virtue of the proviso at the beginning of the paragraph, the parties would always have liberty to agree on a different number of days if they wished.

44. Mr. CHOUKRI SBAI (Observer for Morocco) endorsed the Swiss proposal for specifying a shorter period of time, because of the importance of handling transactions quickly.

45. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission that the rule in paragraph (2) had been worded so as to cover many situations, from simple demand to that of a stand-by letter of credit requiring the presentation of a large number of documents; it was essentially a rule of reasonable time, not a seven-day rule, and one which accorded with practice, including the practice reflected in the UCP rules.

46. Mr. SHISHIDO (Japan) said that the period of seven business days should be available to each of the banks successively involved in handling a payment demand. That would be consistent with the corresponding provision in article 13*(b)* of the UCP rules. He therefore suggested the addition, after the words "seven business days", of text to the effect that the prescribed period should count for each entity concerned.

47. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission that the Working Group had discussed the point raised by Japan. In approving the provision as it stood, the Group had agreed that it might need to be reviewed.

48. Mr. CHOUKRI SBAI (Observer for Morocco) said that, while recognizing the force of the proviso at the beginning of the paragraph, if the stipulated period was not reduced, problems would arise. Also, it would be useful to specify that the last day of the period was counted, but not the first, and that the period should consist of not more than seven business days, beginning on the day of the demand, or alternatively on the day on which documents were presented.

49. Mr. LAMBERTZ (Observer for Sweden) said that he continued to hold the views about article 16 expressed by the Working Group (see A/CN.9/408, para. 54) and he trusted they were shared by the Commission. If so, paragraph (1) would be suppletive, not mandatory, in the relationship between the guarantor/issuer and the principal/applicant. In the relationship between the guarantor/issuer and the beneficiary, on the other hand, he felt it would be mandatory. That implied a contradiction, since paragraph (1) referred to the standard of conduct prescribed in article 14(1) which, because of the provision in article 14(2), was not itself mandatory. In drawing the Commission's attention to that situation, his delegation had no proposal for rectifying it and could accept the text as it stood.

50. In reply to a question put by Mr. GAUTHIER (Chairman of the Committee of the Whole), Mr. SHISHIDO (Japan) said that, in suggesting that the seven-day period should be allowed for each entity concerned, he had had in mind the counter-guarantor and the confirmer in addition to the guarantor. However, other entities might conceivably be involved, for example a nominated bank, as mentioned in article 13*(b)* of the UCP rules.

51. Mr. EDWARDS (Australia) asked whether the intention behind the Japanese suggestion was that the various periods of time should be cumulative.

52. Mr. HERRMANN (Secretary of the Commission) said it had been agreed in the Working Group that the provision in article 16(2) should be seen, in the light of the definition of the term "guarantor/issuer" in article 6, as including a counter-guarantor and a confirmer. In other words, paragraph (2) would mean that, whenever the question arose, the entity concerned, whether a guarantor/issuer or a counter-guarantor or a confirmer, would have a maximum of seven business days in which to act. Looking at article 13*(b)* of the UCP rules, he did not believe it was intended to have the cumulative effect that, if one entity acted in less than seven business days, for example three business days, the succeeding entity would have ten business days at its disposal. In his view, therefore, the present text of paragraph (2) and the version proposed by Japan had the same meaning.

53. In one respect, though, the two approaches differed, in that the Japanese representative had raised the possibility that a nominated bank might be involved as well. In regard to documentary credits, the UCP rules contemplated that situation in referring to a nominated bank appointed by another entity to act on its behalf in examining documents. In such a case, the nominated bank would simply be an agent, and the Working Group had agreed that the Convention should make no specific provision for the situation of agents, which would be governed by the general law of agency. That being so, article 16(2), as it stood, would apply to a nominated bank.

The meeting rose at 5 p.m.

Summary record of the 559th meeting

Wednesday, 10 May 1995, at 9.30 a.m.

[A/CN.9/SR.559]

Chairman: Mr. GOH (Singapore)

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

The meeting was called to order at 9.35 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 16 (continued) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) reminded the Commission of the three points that had been raised in connection with article 16 at the previous meeting: a suggestion by the representative of Japan that additional text be included in order to indicate that the reference to the guarantor/issuer was intended, where appropriate, to apply to the counter-guarantor or the confirmer; a suggestion by the observer for Switzerland that the maximum period referred to in paragraph (2) be reduced from seven to three business days; and a suggestion by the representative of Austria that, for purposes of clarification, a phrase such as

"following receipt of the documents by the guarantor/issuer" be inserted in paragraph (2) after the words "seven business days".

