not longer than, say, six years and could be re-elected.

37. Mr. Broches remarked that in the International Court the term of office of the Registrar was fixed at seven years in the Regulations rather than the Statute of the Court. Similarly, in the Bank the term of office of the President was specified in the by-laws and not the Articles.

38. Mr. Rajan pointed out that even a ceiling of, say, six years on the term of office of the Secretary-General might not overcome the problem mentioned by Mr. Khosropur if the initial membership was very small. A much shorter maximum term of office would be required.

39. Mr. Woods concluded that the feeling of the meeting was in favor of imposing a ceiling on the term of office of the Secretary-General and his Deputy in the Convention and of stressing in the Report of the Executive Directors the need for a shorter term for the initial appointments. He asked Mr. Broches to draft some language for the consideration at the next meeting of the Committee.

40. Mr. Lieftinck asked whether some provisions should not be made for dismissal of the Secretary-General, perhaps by a two-third majority, when he had lost the confidence of the Council.

41. Mr. Broches said that this point could be covered either in the administrative regulations of the Centre or, as was the case in the Bank with respect to its President, in the employment contract.

Section 4, The Panels

42. Mr. Woods asked for comments on Section 4 (Articles 12 through 16).

43. Mr. Carba asked what was the origin of the expression "high moral character" as applied to members of the Panels.

44. Mr. Broches replied that it came from the Statute of the International Court of Justice.

* See Doc. 130

* Regulations and Rules of the Centre (ICSID/4)

45. Mr. Kochman asked what was the reason for the clause in paragraph (1) of Article 13 about the nationality of members of the Panels.

46. Mr. Broches replied that it was felt that some countries might not be able at the outset to find sufficiently eminent people willing to serve on the Panels and should be allowed to draw on nationals of other States with which they had some affinity.

47. Mr. Rajan, reverting to the words "high moral character", suggested that they be deleted, because under the provisions for challenge of arbitrators or annulment of awards, a party would be entitled to raise questions about an arbitrator's morality. This could lead to undesirable situations. The requirement of "high moral character" might be realistic for the selection of the relatively small number of judges of the International Court of Justice. On the other hand, the selection of some 400 Panel members on the same basis might prove difficult besides inviting controversy and uncertainty regarding effectiveness of awards.

48. Mr. Woods did not feel that to refer to qualified persons of "high moral character" was an unduly strict standard, or would cause difficulty in composing the Panels.

49. Mr. Broches pointed out that lack of high moral character was not a ground for annulment of an award; as Mr. Rajan had said, it might be used to challenge an arbitrator. For the latter purpose, it was not enough, however, to allege that the arbitrator was not of high moral character, but to establish facts indicating a manifest lack of that quality, and he did not think this a dangerous provision. Many experts at earlier meetings had urged the need to impress on States the desirability of appointing persons who possessed in a high degree three basic qualities, viz., competence, high moral character and independence of judgment.

50. Mr. Lieftinck suggested that as the concept of "high moral character" might vary in different parts of the world this standard might be replaced by that of "integrity", so that the text would read: "Persons of integrity and recognized competence who may be relied upon to exercise independent judgment."

51. Mr. Broches recalled that the standard of "high moral character" had been used in the Statute of the International Court of Justice although it had to be applied to persons from different cultures. The Legal Committee had felt that these were the right words and he would prefer to leave them unaltered.

52. Mr. Woods said that there was a substantial majority in favor of leaving the reference to "high moral character" as it stood.

Section 5, Financing the Centre

53. Mr. Broches said that the word "the" should be inserted as the second word in the paragraph so that the opening words of the article would read: "If the expenditure of the Centre cannot be met" While it had been agreed that, as a general rule, the Convention and the accompanying Report of the Executive Directors should be discussed separately, this Article should be considered together with the relevant paragraph of the Report (paragraph 16 of R65-11) in view of the importance of the

Bank's role in assisting in financing the Centre foreseen in the phrase "or out of other receipts" in Article 17. Paragraph 16 of the Report would reflect a decision by the Executive Directors regarding the nature and extent of the Bank's financial assistance and that decision would in fact be taken through the Executive Directors' adoption of that paragraph of their Report.

54. Mr. Woods recalled that it had been the Bank's intention from the beginning that it would finance the Centre to a certain extent. The extent of financial assistance would be reviewed annually.

Section 6, Status, Immunities and Privileges

55. Mr. Broches in answer to Mr. Ozaki's request for clarification of the privileges and immunities of "parties" to a dispute explained that Article 21 gave the Chairman and members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, as well as officers and employees of the Secretariat, immunity from legal processes with respect to acts performed by them in the exercise of their functions. Article 22 extended that immunity to certain other groups, and after careful consideration the Legal Committee had agreed that "parties" to a dispute should be one such group thereby offering them a measure of protection if they had to appear in a country in which the atmosphere was unfriendly. While "parties" did not strictly perform "functions" the Legal Committee considered that the wording adequately conveyed the intended meaning viz., that parties would in fact be immune only in respect of acts done before the tribunal as parties to the dispute.

56. Mr. van Campenhout observed that the standard adopted in Article 21(b) viz. "immunities accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States", might not be sufficiently comprehensive since there were some employees of States who, while being "of comparable rank," were not entitled to any privileges whatsoever. In his view it might be better to refer to the immunities accorded to "diplomatic agents".

57. Mr. Broches agreed that the provision might be difficult to apply. On the other hand a careful study of other recent conventions dealing with privileges and immunities had revealed no better solution, and the Legal Committee had taken the view that Contracting States could be relied upon to apply the provision reasonably and in good faith despite any uncertainty created by the wording.

58. Mr. Mejia asked what was meant by the term "international legal personality" in Article 18 and whether it had been used in other conventions.

59. Mr. Broches said that the concept of international legal personality had existed in international law for about 20 years and had recently been used in multilateral agreements. One such agreement was the Charter of the African Development Bank. The term "international legal personality" implied the capacity to act on the international level as distinguished from the capacity to act on the domestic, or national level. The Centre had international legal personality as well as the capacity to perform on the domestic level, the acts listed in Article 18.

60. Mr. Malaplate said his government felt that the immunities to be granted to parties, agents, counsel, advocates, witnesses and experts under Article 22(b) were inadequate in that their communications were not accorded special treatment as were those of the Centre itself.

61. Mr. Broches said there were two aspects to the question of communications. Special treatment in respect of communications, e.g. the right to use codes, was only accorded to the Centre itself, and he was not aware of any precedent for extending this privilege to others. On the other hand, the groups of persons Mr. Malaplate had in mind would, under Article 21(a) be immune for suit in respect of statements in communications say between them and the tribunal.

Chapter II - Jurisdiction of the Centre

Article 25, paragraph(1)

62. Mr. Broches recalled that the principal provisions of Article 25, i.e. paragraph (1), which represented a compromise between various points of view, had been adopted by the Legal Committee by a very substantial majority.

63. Mr. Lieftinck said he had been requested by the Israeli Government to express a strong preference for the "closed" approach which sought to limit the jurisdiction of the Centre by a more or less precise definition of the disputes which could come before it, over the "open" formula favored by the majority of the Legal Committee. The Netherlands and Yugoslavia, however, were more in favor of the "open" formula, the position which he himself would support.

64. Mr. Ozaki said that the Japanese Government preferred the "open" formula but would like to see included in the Report on the Executive Directors some examples of what was meant by the term "investment".

65. Mr. Broches said that the staff had prepared a definition of "investment" and had also brought to the attention of the Legal Committee a number of examples of definitions of that term taken from legislation and bilateral agreements. None of these had proved acceptable. The large majority had, moreover, agreed that while it might be difficult to define "investment," an investment was in fact readily recognizable. The Report would say that the Executive Directors did not think it necessary or desirable to attempt to define the term "investment" given the essential requirement of consent of the parties and the fact that Contracting States could make known in advance within what limits they would consider making use of the facilities of the Centre. Thus each Contracting State could, in effect, write its own definition.

66. Mr. Gutierrez Cano had been convinced by Mr. Broches' explanation. However, some of the countries he represented had, in the Legal Committee, maintained the position that the jurisdiction of the Centre ought to be closely defined. He thought some explanation or description should be given (not necessarily in the text of the Convention) indicating generally the kind of matters with which the Centre would deal.

67. Mr. Broches observed that Mr. Gutierrez Cano's point was slightly different from the narrower one raised by Mr. Ozaki. Mr. Ozaki was

concerned with the definition of "investment", whereas the countries referred to by Mr. Gutierrez Cano and some Latin American countries were concerned with the definition of "investment disputes" assuming for the moment that the term "investment" itself needed no definition. The Report to the Executive Directors on the work of the Legal Committee (R64-155)" contains some examples of investment disputes, e.g. the Centre could deal with disputes arising out of a unilateral change of the legislation of the host State to the detriment of the investor. He did not, however, think it would be desirable to do more in the Report than make it clear that the dispute had to be a "legal" dispute.

68. Mr. Mejia recalled that the Colombian Government was opposed to the use of the term "legal dispute" as being too wide, and would prefer a more precise expression. That government was also against the idea of a private citizen being placed on the same plane as that of a State in a dispute.

There was no comment on paragraphs (2) and (3) of Article 25.

Article 25, paragraph (4)

69. Mr. Khosropur noted that if, as had been indicated in Document R65-6, page 3, the Secretary-General was to be given the function of transmitting notifications under paragraph (4) to Contracting States, a consequential change would be necessary in Article 75 which at present assigned that function to the Bank.

70. Mr. Rajan said that Article 25(4) was a very important provision and to some extent took care of the points raised by Messrs. Mejia and Gutierrez Cano, by India, and some other countries. He felt that one reason for the wide support Article 25 as a whole had received in the Legal Committee was the incorporation in it of this provision.

Article 26

71. Mr. Kochman asked whether in the second sentence of Article 26(1) the word "may" could not be replaced by a stronger one.

72. Mr. Broches said that the first sentence of Article 26(1) reflected the position supported by State practice, that when governments agreed to an arbitration clause they did not normally require in addition the prior exhaustion of other remedies. The second sentence of Article 26(1) had been added by the Legal Committee merely to make clear that the first sentence was not intended to cast any doubt on the right of States to require exhaustion of local remedies. The words "A Contracting State may require" left no doubt as to the right of the State in this regard.

73. Mr. Lieftinck said he had been requested by the Israeli Government to speak in favor of making the exhaustion of local remedies the rule and recourse to arbitration under the Convention, the exception. However, he would himself support the Netherlands position viz. that while they accepted the present text of Article 26(1) as a compromise, they felt that the second sentence was in fact superfluous.

74. Mr. Rajan said that while Article 26(1) as it stood was acceptable to his Government, he would like Mr. Broches to clarify whether a State's

¹¹ Doc. 124

right to require exhaustion of local remedies was one which must have been embodied in an agreement between the State and the investor.

75. Mr. Broches said that when a State had entered into an agreement with an investor containing an arbitration clause unqualified by any reservation regarding prior exhaustion of local remedies, the State could not thereafter demand that the dispute be first submitted to the local courts.

76. Mr. Rajan thought that this point should be clarified in the Report of the Executive Directors.

77. Mr. Broches recalled that paragraph 31 of the Draft Report (R65-11) dealt with the matter. On the suggestion of Mr. Woods the question of whether that paragraph might be expanded or modified was postponed until discussion of the Report.

78. Mr. Malaplate wondered if paragraph (1) of Section 26 could not be simplified and be condensed to say that "consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed to exclude any other remedy." He also suggested that, in the French text, the term "recours" be used instead of "voies". Mr. Broches said that he would look into those two points.

79. Mr. Woods invited comments on paragraph (2) of Article 26.

80. Mr. Lieftinck suggested that the words "under an investment scheme" be deleted. What mattered was that the State had satisfied its national's claims, whether under an insurance scheme or otherwise.

81. Mr. Broches said that paragraph (2) had been accepted in the Legal Committee by a very slim majority and that there had been a very large minority opposed to the very idea of subrogation of the investor's State. Objections had been of two kinds: some delegates thought that, as the purpose of the Convention was to enable a private party and a State to settle their disputes, it would be contradictory to permit the substitution of the private investor by his State in the proceedings. Others felt that a developing State would be in a weaker position if it were confronted by the investor's State rather than the investor himself. A small majority had been found in favor of the present text because it clearly restricted the right of the investor's State to appear before the Centre to the cases in which that State would stand in the investor's shoes as it were and divest itself of its sovereign character. The purpose of the words "under an investment insurance scheme" was to allay the fears of some countries that investors might transfer claims to their State for the sole purpose of having a stronger position in the dispute.

82. Mr. Lieftinck felt that the limitation to investment insurance schemes would amount to a discrimination against the nationals of States which had no such schemes. As a result there would be pressure put on Governments to create such schemes if only to afford their nationals the benefits of paragraph (2). An investor could more easily convince his State to take over his claim if he could substitute the State in proceedings before the Centre.

83. Mr. Woods announced that the discussions would continue on the

morning of Thursday, February 19, 1965, after the IFC Board meeting, and the Committee might also meet in the afternoon of that day.

84. The meeting adjourned at 12:50 o'clock p.m.

SID/65-3 (February 17, 1965)

COMMITTEE OF THE WHOLE ON SETTLEMENT OF INVESTMENT DISPUTES
Meeting of February 16, 1965

Proposed Amendments to the Revised Draft of the Convention

Article 6

(1)

(f) adopt the annual budget of revenues and expenditures of the
Centre;

.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of five members or one-fourth of the members of the Council, whichever is less.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

SID/65-4 (February 23, 1965)

Memorandum of the Meeting of the Committee of the Whole, February 18, 1965, not an approved record. Discussion of Chapter II, Article 26(2)¹

1. There were present: omitted

Article 26, paragraph (2)

2. Mr. Woods asked Mr. Broches whether he had any suggestions to make in reply to the point raised by Mr. Lieftinck at the last meeting of the Committee. Mr. Broches said that he would propose two small changes in the text of paragraph (2) of Article 26; the first of which might meet Mr. Lieftinck's point while the other one might clarify some doubts that had been expressed by the German and Japanese authorities. The first change would consist in substituting the words "under an investment guarantee system" for the words "under an investment insurance scheme". The second suggestion would consist in adding at the end of the first sentence of paragraph (2) the words "and requests such substitution" to make absolutely clear that substitution of the investor's State for his national would not occur without the agreement of that State.
3. Mr. Hirschtritt said that the proposed changes were acceptable to him but enquired whether the use of the word "guarantee" instead of "insurance" could be interpreted as still including investment insurance systems if some country wanted to use such a system.
4. Mr. Broches stated that such insurance systems would be covered by the provision.
5. Mr. van Campenhout suggested that in order to avoid any doubts on the subject it might be preferable to use both the word "guarantee" and the word "insurance" and to specify "under an investment guarantee or insurance system".
6. Mr. Lieftinck supported Mr. van Campenhout's suggestion in order to avoid any doubts about the scope of subrogation.
7. Mr. Gutierrez Cano recalled that at the meetings of the Legal Committee the experts from the countries he represents had expressed their objection to the very principle of subrogation in the Convention. Those experts had opposed the provision now in Article 26, paragraph (2) on juridical and political reasons and he shared their views. The primary purpose of the Convention was to provide new machinery for settlement of disputes between individual investors and host governments. At the present time the methods of handling those disputes are either recourse to local courts or the espousal of the individual's case by his own State thus raising the dispute to the inter-State level. The Convention intended to add a new procedure by which the individual investor could acquire the status of a subject of international law and appear before an international forum such as the Centre. This new independent procedure should not be linked with other forms of settlement of investment disputes through the device of subrogation which would transform a dispute between an individual and a government into a dispute between States or between a State and a still unknown international organization. In his opinion, the presence of an individual in the proceedings before the Centre was an essential feature of the proposed Convention. The introduction of the State in lieu of its national would change the nature of the dispute. He therefore proposed that subrogation as provided in paragraph (2) of Article 26 be abandoned.
8. Mr. Broches recalled that the provision in paragraph (2) of Article 26 had been the subject of a long debate in the Legal Committee. In the final

¹ The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

vote on that provision, the roll call had shown that 24 delegates were in favor, 19 were opposed and 3 abstained. The purpose of the provision was to add the possibility that a State which has indemnified its own citizen could, if it so wished and if the host State agreed, step down from its position as a sovereign entity to the level of the investor and go before the arbitral tribunal as if it were a private individual, giving up any rights which it might have as a State. The majority in the Legal Committee thought that such a possibility should not be excluded in the Convention while some of the spokesmen in the minority felt that it was wrong to have two States before an arbitral tribunal set up under a Convention which had the purpose of providing facilities for settlement of disputes between States and individuals.

9. Mr. Woods asked what was Mr. Broches' opinion, as General Counsel, on this issue.

10. Mr. Broches replied that he did not think that many States would want to avail themselves of the possibility of being substituted for their national in proceedings before the Centre. On the other hand, the provision referred also to international institutions and if governments decided to set up an international institution for multilateral investment guarantees, the possibility that the institution be substituted for the investors it had indemnified would be extremely useful. Since it was always difficult to amend existing conventions, he would be in favor of retaining paragraph (2) of Article 26 as an added element of flexibility in the Convention but did not consider it an essential feature of the Convention.

11. Mr. Kochman said that Mr. Gutierrez Cano had already covered almost all the points he had wanted to make. He agreed with most of Mr. Gutierrez Cano's views. By way of clarification on a technical point, he wanted to know whether the last sentence in paragraph (2) was really necessary since the very concept of subrogation indicated that the investor could not transfer to his State more rights or obligations by way of subrogation than he enjoyed.

12. Mr. Broches explained that the last sentence in paragraph (2) was not necessary from a legal viewpoint but had been introduced in order to make it absolutely clear, in view of the concern expressed by many capital-importing countries, that if the investor's State wanted to avail itself of this course, it would have the rights of the investor and no more than rights of the investor.

13. Mr. Donner said that his government had some concern about paragraph (2) of Article 26 in connection with paragraph (1) of the same article and with Article 27. Many bilateral investment insurance or guarantee agreements enabled the guarantor government which had indemnified an investor to pursue the investor's claims. His government wanted to make sure that the provision in paragraph (2) of Article 26 according to which any other remedy outside the framework of the Convention would be waived by the subrogee State would not apply except where the capital-exporting State had expressly consented to being substituted to the investor in proceedings before the Centre.

14. Mr. Broches replied that there had never been any intention to force a capital-exporting country to appear in lieu of its national in proceedings before the Centre but only to permit such State to appear if it so requested and if the other State consented. To make that point absolutely clear he had suggested the addition of the words "and requests such substitution" at the end of the first sentence of paragraph (2). However, once the capital-exporting

State had decided to appear in the proceedings before the Centre as a subrogee for the investor and the other State had consented to such substitution it would be unreasonable if the capital-exporting State could keep in reserve the possibility of using other remedies, for instance under a bilateral agreement.

15. Mr. Donner said that it would be important to exclude these doubts in the minds of some capital-exporting countries in the same manner as it had been done for some fears of capital-importing countries in the last sentence of paragraph (2). He would have liked to see some language introduced in Article 26, paragraph (2) to make it absolutely clear that a capital-exporting country which had indemnified its investors would not lose any of its remedies without its consent by the mere fact of subrogation.

