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RAPPORT RELATIF A LA PREMIERE REUNION DE LA COMMISSION SPÉCIALE SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET AUTRES MEMBRES DE LA FAMILLE (5-16 MAI 2003)

établi par le Bureau Permanent

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REPORT ON THE FIRST MEETING OF THE SPECIAL COMMISSION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (5-16 MAY 2003)

drawn up by the Permanent Bureau

Document préliminaire No 9 d'octobre 2003
à l'intention de la Commission spéciale d'avril 2004
sur les affaires générales et la politique de la Conférence

Preliminary Document No 9 of October 2003
for the attention of the Special Commission of April 2004
on General Affairs and Policy of the Conference

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OBLIGATIONS ALIMENTAIRES
MAINTENANCE OBLIGATIONS

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RAPPORT RELATIF A LA PREMIERE REUNION DE LA COMMISSION SPECIALE SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET AUTRES MEMBRES DE LA FAMILLE (5-16 MAI 2003)

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Document préliminaire No 5 d'octobre 2003
à l'intention de la Commission spéciale de juin 2004
sur le recouvrement international des aliments
envers les enfants et d'autres membres de la famille

Preliminary Document No 5 of October 2003
for the attention of the Special Commission of June 2004
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RAPPORT RELATIF A LA PREMIERE REUNION DE LA COMMISSION SPÉCIALE SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET AUTRES MEMBRES DE LA FAMILLE (5-16 MAI 2003)

établi par le Bureau Permanent

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REPORT ON THE FIRST MEETING OF THE SPECIAL COMMISSION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (5-16 MAY 2003)

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List of participants in the Special Commission

La Commission spéciale s'est réunie du 5 au 16 mai 2003
The Special Commission met from 5 to 16 May 2003

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INTRODUCTION

A. Terms of reference, representation and chairmanship

1. The Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance met in the Academy Building of the Peace Palace in The Hague from 5 to 16 May 2003. This followed a recommendation originally adopted by the Special Commission of the Hague Conference on Private International Law of April 1999 on the review of the operation of the Hague Conventions concerning Maintenance Obligations and the New York Convention on the Recovery Abroad of Maintenance. This recommendation reads as follows:

> *"The Special Commission on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance,*
>
> – *having examined the practical operation of these Conventions and having taken into account other regional and bilateral instruments and arrangements,*
>
> – *recognising the need to modernise and improve the international system for the recovery of maintenance for children and other dependent persons,*
>
> – *recommends that the Hague Conference should commence work on the elaboration of a new worldwide international instrument.*
>
> *The new instrument should:*
>
> – *contain as an essential element provisions relating to administrative co-operation,*
>
> – *be comprehensive in nature, building upon the best features of the existing Conventions, including in particular those concerning the recognition and enforcement of maintenance obligations,*
>
> – *take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology,*
>
> – *be structured to combine the maximum efficiency with the flexibility necessary to achieve widespread ratification.*
>
> *The work should be carried out in co-operation with other relevant international organisations, in particular the United Nations.*
>
> *The Hague Conference, while accomplishing this task, should continue to assist in promoting the effective operation of the existing Conventions and the ratification of the New York Convention and the two Hague Conventions of 1973.*
>
> *The Special Commission recalls and emphasises the importance of the practical recommendations contained in the General Conclusions of the Special Commission of November 1995, which were drawn up by the Permanent Bureau* (General Affairs, Prel. Doc. No 10, May 1996)."

2. Following this recommendation, the Special Commission on General Affairs of May 2000 concluded that there should be included with priority on the Conference's agenda "the drawing up of a new comprehensive convention on maintenance obligations, which would improve the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation. Non-Member States of the Hague Conference, in

particular signatory States of the New York Convention of 1956, should be invited to participate in the future work."[1]

3. Commission I on General Affairs and Policy of the Nineteenth Diplomatic Session of the Hague Conference on Private International Law, which met from 22-24 April 2002, reaffirmed the conclusion of the Special Commission on General Affairs and Policy of May 2000 and added that "every effort should be made to ensure that the processes involved are inclusive, including by the provision if possible of Spanish translation of key documents and facilities for Spanish interpretation at plenary meetings".[2] These decisions were incorporated in the Final Act of the Nineteenth Session of the Hague Conference on Private International Law.[3]

4. Of the 46 States represented at the Special Commission meeting in May 2003, 14 were Parties to the *1956 Hague Convention on the law Applicable to Maintenance Obligations towards Children,* one of which has ratified the Convention on behalf of a certain Special Administrative Region, 17 were Parties to the *1958 Hague Convention concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations towards Children*, 16 were Parties to the *1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*, 10 were Parties to the *1973 Hague Convention on the Law Applicable to Maintenance Obligations,* and 33 were Parties to the *1956 New York Convention on the Recovery Abroad of Maintenance* (five being non-Member States of the Hague Conference). It is worth noting that nine of the States represented were Parties to the five Conventions on Maintenance Obligations. In addition, five intergovernmental organisations and six non-governmental organisations were present as observers.

5. The Special Commission was opened by Mr Teun Struycken, Chairman of the Netherlands Standing Committee on Private International Law. He proposed the Honorable Mr Fausto Pocar (Italy) as the Chair of the meeting, who was elected unanimously by the Commission. Mrs Alegría Borrás (Spain) and Mrs Jennifer Degeling (Australia) were elected as *Rapporteurs*.

6. During the Special Commission, the Chair of the meeting proposed the creation of a Working Group, which would later become a Drafting Committee for the preparation of a preliminary draft of the new instrument on Maintenance.[4] The following experts and observers were elected to the Working Group: Ms Jan Marie Doogue (Chair) (New Zealand), Mrs Stefania Bariatti (Italy), Mrs Marie-Odile Baur (Observer) (European Union – European Commission), Mr Paul Beaumont (United Kingdom of Great Britain and Northern Ireland), Ms Alegría Borrás (Rapporteur – *ex officio* member) (Spain), Ms Mary Helen Carlson (United States of America), Ms Jennifer Degeling (Rapporteur - *ex officio* member) (Australia), Ms Sonya Djemni-Wagner (France), Ms Cecilia Fresnedo de Aguirre (Observer) (Inter-American Children's Institute, IACI), Ms Denise Gervais (Canada), Mr Miloš Hatapka (Slovakia), Mr Robert Keith (United States of America), Ms Mária Kurucz (Hungary), Ms Namira Negm (Egypt), Mrs María Elena Mansilla y Mejia (Mexico) and Mr Guoshun Sun (China). A Working Group on Applicable Law was also created during the Special Commission.[5] In addition, at the end of the meeting two informal working Groups were agreed upon.[6]

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[1] Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference, Preliminary Document No 10 of June 2000, p. 17, para. 9 (< http://www.hcch.net/e/workprog/genaff.html >).
[2] Working Document No 4 from Commission I, distributed on 24 April 2002.
[3] The Hague, 13 December 2002, Part C, paragraph 1.
[4] *See* paragraph 145 below.
[5] *See* paragraph 109 below.
[6] *See* paragraph 147 below.

B. Preliminary Documents and Agenda

7. Four Preliminary Documents were prepared for the Commission, three of which had been previously circulated to participants:

?? Preliminary Document No 1, Information Note and Questionnaire concerning a new global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance drawn up by William Duncan, Deputy Secretary General was sent out to National Organs in June 2002;

?? Preliminary Document No 2, Compilation of Responses to the 2002 Questionnaire concerning a new global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance, was made available in the form of a disk for each head of Delegation at the meeting and on the Internet as soon as the responses had been received by the Permanent Bureau;

?? Preliminary Document No 3, Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance, Report drawn up by the William Duncan, Deputy Secretary General was sent out to National Organs in April 2003;

?? Preliminary Document No 4, Parentage and International Child Support-Responses to the 2002 Questionnaire and an Analysis of the Issues, Report drawn up by Philippe Lortie, First Secretary was sent out to National Organs in April 2003.

8. The Agenda adopted by the Special Commission reflected its mandate. The discussions concerned successively Administrative Co-operation, Recognition and Enforcement, Jurisdiction, Applicable Law, building Co-operation and securing Compliance, and questions of Scope. There was also a presentation by William Duncan, Deputy Secretary General on a future Preliminary Document on Legal Aid and a presentation by Philippe Lortie, First Secretary on the use of information technology in respect to the Recovery of Maintenance.

9. The Commission ended with a review and approval of Working Documents Nos 1 and 2 of the Working Group (Drafting Committee) which are appended.

PART I – ADMINISTRATIVE CO-OPERATION

10. The discussion in plenary concentrated in the first instance on the structuring of an efficient and responsive system of administrative co-operation. Experts agreed, as they did during the 1999 Special Commission, that the international system for the recovery of child support and other forms of family maintenance is excessively complex and that provisions for administrative co-operation need to be overhauled and properly monitored. In this respect, the discussion on administrative co-operation focussed on the establishment of authorities and their functions / responsibilities, the application process, documentation and its transmission, the need for forms whether standard or model forms, translation requirements, speed and costs. From time to time during the discussion, reference was made to the savings in cost and time that could be achieved by the use of new information technologies. The discussion took place in the context of the description in Preliminary Document No 3, Chapter II. Overall, the system should be capable of processing requests swiftly, cost effective, flexible, user-friendly and should not impose obligations which are too burdensome. Considerable progress was made and by the end of the Special Commission a large number of "heads" were agreed which now

provide a basis for the Drafting Committee to continue its work.[7] At the end of the Special Commission, during the discussion of the administrative co-operation proposals by the Working Group (Drafting Committee) and the overall question of what should constitute the core content of administrative co-operation, some experts suggested taking as examples certain provisions of existing Hague Conventions. Reference was made to Article 7 of the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Articles 7-9 of the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* and Articles 29-31 of the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.*

11. A number of questions remain to be resolved, some of which have at their root concerns about resource implications for States. What should be the range of services to be provided by authorities in each Contracting State, to whom should those services be made available, and to what extent should they be provided cost free? A further study being carried out by the Permanent Bureau on service costs and provisions for legal aid and assistance should help to throw some further light on these issues. The problems are complicated by the different child support systems that operate internationally, and in particular by the divide between administrative and court based systems for the assessment and enforcement of child support.

A. Authorities and their functions

12. It was observed that a substantial number of the Central Authorities established under the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* do not operate efficiently. Inadequate resources and a lack of co-ordination and support in implementing the Convention were put forward as reasons for this inefficiency. Appropriate provisions in the new instrument should respond to these problems.

13. The discussion on Central Authorities and their functions focussed on two elements: First, the question of the designation of Central Authorities; secondly, the question of the responsibilities to be ascribed to those Authorities (paragraphs 29 to 35 of Prel. Doc. No 3).

Central Authorities – designation

14. The discussions revealed the existence of varying systems of administrative co-operation in different States. Some States have separate receiving and transmitting agencies. This separation of functions is essential in some States for constitutional reasons and can operate successfully. Nevertheless, a number of experts were in favour of the establishment of a single Central Authority in order that one agency be aware of and responsible for all aspects related to the process. Certain States, such as multi-unit States, have more than one Central Authority. Despite the divergence of opinions on this matter, the overall consensus emerged that States should be free to decide how to organise their systems of co-operation, so long as one Central Authority "point of contact" is identified for the purposes of communication and tracking the progress of an application. In this respect, several experts were of the view that it is essential that the designation of Central Authorities together with their contact details be communicated to the Permanent Bureau before ratification of the new instrument, and that the

[7] *See*, the administrative co-operation proposals by the Working Group (Drafting Committee) of the May 2003 Special Commission included in Working Document No 1, a copy of which can be found in Appendix 1 to this Report.

Permanent Bureau should be promptly informed of any changes.

15. Several experts proposed drawing from the experience gained through the development of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. In particular, it was mentioned that it could be useful to develop a Guide to Good Practice in order to assist Central Authorities.