2. Ms. CZERWENKA (Germany), Mr. STOUFFLET (France), Mr. SHISHIDO (Japan) and Mr. CHOUKRI SBAI (Observer for Morocco) expressed support for the Austrian proposal.

3. Mr. GAUTHIER (Chairman of the Committee of the Whole), observing that there were no comments on either the Japanese or the Swiss proposal, said he took it that the Commission wished to adopt article 16 as it stood, subject to drafting changes along the lines suggested by the representative of Austria.

4. *It was so decided.*

Article 17 (A/CN.9/408, annex)

5. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing the article, drew attention to an error in paragraphs (1) and (2), where the reference to article 14 should be to article 15.

6. Mr. STOUFFLET (France) said that the title of article 17—"Payment of demand"—read oddly, at least in the French version. Perhaps it could be shortened to just "Payment".

7. Mr. BONELL (Italy) said that paragraph (1) served primarily to stipulate that the guarantor/issuer would be obliged to pay if the demand was in accordance with article 15. The exceptions to that rule, namely cases of bad faith, which were dealt with in article 19, represented a secondary aspect. Moreover, it was difficult to see how a demand could be in conformity with article 15 if it proved to have been made in bad faith. He therefore proposed that the phrase "Subject to article 19" be deleted from the beginning of paragraph (1).

8. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that his delegation shared the view expressed by the representative of Italy. It would be better to omit the reference to article 19. He also felt that the words "of demand" should be deleted from the title, as had been suggested by the representative of France.

9. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that there seemed to be general agreement that the title should be amended to read "Payment".

10. *It was so decided.*

11. Mr. GAUTHIER (Chairman of the Committee of the Whole), turning to the question of the need for the reference to article 19 in paragraph (1), said that the Working Group had differentiated between demands for payment which were simple, in which case no certification or other documentation was required, and demands which were subject to presentation of documents, in which case, if the documents, upon examination, were deemed to be in facial conformity, the guarantor/issuer would effect payment. Hence there was a possibility that a seemingly proper demand made in accordance with article 15 could in fact be fraudulent or have no conceivable basis, as provided for in article 19. The Working Group had therefore considered it important to show that article 19 was an exception rule.

12. Mr. BONELL (Italy) said that, after listening to the explanation by the Chairman of the Committee of the Whole, he was more than ever convinced of the need to delete the words "Subject to article 19", particularly if the Commission accepted the suggestion made at the previous meeting by the representative of Australia concerning a statement, for all documents presented, certifying that the demand was not in bad faith.

13. Mr. HERRMANN (Secretary of the Commission) said that the draft text provided for the system of payment based on conformity of documents or implied certification that a demand had been made in good faith. The latter concept had to be clearly distinguished from the question whether the act of demanding payment had been made in good faith. It would be possible to use wording other than the emphatic phrasing "Subject to", which, as the representative of Italy had pointed out, drew attention to the fraud exception. In the original draft text, the provisions of article 19 had appeared in article 17. According to a drafting rule applied by the Commission, clauses beginning "Subject to . . ." were not normally used when the related points came within the same article. The phrase could be expressed differently or alternatively placed at the end of the sentence.

14. Mr. LAMBERTZ (Observer for Sweden) said that his delegation wished to express its support for the views expressed by the Secretary of the Commission.

15. Mr. OGARRIO (Mexico) said that he too supported the arguments just put forward.

16. Mr. SHISHIDO (Japan) said that his delegation shared the view expressed by the Secretary of the Commission. The words "Subject to article 19" should be retained.

17. Mr. ILLESCAS (Spain) said that his delegation also preferred to keep paragraph (1) as it stood.

18. Mr. CHOUKRI SBAI (Observer for Morocco) said that the current text of paragraph (1) should be maintained. The reference in that paragraph to article 19 was necessary since article 19 was concerned with the rights of all the parties and dealt with the important questions of fraud, forgery, unjustified demands and other wrongful acts.

19. Ms. EKEMEZIE (Nigeria) said that she too wished to retain the article as it stood, particularly after having heard the explanations given by the Chairman of the Committee of the Whole and the Secretary of the Commission. With a view to resolving the concern of the representative of Italy, some reformulation of the text might be necessary in order to avoid the words "Subject to".

