Conférence de La Haye de droit international privé
Hague Conference on Private International Law

Actes et documents

de la Vingt et unième session

Proceedings

of the Twenty-First Session

Tome I (Partie/Part 2)

Obligations alimentaires
Child support

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5 to 23 November 2007

Tome I (Partie/Part 2)

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Note du Bureau Permanent

Conformément à une pratique qui a pris naissance lors de la Session extraordinaire de 1966, les interventions ont été résumées dans la langue, anglaise ou française, utilisée par les orateurs. Étant donné que les travaux de la Première commission ont été ouverts à tous les délégués à la Session diplomatique, aucune liste des membres de cette Commission n'est établie (voir le tome III, *Matières diverses*, pour la liste intégrale des participants à la Session diplomatique).

Les Documents de travail sont également reproduits dans la langue utilisée par leur auteur, le Bureau Permanent ne pouvant assurer la traduction des documents produits par les délégations. Sont toutefois diffusés dans les deux langues les documents produits par le Président et les co-Rapporteurs, le Secrétariat et les Comités de rédaction.

Notice by the Permanent Bureau

In accordance with a practice begun during the Extraordinary Session of 1966, the speakers' remarks have been summarised in the languages they employed, respectively English or French. Since the work of the First Commission was open to all delegates to the Diplomatic Session, a list of Commission members has not been drawn up (see Tome III, *Miscellaneous matters*, for the complete list of Diplomatic Session participants).

Working Documents are also reproduced in the languages employed by their authors, since the Permanent Bureau has no translation service. However, documents emanating from the Chair, the co-Reporters, the Secretariat or the Drafting Committees have been distributed in both languages.

Documents de travail de la Première commission

Working Documents of the First Commission

Documents de travail Nos 1 à 8

Working Documents Nos 1 to 8

Distribués le jeudi 8 novembre 2007

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No 1 – Proposal of the delegation of China

Article 3(c)

(c) "legal assistance" means the assistance provided for under the law of the requested State which is necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in accordance with the law of the requested State, such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings;

Rationale

The proposal is to ensure that full respect is given to the law of the requested State so that legal assistance refers to that provided by the law of the requested State and such assistance will also be provided in accordance with the law of the requested State.

No 2 – Proposal of the delegation of the European Community

Option 2

Article 14 Effective access to procedures

[…]

3 The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State or other mechanisms enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

[…]

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention from persons –

(a) by reason only of their foreign nationality or of their not being domiciled or resident in the State in which proceedings are brought, or

(b) applying for recognition and enforcement.

Article 14 bis *Free legal assistance for child support applications*

[…]

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1)(a) and (b) and Article 17(4) –

Article 33 Public bodies as applicants

1 For the purposes of applications under Article 10(1)(a) and (b) and Article 17(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in lieu of maintenance.

[Paragraphs 2 to 4 unchanged.]

5 Public bodies as applicants shall benefit from the same services or legal assistance as those set out in Article 14.

No 3 – Proposal of the delegation of Argentina

Article 4 Designation of Central Authorities

2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State. This provision shall not apply to territories that are the subject of a sovereignty dispute recognised by the United Nations.

No 4 – Proposal of the delegations of Argentina, Brazil, Chile, Ecuador, Mexico and Peru and of the Dominican Republic, Guatemala and El Salvador

Article 3 Definitions

For the purposes of this Convention –

[…]

(c) "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. This includes assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of genetic testing when this is necessary and from costs of proceedings;

Article 8 Central Authority costs

1 Each Central Authority shall bear its own costs in applying this Convention.

2 Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention ~~save for exceptional costs or expenses arising from a request for a specific measure under Article 7~~.

Article 14 Effective access to procedures

[…]

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings brought ~~[~~by the creditor~~]~~ under the Convention.

Doc.trav./Work.Docs Nos 1-8

Article 14 bis *Free legal assistance for child support applications*

~~1~~ The requested State shall provide free legal assistance in respect of all applications by the creditor under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21 or a disabled person.

2(a), (b) and (c): deleted.

Article 14 ter *Applications not qualifying under Article 14* bis

In the case of an application not qualifying for free legal assistance under Article 14 *bis* –

(a) the provision of free legal assistance may be made subject to a means ~~or a merits~~ test;

(b) an applicant who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

No 5 – Proposal of the delegations of China, Japan and the Russian Federation

Article 14 Effective access to procedures

1 The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under Chapter III or direct applications.

2 To provide such effective access, the requested State shall provide free legal assistance in accordance with the provisions in this Article unless the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

3 Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

4 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

5 The requested State shall provide the most favourable legal assistance provided for by the law of the requested State in respect of all applications under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child.

6 A Contracting State may declare in accordance with Article 58 that it will provide free legal assistance in applications or exemptions from costs or expenses concerning child support on the basis of the assessment of the child's means only, or without any means test at all.

7 A Contracting State may declare in accordance with Article 58 that it will provide free legal assistance on the basis of reciprocity with any other Contracting State that makes the same declaration.

8 This Article shall also apply to a public body which has provided benefits in lieu of maintenance and is eligible to reimbursement in the State of origin.

Rationale:

It is important that effective access to procedures should be provided for both applications under Chapter III and direct applications. There is no sound justification to discriminate applicants making direct applications and to deny them effective access to procedures.

The idea is to ensure that foreign applicants will enjoy the same treatment as domestic applicants and the most favourable legal assistance provided for by the law of the requested State will also be available to foreign applicants in child support cases.

The declaration mechanism will allow States with similar levels of economic development to provide free legal assistance on the basis of reciprocity. A State which has the resources and capability may also declare that it will assess the means of a child only or it will dispense with the means test. This should provide sufficient flexibility for States that are willing to go further than providing national treatment for legal assistance while States that are not so ready will not be denied the benefits of the Convention because of the overwhelming financial burden imposed. Such States may at a later stage make a declaration to extend the free legal assistance when they have reached a sufficient level of economic development or have reformed their legal aid system.

The proposal would also facilitate application of the Article to a public body by limiting the burden to provide free legal assistance.

This proposal is a compromise combining some of the best features under Option 1 and Option 2 and would be more acceptable to a wider range of States which have diverse legal traditions and varied legal aid regimes in light of different levels of economic development.

No 6 – Proposal of the delegation of New Zealand

Article 3 Definitions

For the purposes of this Convention –

[…]

(c) "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. [The methods of assuring that such assistance is provided may include ~~This includes assistance such as~~ legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings;]

No 7 – Proposal of the delegation of Australia

Article 20(8)

8 A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt ~~if~~ to the extent that the recognition and enforcement ~~was only applied for in respect of~~ relates to payments that fell due in the past.

New text would read:

8 A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

No 8 – Proposal of the delegation of the Russian Federation

Article 2 Scope

Option 1

1 The Convention shall apply to maintenance obligations arising from a parent-child relationship towards a child under the age of 18.

2 A Contracting State may declare in accordance with Article 58 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, marriage or affinity, to spousal support with the exception of Chapters II and III, or to maintenance obligations arising from a parent-child relationship towards a child under the age of 21.

Option 2

1 This Convention shall apply to maintenance obligations arising from a parent-child relationship towards a child.

2 A Contracting State may declare in accordance with Article 58 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, marriage or affinity, to spousal support with the exception of Chapters II and III.

[…]

Article 3 Definitions

[…]

(e) "child" means -

i) every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier or,

ii) an incapacitated person beyond the age indicated in sub-paragraph (i) of this Article who is unable to support himself and who has the right to maintenance obligations from his parents under the law of the Contracting State of his residence.

Option 3

1 This Convention shall apply to maintenance obligations arising from a parent-child relationship towards a child under the age of 21, and with the exception of Chapters II and III to spousal support.

A Contracting State may make a reservation, in accordance with Article 57, and limit the application of this Convention to maintenance obligations arising from a parent-child relationship towards a child under the age of 18.

[Paragraphs 2 to 4 unchanged.]

Article 57 Reservations

1 Any Contracting state may, not later than at the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 56(1), make one or more reservations provided for in Article 2(1). […]

Documents de travail Nos 9 à 15

Working Documents Nos 9 to 15

Distribués le vendredi 9 novembre 2007

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No 9 – Proposal of the delegations of Australia, Canada and New Zealand and of the Commonwealth Secretariat

Article 27 Reciprocal arrangements involving the use of provisional and confirmation orders

Add a new paragraph (d):

(d) Article 15 shall not prevent proceedings for the modification of the decision being commenced in either State.

It is also suggested, as a matter of drafting, that the heading to Article 27 should read: "Decisions produced by the use of provisional and confirmation orders".

No 10 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 34 Demandes présentées directement aux autorités compétentes

1 La présente Convention n'exclut pas la possibilité de recourir à de telles procédures lorsqu'elles sont disponibles en vertu du droit interne d'un État contractant autorisant une personne (un demandeur) à saisir directement une autorité compétente de cet État dans une matière régie par cette Convention, y compris, sous réserve de l'article 15, en vue de l'obtention ou de la modification d'une décision en matière d'aliments.

2 ~~Toutefois, l~~L'article 14~~(5) et~~ (6) et les dispositions des chapitres V, VI et VII s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à une autorité compétente d'un État contractant.

Justification pour les changements proposés :

L'art. 34(1) : Dans des États fédéraux comme le Canada, l'utilisation du terme « national » dans la version anglaise n'est pas appropriée étant donné la division de pouvoirs législatifs. Le changement proposé est également nécessaire pour des fins de concordance avec le texte français.

L'art. 34(2) : Nous proposons de supprimer le terme « toutefois » car les paragraphes premier et 2 traitent de questions différentes. Tel que mentionné dans nos commentaires, nous suggérons également de supprimer la référence à l'article 14(5).

* * *

Article 34 Direct requests to competent authorities

1 This Convention does not exclude the possibility of recourse to such procedures as may be available under the internal law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by this Convention including, subject to Article 15, for the purpose of having a maintenance decision established or modified.

2 ~~However,~~ Article 14~~(5) and~~ (6) and the provisions of Chapters V, VI and VII shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.

Rationale for proposed changes:

Art. 34(1): In federal States such as Canada, the term "national" in the English version of the text would not be appropriate given the constitutional division of legislative authority. The proposed change is also needed so that there is consistency with the French language text.

Art. 34(2): We propose removing the term "however" because paragraphs 1 and 2 deal with separate matters. As mentioned in our comments, we also suggest deleting reference to Article 14(5).

No 11 – Proposal of the delegation of Switzerland

Article 20 Procedure on an application for recognition and enforcement

1 […]

2 Subject to Article 6(2)(d), w~~W~~here an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

[…]

No 12 – Proposal of the delegation of the International Bar Association

Article 34 Direct requests to competent authorities

1 This Convention does not exclude the possibility of recourse to such procedures as may be available under the national law of a Contracting State allowing a ~~person (an applicant)~~ creditor, debtor or public body to seize directly a competent authority of that State in a matter governed by this Convention. ~~including, subject to Article 15, for the purpose of having a maintenance decision established or modified.~~

2 ~~However,~~ Article 14~~(5) and~~ (6)[1] and the provisions of Chapters IV, V, VI and VII and Articles 40, 41(1) and (2) and 43 shall apply in relation to a request ~~for recognition and enforcement~~ made directly to a competent authority in a Contracting State.

Article 9 Application through Central Authorities

1 An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State. For the purpose of this provision, residence excludes mere presence.

2 Notwithstanding Article 9(1), a Contracting State may agree with another Contracting State to establish procedures to permit a party in the requesting State to make an application directly to the Central Authority of the requested State.

Rationale

Article 34 establishes the right of an applicant in the requesting State to make a direct request to the competent authority in the requested State. It is the understanding of the IBA that a party may make a direct request *sua sponte* or with the assistance of privately retained counsel. The IBA recommends that the Convention should not provide that a party making a direct request with or without private counsel must receive free legal assistance from the requested State. Whether legal assistance is provided is subject to the national law of the State involved. A party in need of free legal assistance should make an application through the Central Authority system. The amendment also adds Articles 40 (recovery of costs from an unsuccessful party), 41(1) and (2) (language requirements), and 43 (non-unified legal systems) to also apply to a direct request.

Article 9 provides that a party must make his application to the Central Authority in the Contracting State in which he or she resides. The IBA suggests that a more flexible approach would allow two Contracting States to agree to permit an applicant to apply directly to the Central Authority in the requested State. In some cases and for some States this may save time, costs and the occasional confusion of overlapping systems.

The IBA further recommends that throughout the instrument the term "direct request" be used when referring to the action of a party in the requesting State directly seeking relief from a competent authority in the requested State, and that the term "direct application" be used when referring to the action of a party in the requesting State who applies directly to the Central Authority in the requested State.

No 13 – Proposal of the delegation of Switzerland

Article 20 Procedure on an application for recognition and enforcement

New paragraph 6 bis*:*

6 *bis* During the time specified for an appeal / challenge according to the preceding paragraph and until any such appeal / challenge has been determined, no measures of enforcement may be taken other than protective measures against the property of the defendant. [The decision authorising enforcement shall carry with it the power to proceed to any such protective measures.]

No 14 – Proposition de la délégation de la Chine – Proposal of the delegation of China

Article 20 Procédure pour une demande de reconnaissance et d'exécution

Nouveau paragraphe 8 bis *:*

Une contestation ou un appel conformément aux paragraphes 7 ou 8 aura comme effet l'interruption ou la suspension de la procédure sous cet article.

* * *

[1] This reference is to Option 1 of Art. 14. Should Option 2 be preferred, the reference would be to "Art.s 14(5) ~~and 14 *ter* (b)~~".

Article 20 Procedure on an application for recognition and enforcement

New paragraph 8 bis*:*

A challenge or appeal under paragraphs 7 or 8 shall have the effect of suspending or staying the procedure under this Article.

No 15 – Proposition de la Communauté européenne – Proposal of the European Community

Article 7 Requête de mesures spécifiques

1 Une Autorité centrale peut, sur requête motivée, demander à une autre Autorité centrale qu'elle prenne des mesures spécifiques appropriées en vertu de l'article 6(2)(b), (c), ~~[~~(g), (h), (i) et (j)~~]~~ lorsque aucune demande en application de l'article 10 n'est pendante. L'Autorité centrale requise prend les mesures appropriées si elle les considère nécessaires afin d'aider un demandeur potentiel ~~[~~à faire une demande prévue à l'article 10 ou~~]~~ à déterminer si une telle demande doit être introduite.

Article 45 Coordination avec les instruments et accords complémentaires

Nouveau paragraphe 1 bis *:*

1 *bis* La présente Convention ne déroge pas à la *Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale* ni à la *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale* pour les États contractants qui sont Parties à l'une ou l'autre de ces Conventions.

* * *

Article 7 Requests for specific measures

1 A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2)(b), (c), ~~[~~(g), (h), (i) and (j)~~]~~ when no application under Article 10 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant ~~[~~in making an application under Article 10 or~~]~~ in determining whether such an application should be initiated.

Article 45 Co-ordination of instruments and supplementary agreements

New paragraph 1 bis*:*

1 *bis* This Convention does not affect the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* for Contracting States that are Parties to either of these Conventions.

Documents de travail Nos 16 à 20

Working Documents Nos 16 to 20

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No 16 – Proposal of the delegation of Australia

Article 20

New paragraph 6 bis*:*

During the time specified for an appeal / challenge according to the preceding paragraph and until any such appeal / challenge has been determined, the respondent shall be entitled to seek a suspension or stay of enforcement measures.

No 17 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 20 Procédure pour une demande de reconnaissance et d'exécution

Nouveau paragraphe 6 bis *:*

6 *bis* Une contestation ou un appel ne suspend pas l'exécution de la décision. L'exécution peut toutefois être suspendue pour un temps et à des conditions déterminées, s'il est démontré qu'il en résulterait un préjudice grave pour le débiteur.

* * *

Article 20 Procedure on an application for recognition and enforcement

New paragraph 6 bis*:*

6 *bis* A challenge or an appeal does not suspend the enforcement of the decision. The enforcement may however be suspended for a time and on conditions determined, if it is shown that serious prejudice to the debtor would likely result.

No 18 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Amendement au titre anglais de la Convention / Amendment to the English title of the Convention:

CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND MAINTENANCE FOR OTHER FAMILY MEMBERS

Justification :

1) Ce titre décrit plus adéquatement l'objet de la Convention.

2) Il assure la conformité avec le titre français.

* * *

Rationale:

1) This title better describes the subject-matter of the Convention.

2) It ensures uniformity with the French title.

No 19 – Proposal of the delegation of Switzerland

Article 21 Documents

1 […]

(b) a document stating that the decision is enforceable in the State of origin ~~and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) are met~~;

New paragraph 1 bis*:*

1 *bis* A Contracting State may by declaration to the Permanent Bureau state that the decisions of its administrative authorities meet the requirements of Article 16(3).

No 20 – Proposition de la délégation de la Communauté européenne – Proposal of the delegation of the European Community

Article 3 Définitions

Nouveau paragraphe (e) :

(e) « acte authentique » désigne :

(i) un acte en matière d'obligations alimentaires dressé ou enregistré formellement en tant qu'acte authentique et dont l'authenticité :

– porte sur la signature et le contenu de l'acte, et

– a été établie par une autorité publique ou toute autre autorité habilitée à ce faire par l'État contractant d'origine ; ou

(ii) une convention en matière d'obligations alimentaires conclue avec des autorités administratives ou authentifiée par celles-ci.

Article 16 Champ d'application du chapitre

~~[~~4 Ce chapitre s'applique aussi aux actes authentiques ~~et accords privés~~ en matière d'obligations alimentaires, conformément à l'article 26.~~]~~

~~[~~*Article 26 Actes authentiques ~~et accords privés~~*

1 Un acte authentique établi ~~ou un accord privé conclu~~ dans un État contractant doit pouvoir être reconnu et exécuté comme une décision en application de ce chapitre s'il est exécutoire comme une décision dans l'État d'origine.

2 Une demande de reconnaissance et d'exécution d'un acte authentique ~~ou d'un accord privé~~ est accompagnée :

(a) du texte complet de l'acte authentique ~~ou de l'accord privé~~ ;

(b) d'un document établissant que l'acte authentique ~~ou l'accord privé~~ visé est exécutoire comme une décision dans l'État d'origine.

3 La reconnaissance et l'exécution d'un acte authentique ~~ou d'un accord privé~~ peuvent être refusées si :

(a) la reconnaissance et l'exécution sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) l'acte authentique ~~ou l'accord privé~~ a été obtenu par fraude ou a fait l'objet de falsification ;

(c) l'acte authentique ~~ou l'accord privé~~ est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque, dans ce dernier cas, elle remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis.

4 Les dispositions de ce chapitre, à l'exception des articles 17, 19, 20(7) et 21(1) et (2), s'appliquent *mutatis mutandis* à la reconnaissance et l'exécution ~~d'un accord privé ou~~ d'un acte authentique ; toutefois :

(a) une déclaration ou un enregistrement fait conformément à l'article 20(4) ne peut être refusé que pour les raisons visées au [paragraphe 3] [paragraphe 3(a)] ; et

(b) une contestation ou un appel en vertu de l'article 20(6) ne peut être fondé que sur :

(i) les motifs de refus de reconnaissance prévus à l'article 26(3) ;

(ii) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 26(2).

5 La procédure de reconnaissance et d'exécution d'un acte authentique ~~ou d'un accord privé~~ est suspendue si des procédures concernant sa validité sont en cours devant une autorité compétente.

6 Un État peut déclarer que les demandes de reconnaissance et d'exécution des actes authentiques ~~et des accords privés~~ ne peuvent être présentées directement à une autorité compétente.~~]~~

* * *

Article 3 Definitions

New paragraph (e):

(e) the term "authentic instrument" means –

(i) a document in matters relating to maintenance obligations which has been formally drawn up or registered as an authentic instrument and the authenticity of which –

– relates to the signature and the content of the instrument; and

– has been established by a public authority or other authority empowered for that purpose by the Contracting State in which it originates, or

(ii) an arrangement relating to maintenance obligations concluded with administrative authorities or authenticated by them.

Article 16 Scope of the Chapter

[4 This Chapter also applies to authentic instruments ~~and private agreements~~ relating to a maintenance obligation in accordance with Article 26.]

[*Article 26 Authentic instruments ~~and private agreements~~*

1 An authentic instrument ~~or a private agreement~~ made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.

2 An application for recognition and enforcement of an authentic instrument ~~or a private agreement~~ shall be accompanied by the following –

(a) a complete text of the authentic instrument ~~or of the private agreement~~;

(b) a document stating that the particular authentic instrument ~~or private agreement~~ is enforceable as a decision in the State of origin.

3 Recognition and enforcement of an authentic instrument ~~or a private agreement~~ may be refused if –

(a) the recognition and enforcement is manifestly incompatible with the public policy of the requested State;

(b) the authentic instrument ~~or the private agreement~~ was obtained by fraud or falsification;

(c) the authentic instrument ~~or the private agreement~~ is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

4 The provisions of this Chapter, with the exception of Articles 17, 19, 20(7) and 21(1) and (2), shall apply *mutatis mutandis* to the recognition and enforcement of an ~~private agreement or~~ authentic instrument save that –

(a) a declaration or registration in accordance with Article 20(4) may be refused only for the reasons specified in [paragraph 3] [paragraph 3(a)]; and

(b) a challenge or appeal as referred to in Article 20(6) may be founded only on the following –

(i) the grounds for refusing recognition and enforcement set out in Article 26(3);

(ii) the authenticity, veracity or integrity of any document transmitted in accordance with Article 26(2).

5 Proceedings for recognition and enforcement of an authentic instrument ~~or a private agreement~~ shall be suspended if proceedings concerning its validity are pending before a competent authority.

6 A State may declare that applications for recognition and enforcement of authentic instruments ~~and private agreements~~ shall not be made directly to a competent authority.]

Documents de travail Nos 21 à 28

Working Documents Nos 21 to 28

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No 21 – Proposal of the delegation of Switzerland

Article 6 Specific functions of Central Authorities

[…]

3 The functions of the Central Authority under this Article may, to the extent permitted under the law of that State, be performed by public bodies, or other bodies or persons subject to the supervision of the competent authorities of that State. The designation of any such public bodies or other bodies or persons as well as their contact details and the extent of their functions shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. Contracting States shall promptly inform the Permanent Bureau of any changes.

4 Nothing in this Article or Article 7 shall be interpreted as imposing an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested State or by way of judicial assistance.

No 22 – Proposal of the delegation of Australia

Article 15(2)

[…]

(e) where the debtor has been unable to obtain effective access to procedures to bring an application to modify the decision or to make a new decision in the State of origin.

No 23 – Proposal of the delegation of Switzerland

Article 10 Available applications

1 […]

(c) establishment of a decision in the requested State where there is no existing decision and it is not possible to establish the decision in the State of the creditor's habitual residence, including where necessary the establishment of parentage;

[…]

3 Save as otherwise provided in this Convention, the applications in paragraphs 1 and 2 shall be determined under the law of the requested State, and applications in paragraphs 1(c) to (f) and 2, shall be subject to the jurisdictional rules applicable in the requested State and to Article 15.

4 If the debtor is not habitually resident in the requested State, applications in paragraph 1(a) and (b) can only be made if an application to the State of the habitual residence of the debtor is likely to be not successful.

No 24 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 4 Désignation des Autorités centrales

3 Chaque État contractant informe le Bureau Permanent de la Conférence de La Haye de droit international privé de la désignation de l'Autorité centrale ou des Autorités centrales ainsi que de leurs coordonnées et, le cas échéant, de l'étendue de leurs fonctions visées au paragraphe 2 au moment du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration faite en vertu de l'article 56 de la Convention. Les États contractants informent aussitôt le Bureau Permanent de tout changement.

Justification

Amendement nécessaire pour tenir compte de la situation des États ayant des systèmes juridiques non unifiés.

* * *

Article 4 Designation of Central Authorities

3 The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited, or when a declaration is submitted in accordance with Article 56 of the Convention. Contracting States shall promptly inform the Permanent Bureau of any changes.

Rationale

Amendment required to account for the situation of States that have non-unified legal systems.

No 25 – Proposal of the delegation of Israel

Article 3 Definitions

(a) "child" means a person under the age of 18.

Reasoning

According to the UN *Convention on the Rights of the Child* and the 1996 Hague Convention a child is a person under the age of 18. The Convention should follow this accepted universal definition, which also implies that the legal basis for a maintenance obligation arising from a parent-child relationship toward a child is different from a maintenance obligation toward a person between the ages of 18 and 21.

(b) "creditor" means a child or a person to whom maintenance is owed or is alleged to be owed;

(c) "debtor" means a person who owes or who is alleged to owe maintenance;

Reasoning

The definition of "creditor" emphasises that a child has a personal right to receive maintenance. Accordingly the term "individual" in both definitions is replaced by "person".

(d) "legal assistance" means the assistance necessary to enable creditors and debtors to know and assert their rights according to the Convention and to ensure that their applications according to the Convention are fully and effectively dealt with in proceedings. This includes assistance such as legal advice on available applications, assistance in issuing proceedings and appeals before the competent authorities and legal representation in these proceedings when necessary.

Reasoning

The definition strives to relate the legal assistance to the specific rights of applicants that are based on the Convention.

(e) "maintenance" means an obligation to pay support to a child by his or her parent or to another person relying on their family relationships, parentage, marriage or affinity;

Reasoning

The definitions of "creditor" and "debtor" use the term "maintenance" and apply also to "child support", hence both should be included under the definition of "maintenance". Moreover, the definitions do not state the grounds of the right to receive maintenance and the corresponding obligation to pay maintenance. The proposed definition emphasises the objective criteria of the obligation – child-parent relationships and family relationships of parentage, marriage or affinity – to pay maintenance.

(f) "proceedings" means judicial or administrative proceedings according to the law of the State addressed.

Reasoning

The term is used in the Convention in different articles without indicating the type of proceedings in the referred State. The definition clarifies that both judicial and administrative proceedings are covered.

Article 20 Procedure on an application for recognition and enforcement

1 Subject to the provisions of this Convention, the procedures for recognition and enforcement of a decision and for appliance of any measure articulated in Article 6 connected to it shall be governed by the law of the State addressed.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III it shall be referred, without any review save under Article 12(8), to the competent authority to declare the decision enforceable or to register the decision for enforcement.

3 The competent authority shall promptly refer to the respondent a copy of the application for recognition and enforcement and a notification that the decision shall be declared enforceable or registered for enforcement without any further proceedings, but that he may –

(a) request within seven days of notification to receive a complete copy of the documents concerned, certified by the competent authority in the State of origin;

(b) lodge within 35 days of notification, a challenge or an appeal (hereinafter "a challenge") for the reasons specified in Article 17 or 19.

4 A challenge by a respondent may also be founded on the fulfilment of the debt if the recognition and enforcement was only applied for in respect of payments that fell due in the past.

5 A declaration or registration will be granted immediately after the period of 35 days according to paragraph 3(b) and it may be refused only on the grounds of Article 19(a), unless the respondent lodged a challenge.

6 The competent authority shall immediately after receiving a challenge refer a copy to the applicant with a notice that he may respond to the challenge within 35 days of notification.

7 The competent authority shall promptly examine the challenge and the response, and decide on the declaration or registration of the application or on the refusal exclusively on the reasons specified in Article 17 or 19.

8 The applicant and the respondent shall be immediately notified of the declaration or registration or of the refusal, made under paragraph 5 or 7; a copy of the notice shall be sent to the Central Authority of the addressed State and it shall immediately notify the Central Authority of the State of origin.

9 In the case that the competent authority did not decide on the challenge within 120 days of receiving the application according to paragraph 2, it shall inform the Central Authority of the addressed State of the status of the application and it shall immediately notify the Central Authority of the State of origin.

10 Further appeal is possible only if permitted by the law of the State addressed and paragraphs 6 to 9 will apply to the appeal save with the required changes.

11 Paragraphs 3 to 10 shall apply in case of a direct application to a competent authority in the requested State in accordance with Article 16(5) save with the required changes in paragraphs 8 and 9.

12 Nothing in this Article shall prevent the use of more expeditious procedures.

Reasoning:

The proposal distinguishes between procedures that shall be governed by the domestic law of the addressed State and those that are determined by the Convention. It also suggests a one stage process for declaration or registration of the application.

Thus, the procedures for recognition and enforcement of a decision and for appliance of measures according to Article 6 – such as using mediation before referring the application to registration and enforcement, initiating provisional measures or staying of a decision for recognition and enforcement when an appeal has been lodged – shall be governed by the law of the State addressed and the procedures for declaration or registration of the application shall be governed by the procedures articulated in this Article.

No 26 – Proposal of the delegation of Switzerland

Article 16 Scope of the Chapter

[…]

3 For the purpose of paragraph 1, "administrative authority" means a public body whose decisions, under the law of the State where it is established –

(a) may be made subject of an appeal to or review by a judicial authority; and

(b) have ~~the same~~ a similar force and effect as a decision of a judicial authority on the same matter.

No 27 – Proposal of the delegation of Switzerland

Article 11 Application contents

Option 1 (if no mandatory forms exist)

1 All applications under Article 10 shall as a minimum include –

[…]

(b) the name and contact details, including the address, ~~and~~ date of birth and nationality of the applicant;

(c) the name and, if known, address, ~~and~~ date of birth and nationality of the respondent;

(d) the name, ~~and the~~ date of birth and nationality of any person for whom maintenance is sought;

[…]

No 28 – Proposition du Groupe de travail chargé des formulaires et de l'Observateur de l'Association internationale des Femmes juges – Proposal of the Forms Working Group and of the Observer for the International Association of Women Judges

PRÉAMBULE

Reconnaissant que des formulaires modèles favorisent une pratique uniforme, diminuent le besoin de traductions et permettent que les procédures soient rapides et peu coûteuses,

* * *

PREAMBLE

Acknowledging that standardised forms promote uniform practice, minimise the need for translation, and facilitate prompt and inexpensive procedures,

Proposition du Sous-comité chargé du profil de Pays – Proposal of the Country Profile Sub-committee

PRÉAMBULE

Considérant que nous croyons que le partage d'information dans un format uniformisé assistera les États contractants dans la mise en œuvre et l'application de la Convention,

* * *

PREAMBLE

Believing that the sharing of information in a common format will assist Contracting States in their implementation and operation of the Convention,

Doc.trav./Work.Docs Nos 21-28

Documents de travail Nos 29 à 35

Working Documents Nos 29 to 35

Distribués le mardi 13 novembre 2007

Distributed on Tuesday 13 November 2007

No 29 – Proposal of the delegation of Japan

Article 17

[…]

6 A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin. Any Contracting State may declare in accordance with Article 58 that it will not recognise and enforce a decision if the decision is or can be appealed in the State of origin.

Rationale:

It would not be appropriate to impose upon Contracting States the obligation to recognise and enforce a foreign decision which is or can be under appeal in the State of origin. If the original decision has been reversed in the appeal of the original State after recognition and enforcement took place in the requested State, it would be very difficult for the debtor to recover the maintenance across the border. Under our current national law, only the foreign decision which is finalised in terms of appeal can be recognised and enforced. And it would be difficult to change this system.

No 30 – Proposal of the delegation of Israel

Article 49 Amendment of forms and additional forms

[…]

4 Additional forms may be annexed to the Convention according to procedures specified in paragraphs 1 to 3.

Rationale:

The proposed paragraph enables to annex in the future additional forms to improve the efficient practice of the Convention.

No 31 – Proposal of the delegations of Ecuador and South Africa

Article 11 Application contents

Option 1

1 All applications under Article 10 shall as a minimum include –

[…]

(c) the name and, if known, address, date of birth, latest photograph where this is available and short description of the respondent;

[…]

No 32 – Proposal of the delegation of Israel

Additional mandatory forms

Option 1

Article 11 Application contents

[…]

4 An application under Article 10 may be made in a form recommended and published by the Hague Conference on Private International Law that was drafted by a Working Group established by a Diplomatic Session of the Hague Conference on Private International Law or by a Special Commission as mentioned in Article 49(1) and that was accepted in a Special Commission or that was distributed for comments for a period of at least 90 days to all Contracting States.

5 Mandatory forms for applications under Article 10 may be enacted according to the procedures specified in Article 49.

Article 49 Amendment of forms

[…]

4 Amended forms according to paragraph 2 or additional mandatory forms according to Article 11(5) shall be annexed to this Convention.

Option 2

Article 11 Application contents

Delete paragraph 4.

Article 49 Amendment of forms

[…]

4 Amended forms according to paragraph 2 shall be annexed to this Convention.

Article 49 bis *Additional mandatory forms and recommended forms*

1 Additional mandatory forms for applications according to Article 11 may be enacted according to the procedures specified in Article 49(1), (2) to all Contracting States save to States that made a reservation according to Article 49(3).

2 Additional forms according to paragraph 1 shall be annexed to this Convention.

3 States may apply recommended model forms [under Article 11] that are published by the Hague Conference on Private International Law and that were drafted by a Working Group established by a Diplomatic Session of the Hague Conference on Private International Law or by a Special Commission as mentioned in Article 49(1) and were accepted in a Special Commission or that have been distrib-

uted for comments for a period of at least 90 days to all Contracting States.

Rationale:

The proposed paragraphs enable to add in the future mandatory or recommended forms to improve the efficient practice of the Convention.

No 33 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 28 Enforcement under internal law

Justification :

Nous proposons de remplacer le terme « *national* » par « *internal* » dans le texte anglais du titre pour assurer une concordance avec le texte français.

* * *

Rationale:

We propose replacing the term "national" for "internal" in the title of the English language text to ensure consistency with the French language text.

No 34 – Proposal of the delegation of Brazil

Article 19

1 […]

(d) if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision was the first to be instituted and fulfils the conditions necessary for its recognition and enforcement in the State addressed;

No 35 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 30 Enforcement measures

1 Contracting States shall make available in ~~domestic~~ internal law effective measures to enforce decisions under this Convention.

Justification :

Nous proposons de remplacer le terme « *domestic* » par « *internal* » dans le texte anglais pour assurer une concordance avec le texte français.

* * *

Rationale:

We propose replacing the term "domestic" by "internal" in the English language text to ensure consistency with the French language text.

Documents de travail Nos 36 à 40

Working Documents Nos 36 to 40

Distribués le mercredi 14 novembre 2007

Distributed on Wednesday 14 November 2007

No 36 – Proposition de la délégation de la Communauté européenne – Proposal of the delegation of the European Community

Article 35 Protection des ~~renseignements~~ données à caractère personnel

Les ~~renseignements~~ données à caractère personnel réunies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ~~ils~~ ont été réunies ou transmises.

Article 36 Confidentialité

Toute autorité traitant de renseignements ~~à caractère personnel~~ en assure la confidentialité conformément à la loi de son État.

Article 37 Non-divulgation de renseignements

1 Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle juge que, ce faisant, la santé, la sécurité ou la liberté d'une personne pourrait être compromise.

2 Lorsqu'une telle décision est prise par une Autorité centrale, elle ~~lie~~ doit être prise en compte par toute autre Autorité centrale.

3 Cette disposition ne peut être interprétée comme empêchant les autorités de recueillir et de se transmettre des renseignements.

* * *

Article 35 Protection of personal ~~information~~ data

Personal ~~information~~ data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted.

Article 36 Confidentiality

Any authority processing ~~personal~~ information shall ensure its confidentiality in accordance with the law of its State.

Article 37 Non-disclosure of information

1 An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.

2 A determination to this effect made by one Central Authority shall be ~~binding on~~ taken into account by another Central Authority.

3 Nothing in this provision shall impede the gathering and transmitting of information between authorities.

No 37 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 46 Règle de l'efficacité maximale

La présente Convention ne fait pas obstacle à l'application d'un accord, d'un arrangement ou d'un instrument international en vigueur entre l'État requérant et l'État requis ou d'une autre loi en vigueur dans l'État requis ou une entente de réciprocité adoptée en vertu de telle loi et qui prévoit :

(a) des bases plus larges pour la reconnaissance des décisions en matière d'aliments, sans préjudice de l'article 19(f) de la Convention ;

(b) des procédures simplifiées ou accélérées relatives à une demande de reconnaissance et d'exécution de décisions en matière d'aliments ; ou

(c) une assistance juridique plus favorable que celle prévue aux articles 14, 14 *bis* et 14 *ter*.

Justification :

Pour prendre en compte les ententes de réciprocité adoptée en vertu de lois des unités territoriales d'États dotés de systèmes juridiques non unifiés.

Pour clarifier que les alinéas (a), (b) et (c) de l'article 46 ne sont pas cumulatifs.

* * *

Article 46 Most effective rule

This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State or other law in force in the requested State or a reciprocity arrangement adopted under such law that provides for –

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 19(f) of the Convention;

(b) simplified or more expeditious procedures on an application for recognition or enforcement of maintenance decisions; or

(c) more beneficial legal assistance than that provided for under Articles 14, 14 *bis* and 14 *ter*.

Rationale:

To account for reciprocity arrangements adopted under the laws of territorial units of States that have non-unified legal systems.

To clarify that sub-paragraphs (a), (b) and (c) are not cumulative.

No 38 – Proposition du Bureau Permanent – Proposal of the Permanent Bureau

PRÉAMBULE

[…]

Souhaitant s'inspirer des meilleurs aspects des Conventions de La Haye existantes, ainsi que d'autres instruments internationaux, notamment la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies,

[…]

* * *

PREAMBLE

[…]

Wishing to build upon the best features of existing Hague Conventions and other international instruments, in particular the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956,

[…]

No 39 – Proposal of the delegation of the European Community

Article 45 Co-ordination of instruments and supplementary agreements

[…]

4 This Convention shall not affect the application of instruments of a Regional Economic Integration Organisation that is Party to this Convention, adopted after the conclusion of this Convention, on matters governed by the Convention provided that such instruments do not affect, in the relationship of Member States with other Contracting States, the application of the provisions of this Convention.

As concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation, this Convention shall not affect the rules of the Regional Economic Integration Organisation, whether adopted before or after the conclusion of this Convention.

No 40 – Proposal of the delegation of Switzerland

Article 45 Co-ordination of instruments and supplementary agreements

1 This Convention does not affect any international instrument concluded before this Convention ~~to which Contracting States are Parties~~ and which contains provisions on matters governed by this Convention.

[…]

Distribués le jeudi 15 novembre 2007

Distributed on Thursday 15 November 2007

No 41 – Proposition du Comité de rédaction – Proposal of the Drafting Committee

Texte du préambule tel que révisé par le Comité de rédaction en date du 14 novembre 2007 :

PRÉAMBULE

Les États signataires de la présente Convention,

[Désireux d'améliorer la coopération entre les États en matière de recouvrement international des aliments destinés aux ~~envers les~~ enfants et à d'autres membres de la famille,

Conscients de la nécessité de disposer de procédures produisant des résultats et qui soient accessibles, rapides, efficaces, économiques, équitables et adaptées à diverses situations,

Souhaitant s'inspirer des ~~meilleurs aspects~~ meilleures solutions des Conventions de La Haye existantes, ainsi que d'autres instruments internationaux, notamment la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies,

Cherchant à tirer parti des avancées technologiques et à créer un système souple et ~~évolutif~~ susceptible de s'adapter aux nouveaux besoins et aux opportunités offertes par les ~~nouvelles~~ technologies et leurs évolutions,

Reconnaissant que l'utilisation de formulaires modèles favorise une pratique uniforme, diminue le besoin de traduction et permet des procédures rapides et peu coûteuses,

Considérant que le partage d'informations dans un format standard aidera les États contractants dans la mise en œuvre et l'application de la Convention,

Rappelant que, en application des articles 3 et 27 de la *Convention* ~~des Nations Unies~~ *relative aux droits de l'enfant* du 20 novembre 1989, établie par les Nations Unies,

– l'intérêt supérieur de l'enfant doit être une considération primordiale dans toutes les décisions concernant les enfants,

– tout enfant a droit à un niveau de vie suffisant pour permettre son développement physique, mental, spirituel, moral et social,

– il incombe au premier chef aux parents ou autres personnes ayant la charge de l'enfant d'assurer, dans la limite de leurs possibilités et de leurs moyens financiers, les conditions de vie nécessaires au développement de l'enfant,

– les États parties devraient prendre toutes les mesures appropriées, notamment la conclusion d'accords internationaux, en vue d'assurer le recouvrement des aliments ~~envers~~ relatif à l'enfant auprès de ses parents ou des autres personnes ayant une responsabilité ~~responsables~~ à son égard, en particulier lorsque ces personnes vivent dans un territoire autre que celui de l'enfant,

Ont résolu de conclure la présente Convention, et sont convenus des dispositions suivantes :]

* * *

Text of the Preamble as reviewed by the Drafting Committee as of 14 November 2007:

PREAMBLE

The States signatory to the present Convention,

[Desiring to improve co-operation among States for the international recovery of child support and other forms of family maintenance,

Aware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive, and fair,

Wishing to build upon the best features of existing Hague Conventions and other international instruments, in particular the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956,

Seeking to take advantage of advances in ~~information~~ technologies~~y~~ and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities,

Acknowledging that standardised forms promote uniform practice, minimise the need for translation, and facilitate prompt and inexpensive procedures,

Believing that the sharing of information in a common format will assist Contracting States in their implementation and operation of the Convention,

Recalling that, in accordance with Articles 3 and 27 of the United Nations *Convention on the Rights of the Child* of 20 November 1989,

– in all actions concerning children the best interests of the child shall be a primary consideration,

– every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,

– the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development, and

– States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child,

Have resolved to conclude this Convention and have agreed upon the following provisions –]

No 42 – Proposition du Bureau Permanent – Proposal of the Permanent Bureau

PRÉAMBULE

[…]

Reconnaissant l'importance d'étendre l'application de la Convention aux organismes publics agissant à la place de personnes physiques ou auxquels est dû le remboursement de prestations fournies à titre d'aliments,

[…]

* * *

PREAMBLE

[…]

Underlining the importance of extending the application of the Convention to public bodies acting in place of individuals or to public bodies seeking reimbursement for benefits provided in lieu of maintenance,

[…]

No 43 – Proposal of the delegation of Switzerland

Article 2 Scope[1]

1 This Convention shall apply to maintenance obligations arising from a parent-child relationship towards a child under the age of ~~21~~ 25 [including claims for spousal support made in combination with claims for maintenance in respect of such a child] and, with the exception of Chapters II and III, to spousal support.

