references to paragraph (1) of article 7 should be read as references to paragraph (2) of article 7. He invited the Commission to comment on article 8.

74. Ms. CZERWENKA (Germany) said that, for the sake of consistency, the authorization of an amendment by the beneficiary referred to in paragraph (2)*(a)* should be in the form stipulated in article 7(2) in the same way as the notice of acceptance of an amendment by the beneficiary.

75. The question had been raised by the banking community in her country whether paragraph (2) related to both revocable and irrevocable undertakings. However, it seemed clear that the provisions covered only irrevocable undertakings.

76. Ms. FENG Aimin (China) said that oral amendments should not be permitted, though the article made no provision on that point. On the other hand, the Chinese version made it clear that issuance must be made in tangible form. She asked for clarification of the English version with regard to oral amendments.

77. Mr. KOZOLCHYK (United States of America) said that, under paragraph (2)*(b)* of article 8, the beneficiary's consent was not required if an amendment consisted "solely of an extension of the validity period of the undertaking", on the assumption that such an extension would invariably be in the interest of the beneficiary. However, that might not always be the case.

78. In stand-by letter of credit practice, a confirming bank might not have agreed to an extension, but the provision as worded did not make it clear whether or not a confirming bank would be bound by the extension. Also, a beneficiary might not want to have an extended credit or an extended bank guarantee.

79. Mr. EDWARDS (Australia) said that the passage at the end of paragraph (2), beginning with the words, "if any amendment does not fall . . .", should perhaps be made into a separate paragraph.

80. Although issuance had been appropriately defined in paragraph (1) of article 7 with regard to an undertaking, it did not seem to have been defined in the context of amendments.

81. He agreed with the representative of the United States on the question of the beneficiary's agreement under paragraph (2)*(b)*.

82. Mr. ILLESCAS (Spain) said that subparagraph *(a)* as drafted raised many questions. The condition that an amendment should be effective if previously authorized by the beneficiary should be changed to stipulate a previous proposal, suggestion or request by the beneficiary. The mechanism for authorization by the interested parties should also cover conditions for extension of validity.

The meeting rose at 5.05 p.m.

Summary record of the 551st meeting

Thursday, 4 May 1995, at 9.30 a.m.

[A/CN.9/SR.551]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 9.30 a.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT *(continued)* (A/CN.9/405, A/CN.9/408, A/CN.9/411)

Article 8 (continued) (A/CN.9/408, annex)

1. Mr. EDWARDS (Australia) wondered whether the "validity period" (article 8), mentioned in paragraph (2)*(b)*, ought not to be defined, in view of the wording of article 7 and the fact that the term also appeared in articles 11 and 12.

2. Mr. CHOUKRI SBAI (Observer for Morocco), supporting the opinion expressed by the representative of Australia, suggested the addition, in article 8, of wording along the lines of "issuance of an amendment shall be in conformity with the terms of paragraph (1) of article 7".

3. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, if it was feared that there might be confusion between the ideas of revocation and amendment, a phrase such as "unless stipulated to be revocable" could be inserted in paragraph (2).

4. Mr. HERRMANN (Secretary of the Commission) thought that there was a wider issue and referred to the paper submitted by the International Chamber of Commerce, which mentioned the rule set out in article 8 of the Uniform Customs and Practice for Documentary Credits (UCP). The position was clear if a stand-by letter of credit incorporated reference to UCP. He wondered whether the Commission wished to include a similar rule, in the interest of consistency.

5. Ms. FENG Aimin (China) pointed out that, pursuant to UCP and the Uniform Rules for Demand Guarantees (URDG), revocability was determined at the time of issuance.

6. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, since instruments were basically irrevocable, revocability had to be stipulated. He asked whether the Commission really wished to insert specific reference to revocability in an article on amendment, in respect of instruments not subject to UCP or URDG. In the absence of any comment, he would assume that the current text was acceptable.

7. With regard to paragraph (2)*(a)*, he asked whether the Commission wished to establish a required form for previous authorization by the beneficiary.