Central Authorities – responsibilities

16. Secondly, in relation to the responsibilities, it was pointed out that responses to the Questionnaire expressed a consensus concerning the need to establish the core roles and functions of Central Authorities. The discussion aimed at considering how to define the extent of the responsibilities and which, if any, can be delegated. A list of possible functions which had been derived from other instruments and from the responses to the 1998 and 2002 Questionnaires were set out in Preliminary Document No 3, paragraph 30, as follows:

?? to discover the whereabouts of the debtor;

?? to seek out relevant information concerning the assets of the debtor and their location;

?? to encourage voluntary payment of maintenance obligations;

?? to facilitate the enforcement of maintenance decisions or determinations which are entitled to recognition under the Convention;

?? where there is no existing foreign order or determination, or it is not possible to recognise and enforce such order or determination, to initiate or facilitate the institution of judicial or administrative proceedings with a view to securing a maintenance decision;

?? where necessary, to assist the applicant in having effective access to the relevant authorities, including where the circumstances so require, by the provision or facilitation of legal aid and advice;

?? to facilitate the transfer of maintenance payments to the creditor;

?? to ensure, where the payments due to the maintenance creditor are not made, the use of all appropriate means of enforcement provided for in the State addressed;

?? to provide assistance in establishing the parentage of a child, for the purpose of maintenance proceedings in any Contracting State;

?? to initiate or facilitate the institution of judicial or administrative proceedings to obtain any necessary "provisional or urgent measures that are territorial in nature and whose purpose is to secure the outcome of a pending or anticipated support claim".

17. The issue of resources and the question of "limited service requests" were discussed. It was not considered that there would be a need for a system of accreditation, as provided for in the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. In relation to the issue of resources, it was possible that extra services could be provided on a reciprocal basis. It was also pointed out that the question of Central Authority services was linked to the question of the scope of the new instrument.

18. Some experts believed that the new instrument should deal only with the essential functions of Central Authorities. It was also considered necessary to indicate in the instrument which functions could and could not be delegated. Many experts confirmed

that the Central Authorities in their States perform all the functions listed in paragraph 30. However, some reservations were expressed with regard to certain aspects of the list.

19. In relation to the whereabouts and assets of the debtor (points 1 and 2 of paragraph 30), responses were varied and depended largely on the extent of the powers of a Central Authority and its access to sources of information, such as those relating to social security and taxation. It would appear that in certain States these sources of information do not exist or are unavailable as a result of data protection laws. The importance of encouraging voluntary payments of maintenance obligations (point 3) was recognised. However, attention was drawn to the risk that a lengthy procedure would result, which could be expensive and counter-productive. Several experts agreed that Central Authorities should take responsibility for securing legal assistance for applicants where necessary (point 6). Many States' Central Authorities confronted difficulties with regard to providing assistance in establishing the parentage of a child (point 9), in particular for reasons of cost and lack of power or jurisdiction. Some experts indicated that, although it was not their States' usual practice, it would be possible for their Central Authorities to initiate or facilitate the institution of proceedings to obtain provisional or urgent measures that are territorial in nature and whose purpose is to secure the outcome of a pending or anticipated support claim (point 10).

20. Further to this preliminary exchange of views, it was suggested that an approach focussing on common goals could facilitate the discussion of the roles and functions of the Central Authorities. With regard to the related question of "scope", several experts were of the opinion that the financial needs of the child are intrinsically linked to the financial needs of the parents. They therefore expressed their desire that the services provided by the Central Authorities should extend to spousal support for custodial parents within the new Convention. Some experts wished to ensure that other potential maintenance creditors were not excluded from the new instrument. In this regard they drew attention to existing Conventions which include maintenance obligations for other adults. Many experts also recognised that the Central Authority should provide assistance both to the creditor and the debtor.

21. Further discussions took place at the end of the Special Commission on the issue of Authorities and their functions in the light of Working Document No 1 of the Working Group (Drafting Committee). Section 4 of Working Document No 1 provides for possible functions of Central Authorities. Paragraph e) of Section 4 outlines what are generally considered to be core functions of Central Authorities and paragraph f) lists some other possible functions raised in discussions in the plenary or the Working Group (Drafting Committee) which are largely non-controversial. However, paragraph g) lists some functions which have been the subject of debate and differing views.

22. Experts were asked by the Chairman of the Working Group (Drafting Committee) for their views on whether particular functions should be considered mandatory or optional. Some experts recognised that all the functions listed in paragraphs f) and g) are important, and felt that most of these functions should be carried out either directly by a Central Authority or by delegation.

23. A few experts were of the opinion that paragraph f) (i) "to receive and transmit applications" should be a mandatory obligation of Central Authorities. Some experts noted that paragraph f) (iii) relates to provision of general information and paragraph f) (vi) refers to provision of information on the specific case. Some experts recognised that it may be difficult for Central Authorities which are staffed by administrative personnel to provide detailed information on laws and procedures. An expert also suggested that it might be more appropriate if the wording of f) (iii) relating to the provision of information with regard to laws and procedures, concerned "the" Contracting State and not "each" Contracting State. An expert noted that the co-operation provision in f) (iv) should also be mandatory.

24. Some experts noted that finding information in relation to the assets of the debtor as outlined in paragraph g) (i) could be difficult. Many experts were concerned about the scope of paragraph g) (ii). With regard to the issue of whether a creditor, attempting to bring proceedings in the State of the debtor should be able to receive assistance from the Central Authority of the State of the debtor, several experts highlighted that this situation represents a substantial part of the workload of their Central Authorities and they do provide assistance in these cases. Several experts were of the opinion that assistance in relation to the establishment of parentage as outlined in paragraph g) (iii) should not be a core function of the Central Authorities. However, another expert felt that the paragraph g) (iii) should constitute a core function for Central Authorities. Other experts noted the importance of this paragraph in practice.

B. The application process

25. The application process discussion began with an introduction of the model form drawn up by the Special Commission of 1999 "Request for Judicial and / or Administrative Assistance for the Recovery Abroad of Maintenance", which is found in the appendices to Preliminary Document No 3. The model form contemplates four situations in which it is possible to make an application. These four situations and questions concerning who is entitled to make an application and the role of the Central Authorities in relation to the application process were the subject of the discussion. These four situations are:

(1) An application for recovery of maintenance based on an existing order or other judicial or administrative act made in the requesting State.

(2) An application for recovery of maintenance, if necessary by the institution of fresh proceedings where the recognition and / or enforcement of the order or other judicial or administrative act is not possible, or is refused.

(3) An application for recovery of maintenance where there is no existing order or other judicial or administrative act.

(4) An application for the variation of an existing maintenance order.

26. Experts endorsed the use of a standard form for applications. Most experts agreed that the four situations in which applications may be made under the model form should all be provided for in the new instrument. However, a few experts expressed some reservations with regard to points (2) and (3).The issue of possible reservations was discussed at a later stage.

27. Experts discussed the role of the Central Authorities in the application process. Three questions were raised in this respect. Firstly, whether applicants should be obliged to apply through the Central Authority in their own State. Secondly, whether applicants should be entitled to apply directly to the judicial or administrative authorities in the requested State. Thirdly, whether applicants should be allowed to apply directly to the Central Authority in the requested State. Generally, experts preferred that an application proceed from the requesting Central Authority to the requested Central Authority. This procedure reduces the risk of fraud. Additionally, it was mentioned that the Central Authority has the opportunity to verify the application before it is transmitted. At the same time some experts felt it important that applicants should retain the right to make applications directly to the judicial or administrative authorities of the State addressed.

28. Many experts underlined the importance of ensuring that the maintenance debtor has a right to apply to the Central Authority. This is particularly important in relation to the modification of judicial or administrative decisions relating to maintenance. Additionally, according to several experts, public authorities should have the right to

make an application to a Central Authority. This is particularly important when such authorities have made an advance payment to a maintenance creditor. Several experts felt that the application process should be the same for public authorities as for individuals. An exception may need to be made in relation to legal aid issues.

29. The majority of experts recognised the importance of acknowledging receipt of an application. However, they noted the necessity to distinguish between two situations. On the one hand a bare notification that an application has been received, and on the other hand an acknowledgement that an application is complete. With regard to the former situation a time limit could be imposed. However, in the latter situation, more complex issues would make it more difficult to set a strict time limit.

30. At the end of the Special Commission, the application process was discussed once again in the light of Working Document No 1. Experts commented on Section 5, paragraph d) as to what could be included in relation to requests for limited assistance and on the question of recovery of arrears. Many experts were of the opinion that requests for limited assistance in relation to locating the debtor and / or his assets could be included. Some experts noted that data protection rules could hinder the ability to obtain information relating to the assets of the debtor. In addition, several experts favoured the inclusion of requests for the recovery of arrears.

C. Documentation and its transmission

31. It had been indicated during the Special Commission of 1999 that, on the one hand, receiving agencies often encountered difficulties in obtaining complete dossiers; on the other, transmitting agencies were sometimes unsure of the documentary requirements of the receiving agency. Furthermore, shortcomings experienced in implementing the requirement, under Article 3(2) of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, that Member States inform the United Nations of their legal requirements were noted.

32. Three questions were discussed by the experts: (1) How do we achieve clarity as to the documents required for a specific application? (2) How do we reduce documentary requirements to a minimum? and (3) is it appropriate to move towards some level of uniformity in the States' requirements?

33. Other issues for discussion, were: (a) whether the new Convention should enumerate the information / documents to accompany an application; (b) whether it should maintain the principle that required information / documentation is a matter for the State addressed; (c) whether it should standardize such requirements; and (d) which procedure will best ensure that the requirements of the States are known. The challenge confronting the framers of the new instrument, would be, namely, to devise provisions which would lead to the reduction of uncertainty, costs, and delay.

34. Experts agreed that the number of documents should be limited. However, several experts distinguished requests for recognition and enforcement from applications for maintenance or modification. A few experts stressed the importance of achieving uniformity, while acknowledging the practical difficulties in doing so. In addition, some experts raised questions concerning the level of involvement by the Central Authority in documentary matters.

35. It was announced that the Permanent Bureau is preparing a report regarding the use of information technology in relation to the international recovery of child support,

and other forms of family maintenance, and the different methods of electronic communication. It was explained that, in the new instrument, references to written documents should permit electronic communication for those States that have adopted the functional equivalence approach. It was generally agreed that the use of electronic communication is desirable. Some experts stated that their Central Authority already communicates via electronic means. And, whereas some experts pointed out that their respective State has enacted laws providing for the admission of electronically-transmitted documents, others reported that their State still requires authenticated written documents. One expert described the internal system of his State, which permits a Central Authority to check the authenticity of electronic documents for use in adjudicating certain cases. He advocated the introduction of such a system on the international level.

D. Standard or model forms

36. The responses to the 2002 Questionnaire on this issue were mixed. Experts and observers agreed that standard or model forms can be useful in gathering information. They have a beneficial impact on State co-operation and mutual trust, as well as speed and cost. However, many experts advocated the limited use of such forms, cautioning that they are ill-suited for gathering certain detailed types of information, such as income. Some suggested a minimum list of simple information to be included in the forms. Other experts stressed the need for flexibility in order to allow the forms to evolve gradually over time in light of experience. Some experts supported the use of mandatory forms. One observer argued in favour of an electronic form, which could be made available on a database maintained by the Hague Conference.

E. Translation requirements

37. The discussion of translation requirements focussed on the following questions: (1) Should all the documents be translated, or only those specified? (2) Which State should carry the cost of translation? (3) Should entire decisions be translated or only their essential parts? (4) Should the translation be automatic or only upon request by the receiving State? (5) Should each State be required to declare its translation requirements?

38. A majority of experts and observers advocated the full translation of judicial decisions, with a few also favouring complete translation of all required documents. Some experts reasoned that the entire decision must be translated in order for judicial officers to review the grounds for recognition and enforcement, such as compatibility with public policy, jurisdiction, and non-existence of fraud.