No 44 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 25 Présence physique de l'enfant ou du demandeur

~~[~~La présence ~~physique~~ de l'enfant ou du demandeur n'est pas exigée lors de procédures introduites en vertu du présent chapitre dans l'État requis.~~]~~

Nous proposons également de déplacer cet article au chapitre VIII.

Justification :

Le Canada estime que la présence de l'enfant ou du demandeur, sous quelque forme que ce soit, ne devrait pas être exigée lors de procédures introduites dans l'État requis et que, par conséquent, le terme « physique » devrait être supprimé à l'article 25. Nous suggérerions aussi que l'article soit déplacé au chapitre VIII de la Convention, de façon à ce qu'il s'applique à toutes les demandes.

* * *

Article 25 Physical presence of the child or applicant

~~[~~The ~~physical~~ presence of the child or applicant shall not be required in any proceedings in the requested State under this Chapter.~~]~~

We also propose to move this Article to Chapter VIII.

Rationale:

Canada believes that presence of the child or applicant, in any form, should not be required in any proceedings in the requested State and that therefore the word "physical" should be removed from Article 25. We would also suggest that the Article be moved under Chapter VIII of the Convention so that it would apply to all applications.

No 45 – Proposal of the delegation of the European Community

~~[~~*Article 39 Power of attorney*

The Central Authority of the requested State may require a power of attorney from the applicant only if it acts ~~as legal representative~~ on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.~~]~~

No 46 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 3 Définitions

Nouvel alinéa :

(f) « un accord en matière d'obligations alimentaires » désigne un accord par écrit prévoyant le paiement d'aliments lorsque cet accord :

– a été déterminé exécutoire comme une décision en vertu de la loi de l'État d'origine par une autorité compétente de l'État d'origine ;

– a été enregistré ou déposé auprès d'une autorité compétente dans l'État d'origine ; et

– peut faire l'objet d'un contrôle et d'une modification par une autorité compétente de l'État d'origine.

(i) Aux fins de cette disposition, l'État d'origine est l'État dans lequel l'accord a été enregistré ou déposé.

Article 16 Champ d'application du chapitre

~~[~~4 Ce chapitre s'applique aussi aux actes authentiques et accords ~~privés~~ en matière d'obligations alimentaires, conformément à l'article 26.~~]~~

~~[~~*Article 26 Actes authentiques et accords ~~privés~~ en matière d'obligations alimentaires*

1 Un acte authentique établi ou un accord ~~privé~~ en matière d'obligations alimentaires conclu dans un État contractant doit pouvoir être reconnu et exécuté comme une décision en application de ce chapitre s'il est exécutoire comme une décision dans l'État d'origine.

2 Une demande de reconnaissance et d'exécution d'un acte authentique ou d'un accord ~~privé~~ en matière d'obligations alimentaires est accompagnée :

(a) du texte complet de l'acte authentique ou de l'accord ~~privé~~ en matière d'obligations alimentaires ;

[1] At least one delegation expressed concern with regard to applying any part of the Convention to persons other than children.

(b) d'un document établissant que l'acte authentique ou l'accord ~~privé~~ en matière d'obligations alimentaires visé est exécutoire comme une décision dans l'État d'origine.

3 La reconnaissance et l'exécution d'un acte authentique ou d'un accord ~~privé~~ en matière d'obligations alimentaires peuvent être refusées si :

(a) la reconnaissance et l'exécution sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) l'acte authentique ou l'accord ~~privé~~ en matière d'obligations alimentaires a été obtenu par fraude ou a fait l'objet de falsification ;

(c) l'acte authentique ou l'accord ~~privé~~ en matière d'obligations alimentaires est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque, dans ce dernier cas, elle remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis.

4 Les dispositions de ce chapitre, à l'exception des articles 17, 19, 20(7) et 21(1) et (2), s'appliquent *mutatis mutandis* à la reconnaissance et l'exécution d'un accord ~~privé~~ en matière d'obligations alimentaires ou d'un acte authentique ; toutefois :

(a) une déclaration ou un enregistrement fait conformément à l'article 20(4) ne peut être refusé que pour les raisons visées au [paragraphe 3] [paragraphe 3(a)] ; et

(b) une contestation ou un appel en vertu de l'article 20(6) ne peut être fondé que sur :

(i) les motifs de refus de reconnaissance prévus à l'article 26(3) ;

(ii) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 26(2).

5 La procédure de reconnaissance et d'exécution d'un acte authentique ou d'un accord ~~privé~~ en matière d'obligations alimentaires est suspendue si des procédures concernant sa validité sont en cours devant une autorité compétente.

6 Un État peut déclarer que les demandes de reconnaissance et d'exécution des actes authentiques et des accords ~~privés~~ en matière d'obligations alimentaires ne peuvent être présentées directement à une autorité compétente.~~]~~

* * *

Article 3 Definitions

New sub-paragraph:

(f) "maintenance agreement" means an agreement in writing requiring the payment of support where that agreement –

– has been determined to be enforceable as a decision under the law of the State of origin by a competent authority of the State of origin;

– has been registered or filed with a competent authority in the State of origin; and

– is subject to review and modification by a competent authority in the State of origin.

(i) For the purposes of this provision, the State of origin is the State in which the agreement has been registered or filed.

Article 16 Scope of the Chapter

~~[~~4 This Chapter also applies to authentic instruments and ~~private~~ maintenance agreements relating to a maintenance obligation in accordance with Article 26.~~]~~

~~[~~*Article 26 Authentic instruments and ~~private~~ maintenance agreements*

1 An authentic instrument or a ~~private~~ maintenance agreement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.

2 An application for recognition and enforcement of an authentic instrument or a ~~private~~ maintenance agreement shall be accompanied by the following –

(a) a complete text of the authentic instrument or of the ~~private~~ maintenance agreement;

(b) a document stating that the particular authentic instrument or ~~private~~ maintenance agreement is enforceable as a decision in the State of origin.

3 Recognition and enforcement of an authentic instrument or a private maintenance agreement may be refused if –

(a) the recognition and enforcement is manifestly incompatible with the public policy of the requested State;

(b) the authentic instrument or the ~~private~~ maintenance agreement was obtained by fraud or falsification;

(c) the authentic instrument or the ~~private~~ maintenance agreement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

4 The provisions of this Chapter, with the exception of Articles 17, 19, 20(7) and 21(1) and (2), shall apply *mutatis mutandis* to the recognition and enforcement of a ~~private~~ maintenance agreement or authentic instrument save that –

(a) a declaration or registration in accordance with Article 20(4) may be refused only for the reasons specified in [paragraph 3] [paragraph 3(a)]; and

(b) a challenge or appeal as referred to in Article 20(6) may be founded only on the following –

(i) the grounds for refusing recognition and enforcement set out in Article 26(3);

(ii) the authenticity, veracity or integrity of any document transmitted in accordance with Article 26(2).

5 Proceedings for recognition and enforcement of an authentic instrument or a ~~private~~ maintenance agreement shall be suspended if proceedings concerning its validity are pending before a competent authority.

Doc.trav./Work.Docs Nos 41-50

6 A State may declare that applications for recognition and enforcement of authentic instruments and ~~private~~ maintenance agreements shall not be made directly to a competent authority.~~]~~

No 47 – Proposal of the delegation of Canada

Article 17 Bases for recognition and enforcement

5 A decision in favour of a child under the age of 18 which cannot be recognised by virtue only of a reservation under Article 17(1)(c), (e) or (f) shall be accepted as establishing the eligibility of that child for maintenance in the ~~requested~~ State addressed.

Article 20 Procedure on an application for recognition and enforcement

3 In the case of a direct application to a competent authority in the ~~requested~~ State addressed in accordance with Article 16(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

Article 21 Documents

3 Upon a challenge or appeal under Article 20(7)(c) or upon request by the competent authority in the ~~requested~~ State addressed, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly –

(a) by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;

(b) by the applicant, where the application has been made directly to a competent authority of the State addressed.

Article 25 Physical presence of the child or applicant

~~[~~The ~~physical~~ presence of the child or applicant shall not be required in any proceedings in the ~~requested~~ State addressed under this Chapter.~~]~~ (*Cf.* Work. Doc. No 44.)

~~[~~*Article 26 Authentic instruments and ~~private~~ maintenance agreements*

3 Recognition and enforcement of an authentic instrument or a private maintenance agreement may be refused if –

(a) the recognition and enforcement is manifestly incompatible with the public policy of the ~~requested~~ State addressed;

(b) the authentic instrument or the ~~private~~ maintenance agreement was obtained by fraud or falsification;

(c) the authentic instrument or the ~~private~~ maintenance agreement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed. (*Cf.* Work. Doc. No 46.)

Rationale:

Ensure consistency in the terminology.

Justification :

Assurer la cohérence dans la terminologie.

No 48 – Proposal of the delegations of Argentina, Brazil, Chile and Peru (Mercosur States and associate States)

Article 2 Scope

1 This Convention […] a child under the age of 21 or who, having reached that age and being disabled, continues being a creditor according to the applicable law, including claims […] in respect of such a child.

2 This Convention shall also apply with the exception of Chapters II and III to –

(a) spousal support;

(b) analogous situations to marriage according to the applicable law.

No 49 – Proposition de la délégation de la Communauté européenne – Proposal of the delegation of the European Community

~~[~~*Article 50 Dispositions transitoires*

[…]

~~[~~2 L'État requis n'est pas tenu, en vertu de la présente Convention, d'exécuter une décision[, un acte authentique ou un accord privé] pour ce qui a trait aux ~~concerne les~~ paiements échus avant l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis sauf en ce qui concerne les obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne de moins de 21 ans.~~]]~~

* * *

~~[~~*Article 50 Transitional provisions*

[…]

~~[~~2 The State addressed shall not be bound under this Convention to enforce a decision[, an authentic instrument or a private agreement] in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21.~~]]~~

No 50 – Proposal of the delegation of Switzerland

~~[~~*Article 39 Power of attorney*

~~The~~ A Central Authority ~~of the requested State~~ may require a power of attorney from the applicant ~~only~~ if the Central Authority of the requested State ~~it~~ acts as legal representative on behalf of the applicant in judicial proceedings or before other authorities, or designates a representative so to act.~~]~~

Documents de travail Nos 51 à 53

Working Documents Nos 51 to 53

Distribués le vendredi 16 novembre 2007

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No 51 – Proposition du Groupe de travail sur l'article 14 et l'accès effectif aux procédures – Proposal of the Working Group on Article 14 and effective access to procedures

PARTIE I – LE PROBLÈME DU DEMANDEUR FORTUNÉ

Introduction :

Le point de départ de la discussion du Groupe de travail fut le fait qu'un État ne devrait pas avoir à supporter les coûts engendrés par un demandeur fortuné dans le cadre d'une demande d'aliments destinés à un enfant. Bien qu'il fut considéré qu'il est peu probable qu'un demandeur fortuné présente une demande d'aliments destinés à un enfant par l'intermédiaire d'une Autorité centrale (plutôt que directement à l'autorité compétente avec l'assistance d'un avocat), le Groupe de travail a considéré de façon détaillée plusieurs des façons possibles d'identifier les demandeurs qui, en raison de leur fortune, ne devraient pas pouvoir bénéficier de l'assistance juridique gratuite.

Deux difficultés majeures ont été rencontrées pour établir un système de « filtre ». Le premier problème fut celui de décider de critères qui soient acceptables d'un point de vue international afin de définir ce qu'est un demandeur fortuné. Des modèles basés sur la comparaison entre le salaire du demandeur et des multiples du salaire moyen dans l'État requérant et dans l'État requis ont fait l'objet de discussions détaillées mais furent finalement considérés comme irréalisables. Le second problème fut celui de concevoir une procédure par laquelle effectuer le test nécessaire des ressources du demandeur. Finalement, l'opinion du Groupe fut que les complexités, les coûts et les retards pouvant résulter d'une procédure conçue afin de filtrer de rares demandeurs fortunés étaient disproportionnés par rapport aux bénéfices probables. Une inquiétude fut aussi exprimée sur le fait qu'une telle procédure, à moins qu'elle ne soit très simple, puisse présenter des obstacles pour ce qui constituera sûrement une grande majorité des « demandeurs non fortunés ».

De plus, cette approche n'était pas attrayante pour plusieurs États représentés dans le Groupe de travail qui étaient en faveur d'une approche centrée sur l'enfant et qui mettraient l'accent sur les ressources de l'enfant plutôt que sur les parents dans la détermination du droit à l'assistance juridique gratuite.

Comme alternative à cette approche, le Groupe de travail a considéré la possibilité de recouvrer les frais de toute assistance juridique gratuite fournie à des demandeurs fortunés par le biais d'un système de recouvrement des frais. L'idée est la suivante : si une personne fortunée forme une demande relative à l'établissement ou à la modification d'une décision en matière d'aliments destinés aux enfants par l'intermédiaire de l'Autorité centrale, les frais encourus en raison de la fourniture d'une assistance juridique gratuite devraient pouvoir être recouvrés au moyen d'une décision relative aux frais et rendue après la décision relative aux aliments. Par exemple, lorsqu'une décision portant sur une demande d'aliments destinés à un enfant a été rendue en faveur du demandeur, les frais peuvent être mis à la charge du débiteur, et le risque que le passif des frais affecte le recouvrement des aliments est déjà évité par l'article 40(1). Lorsqu'un demandeur fortuné ne parvient pas à obtenir la décision recherchée en raison de sa situation financière, l'État auquel il s'est adressé peut recouvrer de façon discrétionnaire à l'encontre du demandeur les frais encourus en raison de la fourniture d'une assistance juridique gratuite.

Le Groupe de travail fut d'avis que cette approche serait conforme à la rédaction de la Convention dans sa forme actuelle. L'article 40(2), en particulier, autorise de façon expresse un système de recouvrement des coûts à l'encontre de la partie qui succombe. De plus, l'article 16(1) prévoit clairement qu'une décision relative aux frais peut être incluse dans une décision (qui inclut une décision de ne pas octroyer d'aliments) relative à des aliments, décision qui serait par la suite reconnue et exécutée en vertu du chapitre V.

Il a été accepté que la Convention ne devait pas essayer d'harmoniser les procédures relatives au recouvrement des frais, ces procédures différant d'un pays à l'autre constituent une question pour le droit interne. Cependant, il serait important d'attirer l'attention par le biais du Rapport explicatif sur l'importance d'éviter un système de frais qui pénalise un demandeur qui succombe pour une raison qui n'est pas liée au bien-fondé de son affaire.

Conclusion :

La Conclusion du Groupe de travail est qu'aucun amendement significatif du texte actuel n'est nécessaire afin de permettre aux États contractants d'appliquer ou d'introduire un système de recouvrement de frais à l'encontre des parties fortunées. Un amendement minime de l'article 40(2) rendrait plus clair le fait qu'il existe dans la Convention un fondement pour l'introduction d'un tel système. De plus, un paragraphe supplémentaire dans l'article 40 pourrait clarifier le fait qu'un État puisse utiliser l'intermédiaire d'un Autorité centrale pour poursuivre une demande de reconnaissance et d'exécution d'une décision relative aux frais à l'encontre d'une partie qui succombe.

Le Groupe de travail recommande ainsi :

a) la suppression de l'article 14 (2^{e} option) *bis* (2)(c) ;

b) l'amendement de l'article 40(2) qui devient :

« Un État peut recouvrer les frais à l'encontre d'une partie qui succombe » ;

c) l'ajout à l'article 40 du paragraphe suivant :

« 3 Pour les besoins d'une demande en vertu de l'article 10(1)(b) afin de recouvrer les frais d'une partie qui succombe en vertu de l'article 40(2), le terme 'créancier' dans l'article 10(1) inclut un État » ;

d) que le Rapport explicatif contienne une explication sur la façon dont les dispositions de la Convention permettent un système de recouvrement des frais à l'encontre d'une partie fortunée.

PARTIE II – AMENDEMENTS SUPPLÉMENTAIRES À L'ARTICLE 14 *BIS* (DEUXIÈME OPTION)

1 *Proposition relative au test génétique*

Supprimer l'article 14 *bis* (2)(a).

Motifs et notes :

Il a été décidé par le Groupe de travail que cette exception au principe général d'assistance juridique gratuite n'était plus nécessaire vu que les coûts relatifs aux tests génétiques pouvaient être recouvrés en vertu de l'article 40.

Le Rapport explicatif devrait aussi clarifier que ceci ne fait pas obstacle à ce qu'un État demande au débiteur le paiement préalable du test génétique

2 *Proposition relative aux demandes manifestement mal fondées*

Supprimer les crochets dans l'article 14 *bis* (2)(b) et conserver le texte.

PARTIE III – DISPOSITIONS PERMETTANT UNE APPROCHE CENTRÉE SUR L'ENFANT EN CE QUI CONCERNE LA FOURNITURE D'ASSISTANCE JURIDIQUE GRATUITE

« Article X

1 Nonobstant les dispositions du paragraphe premier de l'article 14 *bis*, un État peut déclarer, conformément à l'article 58, qu'il fournira une assistance juridique gratuite en ce qui concerne les demandes mentionnées au [paragraphe premier] [paragraphe 2] de l'article 14 *bis*, soumise seulement à un test basé sur l'évaluation des [moyens] [revenus] de l'enfant.

2 Un État, au moment où il fait une telle déclaration, doit fournir au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont le test des [moyens] [revenus] de l'enfant sera effectué ainsi que le seuil au-dessus duquel l'assistance juridique gratuite ne sera pas fournie.

3 Une demande mentionnée au paragraphe premier, adressée à un État qui a fait une déclaration mentionnée à ce paragraphe, devra inclure une déclaration par le demandeur que les [moyens] [revenus] de l'enfant sont en-dessous du seuil mentionné au paragraphe précédent. L'État requis peut demander de plus amples preuves des [moyens] [revenus] de l'enfant seulement s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

4 Un État requis ayant fait une déclaration conformément au paragraphe premier produit l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne toutes les demandes présentées en vertu du chapitre III relatives aux obligations alimentaires envers un enfant découlant d'une relation parent-enfant. »

Motifs et notes :

Cette proposition implique un compromis entre la première option et la deuxième option actuelles dans l'article 14. Elle permet à un État en tant qu'alternative à la fourniture d'assistance juridique gratuite pour les affaires d'aliments destinés aux enfants d'appliquer un test relatif aux [ressources] [revenus] de l'enfant plutôt qu'un test relatif à celles de ses parents. Ce compromis est obtenu grâce à la nouvelle disposition qui peut être fusionnée dans l'article 14 (2e option) actuel.

Dans le paragraphe premier de la proposition la référence au paragraphe premier (entre crochets) de l'article 14 *bis* signifierait qu'une déclaration couvrirait toutes les demandes relatives aux enfants. La référence alternative au paragraphe 2 (entre crochets) de l'article 14 *bis* signifierait que la déclaration ne permettrait pas de déroger au principe d'assistance juridique gratuite en ce qui concerne les demandes de reconnaissance et d'exécution.

Il doit être noté que la proposition ci-dessus n'est pas une alternative aux propositions faites dans la partie I et dans la partie II. Les propositions peuvent être combinées (voir partie IV) ; elles sont exposées séparément pour faciliter la discussion.

La possibilité d'avoir plus de garanties afin d'assurer qu'un enfant ne soit pas soumis à un test trop rigoureux de ses ressources pourrait être prise en considération.

PARTIE IV – ARTICLES 14 À 14 *QUATER* ET 40, INCLUANT TOUTES LES PROPOSITIONS DU GROUPE DE TRAVAIL

Article 14 Accès effectif aux procédures

1 L'État requis assure aux demandeurs un accès effectif aux procédures, y compris dans le cadre des procédures d'exécution et d'appel, qui découlent des demandes présentées conformément au chapitre III.

2 Pour assurer un tel accès effectif, l'État requis doit fournir une assistance juridique gratuite conformément aux articles 14, 14 *bis*, 14 *ter* et 14 *quater* à moins que le paragraphe 3 s'applique.

3 L'État requis n'est pas tenu de fournir une telle assistance juridique gratuite si et dans la mesure où les procédures de cet État permettent au demandeur d'agir sans avoir besoin d'une telle assistance et que l'Autorité centrale fournit gratuitement les services nécessaires.

4 Les conditions d'accès à l'assistance juridique gratuite sont équivalentes à celles fixées dans les affaires internes équivalentes.

5 Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais dans les procédures introduites en vertu de la Convention.

Article 14 bis *Assistance juridique gratuite pour les demandes d'aliments relatives aux enfants*

1 L'État requis doit fournir l'assistance juridique gratuite au regard de toutes les demandes relatives aux obligations alimentaires découlant d'une relation parent-enfant envers un enfant âgé de moins de 21 ans présentées [par un créancier] en vertu du chapitre III.

2 Par dérogation au paragraphe premier, l'État requis peut, en ce qui a trait aux demandes autres que celles visées à l'article 10(1)(a) et (b) refuser l'octroi d'une assistance juridique gratuite s'il considère que la demande, ou quelque appel que ce soit, est manifestement mal fondée.

Article 14 ter *Déclaration permettant l'utilisation d'un test centré sur les [ressources] [revenus] de l'enfant*

1 Nonobstant les dispositions du paragraphe premier de l'article 14 *bis*, un État peut déclarer, conformément à l'article 58, qu'il fournira une assistance juridique gratuite en ce qui concerne les demandes mentionnées au [paragraphe premier] [paragraphe 2] de l'article 14 *bis*, soumise seulement à un test basé sur l'évaluation des [moyens] [revenus] de l'enfant.

2 Un État, au moment où il fait une telle déclaration, doit fournir au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont le test des [moyens] [revenus] de l'enfant sera effectué ainsi que le seuil au-dessus duquel l'assistance juridique gratuite ne sera pas fournie.

3 Une demande mentionnée au paragraphe premier, adressée à un État qui a fait une déclaration mentionnée à ce paragraphe, devra inclure une déclaration par le demandeur que les [moyens] [revenus] de l'enfant sont en-dessous du seuil mentionné au paragraphe 2. L'État requis peut demander de plus amples preuves des [moyens] [revenus] de l'enfant seulement s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

4 Un État requis ayant fait une déclaration conformément au paragraphe premier produit l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne toutes les demandes présentées en vertu du chapitre III relatives aux obligations alimentaires envers un enfant découlant d'une relation parent-enfant.

Article 14 quater *Demandes ne permettant pas de bénéficier des articles 14* bis *ou 14* ter

Dans le cadre d'une demande ne permettant pas de bénéficier de l'assistance juridique gratuite conformément à l'article 14 *bis* ou à l'article 14 *ter* :

(a) l'octroi d'une assistance juridique gratuite peut être subordonné à l'examen des ressources du demandeur ou à l'analyse de son bien-fondé ;

(b) un [demandeur] [créancier] qui, dans l'État d'origine, a bénéficié d'une assistance juridique gratuite a droit, dans toute procédure de reconnaissance ou d'exécution, de bénéficier au moins dans la même mesure, d'une assistance juridique gratuite telle que prévue par la loi de l'État requis dans les mêmes circonstances.

Article 40 Recouvrement des frais

1 Le recouvrement de tous frais encourus pour l'application de cette Convention n'a pas de priorité sur le recouvrement des aliments.

2 Un État peut recouvrer les frais à l'encontre d'une partie qui succombe.

3 Pour les besoins d'une demande en vertu de l'article 10(1)(b) afin de recouvrer les frais d'une partie qui succombe en vertu de l'article 40(2), le terme « créancier » dans l'article 10(1) inclut un État.

* * *

PART I – THE PROBLEM OF THE WEALTHY APPLICANT

Introduction:

Discussion in the Working Group proceeded on the basis that a State should not have to bear the costs of a wealthy applicant in a child support application. Although it was considered unlikely that a wealthy applicant for child support would make an application through the Central Authority route (rather than directly to a competent authority with the assistance of a private lawyer), the Working Group considered in detail a number of possible ways of identifying applicants who, by reason of their wealth, should not be afforded free legal assistance.

Two major difficulties were encountered in establishing such a "filtering" system. The first was the problem of deciding upon criteria which are internationally acceptable by which to define a wealthy applicant. Models based on a comparison between the applicant's income and multiples of average income in the requesting and requested State were discussed in detail but considered in the end unworkable. A second problem was that of devising a procedure by which to make the necessary assessment of the applicant's means. Finally, the view was taken that the complexities, costs and delays which may result from a process designed to filter out rare wealthy applicants were wholly disproportionate to the likely benefits. There was a concern also that such a process, unless very simple, could present obstacles for what will certainly be a vast majority of "non-wealthy applicants".

In addition, this approach was not attractive for several States represented on the Working Group who favoured a child-centred approach which would place emphasis on the means of the child rather than the parent in determining entitlement to free legal assistance.

As an alternative to this approach, the Working Group considered the possibility of recovering the costs of any free legal assistance provided to wealthy applicants through a system of costs recovery. The idea is that, if a wealthy person applies for establishment or modification of a child support order through the Central Authority channel, the costs incurred through the provision of free legal assistance should be recoverable by means of an order for costs made following the decision concerning maintenance. For example, where the applicant is successful in her / his child support application the costs may be awarded against the debtor, and any danger that the liability for costs will affect the recovery of maintenance is already avoided by Article 40(1). Where a wealthy applicant fails to obtain the order sought on the basis that her / his financial circumstances do not justify it, the State addressed has the discretion to recover the costs of providing free legal assistance from the applicant.

The Working Group was of the view that this approach would be in conformity with the Convention as presently drafted. In particular, the existing Article 40(2) explicitly authorises a system of costs recovery from unsuccessful parties. Moreover, Article 16(1) makes clear that an order for costs can be included in a maintenance decision (which includes a decision not to award maintenance), which would then be entitled to recognition and enforcement in other Contracting States under Chapter V.

It was accepted that the Convention should not attempt to harmonise procedures for the recovery of costs, which differ from country to country and are a matter for internal law. However, it would be important to draw attention in

Doc.trav./Work.Docs Nos 51-53

the Explanatory Report to the importance of avoiding a system of costs that penalises an applicant whose lack of success has nothing to do with the merits of her case.

Conclusion:

The Conclusion of the Working Group is that no substantial amendments to the present text are needed to enable Contracting States to apply or introduce a system of costs recovery from wealthy parties. A minor amendment to Article 40(2) would make it clear that there is a Convention basis for the introduction of such a system. Moreover, an additional paragraph in Article 40 could clarify that a State may use the Central Authority route to pursue an application for the recognition and enforcement of an order for costs made against an unsuccessful party.

The Working Group therefore recommends:

a) the deletion of Article 14 (Option 2) *bis* (2)(c);

b) the amendment of Article 40(2) to read:

"A State may recover costs from an unsuccessful party";

c) the addition to Article 40 of the following paragraph:

"3 For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with Article 40(2), the term 'creditor' in Article 10(1) shall include a State";

d) that the Explanatory Report should contain an explanation of how the provisions of the Convention permit a system of costs recovery from a wealthy party.

PART II – FURTHER AMENDMENTS TO ARTICLE 14 *BIS* (OPTION 2)

1 *Proposal on genetic testing*

Delete Article 14 *bis* (2)(a).

Rationale and note:

It was decided by the Working Group that this exception to the general principle of free legal assistance was no longer necessary as the costs of genetic testing can be recovered under Article 40.

The Explanatory Report should also make it clear that this does not prevent a State from requiring advanced payment for genetic testing from a debtor.

2 *Proposal on manifestly unfounded applications*

Delete the square brackets in Article 14 *bis* (2)(b) and retain the text.

PART III – PROPOSAL TO ALLOW A CHILD-CENTRED APPROACH TO THE PROVISION OF FREE LEGAL ASSISTANCE

"Article X

1 Notwithstanding paragraph 1 of Article 14 *bis*, a State may declare, in accordance with Article 58, that it will provide free legal assistance in respect of applications referred to in [paragraph 1] [paragraph 2] of Article 14 *bis*, subject only to a test based on an assessment of the [means] [income] of the child.

2 A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's [means] [income] will be carried out, including the threshold above which free legal assistance will not be provided.

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a statement by the applicant that the child's [means] [income] [are] [is] below the threshold referred to in the preceding paragraph. The requested State may only request further evidence of the child's [means] [income] if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

4 A requested State which has made the declaration in accordance with paragraph 1 shall provide the most favourable legal assistance provided for by the law of the requested State in respect of all applications under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child."

Rationale and notes:

This proposal involves a compromise between the existing Option 1 and Option 2 in Article 14. It permits a State, as an alternative to the provision of free legal assistance in child support cases, to apply a means test based on the [means] [income] of the child rather than the parent. This compromise is achieved by a new provision which can be merged with the existing Article 14 Option 2.

In paragraph 1 of the proposal the reference to paragraph 1 (in square brackets) of Article 14 *bis* would mean that a declaration would cover all applications in respect of a child. The alternative reference to paragraph 2 (in square brackets) of Article 14 *bis* would mean that the declaration could not allow derogation from the principle of free legal assistance in applications for recognition and enforcement.

It should be noted that the above proposal is not an alternative to the proposals set out in Parts I and II. The proposals can be combined (see Part IV); they are set out separately to facilitate discussion.

Consideration may be given to the possibility of further safeguards to ensure that a child is not made subject to a means test that is too stringent.

PART IV – ARTICLES 14 TO 14 *QUATER* AND 40, CONTAINING ALL THE PROPOSALS OF THE WORKING GROUP

Article 14 Effective access to procedures

1 The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under Chapter III.

2 To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14, 14 *bis*, 14 *ter* and 14 *quater* unless paragraph 3 applies.

3 The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

4 Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

Article 14 bis *Free legal assistance for child support applications*

1 The requested State shall provide free legal assistance in respect of all applications [by a creditor] under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21.

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1)(a) and (b) refuse free legal assistance, if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Article 14 ter *Declaration to permit use of child-centred [means] [income] test*

1 Notwithstanding paragraph 1 of Article 14 *bis*, a State may declare, in accordance with Article 58, that it will provide free legal assistance in respect of applications referred to in [paragraph 1] [paragraph 2] of Article 14 *bis*, subject only to a test based on an assessment of the [means] [income] of the child.

2 A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's [means] [income] will be carried out, including the threshold above which free legal assistance will not be provided.

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a statement by the applicant that the child's [means] [income] [are] [is] below the threshold referred to in paragraph 2. The requested State may only request further evidence of the child's [means] [income] if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

4 A requested State which has made the declaration in accordance with paragraph 1 shall provide the most favourable legal assistance provided for by the law of the requested State in respect of all applications under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child.

Article 14 quater *Applications not qualifying under either Articles 14* bis *or 14* ter

In the case of an application not qualifying for free legal assistance under Article 14 *bis* or Article 14 *ter* –

(a) the provision of free legal assistance may be made subject to a means or a merits test;

(b) [an applicant] [a creditor], who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

Article 40 Recovery of costs

1 Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

2 A State may recover costs from an unsuccessful party.

3 For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with Article 40(2), the term "creditor" in Article 10(1) shall include a State.

No 52 – Proposal of the delegation of Australia

Article 14 bis *Free legal assistance for child support applications*

1 The requested State shall provide free legal assistance in respect of all applications under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21.

x Notwithstanding paragraph 1, the requested State may refuse free legal assistance to a debtor on the basis that the debtor does not satisfy its means or merits test.

No 53 – Proposition des délégations de l'Australie, de la Chine, d'Israël, du Japon, de la Fédération de Russie et de la Suisse – Proposal of the delegations of Australia, China, Israel, Japan, the Russian Federation and Switzerland

Article 19 Motifs de refus de reconnaissance et d'exécution

(e)

(i) si le défendeur n'a pas été dûment avisé de la procédure et n'a pas eu la possibilité de se faire entendre ; ou

(ii) si un tel avis n'est pas prévu par la loi de l'État d'origine, le défendeur n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester en fait et en droit ; ou

[…]

* * *

Article 19 Grounds for refusing recognition and enforcement

(e)

(i) if the respondent had no proper notice of the proceedings and an opportunity to be heard; or

(ii) if, where no such notice is foreseen by the law of the State of origin, the respondent had no proper notice of the decision and the opportunity to challenge it on fact and law; or

[…]

Doc.trav./Work.Docs Nos 51-53

Note by the delegation of Switzerland:

Proper notice of proceedings is a core feature of due process and essential for the protection of the defendant. Nevertheless, according to the English text of draft Article 19(e), a foreign decision can be recognised and enforced, even if there was no proper notice of proceedings. The conditions in sub-paragraph (e)(i) and (ii) have to be fulfilled cumulatively, in order to enable the State of recognition to refuse recognition and enforcement (in contrary to the French text, where the conditions are alternative). This means that recognition and enforcement must be admitted by the State of recognition, if the defendant just had proper notice of the decision and the opportunity to challenge this decision – although it may never even have learned about the proceedings before the decision has been rendered. In other terms, the system of the actual draft just relies on the possibility to challenge decisions according to the procedural law of the forum. It is much more difficult for the defendant to invoke his rights on second instance than it would be on a first instance proceeding, and the defendant has lost already one instance. Furthermore, the possibility to invoke the right to be heard might be, according to some procedural laws, only a formal one. In addition, it is highly difficult for the authority of recognition and enforcement to examine, on a hypothetical basis, whether the respondent would have had the possibility to effectively challenge or appeal the decision, as it has to go deeply into the procedural law of the forum. While a quite similar solution is contained in the EC "Brussels I" Regulation, the actual draft seems much too far-reaching in a worldwide context.

While the proposal of the delegation of Switzerland is mainly based on proper notice of proceedings, it takes into account the special system in some countries, according to which a decision is rendered without any prior notice of proceedings, but which provides for efficient means to challenge the decision.

Documents de travail Nos 54 à 63

Working Documents Nos 54 to 63

Distribués le lundi 19 novembre 2007

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No 54 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 19 Motifs de refus de reconnaissance et d'exécution

La reconnaissance et l'exécution de la décision peuvent être refusées :

[…]

(e) ~~si le défendeur :~~

(i) si le défendeur n'a pas été dûment avise de la procédure et n'a pas eu l'opportunité de se faire entendre, ~~et~~ ou

(ii) lorsque la loi de l'État d'origine ne prévoit pas de tel avis, le défendeur n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester en fait et en droit ; ou

Justification : proposition de formulation à la suite du Document de travail No 53.

* * *

Article 19 Grounds for refusing recognition and enforcement

Recognition and enforcement of a decision may be refused –

[…]

(e) ~~if the respondent had neither~~

(i) if the respondent did not receive proper notice of the proceedings and an opportunity to be heard, ~~nor~~ or

(ii) where the law of the State of origin does not provide for such notice, the respondent did not receive proper notice of the decision and the opportunity to challenge it on fact and law; or

Rationale: possible alternative wording following Working Document No 53.

No 55 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 20 Procédure pour une demande de reconnaissance et d'exécution

[…]

11 Le présent article ne fait pas obstacle au recours à des procédures plus simples ~~ou~~ et plus rapides.

Justification :

L'objectif est de promouvoir des procédures plus simples et plus rapides.

* * *

Article 20 Procedure on an application for recognition and enforcement

[…]

11 Nothing in this Article shall prevent the use of simpler ~~or~~ and more expeditious procedures.

Rationale:

The purpose is to promote simpler and more expeditious procedures.

No 56 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

[*Article 51 Informations relatives aux lois, procédures et services*

1 Un État contractant, au moment où il dépose son instrument de ratification ou d'adhésion ou une déclaration faite en vertu de l'article 56(1) de la Convention, fournit au Bureau Permanent de la Conférence de La Haye de droit international privé :

[…]]

Justification :

Tenir compte de la situation des États dotés de systèmes juridiques non unifiés.

* * *

[*Article 51 Provision of information concerning laws, procedures and services*

1 A Contracting State, by the time its instrument of ratification or accession is deposited or a declaration is submitted in accordance with Article 56(1) of the Convention, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –

[…]]

Rationale:

To take into account the situation of States that have non-unified legal systems.

No 57 – Proposal of the delegation of the European Community

Article 44 Co-ordination with prior Hague Maintenance Conventions

In relations between the Contracting States, this Convention replaces, subject to Article 50, the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.

Article 50 Transitional provisions

1 The Convention shall apply in every case where –

(a) a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;

(b) a direct application for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.

2 However, as between the Contracting States to this Convention that are also Party to the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* or the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children the following rule shall apply as regards the recognition and enforcement of decisions given in the State of origin before the entry into force of this Convention for that State:

If the conditions for the recognition and enforcement under this Convention prevent the recognition and enforcement of a decision that would otherwise have been recognised and enforced under the terms of the Convention that was in effect at the time the decision was rendered, the conditions of that Convention shall apply.

32 The State addressed shall not be bound under this Convention to enforce a decision[, an authentic instrument or a private agreement] in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21.

Note: the Explanatory Report would clarify that the reference to "conditions" allows the procedures for recognition and enforcement under the new Convention to apply, even if the conditions (*i.e.*, basis for recognition and grounds for non-recognition) apply.

No 58 – Proposal of the delegation of Australia

Article 15 Limit on proceedings

[…]

2 The previous paragraph shall not apply –

[…]

(e) where the competent authority in the Contracting State, where proceedings to modify the decision or make a new decision are contemplated, is satisfied that the debtor has made all proper attempts to bring such proceedings in the State of origin and has faced exceptional difficulties in asserting his or her rights there due to a failure to receive free legal assistance.

No 59 – Proposition des délégations du Canada et de la Communauté européenne – Proposal of the delegations of Canada and the European Community

Article 3

Nouveau paragraphe :

(e) « convention en matière d'obligations alimentaires » désigne un accord par écrit relatif au paiement d'aliments lorsque, dans l'État d'origine, la convention en matière d'obligations alimentaires :

(i) est exécutoire comme une décision ;

(ii) peut faire l'objet d'un contrôle et d'une modification par une autorité compétente ;

(iii) – a été dressée ou enregistrée formellement en tant que acte authentique par une autorité compétente ; ou

Doc.trav./Work.Docs Nos 54-63

– a été authentifiée ou enregistrée par une autorité compétente, conclue avec elle ou déposée auprès d'elle.

Article 16 Champ d'application du chapitre

[…]

[4 Ce chapitre s'applique aussi aux ~~actes authentiques et accords privés~~ conventions en matière d'obligations alimentaires, conformément à l'article 26.]

[*Article 26 ~~Actes authentiques et accords privés~~ Conventions en matière d'obligations alimentaires*

1 Une ~~acte authentique~~ convention en matière d'obligations alimentaires établie ou ~~un accord privé~~ conclue dans un État contractant doit pouvoir être reconnue et exécutée comme une décision en application de ce chapitre ~~s'il est exécutoire comme une décision dans l'État d'origine~~.

2 Une demande de reconnaissance et d'exécution d'une ~~acte authentique ou d'un accord privé~~ convention en matière d'obligations alimentaires est accompagnée :

(a) du texte complet de ~~l'acte authentique ou de l'accord privé~~ la convention en matière d'obligations alimentaires ;

(b) d'un document établissant que ~~l'acte authentique ou l'accord privé~~ la convention en matière d'obligations alimentaires visée est exécutoire comme une décision dans l'État d'origine.

3 La reconnaissance et l'exécution d'une ~~acte authentique ou d'un accord privé~~ convention en matière d'obligations alimentaires peuvent être refusées si :

(a) la reconnaissance et l'exécution sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) ~~l'acte authentique ou l'accord privé~~ la convention en matière d'obligations alimentaires a été obtenue par fraude ou a fait l'objet de falsification ;

(c) ~~l'acte authentique ou l'accord privé~~ la convention en matière d'obligations alimentaires est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque, dans ce dernier cas, elle remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis.

4 Les dispositions de ce chapitre, à l'exception des articles 17, 19, 20(7) et 21(1) et (2), s'appliquent *mutatis mutandis* à la reconnaissance et l'exécution d'une ~~accord privé ou d'un acte authentique~~ convention en matière d'obligations alimentaires ; toutefois :

(a) une déclaration ou un enregistrement fait conformément à l'article 20(4) ne peut être refusé que pour les raisons visées au [paragraphe 3] [paragraphe 3(a)] ; et

(b) une contestation ou un appel en vertu de l'article 20(6) ne peut être fondé que sur :

(i) les motifs de refus de reconnaissance prévus à l'article 26(3) ;

(ii) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 26(2).

5 La procédure de reconnaissance et d'exécution d'une ~~acte authentique ou d'un accord privé~~ convention en matière d'obligations alimentaires est suspendue si une contestation concernant la convention est ~~des procédures concernant sa validité sont~~ en cours ~~devant une autorité compétente~~ dans l'État d'origine.

6 Un État peut déclarer que les demandes de reconnaissance et d'exécution des ~~actes authentiques et des accords privés~~ conventions en matière d'obligations alimentaires ne peuvent être présentées directement à une autorité compétente.]

* * *

Article 3

New paragraph:

(e) "maintenance arrangement" means an agreement in writing relating to the payment of maintenance where, in the State of origin, the maintenance arrangement:

(i) is enforceable as a decision;

(ii) is subject to review and modification by a competent authority;

(iii) – has been formally drawn up or registered as an authentic instrument by a competent authority; or

– has been authenticated by, or concluded, registered or filed with a competent authority.

Article 16 Scope of the Chapter

[…]

[4 This Chapter also applies to ~~authentic instruments and private agreements relating to a~~ maintenance ~~obligation~~ arrangements in accordance with Article 26.]

[*Article 26 ~~Authentic instruments and private agreements~~ Maintenance arrangements*

1 ~~An authentic instrument or private agreement~~ A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter ~~provided that it is enforceable as a decision in the State of origin~~.

2 An application for recognition and enforcement of ~~an authentic instrument or a private agreement~~ a maintenance arrangement shall be accompanied by the following –

(a) a complete text of the ~~authentic instrument or of the private agreement~~ maintenance arrangement;

(b) a document stating that the particular ~~authentic instrument or private agreement~~ maintenance arrangement is enforceable as a decision in the State of origin.