8. Mr. CHOUKRI SBAI (Observer for Morocco) supported the current wording and stressed the advisability of avoiding too many formal requirements.

9. Mr. BYRNE (United States of America) said that his delegation did not want to insert a formality requirement in paragraph (2)*(a)*. The provision was unnecessary because paragraph (1) of article 8 made appropriate reference to paragraph (1) of article 7.

10. Ms. FENG Aimin (China) supported the view expressed by the United States representative. Paragraph (1) of article 7 was binding and there was therefore no need to make any stipulation about previous authorization in article 8.

11. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he understood the representatives of China and the United States to have said that there was no need for subparagraph *(a)* and that there should not be two regimes, one in which the amendment became effective upon issuance and one in which it became effective when a notice of acceptance was given. He asked whether the Commission wished to maintain the two rules. Paragraph (2)*(b)* might simply be deleted, which would mean that the undertaking could be amended only when the guarantor/issuer received a notice of acceptance.

12. Mr. ILLESCAS (Spain) said it would be clearer to delete paragraph (2)*(b)*, as that would harmonize the different regimes for amendments and dispel any doubts as to when notification of an amendment was needed.

13. Mr. SHISHIDO (Japan) said he would accept either option, but it would be simpler and better to follow the proposals made by the representatives of China and the United States.

14. Mr. ADENSAMER (Austria) said that rules should not be made simply from an academic point of view. It was not rare in practice to have extensions of the validity period of an undertaking. The present text should be retained, as it had been dictated by the needs of practice.

15. Mr. VASSEUR (Observer for Monaco) said that no amendment could be extended without its being accepted by the beneficiary, but that if it was the beneficiary who had requested the amendment, then his acceptance was not necessary. He would prefer to delete subparagraph *(b)* and retain subparagraph *(a)*.

16. Mr. STOUFFLET (France) said that he could accept the article as drafted but thought that subparagraph *(a)* should be clarified. He wondered whether the difficulty was due to the use of the word "authorized" and whether the word "requested" might not be clearer.

17. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said he supported the deletion of subparagraph *(b)*.

18. Ms. BAZAROVA (Russian Federation) said she would like to keep the text as it was, since it was based on practice. She shared the misgivings of the representative of France and felt that it would be better to replace the word "authorized" by "requested".

19. Mr. OGARRIO (Mexico) agreed with the proposals to replace "authorized" by "requested" and to delete subparagraph *(b)*.

20. Mr. MAHASARANOND (Thailand) said he supported the present text.

21. Mr. KOZOLCHYK (United States of America) said that to eliminate subparagraph *(b)* would not be merely to express an academic point of view, but to conform with practice. If it were kept, it would not only be in contradiction with practice, but also contrary to UCP.

22. Mr. CHOUKRI SBAI (Observer for Morocco) said the phrase "unless otherwise stipulated" opened the door to freedom of contracting. That was in the interest of the beneficiary, and accordingly, it would be useful to retain the text.

23. Mr. GAUTHIER (Chairman of the Committee of the Whole) said he took it that the Commission wished to maintain the dual approach reflected in the two subparagraphs, but that the word "authorized" could be replaced by the phrase "previously requested or otherwise consented to". It appeared that work was needed by the drafting group to clarify the idea that "unless otherwise stipulated" referred to the whole of paragraph (2).

24. Mr. KOZOLCHYK (United States of America) said that with regard to practice in stand-by letters of credit, paragraph (2)*(a)* meant that by formal means in the text of a letter of credit or amendment, the amount available could be increased or decreased on an automatic basis. A difficulty was raised by the word "requested", which would present the banks with a different issue, from an operational viewpoint. The form of request could vary substantially, depending on whether it came from the beneficiary or the issuer, which would invite confusion or litigation. The word "authorized" had a more serious connotation than the word "requested", and the two should not be used together.