20. Mr. STOUFFLET (France) said that his delegation preferred to keep the text as drafted.

21. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that he took it that the Commission wished to adopt article 17 with the inclusion of the reference to article 19.

22. *It was so decided.*

Article 18 (A/CN.9/408, annex)

23. Mr. GAUTHIER (Chairman of the Committee of the Whole), introducing the article, explained that the rule of set-off had been made subject to one exception because the Working Group had been anxious to prevent a practice, which it had seen developing, whereby a guarantor/issuer in certain circumstances avoided actual payment by purchasing from the principal/applicant a debt on paper that it then used as a set-off.

24. Ms. FENG Aimin (China) asked whether the right of set-off could be exercised at any time during the validity period of the undertaking. If so, would that mean that the undertaking would expire earlier, or that the guarantor/issuer would be released from liability earlier?

25. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that article 18 described a payment modality. Set-off

was merely one form of discharging an obligation to pay; it could not be employed unless and until the demand for payment had been made and the guarantor/issuer had decided that it was obliged to make payment.

26. Ms. FENG Aimin (China) said that in that case, the set-off should be made conditional on payment against demand. There was no discharge of obligations on the part of either party.

27. Mr. GAUTHIER (Chairman of the Committee of the Whole) suggested replacing the phrase "may discharge the payment obligation" with "may make payment".

28. Ms. FENG Aimin (China) said that if the guarantor acted without the consent of the beneficiary, then even though exercise of the right of set-off was legitimate, the beneficiary might suffer some harm in terms of interest or exchange rates.

29. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the text did not deal in detail with the mechanics or application of set-off, but merely provided that it could be used. It assumed that the first step was to have set-off rules and simply affirmed that the guarantor/issuer could pay through the vehicle of a set-off, with one exception.

30. Ms. FENG Aimin (China) said it was still necessary to have the beneficiary's consent before the right of set-off could be exercised. With that consent, there would be no conflict with the provisions of article 7, paragraph (4), or article 11.

31. Mr. CHOUKRI SBAI (Observer for Morocco), agreeing with the explanation by the Chairman of the Committee of the Whole, said there was no text in civil law which provided for cessation of an obligation. Essentially, an obligation could be fulfilled only through payment, but it could also be discharged through renewal, postponement, prescription or set-off. A set-off was a generally accepted legal instrument, and a guarantor was entitled to avail himself of it, regardless of the wishes of the beneficiary.

32. In the text the word "set-off" had been translated into Arabic as "indemnification". That was incorrect, because both the guarantor and the beneficiary were debtors and creditors to one another, and it was therefore a matter of setting off their obligations against each other, not of one indemnifying the other.

33. Mr. SHISHIDO (Japan) said that his delegation had difficulties with the exception clause. The words "any claim" were too broad, and the words "by the principal/applicant" were too narrow. The clause was quite important, as without it the guarantor/issuer could obtain the same position as the principal/applicant, thereby damaging the independence of the stand-by letter of credit or bank guarantee. The clause made sense only if it meant "except with any claim which relates to the underlying transaction assigned to it by anybody". The only claim to be assigned to the guarantor/issuer was that which derived from the underlying transaction between the principal/applicant and the beneficiary. If the Commission provided for the possibility of assignment by the principal/applicant, it could not prohibit him from assigning the claims from the underlying transaction to a third party, from whom they were then obtained by the guarantor/issuer.

34. Mr. BYRNE (United States of America) said that if the exception clause was kept as drafted, the phrase "or of the instructing party" should also be added, in order to preserve the independence of the letter of credit.

35. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that since parties other than the principal might have assigned their claim, perhaps the words "to it" could be deleted and the words "or the instructing party" added at the end of the sentence.

36. Ms. CZERWENKA (Germany) asked why the two ideas should be linked.

37. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that if the phrase "to it" was deleted, the text would be concerned with where the assignment originated. The current drafting would mean that the claim was assigned to the guarantor directly by the principal and that there was no one else in the chain. That would be the limit of the exception. With the phrase "except with any claim assigned by the principal/applicant or the instructing party", on the other hand, the text would cover situations where the claim was first assigned by the principal to someone other than the guarantor, and then assigned by that other person to the guarantor. It would be too restrictive to cover only the direct assignment by the principal/applicant to the guarantor. If the claim originated with the principal/applicant or the instructing party and there was a chain which eventually brought it into the hands of the guarantor/issuer, that situation should be covered by the exception.