39. In contrast, a substantial number of experts and observers supported partial translation of judicial decisions, limited to the essential part. In addition, one expert proposed that the translation be limited to a certified synopsis, drafted by the court of origin and providing the essential facts and information regarding maintenance. This idea was supported by some experts because of its potential for lowering costs. Finally, some experts expressed a preference for a flexible approach, permitting each State to establish its own requirements.

40. The consensus was that the cost of translation should be borne by the transmitting State. However, as a few experts pointed out, this cost may be reduced by permitting translation into a widely-used language, such as English or French. It was noted that the

issue of requirements concerning translations may have to be discussed again depending which procedures will eventually be adopted concerning recognition and enforcement. If for example, the system were to provide for review of the decision only on application by the debtor, a full translation may not then be required in the first instance. The cost of supplying a translation in case the debtor asks for a review, might fall on the debtor.

F. Speed

41. It was recognised that the provision of a fast moving and responsive system for the processing of applications must be a primary objective of the new instrument. Indeed, problems of delay were a recurring theme in the responses to the 2002 Questionnaire. The absence of time lines and procedures for making authorities mutually accountable for the progress of cases exacerbates problems of delay, the causes of which are listed in paragraph 25 of Preliminary document No 3. The point was made that many of the matters discussed with regard to the subject of administrative co-operation have implications for the speed of the process.

42. In their discussion regarding speed, the experts addressed the following possible approaches: obliging authorities to act "expeditiously"; including time lines and requiring periodic reports on progress; including a provision concerning the use of the most rapid means of communication; and, establishing methods of reviewing performance including a requirement to provide statistical information concerning the speed with which cases are handled.[8]

43. First, the experts discussed the question of whether the new instrument should oblige judicial and administrative authorities to act "expeditiously", as required by Article 11 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.* Although recognizing the importance of speedy processing of applications, some experts were of the view that such a provision is not justified in the context of maintenance obligations and, in any event, would be difficult to impose upon judicial authorities. One expert suggested that it would be more realistic to impose upon Central Authorities a requirement to act diligently. Other experts, however, emphasized that delays in recovery of maintenance could result in grave consequences for those in real need. Therefore, although the level of urgency is certainly not the same as that in cases of child abduction, an obligation to act "expeditiously" is justified.

44. Secondly, several experts were in favour of the inclusion of time lines in the new instrument. Indeed, certain States have already established such time lines. They observed that, even if those time lines are not a guarantee of action, their presence does enable some pressure to be placed on Central Authorities. However, it was also underlined that time lines should be adapted in accordance with the services to be carried out by Central Authorities. Some experts believed, on the other hand, that the establishment of time lines would not be effective or appropriate in practice. Not only would time lines prevent flexibility, but enforceability would not be possible. Many experts agreed that obliging Central Authorities to make periodic progress reports would constitute another effective means of encouraging the expeditious processing of maintenance applications.

45. Thirdly, the value of including a provision in the new instrument encouraging or mandating or authorizing the use of the most rapid means of international communication, in particular electronic means, was recognized and emphasized by the experts. While electronic transmission of documents will not be appropriate in all situations, the experts expressed the desire that this method of communication be used wherever possible.

46. Finally, many experts agreed that a method of reviewing the performance of Central Authorities, such as the provision of statistics, would have a positive impact on the level of accountability of those Authorities. It was observed that the inclusion of a general provision in the new instrument requiring the speedy processing of applications would not be sufficient. In particular, experts emphasized the importance of a Guide to Good Practice and the use of standard forms for communication, as well as the benefits of post-Convention support. Finally, it was acknowledged that the goals of speed and efficiency should be combined in the processing of applications.

G. Electronic transfer of funds

47. The issue of electronic transfer of funds in relation to the to the recovery of maintenance payments was discussed both in relation to speed and costs. A study indicating all possible avenues is in preparation and will be distributed to experts at a later stage before the next meeting of the Special Commission. In the interim, an Information Document[9] was produced during the Special Commission and distributed to the experts.

48. Several existing methods of transferring funds were examined. First, a non-resident creditor may open a bank account in the State of the debtor and access funds through an Automatic Teller Machine (ATM) or Banquomat. Second, the creditor may choose a multinational bank with branches in the States of both creditor and debtor in order to reduce the cost of transferring funds. Third, the funds may be transferred through electronic clearing house or settlement systems, such as SWIFT. SWIFT is available worldwide, but is rather expensive. A similar private system of compensation is in place between the United States of America and Canada. The latter system allows for very low-cost transfers of funds. Such a system may soon be available within the European Union under the aegis of the European Central Bank. However, the implementation of such a system would be difficult without the support of the banks concerned as they are usually responsible for the implementation of such systems.

49. It was suggested that the new instrument include a general provision similar to Article 20 of the Inter-American / Montevideo Convention of 15 July 1989 on Support Obligations. Such a provision could allow the conclusion of bilateral arrangements which may be necessary to implement such systems.

50. Several experts shared their experience on the issue of transfer of funds. One expert noted that payments taken individually were often so small that it was sometimes necessary to group them together in order to diminish the transfer costs. It was also observed that, as a result of the small amounts involved, it is difficult to interest central banks in transfers for maintenance matters.

51. The Permanent Bureau will continue its study of this matter in co-ordination with the experts and also with central banks and international organisations involved. In this respect, it would be interesting to know from the experts the total number and amounts of the transfers involved in maintenance cases in order to convince the banks to work on this issue.

H. Costs

52. The question discussed which arises in relation to costs is whether or in what circumstances the services provided by authorities should be charged for or supplied free of charge.[10]

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[8] *See*, paragraph 50 of Preliminary Document No 3.
[9] This Information Document is set out in Appendix 3 to this document.
[10] *See*, paragraphs 51 to 55 of Preliminary Document No 3. Paragraphs 53 and 54 describe existing instruments which have relevant provisions on costs in relation to Central Authorities and paragraph 55 provides a non-exhaustive list of factors which might be taken into account in devising an approach to the question of costs within a new instrument on maintenance obligations.

53. It was acknowledged that the costs engendered by administrative services are closely linked to the question of legal aid and assistance. The question of legal aid and assistance is very important and will be the subject of a separate Preliminary Document to be distributes at a later stage. Therefore, at this stage, the discussion focussed only on the issue of those costs linked to administrative services and the considerations listed in paragraph 55.

54. The experts recognized that free services in maintenance matters would be desirable. However, most Central Authorities have limited financial resources. Experts noted that the question of costs is very complex. Several experts recognised the importance of providing core services free of charge. Some experts suggested that additional services could be provided cost free on a bilateral reciprocity basis. Therefore, it was suggested that the new instrument identify core functions of Central Authorities to be supplied free of charge and determine a second category of functions for which costs could be partially or fully charged. Some experts approved the proposal that administrative services need not be supplied cost free to public authorities. Many experts were not in favour of recovering costs from the creditor. However, they did not oppose recovery of costs from the debtor. In fact, many experts were in favour of making charges against the debtor for certain services in certain cases, in particular where a payment is not voluntary. To this end, it might be possible to recover some costs from maintenance paid. It was observed that issues of reciprocity will arise if the new instrument in effect places greater burdens on certain Central Authorities, for example those that operate administrative systems for recovery of child support. It was suggested that a general principle of equivalence should apply to the burdens assumed by Contracting States.

55. Experts noted that in relation to the recovery of costs, some States make a distinction between public authorities and individuals. This distinction is particularly pertinent in regard to judicial proceedings as some States will only accept applications for legal aid from individuals.

56. The subject of legal aid and assistance was also discussed in relation to cost.[11] There is a great disparity between States in relation to their legal aid systems and there is a wish, as expressed during the Special Commission of 1999, to establish a more uniform approach within the new convention. Three important elements have to be examined in this respect. Firstly, the importance of ensuring that a potential creditor is not inhibited from proceeding through lack of means. Secondly, that there should not be an imbalance in the financial burdens imposed on States which operate an administrative system and those which operate a judicial system. Thirdly, the importance of avoiding discrimination against foreign applicants.

57. Several experts described the legal aid system existing in their States. In some States legal aid is available to all applicants. In many States the attribution of legal aid is dependent upon a means test based on the parent or the child. One expert noted that even if an applicant fails to meet a means test, legal aid can be provided based on the merits of the case. Many experts noted that in their States there is positive discrimination in favour of foreign applicants. This is sometimes justified, and should be taken into account in the formulation of any non-discrimination provision.

58. Later during the meeting of the Special Commission, the Chair of the Working Group (Drafting Committee) introduced section 9 of Working Document No 1 relating to

[11] *See* paragraph 8, the Permanent Bureau is preparing a separate document on this subject.

costs. She noted that certain functions should be provided free of charge and others might come at a cost. She also noted that a distinction might be needed in relation to costs between child support and others forms of family maintenance. Finally she raised the issue of the possibility of recovering costs from the maintenance debtor.

59. Experts reiterated that the core functions of Central Authorities should be provided free of charge. However, they underlined that it might be necessary to charge for certain additional services. A few experts were of the opinion that a distinction should be made in relation to costs between child support applications and applications for other forms of family maintenance. Other experts expressed a view that no such distinction should be made. Many experts wanted to ensure that the recovery of costs from the debtor should not be detrimental to the creditor. An expert noted that under the law of her State it would be impossible to recover costs from the debtor. An expert suggested that there should be a difference in rules for maintenance debtors and public authorities as applicants. Some experts were of the opinion that there should not be such a difference.

I. Other

60. In relation to other issues it was indicated that, in order to assist the Working Group (Drafting Committee), it would be useful for the experts to reflect upon the core functions that they would like to see ascribed to Central Authorities in the new instrument. Further consideration would need to be given to which functions should be considered mandatory and, among those functions, which should be supplied free of charge bearing in mind that that there will be different types of application and different categories of applicant.

61. One of the Rapporteurs stressed the need to look to the future in the creation of the new instrument. She also expressed the hope that those experts with the capacity to do so would strive to influence the development and improve the structure and resources of Central Authorities in their States. The use of standard forms was referred to as a simple and effective way to minimise staff costs and speed up the processing of maintenance applications.

62. With a view to the future and long-term application of the new instrument, it was mentioned that it could be useful to consider establishing an electronic case management system, such as that which is currently being piloted by the Permanent Bureau under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. Such a system could allow users to communicate and track the processing of maintenance cases effectively and at low cost. It was also mentioned that the establishment of an electronic case management system could contribute to a certain uniformity of practice and, therefore, increase confidence among Central Authorities, as well as facilitate the gathering of statistics.

63. Other experts wished to underline the importance of certain issues being examined in the elaboration of a new instrument. In particular, experts discussed the following issues: the possibility of including a mediation provision as an alternative method of dispute resolution; the distribution within States of brochures promoting the new instrument; provision for limited service requests; the drafting of a guide to good practice; and encouraging Central Authorities to facilitate the transfer of funds.

PART II - RECOGNITION AND ENFORCEMENT

A. Bases for recognition

64. Responses to the 2002 questionnaire had shown strong support for the view that the new instrument should contain an efficient system for the recognition and enforcement of foreign maintenance decisions. A system which provides for the widest

possible recognition of existing decisions is strongly in the interest of the creditor. It eliminates the costs and delays which are incurred if the creditor has to pursue a fresh application because an existing order cannot be recognised. It also helps to reduce the problems arising from multiple conflicting orders. Several experts emphasised the importance of devising a scheme of recognition and enforcement which is relatively simple and cost effective, as well as one which is capable of securing widespread support among States.

65. With regard to the possible bases for recognition, no opposition was expressed to recognition based on the residence (habitual or otherwise) of the defendant, or the voluntary submission of the defendant to the jurisdiction. Many delegates also expressed their support for the principle that a decision given by the authorities of the country where the creditor had his / her habitual residence should be recognised and enforced. Such a principle was said to be both just and simple, giving legal certainty and predictability.