25. Ms. FENG Aimin (China) agreed with the representative of the United States that the article had worrisome aspects. One such aspect was the way it differed from the terms of article 2, paragraph (2)*(b)*: "at the request or on the instruction of the customer ('principal/applicant') of the guarantor/issuer". That might cause some confusion.

26. Mr. EDWARDS (Australia) said he shared the concern raised by the representative of the United States. A dispute could arise as to the terms of consent.

27. Mr. BOSSA (Uganda) said the use of the word "authorized" or "requested" would depend on where the amendment originated. If it was initiated by the applicant, it would be authorized or consented to by the beneficiary. If, however, it was initiated by the beneficiary, then he would have requested it. To cover the two situations, the text could read "The amendment had been previously authorized or requested by the beneficiary".

28. Mr. KOZOLCHYK (United States of America) said his delegation could not accept subparagraph *(b)* as it applied to stand-by letters of credit practice. The United States banking industry had felt that if there was a rule that the beneficiary need not be consulted, it would have to oppose the adoption of the Convention. The only alternative would be to reserve a rule for the stand-by practice, but the procedure of having such special rules had so far been avoided.

29. Mr. FAYERS (United Kingdom) said that while the issue was not important in guarantee practice, it evidently was in regard to stand-by letters of credit. The provision introduced a new operational rule, replete with difficulties, and he therefore agreed with the representative of the United States.

30. Mr. LAMBERTZ (Observer for Sweden) said in fact the question was a minor one. The only issue was when an amendment became effective. If the amendment were of the kind referred to in subparagraph *(b)*, consisting solely of an extension of the validity period of the undertaking, both parties would normally consider that it had been made and there would be no need for acceptance by the beneficiary. According to the rule, however, it would not have been made. It would therefore cause problems to eliminate subparagraph *(b)*. However, he wondered whether the drafting had to be so precise as to the time when the amendment became effective. A compromise might be to state "unless otherwise stipulated in the undertaking or elsewhere agreed by the

guarantor/issuer and beneficiary, an undertaking is amended when consented to by the beneficiary".

31. Mr. OGARRIO (Mexico) said that paragraph (2)*(b)* had been introduced as an exception to the general principle whereby the consent of the beneficiary was necessary for an amendment, on the assumption that the extension of the validity period of the undertaking would always be to the advantage of the beneficiary. It had, however, been pointed out that in some cases an extension would not be to his advantage, particularly in the case of commercial letters of credit. He therefore supported the deletion of paragraph (2)*(b)*.

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

32. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that as his suggested use of the word "requested" did not appear to solve the problem, it would perhaps be better to stick to "authorized", as being closer to what had been intended. On the more substantive point of whether to keep or to delete subparagraph *(b)*, there appeared to be two schools of thought. It was, in his view, necessary to consider whether there did indeed exist cases that would make the rule a bad one and, conversely, whether there existed other cases that made it essential. The wording "unless otherwise stipulated in the undertaking" implied the possibility of supplementing or replacing the present rule by some other provision such as a rule based on UCP or URDG. On reflection, however, and taking into account the practical point of view, he had come to the conclusion that it might be preferable to delete paragraph (2)*(b)*. The exercise of drafting a new convention that applied a unified system of rules for instruments that were seen by some as being different or that did indeed reflect different practices had led the Working Group to seek uniform rules that respected such differences in practices while attempting to bridge them. However, it had emerged that for a significant segment of practices in relation to stand-by letters of credit, paragraph (2)*(b)* would raise problems. Though others considered that paragraph to be useful, he felt that its deletion would have a lesser impact on practices than its retention. In his view, a text without paragraph (2)*(b)* was more likely to achieve consensus.