16. Mr. Broches thought that paragraph (2), with the additions he had earlier suggested, could not be interpreted by anybody in a manner detrimental to the interest of the capital-exporting countries. If a capital-exporting State did not request to be substituted in the proceedings or the other State party to the proceedings did not consent to the substitution, Article 26(1) would not apply to the capital-exporting State because it dealt with consent of the parties to proceedings and the capital-exporting State would not be a party. Nor would Article 27 affect the situation because it referred to a dispute between the national of the capital-exporting State and the host State and, once the capital-exporting State had indemnified its national and then made a claim against the host State under a bilateral agreement, the dispute would be between those two States.

17. Mr. Donner thought that the statement of Mr. Broches as counsel to the Executive Directors would be very useful.

18. Mr. Garba wished to associate himself with Mr. Gutierrez Cano's position. He would like to see paragraph (2) of Article 26 deleted because of its political implications which would outweigh any possible benefit that would be derived from its retention. To permit a dispute between a Contracting State and an investor to be elevated to a dispute between two States would be very dangerous for a large number of developing countries.

19. Mr. Machado remarked that paragraph (2) was perhaps the most difficult provision in the proposed Convention. The idea of a sovereign State subrogating itself to one of its nationals was a great innovation in international law. As the purpose of the Convention was to stimulate the flow of private capital to the developing countries, he felt that private investors should be protected but any possibility of conflict between sovereign States about private investment should be avoided. If investment insurance or guarantee became more frequent, States might tend to become the successors of their investors in disputes and, as it were, the collectors of private debts. It had been suggested that subrogation be altogether deleted from the Convention but he realized that investment guarantees existed under quite a number of international agreements. Therefore he suggested that the paragraph be re-worded to make it clear (1) that there would be no automatic subrogation but that an agreement between the two States would be required; (2) that subrogation could take place only in the case of the claim by a citizen of the subrogee State; (3) that the indemnification of the investor should be made under the terms of an investment insurance or guarantee agreement in force between the two States; and (4) that the amount claimed by the subrogee State should not, in any case, exceed the amount paid by it to its investor. If this were accepted, he thought that the paragraph on subrogation might be less unpalatable to many governments.

20. Mr. Reilly saw much advantage in Article 26(2) which had, moreover, been accepted by the Legal Committee after a great deal of discussion and thought. The United Kingdom's Export Credits Guarantee Department, for instance, could, after payment of a claim, find itself in the shoes of an investor. This Article would enable it to pursue the remedies available to the investor in the dispute. If it were not expressly given this capacity, the only remedy available to the Department would be to use its power as a government and perhaps take the dispute to the International Court of Justice. No government would wish to do this. The effect of Article 26(2) would not be that of raising the investment dispute to the level of a dispute between States, but rather of permitting the investor's State as such to remain in the background while an impartial tribunal decided the dispute as though the party in interest were the investor himself. In other words, the government would not bring its weight to bear in the dispute, and it would be unfair to the tribunals to assume that they would treat the case any differently for the reason that a State now stood in the place of the investor.

21. Mr. Mejia-Palacio recalled that it had been the policy of the Bank and of IFC in dealing with private investors to try to avoid the intervention of governments, and the idea behind the proposed Centre for settlement of investment disputes was in accord with that thinking. The aim of the Convention was to give confidence to investors that they would be well treated by the host Government and that they would have facilities for settling their disputes with that government amicably and fairly before an international tribunal. But to make the Centre available, as in effect did Article 26(2), for the settlement of disputes between States without any safeguard other than the requirement of the consent of the States concerned would not be proper. States had many methods open to them for settling disputes between one another e.g. the International Court of Justice, and the procedures under the Washington Convention of 1929. Bilateral investment agreements contained clauses on the settlement of disputes and frequently provided that negotiation should precede recourse to those procedures besides other appropriate safeguards of the sovereignty of the parties. Moreover there might be constitutional difficulties in some countries regarding the very process of subrogation. He would, therefore, prefer to see Article 26(2) deleted or to accept a provision along the lines of that proposed by Mr. Machado.

22. Mr. Broches commenting on the statements of Messrs. Garba, Gutierrez Cano, Machado and Mejia-Palacio observed that much had been said of the political dangers of introducing the investor's State in proceedings before the Centre. Those speakers had overlooked the fact that there was a constantly growing body of agreements which did introduce the investor's State into relations between the investor and the host State. A number of investment guarantee agreements now provided for compulsory arbitration, in which the host State was called upon to recognize the substitution of the investor by his State. While it was true that those agreements provided for negotiation prior to arbitration, the host State had no choice as to whether or not it would permit substitution of the investor's State in the proceedings. Article 26(2) therefore introduced nothing new but merely took account of the whole web of interstate agreements of this nature which existed at present, and the Convention left it to both States concerned to choose whether they would use the facilities of the Centre rather than the procedures provided for in their bilateral agreements.

23. As to the suggestions for amendment made by Mr. Machado, two were in fact already incorporated in Article 26(2).
24. Mr. Woods said that any suggestions for amendment should be considered only after a decision had been taken as to whether a provision along the lines of Article 26(2) should be retained or omitted.
25. Mr. Thor said that all five countries he represented were in favor of subrogation as stated in Article 26(2), which they regarded as a vital provision.
26. Mr. van Campenhout favored retaining Article 26(2) for the reasons stated by Mr. Broches. He saw no danger in it because its application demanded prior agreement between the States concerned and was limited to cases where a State had become subrogated under a guarantee or insurance scheme in a manner frequently provided for in bilateral investment treaties.
27. Mr. van Vuuren supported the proposal to retain Article 26(2) which was the result of long and thorough discussion in the Legal Committee.
28. Mr. Rajan referring to Mr. Machado's suggestions for amendment agreed that two of them were in fact covered in the present text of Article 26(2) but felt that the wording might perhaps be altered to make this clear. On the other hand, Mr. Machado's fourth point, viz. that the amount claimed by the subrogated State should not exceed the amount that that State had paid to the investor, was not covered and some way should be found to do this. He also urged that Article 26(2) should specify a time limit within which the investor's State could request the host State's agreement to substitution.
29. Mr. Broches suggested that Mr. Rajan's last point might be met by deletion of the words "at any time thereafter" in the fourth line of the text so that substitution could be requested and consented to only at the time of the host State's original consent to jurisdiction.
30. Mr. San Miguel said he was against substitution of the investor by his State or an international institution as foreseen in Article 26(2), and would support the proposal of Mr. Machado. He believed that this principle could have political consequences which might in the end defeat the purposes of the Convention.
31. Mr. Khosropur said that the majority of the countries he represented were not opposed to Article 26(2) and he would, therefore, be in favor of retaining it. There could be no substitution without the consent of the host State - consent which that State would always be free to refuse.
32. Mr. Hirschtritt said he personally thought Article 26(2) was a beneficial one in that it provided a mechanism for reducing the level of a dispute rather than elevating it to the so-called political or diplomatic level as might otherwise be the case.
33. Mr. Handfield-Jones recalled that both Mr. Hirschtritt and Mr. Reilly had visualized circumstances in which the investor's State was being brought in as an unwilling party, and inquired whether the whole problem could not be avoided by an arrangement under which the guaranteeing organization in the investor's State would require the private individual

or the private national enterprise to have recourse to the facilities of the Centre before meeting the insurance or guarantee claim.

34. Mr. Broches agreed that that was possible although problems might arise in practice. For instance, some insurers felt that once the investor had been satisfied it would be difficult to make him spend money and time pursuing a claim in which he had a merely academic interest. Again, it might be open to the host State to argue that the investor had no real interest in the case since he had been compensated for any damage he might have suffered.

35. Mr. Chen said he was for retention of Article 26(2).

36. Mr. Gutierrez Cano asked how it would affect the position of the host State if, after substitution of the investor by his State it was proved that the investor had himself acted in breach of some legislative provision or had incurred some obligation of a pecuniary nature.

37. Mr. Broches in reply said that since the State stood in the shoes of the investor any defences which the host State would have had against the investor would be just as valid against his State. If there were an independent claim by the host State against the investor it would not be affected by the substitution, so that the host State could bring the investor before the Centre if it wished to do so.

38. Mr. Machado asked whether, if the Convention were silent on subrogation by the investor's State, it would not still be open to the host State to consent to such subrogation.

39. Mr. Broches, in reply, pointed out that the question of subrogation was not really involved at all. Article 26(2) had been included not in order to provide for subrogation, but to enable two States to appear before the Centre despite the basic provisions of Article 25 which said that the facilities of the Centre were only available for disputes in which one party was a State and the other was not.

40. Mr. Gutierrez Cano said that, considering that the situation described in the Convention is unprecedented, subrogation should be avoided not only of a State but also of any other institution.

41. Mr. Machado thought that to permit two States to appear before the Centre would be to invite undue publicity for the dispute, and this, in turn, would create political tensions which all countries would have an interest in avoiding.

42. Mr. Woods said that there seemed to be a preponderance of opinion in favor of retaining Article 26(2). However, it was the object of the discussion to formulate a text which would be acceptable to as many countries - both capital-exporting and capital-importing - as possible. He would adjourn the meeting of the Committee of the Whole until Tuesday morning February 23 when, time permitting, the discussion would be resumed and a decision taken on whether or not a provision along the lines of Article 26(2) should be retained. If it did not prove possible to continue the discussion on Tuesday morning, it would be necessary to meet that afternoon.

43. The meeting adjourned at 5:00 o'clock p.m.

SID/65-5 (February 25, 1965)

Memorandum of the Meeting of the Committee of the Whole, February 23, 1965, morning, not an approved record. Discussion of Chapters III and IV¹

1. There were present: omitted

2. Mr. Woods recalled that when the Committee had adjourned on Thursday, February 18, 1965, it had been discussing Article 26(2). As some Directors might not have had sufficient time to study the Memorandum of the discussion at that meeting, he would suggest postponement of further discussion of Article 26(2) and go on to consider Article 27.

Article 27

3. Mr. Gutierrez Cano said that Article 27 was quite acceptable to him. However, he would like to postpone final consideration of Article 27 until after the decision on Article 26(2).

4. Accordingly, final consideration of Article 27 was postponed.

CHAPTER III - CONCILIATION

Section 1. Request for Conciliation

5. Mr. Lieftinck said that the Israeli authorities had expressed the opinion that a request by an investor for conciliation or arbitration (Articles 28 and 36, respectively) should be subject to prior consent by his State. That was not, however, the position taken by any of the other governments he represented.

6. Mr. Broches observed that the point had been raised by the Israeli delegation in Bangkok but had not been reiterated in the Legal Committee. It had received no support probably for the reason that it would get the investor's State back into the picture, whereas the whole purpose of the Convention was to keep capital-exporting States out of the dispute. He himself would be opposed to the Israeli suggestion.

Section 2. Constitution of the Conciliation Commission

7. Mr. Rajan suggested that in Article 31(2) the word "qualifications" used in the draft of September 11, 1964 (Z-12)² was to be preferred to the word "qualities" used in the present draft because "qualifications" was more precise when speaking of the attributes listed in Article 14(1).

8. Mr. Broches pointed out that the word "qualities" had been used in Article 57 in order to refer to all of the attributes listed in Article 14(1). When reviewing the draft they had had to choose one term to be used consistently and they had chosen "qualities" as being more appropriate than "qualifications" when used to cover different kinds of attributes including, for example, that of "high moral character".

9. Mr. Garba said that the word "qualities" was more comprehensive than "qualifications" and if the words "of high moral character" were to be retained in Article 14(1), there would be no option but to use the word "qualities".

¹ The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

² See Doc. 131

³ See Memoranda of the Meetings of the Committee of the Whole on February 25, and March 4, 8 and 9, 1965, Docs. 135, 137, 139 and 141 respectively

⁴ See Memoranda of the Meetings of the Committee of the Whole on March 4, 8 and 9, 1965, Docs. 137, 139 and

⁵ Doc. 43

10. Mr. Woode said that there did not seem to be much support for Mr. Rajan's proposal and that the word "qualitica" recommended by the Legal Committee would be retained.

Section 3. Conciliation Proceedings

11. There was no comment on Section 3.

CHAPTER IV - ARBITRATION

Section 1. Request for Arbitration

12. There was no comment on Section 1.

Section 2. Constitution of the Tribunal

13. Mr. Brochee observed that Section 2 was important as it dealt with the composition of arbitral tribunals which would be charged with rendering binding awards. There had been an overwhelming majority in favor of maintaining flexibility as to the composition of the tribunals. The Legal Committee had particularly wanted to enable parties to elect arbitrators from outside the Panel of Arbitrators and that approach was now reflected in the text. Another important issue had been the extent to which an arbitral tribunal should be composed of persons of what might be called the "nationalities directly involved" i.e. nationals of the State party to the dispute and of the State whose national was a party to the dispute. The present text (unlike the draft of September 11, 1964) did not exclude entirely the nationalities directly involved. On the other hand, Article 39 required as a general rule that persons of these nationalities should not constitute the majority of the tribunals, subject to one exception viz. when the parties had agreed upon the very individuals who would serve on the tribunal.

14. Mr. Rejan observed that Article 39 modified as proposed by the staff would always apply so as to exclude the nationalities directly involved in the case where the parties had agreed that each of them would appoint one arbitrator and the Chairman of the Administrative Council would appoint the third, unless agreement was reached as contemplated in the proviso.

15. Mr. Broches said that Mr. Rajan was entirely right in his interpretation of Article 39. He believed that the provision accurately reflected the intention of the Legal Committee which was concerned to avoid a situation in which the third arbitrator, as the only one appointed by a neutral party, might find himself in the position of a sole arbitrator in having to maintain a balance between two other arbitrators who were more inclined to act as advocates for the parties appointing them.

16. There were both advantages and disadvantages in having "nationals" on the tribunal. Among the advantages was that their knowledge of local conditions would be helpful. One obvious disadvantage was that "national" arbitrators might not be regarded as entirely impartial. On balance the best solution would be to have a five-man tribunal of whom two would be "national" arbitrators appointed by each party to the dispute. In this way while the tribunal would have the benefit of two of its members' familiarity with their respective local conditions there would be a majority not linked by nationality to either party. On the other hand,

a five-man tribunal would be relatively expensive. Article 39 excluded a majority of "national" arbitrators unless the identity of each arbitrator was known and accepted by both parties.

Section 3. Powers and Functions of the Tribunal

17. Mr. Broches referring to Article 42 on the law applicable in a dispute explained that it proceeded on the initial assumption that the parties would themselves agree upon the law to be applied. Where the parties by an oversight, or because they could not agree, or because they felt that the tribunal was best qualified to decide the matter, did not reach agreement on the law applicable, the supplementary rule in Article 42(1) would require the tribunal to look to two sources, viz. in the first place, to national law and specifically to the law of the country where the investment had taken place; and secondly, to international law if international law should be applicable.

18. Mr. Donner said he understood the reference in Article 42(1) to "rules of international law" as including the rules of law set down in bilateral investment treaties between the State party to the dispute and the State whose national was a party to the dispute. In his opinion this had been clearer in the draft of September 11, 1964¹ which had specified that the term "international law" should be understood in the sense given to it by Article 38 of the Statute of the International Court of Justice. That provision had been eliminated and the substance of it transferred to paragraph 41 (and a footnote thereto) of the draft Report of the Executive Directors which would accompany the Convention. His authorities would have been better pleased with the earlier version referred to, since the present one seemed to them to give rise to doubts as to whether the rules of law set down in bilateral investment treaties would or would not be applicable to disputes under the terms of Article 42(1). Could Mr. Broches give an assurance that there was in fact no doubt on this point?

19. Mr. Broches said that there could be no doubt whatever that the term "international law" in Article 42(1) did in fact include rules set out in bilateral agreements between the States concerned. The fact that the interpretative clause in the original version of the Article had been transferred to the Report of the Executive Directors did not imply any change in the substance of the provision.

20. Mr. Mejia-Palacio supported by Mr. Machado referred to the phrase "the law of the Contracting State party to the dispute" in Article 42(1) and took the view that if Article 26(2) were retained there would in fact be two States parties to the dispute and that this would create some ambiguity. In their view Article 26(2) should be deleted.

21. Mr. Rajan repeated his government's view, expressed in the Legal Committee, that no reference should be made to international law and that the only law which should be applied to the dispute was that of the Contracting State party to the dispute.

22. Mr. Broches recalled that in the Legal Committee the reference in Article 42(1) to the national law of the Contracting State party to the dispute had been adopted by a majority of 31 to 1. The reference to international law had been adopted by a majority of 24 to 6. The representative of India on the Legal Committee had envisaged recourse to the

¹ Doc. 43
² Doc. 128

Centre only in cases where India would enter into special investment agreements with investors under which investors would have rights and obligations which they would not have had under general law. If such a special agreement were concluded, the agreement would itself be the law between the parties. He could see no conflict, however, between that view and the reference to international law in Article 42 which, in reality, comprised (apart from treaty law) only such principles as that of good faith and the principle that one ought to abide by agreements voluntarily made and ought to carry them out in good faith.

23. Mr. Suzuki said his government preferred the corresponding provision in the earlier draft which, in the absence of agreement between the parties, had left it to the tribunal to decide what law to apply. It could very well happen that the parties might designate the law of a third State as governing the dispute. If the host State then changed its mind thus creating a lack of agreement on the point, the tribunal might, under the present text, still be obliged to apply the law of the host State. The present provision might also be difficult to apply where domestic law was in conflict with international law.

24. Mr. Broche recalled that the corresponding article in the earlier draft had required the tribunal (in the absence of agreement between the parties) to decide the dispute in accordance with "such rules of national and international law as it shall determine to be applicable". In a transaction across the boundaries of States it was frequently necessary in the event of a dispute, for a court or arbitral tribunal to decide what law governed the relations between the parties. A body of rules, often referred to as the "conflict of laws", had developed around such situations and enabled one to determine the law applicable to a particular transaction or a particular aspect of a transaction. The choice contemplated under the earlier version of Article 42(1) was not so much between national and international law, but as between several national laws.

25. It had been urged strongly by one group of countries that the national law to be applied should be the law of the host State. This pre-occupation with application of the law of the host State could, in certain instances, be traced to historical roots in the regime of so-called "capitulations". Such countries were apprehensive not so much of the application of international law to the transaction, but of the national law of some foreign State, a situation with which their governments would have great difficulty. For that reason they did not wish to give the tribunal too great a freedom in its choice of law. He had himself concluded that, in the normal case, the reference should be to the law of the host State, and that it would be reasonable so to provide in Article 42(1). Referring specifically to the case put by Mr. Suzuki, he felt that no problem could arise there, because the parties had themselves chosen the law of a specified third State and the tribunal would have no option but to apply it.

26. As to the issue national versus international law, the vote in the Legal Committee had been very clearly in favor of permitting the tribunal to apply international law particularly in order to take account of cases where a State changed its own law to the detriment of an investor and in violation of an agreement not to do so. In such a case international law would not question the power of the sovereign State to change its law, but could hold that State liable in damages to the investor whose rights it had violated through an act inconsistent with international law.

27. Article 42(1) had been the result of a long and thorough discussion in the Legal Committee and, speaking as the Bank's General Counsel, he found it satisfactory from the points of view both of capital-importing countries and capital-exporting countries.

28. Mr. Rajan said that he would not press this point any further but would only like to know whether the validity of the laws of the host State could be questioned before an arbitral tribunal.

29. Mr. Broches replied that the validity of the national laws would not be at issue but the dispute might be on the question whether a valid law of the host country was harmful to any country or its nationals and therefore would give rise to international responsibility of the host State.

30. Mr. Gutierrez Cano said that the wording of Article 42 might have given rise to some confusion as to the priority between the domestic law of the host State and international law and he would like to have this point clarified.