66. An expert from the United States of America indicated that the Uniform Interstate Family Support Act of the United States has been enacted in all fifty states and enumerates seven circumstances in which the state may exercise jurisdiction over a non-resident defendant. It was noted that "creditor's jurisdiction" was not included as such among these bases of jurisdiction, although in practice there are very many circumstances in which a creditor may proceed in his / her own jurisdiction. The expert explained the constitutional reasons for the refusal to apply the rule of "creditor's jurisdiction". The Supreme Court has indicated that in maintenance cases, in accordance with the constitutional principle of "due process", there must be a link between the debtor and the State in which the order was made. Therefore, the American experts hoped that it would be possible to reconcile the divergent approaches in the new instrument.

67. Experts from the United States of America indicated that they would be inclined to accept an instrument which would allow them to make a declaration or reservation with respect to their inability to base their jurisdiction solely on the residence of a creditor.

68. Experts discussed the "fact-based" approach to recognition which had been explained at the 1999 Special Commission and was proposed for acceptance in the response of the United States of America to the 2002 Questionnaire. Under this approach a foreign decision is recognised if made in factual circumstances which would, *mutatis mutandis*, be a basis for jurisdiction in the court / authority addressed. Experts from the United States confirmed their wish that the new instrument should include the "fact-based" approach among the bases for recognition and enforcement. They emphasised that the main objective was the recovery of maintenance and observed that the "fact-based" approach worked successfully and had encountered no opposition in the context of the bilateral agreements in which it is utilised.

69. Several other experts suggested that the "fact-based" approach was workable and acceptable within a general scheme of recognition and enforcement. However, certain experts expressed reluctance at including the "fact-based approach" in the new instrument, in view of the fact that the "creditor's jurisdiction" approach is applied by a large majority of States. Furthermore, they noted that the Brussels regimes establish uniform rules of jurisdiction at the level of the European Community. These regimes favour the maintenance creditor by giving him or her a choice of proceeding against the debtor either in the State of the debtor's residence, or in the State where the creditor is himself or herself resident. On the other hand, in cases of modification of the original order the only possible jurisdiction is that of the creditor's residence.

70. A large number of experts indicated that it was essential that the new instrument be capable of attracting universal support. They therefore expressed the hope that a compromise would be sought and supported the proposal of the Deputy Secretary General in paragraph 87 of Preliminary Document No 3 as a good starting point for negotiations:

1 A maintenance decision made by a court / authority in one Contracting State (the State of origin) shall be recognised and enforced in all other Contracting States if –

a *the debtor was (habitually) resident in the State of origin at the time proceedings were instituted;*

b *the debtor submitted to the jurisdiction;*

c *the facts in the case would,* mutatis mutandis, *have supported jurisdiction under the rules of the requested State; or*

d *the creditor was (habitually) resident in the State of origin at the time proceedings were instituted.*

2 *A Contracting State whose own authorities or courts are not permitted to make a maintenance decision based solely on the residence of the creditor within the jurisdiction may make a reservation in respect of paragraph 1*(d)*.*

71. This proposal would allow a constructive compromise to be reached without the need for States to renounce their existing systems of recognition and enforcement. Furthermore, effective administrative co-operation would facilitate the application of different approaches. This was the basis on which the Working Group (Drafting Committee) was at the present to proceed.

72. One expert suggested the addition of other bases for recognition to the list proposed in paragraph 87, in order to recognise, for example, agreed jurisdiction and jurisdiction for matters ancillary to proceedings concerning the status of the person for which the State has jurisdiction.

73. One observer drew the attention of the experts to the Code of Civil Procedure of Uruguay which provides that, in order to recognise a foreign judgment, the Uruguayan authority must verify the jurisdiction of the decision-maker under the applicable law of the State in which the decision was made.

74. The possibility was raised of recognising a maintenance decision where made by an authority agreed upon by the parents. The issue of nationality was also addressed, but several experts expressed the view that habitual residence provided a more realistic and useful basis for recognition than nationality.

B. Procedures for recognition and enforcement

75. With regard to procedures for recognition and enforcement experts generally recognised the need to establish fair, efficient and speedy procedures, and ones capable of being applied within both administrative and judicial systems. Additionally, they stated the importance of not reviewing the merits of the decision at the recognition stage.

76. Several experts indicated their willingness to consider a system which places the onus on the debtor of raising objections to recognition, *i.e.* a system in which recognition occurs unless the debtor raises one among a limited list of defences or grounds for refusal within a specified period of time. One expert noted the importance, in this context, of interpreting the public policy "defence" restrictively. On the other hand, several experts expressed the view that it is premature at this stage to consider abolition of "exequatur".

C. Enforcement under national law

77. With regard to the enforcement measures operating in different States, it was recognised that there exist at present wide divergences, and the observation was made that wide discrepancies in enforcement practice between different States can lead to a

loss of mutual confidence.

78. Several experts described the enforcement methods available in their respective States. There was general acceptance that the mechanisms available for enforcing maintenance decisions under the new instrument would have to be determined by the national law of the enforcing State. Nevertheless, several experts accepted the need for an explicit principle of non-discrimination. There was also support for procedures that would ensure transparency. It would be important, for example, for States to supply information relating to their enforcement procedures at the time of acceding to or ratifying the new instrument. This might, for example, include general information concerning "protected earning rates" which operate in many countries to ensure that the debtor retains a minimum net income. While the need for the provision of general information on enforcement was generally accepted, one expert suggested that it would be inappropriate to exclude a State from the new Convention system simply because that State was perceived to have inadequate enforcement mechanisms.

D. The Working Group's (Drafting Committee) Draft

79. The headings proposed by the Working Group (Drafting Committee) on recognition and enforcement are contained in Working Document No 2 (see Annexes). Upon presentation of these headings by the Chair of the Working Group (Drafting Committee), a number of specific points were raised by experts.

80. Many experts opposed the possibility of reservation on item 1 c), which requires recognition of a foreign order if the court addressed could have exercised jurisdiction under domestic law on the same facts. Several experts clarified that 1 c) includes cases in which the court could have had jurisdiction, rather than would have exercised jurisdiction.

81. One expert expressed concern about item 2, which permits States to make a reservation where jurisdiction was based on the creditor's residence alone. Moreover, to increase foreseeability, he suggested either a complete list of criteria for recognition or a declaration system whereby States indicate the circumstances in which they will and will not recognize an order. Another expert questioned provision 2 as it relates to States with ambiguous internal law as to creditor-based jurisdiction.

82. A few experts supported the inclusion of nationality as a further basis for recognition in the new Convention. It was noted that, under 1 c), a State which itself accepts nationality jurisdiction will be obliged to recognise foreign decisions given on a nationality basis. As to the child's habitual residence, some experts asserted that it was redundant given the inclusion of creditor's residence. Another expert cautioned that the child is not the creditor in some States. One expert advocated including for recognition purposes the cases of party agreement and maintenance orders issued by a State with jurisdiction on a matter of personal status, referring to the situation in the European Union under the Brussels regimes was referred to.

83. Certain experts queried the definition of "fraud", whether the term was limited to procedure. One expert advocated including a provision for verifying jurisdiction in the original State.

84. Certain experts suggested revising model (a) to make clear that, although the debtor has the opportunity, he is not "obliged" to object within the specified period. Several experts supported a provision specifying that the presence of the child or custodial parent is not required during proceedings.

85. Some experts requested clarification on the operation of the two models in Working Document No 2 and it was pointed out that the two models differ in that, under model (a), the defendant bears responsibility for raising certain grounds for refusing recognition

and enforcement, whereas under model (b), the State requested has the power independently to review whether bases for refusal exist.

PART III - JURISDICTION TO MAKE AND MODIFY MAINTENANCE DECISIONS

A. General questions and background

86. The discussion in plenary on the subject of direct rules of jurisdiction focused on the questions of whether the inclusion of uniform rules in the new instrument was desirable, whether uniform rules would bring real and practical benefits to the international system, and whether it was realistic to expect that negotiations on the subject would produce agreement or consensus. There was less discussion at this stage of what might be the precise content of any uniform rules of jurisdiction within the new instrument. The discussion took place in the context of the description in Preliminary Document No 3, Chapter IV, of existing approaches to jurisdiction within certain national and regional systems. That description had identified two important areas of divergence in relation to current approaches to jurisdiction. First, in the case of jurisdiction to make original maintenance orders or decisions, there was the divergence between on the one hand those systems which accepted creditor's residence / domicile without more as a basis for exercising jurisdiction (typified by the Brussels / Lugano and Montevideo regimes), and on the other hand systems which insist upon some minimum nexus between the court or authority exercising jurisdiction and the debtor (typified by the system operating within the USA). Second, in the case of jurisdiction to modify an existing maintenance order or decision, there was the divergence between systems which adopt the general concept of "continuing jurisdiction" in the State where the original order or decision was made (see USA model), and those which on the other hand accept that jurisdiction to modify an existing order may shift to the courts or authorities of another State, in particular one in which the creditor has established a new residence or domicile (see the Brussels / Lugano model as an example).

B. Options considered

87. During the debate on the subject, experts considered a number of options, including the following:

(a) That the attempt should be made to identify a common core of jurisdictional grounds on which there might be widespread agreement, beginning for example with defendant's forum and submission to the jurisdiction, and then adding a creditor's forum but subject to limitations necessary to satisfy the "due process" concerns of certain States.

(b) That a common core of rules might be identified, including creditor's forum, on the basis that this principle is widely accepted, but this might be combined with some kind of opt-out provision for States unable to accept a pure creditor's forum.

(c) That the search for uniform principles should be set aside, and concentration should be placed on developing an effective system of co-operation combined with indirect rules of jurisdiction for the purposes of recognition and enforcement of maintenance decisions or orders.

88. The following is a distillation of the arguments expressed during the Special Commission meeting for and against including in the new instrument uniform direct rules of jurisdiction, whether in respect of the exercise of original jurisdiction or in respect of modification jurisdiction.

C. In favour of including direct rules of jurisdiction

(a) A uniform agreed set of jurisdictional rules would promote the goals of clarity, foreseeability and simplicity.

(b) Agreed jurisdictional standards will foster mutual confidence and provide a firm framework on which to build an effective system of administrative co-operation. Administrative authorities will find their work more difficult if they have to deal with foreign systems operating varying jurisdictional standards.

(c) Uniform direct rules of jurisdiction provide a firm foundation for a system of recognition and enforcement of maintenance decisions, and make it easier to operate simple and rapid procedures for recognition and enforcement.

(d) Uniform rules help to prevent duplication of litigation and the generation of multiple conflicting decisions. While this may not be a serious problem in relation to the exercise of original jurisdiction (especially where child support is concerned), it is a real problem in the context of jurisdiction to modify an existing order. It is difficult to devise rules which regulate modification jurisdiction without at the same time considering the grounds for exercising original jurisdiction.

(e) There is likely to be broad agreement in respect of certain heads of jurisdiction, such as defendant's residence (however defined), or submission of the defendant to the jurisdiction. Also, the idea that the residence (however defined) of the creditor should found jurisdiction is very widely accepted.

(f) Where there is a situation in which it appears that many or most States would be able to agree on common rules of direct jurisdiction, the opportunity to reflect this in the new instrument should not be lost. The position of a minority of States that cannot join the consensus could be accommodated by an opt-out clause of some sort.

(g) If, as appears to be the case, the differences are small in terms of practice between those systems which do and those which do not without qualification accept a creditor's jurisdiction, it ought to be possible to formulate jurisdictional principles which capture the large area of common ground.

(h) Uniform rules on jurisdiction in Hague Conventions provide a valuable model for reforms in national systems.

D. Against the inclusion of rules of direct jurisdiction

(a) The absence at the international level of agreed jurisdictional standards has not in practice been a serious cause of concern, and is not a source of the major shortcomings currently experienced within the international system. For many States, harmonisation of direct rules of jurisdiction excites little interest.

(b) Experience has shown that, where different approaches to jurisdiction operate in different systems, where both are supported by principle, and where both seem to work well in practice and give satisfaction within their respective contexts, it may be extremely difficult to reach consensus on a uniform approach.