3 Recognition and enforcement of ~~an authentic instrument or a private agreement~~ a maintenance arrangement may be refused if –

(a) the recognition and enforcement is manifestly incompatible with the public policy of the requested State;

(b) the ~~authentic instrument or the private agreement~~ maintenance arrangement was obtained by fraud or falsification;

(c) the ~~authentic instrument or the private agreement~~ maintenance arrangement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

4 The provisions of this Chapter, with the exception of Articles 17, 19, 20(7) and 21(1) and (2), shall apply *mutatis mutandis* to the recognition and enforcement of a ~~private agreement or authentic instrument~~ maintenance arrangement save that –

(a) a declaration or registration in accordance with Article 20(4) may be refused only for the reasons specified in [paragraph 3] [paragraph 3(a)]; and

(b) a challenge or appeal as referred to in Article 20(6) may be founded only on the following –

(i) the grounds for refusing recognition and enforcement set out in Article 26(3);

(ii) the authenticity, veracity or integrity of any document transmitted in accordance with Article 26(2).

5 Proceedings for recognition and enforcement of ~~an authentic instrument or a private agreement~~ a maintenance arrangement shall be suspended if a challenge concerning the arrangement is ~~proceedings concerning its validity are~~ pending in the State of origin ~~before a competent authority~~.

6 A State may declare that applications for recognition and enforcement of ~~authentic instruments and private agreements~~ maintenance arrangements shall not be made directly to a competent authority.~~]~~

No 60 – Proposal of the delegations of Argentina, Brazil, Chile, Ecuador, Peru and Uruguay

Article 2 Scope

1 This Convention […] a child under the age of 21 including claims […] in respect of such a child.

2 Any Contracting State may declare in accordance with Article 58 that it either will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity or will exclude an application covered by paragraph 5(b) or 6. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.

[Paragraphs 3 and 4 unchanged.]

5 This Convention shall also apply with the exception of Chapters II and III to –

(a) spousal support;

(b) analogous situations to marriage according to the applicable law.

6 This Convention shall also apply in an application for recognition and enforcement of a decision, to maintenance obligations in respect of an adult who, by reason of an impairment or insufficiencies of his or her personal faculties, is not in a position to maintain him or herself.

No 61 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Supprimer le texte du présent article 13 :

[*Article 13 Moyens de communication – recevabilité*

La recevabilité, devant les tribunaux ou les autorités administratives des États contractants, de toute demande transmise par l'Autorité centrale de l'État requérant en vertu de la présente Convention, ou de tout document ou information qui y est annexé ou fourni par une Autorité centrale, ne peut être contestée uniquement en raison du support ou des moyens de communication utilisés entre les Autorités centrales concernées.]

Remplacer avec le suivant :

Article 13 Recevabilité des documents transmis par les Autorités centrales

Toute demande présentée par l'intermédiaire des Autorités centrales des États contractants, conformément au chapitre III, et tout document ou information qui y est annexé ou fourni par une Autorité centrale, est recevable par les autorités compétentes des États contractants et ne peut être contesté uniquement en raison du support ou des moyens de communication utilisés entre les Autorités centrales concernées.

Justification :

La nouvelle formulation de l'article 13 qui est proposée est plus fidèle à l'article 30 de la Convention sur l'enlèvement international d'enfants puisqu'elle permet une grande recevabilité des documents transmis par l'intermédiaire des Autorités centrales.

L'inclusion d'une disposition qui correspond davantage à l'article 30 de la Convention sur l'enlèvement international d'enfants est importante pour les États qui jugent que cet article 30 est nécessaire pour faciliter la recevabilité, par leurs autorités compétentes, des documents qui sont transmis par d'autres États et qui sont sous une forme et utilisent une terminologie qui diffèrent de celles utilisées par leurs autorités.

Dans les États dont les autorités compétentes ont reconnu l'importance de l'article 30 de la Convention sur l'enlèvement international d'enfants dans le cadre de procédures instituées en vertu de cette Convention, l'absence d'une disposition semblable dans la Convention sur les obligations alimentaires pourrait permettre de conclure que les principes énoncés à l'article 30 ont été jugés comme étant non applicables aux demandes faites en vertu de la Convention sur les obligations alimentaires.

Cette proposition limite également la règle de recevabilité de cette disposition aux demandes transmises par l'intermédiaire des Autorités centrales et conserve la prohibition de contestation en raison uniquement du support ou des moyens de communication utilisés.

* * *

Doc.trav./Work.Docs Nos 54-63

Delete current Article 13:

[*Article 13 Means of communication – admissibility*

The admissibility in the courts or administrative authorities of the Contracting States of any application transmitted by the Central Authority of a requesting State in accordance with the terms of this Convention, or of any documents or other information appended thereto or provided by a Central Authority, may not be challenged by reason only of the medium or means of communications employed between the Central Authorities concerned.]

Replace with the following:

Article 13 Admissibility of documents transmitted through Central Authorities

Any application made through Central Authorities of the Contracting States in accordance with Chapter III, and any document or information appended thereto or provided by a Central Authority, shall be admissible in the competent authorities of the Contracting States and may not be challenged by reason only of the medium or means of communications employed between Central Authorities concerned.

Rationale:

The new formula of Article 13 is more closely based on Article 30 of the International Child Abduction Convention as it provides for more general admissibility of documentation transmitted through Central Authorities.

The inclusion of a provision that corresponds to Article 30 of the International Child Abduction Convention is important for States that have found Article 30 to be necessary to facilitate acceptance by its competent authorities of documents from other States that are not in the same form and use different terminology than that used by those competent authorities.

In States whose competent authorities have attached significance to Article 30 of the International Child Abduction Convention in proceedings under that Convention, the absence of a comparable provision in the Maintenance Convention may lead to the interpretation that the principles contained in Article 30 were not considered applicable to applications pursuant to the Maintenance Convention.

The proposal also restricts the admissibility rule of this provision to applications transmitted through Central Authorities and maintains the prohibition against challenge by reason only of the medium or means of communication.

No 62 – Proposition de compromis relatif aux articles 14, 20 et 40 par un groupe de travail informel de délégations[1] – Compromise proposal on Articles 14, 20 and 40 by an informal working group of delegations[1]

Article 14 Accès effectif aux procédures

1 L'État requis assure aux demandeurs un accès effectif aux procédures, y compris dans le cadre des procédures d'exécution et d'appel, qui découlent des demandes présentées conformément au chapitre III.

2 Pour assurer un tel accès effectif, l'État requis doit fournir une assistance juridique gratuite conformément aux articles 14, 14 *bis*, 14 *ter* et 14 *quater* à moins que le paragraphe 3 s'applique.

3 L'État requis n'est pas tenu de fournir une telle assistance juridique gratuite si et dans la mesure où les procédures de cet État permettent au demandeur d'agir sans avoir besoin d'une telle assistance et que l'Autorité centrale fournit gratuitement les services nécessaires.

4 Les conditions d'accès à l'assistance juridique gratuite sont équivalentes à celles fixées dans les affaires internes équivalentes.

5 Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais dans les procédures introduites en vertu de la Convention.

Article 14 bis *Assistance juridique gratuite pour les demandes d'aliments relatives aux enfants*

1 L'État requis doit fournir l'assistance juridique gratuite au regard de toutes les demandes relatives aux obligations alimentaires découlant d'une relation parent-enfant envers une personne âgée de moins de 21 ans présentées par un créancier en vertu du chapitre III.

2 Nonobstant le paragraphe premier, l'État requis peut, en ce qui a trait aux demandes autres que celles visées à l'article 10(1)(a) et (b) et les affaires couvertes par l'article 17(4) refuser l'octroi d'une assistance juridique gratuite s'il considère que la demande, ou quelque appel que ce soit, est manifestement mal fondée.

Article 14 ter *Déclaration permettant l'utilisation d'un test centré sur les ressources de l'enfant*

1 Nonobstant les dispositions du paragraphe premier de l'article 14 bis, un État peut déclarer, conformément à l'article 58, qu'il fournira une assistance juridique gratuite en ce qui concerne les demandes autres que celles faites en vertu de l'article 10(1)(a) et (b), soumise seulement à un test basé sur l'évaluation des moyens de l'enfant.

2 Un État, au moment où il fait une telle déclaration, doit fournir au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont le test des moyens de l'enfant sera effectué ainsi que le critère financier qui doit être rempli afin de passer le test avec succès.

3 Une demande mentionnée au paragraphe premier, adressée à un État qui a fait une déclaration mentionnée à ce paragraphe, devra inclure une déclaration signée par le demandeur attestant que les moyens de l'enfant satisfont au critère mentionné au paragraphe 2. L'État requis peut demander de plus amples preuves des moyens de l'enfant seulement s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

4 Si l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne toutes les demandes présentées en vertu du chapitre III relatives aux obligations alimentaires découlant d'une relation parent-enfant envers un enfant sont plus favorables que celle fournie conformément aux paragraphes premier à 3 ci-dessus, l'assistance juridique la plus favorable doit être fournie.

[1] Ce groupe de travail informel était composé des délégations du Canada, de la Chine, de la Communauté européenne, des États-Unis d'Amérique, du Japon, de la Fédération de Russie et de la Suisse. / This informal working group was composed of delegations from Canada, China, the European Community, Japan, the Russian Federation, Switzerland and the United States of America.

Article 14 quater *Demandes ne permettant pas de bénéficier des articles 14* bis *ou 14* ter

Dans le cadre de toute demande faite en application de la Convention autre que celles relevant des articles 14 *bis* ou 14 *ter* :

(a) l'octroi d'une assistance juridique gratuite peut être subordonné à l'examen des ressources du demandeur ou à l'analyse de son bien-fondé ;

(b) un demandeur qui, dans l'État d'origine, a bénéficié d'une assistance juridique gratuite a droit, dans toute procédure de reconnaissance ou d'exécution, de bénéficier, au moins dans la même mesure, d'une assistance juridique gratuite telle que prévue par la loi de l'État requis dans les mêmes circonstances.

Article 20 Procédure pour une demande de reconnaissance et d'exécution

1 Sous réserve des dispositions de cette Convention, les procédures de reconnaissance et d'exécution sont régies par la loi de l'État requis.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise :

(a) transmet promptement la décision à l'autorité compétente pour déclarer la décision exécutoire ou procéder à son enregistrement aux fins d'exécution, dans les plus brefs délais ; ou

(b) si elle est l'autorité compétente, prend promptement elle-même ces mesures.

3 Dans le cas d'une demande présentée directement à l'autorité compétente dans l'État requis en vertu de l'article 16(5), cette autorité, dans les plus brefs délais, déclare la décision exécutoire ou procède à son enregistrement aux fins d'exécution.

4 Une déclaration ou un enregistrement ne peut être refusé que pour les raisons spécifiées à article 19(a). À ce stade, ni le demandeur ni le défendeur ne sont autorisés à présenter d'objection.

5 Le demandeur et le défendeur reçoivent dans les plus brefs délais notification de la déclaration ou de l'enregistrement, ou de leur refus, fait en vertu des paragraphes 2 et 3 et peuvent le contester ou en faire appel en fait et en droit.

6 La contestation ou l'appel est formé dans les 30 jours qui suivent la notification en vertu du paragraphe 5. Si l'auteur de la contestation ou de l'appel ne réside pas dans l'État contractant où la déclaration ou l'enregistrement a été fait ou refusé, la contestation ou l'appel est formé dans les 60 jours qui suivent la notification.

7 La contestation ou l'appel ne peut être fondé que sur :

(a) les motifs de refus de reconnaissance et d'exécution prévus à l'article 19 ;

(b) les bases de reconnaissance et d'exécution prévues à l'article 17 ;

(c) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 21(1)(a), (b) ou (d).

8 La contestation ou l'appel formé par le défendeur peut aussi être fondé sur le paiement de la dette lorsque la reconnaissance et l'exécution n'ont été demandées que pour les paiements échus.

9 Le demandeur et le défendeur reçoivent promptement notification de la décision résultant de la contestation ou de l'appel.

10 Un recours subséquent n'est possible que s'il est permis par la loi de l'État requis.

11 Le présent article ne fait pas obstacle au recours à des procédures plus simples ou plus rapides.

Article 20 bis *Procédure alternative pour une demande de reconnaissance et d'exécution*

1 Nonobstant l'article 20(2) à (11), un État peut déclarer conformément à l'article 58 qu'il appliquera la procédure de reconnaissance et d'exécution prévue par cet article.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre la décision à l'autorité compétente qui se prononce sur la demande de reconnaissance et d'exécution ; ou

(b) si elle est l'autorité compétente, prend elle-même ces mesures.

3 Une décision de reconnaissance et d'exécution est rendue par l'autorité compétente après que le défendeur ait été dûment et promptement notifié de la procédure et que chacune des parties ait eu une opportunité adéquate d'être entendue.

4 L'autorité compétente peut contrôler les bases de reconnaissance et d'exécution spécifiées à article 19(a), (c) et (d) de son propre chef et toutes les bases prévues aux articles 17, 19(b), (e) et (f) et 20(7)(c) si elles sont soulevées par le défendeur ou si un doute relatif à ces bases existe au vu des documents soumis conformément à l'article 21.

5 Un refus de reconnaissance et d'exécution peut aussi être fondé sur le paiement de la dette lorsque la reconnaissance et l'exécution n'ont été demandées que pour les paiements échus.

6 Tout appel, s'il est permis par la loi de l'État requis, de doit pas avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

7 Toute décision prise par l'autorité compétente en matière de reconnaissance et d'exécution doit être prise promptement.

Article 40 Recouvrement des frais

1 Le recouvrement de tous frais encourus pour l'application de cette Convention n'a pas de priorité sur le recouvrement des aliments.

2 Un État peut recouvrer les frais à l'encontre d'une partie qui succombe.

Doc.trav./Work.Docs Nos 54-63

3 Pour les besoins d'une demande en vertu de l'article 10(1)(b) afin de recouvrer les frais d'une partie qui succombe en vertu de l'article 40(2), le terme « créancier » dans l'article 10(1) inclut un État.

4 Cet article ne porte pas dérogation à l'article 8.

* * *

Article 14 Effective access to procedures

1 The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under Chapter III.

2 To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14, 14 *bis*, 14 *ter* and 14 *quater* unless paragraph 3 applies.

3 The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

4 Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

Article 14 bis *Free legal assistance for child support applications*

1 The requested State shall provide free legal assistance in respect of all applications by a creditor under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21.

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1)(a) and (b) and the cases covered by Article 17(4) refuse free legal assistance, if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Article 14 ter *Declaration to permit use of child-centred means test*

1 Notwithstanding paragraph 1 of Article 14 *bis*, a State may declare, in accordance with Article 58, that it will provide free legal assistance in respect of applications other than under Article 10(1)(a) and (b) and the cases covered by Article 17(4), subject only to a test based on an assessment of the means of the child.

2 A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's means will be carried out, including the financial criteria which would need to be met to satisfy the test.

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a signed statement by the applicant attesting that the child's means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child's means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

4 If the most favourable legal assistance provided for by the law of the requested State in respect of applications under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child is more favourable than that provided for under paragraphs 1 to 3 above, ~~that level of~~ the most favourable legal assistance shall be provided.

Article 14 quater *Applications not qualifying under Article 14* bis

In the case of all applications under this Convention other than those under Article 14 *bis* or Article 14 *ter* –

(a) the provision of free legal assistance may be made subject to a means or a merits test;

(b) an applicant, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

Article 20 Procedure on an application for recognition and enforcement

1 Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or

(b) if it is the competent authority take such steps itself.

3 Where the application is made directly to a competent authority in the requested State in accordance with Article 16(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

4 A declaration or registration may be refused only for the reasons specified in Article 19(a). At this stage neither the applicant nor the respondent is entitled to make any submissions.

5 The applicant and the respondent shall be promptly notified of the declaration or registration, or the refusal thereof, made under paragraphs 2 and 3 and may bring a challenge or appeal on fact and on a point of law.

6 A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

7 A challenge or appeal may be founded only on the following –

(a) the grounds for refusing recognition and enforcement set out in Article 19;

(b) the bases for recognition and enforcement under Article 17;

(c) the authenticity, veracity or integrity of any document transmitted in accordance with Article 21(1)(a), (b) or (d).

8 A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

9 The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

10 Any further appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision.

11 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 20 bis *Alternative procedure on an application for recognition and enforcement*

1 Notwithstanding Article 20(2) to (11), a State may declare in accordance with Article 58 that it will apply the procedure for recognition and enforcement set out in this Article.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall decide on the request for recognition and enforcement; or

(b) if it is the competent authority take such a decision itself.

3 A decision on recognition and enforcement shall be given by the competent authority after the respondent has been duly and promptly notified of the proceedings and both parties have been given an adequate opportunity to be heard.

4 The competent authority may review the grounds for refusing recognition and enforcement set out in Article 19(a), (c) and (d) of its own motion and all other grounds listed in Articles 17, 19(b), (e) and (f) and 20(7)(c) if they are raised by the defendant or if concerns relating to those grounds arise from the face of the documents submitted in accordance with Article 21.

5 A refusal of recognition and enforcement may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

6 Any appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

7 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 40 Recovery of costs

1 Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

2 A State may recover costs from an unsuccessful party.

3 For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with Article 40(2), the term "creditor" in Article 10(1) shall include a State.

4 This Article shall be without prejudice to Article 8.

No 63 – Proposal of the delegations of China and Israel

Article 2

1 Subject to the provisions of this Article, the Convention shall apply to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 [including claims for spousal support made in combination with claims for maintenance in respect of such a person] or other relationship relating to a person who, by reason by an impairment or sufficiency of his or her physical faculties, is not in a position to support his or herself, and with the exception of Chapters II and III to spousal support.

2 A Contracting State may inform the Permanent Bureau in accordance with Article 51 that the application of this Convention is limited to maintenance obligations arising from a parent-child relationship towards a child under the age of 18.

[…] *(unchanged)*

Article 51

Add new paragraph 1(e):

(e) any limit on the scope of the Convention pursuant to Article 2(2).

Rationale:

The purpose of this proposal is to provide a compromise for States which prefer a wider scope of the Convention and States which have difficulties about the application of the Convention to people between the ages of 18 and 21 and vulnerable adults. The use of the mechanism under Article 51 will facilitate States which need to limit the scope of the Convention.

The rest of the Article remains unchanged and a State is free to extend the application of the Convention to a wider range of categories of persons.

Doc.trav./Work.Docs Nos 54-63

Document de travail No 64

Working Document No 64

Distribué le mardi 20 novembre 2007

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No 64 – Proposition du Comité de rédaction – Proposal of the Drafting Committee

Amendements rédactionnels relatifs au Document de travail No 62 :

Article 14 Accès effectif aux procédures

1 L'État requis assure aux demandeurs un accès effectif aux procédures, y compris dans le cadre des procédures d'exécution et d'appel, qui découlent des demandes ~~présentées conformément~~ prévues au chapitre III.

2 Pour assurer un tel accès effectif, l'État requis ~~doit~~ fourni~~t~~r une assistance juridique gratuite conformément aux articles 14, 14 *bis*, 14 *ter* et 14 *quater* à moins que le paragraphe 3 s'applique.

3 L'État requis n'est pas tenu de fournir une telle assistance juridique gratuite si et dans la mesure où les procédures de cet État permettent au demandeur d'agir sans avoir besoin d'une telle assistance et que l'Autorité centrale fournit gratuitement les services nécessaires.

4 Les conditions d'accès à l'assistance juridique gratuite ~~sont équivalentes à~~ ne doivent pas être plus restrictives que celles fixées dans les affaires internes équivalentes.

5 Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans les procédures introduites en vertu de la Convention.

Article 14 bis *Assistance juridique gratuite pour les demandes d'aliments ~~relatives~~ destinés aux enfants*

1 L'État requis ~~doit~~ fourni~~t~~r une ~~l'~~assistance juridique gratuite ~~au regard de~~ pour toutes les demandes relatives aux obligations alimentaires découlant d'une relation parent-enfant envers une personne âgée de moins de 21 ans présentées par un créancier en vertu du chapitre III.

2 Nonobstant le paragraphe premier, l'État requis peut, en ce qui a trait aux demandes autres que celles ~~visées~~ prévues à l'article 10(1)(a) et (b) et ~~les~~ aux affaires couvertes par l'article 17(4) refuser l'octroi d'une assistance juridique gratuite s'il considère que la demande, ou quelque appel que ce soit, est manifestement mal fondée.

Article 14 ter *Déclaration permettant ~~l'utilisation d'un test centré sur les~~ un examen limité aux ressources de l'enfant*

1 Nonobstant les dispositions du paragraphe premier de l'article 14 *bis*, un État peut déclarer, conformément à l'article 58, qu'il fournira une assistance juridique gratuite en ce qui ~~concerne les~~ a trait aux demandes autres que celles ~~faites en vertu~~ prévues à l'article 10(1)(a) et (b) et aux affaires couvertes par l'article 17(4), ~~soumise seulement à un test basé~~ sur le seul fondement d'une ~~l'~~évaluation des ~~moyens~~ ressources de l'enfant.

2 Un État, au moment où il fait une telle déclaration, ~~doit~~ fourni~~t~~r au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont ~~le test~~ l'évaluation des ~~moyens~~ ressources de l'enfant sera effectué ainsi que ~~le critère~~ les conditions financi~~è~~ères qui doivent être remplies ~~afin de passer le test avec succès~~.

3 Une demande mentionnée au paragraphe premier, adressée à un État qui a fait une déclaration mentionnée à ce paragraphe, devra inclure une déclaration signée par le demandeur attestant que les ~~moyens~~ ressources de l'enfant satisfont aux ~~critère~~ conditions mentionnées au paragraphe 2. L'État requis ne peut demander ~~de plus amples~~ des preuves additionnelles des ~~moyens~~ ressources de l'enfant ~~seulement~~ que s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

4 Si l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne ~~toutes~~ les demandes présentées en vertu du chapitre III relatives aux obligations alimentaires découlant d'une relation parent-enfant envers un enfant ~~sont~~ est plus favorable~~s~~ que celle fournie conformément aux paragraphes 1 à 3 ~~ci-dessus~~, l'assistance juridique la plus favorable doit être fournie.

Article 14 quater *Demandes ne permettant pas de bénéficier des articles 14* bis *ou 14* ter

~~Dans le cadre de toute~~ Pour les demande~~s~~ ~~faite~~ présentées en application de la Convention ~~autre que celles relevant~~ qui ne relèvent pas des articles 14 *bis* ou 14 *ter* :

(a) l'octroi d'une assistance juridique gratuite peut être subordonné à l'examen des ressources du demandeur ou à l'analyse de son bien-fondé ;

(b) un demandeur qui, dans l'État d'origine, a bénéficié d'une assistance juridique gratuite, bénéficie, ~~a droit,~~ dans toute procédure de reconnaissance ou d'exécution, ~~de bénéficier, au moins dans la même mesure,~~ d'une assistance juridique gratuite au moins équivalente à celle ~~telle que~~ prévue par la loi de l'État requis dans les mêmes circonstances.

Article 20 Procédure pour une demande de reconnaissance et d'exécution

1 Sous réserve des dispositions de la ~~cette~~ Convention, les procédures de reconnaissance et d'exécution sont régies par la loi de l'État requis.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre ~~promptement~~ la décision à l'autorité compétente qui doit sans retard ~~pour~~ déclarer la décision exécutoire ou procéder à son enregistrement aux fins d'exécution~~, dans les plus brefs délais~~ ; ou

(b) si elle est l'autorité compétente, prendre ~~promptement~~ elle-même ces mesures.

3 ~~Dans le cas d'une~~ Lorsque la demande est présentée directement à l'autorité compétente dans l'État requis en vertu de l'article 16(5), cette autorité~~, dans les plus brefs délais,~~ déclare sans retard la décision exécutoire ou procède à son enregistrement aux fins d'exécution.

4 Une déclaration ou un enregistrement ne peut être refusé que pour les raisons ~~spécifiées~~ énoncées à article 19(a). À ce stade, ni le demandeur ni le défendeur ne sont autorisés à présenter d'objection.

5 ~~Le demandeur et le défendeur reçoivent dans les plus brefs délais notification de la déclaration ou de l'enregistrement, ou de leur refus, fait en vertu des paragraphes 2 et 3 et peuvent le contester ou en faire appel en fait et en droit~~ La déclaration ou l'enregistrement fait en application des paragraphes 2 et 3, ou leur refus, est notifié promptement au demandeur et au défendeur qui peuvent le contester ou faire appel en fait et en droit.

6 La contestation ou l'appel est formé dans les 30 jours qui suivent la notification en vertu du paragraphe 5. Si l'auteur de la contestation ou de l'appel ne réside pas dans l'État contractant où la déclaration ou l'enregistrement a été fait ou refusé, la contestation ou l'appel est formé dans les 60 jours qui suivent la notification.

7 La contestation ou l'appel ne peut être fondé que sur :

(a) les motifs de refus de reconnaissance et d'exécution prévus à l'article 19 ;

(b) les bases de reconnaissance et d'exécution prévues à l'article 17 ;

(c) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 21(1)(a), (b) ou (d) ou 21(3)(b).

8 La contestation ou l'appel formé par le défendeur peut aussi être fondé sur le paiement de la dette ~~lorsque~~ dans la mesure où la reconnaissance et l'exécution ~~n'ont été demandées que pour~~ concernent les paiements échus.

9 ~~Le demandeur et le défendeur reçoivent promptement notification de la décision résultant de la contestation ou de l'appel~~ La décision sur la contestation ou l'appel est promptement notifiée au demandeur et au défendeur.

10 Un recours subséquent n'est possible que s'il est permis par la loi de l'État requis. La suspension de l'exécution n'est pas possible à ce stade[1].

11 Le présent article ne fait pas obstacle au recours à des procédures plus simples ou plus rapides.

Article 20 bis *Procédure alternative pour une demande de reconnaissance et d'exécution*

1 Nonobstant l'article 20(2) à (11), un État peut déclarer conformément à l'article 58 qu'il appliquera la procédure de reconnaissance et d'exécution prévue par cet article.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre la décision à l'autorité compétente qui se prononce sur la demande de reconnaissance et d'exécution ; ou

(b) si elle est l'autorité compétente, prend elle-même ces mesures.

3 Une décision de reconnaissance et d'exécution est rendue par l'autorité compétente après que le défendeur ait été dûment et promptement notifié de la procédure et que chacune des parties ait eu une opportunité adéquate d'être entendue.

4 L'autorité compétente peut contrôler les bases de reconnaissance et d'exécution spécifiées à article 19(a), (c) et (d) de son propre chef et toutes les bases prévues aux articles 17, 19(b), (e) et (f) et 20(7)(c) si elles sont soulevées par le défendeur ou si un doute relatif à ces bases existe au vu des documents soumis conformément à l'article 21.

5 Un refus de reconnaissance et d'exécution peut aussi être fondé sur le paiement de la dette ~~lorsque~~ dans la mesure où la reconnaissance et l'exécution ~~n'ont été demandées~~ ne concernent que ~~pour~~ les paiements échus.

6 Tout appel, s'il est permis par la loi de l'État requis, ~~de~~ ne doit pas avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

7 ~~Toute décision prise par l~~L'autorité compétente pour rendre une décision en matière de reconnaissance et d'exécution doit agir de façon expéditive ~~être prise promptement~~.

Article 40 Recouvrement des frais

1 Le recouvrement de tous frais encourus pour l'application de cette Convention n'a pas de priorité sur le recouvrement des aliments.

2 Un État peut recouvrer les frais à l'encontre d'une partie ~~qui succombe~~ perdante.

3 Pour les besoins d'une demande ~~en vertu de~~ prévue à l'article 10(1)(b) afin de recouvrer les frais à l'encontre d'une partie ~~qui succombe~~ perdante en vertu de l'article 40(2), le terme « créancier » dans l'article 10(1) inclut un État.

4 Cet article ne porte pas dérogation à l'article 8.

* * *

[1] Si cette formulation est retenue un amendement subséquent à l'art. 28(1) sera nécessaire comme suit : « Sous réserve des dispositions du présent chapitre et du chapitre V […] ».

Drafting amendments arising from Working Document No 62:

Article 14 Effective access to procedures

1 The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under Chapter III.

2 To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14, 14 *bis*, 14 *ter* and 14 *quater* unless paragraph 3 applies.

3 The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

4 Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

Article 14 bis *Free legal assistance for child support applications*

1 The requested State shall provide free legal assistance in respect of all applications by a creditor under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a ~~child~~ person under the age of 21.

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1)(a) and (b) and the cases covered by Article 17(4) refuse free legal assistance, if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Article 14 ter *Declaration to permit use of child-centred means test*

1 Notwithstanding paragraph 1 of Article 14 *bis*, a State may declare, in accordance with Article 58, that it will provide free legal assistance in respect of applications other than under Article 10(1)(a) and (b) and the cases covered by Article 17(4), subject only to a test based on an assessment of the means of the child.

2 A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's means will be carried out, including the financial criteria which would need to be met to satisfy the test.

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a signed statement by the applicant attesting that the child's means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child's means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

4 If the most favourable legal assistance provided for by the law of the requested State in respect of applications under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child is more favourable than that provided for under paragraphs 1 to 3 ~~above~~, the most favourable legal assistance shall be provided.

Article 14 quater *Applications not qualifying under Article 14* bis

In the case of all applications under this Convention other than those under Article 14 *bis* or Article 14 *ter* –

(a) the provision of free legal assistance may be made subject to a means or a merits test;

(b) an applicant, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

Article 20 Procedure on an application for recognition and enforcement

1 Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or

(b) if it is the competent authority take such steps itself.

3 Where the ~~application~~ request is made directly to a competent authority in the ~~requested~~ State addressed in accordance with Article 16(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

4 A declaration or registration may be refused only for the reasons specified in Article 19(a). At this stage neither the applicant nor the respondent is entitled to make any submissions.

5 The applicant and the respondent shall be promptly notified of the declaration or registration, or the refusal thereof, made under paragraphs 2 and 3 and may bring a challenge or appeal on fact and on a point of law.

6 A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

7 A challenge or appeal may be founded only on the following –

(a) the grounds for refusing recognition and enforcement set out in Article 19;

(b) the bases for recognition and enforcement under Article 17;

(c) the authenticity, veracity or integrity of any document transmitted in accordance with Article 21(1)(a), (b) or (d) or 21(3)(b).

8 A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

9 The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

10 ~~Any f~~Further appeal is possible only~~,~~ if permitted by the law of the State addressed~~,~~. No ~~shall not have the effect of stay~~ing ~~the~~ of enforcement shall be possible ~~of the decision~~ at this stage.[1]

11 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 20 bis *Alternative procedure on an application for recognition and enforcement*

1 Notwithstanding Article 20(2) to (11), a State may declare in accordance with Article 58 that it will apply the procedure for recognition and enforcement set out in this Article.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall decide on the request for recognition and enforcement; or

(b) if it is the competent authority take such a decision itself.

3 A decision on recognition and enforcement shall be given by the competent authority after the respondent has been duly and promptly notified of the proceedings and both parties have been given an adequate opportunity to be heard.

4 The competent authority may review the grounds for refusing recognition and enforcement set out in Article 19(a), (c) and (d) of its own motion and all other grounds listed in Articles 17, 19(b), (e) and (f) and 20(7)(c) if they are raised by the defendant or if concerns relating to those grounds arise from the face of the documents submitted in accordance with Article 21.

5 A refusal of recognition and enforcement may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

6 Any appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

7 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 40 Recovery of costs

1 Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

2 A State may recover costs from an unsuccessful party.

3 For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with Article 40(2), the term "creditor" in Article 10(1) shall include a State.

4 This Article shall be without prejudice to Article 8.

[1] If this wording is adopted a consequential amendment to Art. 28(1) will be necessary as follows: "Subject to the provisions of this Chapter and Chapter V […]".

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Distribué le mardi 20 novembre 2007

No 65 – Proposition du Comité de rédaction

PROJET DE CONVENTION SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX ENFANTS ET À D'AUTRES MEMBRES DE LA FAMILLE

PRÉAMBULE

Les États signataires de la présente Convention,

[Désireux d'améliorer la coopération entre les États en matière de recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille,

Conscients de la nécessité de disposer de procédures produisant des résultats et qui soient accessibles, rapides, efficaces, économiques, équitables et adaptées à diverses situations,

Souhaitant s'inspirer des meilleures solutions des Conventions de La Haye existantes, ainsi que d'autres instruments internationaux, notamment la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies,

Cherchant à tirer parti des avancées technologiques et à créer un système souple et susceptible de s'adapter aux nouveaux besoins et aux opportunités offertes par les technologies et leurs évolutions,

Rappelant que, en application des articles 3 et 27 de la *Convention relative aux droits de l'enfant* du 20 novembre 1989, établie par les Nations Unies,

– l'intérêt supérieur de l'enfant doit être une considération primordiale dans toutes les décisions concernant les enfants,

– tout enfant a droit à un niveau de vie suffisant pour permettre son développement physique, mental, spirituel, moral et social,

– il incombe au premier chef aux parents ou autres personnes ayant la charge de l'enfant d'assurer, dans la limite de leurs possibilités et de leurs moyens financiers, les conditions de vie nécessaires au développement de l'enfant,

– les États parties devraient prendre toutes les mesures appropriées, notamment la conclusion d'accords internationaux, en vue d'assurer le recouvrement des aliments destinés aux enfants auprès de leurs parents ou d'autres personnes ayant une responsabilité à leur égard, en particulier lorsque ces personnes vivent dans un territoire autre que celui de l'enfant,

Distributed on Tuesday 20 November 2007

No 65 – Proposal of the Drafting Committee

DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

PREAMBLE

The States signatory to the present Convention,

[Desiring to improve co-operation among States for the international recovery of child support and other forms of family maintenance,

Aware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive, and fair,

Wishing to build upon the best features of existing Hague Conventions and other international instruments, in particular the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956,

Seeking to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities,

Recalling that, in accordance with Articles 3 and 27 of the United Nations *Convention on the Rights of the Child* of 20 November 1989,

– in all actions concerning children the best interests of the child shall be a primary consideration,

– every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,

– the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development, and

– States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child,

Ont résolu de conclure la présente Convention, et sont convenus des dispositions suivantes :]

CHAPITRE PREMIER – OBJET, CHAMP D'APPLICATION ET DÉFINITIONS

Article premier Objet

La présente Convention a pour objet d'assurer l'efficacité du recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille, en particulier en :

(a) établissant un système complet de coopération entre les autorités des États contractants ;

(b) permettant de présenter des demandes en vue d'obtenir des décisions en matière d'aliments ;

(c) assurant la reconnaissance et l'exécution des décisions en matière d'aliments ; et

(d) requérant des mesures efficaces en vue de l'exécution rapide des décisions en matière d'aliments.

Article 2 Champ d'application

1 La présente Convention s'applique aux obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne de moins de 21 ans [y compris aux demandes d'aliments entre époux et ex-époux concomitantes aux demandes d'aliments envers une telle personne] et, à l'exception des chapitres II et III, aux obligations alimentaires entre époux et ex-époux.

2 Tout État contractant peut, conformément à l'article 58, déclarer qu'il étendra l'application de tout ou partie de la Convention à telle ou telle obligation alimentaire découlant de relations de famille, de filiation, de mariage ou d'alliance. Une telle déclaration ne crée d'obligation entre deux États contractants que dans la mesure où leurs déclarations recouvrent les mêmes obligations alimentaires et les mêmes parties de la Convention.

3 Les dispositions de la présente Convention s'appliquent aux enfants indépendamment de la situation matrimoniale des parents.

Article 3 Définitions

Aux fins de la présente Convention :

(a) « créancier » désigne une personne à qui des aliments sont dus ou allégués être dus ;

(b) « débiteur » désigne une personne qui doit ou de qui on réclame des aliments ;

(c) « assistance juridique » désigne l'assistance nécessaire pour mettre les demandeurs en mesure de connaître et de faire valoir leurs droits et pour garantir que leurs demandes seront traitées de façon complète et efficace dans l'État requis[. Une telle assistance peut être fournie notamment au moyen de conseils juridiques, d'une assistance lorsqu'une affaire est portée devant une autorité, d'une représentation en justice et de l'exonération des frais de procédure] ;

(d) « accord par écrit » désigne un accord consigné sur tout support dont le contenu est accessible pour être consulté ultérieurement ;

Have resolved to conclude this Convention and have agreed upon the following provisions –]

CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

Article 1 Object

The object of the present Convention is to ensure the effective international recovery of child support and other forms of family maintenance in particular by –

(a) establishing a comprehensive system of co-operation between the authorities of the Contracting States;

(b) making available applications for the establishment of maintenance decisions;

(c) providing for the recognition and enforcement of maintenance decisions; and

(d) requiring effective measures for the prompt enforcement of maintenance decisions.

Article 2 Scope

1 This Convention shall apply to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 [including claims for spousal support made in combination with claims for maintenance in respect of such a person] and, with the exception of Chapters II and III, to spousal support.

2 Any Contracting State may declare in accordance with Article 58 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.

3 The provisions of this Convention shall apply to children regardless of the marital status of the parents.

Article 3 Definitions

For the purposes of this Convention –

(a) "creditor" means an individual to whom maintenance is owed or is alleged to be owed;

(b) "debtor" means an individual who owes or who is alleged to owe maintenance;

(c) "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State[. The means of providing such assistance may include legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings];

(d) "agreement in writing" means an agreement recorded in any medium the information contained in which is accessible so as to be usable for subsequent reference;

(e) « convention en matière d'obligations alimentaires » désigne un accord par écrit relatif au paiement d'aliments qui :

(i) a été dressé ou enregistré formellement en tant que acte authentique par une autorité compétente ; ou

(ii) a été authentifié ou enregistré par une autorité compétente, conclu avec elle ou déposé auprès d'elle,

et peut faire l'objet d'un contrôle et d'une modification par une autorité compétente d'un État contractant.

(e) "maintenance arrangement" means an agreement in writing relating to the payment of maintenance which –

(i) has been formally drawn up or registered as an authentic instrument by a competent authority; or

(ii) has been authenticated by, or concluded, registered or filed with a competent authority,

and may be the subject of review and modification by a competent authority.

CHAPITRE II – COOPÉRATION ADMINISTRATIVE

Article 4 Désignation des Autorités centrales

1 Chaque État contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.

2 Un État fédéral, un État dans lequel plusieurs systèmes de droit sont en vigueur ou un État ayant des unités territoriales autonomes, est libre de désigner plus d'une Autorité centrale et doit spécifier l'étendue territoriale ou personnelle de leurs fonctions. L'État qui fait usage de cette faculté désigne l'Autorité centrale à laquelle toute communication peut être adressée en vue de sa transmission à l'Autorité centrale compétente au sein de cet État.

3 Au moment du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration faite conformément à l'article 56, chaque État contractant informe le Bureau Permanent de la Conférence de La Haye de droit international privé de la désignation de l'Autorité centrale ou des Autorités centrales ainsi que de leurs coordonnées et, le cas échéant, de l'étendue de leurs fonctions visées au paragraphe 2. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

Article 5 Fonctions générales des Autorités centrales

Les Autorités centrales doivent :

(a) coopérer entre elles et promouvoir la coopération entre les autorités compétentes de leur État pour réaliser les objectifs de la Convention ;

(b) rechercher, dans la mesure du possible, des solutions aux difficultés pouvant survenir dans le cadre de l'application de la Convention.

Article 6 Fonctions spécifiques des Autorités centrales

1 Les Autorités centrales fournissent une assistance relative aux demandes visées au chapitre III, notamment en :

(a) transmettant et recevant ces demandes ;

(b) introduisant ou facilitant l'introduction de procédures relatives à ces demandes.

2 Relativement à ces demandes, elles prennent toutes les mesures appropriées pour :

(a) accorder ou faciliter l'octroi d'une assistance juridique, lorsque les circonstances l'exigent ;

CHAPTER II – ADMINISTRATIVE CO-OPERATION

Article 4 Designation of Central Authorities

1 A Contracting State shall designate a Central Authority to discharge the duties that are imposed by the Convention on such an authority.

2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

3 The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited or when a declaration is submitted in accordance with Article 56. Contracting States shall promptly inform the Permanent Bureau of any changes.

Article 5 General functions of Central Authorities

Central Authorities shall –

(a) co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention;

(b) seek as far as possible solutions to difficulties which arise in the application of the Convention.

Article 6 Specific functions of Central Authorities

1 Central Authorities shall provide assistance in relation to applications under Chapter III. In particular they shall –

(a) transmit and receive such applications;

(b) initiate, or facilitate the institution of, proceedings in respect of such applications.

2 In relation to such applications they shall take all appropriate measures –

(a) where the circumstances require, to provide or facilitate the provision of legal assistance;

(b) aider à localiser le débiteur ou le créancier ;

(c) faciliter la recherche des informations pertinentes relatives aux revenus et, si nécessaire, au patrimoine du débiteur ou du créancier, y compris la localisation des biens ;

(d) encourager le règlement amiable des différends afin d'obtenir un paiement volontaire des aliments, lorsque cela s'avère approprié par le recours à la médiation, à la conciliation ou à d'autres modes analogues ;

(e) faciliter l'exécution continue des décisions en matière d'aliments, y compris les arrérages ;

(f) faciliter le recouvrement et le virement rapide des paiements d'aliments ;

(g) faciliter l'obtention d'éléments de preuve documentaire ou autre ;

(h) fournir une assistance pour établir la filiation lorsque cela est nécessaire pour le recouvrement d'aliments ;

[(i) introduire ou faciliter l'introduction de procédures afin d'obtenir toute mesure nécessaire et provisoire à caractère territorial et ayant pour but de garantir l'aboutissement d'une demande pendante d'aliments ;]

(j) faciliter la signification et la notification des actes.