33. Ms. FENG Aimin (China) said that she was not opposed to the deletion of paragraph (2)*(b)*, but felt that a number of issues needed to be considered. One of them concerned the position of the confirmer, who was often involved in the amendment of an undertaking. The majority of banks followed ICC rules, and too much emphasis on amendment of the relationship between the issuer and the beneficiary would create problems. Indeed, consideration should be given to deleting the entire paragraph (2) of article 8. There also appeared to be a contradiction between article 8 and article 2(2), which concerned the relationship between the principal/applicant and the guarantor/issuer. In banking practice, banks followed the instructions of the applicant. If the applicant wanted an amendment to be issued, whether or not the beneficiary's consent had been obtained beforehand, the bank must respect that request. There was also a conflict with UCP and URDG, which was likely to raise many problems of a practical nature. As the article appeared to contradict actual practice in the banking world, she did not think it advisable to add extra rules. In her view, article 8(2) went too far and would merely complicate current banking practices. On the other hand, its deletion would not give rise to any problems. In short, paragraphs (1) and (3) were sufficient on their own. There was no need for paragraph (2).

34. Ms. ASTOLA (Finland) said she was not entirely against the deletion of paragraph (2)*(b)* in its present form. In most cases it was the beneficiary who asked for an extension, a case covered by subparagraph *(a)*. But sometimes the extension was initiated by the guarantor or principal. There again there was no problem if the beneficiary had previously accepted the extension or if such an extension had been provided for in the guarantee. But there might be a problem if nothing had been said about such an extension which might then, in some cases, be unfair to the beneficiary. She therefore suggested adding the words "and consented to by the beneficiary" in paragraph (2)*(b)*. Such consent would not necessarily have to be given beforehand.

35. Mr. LAMBERTZ (Observer for Sweden) said he agreed in substance with what the representative of Finland had said. If paragraph (2)*(b)* were to be deleted, it would be necessary to meet the concerns of those who saw such a deletion as creating a problem. It might be possible to add in subparagraph *(a)*, after the word "authorized" the words "or is otherwise consented to by the beneficiary". That would open the possibility, in the event of an argument about whether an amendment was effective or not when the validity period had been extended, to regard it as the kind of amendment for which the non-objection of a beneficiary implied his consent.

36. Ms. CZERWENKA (Germany) said that, having heard the arguments, especially those of the representative of Mexico, her delegation could now agree to delete paragraph (2)*(b)*. In practice most cases would be covered by paragraph (2)*(a)*.

37. Mr. GAUTHIER (Chairman of the Committee of the Whole), after inviting comment, noted that there was no support for the Chinese suggestion to delete paragraph (2) altogether.

38. After inviting comment, he noted that there was some support for the Finnish suggestion to retain paragraph (2)*(b)* and incorporate into it the notion of consent by the beneficiary.

39. After inviting comment, he noted that there was support for the Swedish proposal to delete paragraph (2)*(b)* and reword paragraph (2)*(a)* to speak of the amendment having previously been authorized or otherwise consented to by the beneficiary. He asked whether the intent was that the consent "otherwise given" would be given after the issuance but be retroactive to it.

40. Mr. LAMBERTZ (Observer for Sweden) said that his intention was that the amendment should be effective on issuance unless opposed. He was not asking for the consent to be active. It would be non-opposition that was retroactive to the time of issuance.

41. Mr. GAUTHIER (Chairman of the Committee of the Whole) wondered whether the proposal would not create more difficulties than it would solve. In his view, it did not make it clear when an amendment was effective and in what circumstances.

42. Mr. HERRMANN (Secretary of the Commission) considered that it would be a contradiction to state in the first rule that the time of receipt of the notice of acceptance was the effective one, and then in the second rule to include a possibly later consent. If that possibility was ruled out, in his view the only remaining question was whether, when the original validity period had expired and the validity had been extended, an amendment should be effective at the time of the consent or retroactively at the time of issuance of the amendment. That question might almost be academic, but the latter alternative might create legal uncertainty with respect to the time between issuance and consent. Once the Commission had dealt with that question, it would be easy to draft the rule. He suggested that a single rule be drafted without discussing where to put it, which was merely a matter of editing.