(c) The perceived advantage of a uniform system are not such as to justify the energy and time that would need to be devoted to the search for consensus, which may in any case be futile and may prolong negotiations unnecessarily. There is a danger that attention will be distracted away from the real practical problems, in particular putting in place an efficient and responsive system of administrative co-operation.

(d) A system of recognition and enforcement can operate successfully on the basis of indirect rules of jurisdiction, without the need to agree uniform direct rules. See for example the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*.

(e) The problems of multiple decisions arising from the exercise of modification jurisdiction may be ameliorated by means other than the elaboration of direct rules of jurisdiction, including for example by provisions relating to recognition and enforcement.

(f) The establishment of rules of direct jurisdiction at the international level which will inevitably differ in some respects from the rules adopted in regional instruments, raises the complex problem of "disconnection", *i.e.* how to define the borderline between cases coming within the scope of the international and regional instruments respectively.

(g) Any disadvantages, in particular for the maintenance creditor, which may arise from the absence of uniform standards of jurisdiction, may be ameliorated by the introduction of an effective and efficient system of co-operation which maximizes the supports offered to the creditor regardless of the country in which the maintenance application is made.

89. The balance of opinion among experts favoured leaving aside the general issue of uniform direct rules of jurisdiction. While many experts acknowledged the theoretical advantages of uniform rules, the preponderant view was that any practical benefits to be derived from uniform rules were far outweighed by the cost of embarking on a long, complex and possibly futile attempt to reach a consensus. The Chairman concluded that while the debate on original jurisdiction was not closed, further discussion of the subject should be set aside, for the time being, to be resumed at a later date.

E. Modification jurisdiction

90. In relation specifically to modification jurisdiction, experts recognised a number of current problems (see Prel. Doc. No 3, paragraphs 105 and 106). There is not only the danger of conflicting orders / decisions, there is also a risk that in certain circumstances there will arise a lacuna in which no court or authority has jurisdiction to deal with a modification application. There is also the continuing problem that in certain countries courts modify a maintenance decision or order in the context of recognition and enforcement proceedings.

91. Some experts were of the view that, for the case in which the debtor moves his or her residence and then seeks modification, a consensus solution might be arrived at. (See *e.g.* Prel. Doc. No 3 at paragraph 125). However, where it is the creditor who moves his or her residence, a solution is more difficult to find. Several experts raised the issue of continuing jurisdiction, describing their States internal systems. One expert expressed the possibility of her State amending its domestic law to accommodate this principle.

92. There was reference also to the connection between modification jurisdiction and administrative cooperation. In those cases where creditors and debtors are either obliged or decide to seek modification in the State where the other party is resident, appropriate assistance should be provided and cases should be processed with due speed.

93. Several experts expressed concern that the new instrument must be fair to creditors and debtors alike. One expert emphasised the need to take into account both upward and downward modifications. Another expert described the methods available in his State for assisting creditors and debtors in their applications for modification. In closing the debate on this subject, the Chairman suggested that the new instrument

might contain some rules regarding modification jurisdiction, even if it could not solve all problems. However, these questions must be resolved at a later time.

F. Conclusion

94. On the last day of the Special Commission, experts returned to the subject of jurisdiction, when a proposal was made for the establishment of an informal working group for the exchange of views on direct jurisdiction. The proposal was supported by several experts, though others were concerned that the group should not encroach on the work of the Drafting Committee or the Working Group on Applicable Law, and stressed the lack of consensus regarding direct jurisdiction in the new Convention. The Chairman, on the basis that the Working Group would be informal, invited interested delegations to contact the German delegation in order that those with an interest might proceed to an exchange of views.

PART IV – APPLICABLE LAW

A. General questions and background

95. The Special Commission discussed whether the new instrument should or should not contain provisions concerning the law to be applied by authorities or courts when making maintenance decisions, and if so, what these rules should be. The discussion took place against the current background (described in Prel. Doc. No 3, Chapter V) of States adopting a variety of approaches to applicable law questions. There already exist two multi-lateral instruments, the *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*, which contain creditor-friendly applicable law principles designed to maximise the chances of the creditor obtaining maintenance, which have still a relatively small circle of States Parties, mostly from within the civil law tradition. At the regional level, the Brussels / Lugano regime does not include applicable law principles, but the Montevideo Convention does contain a creditor-friendly rule requiring authorities to apply the law of the habitual residence of the creditor or the debtor according to which is more favourable to the creditor. Apart from this, many common law systems have a long tradition of applying forum law which, particularly in respect of the quantification of maintenance, is seen as a matter of practicality. There are also a number of States in which applicable law rules exist for specific subject matters, such as the question of eligibility to obtain maintenance. The law applicable to the determination of parentage in the context of child support proceedings is addressed separately.[12]

B. Options considered

96. Among the options considered by experts were the following:

(a) To include within the new instrument a general applicable law regime.

(b) To include within the new instrument a general applicable law regime, but on an optional basis for Contracting States, perhaps in the form of an optional protocol, or a declaration system.

(c) To include within the new instrument applicable law rules dealing with certain specific subject matters.

(d) To have no provisions in the new instrument concerning applicable law.

C. The debate

97. The discussion among experts revealed a wide spectrum of views, reflecting to

[12] *See* above, paragraph 124.

some extent different traditions with regard to applicable law issues. Experts from civil

law jurisdictions for the most part favoured the inclusion in the instrument (in some form) of an applicable law regime for reasons of comity, justice, clarity and consistency, as well as because the new instrument should be comprehensive in nature. On the other hand, many experts representing common law jurisdictions, including in particular those with experience of operating low cost administrative systems of maintenance assessment, tended to favour the application of forum law, especially to quantification of maintenance, and viewed the alternative as impractical.

98. Most experts who favoured the inclusion of a general applicable law regime felt that the Hague Convention of 1973 should provide the starting point. It was important to build on what already exists, and the 1973 Convention has given broad satisfaction among its Contracting States. Its applicable law principles are applied successfully in a large number of cases. The basic principle of the Convention, that the internal law of the habitual residence of the maintenance creditor should govern the maintenance obligation, was viewed as just and appropriate. At the same time, the need to review certain aspects of the 1973 Convention was recognised. Article 8, which provides that the law applicable to a divorce should also be applicable to maintenance obligations (and their revision) between the divorced spouses had been subject to different interpretations and was one particular source of concern.

99. The argument was put that the present negotiations present a rare opportunity to review the 1973 Convention and that this opportunity should not be lost. It was also felt that this should be a process involving all States, not just those which are already Parties to the 1973 or the 1956 Convention.

100. A number of experts also pointed out that, in those countries where there is a tradition of applying foreign law in maintenance cases, this is done without undue difficulty, cost or delays. In many civil law systems the judge has a duty to apply foreign law *ex officio* and has the means available to find out what that law consists of.

101. On the other hand, several experts, principally representing common law jurisdictions, emphasised the practical difficulties and the cost implications of applying foreign law in maintenance cases.

102. There are fundamental differences in the approach to proof of foreign law between civil and common law systems, which are deeply rooted in tradition. In common law systems, proof of foreign law is generally treated as an issue of fact. The burden of proving foreign law generally rests on the proponent. Expert evidence is usually needed, and an opportunity to counter that evidence must be given. Even then, there are problems of reliability in applying foreign law. Mistakes are very easily made.

103. It was further agreed that the cost and time involved in proving foreign law are generally not justified on a cost / benefit analysis, given that in many cases relatively small sums of maintenance may be involved. In those States which have, in order to increase efficiency, introduced administrative systems of assessment, a requirement to apply foreign law may drive maintenance cases back into the courts and this may lead to delays and expense, a result which would not be in the interests of creditors, for whose benefit the new systems have been introduced. Moreover, with the development in several countries of complex formula-based systems of assessment, the idea that these should be applied in other countries by judges who have no familiarity with them, or administrative officials who have no legal training, is unrealistic.

104. Some experts discussed the possibility of a compromise approach. In Canada, for example, where both civil and common law systems are represented in the provinces, applicable law rules designed to favour the creditor operate in relation to the question of eligibility for maintenance, while forum law applies to the matter of assessment or quantification of maintenance. Additionally, some experts suggested that, in reality despite apparent theoretical differences the results of the application of the civil law and common law approaches are often the same. For example, the application of the law of

the creditor's habitual residence, where (as is frequently the case) the creditor brings the application before the authorities where he or she is resident, will in fact result in the application of forum law.

105. A number of experts referred to the importance of finding satisfactory applicable law principles in relation to specific subject matters, where their absence was a cause of uncertainty or even injustice. Among the matters referred to were the questions of eligibility to benefit from a maintenance decision, the question of representation *en justice* of a child, and limitation periods relating to the enforcement of maintenance claims. At the same time, one expert warned of the complications which arise if different applicable law principles apply to different aspects of the same claim.

106. There was a brief exchange of views among experts on the role that the principle of "party autonomy" should play in any revision of applicable law principles. It was recognised that this raised a number of difficult questions, such as the limits on party autonomy in designating the applicable law especially in child support cases, as well as the question of the law to govern the formal and the essential validity of any choice of law made by the parties. The question also arose of the law which should govern maintenance obligations arising out of an agreement which does not contain an express choice of law clause. Some of these issues had been discussed in more detail in previous Special Commissions.[13]

107. The Special Commission, on the proposal of Chairman, decided to establish a working group on applicable law issues comprising experts drawn both from States Parties to the 1956 and 1973 Hague Conventions and other States. The agreed mandate of the Working Group is as follows:

(1) To examine whether and to what extent the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* should be revised.

(2) To explore possible compromises between the different approaches to applicable law.

(3) To assess the possibility of a compromise on certain issues of applicable law, such as limitation periods, in relation to enforcement, party autonomy as to spousal support, eligibility for maintenance, and representation *en justice* of the child.

108. The function of the Working Group is not to provide precise solutions, but rather to make recommendations to help enable the Special Commission, at its next meeting, to decide how to proceed.

109. The following experts were unanimously elected to the Working Group on Applicable Law, which will be assisted in its work by the Permanent Bureau: Mr Bonomi (Chair) (Switzerland), Ms Bird (Australia), Miss Correia (Portugal), Ms Dubrocard (France), Mr Hayakawa (Japan), Mrs Kristensen (Norway), Mr McClean (Observer) (Commonwealth Secretariat), Ms Morrow (Canada), Mr Spector (United States of America) and Mr Wagner (Germany).

PART V - PARENTAGE AND INTERNATIONAL CHILD SUPPORT

110. The issue of parentage, the study of which is dealt in Preliminary Document No 4 entitled "Parentage and International Child Support Responses to the 2002 Questionnaire and an Analysis of the Issues", was examined on three different occasions during the Special Commission.It was first considered during the discussions on administrative co-operation, then, in relation to the question of recognition and enforcement and, finally, with regard to the matter of applicable law.

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[13] *See* Preliminary Document No 3, paragraph 141 and "Note on the desirability of revising the Hague Conventions on Maintenance Obligations" drawn up by William Duncan, Preliminary Document No 2 of January 1999 for the attention of the Special Commission of April 1999, paragraphs 33-41.

111. During these discussions reference was made to paragraph 38 of the Explanatory Report of the 1973 Convention written by Mr Verwilghen, which states that "the great majority of delegates [attending the Diplomatic Conference] felt that the recognition and enforcement of the maintenance aspects of the foreign decision should, in principle, be independent of the effectiveness, in the State addressed, of that part of the said decision which concerns the status of persons or any other matter". He confirmed that recognition and enforcement can be refused only if the portion of the decision relating to maintenance is manifestly incompatible with public policy of the requested State.