3 Les fonctions conférées à l'Autorité centrale en vertu du présent article peuvent être exercées, dans la mesure prévue par la loi de l'État concerné, par des organismes publics, ou d'autres organismes soumis au contrôle des autorités compétentes de cet État. La désignation de tout organisme public ou autre organisme, ainsi que ses coordonnées et l'étendue de ses fonctions sont communiquées par l'État contractant au Bureau Permanent de la Conférence de La Haye de droit international privé. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

4 Le présent article et l'article 7 ne peuvent en aucun cas être interprétés comme imposant à une Autorité centrale l'obligation d'exercer des attributions qui relèvent exclusivement des autorités judiciaires selon la loi de l'État requis.

Article 7 Requêtes de mesures spécifiques

1 Une Autorité centrale peut, sur requête motivée, demander à une autre Autorité centrale de prendre les mesures spécifiques appropriées prévues à l'article 6(2)(b), (c), [(g), (h), (i) et (j)] lorsque aucune demande prévue à l'article 10 n'est pendante. L'Autorité centrale requise prend les mesures s'avérant appropriées si elle considère qu'elles sont nécessaires pour aider un demandeur potentiel à présenter une demande prévue à l'article 10 ou à déterminer si une telle demande doit être introduite.

[2 Une Autorité centrale peut également prendre des mesures spécifiques, à la requête d'une autre Autorité centrale, dans une affaire de recouvrement d'aliments pendante dans l'État requérant et comportant un élément d'extranéité.]

(b) to help locate the debtor or the creditor;

(c) to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;

(d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;

(e) to facilitate the ongoing enforcement of maintenance decisions including any arrears;

(f) to facilitate the collection and expeditious transfer of maintenance payments;

(g) to facilitate the obtaining of documentary or other evidence;

(h) to provide assistance in establishing parentage where necessary for the recovery of maintenance;

[(i) to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;]

(j) to facilitate service of documents.

3 The functions of the Central Authority under this Article may, to the extent permitted under the law of that State, be performed by public bodies, or other bodies subject to the supervision of the competent authorities of that State. The designation of any such public bodies or other bodies as well as their contact details and the extent of their functions shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. Contracting States shall promptly inform the Permanent Bureau of any changes.

4 Nothing in this Article or Article 7 shall be interpreted as imposing an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested State.

Article 7 Requests for specific measures

1 A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2)(b), (c), [(g), (h), (i) and (j)] when no application under Article 10 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 10 or in determining whether such an application should be initiated.

[2 A Central Authority may also take specific measures on the request of another Central Authority in relation to a case having an international element concerning the recovery of maintenance pending in the requesting State.]

Article 8 Frais de l'Autorité centrale

1 Chaque Autorité centrale prend en charge ses propres frais découlant de l'application de la Convention.

2 Les Autorités centrales ne peuvent mettre aucuns frais à la charge du demandeur pour les services qu'elles fournissent en vertu de la Convention sauf s'il s'agit de frais exceptionnels découlant d'une requête de mesures spécifiques prévue à l'article 7.

3. L'Autorité centrale requise ne peut pas recouvrer les frais exceptionnels mentionnés au paragraphe 2 sans avoir obtenu l'accord préalable du demandeur sur la fourniture de tels services à un tel coût.

CHAPITRE III – DEMANDES PAR L'INTERMÉDIAIRE DES AUTORITÉS CENTRALES

Article 9 Demande par l'intermédiaire des Autorités centrales

Toute demande prévue au présent chapitre est transmise à l'Autorité centrale de l'État requis par l'intermédiaire de l'Autorité centrale de l'État contractant dans lequel réside le demandeur. Aux fins de la présente disposition, la résidence exclut la simple présence.

Article 10 Demandes disponibles

1 Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un créancier qui poursuit le recouvrement d'aliments en vertu de la présente Convention :

(a) reconnaissance ou reconnaissance et exécution d'une décision ;

(b) exécution d'une décision rendue ou reconnue dans l'État requis ;

(c) obtention d'une décision dans l'État requis lorsqu'il n'existe aucune décision, y compris l'établissement de la filiation si nécessaire ;

(d) obtention d'une décision dans l'État requis lorsque la reconnaissance et l'exécution d'une décision n'est pas possible ou est refusée en raison de l'absence d'une base de reconnaissance et d'exécution prévue à l'article 17 ou sur le fondement de l'article 19(b) ou (e) ;

(e) modification d'une décision rendue dans l'État requis ;

(f) modification d'une décision ayant été rendue dans un État autre que l'État requis.

2 Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un débiteur à l'encontre duquel existe une décision en matière d'aliments :

[(a) reconnaissance d'une décision ;]

(b) modification d'une décision rendue dans l'État requis ;

(c) modification d'une décision ayant été rendue dans un État autre que l'État requis.

Article 8 Central Authority costs

1 Each Central Authority shall bear its own costs in applying this Convention.

2 Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention save for exceptional costs arising from a request for a specific measure under Article 7.

3 The requested Central Authority may not recover the costs of the services referred to in paragraph 2, without the prior consent of the applicant to the provision of such services at such cost.

CHAPTER III – APPLICATIONS THROUGH CENTRAL AUTHORITIES

Article 9 Application through Central Authorities

An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State. For the purpose of this provision, residence excludes mere presence.

Article 10 Available applications

1 The following categories of application shall be available to a creditor in a requesting State seeking to recover maintenance under this Convention –

(a) recognition or recognition and enforcement of a decision;

(b) enforcement of a decision made or recognised in the requested State;

(c) establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage;

(d) establishment of a decision in the requested State where recognition and enforcement of a decision is not possible or is refused because of the lack of a basis for recognition and enforcement under Article 17 or on the grounds specified in Article 19(b) or (e);

(e) modification of a decision made in the requested State;

(f) modification of a decision made in a State other than the requested State.

2 The following categories of application shall be available to a debtor in a requesting State against whom there is an existing maintenance decision –

[(a) recognition of a decision;]

(b) modification of a decision made in the requested State;

(c) modification of a decision made in a State other than the requested State.

3 Sauf disposition contraire de la Convention, les demandes prévues aux paragraphes premier et 2 sont traitées conformément au droit de l'État requis et, dans le cas des demandes prévues aux paragraphes premier (c) à (f) et 2[(b) et (c)], sont soumises aux règles de compétence applicables dans cet État.

Article 11 Contenu de la demande

1 Toute demande prévue à l'article 10 comporte au moins :

(a) une déclaration relative à la nature de la demande ou des demandes ;

(b) le nom et les coordonnées du demandeur, y compris son adresse et sa date de naissance ;

(c) le nom du défendeur et, lorsqu'elles sont connues, son adresse et sa date de naissance ;

(d) le nom et la date de naissance des personnes pour lesquelles des aliments sont demandés ;

(e) les motifs sur lesquels la demande est fondée ;

(f) lorsque la demande est formée par le créancier, les informations relatives au lieu où les paiements doivent être effectués ou transmis électroniquement ;

(g) à l'exception de la demande prévue à l'article 10(1)(a) [et (2)(a)], toute information ou tout document exigé par une déclaration de l'État requis faite conformément à l'article 58 ;

(h) les noms et coordonnées de la personne ou du service de l'Autorité centrale de l'État requérant responsable du traitement de la demande.

2 Lorsque cela s'avère approprié, la demande comporte également, lorsqu'ils sont connus :

(a) les revenus et le patrimoine du créancier ;

(b) les revenus et le patrimoine du débiteur, y compris le nom et l'adresse de l'employeur du débiteur, ainsi que la localisation et la nature des biens du débiteur ;

(c) toute autre information permettant de localiser le défendeur.

3 La demande est accompagnée de toute information ou tout document justificatif nécessaire y compris pour établir le droit du demandeur à l'assistance juridique. La demande prévue à l'article 10(1)(a), n'est accompagnée que des documents énumérés à l'article 21.

4 Toute demande prévue à l'article 10 peut être présentée au moyen du formulaire recommandé et publié par la Conférence de La Haye de droit international privé.

Article 12 Transmission, réception et traitement des demandes et des affaires par l'intermédiaire des Autorités centrales

1 L'Autorité centrale de l'État requérant assiste le demandeur afin que soient joints tous les documents et informations qui, à la connaissance de cette autorité, sont nécessaires à l'examen de la demande.

2 Après s'être assurée que la demande satisfait aux exigences de la Convention, l'Autorité centrale de l'État

3 Save as otherwise provided in this Convention, the applications in paragraphs 1 and 2 shall be determined under the law of the requested State, and applications in paragraphs 1(c) to (f) and 2[(b) and (c)], shall be subject to the jurisdictional rules applicable in the requested State.

Article 11 Application contents

1 All applications under Article 10 shall as a minimum include –

(a) a statement of the nature of the application or applications;

(b) the name and contact details, including the address, and date of birth of the applicant;

(c) the name and, if known, address and date of birth of the respondent;

(d) the name and the date of birth of any person for whom maintenance is sought;

(e) the grounds upon which the application is based;

(f) in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;

(g) save in an application made under Article 10(1)(a) [and (2)(a)], any information or document specified by declaration in accordance with Article 58 by the requested State;

(h) the name and contact details of the person or unit from the Central Authority of the requesting State responsible for processing the application.

2 As appropriate, and to the extent known, the application shall in addition in particular include –

(a) the financial circumstances of the creditor;

(b) the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor;

(c) any other information that may assist with the location of the respondent.

3 The application shall be accompanied by any necessary supporting information or documentation including documentation concerning the entitlement of the applicant to legal assistance. In the case of applications under Article 10(1)(a), the application shall be accompanied only by the documents listed under Article 21.

4 An application under Article 10 may be made in the form recommended and published by the Hague Conference on Private International Law.

Article 12 Transmission, receipt and processing of applications and cases through Central Authorities

1 The Central Authority of the requesting State shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application.

2 The Central Authority of the requesting State shall, when satisfied that the application complies with the re

requérant la transmet, au nom du demandeur et avec son consentement, à l'Autorité centrale de l'État requis. La demande est accompagnée du formulaire de transmission prévu à l'annexe 1. Lorsque l'Autorité centrale de l'État requis le demande, l'Autorité centrale de l'État requérant fournit une copie complète certifiée conforme par l'autorité compétente de l'État d'origine des documents énumérés aux articles 21(1)(a), (b) et (d) et 21(3)(b) [et 26(2)].

3 Dans un délai de six semaines à compter de la date de réception de la demande, l'Autorité centrale requise en accuse réception au moyen du formulaire prévu à l'annexe 2, avise l'Autorité centrale de l'État requérant des premières démarches qui ont été ou qui seront entreprises pour traiter la demande et sollicite tout document ou toute information supplémentaire qu'elle estime nécessaire. Dans ce même délai de six semaines, l'Autorité centrale requise informe l'Autorité centrale requérante des nom et coordonnées de la personne ou du service chargé de répondre aux questions relatives à l'état d'avancement de la demande.

4 Dans un délai de trois mois suivant l'accusé de réception, l'Autorité centrale requise informe l'Autorité centrale requérante de l'état de la demande.

5 Les Autorités centrales requérante et requise s'informent mutuellement :

(a) de l'identité de la personne ou du service responsable d'une affaire particulière ;

(b) de l'état d'avancement de l'affaire et répondent en temps utile aux demandes de renseignements.

6 Les Autorités centrales traitent une affaire aussi rapidement qu'un examen adéquat de son contenu le permet.

7 Les Autorités centrales utilisent entre elles les moyens de communication les plus rapides et efficaces dont elles disposent.

8 Une Autorité centrale requise ne peut refuser de traiter une demande que s'il est manifeste que les conditions requises par la Convention ne sont pas remplies. Dans ce cas, cette Autorité centrale informe aussitôt l'Autorité centrale requérante des motifs de son refus.

9 L'Autorité centrale requise ne peut rejeter une demande au seul motif que des documents ou des informations supplémentaires sont nécessaires. Toutefois, l'Autorité centrale requise peut demander à l'Autorité centrale requérante de fournir ces documents ou ces informations supplémentaires. À défaut de les fournir dans un délai de trois mois ou dans un délai plus long spécifié par l'Autorité centrale requise, cette dernière peut décider de cesser de traiter la demande. Dans ce cas, elle en informe l'Autorité centrale requérante.

[*Article 13 Moyens de communication – recevabilité*

La recevabilité, devant les tribunaux ou les autorités administratives des États contractants, de toute demande, ainsi que de toute documentation ou information relative à cette demande transmise par l'Autorité centrale de l'État requérant conformément à la Convention ne peut être contestée uniquement en raison du support ou des moyens technologiques utilisés entre les Autorités centrales concernées.]

quirements of the Convention, transmit the application on behalf of and with the consent of the applicant to the Central Authority of the requested State. The application shall be accompanied by the transmittal form set out in Annex 1. The Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 21(1)(a), (b) and (d) and 21(3)(b) [and 26(2)].

3 The requested Central Authority shall within six weeks from the date of receipt of the application, acknowledge receipt in the form set out in Annex 2, and inform the Central Authority of the requesting State what initial steps have been or will be taken to deal with the application and may request any further necessary documents and information. Within the same six-week period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.

4 Within three months after the acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.

5 Requesting and requested Central Authorities shall keep each other informed of –

(a) the person or unit responsible for a particular case;

(b) the progress of the case and provide timely responses to enquiries.

6 Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.

7 Central Authorities shall employ the most rapid and efficient means of communication at their disposal.

8 A requested Central Authority may refuse to process an application only if it is manifest that the requirements of the Convention are not fulfilled. In such case, that Central Authority shall promptly inform the requesting Central Authority of its reasons for refusal.

9 The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to provide these additional documents or information. If the requesting Central Authority does not do so within three months or a longer period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application. In this case, it shall inform the requesting Central Authority of this decision.

[*Article 13 Means of communication – admissibility*

The admissibility in the courts or administrative authorities of the Contracting States of any application, and of any documents or other information relating to that application transmitted by the Central Authority of a requesting State in accordance with the terms of this Convention may not be challenged by reason only of the medium or technological means employed between the Central Authorities concerned.]

[*Article 14 Accès effectif aux procédures*

1 L'État requis assure aux demandeurs un accès effectif aux procédures, y compris dans le cadre des procédures d'exécution et d'appel, qui découlent des demandes présentées conformément au chapitre III.

2 Pour assurer un tel accès effectif, l'État requis doit fournir une assistance juridique gratuite conformément aux articles 14, 14 *bis*, 14 *ter* et 14 *quater* à moins que le paragraphe 3 s'applique.

3 L'État requis n'est pas tenu de fournir une telle assistance juridique gratuite si et dans la mesure où les procédures de cet État permettent au demandeur d'agir sans avoir besoin d'une telle assistance et que l'Autorité centrale fournit gratuitement les services nécessaires.

4 Les conditions d'accès à l'assistance juridique gratuite sont équivalentes à celles fixées dans les affaires internes équivalentes.

5 Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais dans les procédures introduites en vertu de la Convention.

Article 14 bis *Assistance juridique gratuite pour les demandes d'aliments relatives aux enfants*

1 L'État requis doit fournir l'assistance juridique gratuite au regard de toutes les demandes relatives aux obligations alimentaires découlant d'une relation parent-enfant envers un enfant âgé de moins de 21 ans présentées [par un créancier] en vertu du chapitre III.

2 Par dérogation au paragraphe premier, l'État requis peut, en ce qui a trait aux demandes autres que celles visées à l'article 10(1)(a) et (b) et les cas couverts par l'article 17(4) refuser l'octroi d'une assistance juridique gratuite s'il considère que la demande, ou quelqu'appel que ce soit, est manifestement mal fondée.

Article 14 ter *Déclaration permettant l'utilisation d'un test centré sur les [ressources] [revenus] de l'enfant*

1 Nonobstant les dispositions du paragraphe premier de l'article 14 *bis*, un État peut déclarer, conformément à l'article 58, qu'il fournira une assistance juridique gratuite en ce qui concerne les demandes mentionnées au [paragraphe premier] [paragraphe 2] de l'article 14 *bis*, soumise seulement à un test basé sur l'évaluation des [moyens] [revenus] de l'enfant.

2 Un État, au moment où il fait une telle déclaration, doit fournir au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont le test des [moyens] [revenus] de l'enfant sera effectué ainsi que le seuil au-dessus duquel l'assistance juridique gratuite ne sera pas fournie.

3 Une demande mentionnée au paragraphe premier, adressée à un État qui a fait une déclaration mentionnée à ce paragraphe, devra inclure une déclaration par le demandeur que les [moyens] [revenus] de l'enfant sont en-dessous du seuil mentionné au paragraphe 2. L'État requis peut demander de plus amples preuves des [moyens] [revenus] de l'enfant seulement s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

[*Article 14 Effective access to procedures*

1 The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under Chapter III.

2 To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14, 14 *bis*, 14 *ter* and 14 *quater* unless paragraph 3 applies.

3 The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

4 Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

Article 14 bis *Free legal assistance for child support applications*

1 The requested State shall provide free legal assistance in respect of all applications [by a creditor] under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21.

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1)(a) and (b) and cases covered by Article 17(4), refuse free legal assistance, if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Article 14 ter *Declaration to permit use of child-centred [means] [income] test*

1 Notwithstanding paragraph 1 of Article 14 *bis*, a State may declare, in accordance with Article 58, that it will provide free legal assistance in respect of applications referred to in [paragraph 1] [paragraph 2] of Article 14 *bis*, subject only to a test based on an assessment of the [means] [income] of the child.

2 A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's [means] [income] will be carried out, including the threshold above which free legal assistance will not be provided.

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a statement by the applicant that the child's [means] [income] [are] [is] below the threshold referred to in paragraph 2. The requested State may only request further evidence of the child's [means] [income] if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

4 Un État requis ayant fait une déclaration conformément au paragraphe premier produit l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne toutes les demandes présentées en vertu du chapitre III relatives aux obligations alimentaires envers un enfant découlant d'une relation parent-enfant.

Article 14 quater *Demandes ne permettant pas de bénéficier des articles 14* bis *ou 14* ter

Dans le cadre d'une demande ne permettant pas de bénéficier de l'assistance juridique gratuite conformément à l'article 14 *bis* ou à l'article 14 *ter* :

(a) l'octroi d'une assistance juridique gratuite peut être subordonné à l'examen des ressources du demandeur ou à l'analyse de son bien-fondé ;

(b) un [demandeur] [créancier] qui, dans l'État d'origine, a bénéficié d'une assistance juridique gratuite a droit, dans toute procédure de reconnaissance ou d'exécution, de bénéficier au moins dans la même mesure, d'une assistance juridique gratuite telle que prévue par la loi de l'État requis dans les mêmes circonstances.]

CHAPITRE IV – RESTRICTIONS AUX PROCÉDURES

Article 15 Limite aux procédures

1 Lorsqu'une décision a été rendue dans un État contractant où le créancier a sa résidence habituelle, des procédures pour modifier la décision ou obtenir une nouvelle décision ne peuvent être introduites par le débiteur dans un autre État contractant, tant que le créancier continue à résider habituellement dans l'État où la décision a été rendue.

2 Le paragraphe premier ne s'applique pas :

(a) lorsque, dans un litige portant sur une obligation alimentaire envers une personne autre qu'un enfant, la compétence de cet autre État contractant a fait l'objet d'un accord par écrit entre les parties ;

(b) lorsque le créancier se soumet à la compétence de cet autre État contractant, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en est offerte pour la première fois ;

(c) lorsque l'autorité compétente de l'État d'origine ne peut ou refuse d'exercer sa compétence pour modifier la décision ou rendre une nouvelle décision ; ou,

(d) lorsque la décision rendue dans l'État d'origine ne peut être reconnue ou déclarée exécutoire dans l'État contractant dans lequel des procédures tendant à la modification de la décision ou à l'obtention d'une nouvelle décision sont envisagées.

4 A requested State which has made the declaration in accordance with paragraph 1 shall provide the most favourable legal assistance provided for by the law of the requested State in respect of all applications under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child.

Article 14 quater *Applications not qualifying under either Articles 14* bis *or 14* ter

In the case of an application not qualifying for free legal assistance under Article 14 *bis* or Article 14 *ter* –

(a) the provision of free legal assistance may be made subject to a means or a merits test;

(b) [an applicant] [a creditor], who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.]

CHAPTER IV – RESTRICTIONS ON BRINGING PROCEEDINGS

Article 15 Limit on proceedings

1 Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made.

2 Paragraph 1 shall not apply –

(a) where, except in disputes relating to maintenance obligations in respect of children, there is agreement in writing between the parties to the jurisdiction of that other Contracting State;

(b) where the creditor submits to the jurisdiction of that other Contracting State either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

(c) where the competent authority in the State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or make a new decision; or,

(d) where the decision made in the State of origin cannot be recognised or declared enforceable in the Contracting State where proceedings to modify the decision or make a new decision are contemplated.

CHAPITRE V – RECONNAISSANCE ET EXÉCUTION

Article 16 Champ d'application du chapitre

1 Ce chapitre s'applique aux décisions rendues par une autorité judiciaire ou administrative en matière d'obligations alimentaires. Par le mot « décisions » on entend également les transactions ou accords passés devant de telles autorités ou homologués par elles. Une décision peut comprendre une indexation automatique et une obligation de payer des arrérages, des aliments rétroactivement ou des intérêts, de même que la fixation des frais ou dépenses.

2 Si la décision ne concerne pas seulement l'obligation alimentaire, l'effet de ce chapitre reste limité à cette dernière.

3 Aux fins du paragraphe premier, « autorité administrative » signifie un organisme public dont les décisions, en vertu de la loi de l'État où il est établi :

(a) peuvent faire l'objet d'un appel devant une autorité judiciaire ou d'un contrôle par une telle autorité ; et

(b) ont une force et un effet équivalant à une décision d'une autorité judiciaire dans la même matière.

[4 Ce chapitre s'applique aussi aux conventions en matière d'obligations alimentaires, conformément à l'article 26.]

5 Les dispositions de ce chapitre s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à l'autorité compétente de l'État requis, conformément à l'article 34.

Article 17 Bases de reconnaissance et d'exécution

1 Une décision rendue dans un État contractant (« l'État d'origine ») est reconnue et exécutée dans les autres États contractants si :

(a) le défendeur résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

(b) le défendeur s'est soumis à la compétence de l'autorité, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en était offerte pour la première fois ;

(c) le créancier résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

(d) l'enfant pour lequel des aliments ont été accordés résidait habituellement dans l'État d'origine lors de l'introduction de l'instance, à condition que le défendeur ait vécu avec l'enfant dans cet État ou qu'il ait résidé dans cet État et y ait fourni des aliments à l'enfant ;

(e) la compétence a fait l'objet d'un accord par écrit entre les parties sauf dans un litige portant sur une obligation alimentaire à l'égard d'un enfant; ou

(f) la décision a été rendue par une autorité exerçant sa compétence sur une question relative à l'état des personnes ou à la responsabilité parentale, sauf si cette compétence est uniquement fondée sur la nationalité de l'une des parties.

CHAPTER V – RECOGNITION AND ENFORCEMENT

Article 16 Scope of the Chapter

1 This Chapter shall apply to a decision rendered by a judicial or administrative authority in respect of a maintenance obligation. The term "decision" also includes a settlement or agreement concluded before or approved by such an authority. A decision may include automatic adjustment by indexation and a requirement to pay arrears, retroactive maintenance or interest and a determination of costs or expenses.

2 If a decision does not relate solely to a maintenance obligation, the effect of this Chapter is limited to the parts of the decision which concern maintenance obligations.

3 For the purpose of paragraph 1, "administrative authority" means a public body whose decisions, under the law of the State where it is established –

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect to a decision of a judicial authority on the same matter.

[4 This Chapter also applies to maintenance arrangements in accordance with Article 26.]

5 The provisions of this Chapter shall apply to a request for recognition and enforcement made directly to a competent authority of the State addressed in accordance with Article 34.

Article 17 Bases for recognition and enforcement

1 A decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if –

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

(b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

(c) the creditor was habitually resident in the State of origin at the time proceedings were instituted;

(d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;

(e) except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or

(f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

2 Un État contractant peut faire une réserve portant sur le paragraphe premier (c), (e) ou (f), conformément à l'article 57.

3 Un État contractant ayant fait une réserve en application du paragraphe 2 doit reconnaître et exécuter une décision si sa législation, dans des circonstances de fait similaires, confère ou aurait conféré compétence à ses autorités pour rendre une telle décision.

4 Lorsque la reconnaissance d'une décision n'est pas possible dans un État contractant en raison d'une réserve faite en application du paragraphe 2, cet État prend toutes les mesures appropriées pour qu'une décision soit rendue en faveur du créancier si le débiteur réside habituellement dans cet État. Cette disposition ne s'applique pas aux demandes directes de reconnaissance et d'exécution prévues à l'article 16(5) à moins qu'une nouvelle demande ne soit faite en vertu de l'article 10(1)(d).

5 Une décision en faveur d'un enfant de moins de 18 ans, qui ne peut être reconnue uniquement en raison d'une réserve faite portant sur l'article 17(1)(c), (e) ou (f), est acceptée comme établissant l'éligibilité de cet enfant à des aliments dans l'État requis.

6 Une décision n'est reconnue que si elle produit des effets dans l'État d'origine et n'est exécutée que si elle est exécutoire dans l'État d'origine.

Article 18 Divisibilité et reconnaissance ou exécution partielle

1 Si l'État requis ne peut reconnaître ou exécuter la décision pour le tout, il reconnaît ou exécute chaque partie divisible de la décision qui peut être reconnue ou déclarée exécutoire.

2 La reconnaissance ou l'exécution partielle d'une décision peut toujours être demandée.

Article 19 Motifs de refus de reconnaissance et d'exécution

La reconnaissance et l'exécution de la décision peuvent être refusées :

(a) si la reconnaissance et l'exécution de la décision sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) si la décision résulte d'une fraude commise dans la procédure ;

(c) si un litige entre les mêmes parties et ayant le même objet est pendant devant une autorité de l'État requis, première saisie ;

(d) si la décision est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque, dans ce dernier cas, elle remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis ;

(e) si le défendeur :

(i) n'a pas été dûment avisé de la procédure et n'a pas eu la possibilité de se faire entendre ; et

2 A Contracting State may make a reservation, in accordance with Article 57, in respect of paragraph 1(c), (e) or (f).

3 A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

4 A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 16(5) unless a new application is made under Article 10(1)(d).

5 A decision in favour of a child under the age of 18 which cannot be recognised by virtue only of a reservation under Article 17(1)(c), (e) or (f) shall be accepted as establishing the eligibility of that child for maintenance in the State addressed.

6 A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

Article 18 Severability and partial recognition and enforcement

1 If the State addressed is unable to recognise or enforce the whole of the decision it shall recognise or enforce any severable part of the decision which can be so recognised or enforced.

2 Partial recognition or enforcement of a decision can always be applied for.

Article 19 Grounds for refusing recognition and enforcement

Recognition and enforcement of a decision may be refused –

(a) if recognition and enforcement of the decision is manifestly incompatible with the public policy ("*ordre public*") of the State addressed;

(b) if the decision was obtained by fraud in connection with a matter of procedure;

(c) if proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;

(d) if the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;

(e) if the respondent had neither –

(i) proper notice of the proceedings and an opportunity to be heard, nor

(ii) n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester en fait et en droit ; ou

(f) si la décision a été rendue en violation de l'article 15.

Article 20 Procédure pour une demande de reconnaissance et d'exécution

1 Sous réserve des dispositions de la Convention, les procédures de reconnaissance et d'exécution sont régies par la loi de l'État requis.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre la décision à l'autorité compétente qui doit sans retard déclarer la décision exécutoire ou procéder à son enregistrement aux fins d'exécution ; ou

(b) si elle est l'autorité compétente, prendre elle-même ces mesures.

3 Lorsque la demande est présentée directement à l'autorité compétente dans l'État requis en vertu de l'article 16(5), cette autorité déclare sans retard la décision exécutoire ou procède à son enregistrement aux fins d'exécution.

4 Une déclaration ou un enregistrement ne peut être refusé que pour les raisons énoncées [aux articles 17 et 19] [à l'article 19(a)]. À ce stade, ni le demandeur ni le défendeur ne sont autorisés à présenter d'objection.

5 La déclaration ou l'enregistrement, faits en application des paragraphes 2 et 3, ou leur refus, sont notifiés promptement au demandeur et au défendeur qui peuvent le contester ou faire appel en fait et en droit.

6 La contestation ou l'appel est formé dans les 30 jours qui suivent la notification en vertu du paragraphe 5. Si l'auteur de la contestation ou de l'appel ne réside pas dans l'État contractant où la déclaration ou l'enregistrement a été fait ou refusé, la contestation ou l'appel est formé dans les 60 jours qui suivent la notification.

7 La contestation ou l'appel ne peut être fondé que sur :

(a) les motifs de refus de reconnaissance et d'exécution prévus à l'article 19 ;

(b) les bases de reconnaissance et d'exécution prévues à l'article 17 ;

(c) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 21(1)(a), (b) ou (d).

8 La contestation ou l'appel formé par le défendeur peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution concernent les paiements échus.

9 La décision sur la contestation ou l'appel est promptement notifiée au demandeur et au défendeur.

10 Un recours subséquent n'est possible que s'il est permis par la loi de l'État requis.

(ii) proper notice of the decision and the opportunity to challenge it on fact and law; or

(f) if the decision was made in violation of Article 15.

Article 20 Procedure on an application for recognition and enforcement

1 Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or

(b) if it is the competent authority take such steps itself.

3 Where the request is made directly to a competent authority in the State addressed in accordance with Article 16(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

4 A declaration or registration may be refused only for the reasons specified in [Articles 17 and 19] [Article 19(a)]. At this stage neither the applicant nor the respondent is entitled to make any submissions.

5 The applicant and the respondent shall be promptly notified of the declaration or registration, or the refusal thereof, made under paragraphs 2 and 3 and may bring a challenge or appeal on fact and on a point of law.

6 A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

7 A challenge or appeal may be founded only on the following –

(a) the grounds for refusing recognition and enforcement set out in Article 19;

(b) the bases for recognition and enforcement under Article 17;

(c) the authenticity, veracity or integrity of any document transmitted in accordance with Article 21(1)(a), (b) or (d).

8 A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

9 The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

10 Further appeal is possible only if permitted by the law of the State addressed.

11 Le présent article ne fait pas obstacle au recours à des procédures plus simples ou plus rapides [sans préjudice de l'application des paragraphes 5, 7 et 9].

Article 21 Documents

1 La demande de reconnaissance et d'exécution en application de l'article 20 est accompagnée des documents suivants :

(a) le texte complet de la décision ;

(b) un document établissant que la décision est exécutoire dans l'État d'origine et, si la décision émane d'une autorité administrative, un document établissant que les conditions prévues à l'article 16(3) sont remplies à moins que cet État ait précisé conformément à l'article 51 que les décisions de ses autorités administratives remplissent dans tous les cas ces conditions ;

(c) si le défendeur n'a pas comparu dans la procédure dans l'État d'origine, un document ou des documents attestant que le défendeur a été dûment avisé de la procédure et a eu la possibilité de se faire entendre ou a été dûment avisé de la décision et a eu la possibilité de la contester en fait et en droit ;

(d) si nécessaire, un document établissant le montant des arrérages et indiquant la date à laquelle le calcul a été effectué ;

(e) si nécessaire, dans le cas d'une décision prévoyant une indexation automatique, un document contenant les informations qui sont utiles à la réalisation des calculs appropriés ;

(f) si nécessaire, un document établissant dans quelle mesure le demandeur a bénéficié de l'assistance juridique gratuite dans l'État d'origine.

2 Dans le cas d'une contestation ou d'un appel fondé sur un motif visé à l'article 20(7)(c) ou à la requête de l'autorité compétente dans l'État requis, une copie complète du document en question, certifiée conforme par l'autorité compétente de l'État d'origine, est promptement fournie :

(a) par l'Autorité centrale de l'État requérant, lorsque la demande a été présentée conformément au chapitre III ;

(b) par le demandeur, lorsque la demande a été présentée directement à l'autorité compétente de l'État requis.

3 Un État contractant peut préciser conformément à l'article 51 :

(a) qu'un texte complet de la décision certifié conforme par l'autorité compétente de l'État d'origine doit accompagner la demande ;

(b) les circonstances dans lesquelles il accepte, au lieu du texte complet de la décision, un résumé ou un extrait de la décision établi par l'autorité compétente de l'État d'origine qui peut être présenté au moyen du formulaire recommandé et publié par la Conférence de La Haye de droit international privé ; ou

(c) qu'il n'exige pas de document établissant que les conditions prévues à l'article 16(3) sont remplies.

11 This Article shall not prevent the use of simpler or more expeditious procedures[, without prejudice to paragraphs 5, 7 and 9].

Article 21 Documents

1 An application for recognition and enforcement under Article 20 shall be accompanied by the following –

(a) a complete text of the decision;

(b) a document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) are met unless that State has specified in accordance with Article 51 that decisions of its administrative authorities always meet those requirements;

(c) if the respondent did not appear in the proceedings in the State of origin, a document or documents attesting that the respondent had proper notice of the proceedings and an opportunity to be heard, or proper notice of the decision and the opportunity to challenge it on fact and law;

(d) where necessary, a document showing the amount of any arrears and the date such amount was calculated;

(e) where necessary, in the case of a decision providing for automatic adjustment by indexation, a document providing the information necessary to make the appropriate calculations;

(f) where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin.

2 Upon a challenge or appeal under Article 20(7)(c) or upon request by the competent authority in the State addressed, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly –

(a) by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;

(b) by the applicant, where the request has been made directly to a competent authority of the State addressed.

3 A Contracting State may specify in accordance with Article 51 –

(a) that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application;

(b) circumstances in which it will accept, in lieu of a complete text of the decision, an abstract or extract of the decision drawn up by the competent authority of the State of origin, which may be made in the form recommended and published by the Hague Conference on Private International Law; or,

(c) that it does not require a document stating that the requirements of Article 16(3) are met.

Article 22 Procédure relative à une demande de reconnaissance

Ce chapitre s'applique *mutatis mutandis* à une demande de reconnaissance d'une décision, à l'exception de l'exigence du caractère exécutoire qui est remplacée par l'exigence selon laquelle la décision produit ses effets dans l'État d'origine.

Article 23 Constatations de fait

L'autorité compétente de l'État requis est liée par les constatations de fait sur lesquelles l'autorité de l'État d'origine a fondé sa compétence.

Article 24 Interdiction de la révision au fond

L'autorité compétente de l'État requis ne procède à aucune révision au fond de la décision.

Article 25 Présence physique de l'enfant ou du demandeur non requise

La présence physique de l'enfant ou du demandeur n'est pas exigée lors de procédures introduites en vertu du présent chapitre dans l'État requis.

[*Article 26 Conventions en matière d'obligations alimentaires*

[0 Un État contractant peut à tout moment déclarer, conformément à l'article 58, que les dispositions de la présente Convention seront étendues [dans ses relations avec les États qui auront fait la même déclaration,] à une convention en matière d'obligations alimentaires conformément aux dispositions suivantes.]

1 Une convention en matière d'obligations alimentaires conclue dans un État contractant doit pouvoir être reconnue et exécutée comme une décision en application de ce chapitre si elle est exécutoire comme une décision dans l'État d'origine.

[1 *bis* Une demande de reconnaissance et d'exécution d'une convention en matière d'obligations alimentaires peut être présentée directement à l'Autorité compétente dans l'État requis ou en vertu de l'article 10(1)(a) et (b) et (2)(a). À cette fin, le terme « décision » inclut une convention en matière d'obligations alimentaires.]

2 La demande de reconnaissance et d'exécution d'une convention en matière d'obligations alimentaires est accompagnée des documents suivants :

(a) le texte complet de la convention en matière d'obligations alimentaires ;

(b) un document établissant que la convention en matière d'obligations alimentaires est exécutoire comme une décision dans l'État d'origine.

3 La reconnaissance et l'exécution d'une convention en matière d'obligations alimentaires peuvent être refusées si :

(a) la reconnaissance et l'exécution sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) la convention en matière d'obligations alimentaires a été obtenue par fraude ou a fait l'objet de falsification ;

Article 22 Procedure on an application for recognition

This Chapter shall apply *mutatis mutandis* to an application for recognition of a decision, save that the requirement of enforceability is replaced by the requirement that the decision has effect in the State of origin.

Article 23 Findings of fact

Any competent authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.

Article 24 No review of the merits

There shall be no review by any competent authority of the State addressed of the merits of a decision.

Article 25 Physical presence of the child or the applicant not required

The physical presence of the child or the applicant shall not be required in any proceedings in the State addressed under this Chapter.

[*Article 26 Maintenance arrangements*

[0 A Contracting State may, at any time, declare in accordance with Article 58 that the provisions of this Convention will be extended[, in relation to other States making a declaration under this Article,] to a maintenance arrangement in accordance with the following provisions.]

1 A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.

[1 *bis* An application for the recognition and enforcement of a maintenance arrangement may be made directly to the competent authority in the requested State or under Article 10(1)(a) and (b) and (2)(a). For this purpose the term "decision" includes a maintenance arrangement.]

2 An application for recognition and enforcement of a maintenance arrangement shall be accompanied by the following –

(a) a complete text of the maintenance arrangement;

(b) a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin.

3 Recognition and enforcement of a maintenance arrangement may be refused if –

(a) the recognition and enforcement is manifestly incompatible with the public policy of the State addressed;

(b) the maintenance arrangement was obtained by fraud or falsification;

(c) la convention en matière d'obligations alimentaires est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque, dans ce dernier cas, elle remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis.

4 Les dispositions de ce chapitre, à l'exception des articles 17, 19, 20(7) et 21(1) et (3), s'appliquent *mutatis mutandis* à la reconnaissance et à l'exécution d'une convention en matière d'obligations alimentaires ; toutefois :

(a) une déclaration ou un enregistrement fait conformément à l'article 20(4) ne peut être refusé que pour les raisons énoncées au [paragraphe 3] [paragraphe 3(a)] ; et

(b) une contestation ou un appel en vertu de l'article 20(6) ne peut être fondé que sur :

(i) les motifs de refus de reconnaissance et d'exécution prévus à l'article 26(3) ;

(ii) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 26(2).

5 La procédure de reconnaissance et d'exécution d'une convention en matière d'obligations alimentaires est suspendue si une contestation portant sur la convention est en cours dans l'État d'origine.

6 Un État peut déclarer que les demandes de reconnaissance et d'exécution des conventions en matière d'obligations alimentaires ne peuvent être présentées que par l'intermédiaire d'une Autorité centrale.

[7 Un État contractant pourra, conformément à l'article 57, se réserver le droit de ne pas reconnaître et exécuter les conventions en matière d'obligations alimentaires.]]

Article 27 Décisions résultant de l'effet combiné d'ordonnances provisoires et de confirmation

Lorsqu'une décision résulte de l'effet combiné d'une ordonnance provisoire rendue dans un État et d'une ordonnance rendue par l'autorité d'un autre État qui confirme cette ordonnance provisoire (État de confirmation) :

(a) chacun de ces États est considéré, aux fins du présent chapitre, comme étant un État d'origine ;

(b) les conditions prévues à l'article 19(e) sont remplies si le défendeur a été dûment avisé de la procédure dans l'État de confirmation et a eu la possibilité de contester la confirmation de l'ordonnance provisoire ; et

(c) la condition prévue à l'article 17(6) relative au caractère exécutoire de la décision dans l'État d'origine est remplie si la décision est exécutoire dans l'État de confirmation ;

(d) L'article 15 ne fait pas obstacle à ce qu'une procédure en vue de la modification d'une décision soit initiée dans l'un ou l'autre des États.

(c) the maintenance arrangement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

4 The provisions of this Chapter, with the exception of Articles 17, 19, 20(7) and 21(1) and (3), shall apply *mutatis mutandis* to the recognition and enforcement of a maintenance arrangement save that –

(a) a declaration or registration in accordance with Article 20(4) may be refused only for the reasons specified in [paragraph 3] [paragraph 3(a)]; and

(b) a challenge or appeal as referred to in Article 20(6) may be founded only on the following –

(i) the grounds for refusing recognition and enforcement set out in Article 26(3);

(ii) the authenticity, veracity or integrity of any document transmitted in accordance with Article 26(2).

5 Proceedings for recognition and enforcement of a maintenance arrangement shall be suspended if a challenge concerning the arrangement is pending in the State of origin.

6 A State may declare that applications for recognition and enforcement of a maintenance arrangement shall only be made through Central Authorities.

[7 A Contracting State may, in accordance with Article 57, reserve the right not to recognise and enforce a maintenance arrangement.]]

Article 27 Decisions produced by the combined effect of provisional and confirmation orders

Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order –

(a) each of those States shall be deemed for the purposes of this Chapter to be a State of origin;

(b) the requirements of Article 19(e) shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order; and

(c) the requirement of Article 17(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State;

(d) Article 15 shall not prevent proceedings for the modification of the decision being commenced in either State.

Article 28 Exécution en vertu du droit interne

1 Sous réserve des dispositions du présent chapitre, les mesures d'exécution ont lieu conformément à la loi de l'État requis.

2 L'exécution est rapide.

3 En ce qui concerne les demandes présentées par l'intermédiaire des Autorités centrales, lorsqu'une décision a été déclarée exécutoire ou enregistrée pour exécution en application du chapitre V, il est procédé à l'exécution sans qu'il soit besoin d'aucune autre action du demandeur.

4 Il est donné effet à toute règle relative à la durée de l'obligation alimentaire applicable dans l'État d'origine de la décision.

5 Le délai de prescription relatif à l'exécution des arrérages est déterminé par celle des lois de l'État d'origine de la décision ou de l'État requis, qui prévoit le délai plus long.

Article 29 Non-discrimination

Dans les affaires relevant de la Convention, l'État requis prévoit des mesures d'exécution au moins équivalentes à celles qui sont applicables aux affaires internes.

Article 30 Mesures d'exécution

1 Les États contractants doivent rendre disponibles dans leur droit interne des mesures efficaces afin d'exécuter les décisions en application de la Convention.