31. Mr. Broches replied that Article 42 intentionally referred to domestic law and international law since a tribunal might be called upon to determine whether standards set by both systems of law had been respected by the host State. As a practical matter, in the case of expropriation for instance, the expropriated investor might complain that the amount of compensation he actually received was insufficient under the host State's own laws or was insufficient under some minimum standard of international law, if such standard existed. Conceivably a claim of that kind could be submitted to the tribunal in an alternative form, the investor claiming that his compensation was ineffectual under the domestic law of the host State and, if the tribunal did not so find, was insufficient under international law. Although it is impossible to foresee how the parties would plead their cases, Mr. Broches thought that, in general, one would have to start with the domestic law of the host State.

32. Mr. Khosropur asked whether a specific provision should not be made in Article 43 to empower an arbitral tribunal to seek "opinions of experts or accountants, if necessary", since expert advice would be particularly needed in the cases likely to come before the Centre.

33. Mr. Broches stated that in the Legal Committee it had been agreed that the word "evidence" would cover expert opinions. As to the question whether a specific provision should be inserted to empower the tribunal to obtain such expert opinions, he thought that any tribunal would have such power and that the rules for the exercise of such power could well be included in the Arbitration Rules.

34. There were no comments on Article 44.

35. Mr. Broches, introducing Article 45, pointed out that the text prepared by the Legal Committee had two purposes: one was to prevent frustration of the proceedings caused by the absence of one party and the other one was to avoid that failure of a party to appear be deemed to be an admission of the other party's assertions.

36. Mr. Chen stated with reference to Article 46 that his government preferred the original text of this Article as it had come out of the Legal

Committee. Since, in the opinion of the Chinese legal expert, consent and jurisdiction were not the same, his government was against the change suggested by the General Counsel. Also the use of the word "otherwise" in the proposed change might give rise to some misunderstanding.

37. Mr. Broches replied that it was generally agreed that consent of the parties is a most essential element of the jurisdiction of the Centre. The original language might have cast some doubt on this principle while the language he had suggested emphasized that consent in the hardcore of jurisdiction while the other elements were secondary.

38. Mr. van Campenhout pointed out that the language suggested by the General Counsel stressed that although consent of the party would be an essential condition for the jurisdiction of the Centre, there might be other reasons why the parties might not have the right to have recourse to the jurisdiction of the Centre, in spite of their agreement. For instance, if the parties agreed to submit a dispute which had nothing to do with investments.

39. Mr. Chen said that on the basis of the explanation given by Mr. van Campenhout for the language suggested by the General Counsel he would be prepared to accept it.

40. Mr. Broches, commenting on Article 47, mentioned that originally it had been proposed that the tribunal should have far-reaching powers to impose provisional measures. As a result of the discussion in the Legal Committee these powers had been reduced to recommending such measures.

Section 4. The Award

41. Mr. Hanfield-Jones asked the reason for introducing paragraph (5) of Article 48 as suggested by the General Counsel.

42. Mr. Broches replied that this addition had been decided by the Legal Committee but had been overlooked by the Drafting Sub-Committee at its last meeting.

Section 5. Interpretation, Revision and Annulment of the Award

43. Mr. Broches explained that Articles 50-52 gave three methods by which the parties could obtain clarification of awards or attack them. Article 50 dealt with interpretation. Since compliance with an award may extend over a number of years, no time limit was imposed for requests for interpretation. On the other hand, the request for interpretation would not suspend the effects of the award, unless the tribunal otherwise ordered.

44. Mr. Broches explained that Article 51 referred to the case of revision because of discovery of facts which, if they had been known at the time the award was rendered, would have been of decisive influence on the award. He pointed out that the additional paragraph (4) would provide that a party asking for revision could ask for suspension of enforcement of the award in its request and enforcement would then be provisionally suspended until the tribunal had had an opportunity to decide on that point.

45. Mr. Chen said that his government was opposed to the addition contained in paragraph (4) because it made it mandatory for the tribunal to stay enforce-

ment of the award if the applicant for revision so requested. It would be better to leave the power to stay enforcement to the tribunal which could still order a provisional stay pending its deliberations.

46. Mr. Broches explained that while in domestic courts when an appeal is made against a decision which is already enforceable there is always some judicial authority available to consider an urgent request to stay enforcement, in the case of awards under the Convention the arbitral tribunal, which would have to consider the application for revision and any request for a stay of execution of the award, would not be immediately available. It might take some time before the tribunal could be re-convened, particularly if some of its members had died or were unable to serve again on it. In those circumstances it was felt that, in fairness to the losing party, he ought to have an absolute right of suspension of execution until the tribunal could be re-assembled and rule on such suspension.

47. Mr. Broches explained that the procedure for annulment was similar to the one provided for revision except that an ad hoc committee would be appointed by the Chairman to take the place of the tribunal which had decided the case.

48. Mr. Mejia-Palacio asked why only 120 days, except in the case of corruption, were granted for filing an application for annulment while in the case of revision, two limits had been provided i.e. 90 days for discovery of the fact and 3 years after which an award had been rendered.

49. Mr. Broches replied that the reason for the different time limits was due to the fact that the ground for annulment, with the exception of corruption, are known to the parties at the very moment they read the award. The legal points involved, however, may be very complicated and for that reason a four-month period was provided. In the case of corruption, evidence of which may come only later, the same four-month period runs from the time of discovery of corruption subject to a final cut-off date of three years. In the case of revision, the three-month period runs from the date of discovery of the new fact on which the application for revision is based and is also subject to the same overall cut-off date of three years.

50. Mr. Chen stated that his government was against the proposed addition in paragraph (4) of an automatic stay of enforcement if the applicant requested it in his application for annulment, for the same reasons he had stated in connection with revision.

51. The meeting adjourned at 2.35 p.m. to reconvene at 3.30 p.m. on the same date.

SID/65-6 (February 25, 1965)

Memorandum of the Meeting of the Committee of the Whole, February 23, 1965, afternoon, not an approved record. Continuation of the Discussion of Chapter IV, and Discussion of Chapters V, VI, VIII, IX and X¹

1. There were present: omitted

2. Mr. Woods welcomed Mr. Samang who was temporarily replacing Mr. Tezi.

Section 6 - Recognition and Enforcement of the Award.

3. Mr. Broches explained that Article 53 established the principle that the parties were bound to abide by and should comply with the terms of the award. Article 54 set forth the procedure for enforcement of the awards in the courts of the Contracting States, should a party fail to comply with Article 53, and finally Article 55, by way of explanation, noted that the principle of State immunity from execution which was accepted in many countries was not affected by the Convention.

4. Mr. Donner stated that the German authorities had great difficulties with the present text of Article 54. The German Ministry of Justice and other authorities were of the opinion that it would be impossible not to permit the domestic courts which are asked to enforce an arbitral award to check, before enforcement, whether the award was or was not in contradiction with the ordre public of their country. This point had been discussed thoroughly with Mr. Broches but no solution had been found. Mr. Donner wished to submit the following amendment, as an addition to paragraph (3) of Article 54, to indicate the kind of provision that would be acceptable to the German authorities: "recognition and enforcement of an arbitral award may be refused if the competent authority of the State in which recognition and enforcement are sought finds that such recognition or enforcement would be contrary to the ordre public of that State".

5. Mr. Broches said that he had great difficulty with the point raised by the German authorities which had also been discussed at length in the Legal Committee, because he could not think of, and had not been given, any examples of cases in which ordre public or public policy would make it reasonable not to enforce an arbitral award. The whole notion of ordre public is meaningful in fields of law which had nothing to do with investments, such as the law dealing with the status of persons, marriage and divorce, adoption, nationality, the coming of age etc. In those fields it is normal for a State to retain the right to refuse to recognize the law of another country or acts done in another country if they would violate its ordre public. In the case of investments, however, he could not imagine how a decision that a party owed to the other party a certain sum of money could have anything to do with ordre public. The proposed Convention provided remedies for attacking an award but once those remedies had been exhausted there ought to be an end to litigation, the parties should be under an obligation to carry out the award and the courts of the Contracting States should be under an obligation to enforce the award. He called the attention of the Committee to the fact that the Convention would deal with disputes where one of the parties would have the character of a private individual while the other would be a State. A State would normally comply with an award because of the international obligation to do so established by the Convention and enforcement through the courts would not be used. If some notion of ordre public were introduced in the case of enforcement of an award through the courts, however, the same notion might then be held to apply to the State party to the dispute which would claim the right to refuse compliance with the award if it determined that such compliance would be violating its own ordre public.

¹ The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

6. Mr. van Campenhout agreed fully with Mr. Broches and could not think of any case in which the notion of ordre public would apply in the kind of dispute that would come before the Centre. In his view, the best protection any State which was afraid of an award violating its own public policy, would be not to consent to go to arbitration in that case.
7. Mr. Donner in reply to Mr. van Campenhout's last comment, pointed out that normally a government could not forecast before proceedings were started whether the resulting award would or would not be in violation of its public policy.
8. Mr. Mejia-Palacio referring to paragraph (1) of Article 53 asked what was the meaning of the second sentence therein and the reference to federal courts.
9. Mr. Broches explained that that provision had been introduced to establish the standard of recognition to be given to awards in countries such as the United States, which had a dual system of courts. The standard was based on the treatment accorded to judgments of the courts of a constituent State of that country.
10. Mr. Mejia-Palacio said that he would like to know whether an investor in a federal State could bring a claim against the federal government or the government of a constituent state or both.
11. Mr. Broches replied that under Article 25 of the Convention, dealing with the jurisdiction of the Centre, a constituent subdivision of a federal State, for instance, a state of the United States, could enter into an arbitral agreement with a foreign investor with the approval of the federal government. If it did so and lost the case the award could be enforced in any country, including that federal State, as if it were the decision of a court in that State.
12. Mr. Woods, reverting to the point raised by Mr. Donner, inquired whether the question had been discussed in the Legal Committee and whether any vote had been taken among the members of the Legal Committee.
13. Mr. Broches stated that the matter had been discussed in the Legal Committee and that a draft provision, allowing a State which had not been a party to the proceedings and whose national had not been a party to the proceedings to refuse enforcement on the grounds of public policy, had been defeated by a vote of 25 to 9. The broader question of ordre public or public policy as a general ground for not enforcing an award had not come to a vote. He stressed the fact that Article 54 required a Contracting State to recognize and enforce an award in accordance with its laws on the execution of judgments; no State would be required to provide a type of execution which did not exist in respect of judgments of its own courts. Finally, he thought that perhaps the substitution of the words "enforce the pecuniary obligations imposed thereby" for the words "enforce it" in the first sentence of paragraph (1) of Article 54 might help to overcome the difficulties which the German authorities had with the present provision.
14. Mr. Woods asked Mr. Donner whether this suggestion would be helpful.
15. Mr. Donner replied that he would have to refer this proposal to his government.

16. Mr. Woods asked Mr. Donner whether he could obtain the views of his government in time for the meeting of the Committee on Thursday, February 25, on the understanding that the reaction of the German authorities did not imply an approval of the German government of the draft Convention.
17. Mr. Donner undertook to try to obtain his government's views on that basis.
18. Mr. Lieftinck expressed the view that any weakening of the provision on enforcement of awards would greatly reduce the usefulness of the Convention. The purpose of the Convention was to build up a procedure for finally settling disputes. If, after a decision had been reached, any Contracting State could still have the power to veto the enforcement of the award in its territories on the ground of "ordre public" which was not a clearly defined concept, the whole Convention would be undermined. In his view even the limitation of enforcement of awards to the pecuniary obligations established by the awards would weaken the Convention and would be difficult for him to accept.
19. Mr. van Campenhout shared Mr. Lieftinck's view that a clause accepting the notion of ordre public as a bar to enforcement would weaken the Convention.
20. Mr. Wright also thought that a provision along the lines suggested by Mr. Donner would weaken the usefulness of the Convention. The alternative suggestion by Mr. Broches seemed on its face to provide a useful way out of this problem.
21. Mr. Hirschtritt asked whether Mr. Broches' suggested amendment would imply that no awards could be rendered requiring a party to perform or not to perform a particular act.
22. Mr. Broches replied that an award could well order the performance or non-performance of certain acts but all that could be enforced would be the obligation to pay damages if the party did not comply with that order. In the kind of disputes that would come before the Centre payment of damages was all that ultimately the parties would expect in the absence of voluntary compliance.
23. Mr. Lieftinck inquired whether the suggested change meant that an order for restitution or for permitting an industry to be transferred from one location to another could not be enforced.
24. Mr. Broches replied that the cases Mr. Lieftinck had in mind were cases of obligations of the host State to perform certain actions within its own territory. In those cases, the host State was under a direct international obligation to carry out the award and the record of compliance of governments with international decisions was quite good. If, however, the host State did not comply with the award, it would be under an obligation to make good the damage resulting from its non-compliance.
25. Mr. Woode suggested that the Committee defer consideration of Article 54 until the next meeting so that Mr. Donner could obtain his government's views on Mr. Broches' suggestion.
26. Mr. Donner wanted to make it clear that his government had proposed the addition of a clause relating to ordre public - which other people seemed to find unacceptable - because the law on enforcement of judgments in Germany was so strict that the German authorities had no discretion in the enforcement of judgments while in other countries enforcement proceedings would allow the

local courts some leeway. Therefore the possibility of resorting to a notion of ordre public was essential in the opinion of the German authorities. He had used advisedly the French term "ordre public" because it is a well-known legal concept in international law which does not suggest any discretionary action on the part of governments.

Chapter V - Replacement and Disqualification of Conciliators and Arbitrators.

27. Mr. Woods asked for comments on Article 56.
28. Mr. Rajan referred to paragraph (3) of Article 56 and asked why in cases where a conciliator or an arbitrator appointed by a party resigns without the consent of the other conciliators or arbitrators, the party should be deprived in all cases of the opportunity of appointing another member of the commission or tribunal, at least in the first instance.
29. Mr. Broches replied that the purpose of the provision was to prevent the possibility of collusion between the party and the arbitrator appointed by him. If a party could prevail upon an arbitrator to resign in the course of the proceedings without cause he would be able to frustrate or slow down the proceedings. Obviously, if the resignation was for good cause, the other members of the tribunal would consent.
30. Mr. Rejan thought that a party should not lose the right to appoint an arbitrator or conciliator if that person had resigned for some reasons which were not acceptable to the others.
31. Mr. Gutierrez Cano agreed with Mr. Rejan and suggested that, in order to avoid any undue delays, the party be required to replace his arbitrator within a specified time; if he did not do it, then the Chairman would appoint the arbitrator. This right of the party should be reserved at least if the other party was in agreement.
32. Mr. Khoeropur pointed out that, if there was a good cause or purpose for the resignation, the tribunal would undoubtedly consent. Therefore he was in favor of retaining the provision as it was.
33. Mr. Machado was also in favor of retaining the existing text. The purpose of this provision was to ensure that proceedings be conducted in good faith.
34. Mr. van Campenhout and Mr. van Vuuren also expressed themselves in favor of retaining the provision as it was.
35. Mr. Khosropur asked whether the reference to Section 2 of Chapter III and Section 2 of Chapter IV in Article 56 would apply also to assignments of conciliators or arbitrators by the Chairman under paragraph (3) of the same article.
36. Mr. Broches replied in the affirmative.

Article 57

37. Mr. Donner said that he had mentioned to Mr. Broches some difficulties which the German authorities had with the text of Article 57. As this point had not been fully discussed in the Legal Committee, he felt justified in raising it now.

38. Mr. Broches explained that the German authorities both in the Legal Committee and in later conversations had expressed the view that a provision on disqualification of conciliators or arbitrators along the lines of the provision contained in the Model Rules of the International Law Commission would be preferable. The Model Rules provide that a party may propose disqualification of an arbitrator but do not state the grounds on which he can be disqualified. In the course of his conversations with the German authorities he had become convinced that their principal concern was whether, under the present text, the lack of independence or the partiality of an arbitrator would be a ground for disqualification. In his opinion partiality or lack of independence was undoubtedly a lack of the qualities required under Article 14 paragraph (1) which requires inter alia that the arbitrators be persons who may be relied upon to exercise independent judgment.

39. Mr. Woods inquired whether this matter had been discussed in the Legal Committee and whether there had been a consensus on the present text.

40. Mr. Broches replied that the matter had been discussed and that the records showed that there had not been great support for a proposal made by the German expert to substitute a provision along the lines of the one contained in the Model Rules.

41. Mr. Woods asked whether any other Director wished to comment on Article 57. As none asked for the floor, he thought that the general view was that Article 57 should stand as it was.

42. Mr. Wright, referring to Article 58 pointed out that, in the fifth line, the second word ("of") should be deleted.

Chapter VI - Costs of Proceedings

43. Mr. Broches explained that these provisions were of a technical nature and had been discussed at length by legal experts who had eventually decided that in conciliation the costs should be borne by the parties and that in arbitration the tribunal should apportion the costs, unless the parties had otherwise agreed.

44. Mr. Handfield-Jones referring to paragraph (1) of Article 60 asked whether he could have any indication on how the guidelines to be followed by commissions and tribunals in determining their fees and expenses would be set up.

45. Mr. Broches replied that no work had yet been done by the staff on this subject. When the time came, the advice of other institutions in the field of arbitration, would undoubtedly be sought.

Chapter VIII - Disputes between Contracting States (Article 64)

46. Mr. Broches said that Article 64 was in common form and referred to the settlement of disputes between States concerning interpretation of the Convention through the International Court of Justice. He recalled that paragraph 46 of the draft Report of the Executive Directors had been included at the request of the Legal Committee to make clear that this Article was not intended to give the International Court of Justice the function of an appellate court in relation to awards by tribunals, but merely to deal with questions of interpretation between members otherwise than in connection with proceedings pending before the Centre e.g.

¹ Doc. 128

a difference of opinion about the degree of immunity that the Convention required members to give to certain persons.

Chapter IX - Amendment (Articles 65 and 66)

47. Mr. Broches said that while there had been general agreement that some mechanism for amendment ought to be provided, some delegates to the Legal Committee had pointed out that their constitutions or constitutional practices in their countries made it difficult, if not impossible, to change the contents of an agreement of this type without the consent of Parliament. Article 66, therefore, provided that an amendment would enter into force only upon ratification or acceptance by all Contracting States.
48. Mr. Suzuki said that in the view of his government the amendment procedure was too strict. He would prefer it if Article 66 were to require ratification or acceptance of an amendment by a qualified majority of Contracting States, say two-thirds of their number.
49. Mr. Broches observed that it might have been possible to provide that an amendment would enter into force on ratification or acceptance by a qualified majority of States and bind only those States. However, this would give rise to two groups of countries with different sets of obligations, viz. those that had approved the amendment, and those that had not.
50. Mr. Woods observed that the strict requirements of the amendment procedure was one of the reasons why the Convention had been drafted in broad terms.
51. Mr. Rajan recalled that the corresponding provision in the draft of September 11, 1964¹ (Article 69) distinguished between amendments involving fundamental alteration in the nature or scope of the Convention which required unanimous acceptance by the Administrative Council, and other amendments which required acceptance by only a two-thirds majority of the Council. He would be in favor of a more flexible procedure for amendment than that provided in the present draft and urged reconsideration of the previous formula to which he had referred.
52. Mr. Broches said he was in complete agreement with Mr. Rajan and had himself hoped to convince the Legal Committee of the need to distinguish relatively important amendments, i.e. those which did change the rights and obligations of Contracting States, and unimportant ones that did not. However, a sub-committee of the Legal Committee, after studying a wide variety of alternatives, had recommended that the Legal Committee adopt the procedure in Article 66. Twenty-seven delegations had expressed support for the provision while none had opposed it.
53. Mr. Machado observed that Article 66 required not merely adoption of an amendment by two-thirds of the members of the Administrative Council but also subsequent ratification or acceptance by all Contracting States. This would make it practically impossible for the Convention to be amended. The Convention would not only be open to members of the Bank but to other States as well, and such a provision would enable any State, whether a member of the Bank or not, to block any change which might prove desirable in the light of experience in the future.