A. The provision of co-operation mechanisms in the establishment of parentage

112. The background to the discussion of co-operation mechanisms for the establishment of parentage is, among other things, the divergence in interpretation and practice under Article 6 of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, according to which the role of the receiving authority is to take, on behalf of the claimant, "all appropriate steps for the recovery of maintenance, including the settlement of the claim and, where necessary, the institution and prosecution of an action for maintenance and the execution of any order or other judicial act for the payment of maintenance". There are different views as to whether the obligation stated in Article 6 also includes actions for the establishment of paternity. Certainly, co-operation in relation to procedures for the determination of parentage is not an explicit requirement under the New York Convention and is often in practice unsatisfactory. Furthermore, some recent bilateral arrangements have put a strong emphasis on the establishment of parentage. It is viewed as essential to an effective system of international enforcement.

113. In the course of the consideration of possible co-operation mechanisms for the establishment of parentage, a few experts questioned the scope and the binding effect of parentage determinations in other States. Some experts reported that, in their States, foreign maintenance decisions can be recognised independent of the foreign determination of paternity.

114. During the discussion, the following hypothetical was presented to the experts in order to stimulate the debate: "mother and child live in the United States ("State A"). The alleged father lives in either Slovakia, Germany, or France ("State B"). The mother and father are not married, and paternity has not yet been recognised. Hypothetically, both State A and State B are parties to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. Based on the sexual relationship that took place in the United States between the mother and father, the creditor is able to file an action for maintenance in State A. Before rendering a decision, the court of State A asks State B to obtain voluntary recognition by the father or, failing that, to assist in gathering evidence of parentage. Any decision rendered by the court of State A will subsequently have to be enforced by State Abbot States A and B are hypothetically party to the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. It is recalled that the effect of that Convention is limited to the parts of the decision which concern maintenance obligations (as provided under Article 3)".

115. Some experts advocated a system of co-operation facilitated by a strong Central Authority. Some indicated that they would favour the inclusion, in the Convention, of the cooperation functions listed in Preliminary Document No 4. Co-operation provisions with regard to the establishment of parentage could include, at a minimum, the following functions: to discover the whereabouts of the debtor; and, to provide assistance in establishing the parentage of a child for the purpose of maintenance proceedings in Contracting States. More detailed functions could include assistance to obtain: the relevant documents in relation to the establishment of parentage by presumption; a voluntary acknowledgement of parentage from the debtor; the relevant oral and

documentary evidence required for the establishment of parentage by a judicial authority; and, a voluntary DNA test of the presumed parent.

116. However, with regard to the last function, certain experts explained that their States cannot accommodate requests for genetic testing if the alleged parent refuses. Other experts expressed an overall reticence for an administrative cooperation scheme because it is not the role of their States to facilitate what they consider to be private matters, while noting that their respective States execute foreign letters of request for evidence, under instruments such as the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, or even if not obliged to do so under an international instrument. In this respect, experts were reminded that the taking of evidence by letters of request is provided for in the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*.

117. The experts were asked whether the States would more willing to co-operate and provide evidence if they were assured that doing so would not oblige them later to recognise parentage and that they need only recognise and enforce the maintenance aspect of the decision. While certain experts noted that exclusive jurisdiction prevents their State from recognising and enforcing foreign judicial orders in relation to parentage determination, one indicated that the State would provide assistance, nevertheless.

118. It was pointed out to experts that certain issues under discussion have been addressed in Article 12 of the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, which provides that a State cannot refuse to execute a letter of request solely on the grounds that it has exclusive jurisdiction over the subject matter of the action or that its internal law would not admit a right of action on the basis of evidence obtained. In this respect, one expert raised questions of interpretation with respect to Article 3 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. Several experts reported that their respective States do not look at issues of parentage when recognising and enforcing foreign maintenance orders. While parentage is not a ground for non-recognition as such, a number of experts indicated that a parentage determination could in certain circumstances raise an issue of public policy in the requested State.

B. The recognition and enforcement of foreign decisions with regard to child support in relation to the establishment of parentage issues

119. The discussion on recognition and enforcement started where the discussion of cooperation ended, that is with the consideration of Article 3 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. When asked whether the new Convention should apply only to recognition and enforcement of the body of a decision which relates to the maintenance issue, in accordance with Article 3, many experts were in favour of the inclusion in the new instrument of a provision similar to Article 3, even though the experts were in general agreement that issues of maintenance and parentage are closely linked. However certain experts expressed reluctance at the idea of considering these two elements separately. Nonetheless, some experts observed that a new Article 3 should be more explicit, in order to prevent divergent interpretations.

120. On this point, paragraph 38 of the Explanatory Report of the 1973 Convention written by Mr Verwilghen, states that: "The authority charged with taking the necessary steps relating to enforcement (*exequatur*) need not, therefore, systematically refuse to apply the Convention for the reason that the maintenance obligation is subordinate to, or

results from a family or 'quasi-family' relationship which is settled, in accordance with the law of the State of origin, in the judgment which is submitted for enforcement. Certainly the able litigant will invoke the plea of public policy (*ordre public*) supported by the same reasoning in order to bring about a refusal of recognition and enforceability. But … the authority addressed can only accept this plea if the part of the decision relating to maintenance is manifestly incompatible with the public policy of the State to which that authority belongs." One proposal was to state explicitly in a new version of Article 3 that the new instrument shall not apply to issues relating to the recognition and enforcement of parentage decisions.

121. Many experts supported the inclusion of a provision similar to the proposal outlined in paragraph 49 of Preliminary Document No 4 stating that the recognition of a child support decision cannot be refused on the basis that the decision entailed a finding of paternity or that a law or a method was applied to the determination of parentage different from that applied in the requested State. It was the view of experts that such a provision would resolve some of the problems encountered by States in the international recovery of maintenance. The effectiveness of the new instrument might be compromised if the recognition and enforcement of the part of the decision relating to maintenance was subject to the recognition by the requested State of the part of the decision concerning parentage.

122. Some experts raised the question of the exception of public policy as a ground of refusal for the recognition and enforcement of maintenance decisions. Different opinions were expressed regarding whether or not, and to what extent, the exception of public policy should be taken into account under the new instrument.

123. The general observation was made that it would seem to be inconsistent to argue on the one hand that the creditor should as a matter of justice be allowed to institute maintenance proceedings in her State of residence, while on the other hand not providing her with the assistance necessary to establish paternity in the State where the defendant is resident.

C. The law applicable to the determination of parentage in the context of child support proceedings

124. The experts were reminded that the issue of the law applicable to the determination of parentage in the context of child support proceedings might arise in two ways, namely the law applicable as to the determination of parentage as a main issue, and as only an incidental issue. Several experts were of the opinion that it would not be appropriate for the new convention to lay down a general applicable law rule for establishing parentage *erga omnes*. Secondly, as to the issue of law applicable to parentage determination as an incidental question, it was indicated that neither the *Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children* nor the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* contain specific provisions on this matter. This issue was discussed during the previous two Special Commissions, in particular the 1995 Special Commission, and several experts endorsed the unanimous conclusion of that Special Commission that the law applicable to the maintenance obligation should also apply to incidental parentage issues. When asked whether their national case law had changed since the Special Commission of 1999, several experts replied that their jurisprudence had remained unchanged. A good number of experts expressed the view that the approach based on the law applicable to parentage determination as an incidental question is the appropriate approach.

D. Outcome and summary of the discussions in relation to parentage issues

125. On the issue of recognition and enforcement, it seems that a consensus is developing in favour of the inclusion in the new instrument of a provision similar to Article 3 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and that this new Article

3 should be more explicit along with the lines set out by Mr Verwilghen in paragraph 38 of the Explanatory Report of the 1973 Convention.

126. On the issue of cooperation for the establishment of parentage, it appears that a majority of experts would favour the availability of such mechanism. However, two different possibilities emerged. First, some experts would favour the use of a judicial cooperation system such as the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. On the other hand, some experts would favour an administrative co-operation system. At the next Special Commission, experts may want to explore how far they could move forward an administrative co-operation system while using as a minimum a judicial co-operation system.

127. With regard to future work in relation to applicable law, some experts suggested that the Working Group on applicable law should consider the issue of parentage determination, but only as an incidental question to maintenance. This issue has been added to the mandate of the Working Group on applicable law.

PART VI - BUILDING CO-OPERATION AND SECURING EFFECTIVE AND CONSISTENT IMPLEMENTATION

128. The discussion on the building of co-operation and the securing of effective and consistent implementation concentrated in the plenary on Chapter VI of Preliminary Document No 3 of April 2003. A checklist of questions was raised for the delegates' consideration, such as the following:

?? what should be the "point of entry requirements" and which of these should be set out in the new instrument itself?

?? what provisions should be made to support States in achieving effective implementation of the new Convention?

?? how should monitoring be conducted?

?? what measures should be taken to promote consistent interpretation and practice under the new instrument?

?? how should review of the operation of the Convention be conducted?

?? on whom should the new instrument place the responsibility for handling specific complaints concerning the operation of the Convention and for addressing systemic problems?

?? should the Convention contain provisions permitting bilateralisation, and if so should this apply to all States or only in relation to States who have not been involved in the negotiations leading to the adoption of the Convention?

?? to what extent should the Permanent Bureau be given responsibilities under the above heads and how will its involvement be financed? Should the role of the Permanent Bureau in providing post-Convention services be written into the instrument itself?

A. General considerations

129. The discussion took place in order to examine what could be done to ensure the effective and consistent implementation of the instrument, a reasonably consistent practice and interpretation of the Convention in Contracting States, the addressing and resolution of the operational problems and blockages in a timely fashion, and the development and maintenance of mutual confidence among the Contracting States, which is necessary for effective cooperation. It was recognised that the development of post-Convention services would be necessary to ensure the effective and consistent implementation of the new instrument. The responses to the 2002 Questionnaire

showed that States feel that provisions concerning compliance should be included in the new instrument and responses to question 33 (h) of the Questionnaire showed that this issue constitutes a major concern for many States. Moreover, several experts observed that experience with other

conventions has revealed that the establishment of an effective implementation system will be essential for the new instrument.

B. Point of entry requirements

130. Many experts were in favour of requiring States, at the time of accession to or ratification of the new instrument, to provide certain basic information needed by other Contracting States to enable co-operation to take place. It was observed that it might be useful to identify what information, in addition to contact information concerning authorities, is considered to be essential for the effective implementation of the new instrument. In this regard, certain experts proposed the use of model forms and the drafting of short and simple questionnaires.

C. Effective implementation

131. Several experts indicated that it would be useful to provide support to States and Central Authorities for the effective implementation of the new instrument, in particular through the development of a Guide to Good Practice, the provision of advice by the Permanent Bureau, the holding of Special Commissions to review the implementation and the practical operation of the Convention, and assistance in the training of persons and authorities.

D. Monitoring

132. Many experts observed the importance of monitoring the operation of the new instrument, in particular through the collection of information from Central Authorities. However, some experts emphasised the dangers of imposing upon Central Authorities heavy reporting obligations, difficult to honour for reasons of lack of human and financial resources. Other experts suggested that States start to consider reporting systems even before the new instrument is drafted.

E. Promoting consistent interpretation and good practice

133. The experts discussed ways to promote consistent interpretation and good practice under the new instrument. In particular, an expert referred to the suggestion put forward at an earlier session to consider establishing an electronic case management system, such as that which is currently being piloted under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. However, it was observed that this pilot project was still in the testing phase. Nevertheless, preliminary results indicate that such a system could have real potential for Central Authorities in the context of a new instrument on maintenance obligations.

F. Review

134. Some experts expressed their support for the holding at regular intervals of Special Commissions to carry out general reviews of the operation of the new instrument.

G. Bilateralisation

135. Many experts were of the view that it was premature to discuss questions relating to bilateralisation at this stage of negotiations. Furthermore, experts were divided on the appropriateness of including a provision on bilateralisation in the new instrument.

H. The Role of the Permanent Bureau

136. One expert suggested that perhaps the Permanent Bureau could play a role in the resolution of problems arising between Central Authorities. It was explained that the Permanent Bureau is given no authority under existing Conventions to intervene in particular disputes. The Central Authorities themselves have the primary responsibility to remove obstacles to the proper functioning of existing Conventions. However, the Permanent Bureau does its good offices to address difficulties that hamper effective co-operation between authorities, for example by organising and facilitating meetings to discuss particular operational difficulties.