38. Mr. FAYERS (United Kingdom) said he shared the doubts expressed by the representative of Germany and did not feel that the deletion of "to it" addressed the point, which was that the Commission wished to stop people from assigning claims to the bank so that the bank could then use them as a set-off against the beneficiary. In actual fact, however, it was very exceptional for a bank to have a claim it could set off, although there had once been a decision by an English court to allow such action against a beneficiary.

39. Mr. ADENSAMER (Austria) suggested that the Commission could characterize those claims which could not be used for set-off and concentrate on those which originated from the underlying transaction or from the applicant. It would then be unnecessary to say by whom the claims had been assigned to the guarantor, and whether there had been a chain of assignments or not.

40. Mr. OGARRIO (Mexico) said that if the words "to it" were deleted, it would be unclear which party the claim was being assigned to. It must remain clear that the assignment was being made precisely to the guarantor/issuer. Language could be added to the effect that any assignment made to the issuer, whether directly or through a third party, would not be subject to set-off.

41. Mr. LAMBERTZ (Observer for Sweden), endorsing the suggestion by the Chairman of the Committee of the Whole, said that even though such cases as those described by the representative of the United Kingdom were rare, it would none the less be a good idea to protect the beneficiary from the principal by putting someone between the former and the bank. Deleting the words "to it" would enable a court to interpret the law in the right way. Alternatively, one could say something along the lines of "except with any claim originating with the principal/applicant".

42. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the Commission seemed to feel that the draft was too restrictive as now worded and that the exception should be broadened. It furthermore did not seem to want to allow the guarantor/issuer to use set-off when its rights stemmed from a process of assignment which had started with a principal/applicant or an instructing party. If deleting the words "to it" did not suffice, the text might be amended to say something along the lines of "except with any claim which originates with the principal/applicant or the instructing party", in order to cover the possibility of a chain.

43. Mr. FARIDI ARAGHI (Islamic Republic of Iran), endorsing the views of the representative of China, said that the draft needed to cover the consent of both parties.

44. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that expanding the exception clause raised the question of how one would trace the chain. As now drafted, the advantage of the clause was that there was only a limited need for investigation. The broader the exception, the more difficult it would be to apply.

45. Mr. CHOUKRI SBAI (Observer for Morocco) said that the words "to it" should be retained for the sake of clarity. They referred exclusively to a single person, the guarantor, who could enjoy the right of set-off and who could not negotiate on the matter.

46. Ms. BAZAROVA (Russian Federation) said she supported keeping the text as drafted. She could agree to adding the phrase "or the instructing party", but wondered how the guarantor would then trace the chain, which it would be obliged to do. She asked if the rights of the principal would not be violated if, after it had assigned its rights to someone else and the guarantee had been issued, the claim was subsequently returned. The exception should not be broadened.

47. Mr. SHISHIDO (Japan) said that the suggestion by the Chairman of the Committee of the Whole was not the same as his own. His suggestion contained two points which could not be separated. To take the second one only would make the exception too broad and would excessively restrict the right of banks to set off. His aim had been very precisely articulated by the representative of Austria and he hoped that the text would reflect what the representative of Austria had said.

48. Mr. GAUTHIER (Chairman of the Committee of the Whole), having asked whether there was support for the Japanese proposal to the effect that the exception would concern any claim which related to the underlying transaction assigned to the guarantor/issuer, said it appeared that most representatives preferred not to make that change.

49. In regard to the United States suggestion that the words "or the instructing party" be added at the end of the paragraph, he took it that the Commission wished to incorporate that amendment.

50. He discerned very little support for the suggestion put forward by the representative of China to the effect that no set-off could occur without the consent of the beneficiary.

51. Ms. BAZAROVA (Russian Federation) expressed the view that the proposal put forward by the representative of Japan to the effect that any claim should be related to the underlying obligation for which the guarantee had been given was an excellent idea capable of solving all the problems with the article. It would obviate the danger of abuse on the part of the principal.

52. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that the representative of Japan had clearly indicated that the two parts of his proposal could not be divorced. However, his own impression had been that there existed insufficient support to justify introducing into article 18 the concept of "relating to the underlying transaction".