¹ Doc. 43

54. He would be in favor of a more flexible procedure, say, one which required adoption of an amendment by a high majority and subsequent ratification by a high number of countries, the amendment to be binding only among countries which had ratified it. It would always be open to a State which could not accept the amendment to withdraw from the Convention.

55. Mr. Broches said he had himself examined practically all possible amendment procedures. A procedure like that proposed by Mr. Machado had been considered at the regional meetings. Mr. Rajan had supported a procedure similar to the one he had proposed to the Legal Committee. Both procedures had met with substantial opposition. The issue seemed to be: should a country be faced with the choice of accepting the amendment or withdrawing from the Convention? The procedure for amendment was an essentially political point upon which the Directors might well wish to seek instructions before reaching a decision. While he was not personally in favor of the present procedure, he did not see any very great need for a more flexible one since the terms of the Convention were themselves flexible.

56. Mr. Woods said that one of the implications of Mr. Machado's proposal had appealed to him viz. that the procedure might require for entry into force of an amendment the concurrence of all Contracting States who were also members of the Bank. He would agree with Mr. Machado that it would be strange to have an amendment delayed for lack of action by a State which was not even a member of the Bank. Mr. Rajan had suggested a different procedure and had introduced the idea of amendment by a qualified majority which would bind the entire membership.

57. While it might be difficult to disregard the advice of the Legal Committee, this was a matter for the Executive Directors to decide, and he suggested that further thought should be given to both proposals before returning to the discussion on Thursday, February 25.

58. Mr. Broches recalled that the provisions on amendment in the draft of September 11, 1964 had called for adoption of amendments by the Administrative Council without any mechanism for ratification. One of the objections to this procedure had been that States would not wish to entrust their Ministers of Finance with making a decision to change an agreement. That had led to inclusion of provisions for ratification or acceptance.

59. Mr. Hirschtritt said he would have to seek instructions from his government on the question of an amendment procedure that did not require subsequent ratification. The adoption of such a procedure might hurt the Bank's aim of securing as wide an acceptance as possible for the Convention.

60. Mr. Rajan thought it would be useful in an amendment procedure which distinguished between fundamental changes and others, to list in the text, those articles the amendment of which required unanimous approval as well as those articles which could be changed by a simpler method.

61. Mr. Lieftinck said he would also prefer more liberal provisions on amendment of the Convention. At first sight it appeared that the bulk of Chapter I on the organization of the Centre might be subject to easier amendment procedures.

62. Mr. Woods said that Mr. Broches would by the next meeting have

a list of articles suitable for amendment by less than the unanimous vote of the membership.

63. Mr. Malaplate referring to Article 66(2) said his government would like to see the text revised along the lines of the following draft:

"No amendment shall affect the rights and obligations of any Contracting State or of any national of a Contracting State arising out of consent to the jurisdiction of the Centre given prior to the date of entry into force of the amendment."

This provision would keep alive rights and obligations arising out of the wider notion of consent to the jurisdiction of the Centre, and not merely those connected with proceedings before it.

Chapter X - Final Provisions

64. Mr. Broches referred the meeting to Document Z-13, the revised draft of the Convention dated December 11, 1964 which had been circulated under cover of Document R 64-153. The Legal Committee had not considered Chapter X, Final Provisions, which was now before the Directors. The term "Section" should be substituted for "Title" wherever it occurred to maintain consistently with the style adopted by the Legal Committee.

Section 1. Entry into Force (Article 67)

65. Mr. Broches, introducing Article 67 pointed out that it listed the States to which the Convention would be open, i.e. the States to which the invitation to sign was addressed. In form it followed the precedents of corresponding provisions in Conventions recently drafted under the auspices of the United Nations.

66. Mr. Gutierrez Cano asked whether the categories listed in Article 67 together covered all countries of the world.

67. Mr. Woods replied in the negative. Mainland China, for example, was clearly not included.

68. Mr. Mejia-Palacio said that attempts had been recently made to bring Mainland China into the specialized agencies of the United Nations and he was apprehensive that if this should happen Mainland China would become eligible to accede to the Convention. He would, therefore, omit reference to States members of the specialized agencies of the United Nations.

69. Mr. Machado said that Article 67 opened the Convention to all States whether or not they were in good faith and were known to comply with their international obligations. He would give only members of the Bank the right to join. Any State not a member of the Bank might be permitted to join upon acceptance of its candidature by a vote of two-thirds of the members of the Administrative Council.

70. Mr. Lieftinck in principle favored an "open" Convention or one which was very liberal as to which States might join. However, he had two comments: first, he was somewhat hesitant about opening the Convention to all States members of the specialized agencies of the United Nations; and secondly,

* Doc. 123

it would be a gracious gesture to a sister institution to mention the International Monetary Fund by name in Article 67.

71. Mr. Chen said his government took a serious view of Article 67. He recalled that the very first article of the Bank's Charter stated that the Bank was to "assist in the reconstruction and development of territories of members etc." By implication, any agency created by the Bank should extend its rights and privileges only to members of the Bank. He proposed that Article 67 be amended to read:

"This Convention shall be open for signature on behalf of States members of the Bank."

If the majority of the Directors favored a provision along the lines of the existing text he would support Mr. Machado's proposal for a procedure limiting admission of States not members of the Bank to States members of the United Nations or parties to the Statute of the International Court of Justice approved for membership by a vote of two-thirds of the Executive Directors of the Bank or of the Administrative Council of the Centre.

72. Mr. Rajan was in favor of retaining the present text of Article 67 possibly with special mention of the International Monetary Fund.

73. Mr. Gutierrez Cano supported Mr. Chen's proposal to limit access to the Convention to States members of the Bank and/or the International Monetary Fund.

74. Mr. Wright asked what were the origins of the present text of Article 67 and whether it had been discussed by the Legal Committee.

75. Mr. Broches said that the corresponding provision in the Preliminary Draft of the Convention which had been discussed at the regional meetings had provided that the Convention would be open for signature to all sovereign States. That provision had been objected to by several countries on political grounds which were by now well known. Because of these objections the provision had been changed and now listed categories of States which, with some overlapping, covered all countries with the exception of those whose admission might create political problems for others. Categories now listed in article 67 were substantially those listed in the corresponding provision (Article VIII) of the New York Convention of 1958 on recognition and enforcement of foreign arbitral awards.

76. In his opinion the wording of the present text had great advantages and very few disadvantages. He did not regard as serious the danger that certain countries might join which were undesirable or untrustworthy, or might attempt to frustrate the Convention or the working of the Administrative Council. If these countries were really of such a character it would be unlikely that anyone would invest there; nor would countries which were not interested in private investment wish to join the Convention.

77. Mr. Mejia-Palacio wished to support Mr. Lieftinck's suggestion that reference to members of the specialized agencies of the United Nations be deleted and replaced by a specific mention of the International Monetary Fund.

78. Mr. Lieftinck elaborating on his earlier proposal said he had

hesitated on whether to refer to members of the specialized agencies of the United Nations because it was relatively easy to become a member of such an agency. Reference to the members of the Bank and of the Fund would, in his view, cover adequate ground although if pressed he might extend the field to members of the United Nations and States parties to the Statute of the International Court of Justice. He was not, however, in favor of establishing a mechanism for admission.

79. Mr. Machado reiterated his proposal to restrict membership of the Convention to members of the Bank and the Fund and possibly to other States admitted to membership by a qualified majority of the Administrative Council. To open the Convention without restriction to a wider group of States as had been suggested would be to let in States whose only interest was the destruction of the Convention.

80. Mr. Wright said that in his opinion Mr. Machado's proposal had a great deal of force. Several aspects of the matter needed consideration. In particular, it was their aim to set up a Convention which would be joined by as many States as possible which would make effective use of it. He would like to know whether the issue under discussion was one which would have any real bearing on the views of those States most likely to use the Convention.

81. Mr. Woods said that the opinions of the Directors seemed equally divided on whether to leave the text of Article 67 as it stood (with the possible insertion of an express reference to the Fund), or to limit access to the Convention in one or other of the ways that had been suggested. However, discussion would be postponed until Thursday, February 25.

82. The meeting adjourned at 5:40 p.m. o'clock.

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SID/65-7 (March 1, 1965)

Memorandum of the Meeting of the Committee of the Whole, February 25, 1965, morning, not an approved record. Continuation of the discussion of Chapters IX and X¹

1. There were present: omitted

2. Mr. Woods hoped it would be possible to complete discussion of the draft Convention at the present meeting leaving consideration of the accompanying Report of the Executive Directors until Thursday, March 4, 1965. The Committee would now resume its consideration of Chapter X.

Chapter X - Final Provisions (continued)

Article 67

3. Mr. Broches said that in the light of the Directors' discussion of Article 67 at the previous meeting of the Committee of the Whole, the

¹ The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

² See Doc. 133

following text might prove acceptable:

This Convention shall be open for signature on behalf of Statss members of the Bank. It shall be open for signature on behalf of other States with the approval of two-thirds of ths members of the Administrative Council.

4. Mr. Woods thought that that text represented the preponderance of views among the Dirsctors.
 5. Mr. Machado and Mr. Chen supported the draft proposed by Mr. Broches.
 6. Mr. Hirschtritt supported by Mr. van Campenhout and Mr. Gutierrez Cano proposed limiting the eligibility of States which were not members of the Bank to such States parties to the Statute of the International Court of Justice as were approved by the Administrative Council by a qualified majority.
 7. Mr. Broches said he had on purpose avoided reference to categories of States in connection with eligibility to become parties to the Convention, and thought that the requirement of approval of a State's candidature by a two-thirds or higher majority would provide an adequate safeguard. However, as some Directors seemed to favor the former approach, the second sentence of the draft he had just read might be re-worded as follwos:

It is open for signature on behalf of other States parties to the Statute of the International Court of Justice with the approval of two-thirds of the members of the Administrative Council.
- While the drafting would have to be improved this text seemed to express the idea with sufficient clarity.
8. Mr. Woods said that Article 67 as drafted by Mr. Broches subject to minor modifications in form seemed acceptable to the Directors. Mr. Hirschtritt might, however, wish to discuss tbe provision further with his colleagues.
 9. Mr. Broches recalled that when Mr. Woods had outlined the program for the Directors' consideration of the Convention he had envisaged a week's pause following the end of the discussion. One government had requested a longer pause. The Directors would then meet in a formal session to take a final decision on points still left open.
 10. There would then remain for consideration the Report of the Executive Directors. The draft Rsport circulated as document R65-11' comprised two parts: the first contained general observations by the Directors, on which thers might be a good deal of discussion, and the second, which would consiet essentially of clarificstion and comments on the text of the Convention, which would not take much time. The pause envisaged by Mr. Woods would commence on completion of ths discussion of the text of the Convention and it would not be necessary to wait until discussion of the Report had also been concluded. When the Directors had finished discussing the Report there would be a further interval.

11. Mr. Woods said he would like the Directors to bear this program in mind. The Report of the President of the Bank to ECOSOC was now scheduled for Friday, March 26, 1965 and that would certainly be a desirable and natural time at which to announce completion of the task which the Board of Governors of the Bank had asked the Executive Directors to undertake.

Article 68

12. Mr. Broches introducing Article 68 said the word "acceptance" which was sometimes used was the exact equivalent in substance of "ratification". It was customary for States to sign an agreement first and then ratify or accept it in accordance with their constitutional procedures. The Bank was designated depository of the Convention.

13. There was no comment on Article 68.

Chapter IX - Amendment

Article 66

14. Mr. Woods asked the Committee to complete its consideration of Article 66.

15. Mr. Broches recalled that the provisions of Article 66 made amendment of the Convention subject to very stringent requirements. The Administrative Council had first to approve the proposal to amend by a two-thirds majority, and after that every Contracting State had to ratify or accept the amendment. Some of the Directors had objections to this procedure, but the alternatives suggested in the Legal Committee had met with no success. While there had been no opposition to the present text in the Legal Committee, the Directors were free to reconsider the matter. Mr. Rajan, for instance, had suggested a return to the concept of distinguishing important amendments, which would require unanimity for their adoption and other amendments which could be adopted by a simpler process. He would like to propose the following new text of Article 66 for consideration by the Directors:

Article 66

(1) Amendments which would impose new obligations on Contracting States or would affect the provisions of Chapter II or Articles 53 and 54 of Chapter IV or Chapter IX shall, if the Administrative Council so decides by a majority of two-thirds of its members, be circulated to all Contracting States;

(2) All other amendments shall enter into force upon adoption by the Administrative Council by a majority of two-thirds of its members;

(3) (Present text of Article 66(2)).

16. By way of explanation he noted that the concept of amendments involving a "fundamental alteration of the nature or scope of the Convention" used in Article 69(1) of the draft of September 11, 1964 had been replaced by specific reference to provisions of crucial importance.

17. Mr. Machado found the text proposed by Mr. Broches acceptable. He would, however, add to the list of fundamental provisions to be specified as requiring unanimity for amendment, Article 7(2) which incorporated the principle of one-State-one-vote.

18. Mr. Mejia-Palacio asked whether the phrase "new obligations" covered new financial arrangements.

19. Mr. Broches replied that amendments of the Convention which imposed new financial obligations would, under the text he had proposed, require unanimity for adoption.

20. Mr. Mejia-Palacio thought that in that respect the draft did not permit adequate flexibility. It would be necessary, for instance, to be able to increase the budget from year to year without difficulty.

21. Mr. Broches pointed out that Article 6 provided for adoption of the Centre's budget. No amendment of the Convention would be necessary in order to permit an increase in the annual budget.

22. Mr. Hirschtritt said he was personally in sympathy with the views that had been expressed in favor of less stringent provisions on amendment. However, it was necessary to look at the problem from the point of view of securing wide support for the Convention. To introduce a procedure whereby the Convention could be changed without the consent of some of the States parties to it would create difficulties for some governments. He believed that the terms of the Convention themselves had sufficient inherent flexibility to meet various problems and most of the minor changes which might become necessary could be accomplished through changes in the rules and regulations without amendment of the text of the Convention itself. Other provisions, like that on the location of the seat of the Centre, had built-in flexibility. It had to be remembered that the Legal Committee had gone into the matter thoroughly and had recommended adoption of the procedure now embodied in Article 66(2). He was not able to support any of the modifications of that procedure hitherto proposed.

23. Mr. van Campenhout said he personally favored the proposal of Mr. Broches. However, he had been advised that that proposal would be difficult for his Parliament to accept. He would be willing to try to persuade those in his country who had expressed that view.

24. Mr. Malaplate thought the existing provisions requiring unanimous ratification of amendments would make any change impossible. He would favor requiring ratification of an amendment by a majority, even a large one like two-thirds or four-fifths. States which could not accept the amendment could still denounce the Convention.

25. Mr. van Vuuren said that although he personally favored the approach suggested by Mr. Broches, he agreed with Mr. Hirschtritt that due weight should be given the fact that the Legal Committee had decided without dissent to recommend the present text of Article 66(1). His government would have to consider the text of the new proposals with a view to determining which of the Articles could be amended by the simpler procedure and which could not.

26. Mr. Donner said that he had sympathy with the views of Mr. Machado and Mr. Malaplate. However, taking into consideration the discussion in the

Legal Committee and its adoption without dissent of Article 66(2) as it now stood, he felt it would be best to leave the text unchanged.

27. Mr. Gutierrez Cano said he was inclined to support the text proposed by Mr. Broches although he would like to have the opportunity of studying the precise wording. He was in favor of limiting the requirement of unanimity to those areas in which it was clearly essential.

28. Mr. Hujan supported the text proposed by Mr. Broches which would be quite acceptable to his government. He was not sure whether it would be necessary to include, as had been suggested by Mr. Machado, a specific reference to Article 7(2) as being one of the provisions requiring unanimity for amendment. He was of the view that it was axiomatic that each member of the Administrative Council would have one vote.

29. Mr. Broches recalled that he himself had been in favor of a simpler amendment procedure. Delegates to the Legal Committee, speaking under instructions from their governments, i.e. from Foreign Offices which would eventually have to place the text before their Parliaments, had favored the procedure now in Article 66(2), and he saw no real danger in the Directors accepting it without change.

30. Mr. Machado recalled that the Legal Committee had been convened to advise the Directors and that the Directors were not bound to the advice of the Committee. He recalled that the texts formulated at Bretton Woods had maintained flexibility. The weakness of the United Nations Charter in providing for a veto power in the Security Council had been amply demonstrated in recent times. Those who insisted on the unanimity principle for amendment of the Convention in effect gave any Contracting State, whether large or small, a right to veto. He could not agree that any text that the Directors might eventually submit to Governments would be perfect and would not need modification in the future. He would, therefore, like to see provision made for a more flexible procedure for amendment. The time might come, for instance, when it might be desirable for the Centre to become completely separate from and independent of the Bank. The President of the Bank might well be too busy with his other functions to perform those given to him under the Convention. The present rule which required unanimity for all amendments would enable any such amendment to be frustrated by a single dissident country.

31. Mr. Mejia-Palacio said he had been convinced of the need for flexibility in the Convention. He particularly had in mind that Article 5 which made the President of the Bank Chairman of the Administrative Council ex officio might need to be changed if the Administrative Council in the future decided that it was unwise for the Centre to be linked to the Bank.

32. Mr. Broches pointed out that Article 66(2) was one on which particular attention ought to be paid to the views of Foreign Offices. For instance some Foreign Offices in Latin American countries thought there would be very serious objections to any possibility of amendment without unanimous ratification. He had himself cited the Bretton Woods texts as examples of agreements which did not require unanimous ratification of amendments. In answer it had been argued that the Bretton Woods texts established a different type of institution - an operating institution rather than a rule-making one - and that in any event it would be difficult to get parliaments again to adhere to an instrument which could be amended otherwise than by unanimous ratification. He doubted that any countries would refuse to sign the Convention on the

grounds that it was "inflexible". On the other hand, it was clear from the discussion in the Legal Committee that some countries might refuse to sign because their parliaments could not give a blank cheque to a group of countries to change its own position on the instrument.

33. Mr. Woods said he agreed with Mr. Broches that on balance Article 66(2) should remain unaltered. It was clear that a majority of the Directors also shared that view.

34. Mr. Malaplate suggested that deposit of instruments of ratification and acceptance both of the Convention as a whole (Article 68) and of amendments (Article 66(1)) should be dealt with in a single provision.

35. The meeting adjourned at 12:45 p.m. o'clock to reconvene at 3:00 p.m. the same day.

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SID/65-8 (March 3, 1965)

Memorandum of the Meeting of the Committee of the Whole, February 25, 1965, afternoon, not an approved record. Continuation of the discussion of Chapter X, and of Article 26(2)¹

1. There were present: omitted

Article 69

2. Mr. Broches introducing Article 69, said that the main object of the procedure prescribed was to ensure that the Convention would enter into force only when it had been ratified or accepted by a reasonable number of both capital-importing and capital-exporting States. An alternative approach might be to provide that the Convention would enter into force on ratification by a certain number of States, and at the same time prescribe a time limit after which, if the required number of ratifications had not been received, it would be open to those States which had ratified to bring the Convention into force among themselves.