43. Ms. CZERWENKA (Germany) said that she was against any change that would give acceptance to a retroactive effect.

44. Ms. BAZAROVA (Russian Federation) said her delegation would prefer a provision covering not subsequent consent to an amendment but the absence of an objection. If that was too difficult to achieve, she would endorse the Chinese proposal to delete the provision altogether, so that no misunderstanding would be possible.

45. Mr. GAUTHIER (Chairman of the Committee of the Whole) noted that the Working Group had discussed a "no objection" rule, to the effect that if there was no reaction from the beneficiary for 10 days the instrument was automatically amended. He therefore wondered if the Commission was not going over old ground. He cautioned it not to lose sight of the interests both of the issuer, who wished to know whether and how far he was bound, and of the beneficiary, who wished to know the nature of his rights and whether those rights were at the mercy of the issuer.

46. Ms. FENG Aimin (China) said that her delegation might consider the Swedish proposal, but had a problem in connection with the relationship between issuer and beneficiary. The Commission should take account of article 9*(c)*(i) of the UCP rules, which stated that if another bank was authorized or requested by the issuing bank to add its confirmation to a credit, but was not prepared to do so, it must so inform the issuing bank without delay. That article showed that the rights of the guarantor in the operations took precedence over those of the beneficiary, whereas the Commission's approach was the contrary one.

47. Mr. EDWARDS (Australia) suggested that delegations should be given an opportunity to take another look at the whole range of options.

48. Mr. SHISHIDO (Japan) suggested that the Commission should revert to the French proposal to use the word "requested" instead of "authorized", since there was no need to take account of cases where an amendment was initiated by the issuer, but only of those where it was initiated by the beneficiary.

49. Mr. KOZOLCHYK (United States of America) supported the suggestion of the Australian representative.

50. He had been involved in writing the UCP provisions and knew that the question of amendments was a very complicated one. Following a long discussion on amendment practices, it had been found that the commercial letter of credit practice was that the consent of the beneficiary was needed, implying that until that consent was given, the credit should remain valid as originally issued. That principle was needed because otherwise there would be great uncertainty for the beneficiary as well as for the confirming and intermediary banks.

51. Once the principle of the need for consent by the beneficiary was established, the question was how the beneficiary should express that consent. The UCP had started by saying that if within seven days nothing was heard, consent should be deemed to have been given. It had then encountered arguments to the effect that there were very few national laws in which the silence of a party was deemed to be binding as an expression of positive consent.

52. He suggested that the Commission should confine itself to laying down principles and not try to prescribe methods in great detail, in view of the widely differing practices in the banking industry. There did seem to be a consensus that the consent of the beneficiary was needed for an amendment, and the Commission should now establish whether that consent had to be express or implied.

The meeting rose at 12.30 p.m.

Summary record of the 552nd meeting

Thursday, 4 May 1995, at 2 p.m.

[A/CN.9/SR.552]

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

The meeting was called to order at 2.10 p.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT *(continued)* (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

Article 8 (continued) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) restated the question under discussion and asked the Commission to consider an approach whereby the article would state that an amendment had to be in a form stipulated, that the consent of the beneficiary was required and that the amendment would have no effect on the rights and obligations of the principal/applicant or of a confirmer unless they had given their consent. The article should also leave open the possibility of providing otherwise.

2. Mr. CHOUKRI SBAI (Observer for Morocco) said that a similar proposal had been before the Committee, namely, to retain the existing text and leave the initiative to the guarantor but to add a passage to state that the amendment would not be considered final unless the beneficiary consented. In that way, the guarantor would have the initiative but that initiative would not be accepted or final without the consent of the beneficiary.

3. Ms. CZERWENKA (Germany) believed that a mere statement that consent was required would be a backward step. If the question of when the amendment became effective were not regulated in the Convention, it would be subject to national law, so that there would be no uniformity. She believed that the Committee had been very close to agreement on the question of the time of effectiveness and would regret it if the question were left open.

4. Mr. LAMBERTZ (Observer for Sweden) supported the proposal made by the Chairman of the Committee of the Whole. He was not convinced that uniformity was necessary, a point that had been made earlier by a number of delegations.