2 De telles mesures peuvent comporter :

(a) la saisie des salaires ;

(b) les saisies-arrêts sur comptes bancaires et autres sources ;

(c) les déductions sur les prestations de sécurité sociale ;

(d) le gage sur les biens ou leur vente forcée ;

(e) la saisie des remboursements d'impôt ;

(f) la retenue ou saisie des pensions de retraite ;

(g) le signalement aux organismes de crédit ;

(h) le refus de délivrance, la suspension ou le retrait de divers permis (le permis de conduire par exemple) ;

(i) le recours à la médiation, à la conciliation et à d'autres modes alternatifs de résolution des différends afin de favoriser une exécution volontaire.

Article 31 Transferts de fonds

1 Les États contractants sont encouragés à promouvoir, y compris au moyen d'accords internationaux, l'utilisation des moyens disponibles les moins coûteux et les plus efficaces pour effectuer les transferts de fonds destinés à être versés à titre d'aliments.

Article 28 Enforcement under internal law

1 Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed.

2 Enforcement shall be prompt.

3 In the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement under Chapter V, enforcement shall proceed without the need for further action by the applicant.

4 Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation.

5 Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.

Article 29 Non-discrimination

The State addressed shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases.

Article 30 Enforcement measures

1 Contracting States shall make available in internal law effective measures to enforce decisions under this Convention.

2 Such measures may include –

(a) wage withholding;

(b) garnishment from bank accounts and other sources;

(c) deductions from social security payments;

(d) lien on or forced sale of property;

(e) tax refund withholding;

(f) withholding or attachment of pension benefits;

(g) credit bureau reporting;

(h) denial, suspension or revocation of various licenses (for example, driving licenses);

(i) the use of mediation, conciliation or similar processes to bring about voluntary compliance.

Article 31 Transfer of funds

1 Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance.

2 Un État contractant dont la loi impose des restrictions aux transferts de fonds accorde la priorité la plus élevée aux transferts de fonds destinés à être versés en vertu de la présente Convention.

Article 32 Supprimé

CHAPITRE VII – ORGANISMES PUBLICS

Article 33 Organismes publics en qualité de demandeur

1 Aux fins d'une demande de reconnaissance et d'exécution en application de l'article 10(1)(a) et (b) et des affaires couvertes par l'article 17(4), le terme « créancier » inclut un organisme public agissant à la place d'une personne à laquelle des aliments sont dus ou auquel est dû le remboursement de prestations fournies à titre d'aliments.

2 Le droit d'un organisme public d'agir à la place d'une personne à laquelle des aliments sont dus ou de demander le remboursement de la prestation fournie au créancier à titre d'aliments est soumis à la loi qui régit l'organisme.

3 Un organisme public peut demander la reconnaissance ou l'exécution :

(a) d'une décision rendue contre un débiteur à la demande d'un organisme public qui poursuit le paiement de prestations fournies à titre d'aliments ;

(b) d'une décision rendue entre un créancier et un débiteur, à concurrence des prestations fournies au créancier à titre d'aliments.

4 L'organisme public qui invoque la reconnaissance ou qui sollicite l'exécution d'une décision produit, sur demande, tout document de nature à établir son droit en application du paragraphe 2 et le paiement des prestations au créancier.

CHAPITRE VIII – DISPOSITIONS GÉNÉRALES

Article 34 Demandes présentées directement aux autorités compétentes

1 La Convention n'exclut pas la possibilité de recourir à de telles procédures lorsqu'elles sont disponibles en vertu du droit interne d'un État contractant autorisant une personne (le demandeur) à saisir directement une autorité compétente de cet État dans une matière régie par la Convention, y compris, sous réserve de l'article 15, en vue de l'obtention ou de la modification d'une décision en matière d'aliments.

2 Les articles 14(5) et 14 *quater* (b) et les dispositions des chapitres V, VI, VII et ce chapitre, à l'exception des articles 37(2), 39, 40(3), 41(3), 42 et 49 s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à une autorité compétente d'un État contractant.

Article 35 Protection des données à caractère personnel

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises.

2 A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable under this Convention.

Article 32 Deleted

CHAPTER VII – PUBLIC BODIES

Article 33 Public bodies as applicants

1 For the purposes of applications for recognition and enforcement under Article 10(1)(a) and (b) and cases covered by Article 17(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in lieu of maintenance.

2 The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

3 A public body may seek recognition or claim enforcement of –

(a) a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;

(b) a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.

4 The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.

CHAPTER VIII – GENERAL PROVISIONS

Article 34 Direct requests to competent authorities

1 The Convention shall not exclude the possibility of recourse to such procedures as may be available under the internal law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by the Convention including, subject to Article 15, for the purpose of having a maintenance decision established or modified.

2 Articles 14(5) and 14 *quater* (b) and the provisions of Chapters V, VI, VII and this Chapter with the exception of Articles 37(2), 39, 40(3), 41(3), 42 and 49 shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.

Article 35 Protection of personal data

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted.

Article 36 Confidentialité

Toute autorité traitant de renseignements en assure la confidentialité conformément à la loi de son État.

Article 37 Non-divulgation de renseignements

1 Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle estime que la santé, la sécurité ou la liberté d'une personne pourrait en être compromise.

2 Une décision en ce sens prise par une Autorité centrale lie toute autre Autorité centrale.

3 Le présent article ne fait pas obstacle au recueil et à la transmission de renseignements entre autorités, dans la mesure nécessaire à l'accomplissement des obligations découlant de la Convention.

Article 38 Dispense de légalisation

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention.

Article 39 Procuration

L'Autorité centrale de l'État requis ne peut exiger une procuration du demandeur que si elle agit en son nom dans des procédures judiciaires ou dans des procédures engagées devant d'autres autorités ou afin de désigner un représentant à ces fins.

Article 40 Recouvrement des frais

1 Le recouvrement de tous frais encourus pour l'application de cette Convention n'a pas de priorité sur le recouvrement des aliments.

2 Un État peut recouvrer les frais à l'encontre d'une partie perdante.

3 Pour les besoins d'une demande en vertu de l'article 10(1)(b) afin de recouvrer les frais d'une partie qui succombe en vertu de l'article 40(2), le terme « créancier » dans l'article 10(1) inclut un État.

Article 41 Exigences linguistiques

1 Toute demande et tout document s'y rattachant sont rédigés dans la langue originale et accompagnés d'une traduction dans une langue officielle de l'État requis ou dans toute autre langue que l'État requis aura indiqué pouvoir accepter, par une déclaration faite conformément à l'article 58, sauf dispense de traduction de l'autorité compétente de cet État.

2 Tout État contractant qui a plusieurs langues officielles et qui ne peut, pour des raisons de droit interne, accepter pour l'ensemble de son territoire les documents dans l'une de ces langues, doit faire connaître, par une déclaration faite conformément à l'article 58, la langue dans laquelle ceux-ci doivent être rédigés ou traduits en vue de leur présentation dans les parties de son territoire qu'il a déterminées.

3 Sauf si les Autorités centrales en ont convenu autrement, toute autre communication entre elles est adressée dans une langue officielle de l'État requis ou en français ou en anglais. Toutefois, un État contractant peut, en faisant la réserve prévue à l'article 57, s'opposer à l'utilisation soit du français, soit de l'anglais.

Article 36 Confidentiality

Any authority processing information shall ensure its confidentiality in accordance with the law of its State.

Article 37 Non-disclosure of information

1 An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.

2 A determination to this effect made by one Central Authority shall be binding on another Central Authority.

3 Nothing in this Article shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under the Convention.

Article 38 No legalisation

No legalisation or similar formality may be required in the context of this Convention.

Article 39 Power of attorney

The Central Authority of the requested State may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.

Article 40 Recovery of costs

1 Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

2 A State may recover costs from an unsuccessful party.

3 For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with Article 40(2), the term "creditor" in Article 10(1) shall include a State.

Article 41 Language requirements

1 Any application and related documents shall be in the original language, and shall be accompanied by a translation into an official language of the requested State or in another language which the requested State has indicated, by way of declaration in accordance with Article 58, it will accept, unless the competent authority of that State dispenses with translation.

2 A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents in one of those languages shall by declaration in accordance with Article 58 specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.

3 Unless otherwise agreed by the Central Authorities, any other communications between such Authorities shall be in an official language of the requested State or in either English or French. However, a Contracting State may, by making a reservation in accordance with Article 57, object to the use of either French or English.

Article 42 Moyens et coûts de traduction

1 Dans le cas de demandes prévues au chapitre III, les Autorités centrales peuvent convenir, dans une affaire particulière ou de façon générale, que la traduction dans la langue officielle de l'État requis sera faite dans l'État requis à partir de la langue originale ou de toute autre langue convenue. S'il n'y a pas d'accord et si l'Autorité centrale requérante ne peut remplir les exigences de l'article 41(1) et (2), la demande et les documents s'y rattachant peuvent être transmis accompagnés d'une traduction en français ou anglais pour traduction ultérieure dans une langue officielle de l'État requis.

2 Les frais de traduction découlant de l'application du paragraphe précédent sont à la charge de l'État requérant, sauf accord contraire des Autorités centrales des États concernés.

3 Nonobstant l'article 8, l'Autorité centrale requérante peut mettre à la charge du demandeur les frais de traduction d'une demande et des documents s'y rattachant, sauf si ces coûts peuvent être couverts par son système d'assistance juridique.

Article 43 Systèmes juridiques non unifiés – interprétation

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi ou à la procédure d'un État vise, le cas échéant, la loi ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence à une décision obtenue, reconnue et / ou exécutée, et modifiée dans cet État vise, le cas échéant, une décision obtenue, reconnue et / ou exécutée, et modifiée dans l'unité territoriale considérée ;

(c) toute référence à une autorité judiciaire ou administrative de cet État vise, le cas échéant, une autorité judiciaire ou administrative de l'unité territoriale considérée ;

(d) toute référence aux autorités compétentes, organismes publics ou autres organismes de cet État à l'exception des Autorités centrales vise, le cas échéant, les autorités compétentes, organismes publics ou autres organismes habilités à agir dans l'unité territoriale considérée ;

(e) toute référence à la résidence ou la résidence habituelle dans cet État vise, le cas échéant, la résidence ou la résidence habituelle dans l'unité territoriale considérée ;

(f) toute référence à la localisation des biens dans cet État vise, le cas échéant, la localisation des biens dans l'unité territoriale considérée.

2 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 42 Means and costs of translation

1 In the case of applications under Chapter III, the Central Authorities may agree in an individual case or generally that the translation into an official language of the requested State may be made in the requested State from the original language or from any other agreed language. If no agreement can be reached and it is not possible for the requesting Central Authority to comply with the requirements of Article 41(1) and (2), then the application and related documents may be transmitted with translation into French or English for further translation into an official language of the requested State.

2 The cost of translation arising from the application of the preceding paragraph shall be borne by the requesting State unless otherwise agreed by Central Authorities of the States concerned.

3 Notwithstanding Article 8, the requesting Central Authority may charge an applicant for the costs of translation of an application and related documents, except in so far as those costs may be covered by its system of legal assistance.

Article 43 Non-unified legal systems – interpretation

1 In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

(a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to a decision established, recognised and / or enforced, and modified in that State shall be construed as referring, where appropriate, to a decision established, recognised and / or enforced, and modified in a territorial unit;

(c) any reference to a judicial or administrative authority in that State shall be construed as referring, where appropriate, to a judicial or administrative authority in the relevant territorial unit;

(d) any reference to competent authorities, public bodies, and other bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;

(e) any reference to residence or habitual residence in that State shall be construed as referring, where appropriate, to residence or habitual residence in a territorial unit;

(f) any reference to location of assets in that State shall be construed as referring, where appropriate, to the location of assets in the relevant territorial unit.

2 This Article shall not apply to a Regional Economic Integration Organisation.

Article 43 bis *Systèmes juridiques non unifiés – règles matérielles*

1 Nonobstant l'article précédent, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

2 Une autorité compétente dans une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter une décision d'un autre État contractant au seul motif que la décision a été reconnue ou exécutée dans une autre unité territoriale du même État contractant selon la présente Convention.

3 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 44 *Coordination avec les Conventions de La Haye antérieures en matière d'obligations alimentaires*

Dans les rapports entre les États contractants, et sous réserve de l'application de l'article 50(2), la présente Convention remplace la *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires* et la *Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants* dans la mesure où leur champ d'application entre lesdits États coïncide avec celui de la présente Convention.

Article 44 bis *Coordination avec la Convention de New York de 1956*

Dans les rapports entre les États contractants, la présente Convention remplace la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies, dans la mesure où son champ d'application entre lesdits États correspond au champ d'application de la présente Convention.

Article 44 ter *Relations avec les Conventions de La Haye antérieures relatives à la notification d'actes et à l'obtention de preuves*

La présente Convention ne déroge pas à la *Convention de La Haye du premier mars 1954 relative à la procédure civile*, ni à la *Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale*, ni à la *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale*.

Article 45 *Coordination avec les instruments et accords complémentaires*

1 La présente Convention ne déroge pas aux instruments internationaux conclus avant la présente Convention auxquels des États contractants sont Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention.

Article 43 bis *Non-unified legal systems – substantive rules*

1 Notwithstanding the preceding Article, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

2 A competent authority in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

3 This Article shall not apply to a Regional Economic Integration Organisation.

Article 44 *Co-ordination with prior Hague Maintenance Conventions*

In relations between the Contracting States, this Convention replaces, subject to Article 50(2), the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.

Article 44 bis *Co-ordination with the 1956 New York Convention*

In relations between the Contracting States, this Convention replaces the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention.

Article 44 ter *Relationship with prior Hague Conventions on service of documents and taking of evidence*

This Convention does not affect the Hague Convention of 1 March 1954 on civil procedure, the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

Article 45 *Co-ordination of instruments and supplementary agreements*

1 This Convention does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention.

2 Tout État contractant peut conclure avec un ou plusieurs États contractants des accords qui contiennent des dispositions sur les matières réglées par la Convention afin d'améliorer l'application de la Convention entre eux à condition que de tels accords soient conformes à l'objet et au but de la Convention et n'affectent pas, dans les rapports de ces États avec d'autres États contractants, l'application des dispositions de la Convention. Les États qui auront conclu de tels accords en transmettront une copie au dépositaire de la Convention.

3 Les paragraphes premier et 2 s'appliquent également aux ententes de réciprocité et aux lois uniformes reposant sur l'existence entre les États concernés de liens spéciaux.

[4 La présente Convention n'affecte pas l'application d'instruments d'une Organisation régionale d'intégration économique partie à la présente Convention, ayant été adoptés après la conclusion de la Convention, en ce qui a trait aux matières régies par la Convention, à condition que de tels instruments n'affectent pas, dans les rapports de ces États avec d'autres États contractants, l'application des dispositions de la Convention. En ce qui a trait à la reconnaissance ou l'exécution de décisions entre les États membres de l'Organisation régionale d'intégration économique, la Convention n'affecte pas les règles de l'Organisation régionale d'intégration économique, que ces règles aient été adoptées avant ou après la conclusion de la Convention.]

Article 46 Règle de l'efficacité maximale

La présente Convention ne fait pas obstacle à l'application d'un accord, d'une entente ou d'un instrument international en vigueur entre l'État requérant et l'État requis, d'une autre loi en vigueur dans l'État requis ou d'ententes de réciprocité adoptées en vertu de cette loi et qui prévoit :

(a) des bases plus larges pour la reconnaissance des décisions en matière d'aliments, sans préjudice de l'article 19(f) de la Convention ;

(b) des procédures simplifiées ou accélérées relatives à une demande de reconnaissance et d'exécution de décisions en matière d'aliments;

(c) une assistance juridique plus favorable que celle prévue aux articles 14 à 14 *quater* ;

(d) des procédures permettant à un demandeur dans un État requérant de présenter une demande directement à l'Autorité centrale de l'État requis.

Article 47 Interprétation uniforme

Pour l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 48 Examen du fonctionnement pratique de la Convention

1 Le Secrétaire général de la Conférence de La Haye de droit international privé convoque périodiquement une Commission spéciale afin d'examiner le fonctionnement pratique de la Convention et d'encourager le développement de bonnes pratiques en vertu de la Convention.

2 Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, with a view to improving the application of the Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

3 Paragraphs 1 and 2 shall also apply to reciprocity arrangements and to uniform laws based on special ties between the States concerned.

[4 This Convention shall not affect the application of instruments of a Regional Economic Integration Organisation that is a Party to this Convention, adopted after the conclusion of the Convention, on matters governed by the Convention provided that such instruments do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. As concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation, this Convention shall not affect the rules of the Regional Economic Integration Organisation, whether adopted before or after the conclusion of the Convention.]

Article 46 Most effective rule

This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, other law in force in the requested State or reciprocity arrangements adopted under such law that provides for –

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 19(f) of the Convention;

(b) simplified or more expeditious procedures on an application for recognition or enforcement of maintenance decisions;

(c) more beneficial legal assistance than that provided for under Articles 14 to 14 *quater*;

(d) procedures permitting an applicant from a requesting State to make an application directly to the Central Authority of the requested State.

Article 47 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 48 Review of practical operation of the Convention

1 The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices under the Convention.

2 À cette fin, les États contractants collaborent avec le Bureau Permanent afin de recueillir les informations relatives au fonctionnement pratique de la Convention, y compris des statistiques et de la jurisprudence.

Article 49 Amendement des formulaires

1 Les formulaires modèles annexés à la présente Convention pourront être amendés par décision d'une Commission spéciale qui sera convoquée par le Secrétaire général de la Conférence de La Haye de droit international privé et à laquelle seront invités tous les États contractants et tous les États membres. La proposition d'amender les formulaires devra être portée à l'ordre du jour qui sera joint à la convocation.

2 Les amendements seront adoptés par des États contractants présents à la Commission spéciale et prenant part au vote. Ils entreront en vigueur pour tous les États contractants le premier jour du septième mois après la date à laquelle le dépositaire les aura communiqués à tous les États contractants.

3 Au cours du délai prévu à l'alinéa précédent, tout État contractant pourra notifier par écrit au dépositaire qu'il entend faire une réserve à cet amendement, conformément à l'article 57. L'État qui aura fait une telle réserve sera traité, en ce qui concerne cet amendement, comme s'il n'était pas Partie à la présente Convention jusqu'à ce que la réserve ait été retirée.

Article 50 Dispositions transitoires

1 La Convention s'applique dans tous les cas où :

(a) une requête visée à l'article 7 ou une demande visée au chapitre III a été reçue par l'Autorité centrale de l'État requis après l'entrée en vigueur de la Convention entre l'État requérant et l'État requis ;

(b) une demande de reconnaissance et d'exécution a été présentée directement à une autorité compétente de l'État requis après l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis.

2 En ce qui concerne la reconnaissance et l'exécution des décisions entre les États contractants à la présente Convention qui sont également parties aux Conventions de La Haye mentionnées à l'article 44, si les conditions pour la reconnaissance et l'exécution prévues par la présente Convention font obstacle à la reconnaissance et à l'exécution d'une décision rendue dans l'État d'origine avant l'entrée en vigueur de la présente Convention dans cet État et qui à défaut aurait été reconnue et exécutée en vertu de la Convention qui était en vigueur lorsque la décision a été rendue, les conditions de cette dernière Convention s'appliquent.

[3 L'État requis n'est pas tenu, en vertu de la Convention, d'exécuter une décision[, ou une convention en matière d'obligations alimentaires] pour ce qui concerne les paiements échus avant l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis sauf en ce qui concerne les obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne de moins de 21 ans.]

2 For the purpose of such review Contracting States shall co-operate with the Permanent Bureau in the gathering of information, including statistics and case law, concerning the practical operation of the Convention.

Article 49 Amendment of forms

1 The forms annexed to this Convention may be amended by a decision of a Special Commission convened by the Secretary General of the Hague Conference on Private International Law to which all Contracting States and all Member States shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.

2 Amendments adopted by the Contracting States present at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the depositary to all Contracting States.

3 During the period provided for by paragraph 2 any Contracting State may by notification in writing to the depositary make a reservation, in accordance with Article 57, with respect to the amendment. The State making such reservation shall until the reservation is withdrawn be treated as a State not a Party to the present Convention with respect to that amendment.

Article 50 Transitional provisions

1 The Convention shall apply in every case where –

(a) a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;

(b) a direct request for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.

2 With regard to the recognition and enforcement of decisions between Contracting States to this Convention that are also Party to either of the Hague Maintenance Conventions mentioned in Article 44, if the conditions for the recognition and enforcement under this Convention prevent the recognition and enforcement of a decision, given in the State of origin before the entry into force of this Convention for that State, that would otherwise have been recognised and enforced under the terms of the Convention that was in effect at the time the decision was rendered, the conditions of that Convention shall apply.

[3 The State addressed shall not be bound under this Convention to enforce a decision[, or a maintenance arrangement] in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21.]

Article 51 Informations relatives aux lois, procédures et services

1 Un État contractant, au moment où il dépose son instrument de ratification ou d'adhésion ou à tout moment en ce qui concerne l'information prévue à l'alinéa (e), fournit au Bureau Permanent de la Conférence de La Haye de droit international privé :

(a) une description de sa législation et de ses procédures applicables en matière d'obligations alimentaires ;

(b) une description des mesures qu'il prendra pour satisfaire à ses obligations en vertu de l'article 6(2) ;

(c) une description de la manière dont il procurera aux demandeurs un accès effectif aux procédures conformément à l'article 14 ;

(d) une description de ses règles et procédures d'exécution, y compris les limites apportées à l'exécution, en particulier les règles de protection du débiteur et les délais de prescription ;

(e) toute précision à laquelle l'article 21(1)(b) et (3) fait référence.

2 Les États contractants peuvent, pour satisfaire à leurs obligations découlant du paragraphe premier, utiliser le formulaire du Profil des États recommandé et publié par la Conférence de La Haye de droit international privé.

3 Les informations sont tenues à jour par les États contractants.

[CHAPITRE IX – DISPOSITIONS FINALES

Article 52 Signature, ratification et adhésion

Première option

1 La Convention est ouverte à la signature des États qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session et des autres États qui ont participé à cette Session.

2 Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

3 Tout autre État pourra adhérer à la Convention après son entrée en vigueur en vertu de l'article 55.

4 L'instrument d'adhésion sera déposé auprès du dépositaire.

5 L'adhésion n'aura d'effet que dans les rapports entre l'État adhérant et les États contractants qui n'auront pas élevé d'objection à son encontre dans les six mois après la réception de la notification prévue à l'article 60. Une telle objection pourra également être élevée par tout État au moment d'une ratification, acceptation ou approbation de la Convention, postérieure à l'adhésion. Ces objections seront notifiées au dépositaire.

OU

Article 51 Provision of information concerning laws, procedures and services

1 A Contracting State, by the time its instrument of ratification or accession is deposited, or in the case of subparagraph (e) at any time, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –

(a) a description of its laws and procedures concerning maintenance obligations;

(b) a description of the measures it will take to meet the obligations under Article 6(2);

(c) a description of how it will provide applicants with effective access to procedures, as required under Article 14;

(d) a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods;

(e) any specification referred to in Article 21(1)(b) and (3).

2 Contracting States may, in fulfilling their obligations under paragraph 1, utilise the Country Profile form recommended and published by the Hague Conference on Private International Law.

3 Information shall be kept up to date by the Contracting States.

[CHAPTER IX – FINAL PROVISIONS

Article 52 Signature, ratification and accession

Option 1

1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twenty-First Session and by the other States which participated in that Session.

2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

3 Any other State may accede to the Convention after it has entered into force in accordance with Article 55.

4 The instrument of accession shall be deposited with the depositary.

5 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the six months after the receipt of the notification referred to in Article 60. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

OR

5 L'adhésion n'aura d'effet que dans les rapports entre l'État adhérant et les États contractants qui auront déclaré accepter cette adhésion, en vertu de l'article 58. Une telle déclaration devra également être faite par tout État membre ratifiant, acceptant ou approuvant la Convention postérieurement à l'adhésion. Cette déclaration sera déposée auprès du dépositaire qui en enverra, par la voie diplomatique, une copie certifiée conforme, à chacun des États contractants.

Deuxième option

1 La présente Convention est ouverte à la signature de tous les États.

2 La présente Convention est sujette à la ratification, à l'acceptation ou à l'approbation des États signataires.

3 Tout État pourra adhérer à la présente Convention.

4 Les instruments de ratification, d'acceptation, d'approbation ou d'adhésion sont déposés auprès du dépositaire.

Article 53 Organisations régionales d'intégration économique

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut également signer, accepter ou approuver la présente Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres ont délégué leur compétence à cette Organisation. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Pour les fins de l'entrée en vigueur de la Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique déclare, en vertu de l'article 54, que ses États membres ne seront pas Parties à la Convention.

4 Toute référence à « État contractant » ou « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique qui y est Partie.

Article 54 Adhésion des Organisations régionales d'intégration économique

1 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer, conformément à l'article 58, qu'elle a compétence pour toutes les matières régies par la présente Convention et que ses États membres ne seront pas Parties à cette Convention mais seront liés par elle en raison du fait de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

5 The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession in accordance with Article 58. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited with the depositary which shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

Option 2

1 This Convention is open for signature by all States.

2 This Convention is subject to ratification, acceptance or approval by the signatory States.

3 This Convention is open for accession by all States.

4 Instruments of ratification, acceptance, approval or accession shall be deposited with the depositary.

Article 53 Regional Economic Integration Organisations

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation declares in accordance with Article 54 that its Member States will not be Parties to this Convention.

4 Any reference to a "Contracting State" or "State" in this Convention applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate.

Article 54 Accession by Regional Economic Integration Organisations

1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 58 that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.

2 Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique en conformité avec le paragraphe premier, toute référence à « État contractant » ou « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

Article 55 Entrée en vigueur

1 La Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé par l'article 52.

2 Par la suite, la présente Convention entrera en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique au sens de l'article 53 ratifiant, acceptant, approuvant ou y adhérant postérieurement, le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt de son instrument de ratification, d'acceptation, d'approbation ou d'adhésion ;

(b) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 56, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée dans ledit article.

Article 56 Déclarations relatives aux systèmes juridiques non unifiés

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer, en vertu de l'article 58, que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

2 Toute déclaration est notifiée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 57 Réserves

1 Tout État contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu de l'article 56, faire une ou plusieurs des réserves prévues aux articles 17(2), [26(7),] 41(3) et 49(3). Aucune autre réserve ne sera admise.

2 Tout État pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au dépositaire.

3 L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée au paragraphe 2.

4 Les réserves faites en application de cet article ne sont pas réciproques.

2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention applies equally to the Member States of the Organisation, where appropriate.

Article 55 Entry into force

1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 52.

2 Thereafter the Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation referred to in Article 53 subsequently ratifying, accepting, approving or acceding to it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession;

(b) for a territorial unit to which the Convention has been extended in accordance with Article 56, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 56 Declarations with respect to non-unified legal systems

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 58 that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 57 Reservations

1 Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 56, make one or more of the reservations provided for in Articles 17(2), [26(7),] 41(3) and 49(3). No other reservation shall be permitted.

2 Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.

3 The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in paragraph 2.

4 Reservations under this Article shall have no reciprocal effect.

Article 58 Déclarations

1 Les déclarations visées aux articles 2(2), 11(1)(g), 14 […], [26(0),] 41(1) et (2), 52(5) option 1, 53(3), 54(1) et 56(1) peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et pourront être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion prendra effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

Article 59 Dénonciation

1 Tout État contractant pourra dénoncer la Convention par une notification écrite au dépositaire. La dénonciation pourra se limiter à certaines unités territoriales d'un État à plusieurs unités auxquelles s'applique la Convention.

2 La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de douze mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est spécifiée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 60 Notification

Le dépositaire notifiera aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé ou adhéré conformément aux articles 52 et 53, les renseignements suivants :

Première option

(a) les signatures, ratifications, acceptations et approbations visées aux articles 52 et 53 ;

(b) les adhésions et les objections aux adhésions visées à l'article 52(5) option 1 ;

OU

Deuxième option

(a) + (b) les signatures et ratifications, acceptations, approbations et adhésions prévues aux articles 52 et 53 ;

(c) la date d'entrée en vigueur de la Convention conformément aux dispositions à l'article 55 ;

(d) les déclarations prévues aux articles 2(2), 11(1)(g), 14 […], [26(0),] 41(1) et (2), 52(5) option 1, 53(3), 54(1) et 56(1) ;

(e) les accords prévus à l'article 45(2) ;

Article 58 Declarations

1 Declarations referred to in Articles 2(2), 11(1)(g), 14 […], [26(0),] 41(1) and (2), 52(5) first option, 53(3), 54(1) and 56(1), may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

Article 59 Denunciation

1 A Contracting State to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a multi-unit State to which the Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of twelve months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 60 Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 52 and 53 of the following –

Option 1

(a) the signatures, ratifications, acceptances and approvals referred to in Articles 52 and 53;

(b) the accessions and objections raised to accessions referred to in Article 52(5) first option;

OR

Option 2

(a) + (b) the signatures and ratifications, acceptances, approvals and accessions referred to in Articles 52 and 53;

(c) the date on which the Convention enters into force in accordance with Article 55;

(d) the declarations referred to in Articles 2(2), 11(1)(g), 14 […], [26(0),] 41(1) and (2), 52(5) first option, 53(3), 54(1) and 56(1);

(e) the agreements referred to in Article 45(2);

(f) les réserves prévues aux articles 17(2), 41(3) et 49(3) et le retrait des réserves prévu à l'article 57(2) ;

(g) les dénonciations prévues à l'article 59.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le [...] [...] 2007, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session.]

(f) the reservations referred to in Articles 17(2), 41(3) and 49(3), and the withdrawals referred to in Article 57(2);

(g) the denunciations referred to in Article 59.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the [...] day of [...], 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session.]

Formulaire de transmission en vertu de l'article 12(2)

AVIS DE CONFIDENTIALITÉ ET DE PROTECTION DES RENSEIGNEMENTS À CARACTÈRE PERSONNEL

Les renseignements à caractère personnel recueillis ou transmis en application de la Convention ne peuvent être utilisés qu'aux fins pour lesquelles ils ont été recueillis ou transmis. Toute autorité traitant de tels renseignements en assure la confidentialité conformément à la loi de son État.

Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle juge que ce faisant la santé, la sécurité ou la liberté d'une personne pourrait être compromise, conformément à l'article 37.

☐ Une décision de non-divulgation a été prise par une Autorité centrale conformément à l'article 37.

1 Autorité centrale requérante	2 Personne à contacter dans l'État requérant
a Adresse	a Adresse (si différente)
b Numéro de téléphone	b Numéro de téléphone (si différent)
c Numéro de télécopie	c Numéro de télécopie (si différent)
d Courriel	d Courriel (si différent)
e Numéro de référence	e Langue(s)

3 Autorité centrale requise .....

Adresse .....

.....

4 Renseignements à caractère personnel concernant le demandeur

a Nom(s) de famille : .....

b Prénom(s) : .....

c Date de naissance : ..... (jj/mm/aaaa)

ou

a Nom de l'organisme public : .....

.....

ANNEX 1

Transmittal Form under Article 12(2)

CONFIDENTIALITY AND PERSONAL INFORMATION
PROTECTION NOTICE

Personal information gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such information shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 37.

☐ A determination of non-disclosure has been made by a Central Authority in accordance with Article 37.

1 Requesting Central Authority	2 Contact person in requesting State
a Address	a Address (if different)
b Telephone number	b Telephone number (if different)
c Fax number	c Fax number (if different)
d E-mail	d E-mail (if different)
e Reference number	e Language(s)

3 Requested Central Authority .....

Address .....

.....

4 Particulars of the applicant

a Family name(s): .....

b Given name(s): .....

c Date of birth: ..... (dd/mm/yyyy)

or

a Name of the public body: .....

.....

5 Renseignements à caractère personnel concernant la (les) personne(s) pour qui des aliments sont demandés ou dus

a ☐ La personne est la même que le demandeur identifié ci-dessus

b i Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

ii Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

iii Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

6 Renseignements à caractère personnel concernant le débiteur[1]

a ☐ La personne est la même que le demandeur identifié ci-dessus

b Nom(s) de famille : .....

c Prénom(s) : .....

d Date de naissance : ..... (jj/mm/aaaa)

7 Ce Formulaire de transmission concerne et est accompagné d'une demande visée à :

☐ l'article 10(1)(a) : reconnaissance ou reconnaissance et exécution d'une décision

☐ l'article 10(1)(b) : exécution d'une décision rendue ou reconnue dans l'État requis

☐ l'article 10(1)(c) : obtention d'une décision dans l'État requis lorsqu'il n'existe aucune décision, y compris l'établissement de la filiation si nécessaire

☐ l'article 10(1)(d) : obtention d'une décision dans l'État requis lorsque la reconnaissance et l'exécution d'une décision n'est pas possible ou est refusée en raison de l'absence d'une base de reconnaissance et d'exécution en vertu de l'article 17 ou sur le fondement de l'article 19(b) ou (e)

☐ l'article 10(1)(e) : modification d'une décision rendue dans l'État requis

☐ l'article 10(1)(f) : modification d'une décision ayant été rendue dans un État autre que l'État requis

[☐ l'article 10(2)(a) : reconnaissance d'une décision]

☐ l'article 10(2)(b) : modification d'une décision rendue dans l'État requis

☐ l'article 10(2)(c) : modification d'une décision ayant été rendue dans un État autre que l'État requis

8 Les documents suivants accompagnent la demande :

a Pour les fins d'une demande en vertu de l'article 10(1)(a) et :

Conformément à l'article 21 :

[1] En vertu de l'art. 3 de la Convention, « 'débiteur' désigne une personne qui doit ou de qui on réclame des aliments ».

5 Particulars of the person(s) for whom maintenance is sought or payable

a ☐ The person is the same as the applicant named above

b i Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

ii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

iii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

6 Particulars of the debtor[1]

a ☐ The person is the same as the applicant named above

b Family name(s): .....

c Given name(s): .....

d Date of birth: ..... (dd/mm/yyyy)

7 This Transmittal Form concerns and is accompanied by an application under:

☐ Article 10(1)(a) – recognition or recognition and enforcement of a decision

☐ Article 10(1)(b) – enforcement of a decision made or recognised in the requested State

☐ Article 10(1)(c) – establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage

☐ Article 10(1)(d) – establishment of a decision in the requested State where recognition and enforcement of a decision is not possible or is refused because of the lack of a basis for recognition and enforcement under Article 17 or on the grounds specified in Article 19(b) or (e)

☐ Article 10(1)(e) – modification of a decision made in the requested State

☐ Article 10(1)(f) – modification of a decision made in a State other than the requested State

[☐ Article 10(2)(a) – recognition of a decision]

☐ Article 10(2)(b) – modification of a decision made in the requested State

☐ Article 10(2)(c) – modification of a decision made in a State other than the requested State

8 The following documents are enclosed together with the application:

a For the purpose of an application under Article 10(1)(a), and:

In accordance with Article 21:

[1] According to Art. 3 of the Convention "'debtor' means an individual who owes or who is alleged to owe maintenance".

☐ Texte complet de la décision (art. 21(1)(a))

☐ Résumé ou extrait de la décision établi par l'autorité compétente de l'État d'origine (art. 21(3)(b)) (le cas échéant)

☐ Document établissant que la décision est exécutoire dans l'État d'origine et, dans le cas d'une décision d'une autorité administrative, un document établissant que les exigences prévues à l'article 16(3) sont remplies (art. 21(1)(b))

☐ Si le défendeur n'a pas comparu dans la procédure dans l'État d'origine, un document établissant que le défendeur a été dûment avisé de la procédure et a eu la possibilité de se faire entendre, ou qu'il a été dûment avisé de la décision et a eu la possibilité de la contester en fait et en droit (art. 21(1)(c))

☐ Si nécessaire, le document établissant l'état des arrérages et indiquant la date à laquelle le calcul a été effectué (art. 21(1)(d))

☐ Si nécessaire, le document contenant les informations qui sont utiles à la réalisation des calculs appropriés dans le cadre d'une décision prévoyant un ajustement automatique par indexation (art. 21(1)(e))

☐ Si nécessaire, le document établissant dans quelle mesure le demandeur a bénéficié de l'assistance juridique gratuite dans l'État d'origine (art. 21(1)(f))

Conformément à l'article 26(2) :

☐ Texte complet de la convention en matière d'obligations alimentaires (art. 26(2)(a))

☐ Document établissant que la convention en matière d'obligations alimentaires visée est exécutoire comme une décision de l'État d'origine (art. 26(2)(b))

☐ Tout autre document accompagnant la demande (ex : si requis, un document pour les besoins de l'art. 33(4)) :

.....

.....

b Pour les fins d'une demande en vertu de l'article 10(1)(b), (c), (d), (e), (f) et (2)(a), (b) ou (c) le nombre de documents justificatifs (à l'exclusion du Formulaire de transmission et de la demande elle-même) conformément à l'article 11(3) :

☐ article 10(1)(b) .....

☐ article 10(1)(c) .....

☐ article 10(1)(d) .....

☐ article 10(1)(e) .....

☐ article 10(1)(f) .....

☐ article 10(2)(a) .....

☐ article 10(2)(b) .....

☐ article 10(2)(c) .....

Nom : ..... (en majuscules) Date : .....

Nom du fonctionnaire autorisé de l'Autorité centrale (jj/mm/aaaa)

☐ Complete text of the decision (Art. 21(1)(a))

☐ Abstract or extract of the decision drawn up by the competent authority of the State of origin (Art. 21(3)(b)) (if applicable)

☐ Document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) are met (Art. 21(1)(b))

☐ Where the respondent did not appear in the proceedings in the State of origin, a document establishing that the respondent had proper notice of the proceedings and an opportunity to be heard, or had proper notice of the decision and the opportunity to challenge it on fact and law (Art. 21(1)(c))

☐ Where necessary, a document showing the amount of any arrears and the date such amount was calculated (Art. 21(1)(d))

☐ Where necessary, a document providing the information necessary to make appropriate calculations in case of a decision providing for automatic adjustment by indexation (Art. 21(1)(e))

☐ Where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin (Art. 21(1)(f))

In accordance with Article 26(2):

☐ Complete text of the maintenance arrangement (Art. 26(2)(a))

☐ A document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin (Art. 26(2)(b))

☐ Any other documents accompanying the application (*e.g.*, if required, a document for the purpose of Art. 33(4)):

.....

.....

b For the purpose of an application under Article 10(1)(b), (c), (d), (e), (f) and (2)(a), (b) or (c) the following number of supporting documents (excluding the Transmittal Form and the application itself) in accordance with Article 11(3):

☐ Article 10(1)(b) .....

☐ Article 10(1)(c) .....

☐ Article 10(1)(d) .....

☐ Article 10(1)(e) .....

☐ Article 10(1)(f) .....

☐ Article 10(2)(a) .....

☐ Article 10(2)(b) .....

☐ Article 10(2)(c) .....

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

Accusé de réception en vertu de l'article 12(3)

AVIS DE CONFIDENTIALITÉ ET DE PROTECTION DES RENSEIGNEMENTS À CARACTÈRE PERSONNEL

Les renseignements à caractère personnel recueillis ou transmis en application de la Convention ne peuvent être utilisés qu'aux fins pour lesquelles ils ont été recueillis ou transmis. Toute autorité traitant de tels renseignements en assure la confidentialité conformément à la loi de son État.

Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle juge que ce faisant la santé, la sécurité ou la liberté d'une personne pourrait être compromise, conformément à l'article 37.

☐ *Une décision de non-divulgation a été prise par une Autorité centrale conformément à l'article 37.*

1 Autorité centrale requise	2 Personne à contacter dans l'État requis
a Adresse	a Adresse (si différente)
b Numéro de téléphone	b Numéro de téléphone (si différent)
c Numéro de télécopie	c Numéro de télécopie (si différent)
d Courriel	d Courriel (si différent)
e Numéro de référence	e Langue(s)

3 Autorité centrale requérante .....

Nom du contact .....

Adresse .....

.....

4 L'Autorité centrale requise confirme la réception le ..... (jj/mm/aaaa) du formulaire de transmission de l'Autorité centrale requérante (numéro de référence ..... ; en date du ..... (jj/mm/aaaa)) concernant la demande visée à :

☐ l'article 10(1)(a) : reconnaissance ou reconnaissance et exécution d'une décision

☐ l'article 10(1)(b) : exécution d'une décision rendue ou reconnue dans l'État requis

☐ l'article 10(1)(c) : obtention d'une décision dans l'État requis lorsqu'il n'existe aucune décision, y compris l'établissement de la filiation si nécessaire

☐ l'article 10(1)(d) : obtention d'une décision dans l'État requis lorsque la reconnaissance et l'exécution d'une décision n'est pas possible ou est refusée en raison de l'absence d'une base de reconnaissance et d'exécution en vertu de l'article 17 ou sur le fondement de l'article 19(b) ou (e)

ANNEX 2

Acknowledgement Form under Article 12(3)

CONFIDENTIALITY AND PERSONAL INFORMATION PROTECTION NOTICE

Personal information gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such information shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 37.

☐ *A determination of non-disclosure has been made by a Central Authority in accordance with Article 37.*

1 Requested Central Authority	2 Contact person in requested State
a Address	a Address (if different)
b Telephone number	b Telephone number (if different)
c Fax number	c Fax number (if different)
d E-mail	d E-mail (if different)
e Reference number	e Language(s)

3 Requesting Central Authority .....

Contact person .....

Address .....

.....

4 The requested Central Authority acknowledges receipt on ..... (dd/mm/yyyy) of the Transmittal Form from the requesting Central Authority (reference number .....; dated ..... (dd/mm/yyyy)) concerning the following application under:

☐ Article 10(1)(a) – recognition or recognition and enforcement of a decision

☐ Article 10(1)(b) – enforcement of a decision made or recognised in the requested State

☐ Article 10(1)(c) – establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage

☐ Article 10(1)(d) – establishment of a decision in the requested State where recognition and enforcement of a decision is not possible or is refused because of the lack of a basis for recognition and enforcement under Article 17 or on the grounds specified in Article 19(b) or (e)

☐ l'article 10(1)(e) : modification d'une décision rendue dans l'État requis

☐ l'article 10(1)(f) : modification d'une décision ayant été rendue dans un État autre que l'État requis

[☐ l'article 10(2)(a) : reconnaissance d'une décision]

☐ l'article 10(2)(b) : modification d'une décision rendue dans l'État requis

☐ l'article 10(2)(c) : modification d'une décision ayant été rendue dans un État autre que l'État requis

Nom de famille du demandeur : .....