3. Mr. Rajan did not think that the Executive Directors of the Bank should be given a role in bringing the Convention into force. Decisions were usually taken by the Directors through ascertaining a consensus. On an issue like that presented by Article 69 there might be a clear divergence of views leading to a vote and the attendant problems. As to the number of ratifications required, his own view was that a requirement of, say, 24 ratifications would take into account the desirability of ratification by an appropriate number of capital-exporting and capital-importing countries.

4. Mr. Chen and Mr. Garba endorsed the statement of Mr. Rajan and proposed that the Convention enter into force on ratification or acceptance by not less than 25 member States of the Bank without further action by the Executive Directors.

5. Mr. Machado thought the procedure in Article 69 would place the Executive Directors in the position of determining what combination of States should bring the Convention into force. He anticipated that the

¹ The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

capital-exporting countries would be the first to join, and clearly the Executive Directors ought not to bring the Convention into force if only capital-exporting countries had adhered to it. On the other hand, it had to be borne in mind that when acting as the Executive Directors of the Bank they would have to reach a decision on the issue by a system of weighted voting which was controlled in effect by three Directors. He would favor substituting the procedure in Article 69 by a requirement of ratification by a fixed number of countries neither so high as to prevent the Convention going into force nor too low, and one which did not require action by the Executive Directors.

6. Mr. Woods observed in reply that recent informal contacts had led him to believe that not only capital-exporting countries but also several capital-importing countries were looking forward to acceding to the Convention as early as possible.

7. In reply to Mr. van Vuuren, Mr. Broches said that the procedure in Article 69 had been designed with a view to ensuring that there would be a fair representation of both capital-exporting and capital-importing countries among adherents to the Convention.

8. Mr. van Vuuren said he could support the procedure in Article 69 as it stood.

9. Mr. Donner said he had a strong preference for eliminating the role of the Executive Directors in bringing the Convention into force. There were constitutional difficulties in making the entry into force of an agreement between States dependent on a decision by the Executive Directors of the Bank. He was, therefore, in favor of making ratification of the Convention by a specified number of countries the only requirement for entry into force.

10. Mr. van Campenhout thought the procedure in Article 69 would give rise to difficulties. For instance, what criteria were the Directors to apply in order to determine whether the right kinds of countries were included among the 12 that had ratified? Would an Executive Director be justified in voting for bringing the Convention into force even if none of the countries he represented had ratified it? Nor was he convinced that it would be easy to determine whether a particular country was a capital-exporting or a capital-importing country.

11. Mr. Kochman endorsed the points raised by Mr. Rajan and supported deletion of the requirement of action by the Executive Directors for entry into force of the Convention.

12. Mr. Malaplate preferred to omit the role of the Executive Directors in bringing the Convention into force. He would favor requiring ratification or acceptance by at least 24 States.

13. Mr. Hirschtritt was in favor of the Convention entering into force on ratification by a specified number of States.

14. Mr. Gutierrez-Cano favored automatic entry into force upon ratification or acceptance by a specified number of States fixed so as to ensure adequate participation by capital-importing countries.

15. Mr. Ozaki said the Japanese Government did not favor requiring action by the Executive Directors to bring the Convention into force. In its written comments his Government had proposed that ratification or acceptance by 25 States (roughly one-fourth of the Bank's membership) be made the condition for entry into force of the Convention.

16. Mr. Woods said it was clear that there was a consensus among the Directors that the procedure in Article 69 whereby the Convention would enter into force after action by the Executive Directors of the Bank acting on the recommendation of the President should be eliminated. It remained to decide upon the actual number of States required to ratify or accept the Convention in order to bring it into force.

17. In that connection he recalled that over some three years the Bank had, with the knowledge and approval of the Executive Directors, invested a very substantial amount of money and effort in order to bring the Convention into being in the sincere belief that the proposed Centre would prove to be of very great assistance in the efforts of countries towards economic development. The Governors of the Bank at their meeting in September, 1964¹ had enjoined the Directors to bring the Centre into being. He would like to see the Centre created as early as possible so that it could prove its worth through its operation and achievements. The figure of 12 ratifications had been initially proposed as being the lowest figure that might gain acceptance. It now appeared that several Directors thought that figure too low. He would urge the Directors to agree upon the lowest number which they felt would be acceptable, and for the purposes of the discussion he would like to suggest 20.

18. Mr. Wright said that a great deal of effort had gone into this project and it was to be hoped that a large number of countries would eventually adhere to the Convention. There might be a certain hesitancy on the part of some countries at first and the best way to overcome it would be to prove the usefulness of the Centre through its operation. Hesitancy on the part of the majority of countries should not be permitted to deprive the others of the use of the facilities of the Centre, and for that reason he would favor a low number of ratifications. It had been argued that as a consequence of the deletion of the requirement of action by the Executive Directors the number of ratifications should be increased. He saw no connection between these requirements and would still favor the number 12. However, if the figure 20 found general acceptance he would support it.

19. Mr. Machado said he had no strong views on the number of ratifications to be required. In his view the principal consideration should be the minimum number of countries that would justify the additional expense that the Bank would assume in maintaining the Centre and opening it for business. We would have no objection to requiring the ratification of from 12 to 20 States.

20. Mr. Chen said that in view of the arguments advanced he would support the figure suggested by Mr. Woods, viz. 20.

21. Mr. van Campenhout said he could support a figure between 12, which seemed the minimum that would justify setting up an administration, and say 20.

22. Messrs. Mejia-Palacio, van Vuuren, Khosropur, Rajan and Ozaki said they could support Mr. Woods' suggestion to require ratification by 20 countries.

¹ See Doc. 41

23. Mr. Woods said there was agreement among the Directors that Article 69 should require ratification by 20 countries to bring the Convention into force.
24. Mr. Malaplate proposed that for a State ratifying after initial entry into force the interval between deposit of its instrument of ratification and entry into force for that State should be 30 days.
25. Mr. Broches agreed that a provision along those lines should be added, and suggested that the interval between deposit of the twentieth instrument of ratification and initial entry into force of the Convention should likewise be 30 days.
26. Mr. Machado supported Mr. Broches' proposal.
27. Mr. van Campenhout asked whether 30 days after deposit of the twentieth instrument of ratification would, as a practical matter, be sufficient to organize the Centre.
28. Mr. Broches replied that it was only necessary to ensure that the Convention had entered into force before the President of the Bank convened the first meeting of the Administrative Council. It was at that meeting that the Secretary-General would be elected and steps taken to organize the Centre.

Article 69A

29. Mr. Kochman asked whether Mr. Broches could give him the background to Article 69A which seemed to him unnecessary.
30. Mr. Broches agreed that if a State entered into an international agreement it had an obligation to adapt its own law to the extent necessary to carry out its obligations, and that on a strict view a provision of this kind was unnecessary. In earlier drafts, following the precedent of the Bank's Articles of Agreement, the provisions on privileges and immunities and on enforcement of awards had been followed by a specific injunction to States to take whatever action might be necessary to implement their obligations in terms of their own law. At the Legal Committee some delegates had questioned the need for such a provision while others had felt it would be a useful reminder to States and perhaps even necessary in some States where treaties would not be applied without implementing legislation. It was finally decided without dissent to include a provision along the lines of Article 69A at the end of the Convention.
31. Mr. Mejia-Palacio said that in the light of his experience Article 69A would serve a very useful purpose and would ensure that implementing legislation would be enacted.
32. Mr. van Campenhout said that while Article 69A might be strictly unnecessary it could be very useful. It should be brought home to governments that it was not enough merely to ratify a Convention but that they must also take effective steps to implement their obligations under it. Precedents for such a clause were to be found in the Bretton Woods Agreements.
33. Mr. Malaplate said that while he had no objection to retaining Article 69A he did not think it useful. He wondered whether a State would

¹ See the Preliminary Draft Convention of October 15, 1963, Doc. 24, and the Draft Convention of September 11, 1964, Doc. 43

agree to accept what might appear to it a limitation of its legislative power.

34. Mr. Broches replied that such a provision was frequently included in international agreements and had proved acceptable.

35. Mr. Woods said that there was a consensus among the Directors in favor of retaining the text of Article 69A which would be renumbered Article 70.

Articles 71, 72 and 73

36. Mr. Broches invited attention to the text of Articles 71-73 which had been distributed informally during the meeting:

Article 71

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 ratification or acceptance or subsequently.

Article 72

Any Contracting State may denounce this Convention by written notice to the Bank. The denunciation shall take effect six months after receipt by the Bank of such notice.

Article 73

Notice by a Contracting State pursuant to Articles 71 or 72 shall not affect the rights or obligations under this Convention of that State, or of any of its constituent subdivisions or agencies, or of any national of that State with respect to or arising out of proceedings for conciliation or arbitration of a dispute which it had consented to submit to the jurisdiction of the Centre before such notice was received by the Bank.

37. Mr. Broches said that the new texts constituted a technical improvement over the previous versions of these articles and had been drafted in the light of comments made by the Japanese Government. With reference to Article 71 the Australian Government had inquired whether the phrase "which are excluded by such State by written notice to the Bank" was intended to convey the notion that once a territory had been excluded it remained excluded or, whether the Article provided a built-in revolving door by which a State could withdraw an exclusion. It was his firm view that the present wording would permit a Contracting State to exclude a dependent territory (sometimes necessary because there had been no time to consult the legislature of the dependent country) and later to include it, perhaps after the dependent territory had given its assent to being bound by the Convention.

38. Mr. Machado said that the notice required by Article 72 should be communicated to the Centre rather than to the Bank which was merely the sponsor of the institution.

39. Mr. Broches pointed out that the Bank, as depositary of the Convention, was the proper authority to which this kind of communication (including ratifications of the Convention and of amendments) should be addressed. The Bank was designated depositary in the concluding paragraph of the Convention. It was usual to designate the sponsor of an institution as depositary. It was also usual to provide that actions affecting the structure of the Convention as a whole, such as denunciation by a Contracting State, should be notified to the depositary which, as Mr. Machado had pointed out, was charged with keeping records and transmitting information to all Contracting States.

40. Mr. Machado thought that the position might be made clear by changing any reference to "the Bank" to read "the Bank as depositary" thus limiting the Bank's functions in this respect to the mere keeping of records and the other simple functions of a depositary.

41. Mr. van Campenhout supported by Mr. Rajan suggested that the problem referred to by Mr. Machado might be taken care of by making it clear in the Report of the Executive Directors that when there was a reference to "the Bank" in these provisions what was meant was the Bank in its capacity as depositary of the Convention. This would be preferable to encumbering the text by the change suggested.

42. Mr. Malaplate referring to Mr. Machado's suggestion observed that deposit of instruments with the Centre might in any event not be possible during the period before the Centre had come into existence.

43. Mr. Woods said that the sense of the meeting appeared to be that the Report of the Executive Directors should reflect the point made by Mr. Machado while the text of the Convention might be left as it stood. The final paragraph of the Convention would, in any event, clearly define the posture of the Bank.

44. Mr. Gutierrez Cano wondered whether the words "the Bank" could be replaced by the words "the depositary".

45. Mr. Broches said that it might be possible when the term "Bank" was first used in Article 68 to follow it by the words "as the depositary of this Convention".

46. Mr. Hirschtritt said he would exercise caution in obacuring the rola of the Bank upon which the Centre would depend to a great extent at any rate in the early years of its existence.

47. Mr. Woods said that the reference to the Bank in Article 68 would be followed by the words suggested by Mr. Broches viz. "as the dapositary of thia Convention". Articles 71 and 72 would thereafter refer to "the depositary" rather than "the Bank".

Article 72

48. Mr. Machado said that the arguments advanced by him regarding use of the words "the Bank" in Article 71 applied with greater force to Article 72. Contracting States should not be permitted to denounce the Convention merely by written notice to the Bank which, as depositary, only received and filed communications. Notice should be given both to the Bank and to the

Administrative Council. In the alternative the provision might merely require "written notice" without specifying to whom such notice should be addressed.

49. Mr. Woods asked Mr. Broches to point out what would be the functions of the Bank as depositary of the Convention.

50. Mr. Broches stated that the features were listed in the draft Article 72 which was before the meeting and was based on the most recent United Nations treaty practice. These functions would be to notify Contracting States of signatures of the Convention, ratifications and acceptances, exclusions from territorial application, the date of entry into force of the Convention, and denunciations.

51. Mr. Woods asked a show of hands on the question of whether the article in question should be left as it was, except for the substitution of the term "depositary" for the word "Bank", and announced that there was a large majority in favor of leaving the article as it was.

Article 73

52. Mr. Broches referred to draft Article 73 which had been presented to the meeting and explained that it was intended to deal with the effects of denunciation of the Convention or the exclusion of a territory from the scope of the application of the Convention on consents to conciliation or arbitration under the Convention already given. Mr. Malaplate had proposed a simplification of the language of that article and he would like to consider that drafting point further and to report to the Board at the next session.

53. Mr. Malaplate stated that the proposal he had made could somehow affect the substance of the provision because the article as it stood now did not seem to protect a consent given before denunciation or exclusions if proceedings under that consent had not yet started.

54. Mr. Broches replied that the intention of Article 73 in the text submitted to the Directors was to make it clear that if a State had consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose. He could not see any difference of substance between the text as it stood and Mr. Malaplate's proposal but in any case, he would review the language of that article to make sure that the provision was clear.

55. Mr. Malaplate remarked that if the English text was clear, the French and Spanish texts seem to apply the only procedures which had been initiated before denunciation of the Convention by that State.

56. Mr. Woods suggested that the Spanish and French texts be reviewed in order to conform them with the English text.

57. Mr. Mejia-Palacio asked what would happen if a State which was a party to the Convention signed an agreement with a company and later withdrew from the Centre while no disputes were pending. If, say ten years later a dispute arose - would that dispute still be under the jurisdiction of the Centre?

58. Mr. Broches replied that if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its disputes with that company under that agreement to the Centre.
59. Mr. Mejia-Palacio stated that in certain cases agreement had no definite duration but provided that they could be terminated by denunciation.
60. Mr. Broches remarked that in the case of an arbitration clause which could be terminated by one of the parties, the jurisdiction of the Centre would come to an end on termination of the clause.
61. Mr. Gutierrez Cano said that Article 73 in the new text was lacking a time limit beyond which the Convention would cease to apply. Unless such time limit was introduced States would be bound indefinitely. He had in mind the case in which there was no agreement between the State and the foreign investor but only a general declaration on the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre. Would the Convention still compel the State to accept the jurisdiction of the Centre?
62. Mr. Broches replied that a general statement of the kind mentioned by Mr. Gutierrez Cano would not be binding on the State which had made it until it had been accepted by an investor. If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.
63. Mr. Rajan said that Mr. Broches' reply to Mr. Mejia-Palacio on the question of termination of agreements had not satisfied him entirely because disputes could arise out of the very termination of the agreement.
64. Mr. Broches answered that in replying to Mr. Mejia-Palacio he had taken the case of a State which had reserved, in its contract, the right to terminate the arbitration clause therein. It would have been an unusual clause but if it existed the parties would be bound by it.
65. Mr. Rajan said that he was still not clear about this question.
66. Mr. Woods thought it important to clarify all the implications of Article 73 before proceeding further. For his part he thought Article 73 expressed a basic principle, i.e. that if an agreement was in force at the time the State party to that agreement denounced the Convention, obligations under that contract to have recourse to arbitration would continue after denunciation.
67. Mr. Machado stated that the fact that sovereign States would be parties to the Convention would create additional difficulties. As long as the State was a party to the Convention it had to fulfil in good faith all its obligations under the Convention and, if a proceeding had been started, subsequent denunciation of the Convention by that State should have no retroactive effect. To say, however, that the Centre would continue to have

jurisdiction over disputes which arose after the State had ceased to be a member of the Centre would in fact compel the State to remain forever in an organization to which it did not want to belong. He therefore suggested that the provision be amended to say that denunciation shall not affect obligations arising out of proceedings or conciliation or arbitration which had started before the Centre and before notice of denunciation had been received.

68. Mr. Woods pointed out that this proposal would frustrate the main purpose of the Convention.

69. Mr. Mejia-Palacio agreed that if a State had undertaken to go before the Centre it could not unilaterally decide that its undertaking had come to an end, but both in international law and domestic law every obligation comes to an end either because it is fulfilled or because the parties have agreed to terminate it or by prescription. Therefore, he had suggested that some ways be found for setting a time limit, as wide as necessary, after which an undertaking to submit to the jurisdiction of the Centre could come to an end.

70. Mr. Broches pointed out that the provision in discussion had not been questioned at any of the regional meetings or in the Legal Committee. It was a basic essential provision. The Convention establishes the principle that agreements to arbitration cannot be broken by one of the parties. The provision under discussion only drew the necessary consequences in case of denunciation of the Convention: the denouncing State could not incur any new obligations but the existing obligations would remain in force.

71. Mr. Woods asked for a show of hands for those in favor of leaving the substance of Article 73 as it was and announced that the consensus was to leave Article 73 unchanged.

Article 74

72. Mr. Kochman asked whether such a provision was necessary in the Convention as it dealt with a matter of detail.

73. Mr. Broches agreed that the provision was not necessary. It had been introduced because a similar provision existed in the Articles of Agreement for IDA:

74. Mr. Woods asked whether there was any objection to deleting the article. As there was none, he stated that the article would be deleted.

Article 75

75. Mr. Broches pointed out that this provision was necessary under the regulations for registration of treaties adopted by the General Assembly.

Article 76

76. Mr. Broches suggested some re-arrangement of the items contained in it and some minor drafting suggestions.

Final Clause

77. Mr. Broches explained that the final clause provided that the Convention would be in three languages, English, French and Spanish and each text would

* International Development Association

be equally authentic. The three languages would be listed in their respective alphabetical order for each language. The clause also indicated that the Bank would sign the Convention for the sole purpose of indicating its acceptance of its functions of depositary given to it by the Convention.

78. Mr. Malaplate stated that his government would like a provision somewhere in the Convention specifying that the Bank would have to provide the Contracting States with certified copies of the Convention.

Article 26 (2)

79. Mr. Woods invited the Committee to consider again Article 26(2) on which the discussion had not been completed last week. He then invited Mr. Broches briefly to review the contents and implications of that Article 26(2).

80. Mr. Broches stated that Article 26(2) would permit, under certain specific circumstances, the substitution of a State for its national in proceedings before the Centre with the consent of the other State. Some objections of principle had been voiced and some strong support of the provision had been given. In further conversations with Directors he had found that some of them while finding the provisions entirely acceptable would nevertheless be willing to leave them out in order to meet the objections raised by some Directors. Some Directors had proposed far-reaching amendments to the provision.

81. Mr. Woods asked for a vote on the question whether paragraph (2) of Article 26 should be eliminated. Messrs. Garba, Gutierrez Cano, Kochman, Mejia-Palacio, Machado, Khosropur and San Miguel were in favor of eliminating the provision.

82. Mr. Woods then asked the Directors who were in favor of retaining the provision to raise their hand. Messrs. Donner, van Vuuren, Lieftinck, Osaki, Sumanang, Thor and van Campenhout were in favor of retaining the provision.

83. Mr. Woods announced that as 7 Directors were in favor of retaining the provision, 7 were against retaining it, 5 had abstained and 1 was absent the question would be reconsidered at the next meeting of the Committee of the Whole.