53. Mr. FAYERS (United Kingdom) said that he had not expressed his support for the Japanese proposal partly because, in his view, that was exactly what the article already meant. It covered precisely that type of claim on the part of the principal, but could also include other claims of the principal/applicant in relation to the beneficiary. He would support the Japanese proposal if it clarified the matter, but he considered that its purpose was already covered by the article.

54. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that, in his view, the representative of the United Kingdom was right to say that the text as it stood included such claims, but was not limited to them. However, it was clear to him that the intention of the representative of Japan was to limit the exception to any claim that related to the underlying transaction. He took it that it was the Commission's wish to retain the text as it stood with the addition at the end of the words "or the instructing party".

55. *It was so decided.*

The meeting was suspended at 11.05 a.m. and resumed at 11.30 a.m.

Article 19 (continued) (A/CN.9/408, annex)

56. Mr. GAUTHIER (Chairman of the Committee of the Whole) drew attention to document A/CN.9/XXVIII/CRP.3, containing three options for article 19 that had been prepared with a view to facilitating the discussion. Option I consisted of the existing text of the article as it appeared in document A/CN.9/408, with a new text for paragraph (1)*(b)*. Option II represented a text proposed by the representative of Australia. Option III was a text based on a proposal put forward by the representative of the United States.

57. Mr. EDWARDS (Australia) said that in proposing option II, Australia had hoped to mobilize opinion in a particular direction. It had not been successful and therefore thought it would be preferable to focus attention on options I and III. Australia felt able to support option III, which would make for greater efficiency and certainty, important considerations for bankers, but wished to propose a different paragraph (3) along the lines of paragraph (3) of option II, as follows:

> "(3) The action of the guarantor/issuer under paragraph (1) does not prejudice any rights of the beneficiary or principal/applicant (including pursuant to article 20)."

His country considered that that formulation provided maximum certainty and made it plain that the relationships between and the rights of the various parties depended on a chosen or national law.

58. Mr. BYRNE (United States of America) said that option II regrettably did not contain the minimum protections regarded as necessary by banks and his Government and hence did not offer a workable text for article 19. The United States would be able to accept option I, but only with reluctance, since it raised many difficulties. It was, for example, not certain that a duty not to pay existed in law; moreover, the banks were clearly uncomfortable with the text and might as a result hesitate to use the Convention. His delegation's preference was for option III, in which it could accept the amendment proposed by the representative of Australia. The amendment would achieve a better balance between the interests of the principal/applicant and those of an innocent beneficiary who might be subject to unfair accusations of fraud. It would also provide a better position for the banks, which did not wish to take on the risk of assessing whether or not fraud was involved. The approach in option III also emphasized the instrument as a payment device and stressed that payment must be made except in the case of fraud.

59. Mr. SHISHIDO (Japan) asked why the representative of Australia thought it necessary to include the beneficiary in his suggested amendment of paragraph (3).

60. Mr. EDWARDS (Australia) said that the flexibility and efficiency of paragraph (1) would be enhanced if the parties knew that the action taken would not prejudice their rights under chosen or national law.

61. Mr. BYRNE (United States of America), referring to the point raised by the representative of Japan, said that the mention of the beneficiary in paragraph (3) indicated that the beneficiary retained a right of action against the guarantor/issuer for wrongful dishonour and that the guarantor/issuer must therefore prove that any one of the elements mentioned in paragraph (1) was present. Some delegations had thought it might be useful to state that the rights of the beneficiary also remained apparent.

62. Mr. OGARRIO (Mexico) said that the amendment to paragraph (3) of option III would produce a more balanced text, since it referred not only to a case where payment was made, but also to action by the guarantor/issuer, which might be payment or refusal to pay, and preserved the rights of any party (beneficiary or principal/applicant) affected by the action taken by the guarantor/issuer. He therefore found option III, as amended by Australia, to be acceptable.

63. Mr. MARKUS (Observer for Switzerland) said that the main difference between option I and option III was that in option I there was an obligation not to pay the beneficiary and in option III a right not to pay the beneficiary. That was a matter of considerable importance, since it was related to the question of whether the principal/applicant was included or not and, if included, to what extent. The problems of all parties in that respect needed to be resolved. In legal reality, the claim of a beneficiary was directly and closely related to the central relationship between the guarantor/issuer and principal/applicant. If the guarantor/issuer received an improper demand, he was, in accordance with the contractual relationship with the principal/applicant, obliged not to pay and, in the case of a demand that was not improper, obliged to pay. To give the beneficiary a discretionary authority to pay or not to pay in any situation would not resolve the problem at all. He therefore preferred option I.