Nom de famille de la (des) personne(s) pour qui des aliments sont demandés ou dus : .....

.....

.....

Nom de famille du débiteur : .....

5 Premières démarches entreprises par l'Autorité centrale requise :

☐ Le dossier est complet et pris en considération

☐ Voir le Rapport sur l'état d'avancement ci-joint

☐ Un Rapport sur l'état d'avancement suivra

☐ Veuillez fournir ces informations et / ou ces documents supplémentaires :

.....

.....

☐ L'Autorité centrale requise refuse de traiter la demande puisqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies (article 12(8)). Les raisons :

☐ sont énumérées dans un document en annexe

☐ seront énumérées dans un prochain document

L'Autorité centrale requise demande à l'Autorité centrale requérante de l'informer de tout changement dans l'état d'avancement de la demande.

Nom : ..... (en majuscules) Date : .....

Nom du fonctionnaire autorisé de l'Autorité centrale (jj/mm/aaaa)

☐ Article 10(1)(e) – modification of a decision made in the requested State

☐ Article 10(1)(f) – modification of a decision made in a State other than the requested State

[☐ Article 10(2)(a) – recognition of a decision]

☐ Article 10(2)(b) – modification of a decision made in the requested State

☐ Article 10(2)(c) – modification of a decision made in a State other than the requested State

Family name(s) of applicant: .....

Family name(s) of the person(s) for whom maintenance is sought or payable: .....

.....

.....

Family name(s) of debtor: .....

5 Initial steps taken by the requested Central Authority:

☐ The file is complete and is under consideration

☐ See attached Status of Application Report

☐ Status of Application Report will follow

☐ Please provide the following additional information and / or documentation:

.....

.....

☐ The requested Central Authority refuses to process this application as it is manifest that the requirements of the Convention are not fulfilled (Article 12(8)). The reasons:

☐ Are set out in an attached document

☐ Will be set out in a document to follow

The requested Central Authority requests that the requesting Central Authority inform it of any change in the status of the application.

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

Documents de travail Nos 66 à 72

Working Documents Nos 66 to 72

Distribués le mardi 20 novembre 2007

Distributed on Tuesday 20 November 2007

No 66 – Proposal of the delegation of the United States of America

Article 2 Scope

1 This Convention shall apply to maintenance obligations arising from a parent-child relationship towards a person under the age of 21, including, for the purposes of Chapters V and VI, claims for spousal support made in combination with claims for maintenance in respect of such a person, and, with the exception of Chapters II and III, to spousal support.

Article 17 Bases for recognition and enforcement

4 A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 16(5) ~~unless a new application is made under Article 10(1)(d)~~ or to claims under Chapter V for spousal support made in combination with claims for maintenance in respect of such a person.

No 67 – Proposal of the delegation of the European Community

(Ce document est remplacé par le Document de travail No 71 / This document was replaced by Working Document No 71)

No 68 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 37 Non-divulgation de renseignements

[…]

2 Lorsqu'une telle décision est prise par une Autorité centrale, elle ~~lie~~ doit être prise en compte par toute autre Autorité centrale, en particulier dans les cas de violence conjugale.

* * *

Article 37 Non-disclosure of information

[…]

2 A determination to this effect made by one Central Authority shall be ~~binding on~~ taken into account by another Central Authority, in particular in cases of family violence.

No 69 – Proposal of the delegation of the United States of America

Article 46 Most effective rule

This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, ~~other law in force in the requested State~~ or reciprocity arrangements in force in the requested State ~~adopted under such law~~ that provide~~s~~ for –

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 19(f) of the Convention;

(b) simplified, ~~or~~ more expeditious procedures on an application for recognition or enforcement of maintenance decisions;

(c) more beneficial legal assistance than that provided for under Articles 14, 14 *bis*, 14 *ter* and 14 *quater*; or

(d) procedures permitting an applicant from a requesting State to make an application directly to the Central Authority of the requested State.

Article 43 Non-unified legal systems – interpretation

1 In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

[…]

(g) any reference to a reciprocity arrangement in force in a State shall be construed as referring, where appropriate, to a reciprocity arrangement in force in the relevant territorial unit.

No 70 – Proposition des délégations du Canada, de la Chine, de Haïti, d'Israël, du Japon, de la Fédération de Russie et de la Suisse – Proposal of the delegations of Canada, China, Haiti, Israel, Japan, the Russian Federation and Switzerland

Article 19 Motifs de refus de reconnaissance et d'exécution

[…]

(e) si, lorsque le fond du litige était considéré en l'absence du défendeur,

i) lorsque la loi de l'État d'origine prévoit un avis de la procédure, le défendeur n'a pas été dûment avisé de la procédure et n'a pas eu l'opportunité de se faire entendre ; ou

ii) lorsque la loi de l'État d'origine ne prévoit pas un avis de la procédure, le défendeur n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester, ou d'en appeler en fait et en droit ; ou

[…]

* * *

Doc.trav./Work.Docs Nos 66-72

Article 19 Grounds for refusing recognition and enforcement

[…]

(e) if, where the merits of the case were considered in the absence of the respondent,

i) when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or

ii) when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or

[…]

No 71 – Proposal of the delegation of the European Community

(Ce document remplace le Document de travail No 67 / This document replaces Working Document No 67)

Article 53 Regional Economic Integration Organisations

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 58 that it exercises competence over all the matters governed by this Convention and that the Member States which have transferred competence to the Regional Economic Integration Organisation in respect of the matter in question shall be bound by this Convention by virtue of the signature, acceptance, approval or accession of the Organisation.

43 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation makes a declarationes in accordance with paragraph 3 ~~Article 54 that its Member States will not be Parties to this Convention~~.

54 Any reference to a "Contracting State" or "State" in this Convention applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a "Contracting State" or "State" in this Convention applies equally to the relevant Member States of the Organisation, where appropriate.

~~*Article 54 Accession by Regional Economic Integration Organisations*~~

~~1 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 58 that it exercises competence over all the matters governed by this Convention and that its Member States will not be Parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation.~~

~~2 In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 1, any reference to a "Contracting State" or "State" in this Convention applies equally to the Member States of the Organisation, where appropriate.~~

Note: References in final provisions to Article 54 need to be changed consequentially (Arts 58 and 60).

No 72 – Proposal of the delegation of the United States of America

Article 33 Public bodies as applicants

1 For the purposes of applications for recognition and enforcement under Article 10(1)(a) and (b), and cases covered by Articles 17(4) and 10(1)(c), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in lieu of maintenance.

Article 14 bis *Free legal assistance for child support applications*

[…]

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1)(a) and (b), and the cases covered by Articles 17(4) and 10(1)(c) when the public body is the creditor, refuse free legal assistance, if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Article 14 ter *Declaration to permit use of child-centred means test*

1 Notwithstanding paragraph 1 of Article 14 *bis*, a State may declare, in accordance with Article 58, that it will provide free legal assistance in respect of applications other than under Article 10(1)(a) and (b), and the cases covered by Articles 17(4) and 10(1)(c) when the public body is the creditor, subject only to a test based on an assessment of the means of the child.

Distribués le mercredi 21 novembre 2007

Distributed on Wednesday 21 November 2007

No 73 – Statement of the delegation of South Africa

A *Introduction*

The delegation of South Africa would like to take this opportunity to express our gratitude to the Hague Conference on Private International Law for their excellent organisation and preparation for the Twenty-First Session of the Hague Conference on Private International Law.

The Recovery of Child Support and other Forms of Family Maintenance and other treaties for international co-operation on cross-border child protection and development are very critical children's rights facilitation instruments and will continue to be important into the future.

We would like to compliment the Permanent Bureau for its efforts in seeking broad participation of States in this session. Due to the futuristic approach of both the draft Protocol on the Law Applicable to Maintenance Obligations and the draft Convention on the International Recovery on Child Support and other Forms of Family Maintenance, it is critical to mobilise the participation of as many States as possible to ensure the instruments' efficacy, globally.

We appreciate and applaud the Member States and regional groupings for their contributions and for the spirit of collectively seeking solutions. We observe that it is the peculiarities, values and best practices in various countries that bring global initiatives and treaties as close to excellence as possible.

International processes such as this Twenty-First Session of the Hague Conference on Private International Law also entrench democracy in the world, mutual respect among nations and the principle of common good in the global village. The following statement is tabled against this background.

B *Observation*

South Africa observes that the participation of African countries in this Session has been limited and we note that the Permanent Bureau extended invitations to a number of African States.

The issue of international recovery of child and family maintenance is critical for the advancement of delivery on women and children's rights. Consequently, broad participation of all countries, and particularly developing countries, is key in such processes as this would enable these countries to share their experiences, best practices and realities.

The development of the human capital and national capabilities in States includes opportunities and capability in individual countries to engage and influence international decisions for the benefit of women and children at country, regional and international levels.

C *Proposal*

To strengthen participation from African countries in the Hague process we propose that:

1) Member States support the Permanent Bureau to strengthen awareness in African States of the Hague processes and the benefits of broad participation towards universal application of the Hague instruments;

2) the necessary technical assistance continue to be provided, in particular through the Hague Conference International Centre for Judicial Studies and Technical Assistance.

D *Conclusion*

In conclusion, we note that State participation in the Hague processes is a good foundation towards achievement of universal ratification by States. Collective action also has the potential to strengthen peace, democracy, quality of life and development of the human potential in the global village.

We are looking forward to the International Co-operation Conference on Cross-Border Child Protection for Children in the Southern and Eastern Africa Region. This conference is scheduled for June 2008 and South Africa as the host country is working with the Hague Conference to ensure that this initiative is a success.

The Conference will also present another opportunity to strengthen familiarity in the region on the Protocol on the Law Applicable to Maintenance Obligations and the Convention on the International Recovery on Child Support and other Forms of Family Maintenance.

No 74 – Proposition de la délégation du Canada – Proposal of the delegation of Canada

Article 43 Systèmes juridiques non unifiés

1 Au regard d'un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

[…]

(h) toute référence à l'assistance juridique gratuite dans cet État vise, le cas échéant, l'assistance juridique gratuite dans l'unité territoriale considérée.

* * *

Article 43 Non-unified legal systems

1 In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units:

[…]

(h) any reference to free legal assistance in that State shall be construed as referring, where appropriate, to free legal assistance in the relevant territorial unit.

Doc.trav./Work.Docs Nos 73-83

No 75 – Proposal of the delegation of the European Community

Transmittal Form under Article 12(2)

CONFIDENTIALITY AND PERSONAL INFORMATION
PROTECTION NOTICE

Personal information gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such information shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 37.

☐ A determination of non-disclosure has been made by a Central Authority in accordance with Article 37.

1 Requesting Central Authority	2 Contact person in requesting State
a Address	a Address (if different)
b Telephone number	b Telephone number (if different)
c Fax number	c Fax number (if different)
d E-mail	d E-mail (if different)
e Reference number	e Language(s)

3 Requested Central Authority .....

Address .....

.....

4 Particulars of the applicant

a Family name(s): .....

b Given name(s): .....

c Date of birth: ..... (dd/mm/yyyy)

or

a Name of the public body: .....

.....

5 Particulars of the person(s) for whom maintenance is sought or payable

a ☐ The person is the same as the applicant named in point 4 ~~above~~

b i Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

ii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

iii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

6 Particulars of the debtor[1]

a ☐ The person is the same as the applicant named in point 4 ~~above~~

b Family name(s): .....

c Given name(s): .....

d Date of birth: ..... (dd/mm/yyyy)

7 This Transmittal Form concerns and is accompanied by an application under:

☐ Article 10(1)(a) ~~— recognition or recognition and enforcement of a decision~~

☐ Article 10(1)(b) ~~— enforcement of a decision made or recognised in the requested State~~

☐ Article 10(1)(c) ~~— establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage~~

☐ Article 10(1)(d) ~~— establishment of a decision in the requested State where recognition and enforcement of a decision is not possible or is refused because of the lack of a basis for recognition and enforcement under Article 17 or on the grounds specified in Article 19(b) or (e)~~

☐ Article 10(1)(e) ~~— modification of a decision made in the requested State~~

☐ Article 10(1)(f) ~~— modification of a decision made in a State other than the requested State~~

[☐ Article 10(2)(a) ~~— recognition of a decision~~]

☐ Article 10(2)(b) ~~— modification of a decision made in the requested State~~

☐ Article 10(2)(c) ~~— modification of a decision made in a State other than the requested State~~

8 The following documents are ~~enclosed together with~~ appended to the application:

a For the purpose of an application under Article 10(1)(a), and:

In accordance with Article 21:

[1] According to Art. 3 of the Convention "'debtor' means an individual who owes or who is alleged to owe maintenance".

☐ Complete text of the decision (Art. 21(1)(a))

☐ Abstract or extract of the decision drawn up by the competent authority of the State of origin (Art. 21(3)(b)) (if applicable)

☐ Document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) are met (Art. 21(1)(b))

☐ Where the respondent did not appear in the proceedings in the State of origin, a document establishing that the respondent had proper notice of the proceedings and an opportunity to be heard, or had proper notice of the decision and the opportunity to challenge it on fact and law (Art. 21(1)(c))

☐ Where necessary, a document showing the amount of any arrears and the date such amount was calculated (Art. 21(1)(d))

☐ Where necessary, a document providing the information necessary to make appropriate calculations in case of a decision providing for automatic adjustment by indexation (Art. 21(1)(e))

☐ Where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin (Art. 21(1)(f))

In accordance with Article 26(2):

☐ Complete text of the maintenance arrangement (Art. 26(2)(a))

☐ A document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin (Art. 26(2)(b))

☐ Any other documents accompanying the application (*e.g.*, if required, a document for the purpose of Art. 33(4)):

.....

.....

b For the purpose of an application under Article 10(1)(b), (c), (d), (e), (f) and (2)(a), (b) or (c) the following number of supporting documents (excluding the Transmittal Form and the application itself) in accordance with Article 11(3):

☐ Article 10(1)(b) .....

☐ Article 10(1)(c) .....

☐ Article 10(1)(d) .....

☐ Article 10(1)(e) .....

☐ Article 10(1)(f) .....

☐ Article 10(2)(a) .....

☐ Article 10(2)(b) .....

☐ Article 10(2)(c) .....

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

Acknowledgement Form under Article 12(3)

CONFIDENTIALITY AND PERSONAL INFORMATION
PROTECTION NOTICE

Personal information gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such information shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 37.

☐ *A determination of non-disclosure has been made by a Central Authority in accordance with Article 37.*

1 Requested Central Authority	2 Contact person in requested State
a Address	a Address (if different)
b Telephone number	b Telephone number (if different)
c Fax number	c Fax number (if different)
d E-mail	d E-mail (if different)
e Reference number	e Language(s)

3 Requesting Central Authority .....

Contact person .....

Address .....

.....

4 The requested Central Authority acknowledges receipt on ..... (dd/mm/yyyy) of the Transmittal Form from the requesting Central Authority (reference number .....; dated ..... (dd/mm/yyyy)) concerning the following application under:

☐ Article 10(1)(a) ~~— recognition or recognition and enforcement of a decision~~

☐ Article 10(1)(b) ~~— enforcement of a decision made or recognised in the requested State~~

☐ Article 10(1)(c) ~~— establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage~~

☐ Article 10(1)(d) ~~— establishment of a decision in the requested State where recognition and enforcement of a decision is not possible or is refused because of the lack of a basis for recognition and enforcement under Article 17 or on the grounds specified in Article 19(b) or (e)~~

☐ Article 10(1)(e) ~~— modification of a decision made in the requested State~~

☐ Article 10(1)(f) ~~— modification of a decision made in a State other than the requested State~~

Doc.trav./Work.Docs Nos 73-83

[☐ Article 10(2)(a) ~~– recognition of a decision~~]

☐ Article 10(2)(b) ~~– modification of a decision made in the requested State~~

☐ Article 10(2)(c) ~~– modification of a decision made in a State other than the requested State~~

Family name(s) of applicant: .....

Family name(s) of the person(s) for whom maintenance is sought or payable: .....

.....

.....

Family name(s) of debtor: .....

5 Initial steps taken by the requested Central Authority:

☐ The file is complete and is under consideration

☐ See attached Status of Application Report

☐ Status of Application Report will follow

☐ Please provide the following additional information and / or documentation:

.....

.....

☐ The requested Central Authority refuses to process this application as it is manifest that the requirements of the Convention are not fulfilled (Article 12(8)). The reasons:

☐ Are set out in an attached document

☐ Will be set out in a document to follow

The requested Central Authority requests that the requesting Central Authority inform it of any change in the status of the application.

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

No 76 – Proposition du Bureau Permanent – Proposal of the Permanent Bureau

Proposition relative à l'article 14 ter *(Doc. trav. No 64) et le développement d'un texte neutre par rapport au support :*

Article 14 ter *Déclaration permettant un examen limité aux ressources de l'enfant*

[…]

3 Une demande mentionnée au paragraphe premier, adressée à un État qui a fait une déclaration mentionnée à ce paragraphe, devra inclure une ~~déclaration signée par le~~ attestation formelle du demandeur ~~attestant~~ indiquant que les ressources de l'enfant satisfont aux conditions mentionnées au paragraphe 2. L'État requis ne peut demander des preuves additionnelles des ressources de l'enfant que s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

[…]

Modification subséquente à l'article 12(2) :

Article 12 Transmission, réception et traitement des demandes et des affaires par l'intermédiaire des Autorités centrales

[…]

2 Après s'être assurée que la demande satisfait aux exigences de la Convention, l'Autorité centrale de l'État requérant la transmet, au nom du demandeur et avec son consentement, à l'Autorité centrale de l'État requis. La demande est accompagnée du formulaire de transmission prévu à l'annexe 1. Lorsque l'Autorité centrale de l'État requis le demande, l'Autorité centrale de l'État requérant fournit une copie complète certifiée conforme par l'autorité compétente de l'État d'origine des documents énumérés aux articles 14 *ter* (3), 21(1)(a), (b) et (d) et 21(3)(b) [et 26(2)].

[…]

* * *

Proposal concerning Article 14 ter *(Work. Doc. No 64) and the development of a medium-neutral text:*

Article 14 ter *Declaration to permit use of child-centred means test*

[…]

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include ~~a signed statement~~ a formal attestation by the applicant ~~attesting~~ stating that the child's means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child's means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

[…]

Consequential amendment to Article 12(2):

Article 12 Transmission, receipt and processing of applications and cases through Central Authorities

[…]

2 The Central Authority of the requesting State shall, when satisfied that the application complies with the requirements of the Convention, transmit the application on behalf of and with the consent of the applicant to the Central Authority of the requested State. The application shall be accompanied by the transmittal form set out in Annex 1. The Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 14 *ter* (3), 21(1)(a), (b) and (d) and 21(3)(b) [and 26(2)].

[…]

No 77 – Proposal of the delegation of the European Community

Article 46 Most effective rule

This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, other law in force in the requested State or reciprocity arrangement in force in the requested State that provides for –

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 19(f) of the Convention;

(b) simplified and more expeditious procedures on an application for recognition or enforcement of maintenance decisions; such rules must, however, be consistent with the objects and purpose of Articles 20 and 20 *bis*, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal;

(c) more beneficial legal assistance than that provided for under Articles 14 to 14 *quater*; or

(d) procedures permitting an applicant from a requesting State to make an application directly to the Central Authority of the requested State.

No 78 – Proposal of the delegations of Argentina, the European Community, Israel, Japan and New Zealand

Article 10(2)

[…]

(a) recognition of a decision, where necessary to suspend or limit the enforcement of a previous decision in the requested State, or a procedure under the law of the requested State enabling suspension or limiting of the enforcement of such a decision. A Contracting State shall inform the Permanent Bureau in accordance with Article 51 of the relevant procedure within that State enabling suspension or limiting of the enforcement of a decision.

No 79 – Non publié/Not published

Doc.trav./Work.Docs Nos 73-83

No 80 – Proposal of the delegation of China

Article 43 Non-unified legal systems

1 […]

(i) any reference to a maintenance arrangement made in a State shall be construed as referring, where appropriate, to a maintenance arrangement in the relevant territorial unit;

(j) any reference to recovery of costs by a State shall be construed as referring, where appropriate, to recovery of costs by the relevant territorial unit.

Rationale:

This proposal is made because of the additional provisions under Articles 26 and 40.

No 81 – Proposal of an informal working group on Articles 2, 3 and 34[1]

Article 2

1 This Convention shall apply to –

(a) maintenance obligations arising from a parent-child relationship towards a person under the age of 21;

(b) recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of paragraph 1(a), and

(c) with the exception of Chapters II and III, to spousal support.

2 A Contracting State may reserve, in accordance with Article 57, the right to limit the application of the Convention under paragraph 1(a), to persons who have not attained the age of 18. A Contracting State which makes this reservation shall not be entitled to claim the application of this Convention to persons of the age excluded by its reservation.

3 Any Contracting State may declare in accordance with Article 58 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.

4 The provisions of this Convention shall apply to children regardless of the marital status of the parents.

Article 3 Definitions

For the purposes of this Convention –

[…]

(f) a "vulnerable person" is a person who, by reason of an impairment or insufficiency of his or her physical or mental faculties, is not able to support him or herself.

[1] The following delegations participated in the informal working group: the United Kingdom, Australia, New Zealand, South Africa, Canada, the United States of America, the European Community, China, Chile, Uruguay, Ecuador, Brazil, Argentina, the Dominican Republic, Germany, the Russian Federation and Israel. The work was linked to finding a compromise on Articles 14 and 20.

Article 34

[…]

3 For the purpose of paragraph 2, Article 2(1)(a) shall apply to a decision granting maintenance to a vulnerable person over the age specified in that sub-paragraph where such decision was rendered before the person reached that age and the impairment arose before that age.

Text to be included in the Final Act:

The Twenty-First Session,

Recommends that the Council on General Affairs and Policy of the Hague Conference on Private International Law should consider as a matter of priority the feasibility of developing a Protocol to the Convention on the International Recovery of Child Support and other Forms of Family Maintenance to deal with the international recovery of maintenance in respect of vulnerable persons.

Such a Protocol would complement and build upon the *Hague Convention of 13 January 2000 on the International Protection of Adults*.

No 82 – Proposal of the delegation of the European Community

Article 46 Most effective rule

1 This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State or reciprocity arrangement in force in the requested State that provides for –

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 19(f) of the Convention;

(b) simplified and more expeditious procedures on an application for recognition or enforcement of maintenance decisions;

(c) more beneficial legal assistance than that provided for under Articles 14 to 14 *quater*; or

(d) procedures permitting an applicant from a requesting State to make an application directly to the Central Authority of the requested State.

2 This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1(a) to (c). However, as regards simplified and more expeditious procedures referred to in paragraph 1(b), they must be compatible with the protection offered to the parties under Articles 20 and 20 *bis*, in particular as regards the parties' rights to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal.

No 83 – Proposition du Bureau Permanent – Proposal of the Permanent Bureau

Texte à insérer dans l'Acte final :

La Vingt et unième session,

1 Se félicite des travaux du Groupe de travail chargé des formulaires, institué par la Commission spéciale sur le re-

couvrement des aliments envers les enfants et d'autres membres de la famille.

2 Souscrit en général aux formulaires présentés dans le Document préliminaire No 31, notamment quant à l'uniformité de leur structure.

3 Recommande que le Groupe de travail chargé des formulaires poursuive ses travaux et examine plus avant les projets de formulaires, dans la perspective de leur adoption lors d'une future Commission spéciale et de leur publication par le Bureau Permanent, en application de l'article 11, paragraphe 4, de la Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille.

4 Loue les travaux du Groupe de travail sur la coopération administrative, créé par la Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille, ainsi que ceux de ses sous-comités chargés respectivement du suivi et de l'examen ainsi que du profil des États.

5 Recommande que le Groupe de travail sur la coopération administrative poursuive temporairement ses travaux et accueille les discussions relatives aux questions de coopération administrative, et recommande qu'une future Commission spéciale examine la création d'un Comité permanent de coopération des Autorités centrales.

6 Souscrit en général au profil des États présenté dans le Document préliminaire No 34, partie IV.

7 Recommande la poursuite des travaux du sous-comité chargé du profil des États, dans la perspective de l'adoption de ce formulaire lors d'une future Commission spéciale et de sa publication par le Bureau Permanent, conformément à l'article 51, paragraphe 2, de la Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille.

* * *

Text to be included in the Final Act:

The Twenty-First Session,

1 Commends the work of the Working Group on Forms established by the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance.

2 Gives its general endorsement to the forms set out in Preliminary Document No 31, in particular with regard to their uniform structure.

3 Recommends that the Working Group on Forms should continue its work and give further consideration to the draft Forms, with a view to their adoption at a future Special Commission and publication by the Permanent Bureau in accordance with Article 11, paragraph 4, of the Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

4 Commends the work of the Administrative Co-operation Working Group, established by the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance, as well as of its sub-committees on Monitoring and Review and on Country Profiles.

5 Recommends that the Administrative Co-operation Working Group should on an interim basis continue its work as a forum for discussion of issues of administrative co-operation and that consideration be given by a future Special Commission to the establishment of a standing Central Authority Co-operation Committee.

6 Gives its general endorsement to the Country Profile set out in Part IV of Preliminary Document No 34.

7 Recommends that the work of the Country Profile sub-committee of the Administrative Co-operation Working Group continue with a view to the presentation for adoption at a future Special Commission of a Country Profile, to be published by the Permanent Bureau in accordance with Article 51, paragraph 2, of the Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

Doc.trav./Work.Docs Nos 73-83

Procès-verbaux
de la Première commission

Minutes
of the First Commission

Procès-verbal No 1

Minutes No 1

Séance du mercredi 7 novembre 2007 (après-midi)

Meeting of Wednesday 7 November 2007 (afternoon)

La séance est ouverte à 14 h 40 sous la présidence de Mme Mária Kurucz (Hongrie). Les co-Rapporteurs sont Mmes Jennifer Degeling (Bureau Permanent) et Alegría Borrás (Espagne).

Ouverture de la réunion de la Commission I / Opening of Commission I

1. **The Chair** welcomed the delegations to the first meeting of Commission I. She reiterated that Commission I would deal with the draft *Convention on the International Recovery of Child Support and other Forms of Family Maintenance*. She noted that the final stage of negotiations had been reached and that during conversations she had had with delegates, she had encountered optimism and a willingness to work and was encouraged by that experience. She further noted that all delegates felt that if a special effort were to be made over these three weeks it would ultimately be beneficial for all, especially for children.

The Chair stated that she felt very honoured that she was elected as the Chair, and that she had much confidence in the delegations and hoped for mutual co-operation and sharing of experiences. She introduced Philippe Lortie and asked him to present the documentation required for Commission I.

Observations générales et documentation / General comments and documentation

2. **Mr Lortie** (First Secretary) thanked the Chair and stated that he was going to present some administrative matters for those delegates that were not in attendance on the opening day of Commission II when he also did this, and so he briefly noted some minor administrative matters before turning to the documentation relevant to Commission I. He further stated that he would also provide information on the availability of documentation in Spanish.

Mr Lortie emphasised that the most important document would be the revised preliminary draft Convention, Preliminary Document No 29, and that it was available, as well as all other documentation, in French and English. He noted that Preliminary Document No 29 would soon be available in Spanish.

Mr Lortie also noted that the other document that was important for discussion purposes would be the compilation of all comments received from States as well as the different working groups and committees, Preliminary Document No 36. He noted that discussion would frequently turn to this document. He also stated that some comments were received in their original language in Spanish and that these would be available in Spanish as of the morning of Thursday 8 November 2007.

Mr Lortie also made reference to Preliminary Document No 31 which had been issued in two parts. Part A was the Report of the Forms Working Group, which had been available since July on the website of the Hague Conference. Mr Lortie indicated that copies of Part A were available from the information desk and were also available in Spanish on the website of the Hague Conference. He further stated that Part B of Preliminary Document No 31 was the complete set of forms required for all applications made under Article 10 and documents under Article 21. He said that this document was available on the website of the Hague Conference in all three languages.

Mr Lortie also announced that the Explanatory Report of the revised preliminary draft Convention, Preliminary Document No 32, was now available in paper form in both English and French in a final form. He noted, however, that it had also been divided into two parts: Part 1 contained Chapters I to III and Part 2 contained Chapters IV to IX, the latter being the balance of the text of the draft Convention. He also clarified that although Preliminary Document No 32 had been published in Spanish, only the text of the document had been translated but not the footnotes.

With regard to Preliminary Document No 34, the Report from the Administrative Co-operation Working Group which was available in paper form in English and French, Mr Lortie stated that a Spanish version would be posted on the website of the Hague Conference during the afternoon of Wednesday 7 November 2007.

Mr Lortie concluded his presentation of the relevant documentation by stating that all other documents were in delegates' folders and that with regard to the Information Note, the Deputy Secretary General may discuss this in more detail.

3. **The Chair** thanked the First Secretary and gave the floor to the Deputy Secretary General to explain the use of working documents and introduce the working method and agenda for Commission I.

4. **The Deputy Secretary General** thanked the Chair and stated that he would repeat some matters that he had discussed on Monday 5 November 2007 in order to re-emphasise some main points. He commenced by reminding the delegations that discussion during the Session would only be on the basis of written proposals, in accordance with Article 14 of the Rules of Procedure. He also wished to re-emphasise Article 1A of the Rules in relation to the principle of consensus to the effect that, wherever possible, all decisions should be reached by consensus.

The Deputy Secretary General then drew the attention of the delegations to the main elements of the draft Agenda for Commission I. He stated that discussion would be opened on all of the main outstanding issues and not on an article-by-article basis. He said that the key issues would be considered on a thematic basis and that these main issues included effective access to procedures, public bodies, procedures for applications for recognition and enforcement, direct requests made to competent authorities and authentic instruments and private agreements.

The Deputy Secretary General noted that the discussion of these themes should continue until the afternoon of Friday 9 November 2007 with regular references to Preliminary Document No 36, which included comments that had been

Procès-verbal/Minutes No 1

made by States and different Committees. He also stated that, because discussion would proceed on a thematic basis, some of the articles appearing in earlier drafts of the Convention and that may be closed issues not requiring debate may not in fact be discussed until the end of the second week.

The Deputy Secretary General observed that there would be an opportunity to return to any open issues on the Friday of the second week and during the entire day Monday of the third week. He stated that the draft Agenda was meant to be flexible and that it enabled discussions to be returned to. He summarised that the second reading of the draft Convention would take place on Tuesday 20 November 2007 and that it would take up the entire day. He stated that the second reading would involve an article-by-article consideration of the draft Convention and that he hoped that, by that stage, most outstanding issues would be resolved.

The Deputy Secretary General stated that the final reading of both the text of the draft Convention and of the draft Protocol would take place on the Thursday of the final week and that it was hoped that that reading would be quick. He emphasised that this agenda was to be treated as flexible and that delegates would be free to suggest changes, and that any such amendments would be agreed by the rest of the delegation through discussion, when the need for such discussion arose. He also noted that the Commission might sometimes need to be suspended for a period of time in order for the Drafting Committee and working groups to complete their work. He noted that the draft agenda might be moved through quicker than expected and that the agenda's flexibility would ensure that all issues were discussed to the fullest extent possible and where necessary.

5. **The Chair** thanked the Deputy Secretary General and emphasised again the flexibility of the draft agenda. She suggested that any delegates who wanted to discuss any item not indicated in the draft agenda should indicate so, so that that topic could be added to the draft agenda.

The Chair encouraged the delegations to submit working documents and explained that the Secretariat would be able to assist in preparing such written proposals. She also reaffirmed the remarks made by the Deputy Secretary General in relation to the thematic approach that Commission I would take, and that the most difficult issues would be discussed first so as to increase the possibility for consensus. She noted that the first theme to be discussed during the afternoon was that of effective access to procedures including costs and legal assistance. She stated that a general introduction would be given of the relevant articles and main principles followed by a more detailed discussion of the definition of legal assistance, Central Authority costs (Art. 8) and discussion of the exceptions to receiving free legal assistance. She said that discussion would then proceed to the varying options contained within Article 14 and on the position of debtors. The Chair gave the floor to the co-*Rapporteur* to present a general introduction of all issues unless there were any other comments from the floor regarding the draft agenda.

Articles 3, paragraphe (c), 8, 14 et 40 / Articles 3, paragraph (c), 8, 14 and 40

6. **Ms Jennifer Degeling** (co-*Rapporteur*) introduced Article 3, paragraph (c), as well as Articles 8, 14 and 40 and proceeded to address their interrelationship. To this end she stated that she would follow the order of the agenda, starting with Article 14.

1 *Introduction aux articles sur l'accès effectif aux procédures, y compris coûts et assistance juridique* / *Introduction to Articles on effective access to procedures, including costs and legal assistance*

a *Article 14*

Ms Degeling gave a general introduction of Article 14 and stated that the Chair of the Drafting Committee would describe the differences between the options contained in Article 14. She would therefore restrict her presentation to the general content of Article 14 and the principle of effective access to procedures.

She emphasised that the right to have effective access to procedures was a fundamental principle of the Convention. She reminded the delegations that the procedures referred to in Article 14 could be administrative or judicial procedures.

As to the general rules regarding effective access to procedures under Article 14 (Options 1 and 2), she noted that the general rule and overarching principle of the draft Convention was that Contracting States should provide applicants with effective access to procedures. Effective access to procedures was usually guaranteed by providing legal assistance, in particular free legal assistance. However, one important exception to this rule was where there were simplified procedures designed to enable applicants to make their case without the need for legal assistance. In addition, she stated that there was a non-discrimination provision that ensured comparable entitlements for both international and domestic cases as well as a general provision concerning an entitlement to free legal assistance in all recognition and enforcement cases. She drew the attention of the delegations to the general prohibition on requiring any security, bond or deposit to guarantee payment of costs.

She noted that there appeared to be consensus on these general rules, which had been in the draft Convention from its first draft. She stated that there had not been any disagreement that Contracting States should provide applicants with effective access to procedures.

Ms Degeling observed that effective access to procedures was so important because applicants for maintenance generally had limited resources. She stated that even small financial barriers might inhibit the use by them of the opportunities provided under the new Convention. The costs for the applicant should not inhibit the use of, or prevent effective access to, the services and procedures provided for in the Convention. But she stated that, at the same time, if the Convention were to attract a wide range of Contracting Parties, it should not be seen to impose excessive financial burdens on Contracting States. Ms Degeling said that they should, however, be realistic and recognise that the provision of services under the Convention would not be free of costs to Contracting Parties, but the costs of providing services should not be disproportionate to the benefits in terms of securing support for more children and other family dependants and, as a result, reducing their welfare budgets. She noted that the simplified procedures referred to in Article 14, such as those found in administrative systems, or simplified legal procedures, provided a model for effective access to procedures at low cost.

Ms Degeling emphasised that there was agreement on the general principles, and so it was necessary to settle the details about effective access to procedures so as to ensure reasonable reciprocity between Contracting States and

which would provide for the equivalent treatment of all applicants.

Ms Degeling addressed the question of the meaning of the phrase "effective access to procedures". She stated that Article 14 imposed an obligation on the Contracting State to ensure that an applicant who has made an application of the kind referred to in paragraphs 1 and 2 of Article 10 has effective access to the procedures of the requested State that might arise in connection with an application. She summarised that "applicant" could therefore include a creditor, a debtor or a public body. The procedures in question might be administrative or judicial, and include appeal procedures. She noted that they may also include any separate procedures that might be required at the enforcement stage or for an appeal. Where "effective access to procedures" could only be guaranteed by providing free legal assistance, she explained that this should be provided in whatever form was appropriate to the particular situation.

Ms Degeling went on to explain that "effective access to procedures" for a person seeking assistance under this Convention implied the ability, with the assistance of authorities in the requested State, to put one's case as fully and as effectively as possible to the appropriate authorities of the requested State. It also implied that a lack of means should not be a barrier.

Furthermore, Ms Degeling outlined that the aims of this Convention – for a simple, low-cost and rapid procedure for the recovery of maintenance – should not be undermined or obstructed by complex, expensive and slow procedures in the requested State. It would be necessary for some States to revise their internal laws and procedures to properly implement this Convention.

Ms Degeling drew the attention of the delegations to the fact that her explanation of effective access to procedures drew on the definition of "legal assistance" as contained in Article 3, paragraph (c). For those countries that did not have simplified procedures for recovery of maintenance, she said that the provision of legal assistance became the principal mechanism to achieve the aims of Article 14.

Ms Degeling outlined that the definition contained in Article 3, paragraph (c), also made clear that free legal assistance was intended, where necessary, to include legal advice and representation. If either were needed and not provided, there could be no genuinely effective access to procedures. But if legal advice or representation were not provided free of charge in the requested State, free assistance should be given to the applicant to apply for whatever legal aid or other financial assistance will give him or her access to the necessary procedures. She noted that this was reflected in paragraph 4 of Options 1 and 2 of Article 14.

Ms Degeling stated that the implementation of Article 14 was closely linked to Article 6, paragraph 1, sub-paragraph (b), which imposed an obligation on the Central Authority to institute or facilitate the institution of legal proceedings. She continued by stating that Article 14 was also linked to Article 6, paragraph 2, sub-paragraph (a), under which the Central Authority could, if circumstances necessitated, be required to provide or facilitate the provision of legal assistance. She noted that the manner in which each Contracting State intended to fulfil its obligations under Article 6 and paragraph 1 of Article 14 should be in accordance with Article 51, paragraph 1, sub-paragraphs (b) and (c). She suggested that this information could also be included in the Country Profile form that was proposed in Preliminary Document No 34, in regard to which Ms Degeling made reference to paragraph 2 of Article 51.

Ms Degeling added that the Special Commission had not decided the question of whether Articles 14 to 14 *ter* applied to a public body and, in particular, whether free legal assistance should be provided to public bodies in accordance with Option 2 of Article 14. She noted that it had also not yet been decided whether public bodies could apply, under Article 10, for the establishment or modification of a decision and, if so, whether Articles 14 to 14 *ter* would apply to such applications. She stated that these questions would be discussed on Thursday 8 November 2007.

Ms Degeling drew the attention of the delegations to the fact that there were policy issues that needed to be resolved in relation to Article 14 and listed the following: 1) whether to accept Option 1 or 2, including the options contained within Article 14 *bis* (Option 2), 2) whether effective access to procedures should be extended to debtors, 3) whether any costs would be imposed for legal assistance (apart from assistance provided by Central Authorities) and 4) any other issues in relation to public bodies.

b *Article 3, paragraphe (c) /* Article 3, paragraph (c)

Ms Degeling proceeded to address the definition of "legal assistance" in Article 3, paragraph (c). She noted that it had been discussed at length at the Special Commission meeting of May 2007 and that the definition now appearing in Article 3, paragraph (c), had been developed by the Drafting Committee. It was in square brackets because the particular wording had yet to be considered by Commission I.

Ms Degeling indicated that the phrase "legal assistance" was defined in Article 3, paragraph (c), as "the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State", and that legal assistance included "assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". In a particular case, one or more of the specific elements of legal assistance in the definition may be relevant and the services needed in Article 6, paragraph 2, sub-paragraph (a), and Article 14 would therefore vary, depending on the circumstances of the particular case.

She noted that the delegations had yet to discuss what it meant to "know and assert their rights" as well as ensuring that "applications are fully and effectively dealt with".

Ms Degeling stated that there was an obligation imposed on the Central Authority by Article 6, paragraph 2, sub-paragraph (a), namely to provide or facilitate the provision of legal assistance in circumstances that would require it. Ms Degeling noted that this would necessarily arise in every case.

The obligation in Article 14 was an obligation on the requested State to provided effective access to procedures, and if necessary, including legal assistance. She added that the Central Authority would be expected to assist the applicant in accordance with sub-paragraph (a) of paragraph 2 of Article 6, to provide or facilitate the provision of legal assistance referred to in Article 14.

Ms Degeling noted that "legal assistance" provided by a Central Authority could be of a general nature: assistance in preparing an application or obtaining documents; assistance in responding to requests from the requested country

for more legal information; liaising with the applicant's legal representative in the requested country; providing an exemption from court fees, and being provided with access to mediation services. She further noted that the legal assistance could also include legal representation, depending of course on the circumstances, and that a private attorney appointed to represent the applicant could also provide legal assistance.

She emphasised that the provision of "legal assistance" could include helping to obtain "legal representation". She further explained that this could mean having a lawyer, attorney or solicitor in the requested country represent the applicant in and out of court, in legal proceedings or negotiations with the other party, or to provide legal advice specifically in relation to the conduct of the applicant's case in the requested country. She noted that in some countries "legal representation" by the Central Authority would mean legal representation of the claim, not the applicant, and the implications of this should be explained in accordance with Article 51, paragraph 1, sub-paragraph (b).

Ms Degeling stated that the provision of "legal assistance" could also include help to obtain "legal advice". This could be legal advice from the Central Authority or legal advice from a private attorney. If the Central Authority was the service provider and was located in a government ministry or department, it was unlikely to give private "legal advice" to individuals. She noted that this was normal and, further, that "legal advice" given by the requested or requesting Central Authority in the context of Article 6 was intended to be of a general nature, but which a Central Authority could be best placed to give. She then proffered the following examples of such general advice: how the child support laws operated in that country; how the Convention was implemented nationally or internationally, and whether the Convention was the most effective instrument to use in a particular case. These were matters in which a Central Authority lawyer was likely to have particular knowledge and expertise.

She emphasised that the provision of legal advice was an important component of legal assistance. It might be needed to help determine whether an application had a chance of success and what other assistance or representation, if any, was needed. The advice could indicate that legal assistance or representation was not needed, or that legal aid would be available to obtain independent legal representation.

Ms Degeling noted that, from these examples, it could be seen that the term "legal assistance" was intended to be an all-encompassing term to include any kind of legal help, advice or representation, and that would "enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State".