84. The meeting adjourned at 4.45 p.m.

SETTLEMENT OF INVESTMENT DISPUTES

Attached is the English text of the draft Convention on Settlement of Investment Disputes (Z-16)¹ with the modifications thus far approved in substance by the Committee of the Whole. Particular reference is made to the following provisions:

Article 6 (1) (f)	Article 67	Article 73
Article 7 (1)	Article 68	Article 74
Article 10 (1)	Article 69	Article 75
Article 17	Article 70	Closing clause
Article 58	Article 71	
Article 66 (2)	Article 72	

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of revenues and expenditures of the Centre;
- (g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

¹ Only the modified articles are reproduced

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of five members or one-fourth of the members of the Council, whichever is less.

(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, by a two-thirds majority of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(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 any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, 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.

SECTION 5
Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by 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.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator 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 proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, 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 be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification or acceptance. Each amendment shall enter into force 30 days after dispatch by the depository of this Convention of a notification to Contracting States that all Contracting States have ratified or accepted the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X

Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification or acceptance by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification or acceptance. It shall enter into force for each State which subsequently deposits its instrument of ratification or acceptance 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

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 depository of this Convention either at the time of ratification or acceptance or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depository of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by it before such notice was received by the depository.

Article 73

Instruments of ratification or acceptance of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depository of this Convention. The depository shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74

The depository 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.

Article 75

The depository shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;

- (b) deposits of instruments of ratification and acceptance in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, 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 under this Convention,

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SID/65-11 (March 11, 1965)

Memorandum of the Meeting of the Committee of the Whole, March 4, 1965, not an approved record.
Continuation of the discussion of Article 26(2), and discussion of Article 54 and of the Preamble¹

1. There were present: omitted

Articles 26(2)¹

2. Mr. Woods asked Mr. Broches briefly to describe once again the contents of this paragraph.

3. Mr. Broches said that paragraph (2) of Article 26 provides that where an investor and a host State have agreed to submit a dispute arising out of an investment to arbitration and the investor has obtained investment insurance or guarantee from his own government, then, if the host State and the national State of the investor agree, the State of the investor can be substituted for the investor in the proceedings before the Centre involving rights to which that State has been subrogated as a result of having indemnified the investor. The provision does not say whether subrogation of the investor State to the rights of his national must or must not be recognized by the host State. Elimination of this provision would make it impossible for the national State of the investor to appear before the Centre in lieu of its national. It would not affect the question of subrogation per se nor would it prevent the indemnifying State from requiring that the investor pursue his remedies under the Convention even after he has been indemnified.

4. Mr. Tazi stressed that subrogation of the national State to the rights of the investor affected the basic nature of the disputes at least from a pro-

¹ The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the Proposed Changes laid down in Doc. 127

² Cf. the discussion of Article 26(2) in the Meetings of the Committee of the Whole on February 18 and 25, 1965, Docs. 131 and 135 respectively

cedural angle and by transforming the case into a case between States would raise many juridical and political problems which did not fall within the scope of the Centre. There might be cases in which it would be better to transfer the dispute from the level of the investor to his State, but this could always be done by direct agreement between the States. He was in favor of deleting paragraph (2) of Article 26 without prejudice to the merits of subrogation as such.

5. Mr. Haushofer pointed out that the main role of the Convention was the protection of the private investor against the host State and thereby the establishment of confidence in the security of private investments in capital-importing countries. To further this confidence insurance against the risks incurred by the investor was an important aspect and the possibility of obtaining insurance often depends on the possibility of substituting the insurer for the insured in proceedings. He did not see how this provision could in any way endanger the position of the capital-importing countries, since the consent of the host State was always a prerequisite. He would be in favor of retaining Article 26(2), but would not strongly oppose its deletion if this were necessary to reach agreement on the Convention. His opinion reflected the views of Belgium and Austria while the other countries he represented had not informed him of their views.

6. Mr. Woods asked a show of hands of those Directors who were in favor of deleting paragraph (2) of Article 26 or would not object to its being deleted. He then announced that 15 Directors out of 20 present were in favor of, or did not object to, deletion.

7. Mr. Gutierrez Cano asked whether as a consequence of the deletion of Article 26(2) Article 27 would also be deleted.

8. Mr. Brochee explained that there had never been any suggestion of deleting Article 27 but only to reconsider some of its language if Article 26(2) had remained in the text of the Convention.

Article 54

9. Mr. Woods recalled that Mr. Donner had raised an objection to the text of that Article and that Mr. Brochee had proposed some language which would be submitted to the German authorities to see whether it would meet their problem. He then invited Mr. Donner to report on this matter.

10. Mr. Donner explained that the German authorities had great difficulty with the present text of Article 54 for two kinds of reasons: (a) the inconsistency of the text of Article 54 with the provisions of the New York Convention of 1958 on recognition and enforcement of foreign arbitral awards to which the German government is a party; and (b) the provisions of German law concerning the execution of judgments of German courts. The German authorities had not yet been able to overcome these difficulties nor did the suggestion of Mr. Brochee help them in that respect. However, in order not to delay the discussion he would not press his point any further, while the German government in the weeks to come would continue to look for a possibility of reconciling the provisions of Article 54 with its own principles within the framework of the implementing legislation that would have to be introduced in Parliament when the Convention came up for ratification. Depending on the result of these efforts he might or might not have to raise this point again.

11. Mr. Woode said that as Mr. Donner did not wish to press his point further, Article 54 would remain as it was unless there was an objection.

12. Mr. Gutierrez Cano said that in his opinion the suggestion made by Mr. Broches for limiting the enforcement of the awards to the pecuniary obligations imposed thereby was very constructive and he would like to see that language introduced in Article 54.

13. Mr. Rajan supported Mr. Gutierrez Cano's proposal.

14. Mr. Malaplate inquired what would be the effect of introducing the reference to pecuniary obligations in Article 54.

15. Mr. Broches replied that while an award would remain res judicata as to all its provisions between the parties, enforcement through the strong arm of the law would be limited to the obligations to pay a sum of money contained in the award. In practice he thought that the difference between the two texts would be minimal.

16. Mr. Machado supported Mr. Gutierrez Cano's proposal as it would enable a State, which could not otherwise abide by the award, to carry out its obligations under the Convention.

17. Mr. Khosropur inquired whether the proposed language would not weaken the Convention, since for example an award might require a host State to grant a visa or a residence permit for an investor at least for a limited time.

18. Mr. Broches replied that in his view the suggested language would not weaken the Convention because he could not imagine specific enforcement of provisions of the award, other than its pecuniary provisions, by a third State against the host State.

19. Mr. Hirschtritt asked whether the obligation of a State party to the proceedings to carry out an award would be weakened by the proposed language.

20. Mr. Broches replied that the obligation of a State party to an arbitration proceedings before the Centre was clearly set forth in Article 53 and would not be affected by the proposed language.

21. Mr. Ozaki said that he and the Japanese government thought it preferable to leave the language of Article 54 unchanged.

22. Mr. Haushofer also expressed his opposition to the proposed language.

23. Mr. Woods stated that there seemed to be a preponderance in favor of the amended language and therefore Article 54(1) would be amended by the inclusion of the words "the pecuniary obligations imposed by that award" in lieu of the word "it" after the word "enforce".

Preamble

24. Mr. Woods stated that the discussion on Chapters I through X of the Convention had been completed; any question of pure drafting which the Directors might have should be brought to Mr. Broches directly.

25. Mr. Broches said that there had been a suggestion by the French government to add in the final provisions a reference to "approval" as an alternative to ratification or acceptance, in order to conform to their practice and unless there was any objection he would correct the text of the Convention accordingly.

26. Mr. Broches said that several comments had been received on the Preamble which was now in the same form in which it had been submitted to the Legal Committee in September. The Legal Committee had had no time to consider it. One suggestion was to delete in paragraph (2) the words "principle of equal" and to add at the end of that paragraph the words "in accordance with international law". In paragraph (6) it had been suggested that the words "due consideration" be changed to "serious consideration". In paragraph (7) it had been suggested that after the words "acceptance of this Convention" the words "and without its consent" be added and that the last ten words of the paragraph be deleted.
27. Mr. Machado suggested that in paragraphs (1) and (2) the words "international investment" be deleted and the words "private foreign investment" be substituted therein so as to use the same words as were used in the Articles of Agreement of the Bank.
28. Mr. Broches explained that in recent years there had been a tendency to shy away from the use of the word "foreign" in connection with investments.
29. Mr. Machado then suggested that the word "private" be added before the words "international investment".
30. Messrs. Donner, Gutierrez Cano and Machado supported this proposal.
31. Mr. Woods said that as there were no objections the proposal was accepted.
32. Mr. Mejia-Palacio suggested that the change from "due consideration" to "serious consideration" was inelegant in Spanish at least.
33. Mr. Gutierrez Cano supported Mr. Mejia-Palacio's point and pointed out that the word "serious" in this connection would be rather vague while the word "due" was what was meant.
34. Mr. Woods noted that there was a consensus that the words "due consideration" should remain in paragraph (6).
35. Mr. Gutierrez Cano asked whether the proposed deletion in paragraph (2) of the words "principle of equal" was a mere matter of drafting or had substantive implications.
36. Mr. Broches replied that the original draft of the Preamble in which many concepts had been combined seemed a little too heavy and an attempt had been made to simplify it. Mr. Malaplate had suggested what was perhaps the best solution to the drafting problem, i.e. to transfer part of the contents of paragraph (2) to paragraph (1).
37. Mr. Mejia-Palacio suggested that the second part of paragraph (2) starting with the words "and bearing in mind", be deleted. The text of the Preamble would then read more easily.
38. Mr. Woods asked whether there were any comments on this proposal, and there being none, the second part of paragraph (2) was deleted.
39. Mr. Gutierrez Cano suggested that in paragraph (3) the word "usually" be replaced by the word "normally".

¹ See Doc. 43

40. Mr. Broches stated that the use of the word "normelly" would tend to make the exception sound abnormal. The word "usually" in the English text was most appropriate.

41. Mr. Machado, supported by Messrs. Gutierrez Cano and San Miguel, suggested that in paragraph (6) the reference to "good faith" in the carrying out of agreement on the part of States should be deleted as it might imply that States would not always act in good faith.

42. Mr. Broches noted that, if this was accepted, the words "an agreement to be observed in good faith" should be replaced by the words "a binding agreement".

43. Mr. Machado said that the change suggested by Mr. Broches was acceptable to him.

44. Mr. Malaplete wondered whether the whole of paragraph (6), which in some respects at least duplicated the contents of the Convention, should not be eliminated.

45. Mr. Broches noted that if paragraph (6) was eliminated, paragraph (7) would have to go as well.

46. Mr. Machado was against the elimination of paragraph (7) because it was one of the "selling points" in trying to obtain the approval of many governments. He would be in favor also of paragraph (6) if it was necessary in order to keep paragraph (7).

47. Mr. Donner was in favor of retaining both paragraphs which summarized the long discussion of the Executive Directors on the subject.

48. Mr. van Vuuren was also in favor of retaining both paragraphs (6) and (7).

49. Mr. Reilly felt that the Preamble could well stop after paragraph (5), but, if the principle of mutual consent had to be re-emphasized, then both paragraphs (6) and (7) should be retained.

50. Mr. Woods concluded that the majority was in favor of retaining paragraphs (6) and (7) with the amendment suggested by Mr. Machado and formulated by Mr. Broches.

51. Mr. Woods asked the Committee to consider again paragraphs (1) and (2) as it had been suggested that the reference to the equality of States in the exercise of their sovereignty in accordance with international law should be inserted in paragraph (1) and invited Mr. Broches to read the suggested language.

52. Mr. Broches read the proposed new text of paragraph (1) as follows:

"Considering that the promotion of economic development requires international cooperation which will respect the equality of States in the exercise of their sovereignty in accordance with international law and depends to a large extent upon private international investment."

53. Mr. Machado supported the amendment.

54. Mr. Donner thought that the new text would unbalance the Preamble and, if any reference had to be made to equality of States in the exercise of their sovereignty in accordance with international law in the Preamble, paragraph (1) did not seem to be the appropriate place for it. The first thought was to stress what was the purpose for which this Convention was put forth, i.e. the promotion of private international investment.
55. Mr. Rajan felt that paragraph (1) should be left as it was in the original text, because the Preamble should be short and only the essential elements should be pointed out. As to the wording of the amendment he had some question about the statement that the promotion of economic development depended to a large extent on private international investment.
56. Mr. Malaplate said that he had originally proposed that the substance of the second part of paragraph (2) be moved to paragraph (1) as a more logical distribution of subject matter, but he did not think it necessary to have a reference to the principle of equality of the States. He also agreed with Mr. Rajan that it was not necessary in the Preamble to say that economic development depended to a large extent on private international investment.
57. Mr. Woods concluded that, as Mr. Malaplate had withdrawn his suggestion, paragraph (1) could be left as it was, except for the addition of the word "private" and the second part of paragraph (2) would be eliminated. This would produce a more compact Preamble.
58. Mr. Rajan, referring to paragraph (3) of the Preamble, wished to support the proposal made earlier by Mr. Gutierrez Cano that the word "usually" be replaced by the word "normally", particularly since the French text used the word "normalement".
59. Mr. Broches replied that words with common roots often assume different meanings in different languages and in his opinion, the English word "usually" would better reflect the French word "normalement" in that context.
60. Mr. Hirschtritt supported Mr. Broches' argument.
61. Mr. Woods proposed that the word "usually" be left in and that the French and Spanish texts be once again reviewed to ensure uniformity among the three languages.
62. Mr. Broches said that the text of the Convention with the amendments approved by the Committee would be put into print and distributed to the Executive Directors for consideration on March 18, 1965. Any suggestions on drafting points should be sent as soon as possible:

* Paragraphs 63 to 106, dealing with Parts I, II and III of the Report of the Executive Directors to accompany the Convention, are not reproduced

SETTLEMENT OF INVESTMENT DISPUTES

1. Attached hereto is the English text of the Preamble to the Convention as amended by the Committee of the Whole at its meeting on Thursday, March 4, 1965.²

2. The Committee also decided to make the following changes in the text of the Convention:

- (a) Deletion of paragraph (2) of Article 26;
- (b) Substitution of the words "ratification or acceptance" by "ratification, acceptance or approval" in Articles 25(4), 66(1), 68(1), 68(2), 70, 73;
- (c) Substitution of the words "ratification and acceptance" by the words "ratification, acceptance and approval" in Article 75(b);
- (d) Substitution of the words "ratified or accepted" in the last line of Article 66(1) by "ratified, accepted or approved";
- (e) Substitution of the words "enforce it" in the second/third lines of Article 54(1) by "enforce the pecuniary obligations imposed by that award".

PREAMBLE

The Contracting States

1. Considering the need for international cooperation for economic development, and the role of private 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;
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;

¹ The articles mentioned refer to the Revised Draft Convention, Doc. 123, as amended by subsequent changes laid down in Docs. 127 and 136
² See Doc. 137

6. Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

7. Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

139

SID/65-13 (March 17, 1965)

Memorandum of the Meeting of the Committee of the Whole, March 8, 1965, not an approved record. Discussion of Paragraphs 14 through 48 of the Draft Report of the Executive Directors to accompany the Convention¹

1. There were present: omitted
2. 2-119: omitted

Draft Report of the Executive Directors (Doc. R. 65-11) (continued)

120. Mr. Woods then called the attention of the Committee to paragraphs 14 through 48 which described the Convention and pointed out that some changes had been made as a result of modifications in the text of the Convention.

121. Mr. Gutierrez Cano suggested that in paragraph 15 the words "as sponsor of the institution" be amended to read "as eponor of the establishment of the institution".

122. Mr. Garba, on paragraph 17 suggested that the words "maximum of simplicity" read just "simplicity".

123. Mr. Broches said that some consequential changes would have to be introduced and he would provide the appropriate language.

124. Mr. Rajan pointed out that during the discussions on the Convention the Committee had agreed that suitable explanations of certain points should be included in the Report. He had in mind particularly the suggestion of Mr. Lieftinck that the Report mention the desirability of appointing initially the Secretary-General for a short period. He had found no such comment in the present draft.

125. Mr. Woods said that the staff would prepare appropriate language to cover those points.

126. Mr. Machado remarked that since the draft report had been prepared, important modifications had been introduced in the text of the Convention, and he would suggest that the staff prepare all consequential amendments to the Report.

127. Mr. Brochee said that this had already been done by the staff although, as Mr. Rajan had pointed out, some points had been omitted. He and his staff

¹ See Doc. 128. The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the changes laid down in Docs. 127 and 138

would go through the Convention and the Report again and present any necessary amendments or additions to the Report at the next meeting.

128. Mr. Gutierrez Cano raised a point about Article 27 of the Convention. He seemed to remember that when paragraph (2) of Article 26 was deleted Mr. Broches had stated that new language would be required for Article 27.

129. Mr. Broches replied that, on the contrary, new language would have been suggested in Article 27 by several Executive Directors, if Article 26(2) had remained in the Convention.

130. Mr. Gutierrez Cano said that in any case Article 27 had not been discussed during previous meetings and he had some suggestions to offer.

131. Mr. Woods said that the Committee would meet again the following day to complete the work on the Report and any pending matters on the Convention.

132. Mr. Malaplate asked whether the fact that the provision of "subrogation" (Article 26(2)) had been deleted in the Convention should not be mentioned in the Report. He understood that paragraph 32 of the draft Report which dealt with subrogation was to be deleted altogether and no substitute text had been proposed. However, he did not feel very strongly on the point.

133. Mr. Gutierrez Cano thought that this point should be recorded in the minutes of the meetings of the Committee rather than included in the Report.

134. The meeting adjourned at 12:45 p.m. to reconvene on Tuesday, March 9, at 11:00 a.m. o'clock.

¹ See Memoranda of the Meetings of the Committee of the Whole on February 18 and 23, 1965, Docs. 131 and 132 respectively
² See Memorandum of the Meeting of the Committee of the Whole on March 9, 1965, Doc. 141

SID/65-12 (March 9, 1965)
Modifications of Parts IV and V of the Draft Report of the Executive Directors to accompany the Convention¹

- A - In paragraph 17, delete the last sentence on page 7 and substitute therefor the following two sentences:
- "Article 10, which requires that the Secretary-General and any Deputy Secretary-General be elected by the Administrative Council by a majority of two-thirds of its members, on the nomination of the Chairman, limits their terms of office to a period not exceeding six years and permits their re-election. The Executive Directors believe that the initial election, which will take place shortly after the Convention will have come into force, should be for a short term

¹ See Doc. 128; Parts I, II and III of the Draft Report are omitted

so as not to deprive the States which ratify the Convention after its entry into force of the possibility of participating in the selection of the high officials of the Centre. Article 10 also limits the extent to which these officials may engage in activities other than their official functions."

- B - The headings of paragraphs 18 and 19 should be modified to read "Functions of the Administrative Council" and "Functions of the Secretary-General", respectively.
- C - Paragraphs 32 and 33 of the Report should be deleted and the reference in paragraph 31 should be to Article 26 rather than to Article 26(1).
- D - In paragraph 43, the word "it" on the last line of the text should be replaced by the words: "the pecuniary obligations imposed by the award".
- E - Paragraphs 47 and 48 of the Report should be replaced by the following paragraph (as circulated informally on March 3, 1965):

"The Convention is open for signature on behalf of States members of the Bank. It will also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign. No time limit has been prescribed for signature. Signature is required both of States joining before the Convention enters into force and those joining thereafter (Article 67). The Convention is subject to ratification or acceptance by the signatory States in accordance with their constitutional procedures (Article 68). As already stated, the Convention will enter into force upon the deposit of the twentieth instrument of ratification or acceptance."