PART VII - SCOPE

137. The discussion on the scope in the plenary focussed on the issues identified in Chapter VII of Preliminary Document No 3.

A. Scope *ratione personae*

138. The discussion first concentrated on the scope *ratione personae*. The existing conventions on maintenance, such as the Hague Conventions of 1958 and 1973 on the recognition and enforcement of maintenance decisions, differ in scope *ratione personae.* On the one hand, the 1958 Convention is confined to obligations in respect of children; on the other hand, the 1973 Convention applies to any maintenance obligations arising from a family relationship, parentage, marriage or affinity. However, the scope of the 1973 Convention may be limited by reservations.

139. It was noted during the discussion that even though it is recognized in most systems that children and spouses or ex-spouses have a right to maintenance, there are still many differences among the systems concerning other family members' rights to maintenance. Examples included the position of step children, foster children and adopted children, unmarried and registered partners, and ascendant relatives. The question of whether a general definition of the scope *ratione personae* should be included in the new instrument was then raised. On this issue, many experts expressed their appreciation of the flexible and broad scope of the 1973 Conventions, a point that would be particularly important in a new instrument in the light of the rapid developments in the area of family law. It was also noted that courts are often able to recognise and enforced decisions which they would not necessarily be able to make themselves, and that the experience with the broad scope of the 1973 Convention had been satisfactory. Some experts suggested that the scope might vary according to the type of maintenance creditor. For example, obligations undertaken by States under the new instrument may be broader in relation to children and narrower in relation to other members of the family. However, an expert highlighted that most potential creditors are in financial need and therefore the new instrument should not necessarily favour children. Nevertheless, the relationship between the scope of the new convention and the willingness of States to commit to providing a wide range of services was acknowledged.

140. The question of whether the new instrument should provide specific definitions was also raised. On this issue, experts stated that specific definitions, such as providing an age limit to define a child, would not be beneficial since they could cause difficulties in the application of the new instrument. The possibility of including an applicable law rule governing certain elements of scope, such as the definition of a creditor or debtor, was also raised.

141. Additional discussions on the scope took place at a later stage of the Plenary Session in the light of the introduction of Working Document No 1. The Chairman of the Working Group (Drafting Committee) then asked the experts if the scope *ratione personae* of the new instrument should be broad or narrow in relation to the identity of maintenance creditors. Many experts supported broad scope for the new instrument

since

limiting scope to certain maintenance creditors, such as children, would constitute a step backwards from existing Conventions. Also, these experts were of the opinion that a wording similar to that contained in Article 1 of the *1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations* would constitute a satisfactory starting point.

B. Possibility of expanding or narrowing the scope of the convention

142. The possibility of allowing the States to extend or restrict the scope, perhaps on a reciprocal basis, was then discussed. Some experts opposed the idea of including within the new instrument reservations or declarations with regard to scope, as these may lead to great variations complicating the application of the Convention. However, other experts considered that at this early stage of discussions the possibility of including reservations and declarations should not be excluded. Some experts believed that it was necessary to examine the possibility of States making a reservation or declaration under the new instrument in order to take account of national public policy. Experts recognised the importance of balancing a broad scope with the need to ensure that the Convention can be widely accepted.

C. The meaning of "maintenance"

143. The discussion then concentrated on the meaning of "maintenance". The responses to question 1 of the 2002 Questionnaire illustrate the variety of forms which maintenance decisions may take under national laws. It was mentioned that maintenance can be payable under many forms such as periodical payments, lump sum payments, property transfers and payments in kind. Several experts felt that the inclusion of a definition of "maintenance" in the new Convention was unnecessary. Several experts suggested that even if it was unnecessary to define "maintenance" in the convention, some guidelines on this matter should be given in the Explanatory Report.

D. Other questions concerning the scope

144. Four other questions concerning the scope were then discussed. First, delegates were asked whether the new instrument should contain provisions concerning public bodies claiming reimbursement of benefits paid to a maintenance creditor. Experts were in favour of including public bodies in the new instrument, as in the *1973 Hague Convention on Recognition and Enforcement of Decisions relating to Maintenance Obligations*. In relation to the question of whether the new instrument should deal with the recovery of arrears, the experts were of the opinion that rules on this matter should be included as long as they are clearly defined. Some experts also noted the difference in domestic laws relating to the ability to establish maintenance obligations retroactively. In relation to the inclusion of public bodies and the recovery of arrears, experts highlighted the importance of maintaining the agreements reached on these subjects in the 1973 Hague Conventions. Concerning the question of whether the instrument should deal with obligations arising from a binding maintenance agreement, several experts favoured their inclusion providing that they are enforceable in the State in which they were made. An expert highlighted that the inclusion of such agreements is particularly important due to the increasing use of alternative dispute mechanisms, especially mediation.

FUTURE WORK AND MANDATE OF THE DRAFTING COMMITTEE

145. The composition of the Drafting Committee is set out above at paragraph 6. The mandate of the Drafting Committee, as outlined by the Chairman and agreed by the Special Commission is as follows: "the Drafting Committee [will] continue working in the interim period until the next session of the Special Commission. Its mandate is to draft a tentative preliminary draft of the new Convention dealing with any issues that have been discussed in the Plenary, provided that the Drafting Committee considers that the debate in Plenary offers sufficient elements to enable the Committee to prepare such drafts, whether in a clear direction or in the form of options or alternatives, using footnotes to highlight outstanding issues where this is appropriate. The mandate is therefore a broad one, but one limited to what has been discussed in the Plenary. The Drafting Committee should not consider issues in respect of which the Plenary decided upon a different course of action, such as with the subject of applicable law. The Committee will determine the best method of working, by e-mail or Committee meetings or both. The Committee will also be assisted by the Permanent Bureau."

146. The Members of the Drafting Committee have agreed to meet in The Hague from 12 to 16 January 2004. In order to prepare for this meeting, it was agreed among the Members of the Drafting Committee that the Chairman would meet with a small sub-group of the Drafting Committee in The Hague from 27 to 30 October 2003 to prepare a preliminary and provisional text and discussion paper. All Members of the Drafting Committee were consulted individually, and without exception agreed that this was the appropriate course. The persons involved in the preparatory meeting will be the Chairman, Ms Alegría Borrás, Ms Jennifer Degeling, Ms Denise Gervais, Ms Sonya Djemni-Wagner, Ms Mary Helen Carlson, and Mr Paul R. Beaumont.

147. It was also decided that the Working Group on Applicable Law should continue its work (see above, at paragraphs 107 and 127, for the mandate of the Working Group). Finally, informal working groups to discuss and exchange information on the operational aspects of State co-operation, and to exchange views on direct jurisdiction were agreed upon, but without any mandate to report to the Special Commission or the Drafting Committee (see above at paragraph 94).

A P P E N D I C E S

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No 1 E

Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (du 5 au 16 mai 2003)

Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5 to 16 May 2003)

Distribution: 13 May 2003

Proposal by the Working Group

OUTLINE OF OBJECTS AND ADMINISTRATIVE CO-OPERATION PROVISIONS

PREAMBLE

1. OBJECTS OF THE CONVENTION

2. SCOPE

STARTING POINT

Scope should be broad and the approach adopted in the 1973 Hague Conventions could be a starting point.

Article 1 of the *1973 Convention on Recognition and Enforcement of Decisions Relating to Maintenance Obligations* states:

> *"This Convention shall apply to a decision rendered by a judicial or administrative authority in a Contracting State in respect of a maintenance obligation arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate…"*

RESERVATIONS AND DECLARATIONS

The possibility and extent of any reservations or declarations concerning scope will be revisited at a later stage.

DEFINITIONS

There seems to be no need at present for substantive definitions of 'child' or 'maintenance'. This is without prejudice to the possibility of applicable law rules concerning *e.g.* the question of entitlement.

The concept of 'decision' may include:
(a) a decision rendered by a judicial or administrative authority;
(b) a settlement made by or before such authority;
(c) a decision or settlement modifying a previous decision or settlement.

May include:
(a) authentic instruments;
(b) a registered agreement, including one arising from mediation.

Reserve for future possible consideration:
A private agreement which is enforceable but has not been registered.

ARREARS

If a possible provision on arrears is included, it may need to make a distinction between "arrears" and "backdated" or "retroactive payments".

ACCRUED INTEREST

A possible provision for interest to accrue on arrears.

COSTS OF COLLECTION AND CONVERSION

Maintenance creditors are disadvantaged when these costs are deducted from maintenance payments.

The new instrument might specify who has responsibility for such costs and how they can be recovered.

There could be co-operation in relation to the recognition and enforcement of decisions on recovery of costs.

3. ADMINISTRATIVE CO-OPERATION

a) Define the purpose of administrative co-operation to highlight its importance

b) Define the extent and core content of co-operation

c) Provide for bilateral or regional arrangements to offer a higher level of co-operation between two States or groups of States

4. AUTHORITIES AND THEIR FUNCTIONS

a) Designate Central Authority (see, *e.g.* Article 29 of the *1996 Convention on the Protection of Children* as a possible model)

b) Notify which authority or authorities are competent to send and receive applications

c) Make the designations and notifications at the time of ratification or accession and update when necessary

d) Functions of authorities could usefully distinguish between –
   (i) those that can only be done by the Central Authority and those that can be delegated to another body
   (ii) those that are mandatory and not mandatory
   (iii) those that concern the maintenance creditor and those that concern the maintenance debtor
   (iv) those that concern outgoing applications and those that concern incoming applications

e) Possible functions (from paragraph 30 of Preliminary Document No 3) at this stage are –
   (i) to discover the whereabouts of the debtor
   (ii) to encourage voluntary payment of maintenance obligations (but not at the expense of delaying recovery of maintenance)
   (iii) to facilitate the enforcement of maintenance decisions which are entitled to recognition under the Convention
   (iv) where necessary, to assist the applicant in having effective access to the relevant authorities, including where the circumstances so require, by the provision or facilitation of legal aid and advice (see, *e.g.* Article 7*(g)* of the *1980 Convention on International Child Abduction*, as a possible model)

f) Other possible functions identified by the Plenary or the Working Group:
   (i) to receive and transmit applications;
   (ii) to provide progress reports or status reports on particular cases;

(iii) to provide information about the laws and procedures of each Contracting State (see, *e.g.* Article 30(2), of the *1996 Convention on the Protection of Children* as a possible model);
(iv) to co-operate with other authorities (see, *e.g.* Article 30(1) of the *1996 Convention on the Protection of Children* as a possible model);
(v) to keep each other informed and, as far as possible, to eliminate any obstacles (see, *e.g.* Article 7*(i)* of the *1980 Convention on International Child Abduction* as a possible model);
(vi) to facilitate obtaining relevant information for legal proceedings (see, *e.g.* Article 7 of the *New York Convention of 1956 on the Recovery of Maintenance Abroad*, as a possible model);
(vii) to facilitate access to mediation (see, *e.g.* Article 31*(b)* of the *1996 Convention on the Protection of Children* as a possible model);
(viii) to facilitate the transfer of maintenance payments to the creditor.

g) Other functions that require particular attention from the Plenary Session:
(i) to seek out relevant information concerning the assets of the debtor and their location;
(ii) where there is no existing foreign decision, or it is not possible to recognise and enforce such decision, to initiate or facilitate the institution of judicial or administrative proceedings with a view to securing a maintenance decision;
(iii) to provide assistance in establishing the parentage of a child, for the purpose of maintenance proceedings in any Contracting State;
(iv) to initiate or facilitate the institution of judicial or administrative proceedings to obtain any necessary "provisional or urgent measures that are territorial in nature and whose purpose is to secure the outcome of a pending or anticipated support claim" (see Article 15*(vi)* of the *Inter-American / Montevideo Convention of 1989 on Support Obligations*).