Ms Degeling also stated that there were two issues to be resolved regarding Article 3, paragraph (c). Firstly, the whole provision was still in brackets because it needed to be discussed in Commission I. Secondly, she noted that there were some proposed amendments to the definition (see Prel. Doc. No 36).

c *Article 8*

Ms Degeling addressed the general principle of Article 8 which stated that there should be no costs imposed for services provided by the Central Authority. She noted that the general principle of cost-free administrative services for applicants and Central Authorities had been well supported, and was consistent with the Convention's aims for simple, low-cost and rapid procedures. This principle was considered to be particularly important with regard to maintenance for children. Ms Degeling also considered it important to ensure that access to the benefits and services of the Convention not be denied to applicants because of their limited financial circumstances.

She stated that the same principles which underpinned Article 14 also underpinned Article 8: (i) the need to provide effective access to services and procedures provided for under the Convention; (ii) the need to ensure that the burdens and benefits of the Convention were not disproportionate; (iii) the need to ensure a certain level of reciprocity among Contracting States in order to contribute to the mutual confidence and respect that is necessary for a successful Convention; and (iv) the need to ensure that the recovery of maintenance takes precedence before the payment of legal and other costs.

She emphasised that paragraph 1 of Article 8 contained a basic principle that each Central Authority was to bear its own costs in applying the Convention. The formulation in paragraph 1 clarified that a Central Authority might not charge another Central Authority for services and should bear its own costs. This provision did not limit the possibility of a Central Authority imposing charges on any other person or body apart from the applicant referred to in paragraph 2.

Ms Degeling stated that paragraph 2 of Article 8 applied to the Central Authority in both the requesting and requested States. They were not able to impose charges on applicants apart from exceptional costs related to requests under Article 7. She stated that the "applicant" could be a person or public body making an application under Article 10. She summarised that the current text indicated that when the applicant was a public body, the same principle of cost-free services applied.

Ms Degeling added that the general principle in paragraph 2 applied, in particular, to the services or functions of Central Authorities that were listed in Articles 5, 6, 7 and 12. She clarified that paragraph 2 of Article 8 stated that Central Authorities were not able to charge for their services but that it was possible that a service that had to be provided by a body other than a Central Authority could be charged for. However, she noted that a body referred to in paragraph 3 of Article 6 must not charge for services when performing functions as the Central Authority.

Ms Degeling summarised that the principle of effective access to procedures set out in Article 14 was thus an overriding principle. An applicant was not to be denied effective access to procedures simply because charges would have to be imposed for some services. If the applicant were not able to afford to pay the charges, the requested State should assist the applicant to have effective access to procedures by, for example, assisting the applicant to make an application for legal aid in the requested State (if the applicant were eligible to apply and if the legal aid would cover the services in question).

According to Ms Degeling, the relationship between Articles 6, 8 and 14 could be explained as follows: Article 14 (effective access to procedures) only related to applications under Chapter III. She went on to say that if a service or function listed in Article 6 were provided or performed by a Central Authority in response to an application under Article 10, that service should be provided free of charge. On

the other hand, if a service were provided by a body that was not the Central Authority and was not performing the functions of the Central Authority, the service could be charged for as long as effective access to procedures was guaranteed. The procedures referred to could be administrative or legal.

Ms Degeling summarised her explanation by stating that charges could not be imposed for Central Authority services on an applicant who made an application under Article 10 (and which could be a creditor, a debtor or a public body) or on a Central Authority (para. 1 of Art. 8). She noted as an aside that a specific exception to this general rule was that an applicant could be charged for translation costs under Article 42. She also reminded the delegations that charges could be imposed on an applicant receiving a service provided by a body other than a Central Authority or on a person for whom a request under Article 7 was made, if the costs or expenses were "exceptional" (para. 2 of Art. 8). In addition, charges would be imposed (i) by a body that was providing a service that was not a Central Authority function or (ii) by a Central Authority that was providing a service under Article 7 and which gave rise to "exceptional" costs or expenses.

Ms Degeling observed the outstanding issues that required resolution in relation to Article 8 and referred the delegates to Preliminary Document No 36 which contained the proposed amendments.

d *Article 40*

Ms Degeling noted that Article 40 contained two important rules that applied to the whole of the Convention: firstly, that the recovery of maintenance payments should take precedence over the recovery of costs and, secondly, that costs could be sought from an unsuccessful applicant.

She emphasised that costs in Article 40 included any costs incurred in relation to the general operation of the Convention and that paragraph 1 would usually apply to claims against the debtor. However, paragraph 2 would refer to both debtors and creditors (*e.g.*, a creditor in an unsuccessful modification application or an unsuccessful establishment application where a debtor successfully contested parentage).

2 *Relation entre les articles 3, paragraphe (c), 8, 14 et 40 /* Relationship between Articles 3, paragraph (c), 8, 14 and 40

a *Article 14*

Ms Degeling wanted to address the relationship between the Articles. She emphasised that the principle contained in Article 14 was at the heart of the Convention. Indeed, without a guarantee of effective access to procedures leading to the recognition and enforcement, establishment or modification of a maintenance decision, the benefits of the Convention would be limited or lost for the majority of applicants. She drew the attention of the delegations to Article 1 and the first line of the draft Convention which stated "[t]he object of the present Convention is to ensure the effective international recovery of child support […]". She believed that they should always bear this in mind during their discussions.

In addition, she noted that there was a close connection between Articles 3, 6 and 14. For Article 14, the context made clear that discussion was about the applicant's access to a court or tribunal or administrative authority in order to have the claim adjudicated or dealt with. Ms Degeling stated that it was a matter for each Contracting State as to how they would provide such access, but that it should be effective. In some systems, the effectiveness of access to procedures depended on the extent of the legal assistance available whilst in simplified systems, legal assistance might not be necessary at all. She stated that the effective access also depended on the extent of administrative and legal assistance given by Central Authorities under Article 6, paragraph 1, sub-paragraph (b), and Article 6, paragraph 2, sub-paragraph (a). She stated that such assistance should be free of charge to applicants under Article 8. She further stated that the principal obstacle to effective access to procedures for recognition and enforcement, establishment or modification of a decision would be the lack of legal assistance offered to the applicant in order to put his or her case fully and effectively to a court or tribunal. She noted that a further obstacle would be the presence of inadequate internal procedures in Contracting States that did not effectively implement the Convention.

b *Article 3, paragraphe (c) /* Article 3, paragraph (c)

Ms Degeling observed that the meaning and effect of provisions in Articles 14 and 6 were strongly directed and influenced by the definition of legal assistance as set out in Article 3, paragraph (c). She noted that the success or otherwise of Article 14 depended on how each Contracting State that did not have simplified systems would perform its obligations to provide legal assistance. Indeed, in Article 14, legal assistance was intended to include, where appropriate or necessary, the concept of "legal aid" and, for that reason, the obligation was on the Contracting State and not the Central Authority to provide it. She added that the extent of legal assistance offered by Contracting States would usually be driven by the costs of such assistance (including the cost of resources, as well as the duration and the complexity of procedures). The availability or extent of legal assistance would also be affected by the internal law of the Contracting State. She emphasised that the legal assistance provided for under Article 6 would not permit any charges by the Central Authority because of Article 8, and for Article 6, paragraph 2, the obligation to provide legal assistance included taking "all appropriate measures". She observed that if the legal assistance in Article 14 were provided by a Central Authority, there could be no charges attached but that if it were provided by others, it should still be classified as free legal assistance under Option 2, Article 14 *bis*, or as free legal assistance "where necessary", under Option 1, Article 14, paragraph 1.

c *Article 8*

Ms Degeling then referred to Article 8. She observed that the Central Authority could not impose any costs on an applicant for any services but that there were exceptions that had already been given. This primarily related to Article 6 but could refer also to services and functions under Articles 12 and 14. She said that this could affect the extent to which functions and services were offered in relation to Article 6, paragraph 2, and that only charges for exceptional costs for Article 7 were allowed under Article 8.

d *Article 40*

As to Article 40 of the draft Convention, Ms Degeling noted that Articles 8 and 14 were both subject to the principle contained in Article 40 that recovery of maintenance should take precedence over the recovery of costs.

Procès-verbal/Minutes No 1

7. **The Chair** thanked the co-*Rapporteur* and asked Ms Doogue, Chair of the Drafting Committee, to present the text of the revised preliminary draft Convention in relation to Article 14.

Présentation du travail du Comité de rédaction par la Présidente du Comité de rédaction, Mme Doogue (Nouvelle-Zélande) / Presentation of the work of the Drafting Committee by the Chair of the Drafting Committee, Ms Doogue (New Zealand)

8. **La Présidente du Comité de rédaction** souhaite la bienvenue à l'assemblée. Elle est heureuse d'annoncer la naissance d'Albert, et félicite les heureux parents M. Philippe Lortie et son épouse, Federica.

The Chair of the Drafting Committee thanked the Chair and noted that she wished to keep her comments as brief as possible. She noted that she might repeat some remarks made by the co-*Rapporteur* but would try to limit this as much as possible. She stated that the phrase "effective access to procedures" was not defined within Article 14 but rested on the use of the term "legal assistance" which was defined in Article 3, paragraph (c), and utilised in the context of Article 14, and so a definition would not be necessary. Ms Doogue noted that she would not discuss Option 1 of Article 14 as it had already been on the table for some time.

The Chair of the Drafting Committee suggested that she would commence with an overview of Option 2 of Article 14, which had been developed since May 2007 by an informal working group.

The Chair of the Drafting Committee commenced by stating that Article 14, paragraph 1, of Option 2 outlined that States must provide applicants with effective access to procedures, including the enforcement and appeal procedures, arising from applications under Chapter III of the Convention. She clarified that this obligation would not be on the Central Authority but on States in order to ensure that effective access was provided. She also noted that this requirement would not apply to direct applications made by applicants.

She noted that paragraph 2 of Article 14 under Option 2 explained the structure of Option 2 and how effective access would be provided. She went on to observe that paragraph 3 of Article 14 under Option 2 established that if the procedures of that State were simplified to enable an applicant to make an application free of charge, or if a Central Authority provided such assistance services as were necessary free of charge, then the State would nevertheless fulfil its obligations. She did not spend time on paragraph 4 but stated in relation to paragraph 5 that it was meant to protect an applicant from having to pay costs up front before a proceeding, which might prove to be a fatal disincentive to making an application. She stated that the text in square brackets in paragraph 5 indicated that consideration must be given to whether to extend the application of paragraph 5 so that it would not just apply to applications made by creditors.

The Chair of the Drafting Committee then went on to consider Article 14 *bis* of Option 2, which imports a privileged position to child maintenance applications. She noted that this had been discussed in May 2007. She observed that paragraph 1 of Article 14 *bis* was consistent with paragraph 1 of Article 14, and stated that "[t]he requested State shall provide free legal assistance in respect of all applications [by a creditor] under Chapter III concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21". She further noted that paragraph 1 of Article 14 *bis* was governed by paragraph 3 of Article 14.

The Chair of the Drafting Committee summarised the exceptions contained in paragraph 2 of Article 14 *bis*. She noted that no exceptions attached themselves to an application made under Article 10, paragraph 1, sub-paragraphs (a) and (b). Ms Doogue stated that there were three broad exceptions: that legal costs may be imposed for genetic testing, that free legal assistance may be refused for applications that were manifestly unfounded and that legal assistance may be refused where the applicant had strong financial circumstances.

The Chair of the Drafting Committee clarified that what was being excluded by sub-paragraph (a) of paragraph 2 of Article 14 *bis* were the administrative costs of genetic testing, not the costs of the Central Authority in obtaining genetic testing. She noted that paragraph 2 of Article 8 related to this discussion, as well as paragraph 2 of Article 40 that enabled the recovery of costs from an unsuccessful party where costs arose from an application.

In relation to the second exception, she clarified that the decision as to whether an application would be manifestly unfounded would not be made by a Central Authority but by a State or its competent authorities. She stated that the only situation where a Central Authority could reject an application would be if it were manifestly obvious that the Convention requirements were not met, as stated in paragraph 8 of Article 12. Ms Doogue then noted that discussion regarding policy would be necessary in relation to the square brackets contained within sub-paragraph (b) of paragraph 2 of Article 14 *bis*.

The Chair of the Drafting Committee discussed the third exception and noted the difficulties that had arisen in its drafting. This was due in part to the options lacking some objective criteria for comparison purposes between States and the absence of clarity with regard to procedures and how the exception would operate, as well as the fact that the current formulations required improvement. She highlighted that Option A of the third exception enabled the requested State to make the assessment, and that Option B enabled the requesting State to make the assessment and then to provide the requested Central Authority with that assessment in order to proceed on the basis of whether legal assistance should or should not be provided. She explained that, given the small number of applications that would fall under this exception, the utility of a complicated provision should be queried and she further explained that Option C consisted therefore in deleting the availability of this exception altogether.

She discussed Article 14 *ter* and stated that this provision related to applications that do not qualify for free legal assistance due to an exception contained in Article 14 *bis*, and that such applications may nevertheless qualify for free legal assistance under a merits test. She noted that paragraph (b) of Article 14 *ter* was essentially the same as paragraph 5 of Article 14 under Option 1. She noted that paragraph (b) of Article 14 *ter* applied to applications for recognition and enforcement brought by a creditor, and observed that it did not necessarily mean that the same type of free legal assistance as had perhaps been provided in the State of origin would be provided, but that there certainly would be an essence of equivalence. She further noted that the square brackets in this provision required consideration

by the delegations as to whether to extend the provision to other categories of applicants and not just to creditors.

The Chair of the Drafting Committee explained the meaning of legal assistance in paragraph (c) of Article 3 and wished to inform the delegates that many hours had been spent looking at previous drafts in order to formulate a harmonised description of the individual elements that would constitute legal assistance, and that it had nearly proved impossible. She noted that the quagmire resulted from the fact that these terms do not mean the same thing in every country, and so she emphasised that there was not much utility in further debate as this had already occurred. She emphasised that this formulation protected the overarching principles of effective access and that it enabled each State to decide how to provide such assistance. Ms Doogue summarised that the effect would therefore be that the situation in each State was preserved, and which made it easier from a drafting perspective as well.

The Chair of the Drafting Committee stated that she looked forward to the discussion and emphasised the overarching aims of the Convention and that, with some hard work, there would hopefully be a positive outcome at the end.

Discussion générale / General discussion

9. **The Chair** thanked Ms Doogue for the clear explanation and opened the floor for general remarks. The Chair asked delegates to restrict their discussion to the main principles that had previously been highlighted.

10. **Ms Carlson** (United States of America) stated that the delegation of the United States of America had submitted two papers: one on costs, and one on every other part of the draft Convention, and that the comprehensive paper on costs was contained as an addendum to Preliminary Document No 36.

Ms Carlson stated that her comments would be restricted to the general views of the delegation of the United States of America on the treatment of costs as well as the interrelationship between Article 3, paragraph (c), Article 6, paragraph 2, and Articles 8 and 14.

Ms Carlson proceeded to list several overarching considerations. She noted that, firstly, one should keep sight of the goal of providing children with maintenance payments as quickly as possible and as was espoused in the Preamble of the Convention. She noted that the Preamble stated that the States signatory to the present Convention were "[a]ware of the need for procedures which produce results", and that Article 1 stated that "[t]he object of the present Convention is to ensure the effective international recovery of child support".

The second overarching consideration that Ms Carlson noted was that an efficient child support system would also enable parents to help support their child(ren), and that the obligation on parents to do so could be seen in the Preamble to the Convention and as it is stated in the *United Nations Convention on the Rights of the Child*. She noted that, if parents could be assisted by the State in this, ultimately it would reduce the pressure on a State and would be in its overall interest, including its taxpayers.

Ms Carlson noted thirdly that this Convention would need to be drafted in a manner so that it endured – hopefully more than 50 years – and would be a useful, ongoing instrument in the light of the fact that there would probably not be another instrument for many years, and that this Convention might be a failure if it simply preserved the status quo. The Convention should be forward looking.

As a fourth overarching consideration, Ms Carlson stated that in addition to Article 14, many other Articles, including Article 3, paragraph (c), Article 6, paragraph 2, and Article 8 were related to costs, and so delegates should be aware that any change in one of those Articles might affect the text of another related Article.

Ms Carlson noted as her fifth overarching consideration that the United States of America recognised that all countries would be required to make changes to their domestic processes in order to implement the new Convention. Ms Carlson stated that the United States of America was working on legislation that would implement the Convention, both at the federal and state levels. Ms Carlson stated that the delegations needed to be reminded that in considering cost options, States should not just look at the current status quo but be more forward thinking and consider a wide, overarching scheme.

Ms Carlson stated that the United States of America had carefully considered the option of costs and was of the firm belief that the Convention would not succeed unless it contained cost-free options for all child support applications, perhaps with only a few, limited, exceptions. Ms Carlson believed that anything less than the presence of cost-free options for legal assistance would mean a reduction in access to the Convention procedures. She also noted that cost-free legal assistance for an applicant did not necessarily mean a costly and expensive system for the State. She noted that cost-effective mechanisms had been developed by some countries as described in documents submitted by a number of States at the Special Commission in May 2007.

Ms Carlson reiterated that the United States of America would not support any Convention that imposed significant costs on child support applicants, as this would mean that many applicants would be denied access to the processes established by a Convention.

Regarding the interrelationship of certain Articles and why Articles 3, paragraph (c), 6, 8 and 14 should be viewed as a package, Ms Carlson stated that Article 6 set forth Central Authority functions and that Article 8 stated that Central Authorities should not charge applicants for services. She further stated that Article 14 addressed effective access to procedures including the provision of legal assistance, and that Article 3, paragraph (c), provided a definition of legal assistance so as to include everything that would be required to ensure that an application would be effectively dealt with.

In some further detail, Ms Carlson discussed Article 6 and that it was currently flexible in relation to which services a Central Authority could provide itself and which could be provided by others. She noted that the only absolute requirement was for Central Authorities to receive and transmit applications (Art. 6(1)), while the balance of Article 6 provided flexibility for other bodies to carry out the other functions. Ms Carlson believed that this flexibility would increase ratification but that States should aim for their Central Authorities to increasingly provide sophisticated services for applicants. Nevertheless, Ms Carlson observed that the flexible nature of Article 6 meant that some States would do more than others. Ms Carlson noted that, in the United States of America, the Central Authority would do all that would be necessary in so far as the provision of services to applicants was concerned since the United States of America had an effective Central Authority sys-

tem. Ms Carlson stressed that, due to this fact, acceptance of Article 6 by the United States of America was a huge compromise and it was a compromise made because of the desire on behalf of the United States of America for everyone to join the Convention, even if it would take time for some countries to develop or enhance their systems of child support.

Ms Carlson noted it would be completely unacceptable to the United States of America if its Central Authority provided many services whilst the Central Authorities of other States provided both much less extensive services and at a higher cost. She stated that the United States of America would view this as being inequitable and, therefore, Article 14 would need to provide for cost-free legal assistance for all child support services, whether provided by the Central Authority under Article 8 or by another authority under Article 14. She noted that, at present, Article 8 only prohibits imposing charges for services that Central Authorities themselves provide. Ms Carlson therefore contended that Articles 8 and 14 should be on a par with each other. Regardless of who performs the service (a Central Authority under Art. 8, or other entity under Art. 14), and regardless of the level of service provided, the services should be provided at no cost to the applicant.

In relation to Article 3, paragraph (c), Ms Carlson stated that the definition of legal assistance was acceptable to the United States of America as long as the services were cost-free and Articles 8 and 14 mirrored each other so as to avoid any ability to charge fees under one of those Articles but not under another.

Ms Carlson then considered Options 1 and 2 of Article 14. She stated that the United States of America opposed Option 1 since it would simply preserve the status quo by allowing legal assistance to be subject to a means test, and would essentially replicate the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. Ms Carlson stated that the incorporation of a subjective means test should be avoided since, in practice, some countries had very restrictive means tests which would not enable many applicants to gain access to free legal assistance.

Ms Carlson summarised that the main argument in favour of Option 1 in Article 14 was that some suggested it allowed more countries to ratify the Convention, since some countries may not be willing or able to go beyond Option 1 at this time. She stated that the United States of America supported the idea of wide ratification, but not if the price would be a Convention that did not improve current practices. Ms Carlson stated that the United States of America strongly supported Option 2 but only if there were to be free legal assistance in all child support cases processed by Central Authorities, that any exceptions would be very limited, and that there would be no exceptions in instances of recognition and enforcement. Ms Carlson noted that such a rule would open doors for many applicants who up until now had not had access to recovering child support in international cases.

In relation to the exception to the provision of free legal assistance to applicants who had a strong financial position, Ms Carlson noted that of the options presented in Article 14 *bis*, the United States of America supported only Option C which would be to delete sub-paragraph (c) in its entirety, on the basis that such an exception would be unworkable, unnecessary and possibly open to abuse. Ms Carlson noted that her delegation's opposition to Options A and B in Article 14 *bis* did not stem from their belief that wealthy people should be entitled to free legal assistance. Ms Carlson noted that such an exception would be unnecessary since wealthy people do not use Central Authorities in any event. She noted that no matter how sophisticated a government system was, it would never be the same as retaining a private attorney whose services were personally tailored. Ms Carlson stated that the exception would also be unworkable because evidence would be required regarding the applicant's income, the cost of living in his / her country as well as any individual circumstances. She said that the administrative burden of undertaking this analysis and collating such evidence would go against the vision of providing more rapid services under the Convention, and it would possibly cost more to make such a determination rather than provide free legal assistance to the rare wealthy applicant in the first place.

Ms Carlson further observed that if separate objective criteria could be produced to determine, firstly, the meaning of wealth within each country, taking into account the different financial circumstances of each State as well as, secondly, each applicant's eligibility for free legal assistance rapidly and with little administrative burden, then such an exception would theoretically be worthwhile. However, Ms Carlson stated that she did not believe that this would be possible. She stated that an objective standard for determining wealth would need to be defined along with a monetary value and, given differences between countries, with regard to wealth, a different figure would need to be developed for each State. Further, establishing criteria in each country to determine whether an applicant was exceptionally wealthy would be difficult, especially whether these should be dependent on assets and income or have some relation to the poverty level. She further stated that, having considered the examples given at the Special Commission in May 2007, any number chosen as a definition of exceptional wealth of an individual would be extremely high. Ms Carlson believed that regardless of the development of these two areas of objective criteria, the administrative burden of identifying the rare exceptionally wealthy applicant would outweigh any savings made by the State.

Ms Carlson stated that the United States of America agreed that progress had been made with the draft Convention and that it would establish many simple and effective procedures as well as administrative co-operation for the prompt handling of applications. She said that, however, without virtually free legal assistance for all child support applications handled by Central Authorities, many of the advances that had been made by this draft Convention could be out of reach for most applicants.

11. **The Chair** noted that she observed the delegation of Australia wishing to take the floor but elected to take a tea break. She noted that the session would resume at 4.30 p.m.

Pause / Break

12. **The Chair** welcomed back the delegations and handed the floor to the delegates from Australia.

13. **Ms Playford** (Australia) thanked the Chair and stated that since this was the first time that Australia had taken the floor, it was necessary to note that the Australian Parliament had recently been dissolved pending a general election that would be held on 24 November 2007. She noted that any outcome from this Diplomatic Session would therefore need to be authorised by the incoming government in Australia. Ms Playford handed the floor to her colleague to address the main issues regarding costs.

14. **Ms Cameron** (Australia) stated that as requested by the Chair, she intended to limit her comments to general comments in relation to Article 14. She informed the delegations that other more specific comments would be delivered at a later stage. With regard to Article 14, Ms Cameron stated that the general position of the delegation of Australia was to support Option 2 over Option 1. Ms Cameron observed that, in short, Option 2 took a slight step forward from the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* and other existing arrangements. She noted that this was what was needed and expected from this Convention: to move forward and create a new system that would ensure real benefits for applicants and that would be long-lasting.

15. **Ms Ménard** (Canada) thanked the Chair and reiterated the belief that had been expressed by other delegates that it was important to have a system that would be cost-free for all applicants. Ms Ménard stated that the Canadian delegation would not support a Convention that provided unequal access to services and procedures for applicants. Ms Ménard also referred to the interrelationship between Articles 3, paragraph (c), 6, paragraph 2, 8 and 14, and the importance of ensuring that the related aspects within these Articles mirrored each other. Ms Ménard considered Article 14 and stated that the Canadian delegation strongly opposed Option 1, which involved a means test. She further noted that the Canadian delegation supported Option 2 for Article 14, subject to the question of appeals, and it supported Option C in Article 14 *bis* because Options A and B would create too high an administrative burden on Central Authorities. She stated that the only costs they would support were costs associated with genetic testing.

16. **Mr Tian** (China) thanked the Chair and stated that he wished to make some general comments regarding the draft Convention. He noted that he had listened to previous speakers and that the Chinese delegation had made contributions to the formulation of processes and international mechanisms that enabled child maintenance applicants to obtain it more quickly and easily.

Mr Tian noted that China took issue with some of the Articles. He stated that China would be ready to modify their national law but that some provisions had gone too far in the drafting process and would cause difficulties to China's internal law and procedures. He said that in relation to Article 14, China strongly supported Option 1 because the internal law of China would then be able to remain consistent. He said that China would be ready to improve its internal law and in the spirit of co-operation would consider Option 2, but that Option 1 was more strongly supported. Mr Tian further observed some difficulties that the Chinese delegation had with Article 2 and with the cut-off age being 21 years in that Article. He stated that the Chinese delegates looked forward to considering the provisions further over the three weeks of the Diplomatic Session.

17. **Mr Ding** (China) thanked the Chair and expressed his wish to support his colleague's comments. He expressed the support of the Hong Kong Special Administrative Region for Option 1 of Article 14. Mr Ding observed that effective access to procedures certainly needed to be provided by States, but that Option 1 would increase the amount of States that would ratify the Convention since that option provided for the equal treatment of maintenance applicants and would reduce the need to amend the internal law and procedures of States as they currently existed. He also noted that the opportunity to make a declaration under paragraph 3 of Option 1 meant that that version of Article 14 succeeded in reaching a compromise in the interests of all States. Mr Ding emphasised that the Hong Kong Special Administrative Region would not support Option 2 of Article 14 unless it were further amended. He noted, however, that delegates from the Hong Kong Special Administrative Region were open to all discussion regarding Articles 6, 8 and 14.

18. **Ms Lenzing** (European Community – Commission) thanked the Chair and observed that the question of effective access to procedures was a difficult one as illustrated by the previous interventions. She stated that it was crucial for a consensus to be reached on this point in order to find a solution for the Convention. She considered the comments that had been made by the Delegates of China, which confirmed that the Commission was in agreement that effective access to procedures was of core concern, and that an application faced many barriers when it sought child support abroad including a lack of effective access to procedures. She noted that delegates were present here in order to improve this situation and that creative solutions would need to be found.

Ms Lenzing commented on the intervention from the United States of America in relation to the links between several Articles of the draft Convention, including paragraph (c) of Article 3, paragraph 2 of Article 6, and Articles 8 and 14. She stated that the European Community agreed with the observations made by the United States of America concerning this interrelationship of Articles. Ms Lenzing believed that Article 6 allowed for flexibility as to the functions of Central Authorities and the European Community supported this Article. She further noted that there were some issues with regard to the Central Authorities of some States doing more than others, and that in order for this situation to be acceptable a solution regarding Article 14 would need to be reached that would correct any perceived deficiency of Article 6. She stated that the focus should therefore be on Article 14, although she wished to remind the delegation of the United States of America that there would not always be one-to-one reciprocity.

Ms Lenzing stated that the European Community supported Option 2 of Article 14 because it supported the concept of free legal assistance with some limited exceptions. She further noted that the presence of an exception in relation to applicants with strong financial circumstances was essential and that this exception could not be deleted as had been advocated by the delegation of the United States of America. The European Community believed that it was an important political issue and that although the exception was difficult to identify objectively, considering differences in living standards in different countries, they believed Option A was feasible for Article 14 *bis*. Ms Lenzing observed that the advantage with Option A was that the cost of living in the requesting State was taken into account, although she noted that the European Community was happy to consider other solutions including a multiplier approach.

Ms Lenzing proceeded to discuss a further exception to free legal assistance, as outlined in the draft Convention in Article 14 *bis*: where an application was manifestly unfounded. She turned to the applicability of appeals to this question, highlighted by the text that appeared in square brackets. Ms Lenzing noted that the question of appeals was an important issue and that the right to appeal was a crucial legal tradition and enshrined in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. She noted that some of the common law delegations present had concerns regarding the question of the applicability of the principle of free legal assistance to appeals, and that the

European Community would be happy to further discuss these concerns with them in order to reach a compromise.

Ms Lenzing further stated that with regard to the question posed by Option 2 of Article 14 of whether to treat foreign applicants differently to domestic applicants, the European Community took the concerns raised by other delegations in this context seriously and would attempt to find a solution. She noted that, in legal terms, equal treatment was fundamental but that assisting foreign applicants in cross-border proceedings did not necessarily impinge on that ideal because domestic applicants were already at an advantage to foreign applicants since they faced lower costs of litigation and had existing knowledge of the procedures for making a claim. In this sense Ms Lenzing stated that more favourable treatment of foreign applicants would be justified.

19. **Mr Oliveira Moll** (Brazil) noted that he shared the views of the delegations of the United States of America and Canada in relation to free legal assistance. In relation to Option 2 of Article 14, Mr Oliveira Moll noted that the delegation of Brazil opposed sub-paragraph (c) of paragraph 2 of Article 14 *bis* and believed that sub-paragraph should be deleted completely, *i.e.*, he supported Option C. He noted that the Brazilian delegates wished to discuss further the other exceptions to free legal assistance as were contained in paragraph 2 of Article 14 *bis*.

20. **Mr Moraes Soares** (Brazil) supported the link and interrelationship between the Articles of the draft Convention that were being discussed and that had previously been noted by other delegations in their interventions. Mr Moraes Soares reiterated his colleague's previous comments and noted that the exceptions outlined in Article 14 *bis* would need to be analysed further as well as, if they were to be included, any means testing or objective financial testing of applicants with strong financial circumstances. He noted that free legal assistance was necessary and should be available, and he looked forward to discussing the exceptions in Article 14 *bis* further in order to reach a positive outcome.

21. **The Chair** confirmed that all provisions would most certainly be considered in more detail.

22. **Mr Markus** (Switzerland) thanked the Chair and drew the attention of the delegations to the general comments of Switzerland on Article 14 in Preliminary Document No 36. He noted that Working Document No 125, a proposal produced by Switzerland in conjunction with Israel and distributed on 15 May 2007, continued to reflect the opinion of Switzerland. Mr Markus observed that he tended towards Option 2 of Article 14 since he believed it was important to make progress with this international instrument. Nevertheless, he stated that Option 2 would need to be worked on further.

In relation to Working Document No 125, Mr Markus noted that the idea was to establish a differentiated system and not just free legal assistance for all. He observed that this proposal differentiated between creditors and debtors, between an application for child support and an application for other forms of family maintenance as well as between an application to establish a decision and an application for recognition and enforcement. He stated that the highest category of persons and applications to be awarded free legal assistance under the proposal would be for applications for recognition and enforcement of a decision concerning child support. He observed that recognition and enforcement needed to be quick and efficient, and if it were cost-free then this would most certainly assist that objective.

In relation to the text of the draft Convention, Mr Markus noted that Switzerland supported Option B of sub-paragraph (c), contained within paragraph 2 of Article 14 *bis*, as this option contained standards for the requesting State. He emphasised however that it should not be misunderstood that these would be the only standards to be applied. There would also be an element of domestic treatment by the requested State, and he therefore believed that Option B needed to be clarified and streamlined.

23. **M. Marani** (Argentine) félicite Madame Kurucz pour sa nomination à la présidence de la Commission I. Malgré la difficulté de la tâche, il se déclare confiant quant à l'aboutissement de leurs travaux. Il souligne que l'accès effectif aux procédures, de même que l'assistance juridique gratuite pour les demandes d'aliments relatives aux enfants sont des questions clés et essentielles pour cette future Convention.

M. Marani souhaite attirer l'attention des délégués sur les éléments contenus dans le préambule de l'avant-projet de Convention et notamment la référence à la protection de l'intérêt supérieur de l'enfant. Il est indispensable d'adopter des remèdes concrets en vue d'assurer cette protection, c'est pourquoi la délégation de l'Argentine soutient la deuxième option de l'article 14.

Concernant l'article 14 bis, paragraphe 2, alinéa (c), il constate que l'incorporation d'éléments subjectifs lors de l'évaluation de la possibilité d'une assistance judiciaire gratuite soulève des inquiétudes. Il ne partage pas l'avis de la Communauté européenne. En effet, il remarque qu'un principe est établi, mais comme l'exception relative à la richesse de la personne repose sur un élément subjectif, il n'est pas possible de déterminer le nombre d'exceptions possibles. Il propose donc de biffer l'alinéa (c) du paragraphe 2.

Concernant l'article 3, paragraphe (c), le délégué de l'Argentine approuve la modification proposée par le Mercosur dans le Document préliminaire No 36 et insiste sur la nécessité de garder à l'esprit la gratuité des coûts afférents aux tests génétiques lorsque ceux-ci sont nécessaires.

24. **M. Heger** (Allemagne) remercie le co-Rapporteur d'avoir rappelé les principes essentiels régissant les articles 6, 8, 14 et 40. Ces dispositions constituent en effet un ensemble dont il est clair que l'accès effectif aux procédures est le fondement. Ce principe est également garanti au niveau européen par la *Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales* et par d'autres traités universels. À la lumière de ces textes, il rejoint les propos de la Déléguée des États-Unis d'Amérique et confirme la nécessité d'établir un système efficace afin de satisfaire aux objectifs poursuivis par la Convention. À cette fin, il convient de garder une ouverture d'esprit, c'est-à-dire d'envisager la possibilité de modifier et d'adapter les lois internes, dans la mesure du possible. Il remarque que cette pratique est familière aux États membres de la Communauté européenne.

M. Heger revient sur le principe de réciprocité évoqué précédemment. La réciprocité est une clause utile lorsque sont constatées des différences trop importantes entre les États. Cependant, il lui semble préférable de privilégier la confiance mutuelle entre les États. Aussi convient-il de trouver les mécanismes qui permettront aux États de parvenir à cette confiance mutuelle.

Concernant l'article 14 *bis*, paragraphe 2, alinéa (c), relatif aux frais et aux exceptions au principe de gratuité de l'assistance juridique, M. Heger souhaite revenir sur les propos de la Présidente du Comité de rédaction et en particulier sur les mots « dégoûtamment riches » qui, semble-t-il, ont été utilisés par les interprètes pour traduire en français l'une des expressions utilisée par la Présidente du Comité de rédaction. Selon lui, cette expression est inappropriée. L'expression latine généralement rattachée à l'argent est « *non olet* » qui signifie sans odeur. Il est vrai qu'il est alors nécessaire de déterminer les critères permettant de définir si une personne est riche, comme l'a indiqué la Déléguée des États-Unis d'Amérique. À cette fin, des données fiables devront être utilisées. Or, de telles données sont d'ores et déjà disponibles au sein de l'Union européenne, ainsi qu'en Allemagne au niveau mondial.

Néanmoins, M. Heger souhaite commenter l'opinion des États-Unis d'Amérique sur cette disposition, telle qu'exprimée dans le Document préliminaire No 36 (addendum) et plus particulièrement la phrase : « *The imposition of costs is unnecessary, unworkable, and inherently subject to abuse.* » Selon lui, la question de savoir si cette exception est nécessaire ou non est d'ordre essentiellement politique. En revanche, il exprime des doutes quant à l'utilisation du mot « *unworkable* » (infaisable), même s'il convient qu'il n'est pas question ici de créer des obstacles qui viendraient alourdir la procédure. Quant à l'expression « *subject to abuse* », il pense que tout abus peut être évité par l'utilisation de données fiables. Il se montre également enclin à ce qu'une réflexion soit menée afin d'écarter les dangers liés à l'utilisation de critères subjectifs. Il remarque que les commentaires des États-Unis d'Amérique ont permis de fixer des points de départ aux discussions et que cette délégation a fait preuve de compromis. Il est important que l'ensemble des délégations travaille en ce sens afin d'aboutir à un résultat positif, si ce n'est dans un temps record mondial, au plus tard à la fin de cette Session, le 23 novembre 2007.

25. **Mr Hayakawa** (Japan) stated that in relation to Article 14, the Japanese delegation supported Option 1. He noted that it was essential for the operating framework of the Convention that free legal assistance be provided for applications related to maintenance. He noted however the differences between States and the internal systems and procedures that each had and that, unless Option 1 was supported, it would be difficult to implement a system of free legal assistance for child support applications.

26. **Ms Kulikova** (Russian Federation) thanked the Chair and noted the suggestions made by previous delegations in a spirit of compromise and efforts to make suggestions that would suit all States. She observed that no delegation had spoken against the principle of free legal assistance, and so the question was more how to implement that principle to be suitable for everyone. She noted that the Russian Federation was ready to meet mutually acceptable solutions.

Ms Kulikova noted that, in principle, the Russian Federation supported Option 1 of Article 14 which was more preferable, although she requested that the options contained within Article 14 be further developed.

Ms Kulikova observed that there was essentially equal treatment between similar cases in relation to the provision of free legal assistance. From this perspective, she also suggested clarifying the notion of legal assistance because the Russian Federation had problems with its definition under paragraph (c) of Article 3. She suggested that perhaps a definition of "free legal assistance" could be developed. Although she noted that at that time the most important concerns for the delegation of the Russian Federation were equal treatment of access to free legal assistance and its provision, she noted that they could possibly consider a proposal where costs would be limited to those related to genetic testing, and that this might be a way forward.

27. **M. Voulgaris** (Grèce) souhaite indiquer que la délégation de la Grèce est largement favorable à l'adoption d'un instrument relatif à la coopération administrative et judiciaire transfrontalière en faveur du recouvrement des aliments envers les enfants et d'autres membres de la famille. L'avant-projet de Convention, complété de l'avant-projet de Protocole sur la loi applicable, va permettre de renouveler et de mettre à jour le fonctionnement d'anciennes Conventions de La Haye sur la loi applicable ainsi que la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger*, tout en tenant compte des besoins actuels. Il observe que cette méthode de coopération administrative et judiciaire sur laquelle repose le projet de Convention a pu déjà être éprouvée au travers de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*, de la *Convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale*, et de la *Convention de La Haye du 19 octobre 1996 concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants*.

En effet, il serait peu satisfaisant de déterminer la loi applicable si rien n'était prévu afin d'en assurer la mise en œuvre. Aussi est-il nécessaire d'encadrer la reconnaissance et l'exécution des décisions prises dans un domaine où les personnes ne disposent pas toujours des moyens nécessaires pour agir. C'est pourquoi la coopération administrative et judiciaire s'est avérée particulièrement efficace dans le domaine du droit de la famille. Le succès rencontré par les Conventions Adoption internationale de 1993 et Enlèvement d'enfants de 1980 démontre l'immense utilité de cette méthode de coopération. Bien que la Grèce n'ait pas participé à l'élaboration du texte de l'avant-projet de Convention, elle salue le travail qui a été accompli par le Comité de rédaction et propose, si besoin, d'apporter sa contribution dans la mesure du possible.

28. **The Chair of the Drafting Committee** noted that she wished to clarify two matters arising from the intervention of the Delegate of Germany. Firstly, she noted that with regard to the comments made by Mr Heger concerning the phrase "*dégoûtamment riches*", she did not believe that she had said anything indicating that. To the contrary, she indicated that wealth was actually desirable, not disgusting. Secondly, she clarified that with regard to sub-paragraph (c) of paragraph 2 of Article 14 *bis*, she had not stated that this exception was unworkable, but that it was difficult and needed to be addressed before it would be workable.

29. **Mme Subia Dávalos** (Équateur) indique que sa délégation soutient la proposition de la Communauté européenne concernant la deuxième option de l'article 14. Cependant, plusieurs observations ont été exprimées et il convient de les étudier. Il est vrai qu'en pratique, il apparaît que certaines Autorités centrales assistent davantage les demandeurs que d'autres Autorités. Aussi est-il nécessaire de parvenir à un traitement égal afin que les étrangers soient considérés de la même manière que les nationaux.

30. **Mme Gonzáles Cofré** (Chili) indique que sa délégation partage l'opinion émise par les Délégués de l'Argentine et du Brésil concernant leur préférence pour la deux-

ième option de l'article 14. Les pays du Mercosur ont en effet atteint un consensus en la matière, bien qu'ils aient pu dans un premier temps favoriser la première option.

Mme Gonzáles Cofré rejoint les propos du Délégué de l'Argentine au sujet des critères subjectifs utilisés aux fins des exceptions à l'article 14. L'utilisation de tels critères soulève des difficultés car elle conduit à un plus grand nombre d'exceptions. Or, il ne faut pas perdre de vue la règle essentielle qu'est la garantie d'un accès effectif aux procédures.

Concernant l'alinéa (c) du paragraphe 2 de l'article 14 *bis*, elle approuve l'opinion émise par la Déléguée des États-Unis d'Amérique et constate, comme elle, qu'en pratique, les demandes, adressées aux autorités, émanant de personnes étant en mesure de payer sont quasiment inexistantes. La Déléguée du Chili indique que ces constatations sont tirées de leur expérience en vertu de la Convention de New York. Elle ajoute que le Chili offre gratuitement son assistance aux demandeurs. Aussi, à la lumière de ce qui a été argué par la délégation de la Communauté européenne, il lui semble que l'on y perdrait plus que ce que l'on y gagne actuellement en insérant une telle règle.

En revanche, la Déléguée du Chili approuve et souligne l'importance d'un traitement d'ensemble des différents articles énoncés. Elle félicite le travail du Comité de rédaction pour la définition retenue à l'article 3, paragraphe (c), bien que le groupe du Mercosur aurait préféré aller encore plus loin en intégrant les tests génétiques. De même aurait-il souhaité un champ d'application plus large. Cependant, sa délégation est disposée à réfléchir à des solutions créatives en vue d'aboutir à un consensus.