SID/65-14 (March 17, 1965)

Memorandum of the Meeting of the Committee of the Whole, March 9, 1965, not an approved record. Discussion of Parts IV-VIII of the Draft Report of the Executive Directors to accompany the Convention¹, and of Article 27 of the Draft Convention²

1. There were present: omitted

2. Mr. Woods said that the Committee of the Whole would, at the present meeting, continue its discussion of the draft Report of the Executive Directors, Document R65-11.

3. Mr. Broches referred the meeting to Document SID/65-12 which reproduced the text of parts I, II and III of the Report and incorporated all of the decisions taken during the past sessions. In addition, the last two pages of that document contained some corrections to parts IV and V of the Report which had not yet been discussed and included the reference in paragraph 17 to the term of service of the Secretary-General which Mr. Rajan had pointed out should go in.

4. He recalled that the Executive Directors had invited attention to the desirability of a short term of service for the first Secretary-General because he would have to be elected immediately after the minimum number of 20 ratifications had been deposited, and if he were appointed for the full six year term it would be that long before States that joined later would have an opportunity to participate in selecting a person for this high office.

5. Referring to paragraphs 18 and 19 of the draft Report he proposed that their headings be changed to "Functions of the Administrative Council" and "Functions of the Secretary-General" respectively.

6. Paragraphs 18-20 were adopted by the Committee.

V - Jurisdiction of the Centre

7. Mr. Mejia-Palacio said that it would not be correct to say, as was done in paragraph 26 that "The Executive Directors did not think it necessary or desirable to attempt to define the term 'investment'" In his opinion, it was difficult to define that term but he could not support the idea that a definition was unnecessary or undesirable.

8. Mr. Broches suggested that the sentence might be reworded to read "No attempt was made to define the term 'investment'".

9. Paragraph 26 amended as proposed by Mr. Broches, was adopted.

10. There was no comment on paragraphs 27-29.

11. Mr. Mejia-Palacio thought that paragraph 30, which gave the background of Article 25(4) of the Convention and which recognized the right of States to notify the Centre of types of disputes which they would or would not consider submitting to the Centre, ought to be changed. In particular, he objected to that part of the paragraph which read:

".....some governments nevertheless felt that adherence to the Convention might be interpreted as holding out an expecta-

¹ See Doc. 128

² The articles discussed, unless otherwise indicated, refer to the Revised Draft Convention, Doc. 123, as amended by the changes laid down in Docs. 127 and 138

³ Doc. 140; the text of and the decisions concerning Parts I, II and III of the Report are not reproduced

tion that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre".

This kind of background could be obtained from the records of the preparatory work and should not be put in the Report so as to make it appear argumentative.

12. Mr. Broches proposed that in order to meet Mr. Mejia-Palacio's point the phrase "some governments nevertheless felt" could be changed to "the view was expressed" or "it was nevertheless felt". Alternatively, the first and second sentences of paragraph 30 might be omitted and the paragraph start with the flat statement "Article 25(4) expressly permitsetc". On the other hand the provisions of Article 25(4) were very important to certain countries and had been the subject of much discussion. He felt it would be helpful to retain a brief explanation of the background, and did not believe that the present wording was argumentative.
13. Mr. Hirschtritt said he would have no objection to omitting the first and second sentences of paragraph 30. Alternatively the words "some governments" might be replaced by "some participants in the preparatory conferences".
14. Mr. Gutierrez Cano observed that the Report was divided into two parts: the first, a declaration of intention or a description of the scope of the project; and second, a description of the provisions of the Convention. The latter part should not contain any speculation on the implications of certain provisions, which would be more appropriate to the first part. For that reason he would be in favor of deleting the first and second sentences of paragraph 30 and of starting the paragraph with the words "Article 25(4) expressly permits Contracting States etc".
15. Mr. Rajan said he could support Mr. Gutierrez Cano's suggestion as offering a clear solution that would be in accord with the rest of the Report. On the other hand, the whole question had assumed a great deal of importance during the earlier discussions and many governments would be looking for some reference to it in the Report. He would therefore prefer the other solution proposed by Mr. Broches viz. to leave the explanation in but to replace the words "some governments nevertheless felt" by the more neutral form "it was nevertheless felt".
16. Mr. Woods said that there seemed to be agreement on leaving the explanation in and changing the phrase "some governments nevertheless felt" in the first sentence to "it was nevertheless felt". The opening words of the sentence "These governments pointed out" would be replaced by "It was pointed out in that connection", and in the same sentence the phrase "dispute which they would consider" should be amended to read "disputes which governments would consider".
17. Mr. Machado said that while he would have preferred a text that appeared less argumentative, he would be prepared to support the amended version of paragraph 30 now before the Committee.
18. Mr. Gutierrez Cano said he would abstain on paragraph 30.
19. Paragraph 30 was adopted by the Committee.
20. Mr. Rajan referring to the last sentence of paragraph 31, enquired whether it could not be expanded by some further explanation of "the rules of inter-

national law regarding the exhaustion of local remedies", and what form a "modification" of the rule might take.

21. Mr. Broches said that if a provision were included in the Convention stating that access to the Centre would always be available without prior exhaustion of local remedies such a provision would have represented a modification of international law, and of course the Convention contained no provision of this nature. It had been recognized that the two sentences in Article 26 of the Convention were really not connected, the second having been inserted to make it clear that the first did not modify the rule of international law on the exhaustion of local remedies. But he could not see how the Report could be elaborated to make the position clearer.

22. Mr. Woods said that paragraphs 32 and 33 of the Report would be deleted since they contained an explanation of Article 26(2) which had itself been deleted. Subsequent paragraphs would be renumbered accordingly in the new version of the draft.

23. As to paragraph 34, he understood that Mr. Gutierrez Cano wished to speak on Article 27 of the Convention which was dealt with in that paragraph. The Committee might therefore wish to complete its discussion of the rest of the Report and then return to paragraph 34 and Article 27 of the Convention.

VI - Proceedings under the Convention

24. There was no comment on paragraphs 35-40 of the Report.

25. Mr. Khosropur referring to paragraph 41 wondered whether it was necessary to quote Article 38(1) of the Statute of the International Court of Justice in the Report since that text was readily accessible to anyone who wished to read it. In any event he did not favor the wording of Article 38(1) itself and in particular its reference to the general principles of law recognized by "civilized" nations.

26. Mr. Broches said that even at the meetings of the Legal Committee many of the distinguished lawyers present had requested that the text of Article 38(1) of the Statute be read to the meeting. He did not think it would be offensive to any reader to put the text of Article 38(1) in a footnote.

27. There was no further comment on paragraph 41. There was no comment on paragraph 42.

28. Mr. Broches referring to paragraph 43 said that in order to conform the wording of the Report to the text of the Convention as amended by the Executive Directors, the phrase, "to enforce it" should be replaced by "to enforce the pecuniary obligations imposed by the award".

29. There was no comment on paragraphs 43-44.

VII - Place of Proceedings

30. There was no comment on paragraph 45.

VIII - Disputes between Contracting States

31. Mr. Broches said that in paragraph 46 the Executive Directors would be

expressing a view on a question of international law when they said in the third sentence:

"Specifically, the provision is not intended to, and in the opinion of the Executive Directors does not, confer"

and some explanation of the background would be useful. At the Legal Committee there had been a proposal to amend the text of Article 64 of the Convention to make two points clear, viz. that (a) Article 64 did not constitute the International Court of Justice a court of appeal in relation to decisions by arbitral tribunals under the Convention and (b) that it did not empower a Contracting State to take a dispute pending before an arbitral tribunal to the International Court of Justice in contravention of Article 27. It had been agreed in the Legal Committee after some discussion that there was no need to amend Article 64 if the substance of the views of the Legal Committee on these points were to be included, for instance, in the Report of the Executive Directors. If any of the Directors felt hesitant about expressing a view on the matter, the phrase "in the opinion of the Executive Directors" could be replaced by "in the opinion of the Legal Committee rendered to the Executive Directors" or words to that effect.

32. In reply to Mr. Garba, Mr. Broches explained that Article 64 was intended to deal with disputes which could arise among Contracting States in the application of the Convention, e.g. a dispute about the degree of immunity or tax exemption that a State grants to an official of the Centre.

33. Mr. Rajan agreed that the explanation in paragraph 46 should remain. However, as the majority of the Executive Directors were not lawyers, he would omit the words "in the opinion of the Executive Directors" which introduced the interpretation of Article 64. He would also replace the phrase "would contravene the prohibition laid down in Article 27" by "contravene the provisions of Article 27".

34. Mr. Broches suggested that the second sentence of paragraph 45 might be amended to read:

"Specifically, the provision is not intended to and in the opinion of the Legal Committee advising the Directors in this regard, does not etc."

35. Mr. Gutierrez Cano said he fully supported retention of the explanation contained in paragraph 45. However, he felt that the idea should be expressed categorically by stating:

"Specifically, the provision does not confer etc."

36. Mr. Broches said that the sentence as redrafted on the proposal of Mr. Gutierrez Cano would, in his view, carry out the mandate of the Legal Committee.

37. Mr. Malaplate said that while he agreed that Article 64 did not confer appellate jurisdiction on the International Court of Justice he doubted whether the terms of the explanation in paragraph 46 was satisfactory. The Directors were not a court and had no power actually to interpret the Convention. He would, therefore, prefer the wording "is not intended to ... confer".

38. Mr. Broches explained that despite the categorical nature of the proposed

wording the Court would not be bound by this statement of the Directors. The categorical statement of the Directors, while giving effect to the wishes of the Legal Committee, was not in fact more than a statement of intention.

39. Mr. Woods said that there seemed to be agreement on redrafting the third sentence of paragraph 46 as follows:

"Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it".

40. Mr. Woods said that consequent upon changes in the provisions on entry into force on the Convention, paragraph 47 and 48 would be deleted and replaced by the paragraph on the last page of document SID/65-12⁴ which reflected the new rules on signature. The substance of paragraph 49 would form a new paragraph immediately following paragraph 4.

41. There was no comment on the text to be substituted for paragraph 47 and 48, or on the other proposed changes.

42. Mr. Woods said that the draft Report of the Executive Directors was now in a form acceptable to the majority of the Directors.⁵

55. Mr. Woods said that the Directors appeared to be willing to consider the final draft of the Report of the Executive Directors together with the final draft of the Convention itself at 10:30 a.m. on Thursday, March 18, 1965. Both documents would be available by that date in English, French and Spanish.

Article 27 of the Convention; Paragraph 34 of the Report⁶

56. Mr. Woods said that the meeting would now hear Mr. Gutierrez Cano's comments on Article 27 and on paragraph 34 of the Report which dealt with that Article.

57. Mr. Gutierrez Cano recalled that it had been decided to postpone discussion of Article 27 which operated to prevent diplomatic protection or the bringing of an international claim in respect of a dispute before the Centre, until a decision had been taken on Article 26(2) on "subrogation". His specific proposal was that all reference to diplomatic protection be eliminated from Article 27. "Diplomatic protection" was a wide concept and a State might wish to retain its rights in that area for a variety of purposes. Moreover, he felt it would be very difficult to distinguish between "formal" and "informal" diplomatic exchange as contemplated in paragraph (2) of Article 27. In his view, a general suspension of diplomatic protection was a matter for each State to decide and Article 27 should specifically prohibit only the bringing of an international claim. He did not think his proposal would alter the main principle underlying Article 27.

58. Mr. Broches replied that Article 27 had been discussed thoroughly and at length in the Legal Committee. All had agreed that the right to bring an international claim should be suspended. As for diplomatic protection, some had felt that reference to it should be omitted entirely, while others had objected to this, and Article 27 as it stood represented the compromise that had been reached. Diplomatic protection could, on the one hand, consist of a formal representation by one government to another declaring that in its opinion

⁴ Doc. 140

⁵ Paragraphs 43-54 of this Memorandum, covering Part I of the Report, are omitted

⁶ See Doc. 144

⁷ Cf. Memoranda of the Meetings of the Committee of the Whole on February 18 and 23, and March 4 and 8, 1965, Docs. 131, 132, 137 and 139 respectively

the latter had failed to perform its obligations. Paragraph (2) on the other hand specifically permitted such actions as informal enquiries made through an Embassy and relating to disputes within the jurisdiction of the Centre. Total exclusion of any reference to the right of diplomatic protection had not been favored by some developing countries. The compromise in Article 27 had been acceptable to all.

59. Mr. Gutierrez Cano said that a further ground for his objections to the idea of suspension of diplomatic protection as contemplated in Article 27 was that it permitted a citizen, by consenting to the jurisdiction of the Centre, to deprive his State of the right to decide whether or not it would extend diplomatic protection in a particular case. However, in view of the compromise just mentioned by Mr. Broches he could go along with Article 27 if it could be made clear, perhaps by the addition of commas after the words "protection" and "claim" in paragraph (1), that the prohibition related only to disputes subject to arbitration under the Convention.

60. Mr. Broches observed that he had understood Mr. Gutierrez Cano to object to a principle which had clearly been accepted by the Legal Committee viz. that a State should give up its right to diplomatic protection in cases where one of its citizens had obtained a direct right of access against a foreign State. However, the change of punctuation suggested by Mr. Gutierrez Cano might make clear what had always been the intention viz. that diplomatic protection would only be suspended in the specific circumstance set forth in Article 27, and he had no objection to it.

61. Mr. Woods said that in the absence of objection from the other Directors the changes proposed by Mr. Gutierrez Cano would be made in Article 27 and reflected in paragraph 34 of the Report. The Directors would, at their next meeting on this subject, take formal action on the text of the Convention and on the Report of the Executive Directors.

62. The meeting was adjourned at 12:45 p.m.

142

R65-37 (March 10, 1965)

Articles of the Draft Convention modified by the Committee of the Whole and Articles subsequently modified in Doc. 143

CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN STATES AND NATIONALS
OF OTHER STATES

PREAMBLE

The Contracting States

Considering the need for international cooperation
for economic development, and the role of private inter-

national investment therein;

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;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

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;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of five members or one-fourth of the members of the Council, whichever is less.

(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, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

CHAPTER II

Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local ad-

ministrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) 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 under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with the provisions of paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Article 39

(1) The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

SECTION 3

Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine

whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 70

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 depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 75

The depositary shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

R65-43 (March 12, 1965)

Memorandum of the General Counsel and corrections to the English Text of the Draft Convention

In further reviewing the text in English, French and Spanish of the Convention in the March 10, 1965 draft which has been circulated to the Executive Directors (R65-37)¹, some inconsistencies and typographical errors have been pointed out by Executive Directors and members of the staff which should be corrected in the final text.

I therefore propose the following corrections in the text of the Convention:

¹ Doc. 142

(a) In Article 7(1), it is provided inter alia that the Administrative Council shall be convened by the Secretary-General at the request of "five members or one-fourth of the members of the Council, whichever is less". Since Article 68(2) now provides that the Convention shall enter into force upon deposit of the twentieth instrument of ratification, acceptance or approval, it is most unlikely that one-fourth of the members of the Administrative Council will ever be less than five members. Accordingly, the text of Article 7(1) should be modified as follows:

English: "(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members ~~or one-fourth of the members~~ of the Council, ~~whichever is less.~~"

(b) The wording of Article 31(1) should be made to conform with the wording of Article 40(1) as follows:

English: "(1) Conciliators may be appointed from outside the Panel of
(page 12) Conciliators, except in the case of appointments by the Chairman pursuant to Article 30."

Article 27, second line:

add a comma after the word "protection" and after the word "claim".

Article 30, fourth line:

delete the words "the provisions of".

Article 39, first line:

delete the figure "(1)" at the beginning.

Article 41(2), second line:

add a comma after the word "Centre".

SM65-6 (March 30, 1965)

Excerpt from the Minutes of the Meeting of the Executive Directors, March 18, 1965. Approval of Resolution No. 65-14 approving the Text of the Convention and of the Report of the Executive Directors

SETTLEMENT OF INVESTMENT DISPUTES

5. The Executive Directors considered

- (a) The text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States as approved by the Committee of the Whole (R65-37, R65-43 and R65-45)¹;
- (b) The text of the Report of the Executive Directors on the Convention as approved by the Committee of the Whole (R65-38)².
- (c) A draft resolution on the subject (P65-44)³;

and, approving an amendment to the draft resolution proposed by Dr. Machado, adopted the following resolution:

RESOLUTION NO. 65-14

SETTLEMENT OF INVESTMENT DISPUTES

WHEREAS the Board of Governors on September 10, 1964 adopted Resolution No. 214⁴ providing as follows:

"RESOLVED:

- (a) The report of the Executive Directors on "Settlement of Investment Disputes," dated August 6, 1964⁵, 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."

¹ Docs. 142 and 143; Doc. R65-45 is not reproduced, see Doc. 145 instead

² Document R65-38 is not reproduced, see Doc. 145 instead

³ Document R65-44 is not reproduced

⁴ Doc. 41

⁵ Doc. 40

NOW THEREFORE the Executive Directors hereby resolve as follows:

- (1) the text of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States formulated by the Executive Directors in the form presented to this meeting and the Report of the Executive Directors thereon are hereby approved for submission to member Governments of the Bank;
- (2) the President of the Bank shall transmit said Report and the text of the said Convention to all member Governments of the Bank;
- (3) the President and the General Counsel of the Bank shall sign a copy of said Convention on behalf of the Bank to indicate the Bank's agreement to fulfil the functions with which it is charged under the Convention;
- (4) the copy of the Convention so signed on behalf of the Bank shall remain deposited in the archives of the Bank and shall be open for signature on behalf of Governments in accordance with its terms.

6. Dr. Mejia-Palacio stated that he wished to be recorded as opposed, on the ground that the Governors who had elected him had voted against Resolution No. 214 of the Board of Governors. Messrs. San Miguel and Guhan abstained from voting.

7. The Executive Directors expressed their appreciation of the outstanding contribution made by the Chairman, and the General Counsel and his associates, to the drafting of the Convention and to the various stages of discussion through which it had passed.

International Centre for Settlement of Investment Disputes

ICSID/2

English

Convention
on the
Settlement of Investment Disputes
between
States and Nationals of Other States

Submitted to Governments
by the Executive Directors of the
INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

AND

ACCOMPANYING REPORT
OF THE EXECUTIVE DIRECTORS

Submitted: March 18, 1965

Entered into Force: October 14, 1966

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CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN STATES AND NATIONALS
OF OTHER STATES

PREAMBLE

The Contracting States

Considering the need for international cooperation for economic development, and the role of private international investment therein;

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;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

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;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

CHAPTER I

International Centre for Settlement of Investment Disputes

SECTION 1

Establishment and Organization

Article 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

SECTION 2

The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

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 his 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 Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of revenues and expenditures of the Centre;
- (g) approve the annual report on the operation of the Centre.

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(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, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

SECTION 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(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 any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, 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.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted 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.

SECTION 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.

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.

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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the 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.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same 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.

SECTION 5

Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts,

the excess shall be borne by 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.

SECTION 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat

(a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;

(b) not being local nationals, shall enjoy 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.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

Article 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

CHAPTER II

Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) 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 under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

CHAPTER III

Conciliation

SECTION 1

Request for Conciliation

Article 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings

shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2

Constitution of the Conciliation Commission

Article 29

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

(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 do not agree upon the number of conciliators and the method 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.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

SECTION 3

Conciliation Proceedings

Article 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour 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. 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.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in 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 shall close the proceedings and shall 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 close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, 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 report or any recommendations made by the Commission.

CHAPTER IV

Arbitration

SECTION 1

Request for Arbitration

Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

SECTION 2

Constitution of the Tribunal

Article 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to Article 36.