64. In regard to the important point raised by the observer for Monaco, that the bank should not be penalized in any way when it paid in order to safeguard its international reputation and did not subsequently make any claim to be reimbursed, option I did not imply that paying in such circumstances without demanding reimbursement was a criminal act.

65. Ms. CZERWENKA (Germany) expressed a preference for option I, for reasons she had stated earlier, but especially because articles 19 and 20 would always need to be taken together. Article 20 would be incomplete if there did not exist a rule making it an obligation for the guarantor/issuer not to pay in the event of obvious fraud. However, in the text as it stood the "unless" proviso was misleading: the article was dealing with the principal/applicant-bank relationship, and it could be decided only between those parties that there might be an obligation not to pay; it could not be agreed between the guarantor/issuer and the beneficiary to the detriment of the principal/applicant. If option III were chosen, Germany would oppose the amendment proposed by Australia. Including the beneficiary in paragraph (3) was highly questionable, because that provision dealt with fraud that was manifest and clear. In her view, the amendment was very misleading since it appeared to imply that even in the case of an improper demand the beneficiary had a right to obtain payment, a situation that was clearly not the intention of the Convention.

66. Ms. BAZAROVA (Russian Federation) suggested that article 19 might be adopted in its present form, since article 14(2) already provided that a guarantor/issuer might not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct. However, if subsequent discussion convinced her, she would, as a compromise, accept option III, but not the Australian amendment.

67. Mr. FARIDI ARAGHI (Islamic Republic of Iran) supported option III for the reasons given by the representative of Mexico.

68. The CHAIRMAN, speaking as representative of Singapore, supported option III as amended by the representative of Australia.

69. Mr. BONELL (Italy) supported option I.

70. Mr. LAMBERTZ (Observer for Sweden) supported option I, for the reasons he had previously given. Option III suggested that in no cases other than those set out in paragraph (1) would a bank have a right not to pay. However, there could be no obligation to pay when there was in fact fraud. In the case of a clever falsification of documents, so that a fraud was not immediately manifest and clear, but the bank was practically sure that there was fraud and hence refused payment, the beneficiary could not possibly sue for wrongful dishonour when later it became manifest and clear that fraud had in fact been committed. Clearly, there existed a right not to pay outside the provisions of option III. If that option were adopted, it would lead to confusion, which was why the Working Group had not chosen it.

71. Most delegations, moreover, would agree that the Convention should contain a rule on provisional measures. In his view, such a rule must always be worded as a prohibition against payment, based on a duty not to pay, and not on a right not to pay. In the absence of an explicit rule on a duty not to pay, the prohibition must be based on an implicit duty. If a court was to tell a bank provisionally not to pay, it must believe there was a good chance that it would never have to pay, that there was a duty not to pay. If the Convention did not contain a provision on the duty not to pay, the courts would have to make up their own rules on the matter. It would therefore be better to make the rules explicit in the Convention. A system containing rules on provisional measures, but without rules to base those rules on, would be illogical and impractical, and he would find it difficult to recommend such a system to his Government.

72. Mr. SHISHIDO (Japan) said that his delegation would prefer option I, although it had reservations on subparagraph *(b)*. It could also accept option III, but strongly objected to the Australian amendment, which would be illogical.

73. Mr. ADENSAMER (Austria) also supported option I.

74. Mr. GRANDINO RODAS (Brazil) and Mrs. SCARNATI ALMADA de CURIA (Argentina) were in favour of option III as amended by the Australian representative.

75. Ms. FENG Aimin (China) and Mr. MAHASARANOND (Thailand) were in favour of option III.

76. Mr. STOUFFLET (France) said his delegation had a preference for option I, but would be ready as a compromise to accept option III. However, he would be hesitant to accept the Australian amendment, which was of questionable utility and might be wrongly interpreted.

77. Mr. SAENZ de TEJADA (Spain) supported option III with the Australian amendment.

78. Mr. KRZYZEWSKI (Poland) said he would prefer to retain article 19 in its original form. However, he could accept option III if there was a majority in favour of a change.