5. THE APPLICATION PROCESS

a) Content of the application

b) The content of certain types of applications might be specified in the text of the Convention if the use of a prescribed or standard form is not adopted

c) Possibly indicate a minimum standard of documentation for initiating applications (depending on the type of application)

d) Possible types of request
(i) recognition and enforcement of an existing decision
(ii) establishment of a new decision
- if recognition and enforcement is not possible
- where there was no prior existing decision
(iii) modification of an existing decision
(iv) limited assistance, *e.g.* only locating the debtor
(v) recovery of arrears

e) Possible applicants
(i) maintenance creditor
(ii) public authorities (no need for separate procedures for public authorities)
- when seeking reimbursement
- when acting on behalf of the creditor
(iii) legal representative of the creditor
(iv) maintenance debtor

f) Possible recipients of the application
(i) a Central Authority in the requesting State, but nothing shall prohibit direct access to the judicial / administrative authorities of the requested State (see, *e.g.* Articles 29 and 31 of the *1980 Convention on International Child Abduction* as possible models)

g) Possible methods of application
(i) by a standard form or model form or neither (possible inclusion of an amendment procedure. See, *e.g.* Article 30 of the *1980 Convention on Access to Justice* as a possible model)
(ii) with annexes for narrative explanation or further information
(iii) with standard forms for certifications, *e.g.* of decisions, or other documentary requirements
(iv) by post, by electronic transmission or other means

h) Clarify responsibilities of Sending (S) and Receiving (R) States regarding documentation, such as -
(i) vet and check applications (S)
(ii) send applications (S)

(iii) send acknowledgement – of receipt, or of acceptability of the application – within set timelines (R)
(iv) identify a point of contact with responsibility for a particular case (R+S)
(v) keep each other informed of the progress of the case and provide timely responses to enquiries (R+S)
(vi) notify other States of documentary requirements for each type of application allowed by the Convention (R)
(vii) specify how these notifications are made (R+S)

6. POSSIBLE LANGUAGE REQUIREMENTS

a) Language of the requested State unless otherwise agreed (or other language by agreement)

b) Possibly specify documents to be translated

c) Possible provision concerning cost of translation

d) Possible provision concerning the extent to which decisions should be translated

7. SPEED

a) Possible timelines for Central authorities

b) Judicial / administrative decision making should be carried out as quickly as a proper consideration of the issues will allow

8. TRANSFER OF FUNDS

a) There should be no national limitation or prohibition on transfer of maintenance funds

b) States are encouraged to promote the use of the most cost-effective and efficient means available to transfer funds

c) Bilateral agreements may assist cheaper transfer arrangements

9. COSTS

a) Costs between States
(i) a basic principle could be that each State bears its own costs. However, there may be some exceptions to this principle
(ii) provide for bilateral/regional arrangements

a) Possible costs between the Applicant and the Central Authority
(i) core functions should be free (see, *e.g.* Article 26 of *1980 Convention on International Child Abduction*, as a possible model)

c) General
(i) a reasonable charge could be made for certain functions
(ii) possible recovery of costs from the maintenance debtor
(iii) possibility of distinguishing an application for child support from other forms of support
(iv) possibility of different rules for maintenance debtors and public authorities as applicants

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No 2 E

Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (du 5 au 16 mai 2003)

Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5 to 16 May 2003)

Distribution: 15 May 2003

Proposal by the Working Group

1. RECOGNITION AND ENFORCEMENT

BASES FOR RECOGNITION

The following to be used as a starting point:

1. A maintenance decision made by a judicial or administrative authority in one Contracting State (the State of origin) shall be recognised and enforced in all other Contracting States if –
a) the debtor was (habitually) resident in the State of origin at the time proceedings were instituted;
b) the debtor submitted to the jurisdiction;
c) the facts in the case would, mutatis mutandis, have supported jurisdiction under the rules of the requested State; or
d) the creditor was (habitually) resident in the State of origin at the time proceedings were instituted.
2. A Contracting State whose own authorities or courts are not permitted to make a maintenance decision based solely on the residence of the creditor within the jurisdiction may make a reservation in respect of paragraph 1(d).

Possibility that reservation would be permitted in respect of 1) c)

Possibility of including further bases of recognition such as:

a) Where jurisdiction has been agreed between the parties (party autonomy)
b) Where maintenance decision was made by an authority having jurisdiction on a matter of personal status
c) Where the child was habitually resident in the jurisdiction

Possibility of including nationality to be revisited

GROUNDS FOR REFUSING RECOGNITION OR ENFORCEMENT

The following are possible grounds for refusing recognition or enforcement:

a) public policy
b) fraud
c) lack of notice of the proceedings and/or opportunity to be heard
d) conflicting decisions

Issues concerning pending proceedings to be considered

Possibility of addressing certain problems surrounding modification jurisdiction under the heading "conflicting decisions" to be considered.

PROCEDURES FOR RECOGNITION AND ENFORCEMENT

State addressed to be bound by findings of fact on which the jurisdiction of the originating judicial or administrative authority was based

No review of merits by the authorities of the State addressed

General principle that the procedure for recognition and enforcement is governed by the law of the State addressed unless the Convention otherwise provides

Different models to be considered, including:

a) a system under which, following notice of enforcement proceedings, the debtor is obliged, within a specified period, to raise any objections to recognition and enforcement
b) a system allowing *ex officio* control by the authority of the State addressed

In any case, rapid procedures should be applied to registration or declaration of enforceability, and procedures should be fair to the debtor

Further consideration to be given to the following:

a) reducing documentary and translation requirements to a necessary minimum
b) the employment of standard forms
c) the use of rapid and efficient means of communication
d) the adherence to time lines
e) the abolition of the requirements of legalisation

Possibly specify documents to be furnished

ENFORCEMENT UNDER NATIONAL LAW

A principle of non-discrimination to be included

Provisions to be included providing for transparency, including supplying information concerning national enforcement rules or procedures, at time of ratification or accession

Possibility to be considered later of annexing to the Convention non-binding recommendations concerning national procedures for enforcement

2. DIRECT JURISDICTION

To be revisited at a later stage

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Information Document

Presented by the Permanent Bureau

Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (du 5 au 16 mai 2003)

Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (5 to 16 May 2003)

Distribution: 16 May 2003

THE USE OF INFORMATION TECHNOLOGY WITH RESPECT TO THE RECOVERY OF MAINTENANCE

THE INTERNATIONAL TRANSFER OF FUNDS AT A LOW COST

Recommendation of the 1999 Special Commission:

The new instrument should:

> *"take account of future needs, the developments occurring in national and international systems of maintenance recovery and the opportunities provided by advances in information technology".*

Responses to Questions 33 (h) & 34 of the 2002 Questionnaire

Out of the 31 jurisdictions that have answered Question 33 with respect to letter (h) – "What degree of importance do you attach to the provisions concerning co-operation in the international transfer of funds at low costs?" – twenty-one jurisdictions have indicated that this is a priority. Out of these twenty-one jurisdictions: six were of the view that it is very important; twelve answered that it is important / desirable; and three indicated that it is interesting. Furthermore, six jurisdictions did not express any views and four jurisdictions have indicated that this is not a priority.

With regard to question 34 of the 2002 Questionnaire, out of the thirty-one jurisdictions that have answered the Questionnaire: five think that this is a core element; sixteen think that this is an optional element; and ten have no views on this point.

Existing norms in relation to the transfer of funds

The *Inter-American / Montevideo Convention of 15 July 1989 on Support Obligations* (Appendices to Prel. Doc. No 3, p. 18) provides at Article 20 that:

> *"The States Parties undertake to facilitate the transfer of funds required for compliance with this Convention".*

Examples of different methods to transfer funds

ATM Cards (Maestro (Europay-Mastercard), Cirrus (United States, Canada), etc.)

This method was presented in relation to a domestic situation by an expert at an earlier Special Commission; it could certainly be implemented at the international level.

Nowadays, in the light of the liberalisation of foreign investments (through the web of Bilateral Investment Treaties (BITs) or what other States call Foreign Investment Protection and Promotion Agreements (FIPAs)), it is now possible, in a number of cases, for non-residents to open bank accounts in foreign States. On that basis, a creditor could open a bank account either on her / his own or through a Central Authority (if the bank laws allow for such a possibility) in the State of the debtor. Therefore, funds from the debtor's bank account could be transferred locally at a low cost to the creditor's bank account then the creditor from abroad could access the funds through an Automatic Teller Machine (ATM).In this case, the ATM will automatically make the conversion for the foreign exchange at a low cost. One inconvenience of this system is that if the creditor loses the card it will be difficult to get a new card from abroad.

Inter-branch transfers

Another possibility is to deal with a multinational bank. In this regard, the creditor should choose a bank that has branches in both the State of the debtor and in her / his own State. Once a bank is selected, the debtor on his / her own or subject to a decision of an authority will open a bank account in a branch of that bank located in his / her State. The multinational bank may have means available to it to facilitate the international transfer of funds at a low cost without depending on the settlement systems of third parties. The two bank accounts can be in the same currency or in different currencies.

International settlement systems

Electronic clearing house systems or settlement systems for the transfer and payment of funds have been in existence at the domestic level for quite a long time. Nowadays, such electronic systems exist at the international or regional level. At the international level the most common system that comes to mind is SWIFT.

SWIFT

SWIFT stands for the Society for Worldwide Inter-bank Financial Telecommunications. SWIFT is a co-operative organisation created and owned by banks which operates a network to facilitate the exchange of payment and other financial messages between financial institutions through out the world. SWIFT provides a secure messaging service for inter-bank communication. A SWIFT payment message is an instruction to transfer funds; the exchange of funds (*i.e.* settlement) subsequently takes place via a payment system or through correspondent banking relationships. Its services are extensively used in the foreign exchange, money and securities markets for confirmation and payment messages. The advantages of SWIFT are that it is broadly available and it is possible to transfer any amount whether for commercial or private purposes. However SWIFT is rather expensive (see <http://www.swift.com> for further information).

Work within the EU

According to exploratory research carried out by the Permanent Bureau, an electronic clearing house system or settlement system may be available very soon within the EU (between the different banks of the Member States). This is the next logical step to the implementation of the Euro. However, it is not certain if it will cover both commercial and private payments, or even government payments, and if it will be restricted to certain amounts (see <http://www.ecb.int> for further information).

Automatic clearing house system (FedACH)

At this point the FedACH system works northbound between the United States and Canada only. It is a private clearing house system between the Federal Reserve in Minneapolis and the TD Bank in Toronto. No third party (like SWIFT) is involved. The system is extra secure as the transactions are done through a private telephone line (not the Internet) from one mainframe computer to another. There is no minimum limit to the level of payment and it can be used for commercial, private and government purposes. Social benefits and pensions payments are also

transmitted through this system. Batch payments of millions of dollars are operated once a day and funds are secured within 2 or 3 days. Therefore the risk is very low. The extremely high volume of transactions makes the system very inexpensive. The fee for a maintenance payment is around 5 Euro cents. Transfers in the United States are electronically directed to the Federal Reserve in Minneapolis at very low cost and payments received in Canada are once again transferred electronically at a very low cost to all other banks and their branches throughout Canada. Furthermore, the system makes an automatic foreign exchange (see <http://www.frbservices.org> for further information).

A southbound transfer (Canada-United States) at a low cost is also possible. To do so, the TD Bank in Toronto would transfer the funds to its branch in New York. The New York branch having access to the domestic clearing house system in the United States can then transfer the funds at a very low cost to any bank in the United States.

Future work

The Permanent Bureau will continue its work towards the preparation of a Preliminary Document in relation to the use of information technology with respect to the international recovery of maintenance, including the transfer of funds at a low cost. The objective is to prepare a document that will present as many solutions and avenues as possible. This will assist the work of the Special Commission and future co-operation in relation to building and securing effective implementation of the new instrument. In this respect, the Permanent Bureau would be interested to hear from the experts about their experience in relation to the electronic transfer of funds. Furthermore, in carrying out its work the Permanent Bureau will want to consult the relevant international and national banking institutions.