(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 do not agree upon the number of arbitrators and the method 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.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contract-

ing State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

SECTION 3

Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or

additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

SECTION 4

The Award

Article 48

(1) The Tribunal shall decide 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 the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

Article 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the

award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

SECTION 5

Interpretation, Revision and Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request 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 Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of 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 shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.

(3) The request 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 Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of

enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

(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 Tribunal 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) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, 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. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

SECTION 6

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify

the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 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.

CHAPTER V

Replacement and Disqualification of Conciliators and Arbitrators

Article 56

(1) After a Commission or a 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 in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

(3) 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 from the appropriate Panel to fill the resulting vacancy.

Article 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. 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 Tribunal under Section 2 of Chapter IV.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator 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 proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, 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 be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

CHAPTER VI

Cost of Proceedings

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

(1) Each Commission and each 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.

Article 61

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the

charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

CHAPTER VII

Place of Proceedings

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

(a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or

(b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

CHAPTER VIII

Disputes between Contracting States

Article 64

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 any party to such dispute, unless the States concerned agree to another method of settlement.

CHAPTER IX

Amendment

Article 65

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 90 days 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 the members of the Administrative Council.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

CHAPTER X

Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open

for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

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 depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising

out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74

The depositary 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.

Article 75

The depositary shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, 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 under this Convention.

Report of the Executive Directors
on the
Convention
on the
Settlement of Investment Disputes
between
States and Nationals of Other States

INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

March 18, 1965

**Report of the Executive Directors on the
Convention on the Settlement of Investment Disputes
between States and Nationals of Other States**

I

1. Resolution No. 214, adopted by the Board of Governors of the International Bank for Reconstruction and Development on September 10, 1964,¹ provides as follows:

“RESOLVED:

- (a) The report of the 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 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.”
2. The Executive Directors of the Bank, acting pursuant to the foregoing Resolution, have formulated a Convention on the Settlement of Investment Disputes between States and Nationals of Other States and, on March 18, 1965, approved the submission of the text of the Convention, as attached hereto, to member governments of the Bank. This action by the Executive Directors does not, of course, imply that the governments represented by the individual Executive Directors are committed to take action on the Convention.
3. The action by the Executive Directors was preceded by extensive preparatory work, details of which are given

¹ Doc. 41
² Doc. 40

in paragraphs 6-8 below. The Executive Directors are satisfied that the Convention in the form attached hereto represents a broad consensus of the views of those governments which accept the principle of establishing by inter-governmental agreement facilities and procedures for the settlement of investment disputes which States and foreign investors wish to submit to conciliation or arbitration. They are also satisfied that the Convention constitutes a suitable framework for such facilities and procedures. Accordingly, the text of the Convention is submitted to member governments for consideration with a view to signature and ratification, acceptance or approval.

4. The Executive Directors invite attention to the provisions of Article 68(2) pursuant to which the Convention will enter into force as between the Contracting States 30 days after deposit with the Bank, the depositary of the Convention, of the twentieth instrument of ratification, acceptance or approval.

5. The attached text of the Convention in the English, French and Spanish languages has been deposited in the archives of the Bank, as depositary, and is open for signature.

II

6. The question of the desirability and practicability of establishing institutional facilities, sponsored by the Bank, for the settlement through conciliation and arbitration of investment disputes between States and foreign investors was first placed before the Board of Governors of the Bank at its Seventeenth Annual Meeting, held in Washington, D.C. in September 1962. At that Meeting the Board of Governors, by Resolution No. 174, adopted on September 18, 1962, requested the Executive Directors to study the question.¹

7. After a series of informal discussions on the basis of working papers prepared by the staff of the Bank, the Executive Directors decided that the Bank should convene con-

¹ Doc. 11

sultative meetings of legal experts designated by member governments to consider the subject in greater detail. 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 assistance of the United Nations Economic Commissions and the European Office of the United Nations, and took as the basis for discussion a Preliminary Draft of a Convention on Settlement of Investment Disputes⁸ between States and Nationals of Other States prepared by the staff of the Bank in the light of the discussions of the Executive Directors and the views of governments. The meetings were attended by legal experts from 86 countries.

8. In the light of the preparatory work and of the views expressed at the consultative meetings, the Executive Directors reported to the Board of Governors at its Nineteenth Annual Meeting in Tokyo, in September 1964,⁹ that it would be desirable to establish the institutional facilities envisaged, and to do so within the framework of an inter-governmental agreement. The Board of Governors adopted the Resolution set forth in paragraph 1 of this Report, whereupon the Executive Directors undertook the formulation of the present Convention. With a view to arriving at a text which could be accepted by the largest possible number of governments, the Bank invited its members to designate representatives to a Legal Committee which would assist the Executive Directors in their task. This Committee met in Washington from November 23 through December 11, 1964,¹⁰ and the Executive Directors gratefully acknowledge the valuable advice they received from the representatives of the 61 member countries who served on the Committee.

III

9. In submitting the attached Convention to governments, the Executive Directors are prompted by the desire

⁴ Doc. 25 . . .

⁵ Doc. 27

⁶ Doc. 29

⁷ Doc. 31

⁸ Doc. 24

⁹ Doc. 40

¹⁰ Docs.-48 through 122

to strengthen the partnership between countries in the cause of economic development. The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.

10. The Executive Directors recognize that investment disputes are as a rule settled through administrative, judicial or arbitral procedures available under the laws of the country in which the investment concerned is made. However, experience shows that disputes may arise which the parties wish to settle by other methods; and investment agreements entered into in recent years show that both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement.

11. The present Convention would offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply. It would provide facilities for conciliation and arbitration by specially qualified persons of independent judgment carried out according to rules known and accepted in advance by the parties concerned. In particular, it would ensure that once a government or investor had given consent to conciliation or arbitration under the auspices of the Centre, such consent could not be unilaterally withdrawn.

12. The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.

13. While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases.

14. The provisions of the attached Convention are for the most part self-explanatory. Brief comment on a few principal features may, however, be useful to member governments in their consideration of the Convention.

IV

The International Centre for Settlement of Investment Disputes

General

15. The Convention establishes the International Centre for Settlement of Investment Disputes as an autonomous international institution (Articles 18-24). The purpose of the Centre is "to provide facilities for conciliation and arbitration of investment disputes * * *" (Article 1(2)). The Centre will not itself engage in conciliation or arbitration activities. This will be the task of Conciliation Commissions and Arbitral Tribunals constituted in accordance with the provisions of the Convention.

16. As sponsor of the establishment of the institution the Bank will provide the Centre with premises for its seat (Article 2) and, pursuant to arrangements between the two institutions, with other administrative facilities and services (Article 6(d)).

17. With respect to the financing of the Centre (Article 17), the Executive Directors have decided that the Bank should be prepared to provide the Centre with office accommodation free of charge as long as the Centre has its seat at the Bank's headquarters and to underwrite, within reasonable limits, the basic overhead expenditure of the

Centre for a period of years to be determined after the Centre is established.

18. Simplicity and economy consistent with the efficient discharge of the functions of the Centre characterize its structure. The organs of the Centre are the Administrative Council (Articles 4-8) and the Secretariat (Articles 9-11). The Administrative Council will be composed of one representative of each Contracting State, serving without remuneration from the Centre. Each member of the Council casts one vote and matters before the Council are decided by a majority of the votes cast unless a different majority is required by the Convention. The President of the Bank will serve *ex officio* as the Council's Chairman but will have no vote. The Secretariat will consist of a Secretary-General, one or more Deputy Secretaries-General and staff. In the interest of flexibility the Convention provides for the possibility of there being more than one Deputy Secretary-General, but the Executive Directors do not now foresee a need for more than one or two full time high officials of the Centre. Article 10, which requires that the Secretary-General and any Deputy Secretary-General be elected by the Administrative Council by a majority of two-thirds of its members, on the nomination of the Chairman, limits their terms of office to a period not exceeding six years and permits their re-election. The Executive Directors believe that the initial election, which will take place shortly after the Convention will have come into force, should be for a short term so as not to deprive the States which ratify the Convention after its entry into force of the possibility of participating in the selection of the high officials of the Centre. Article 10 also limits the extent to which these officials may engage in activities other than their official functions.

Functions of the Administrative Council

19. The principal functions of the Administrative Council are the election of the Secretary-General and any Deputy Secretary-General, the adoption of the budget of

the Centre and the adoption of administrative and financial regulations, rules governing the institution of proceedings and rules of procedure for conciliation and arbitration proceedings. Action on all these matters requires a majority of two-thirds of the members of the Council.

Functions of the Secretary-General

20. The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal officer of the Centre (Articles 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b) and 65). In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the dispute is *manifestly* outside the jurisdiction of the Centre (Articles 28(3) and 36(3)). The Secretary-General is given this limited power to "screen" requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention.

The Panels

21. Article 3 requires the Centre to maintain a Panel of Conciliators and a Panel of Arbitrators, while Articles 12-16 outline the manner and terms of designation of Panel members. In particular, Article 14(1) seeks to ensure that Panel members will possess a high degree of competence and be capable of exercising independent judgment. In keeping with the essentially flexible character of the pro-

ceedings, the Convention permits the parties to appoint conciliators and arbitrators from outside the Panels but requires (Articles 31(2) and 40(2)) that such appointees possess the qualities stated in Article 14(1). The Chairman, when called upon to appoint a conciliator or arbitrator pursuant to Article 30 or 38, is restricted in his choice to Panel members.

V

Jurisdiction of the Centre

22. The term "jurisdiction of the Centre" is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings. The jurisdiction of the Centre is dealt with in Chapter II of the Convention (Articles 25-27).

Consent

23. Consent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1)).

24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

25. While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto.

Nature of the dispute

26. Article 25(1) requires that the dispute must be a "legal dispute arising directly out of an investment." The expression "legal dispute" has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.

27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4)).

Parties to the dispute

28. For a dispute to be within the jurisdiction of the Centre one of the parties must be a Contracting State (or a constituent subdivision or agency of a Contracting State) and the other party must be a "national of another Contracting State." The latter term as defined in paragraph (2) of Article 25 covers both natural persons and juridical persons.

29. It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.

30. Clause (b) of Article 25(2), which deals with juridi-

cal persons, is more flexible. A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to proceedings under the auspices of the Centre if that State had agreed to treat it as a national of another Contracting State because of foreign control.

Notifications by Contracting States

31. While no conciliation or arbitration proceedings could be brought against a Contracting State without its consent and while no Contracting State is under any obligation to give its consent to such proceedings, it was nevertheless felt that adherence to the Convention might be interpreted as holding out an expectation that Contracting States would give favorable consideration to requests by investors for the submission of a dispute to the Centre. It was pointed out in that connection that there might be classes of investment disputes which governments would consider unsuitable for submission to the Centre or which, under their own law, they were not permitted to submit to the Centre. In order to avoid any risk of misunderstanding on this score, Article 25(4) expressly permits Contracting States to make known to the Centre in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre. The provision makes clear that a statement by a Contracting State that it would consider submitting a certain class of dispute to the Centre would serve for purposes of information only and would not constitute the consent required to give the Centre jurisdiction. Of course, a statement excluding certain classes of disputes from consideration would not constitute a reservation to the Convention.

Arbitration as exclusive remedy

32. It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to

the exclusion of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26. In order to make clear that it was not intended thereby to modify the rules of international law regarding the exhaustion of local remedies, the second sentence explicitly recognizes the right of a State to require the prior exhaustion of local remedies.

Claims by the investor's State

33. When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute.

VI

Proceedings under the Convention

Institution of proceedings

34. Proceedings are instituted by means of a request addressed to the Secretary-General (Articles 28 and 36). After registration of the request the Conciliation Commission or Arbitral Tribunal, as the case may be, will be constituted. Reference is made to paragraph 20 above on the power of the Secretary-General to refuse registration.

Constitution of Conciliation Commissions and Arbitral Tribunals

35. Although the Convention leaves the parties a large measure of freedom as regards the constitution of Com-

missions and Tribunals, it assures that a lack of agreement between the parties on these matters or the unwillingness of a party to cooperate will not frustrate proceedings (Articles 29-30 and 37-38, respectively).

36. Mention has already been made of the fact that the parties are free to appoint conciliators and arbitrators from outside the Panels (see paragraph 21 above). While the Convention does not restrict the appointment of conciliators with reference to nationality, Article 39 lays down the rule that the majority of the members of an Arbitral Tribunal should not be nationals either of the State party to the dispute or of the State whose national is a party to the dispute. This rule is likely to have the effect of excluding persons having these nationalities from serving on a Tribunal composed of not more than three members. However, the rule will not apply where each and every arbitrator on the Tribunal has been appointed by agreement of the parties.

Conciliation proceedings; powers and functions of Arbitral Tribunals

37. In general, the provisions of Articles 32-35 dealing with conciliation proceedings and of Articles 41-49, dealing with the powers and functions of Arbitral Tribunals and awards rendered by such Tribunals, are self-explanatory. The differences between the two sets of provisions reflect the basic distinction between the process of conciliation which seeks to bring the parties to agreement and that of arbitration which aims at a binding determination of the dispute by the Tribunal.

38. Article 41 reiterates the well-established principle that international tribunals are to be the judges of their own competence and Article 32 applies the same principle to Conciliation Commissions. It is to be noted in this connection that the power of the Secretary-General to refuse registration of a request for conciliation or arbitration (see paragraph 20 above) is so narrowly defined as not to encroach on the prerogative of Commissions and Tribunals to determine

their own competence and, on the other hand, that registration of a request by the Secretary-General does not, of course, preclude a Commission or Tribunal from finding that the dispute is outside the jurisdiction of the Centre.

39. In keeping with the consensual character of proceedings under the Convention, the parties to conciliation or arbitration proceedings may agree on the rules of procedure which will apply in those proceedings. However, if or to the extent that they have not so agreed the Conciliation Rules and Arbitration Rules adopted by the Administrative Council will apply (Articles 33 and 44).

40. Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term "international law" as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.¹¹

¹¹ Article 38(1) of the Statute of the International Court of Justice reads as follows:

"1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Recognition and enforcement of arbitral awards

41. Article 53 declares that the parties are bound by the award and that it shall not be subject to appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (Article 51) and annulment (Article 52). In addition, a party may ask a Tribunal which had omitted to decide any question submitted to it, to supplement its award (Article 49(2)) and may request interpretation of the award (Article 50).

42. Subject to any stay of enforcement in connection with any of the above proceedings in accordance with the provisions of the Convention, the parties are obliged to abide by and comply with the award and Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court. Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary States, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each Contracting State to meet the requirements of the Article in accordance with its own legal system.

43. The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 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.

VII

Place of Proceedings

44. In dealing with proceedings away from the Centre, Article 63 provides that proceedings may be held, if the parties so agree, at the seat of the Permanent Court of Arbitration or of any other appropriate institution with which the Centre may enter into arrangements for that purpose. These arrangements are likely to vary with the type of institution and to range from merely making premises available for the proceedings to the provision of complete secretariat services.

VIII

Disputes Between Contracting States

45. Article 64 confers on the International Court of Justice jurisdiction over disputes between Contracting States regarding the interpretation or application of the Convention which are not settled by negotiation and which the parties do not agree to settle by other methods. While the provision is couched in general terms, it must be read in the context of the Convention as a whole. Specifically, the provision does not confer jurisdiction on the Court to review the decision of a Conciliation Commission or Arbitral Tribunal as to its competence with respect to any dispute before it. Nor does it empower a State to institute proceedings before the Court in respect of a dispute which one of its nationals and another Contracting State have consented to submit or have submitted to arbitration, since such proceedings would contravene the provisions of Article 27, unless the other Contracting State had failed to abide by and comply with the award rendered in that dispute.

IX

Entry into Force

46. The Convention is open for signature on behalf of States members of the Bank. It will also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign. No time limit has been prescribed for signature. Signature is required both of States joining before the Convention enters into force and those joining thereafter (Article 67). The Convention is subject to ratification, acceptance or approval by the signatory States in accordance with their constitutional procedures (Article 68). As already stated, the Convention will enter into force upon the deposit of the twentieth instrument of ratification, acceptance or approval.

SecM65-74 (March 24, 1965)

Copy of Letter sent by the President to all member countries, Governors and Alternate Governors, transmitted to the Executive Directors



OFFICE OF THE PRESIDENT

INTERNATIONAL BANK FOR
RECONSTRUCTION AND DEVELOPMENT
WASHINGTON, D. C. 20433, U.S.A.

March 23, 1965

Sir:

I have the honor to transmit to your Government herewith:

- 1) Resolution No. 65-14 of the Executive Directors, adopted on March 18, 1965¹, approving a Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and the text of said Convention for submission to governments;
- 2) the Report of the Executive Directors² referred to above;
- 3) the text of the Convention³ referred to above.

The Convention has been deposited in the archives of the Bank and is open for signature on behalf of governments in accordance with Article 67 thereof.

The Convention is the result of detailed and careful study and deliberation over a period of several years. In my opinion it can make an important and a needed contribution to the cause of economic development.

I unreservedly recommend the Convention for early and favorable consideration by your Government so that the procedures and facilities it provides may be available to governments and investors with a minimum delay.

Sincerely yours,

George D. Woods

¹ See Doc. 144
² See Doc. 145
³ See Doc. 145

R67-85 (June 20, 1967)

Memorandum of the President to the Executive Directors on Publication of the Legislative History of the Convention

1. The rapid acceptance of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which has up to now been signed by about half the Members of the Bank and ratified by almost a third, has been most gratifying. In addition, a great deal of interest in the Convention has been shown both by actual and potential investors in foreign countries and by governmental offices seeking such investments.

2. In the light of this positive interest in the Convention it appears appropriate at this time to proceed with the assembly and publication of the legislative history of that instrument. Such travaux preparatoires are customarily published either by the sponsor of a treaty (in this case the Bank) or sometimes by the organization created by it (in this case ICSID). In respect of the Convention they would comprise summary records or minutes of the meetings (or extracts therefrom) and the related documents of:

- (a) The Committee of the Whole of the Executive Directors on Settlement of Investment Disputes;
- (b) The Consultative Meetings of Legal Experts Designated by Governments;
- (c) The Legal Committee on Settlement of Investment Disputes;
- (d) The Executive Directors;

insofar as these are relevant to the text of the Convention, to the procedure of its formulation, or to the drafting of the interpretative portions of the Report of the Executive Directors which was submitted to Governments along with the Convention.

3. The financial implications of this publication project are dealt with in the draft budget for fiscal year 1968 and need not therefore be considered or decided now. However, in order to permit this work to progress, it is necessary, as a formal matter, to declassify those of the documents referred to above that were initially issued as "Restricted" or "Confidential" material.

4. Since, with the entry into force of the Convention, the reason has disappeared for the original restriction on the publication of the documents relating to its formulation, I propose that in the absence of objection (to be communicated to the Secretary or the Deputy Secretary) by the close of business on Friday, June 30, 1967, the restriction on the publication of the relevant documents (or portions thereof) be lifted, and that a decision to this effect be recorded in the minutes of the next meeting of the Executive Directors.

George D. Woods
President

Annex 2

M67-7 (July 21, 1967)

IDA/M67-15

Excerpt from the Minutes of the Joint Meeting of the Executive Directors of the International Bank for Reconstruction and Development and of the International Development Association, July 11, 1967

SETTLEMENT OF INVESTMENT DISPUTES - PUBLICATION OF LEGISLATIVE HISTORY

4. The Executive Directors recorded their approval on June 30, 1967 of the report (R67-85)¹ recommending publication of the legislative history of the Convention on Settlement of Investment Disputes.

¹ Annex I