79. Ms. EKEMEZIE (Nigeria) was in favour of option I and thought it might be useful to include paragraph (3) of option III in that option.

80. Mr. AL-NASSER (Saudi Arabia) said that his delegation would be in favour of option III with the Australian amendment, but suggested that the drafting group should study the text and take into account the points raised by the observer for Sweden.

81. Mr. FAYERS (United Kingdom) said his delegation preferred option III as amended by Australia, but could accept option I.

82. He wondered if some of the problems had arisen because delegations did not appreciate the fact that article 19 was concerned with a particular moment in time, namely, when the bank was called upon to pay. Trying to deal with questions that might arise years later when rights and wrongs came to light merely confused the issue.

83. On the link between articles 19 and 20 and the argument that if there was no obligation not to pay, it somehow impeded the right to have provisional measures under article 20, he believed that that matter could be accommodated in the text by providing that the courts had jurisdiction in that instance. In English law the courts had, as a matter of public policy, jurisdiction to intervene in any relationship where there was an instance of fraud.

84. Mr. HERRMANN (Secretary of the Commission) said that perhaps some of the considerations voiced in favour of or against the various options had not been fully understood. Those in favour of option I were primarily representatives of European States with a civil-law tradition. It might be wise to see what was behind their preference and whether there was a way of accommodating it. The main argument in favour of option I and against option III was the link with article 20 and the possibility of having provisional measures. For the States in question, a mere right not to pay could not be a sufficient basis for a provisional order to stop payment, which would have to be founded on a possible obligation not to pay. No State with such a legal system would be able to accept the Convention on the understanding that an exception was being made to that principle with sole reference to the limited area of letters of credit. That point might not have been appreciated by representatives of countries with other legal systems.

85. As to the Swedish concern about fraud that was not immediately manifest, he pointed out that whatever was not covered by article 19 was covered by article 17, which provided that payment should be made on a conforming demand.

86. With respect to the Australian proposal, which had caused some misunderstanding, he said that it would make less obvious the original purpose of paragraph (3), which was to say that it did not prejudice any rights of the principal/applicant. The proposed additional rule added nothing and ought to be regarded as self-evident.

The meeting rose at 12.30 p.m.

Summary record of the 560th meeting

Wednesday, 10 May 1995, at 2 p.m.

[A/CN.9/SR.560]

Chairman: Mr. GOH (Singapore)

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

The meeting was called to order at 2.20 p.m.

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

Article 19 (continued) (A/CN.9/408, annex)

1. Mr. GAUTHIER (Chairman of the Committee of the Whole) said that there was no support for option II and that a preference seemed to have emerged for the approach adopted in option III (A/CN.9/XXVIII/CRP.3). But a way had to be found of ensuring that it did not prejudice the right of the principal/applicant to seek provisional court measures before payment was made to the beneficiary in the case of a manifestly improper demand.

2. Ms. CZERWENKA (Germany) said that, if a majority view in favour of option III prevailed, the right of the principal/applicant to take action against the guarantor/issuer in order to stop payment would not be recognized in the draft Convention. National Law would then be applicable to such cases and uniformity would be sacrificed. Moreover, in many jurisdictions the rights of the principal/applicant in the matter were unclear. If article 20 were maintained, it could prove unenforceable in jurisdictions where a claim by the principal/applicant against the guarantor/issuer to stop payment was not recognized. Option III dealt only with the relationship between the guarantor/issuer and the beneficiary and failed to address the relationship between the guarantor/issuer and the principal/applicant.

3. Mr. BYRNE (United States of America) said that the Secretary had suggested at the end of the previous meeting that the problem with regard to article 19 might be associated with a sub-family of the civil-law system and might be partly of a regional nature. However, the difficulty was to some extent conceptual and theoretical and there was no single valid approach to the problem.

4. Clearly, very different integrated systems existed for dealing with extraordinary relief, but he understood from the Secretary's remarks that there was a necessary conceptual link to the ability of a court to grant extraordinary relief under article 20, which depended on the existence of a bank's obligation not to pay. Referring to a hypothetical case involving the Swedish company Volvo as principal/applicant before a Swedish court, he said that he found it difficult to believe that, where there was irrefutable proof of fraud, a court would refuse to grant extraordinary relief because of a lack of linkage between articles 19 and 20 in the Convention. Even where the fraud was not manifest and clear to