31. **M. Cieza** (Pérou) réitère la position de sa délégation, exprimée lors de la dernière réunion de la Commission spéciale en mai 2007, en faveur de la deuxième option de l'article 14.

Plus particulièrement en ce qui concerne l'article 14, paragraphe 2, alinéa (a), la délégation du Pérou, comme d'autres délégations du Mercosur, a des inquiétudes s'agissant d'imposer des frais pour un test génétique. Concernant, l'article 14 *bis*, paragraphe 2, alinéa (b), M. Cieza exprime sa réticence à refuser l'assistance gratuite pour des motifs nécessitant l'examen du bien-fondé de la demande. Enfin, il s'exprime en faveur de la suppression de l'alinéa (c) du paragraphe 2 de l'article 14 *bis*.

32. **Mr Beaumont** (United Kingdom) thanked the Chair and welcomed her to the chairing position of Commission I. He acknowledged the comments that had been made by the Delegate of China and stated that he hoped this Convention could go further than Option 1 of Article 14. He noted that this was to be a global Convention and that in cross-border claims for maintenance the costs were significant, and so if Option 1 were to be supported and adhered to, people would be faced with a standard means test in order to obtain free legal assistance. He noted that these tests were getting stricter rather than more generous, and so if delegations were to really do something significant here and take an approach that invested more money in free services and access to procedures for international applicants, then the delegations would really need to go beyond Option 1. Mr Beaumont noted that the unfortunate outcome of not doing this was that creditors would increasingly rely on the State to provide financial support rather than debtors. He observed that this required a deeper analysis of whether one option was actually cheaper than another.

Mr Beaumont believed that in addition to the protection of children, the protection of the taxpayer should also be a motivating concern. On this basis, Mr Beaumont stated that the delegation of the United Kingdom was in favour of Option 2 of Article 14, although he noted that it required further development. He asked the States who supported Option 1 to be bold and consider Option 1 of Article 14 under a deeper analysis. He noted that both political and economic arguments existed beneath the surface of Option 2.

33. **Mrs Hoang Oanh** (Viet Nam) noted that she had considered the explanation that had been made by the Delegate of the United Kingdom but that Vietnam remained in favour of Option 1 of Article 14. Mrs Hoang Oanh believed that the adoption of Option 1 would be more attractive to a larger amount of parties and that the inclusion of the exceptions within Option 2 went against the priority of providing free legal assistance to maintenance creditors in circumstances where many of these applicants had very limited resources.

34. **M. Sánchez Trejo** (El Salvador) rappelle que les travaux menés par la Commission I ne sont pas ceux d'une multinationale discutant de transactions financières mais ceux d'un ensemble de délégations rassemblant un grand nombre de sensibilités humaines dont l'objectif commun est le bien-être des enfants. Or le recouvrement d'aliments concerne des millions de personnes dans tous les pays du monde. Certes, l'État doit jouer un rôle protecteur à l'égard des familles éclatées et dans des situations où les parents sont responsables vis-à-vis d'enfants. Il semble essentiel de tenir compte des besoins des enfants. C'est pourquoi, El Salvador, comme d'autres délégations telles que celle du Guatemala, est favorable à la deuxième option de l'article 14. Le Délégué d'El Salvador pense que ce qui importe, à l'avenir, est de pouvoir se montrer digne de ses enfants.

35. **The Chair** thanked the delegation and stated that since there was no more general discussion she would close the meeting for the afternoon. She noted that nearly all delegates had expressed their interest in entering negotiations in order to find a consensus and that a solution lay simply in the details. She noted that specific discussion on certain Articles would commence on Thursday 8 November 2007, and that such discussion would be started by considering the definition of legal assistance at 9.30 a.m. She stated that this would be followed by discussion of Articles 8 and 14 and, following the conclusion of such discussion, the agenda would be followed.

La séance est levée à 17 h 55.

Procès-verbal No 2

Minutes No 2

Séance du jeudi 8 novembre 2007 (matin)

Meeting of Thursday 8 November 2007 (morning)

La séance est ouverte à 9 h 45 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 3, paragraphe (c) / Article 3, paragraph (c)

1. **The Chair** recalled that the previous day there had been a general discussion on the cost-related Articles of the revised preliminary draft Convention. She stated that today the discussion would move on to the separate Articles in this area that remained outstanding, starting with Article 3, paragraph (c), the definition of legal assistance. She noted that the present definition, found in square brackets in the preliminary draft Convention, was based on a working document submitted by the delegations of New Zealand and Australia during the last Special Commission meeting and worked on by the Drafting Committee. She recalled that the proposal had received wide support and she noted that this definition of legal assistance gives the rationale and aim of legal assistance and, in the second sentence, provides that this includes assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings. She stated that these were examples of legal assistance and the main rule could be found in the first sentence. She noted that two written comments had been received from States on this Article and these could be found in Preliminary Document No 36; one was from the Mercosur countries and one from Switzerland. She suggested that because the Latin American proposal was so closely related to the costs of genetic testing and the provision in that regard found in Article 14 *bis*, the discussion of that proposal should take place when Articles 14 and 14 *bis* were being discussed. She then asked the delegation of Switzerland to present their proposal.

2. **Ms John** (Switzerland) stated that in order to ensure that the competent authorities could really comply with the duties set out under the definition of "legal assistance", the proposal had shortened the text of the definition. She noted that it would read as follows: "'legal assistance' means the assistance necessary to enable applicants to assert their rights and to ensure that applications are effectively dealt with in the requested State. This includes assistance such as general information of a legal nature (at least), assistance in bringing a case before an authority and legal representation". She emphasised that the changes were as follows: first, the term "legal advice" was replaced with the phrase "general information of a legal nature (at least)". She stated that the reasoning for this was that in Switzerland the competent authorities are not in a position to offer legal advice in the sense that a lawyer could provide to a party. In earlier discussions on this issue it was made clear that in other countries the competent authorities under the preliminary draft Convention in most cases will be the ones that have the knowledge about the procedures involved and could provide this information. She noted that the words "at least" in parentheses indicate there could be more if this was possible in the State. She stated that the second change made was the deletion of the words "know and", leaving the sentence stating "to enable applicants to assert their rights" because they thought this to be sufficient. She noted that the word "fully" had also been deleted, leaving the sentence to read "applications are effectively dealt with". She stated that the third change was the deletion of the words "and exemption from costs of proceedings", because it was felt that this had more to do with free legal assistance than with legal assistance. She remarked more generally that clarification was necessary in that here there was a definition of legal assistance while the text of the preliminary draft Convention speaks mostly of free legal assistance.

3. **Mr Hayakawa** (Japan) asked whether the second sentence of Article 3, paragraph (c), containing descriptions of several types of legal assistance, required that all States provide all these types of legal assistance, because if so this could be problematic. He stated that under the legal framework of Japan, there is no exemption from the cost of legal proceedings but the applicants are given the money to pay for them. So if this Article obliged the Contracting States to have exemption from the cost of legal proceedings as a form of legal assistance, this would be a problem for Japan.

4. **Mr Ding** (China) stated that he shared the concern expressed by the delegation of Japan. He stated that it was the understanding of his delegation that the legal assistance provided should be that available in each Contracting State. He noted that the delegation of China had prepared a working document on this issue which would be available later in the session and he hoped that it could be further discussed then.

5. **Mr Moraes Soares** (Brazil) stated that the proposal from the Mercosur countries on the costs of genetic testing was linked to the issue now being discussed. He noted that while they had agreed to discuss this when Article 14 was being examined, it seemed that it was relevant to the present discussion, such as the difference between legal assistance and free legal assistance. He expressed concern that if the discussion on the Mercosur proposal was not discussed until later, these issues would already have been decided and asked if it was possible to have the discussion about the proposal from the Mercosur countries now.

6. **The Chair** stated that her intention was that Article 3, paragraph (c), would not be finalised by the time the discussion reached Article 14 *bis* and so the proposal could be discussed then in that context.

7. **Mr Moraes Soares** (Brazil) agreed to this arrangement.

8. **Mr Segal** (Israel) expressed support for the proposal of the delegation of Switzerland because usually definitions are not intended to create obligations on specific matters. He stated that when there were specific examples provided, as in the current text, the expression "such as" could be interpreted as meaning that this should be the least that is provided in terms of legal assistance. He stated that this was unnecessary as there were later Articles that contained specific obligations and that the methods of providing legal assistance should be left open to the law of each Contracting State, if not specifically set out in a later Article. He

Procès-verbal/Minutes No 2

emphasised that there should be a more flexible definition of legal assistance.

9. **Ms Lenzing** (European Community – Commission) stated that the European Community was happy with the text as redrafted by the Drafting Committee. She noted that it was the first sentence that was important, and the general obligation that legal assistance include all the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. She stated that, as the Explanatory Report specified, this general definition, along with the examples specified in the second sentence, left enough flexibility to Contracting States. She noted that the Explanatory Report stated clearly that not everything set out in the second sentence had to be provided in every circumstance but rather it depended on the organisation, the system and the context where the specific aspect of the definition had to be provided. She referred to the objection of Switzerland that its competent authority would not be able to provide legal advice but stated that, in her understanding, the definition did not oblige the Central Authority to provide legal advice. She commented that since the definition had to work with both Article 6 and Article 14 it gave the Contracting States the flexibility to, for example, under Article 6, only facilitate the provision of legal assistance by telling the applicant he could consult a particular lawyer, or by giving general information of a legal nature and then if specific legal advice that could only be given by lawyers was necessary, and the applicant qualifies for free legal assistance under Article 14, the Contracting States would have to pay for the services of the lawyer. She stated that in her understanding the definition was flexible to accommodate every system. She responded to the point raised by the Delegate of Japan concerning the phrase "exemption from costs of proceedings" and suggested that perhaps it could be redrafted to include a broader range of situations. She reiterated that she did not understand the second sentence of Article 3, paragraph (c), as causing any conflict with any legal system as it was the first sentence that was important, the second sentence was illustrative, and that finally it was the result that mattered, not the form of legal assistance used to achieve it.

10. **Ms Carlson** (United States of America) expressed support for the definition of Article 3, paragraph (c), in its current form but noted that this did depend on the results of the discussion on Article 14. She agreed with the Delegate of the European Community that the second sentence was merely illustrative. She stated that she read the second sentence as meaning "this includes where necessary or appropriate" and felt that this sense was indicated by the use of the words "such as". She stated that it was not the case that all types of legal assistance had to be provided in every case and she gave the example that the Central Authority of the United States of America cannot act as a legal representative, so if the second sentence of Article 3, paragraph (c), meant what other delegations feared it might mean, then it would also be problematic for the United States. She remarked that the inclusion of the exemption from the cost of legal proceedings was possibly out of place here, appearing to relate more to free legal assistance. She commented in response to the proposal of the delegation of Switzerland that she thought it served a pedagogical benefit to keep the words "know" and "fully" in the Article.

11. **Ms Nind** (New Zealand) expressed support for the position of the delegations of the European Community and the United States of America. She stated that she saw the second sentence as illustrative and not requiring assistance to be provided in a way that was not known or recognised in that State. She commented that she was also hesitant about the inclusion of the exemption of costs of legal proceedings and would accept a change in that wording to accommodate people's concerns.

12. **Ms Kulikova** (Russian Federation) noted that as far as the definition of legal assistance was concerned her original reading of the second sentence of the paragraph was the same as that of other delegations: that it was something obligatory. She stated that it would be preferable if it were seen as an illustrative list, as there are different legal systems and different types of legal assistance provided in national legislation and each country would understand legal assistance in the manner provided for in its own national legislation. She commented that the Russian Federation did not have some of the institutions listed in the second sentence, or that some of them were understood in a different way. She noted that in different legal systems the same term referred to different legal notions. She referred to the term "legal advice" and recalled that in the previous Special Commission meetings she had expressed concern about the extent of what would be covered by it. She supported the proposal of the delegation of Switzerland to replace "legal advice" with "information of a legal nature" as it was clearer, while "legal advice" was broader and gave no indications of the limits of the obligation. She stated that legal assistance should be understood as it is understood under the national legislation of each State, and requested that the second sentence be altered to clarify that it is indeed illustrative and that not all the forms of legal assistance listed are necessary for each and every State, but that they are dependent on what types of legal assistance are available in the State.

13. **Ms Doogue** (New Zealand) asked whether inserting the words "may include" in the second sentence would succeed in clarifying that the sentence was illustrative.

14. **Mme Parra Rodriguez** (Espagne) souhaite appuyer l'opinion émise par les délégations de la Fédération de Russie et de la Nouvelle-Zélande. Elle indique que la délégation de l'Espagne accepte la définition de l'assistance juridique proposée à l'article 3, paragraphe (c), de l'avant-projet révisé de Convention. Elle estime cependant qu'il serait préférable de préciser le caractère illustratif des éléments qui y sont énumérés. Elle mentionne que dans la version espagnole du texte, la liste de ces éléments présente un caractère plus impératif. Elle propose soit de clarifier la deuxième phrase de cet article qui est susceptible de poser des problèmes d'interprétation, soit de la supprimer.

15. **M. Marani** (Argentine) indique que la délégation de l'Argentine partage l'opinion exprimée dans les interventions précédentes au sujet de l'article 3, paragraphe (c), en admettant les éventuels problèmes d'interprétation pouvant être soulevés par cet article. Bien qu'il reconnaisse cet aspect, il souligne que l'Argentine, pour sa part, interprète cette phrase comme étant simplement illustrative. Il estime que la première phrase de cet article est la plus importante parce qu'elle établit une obligation concrète. Il considère la deuxième phrase comme une série d'exemples qui vient illustrer la première phrase. Il conclut en indiquant qu'il estime important de maintenir les deux parties de cet article à cause du lien qui les unit.

16. **Mr Oliviera Moll** (Brazil) stated that the interpretation of the second sentence as not obligatory was new for his delegation, as they were not interpreting it in that way. He noted that the sentence read "includes assistance such as" rather than "may include". He stated that the Article did not exclude other forms but, since those listed were ex-

pressly mentioned, it seemed to him that they were obligatory. He commented that it would have to be taken into account that, for example, Article 30, paragraph 2, listing enforcement measures read "may include" and this would lead to a different interpretation.

17. **Mme González Cofré** (Chili) fait remarquer qu'elle partage la même préoccupation que la délégation du Brésil. Elle indique que la délégation du Chili a eu l'impression, lors des discussions du mois de mai, qu'il s'agissait de normes minimales. Elle partage également l'opinion exprimée par la délégation des États-Unis d'Amérique sur le fait que certains États auront la possibilité de fournir une meilleure assistance que d'autres qui n'en auront pas les moyens. Elle pose enfin la question de savoir s'il s'agit bien de standards minimaux ou non.

18. **Mr Markus** (Switzerland) stated that the definition as such may not be obligatory but as soon as the word that is defined is used in an operative provision it becomes mandatory and obligatory. He gave the example that if in Article 14 *bis* of Option 2 it was stated that the requested State shall provide free legal assistance this meant that every element in Article 3, paragraph (c), must be offered by a State which is bound by this Convention. He stated that this was also the reason why the delegation of Switzerland made the proposal and why they had some doubts whether Switzerland could offer everything that was contained in the definition. He welcomed the proposal by the Delegate of New Zealand to include the term "may include" as it clarified that the second sentence is just an illustration of what is meant by legal assistance and it would take away the obligatory nature of every element which is contained in it. He went on to state that his delegation was persuaded that there was a problem with the definition of legal assistance and the definition of free legal assistance and found it more confusing than before. He felt this needed to be clarified. He stated that his delegation would be in favour of deleting the phrase "and exemption from costs of proceedings" from the second sentence of Article 3, paragraph (c), as it seemed clear that this was a matter of free legal assistance and not legal assistance as such. He remarked that his delegation was also concerned by the Explanatory Report as it departed from the idea that not everything contained in the definition was obligatory. He referred to paragraph 380 of Preliminary Document No 32 where it states that "[a] failure to provide legal advice in the first instance may be a denial of access to justice" and he stated that it was clear that legal advice, the issue at hand, would, according to the text of the Explanatory Report, be an extremely important element. He noted that this increased his delegation's hesitation about the text of Article 3, paragraph (c).

19. **Mr Sello** (South Africa) expressed support for the inclusion of the words "may include" so as to ensure that the definition does not sound obligatory.

20. **Mr Bavykin** (Russian Federation) asked for a clarification of the status of the Explanatory Report. He stated that his question was prompted by the intervention of the Delegate of Switzerland who read a sentence from the Report that gave a conclusion. He questioned whether all the explanations given in the Report had to be relied upon as something given by an upper authority and whether it was to be regarded as a document that would guide the delegates all the time or whether it was just supplementary material to give extra ideas. He asked if it was possible for delegates to determine for themselves the interpretation of particular Articles or if the Report had to be relied upon when there is some doubt in the interpretation of any of the Articles.

21. **The Deputy Secretary General** responded that the Explanatory Report in Preliminary Document No 32 was certainly not a final Report. He stated that it had been prepared by the co-*Rapporteurs* to assist debate in this Session and, particularly, to remind the delegates how the wording of the existing text of the Convention had been arrived at. He noted that there would ultimately be a final Report prepared by the co-*Rapporteurs* following this Session, which would be finalised according to a procedure that was yet to be agreed. However, at this stage he thought that the co-*Rapporteurs* would share the view that the Explanatory Report was an aid to understanding the text and a reminder of how the present wording was reached. He stated that at this stage the Report was not intended to be authoritative. He noted that the status of the final Explanatory Report would, of course, be different.

22. **The Chair** commented that Working Document No 1 of Commission I containing the proposal by the delegation of China relating to Article 3, paragraph (c), was now being distributed and asked the delegation of China to present their proposal.

23. **Mr Ding** (China) stated that his delegation proposed a slight adjustment to Article 3, paragraph (c). He stated that the aim of the proposal was to make sure that the assistance referred to was as provided for by the law of the requested State, and that the list was illustrative only with full respect being given to the law of the requested State. He noted that he was in agreement with comments given on the amendment of the original text but would also like to hear comments on their proposal.

24. **Ms Cameron** (Australia) expressed support for the existing wording of Article 3, paragraph (c), and the definition of legal assistance found there. She recalled the words of the Chair of the Drafting Committee the previous day on the difficulty of creating a definition of legal assistance. She stated that the current wording was already a fairly delicate balance between the overarching obligation in the first sentence, and the illustration of how that obligation might be met in the second sentence, and that none of the proposals that had been made was satisfactory to preserve that balance. She stated that she did not interpret the second sentence of the definition as illustrative only, but rather she interpreted it as meaning that where it was necessary to meet the obligation imposed by the first sentence to provide those things in the second sentence, there was an obligation to provide those things. She noted that the overarching obligation was to ensure that the applicant can know and assert their rights and that their applications are fully and effectively dealt with and if, in a given State, that requires legal advice, then legal advice needed to be provided. She commented that her delegation had only had a short time to look at the proposal of the delegation of China and she requested explanation of what sort of assistance is provided in China to ensure an applicant is able to know and assert their rights that is different to those sorts of assistance that were included in the Article. She stated that this might go some way to help find a compromise.

25. **Mr McClean** (Commonwealth Secretariat) stated that there was a technical difficulty with the proposal of the delegation of China. He stated that while the focus was on the provision of legal assistance by the requested State under Article 14, the Article 3 definition served a wider purpose and he gave the example of Article 21 which contained a reference to a document showing what free legal assistance was provided in the State of origin. He stated that legal assistance in that context could not be defined in relation to the law of the requested State and the definition

of legal assistance had to be relevant for that Article also. He stated that it was not possible to have the link to the law of the requested State in Article 3, and if it were necessary to include it, it would have to be somewhere else.

26. **Ms Carlson** (United States of America) agreed with the delegation of Australia that the second sentence was not obligatory and also not merely illustrative, but was in between. She noted that the first sentence was obligatory and it would not be appropriate to change the second sentence to say that "this may include" because the obligation in the first sentence to provide whatever assistance may be necessary was a mandatory obligation. She recalled the plea of the Chair of the Drafting Committee not to change the definition too much and stated that she felt it would address the concerns of the delegations that felt the second sentence could not be interpreted as merely illustrative if the words "where necessary" were added to the sentence. She stated that this would retain the balance of the definition and also not amend the Article too much. She referred to the proposal of the delegation of China and stated that she felt that the first sentence of their proposal changed the balance. She noted that the existing Article 3, paragraph (c), contained a mandatory obligation to provide the assistance necessary and, whether or not the national law currently provides for such assistance, under this Convention that assistance must now be provided. She felt that with the proposal of the delegation of China this would be ambiguous and could be interpreted as saying that legal assistance meant the assistance that States already have under their national law that might help the applicant process their applications. She proposed to retain Article 3, paragraph (c), as it stood in the draft and to insert in the second sentence, after the word "includes", the words "as necessary".

27. **Mr Hellin** (Finland) stated that the real obligation is in the first sentence and it was to give the assistance necessary to enable applicants to know and to assert their rights. He commented that it was then up to national law to decide how this objective would be achieved. He stated that the objective of the delegation of China was already achieved by the original definition as the decision of how to achieve the goal was for national law. He agreed with the Delegate of the United States of America that the second sentence was not merely illustrative because if legal advice was necessary to fulfil the obligation set out in the first sentence, then legal advice must be given. He stated that in his view the second sentence was important and he agreed that the words "where necessary" or "may include" could be added but that they would not change the substance very much.

28. **Ms Kulikova** (Russian Federation) stated that she thought that the proposal of the delegation of China went in the right direction because the idea was that every State should ensure all the measures necessary to enable the full and effective dealing with the application according to national law as it would be impossible to provide something more than can be found in the existing legal system. She noted that some forms of legal assistance provided in other States may simply not suit the legal system under the Russian Federation's own scheme of legal assistance. She referred to the second sentence and stated that her delegation would be interested in developing the proposal suggested by the Delegate of New Zealand because including "may" would be a good solution. She stated that "where necessary" would not clarify the situation or indicate whether the second sentence should be read as being obligatory or not. She stated that the debate showed that there were different views on this point among the different delegations, but if it was indeed an illustrative list then she would agree with the New Zealand proposal.

29. **M. Cieza** (Pérou) indique qu'il considère les deux parties de la définition de l'assistance juridique comme des dispositions contraignantes, par conséquent obligatoires. Il renvoie à ce sujet au Document préliminaire No 32, paragraphe 66, et souligne la phrase selon laquelle « [c]es explications établissent clairement que certains éléments, tels que le 'conseil juridique, l'assistance dans le cadre d'une affaire portée devant une autorité, la représentation en justice et l'exonération des frais de procédure', seront ou non compris dans la définition selon les circonstances ».

Il remercie la délégation de la Chine pour la proposition qu'elle a faite dans le Document de travail No 1, qui tend à aboutir à un compromis. Il précise que sa préoccupation est de savoir ce qui arriverait dans le cas où la loi de l'État requis prévoit une distinction entre les nationaux et les étrangers. Il indique que le Pérou redoute d'éventuelles situations où les étrangers bénéficieraient d'une assistance moindre par rapport à celle accordée aux nationaux.

30. **Ms Ménard** (Canada) expressed support for Article 3, paragraph (c), as currently drafted, subject to changes that could be made to Article 14. She stated that the second sentence was not just a list of examples and merely illustrative and should be drafted the way it was at present. She noted that adding the words "where necessary" could be adequate for their needs.

31. **M. Marani** (Argentine) estime qu'il serait judicieux de réagir à la proposition de la Chine qui, à son avis, aboutirait à renoncer à une norme minimale internationale en matière d'assistance juridique. Il souhaite qu'il ne soit pas nécessaire de laisser la décision aux ordres nationaux mais que la présente assemblée trouve un standard minimum international. En outre, il considère que la deuxième partie de l'article 3, paragraphe (c), n'est pas uniquement illustrative. Il se rallie sur ce point, à la position de la délégation des États-Unis d'Amérique qui est en faveur de l'incorporation de termes tels que « le cas échéant », « en cas de nécessité ». Il conclut en indiquant que la délégation de l'Argentine pourrait accepter une telle modification de la formulation de cette deuxième partie.

32. **Mme Mansilla y Mejía** (Mexique) indique qu'en ce qui concerne l'article 3, paragraphe (c), la délégation du Mexique juge la première phrase de la définition de l'assistance juridique correcte. Ensuite, elle fait observer que la deuxième phrase de cette définition offre les moyens pour proposer une assistance. Tout en considérant que les moyens proposés sont contraignants, elle précise que la première phrase constitue la définition et la seconde, les moyens auxquels l'on devrait recourir pour fournir cette assistance. En guise de conclusion, elle estime que ces deux parties sont obligatoires et devraient être maintenues.

33. **Mr Markus** (Switzerland) stated that he could not agree with the analysis in the last intervention. He stated that the second sentence as it was currently formulated made all the elements found there mandatory. He agreed with the new analysis given by the United States of America that the first sentence was a mandatory objective which had to be followed by every Contracting State of the Convention, while the second sentence had to be amended to reflect that these were only possible means of achieving this goal of the first sentence. He referred to the proposal of the Delegate of the United States of America to insert the words "as necessary", and stated that he supported this proposal and it would satisfy the concerns of his delegation. He added that he preferred the wording of "where necessary" rather than "as necessary". He referred to the proposal of the delegation of China and stated that he was

hesitant to rely fully on the law of the requested State because it could result in having the standard of the law of the requested State only, or there was at least a danger that the text could be understood in that way, and this was not sufficient. He stated that there should be an autonomous standard set in the preliminary draft Convention and that this would be an achievement of great use for creditors in the future under this Convention.

34. **Mr Bonomi** (Switzerland) remarked that civil law has a nice way to express the dilemma which was set out by the Delegate of the United States of America as to whether the sentence was obligatory or not. He stated that in Article 3, paragraph (c), there was an *obligation de résultat* and not an *obligation de moyens*, that there was an obligation to provide access to justice by legal assistance but not by specific means.

35. **The Chair** asked the delegation of Switzerland whether they would accept the retention of the words "to know" and "fully" in the first sentence of the Article provided the words "where necessary" or "as necessary" are added in the second sentence, as all other States seemed to be in favour of retaining these words.

36. **Mr Markus** (Switzerland) apologised for not mentioning this and indicated that they would agree to leave these two expressions in the first sentence.

37. **Ms Lenzing** (European Community – Commission) stated that her delegation shared the doubts concerning the proposal of the delegation of China as they thought it could be interpreted in a way that would jeopardise the *obligation de résultat* that is in the first sentence. She agreed with the Delegate of Finland that the concern expressed by the delegation of China had been taken into account in the second sentence. She expressed support for the proposal of the Delegate of the United States of America and said that the decision of whether it should be "as necessary" or "where necessary" could be left for the Drafting Committee, although she stated that her delegation preferred "as necessary" because it related more to the extent to which legal assistance has to be provided and not to the cases in which legal assistance can be provided.

38. **Mr Ding** (China) raised the question relating to the words "where necessary" or "as necessary" of who would decide what was necessary. He asked whether it would be the requested State, the applicant or the requesting State.

39. **The Chair** responded by stating that her understanding was that it would be the authority which received the application that has to proceed on that basis with the application. She noted that this may be the requested Central Authority or it might be the competent authority of the requested State. She stated that these are the authorities that have to decide on the possible methods to achieve the goal aimed at by the first sentence.

40. **Ms Fisher** (International Association of Women Judges) noted that her organisation represented many judges in different countries and took no substantive position on the issue. She stated, however, that she would request that the Article use language that could be clearly interpreted. She commented that part of the problem raised by the second sentence of Article 3, paragraph (c), had to do with an internal ambiguity that was disturbing to some of the delegations and that she believed would also be disturbing to the members of her organisation. Her suggestion was that if the second sentence was indeed mandatory then the words "assistance such as" should be removed and the words "where necessary" added so that it read "where necessary legal advice".

41. **Ms Albuquerque Ferreira** (China) stated that the Representative of the Commonwealth Secretariat had a point and the proposal in Working Document No 1 had a small technical fault. She stated that following the discussion she believed there was an obligation of result and that States would be free to choose the means required to achieve that result. She stated that if the proposal of adding "where necessary" or "as necessary" were accepted, the second sentence would be made more mandatory than it was now and this would not resolve the problems. She noted that while this Article was just a definition, it had a purpose in relation to other Articles.

42. **Mr Moraes Soares** (Brazil) indicated his support for the inclusion of "where necessary" or "as necessary". He stated that it was not merely an illustrative list or an obligatory list and that this could be a solution to these issues, but was without prejudice to the cost of genetic testing.

43. **Mr Beaumont** (United Kingdom) asked the other delegations whether any of the specific things mentioned would in all circumstances be objectionable. He stated that if the particular form of legal assistance could be found in some instances then the wording "where necessary" would be sufficient to deal with their fears. He noted that if the method was objectionable in all cases, there would be a need to change it.

44. **Ms Fisher** (International Association of Women Judges) stated that she did not quite agree. She thought that even if some of the methods in the second sentence were always objectionable, but it was not necessary to provide them in order to comply with the obligation in the first sentence, and the State could find some other way to comply, then "as necessary" would give rise to no problems.

45. **Mr Ding** (China) stated that he was concerned that this list of means would impose mandatory obligations on the State because in China there were also other dispute resolution methods and he did not think it was a good idea to specify the means a State had to use as it should be left to the domestic law of that State. He stated that his comment was important for some States where some of the means are not available or are subject to limitations. We should not try to amend the law of those States to introduce something that is not known there. He suggested deleting the list.

46. **Ms Kulikova** (Russian Federation) stated that she wanted to respond to the question raised by the United Kingdom and hoped that this would assist the Drafting Committee and help them to understand. She stated that it was not just the question of what particular type of examples were included that are unacceptable but that there was another question. She stated that there were different understandings of the terms set down here. She explained that the interpretations of the phrases under national legislations may be different and the actions to be taken would be different. She gave the example that it was difficult to use the system of legal representation in Russia in the way it is used in the United Kingdom. She stated that the notion of legal advice was also difficult. She wanted to emphasise that this was an illustrative list and she supported the proposal of China that the methods should be understood in the way that they are understood in national legislation.

47. **The Chair** concluded that there was agreement about the content of the first sentence and that it was an obliga-

Procès-verbal/Minutes No 2

tion in so far as a definition could be an obligation. She had heard agreement for that point so she suggested the deletion of square brackets around the first sentence. She stated that the second sentence was to remain in square brackets but that a large majority of States agreed that it outlined the possible means to achieve the goal defined in the first sentence and to further emphasise this the proposal was made, supported by the majority, to include "where necessary" or "as necessary". She requested that the Drafting Committee make the modifications that they would find appropriate to clarify the second sentence as the means by which the aim of the first sentence could be achieved.

48. **Ms Kulnikova** (Russian Federation) stated that she could accept the words "as necessary" or "where necessary" if there was a clear understanding that the second sentence was an illustrative list and not an obligatory requirement. If there was no such general understanding, then it would be useful to look for wording to make it clear.

49. **The Chair** stated that it appeared that the strong feeling among the delegations was that the obligation was to achieve the goal in the first sentence and that it could be done in whatever way was thought suitable, but it was necessary to achieve that goal and the methods listed could be used in that regard. She reiterated that the second sentence would remain in square brackets for the moment.

Article 8

50. **The Chair** recalled that there was agreement that the Central Authorities would provide their services free of charge. She noted that there was only one exception, found in Article 8, paragraph 2, which provided that Central Authorities may not impose any charge on an applicant for the provision of their services under the preliminary draft Convention save for exceptional costs or expenses arising from a request for a specific measure under Article 7. She asked the delegation of the United States of America to introduce their written comments on this provision.

51. **Ms Carlson** (United States of America) stated that the proposal of the United States of America could be found at section III of the addendum to Preliminary Document No 36. She expressed support for Article 8, paragraph 1, and she noted that the comments of her delegation related to Article 8, paragraph 2. She stated that her delegation supported that Central Authorities should not charge an applicant for the services they provided, so long as Article 14 provided that legal assistance is to be provided free of charge to applicants. She commented that if Article 14 should allow charges for legal assistance when that legal assistance is not provided by the Central Authority, then this preliminary draft Convention would be a step backwards and it would be an invitation for disparate treatment. She recalled her submission the previous day that it would require a major change to this Article if Article 14 did not provide for cost-free services for applicants in child support cases. She reiterated that she was not advocating any such change to Article 8, but rather making the point that in order for the Convention to succeed, Articles 8 and 14 must together assure that a child support applicant receives all services free of charge, regardless of whether the service was legal assistance or something else, and regardless of who provided the service. She stated that the first part of paragraph 2 of Article 8 presupposes that in Article 14, if some other person or body provided the services, there would be no charge to the applicant.

Ms Carlson stated that her delegation's second comment was that Article 8, paragraph 2, should be ended after the words "their services" and the rest of the sentence should be deleted. She noted that Article 8, paragraph 2, allowed the imposition of exceptional costs arising from requests under Article 7. She stated that it was unnecessary to have a special rule for Article 7 and to treat costs incurred under that Article differently from other special costs. She noted that anything that the Central Authority would be required to do under Article 7 would be connected with Article 6, paragraph 2, and that this latter paragraph was very flexibly drafted so that all obligations were flexible. She stated that the difference with Article 7 was that it involved requests made when there is not already a request pending in the requested State, and there was no reason why there should be any extraordinary rule for special costs here. She referred to Article 7, paragraph 1, where the Central Authority has to take appropriate measures, and noted that it was for the requested Central Authority to decide what the appropriate specific measures would be. She referred to Article 7, paragraph 2, and noted that it also read "may" and contained no mandatory obligation. She concluded that the Central Authority retained a large amount of discretion. She further remarked that if this part of the Article were not deleted, there should be some amendment as the words "exceptional costs" were ambiguous. She stated that this was because, although it appeared that it should be read as referring to costs incurred under Article 7, it could also be read as referring to any exceptional expenses incurred, with the words "specific costs" alone referring to those incurred under Article 7.

52. **The Chair** noted that there was another written comment from the delegation of Switzerland and asked that delegation to introduce it.

53. **Mr Markus** (Switzerland) noted that his delegation's comment in Preliminary Document No 36 related to the situations in which exceptional costs or expenses can arise. He proposed that the requesting authority should be notified of the costs prior to a service being provided and that the requesting authority should be requested to guarantee payment of these costs. He remarked that it can often be quite problematic to obtain reimbursement of costs after having delivered the service. He proposed the insertion of the amendment proposed in Preliminary Document No 36. He responded to the proposal of the Delegate of the United States of America by commenting that he was under the impression that Article 7 should remain an exception and the specific measures provided there should not have to be necessary. He noted that in the normal case the application was filed with the requesting authority and this allowed the requesting authority to be fully informed and to process the case in the normal way. He stated that the Article 7 exceptional requests are not used in many cases but could trigger costs, which are considerable, even though it is possible that the result will be that there is no request made under the application. Mr Markus stated that he was thinking of specific measures which ask for or need the support of external authorities or institutions and gave the example of seeking the debtor or details of the debtor's financial situation. He stated that research sometimes cannot be done by the Central Authority but has to be carried out with the support of other institutions and cannot be done for free. He proposed maintaining Article 8, paragraph 2, as currently drafted.

54. **Ms Lenzing** (European Community – Commission) stated that the European Community supported Article 8, paragraph 2, as currently drafted. She recalled that she had noted yesterday the link between Article 8, paragraph 2, and Article 14 and that she understood that Article 8, paragraph 2, could not be finalised until the final solution for

Article 14 was agreed. She stated that while she supported the compromise reached on Article 7, it was important for some States to counterbalance the requirement of extra co-operation with the possibility of imposing charges and it was undesirable to reopen the compromise that had been reached in that regard. She agreed that the text was ambiguous, noting that while it could be interpreted as the Delegate of the United States of America suggested, with both "exceptional costs" and "expenses arising from a request for a specific measure" relating to actions taken under Article 7, it could also be interpreted that only the second aspect related to Article 7 and that it was possible to charge for exceptional costs more generally. She requested a clarification in the draft to make it clear that it was not possible to charge for exceptional costs generally, but only those in relation to Article 7. She referred to the proposal by the delegation of Switzerland stating that while she would have to reflect on it, the requirement of notification seemed to be a sensible addition. She stated that as regards the guarantee of payment, further reflection would be necessary.

55. **M. Marani** (Argentine) annonce que les délégations de l'Argentine, du Brésil, du Chili, de l'Équateur, du Mexique et du Pérou ont fait une proposition au sujet de l'article 8 dans le Document de travail No 4.

Il souhaite premièrement remercier la délégation des États-Unis d'Amérique qui a présenté les arguments pertinents visant à supprimer la deuxième partie du paragraphe 2 de l'article 8.

Il souligne la préoccupation des pays d'Amérique latine susmentionnés, qui se situe au niveau du caractère exceptionnel des situations pouvant découler de l'article 7. Toujours par rapport à ce dernier article, ces délégations soulèvent une deuxième préoccupation quant aux charges pesant exclusivement sur les Autorités centrales.

Sur ce dernier point, il fait remarquer que cette préoccupation serait éventuellement résolue en fonction du résultat des débats pour l'article 14.

En ce qui concerne la proposition de la Suisse, il précise qu'il ne parle qu'au nom de l'Argentine, seule, parce que toutes les délégations des États d'Amérique latine n'ont pas encore eu le temps de l'examiner ensemble. Mais il estime que si la demande qu'ils ont formulée n'aboutit pas, la notion de garanties du demandeur pourrait constituer un problème pour l'Argentine.

56. **Mr Segal** (Israel) expressed support for the position of the European Community regarding Article 7. He stated that he also understood it as a compromise. He noted that Israel did not have a system of locating debtors and that obtaining information raised issues of privacy and may need a court order, which can lead to quite burdensome obligations when there is no request pending. He stated that the requested State should have the possibility of imposing costs, especially as there may be no application made under the preliminary draft Convention following the delivery of these services. He referred to the point raised by the Delegate of the United States of America that costs could be incurred if they are provided by other bodies and stated that this was already covered by Article 6, paragraph 3, which provided that those functions of the Central Authority could be done by other authorities in that State. He stated that this meant that if the Central Authority should give legal aid, this will be covered and there was no need for further clarification of this in Article 8, paragraph 2.

57. **Ms Cameron** (Australia) responded to the delegations of the United States of America and Argentina on the issue of exceptional costs and expressed some sympathy to the logic expressed by the Delegate of the United States of America in her intervention on the matter. She stated, however, that it might also be looked at a different way. She noted that the Delegate of the United States of America had expressed the opinion that because providing the service would be at the discretion of the Central Authority, if that authority were not able to afford to provide a service without imposing a charge, then it would not have to provide that service. She stated that it might alternatively be seen that Article 8, paragraph 2, allowed the Central Authority to provide a service that it might otherwise be unable to provide due to the costs, and deleting the second part of the paragraph would mean that requests for those services would always be refused. She noted that there were unresolved issues as regards Article 7 which would remain that way until the Article itself was discussed. She referred to the proposal of the delegation of Switzerland and asked whether the words were to be inserted into the preliminary draft Convention or the Explanatory Report. She stated that her delegation would be sympathetic to the inclusion of notification but would prefer the guarantee aspect to be drafted more clearly as it may be that neither State involved wished to proceed on that basis. She went on to express a different concern, that Article 8, paragraph 2, would not protect the applicant from administrative costs. She noted that a number of States had spoken of the relationship between Articles 8 and 14, but there was no question of administrative costs, as opposed to legal costs, being included under Article 14 so that was a separate issue. She stated that Article 8 seemed to set out an arbitrary basis on which to decide which services should incur costs, as it appeared that if they are provided by the Central Authority itself, then there will be no charge, but if supplied by an external agency then there could be costs. She noted that this would give the internal organisation of the relevant bodies more significance than they should have. She remarked that if the applicant could be charged for enforcement services then the aim of the Convention would be undermined.

58. **Ms Kulikova** (Russian Federation) recalled the long debates concerning the package of Articles 6, 7 and 8 and although her delegation was one of those which spoke of free of charge co-operation between Central Authorities, they were satisfied with Articles 7 and 8 as they now stood, and the balance that had been struck, but noted that it would be problematic for them if it were to go further and impose more charges on the co-operation between Central Authorities. She noted that the provisions of Article 6, in particular those in Article 6, paragraph 2, were drafted in a soft manner and they created no strict obligations, which was another part of the package as far as she could recall. She said that bearing in mind the flexibility of Article 6 she was satisfied with the compromise found in Articles 7 and 8.

59. **Mr Markus** (Switzerland) referred to the questions asked by the Delegate of Australia and stated that the proposal of the delegation of Switzerland would be an amendment of the text of Article 8, paragraph 2, to add an additional phrase. He also noted that there seemed to be some support regarding the proposal on notification, although there was some reticence with respect to the proposal regarding guarantee of payments. He clarified that he was not referring to an instrument of guarantee but rather to a mere declaration by the requesting authority that they would undertake to pay the costs, maybe in an e-mail or letter. He hoped that this would facilitate possible consensus on this second point.

60. **The Chair** concluded that the proposal of the delegation of the United States of America and the Latin American States to delete the second part of Article 8, paragraph 2, did not get the support of the majority of States and she referred to the intervention of the Delegate of Australia that the risk of not providing the possibility to ask for reimbursement of exceptional costs was that an applicant would not be able to receive the specific assistance requested. She noted that there were no objections to the proposal of notification in advance and she requested that the Drafting Committee make the necessary amendment to Article 8, paragraph 2. She referred to the issue of a guarantee and suggested that perhaps it should not be in the text of the Convention, but rather in the Explanatory Report to show that such a possibility exists. She also requested that the Drafting Committee examine as a drafting matter the words "costs or expenses" to see whether one of these aspects could be deleted.

61. **Mr Markus** (Switzerland) expressed his agreement with the conclusions of the Chair.

Article 14

62. **The Chair** recalled that the general discussion of the previous day had concentrated on Article 14 and the two available options. She noted that there had been a considerable majority of States in favour of Option 2 but that there were also States in favour of Option 1, and she stated that on this basis the discussion would focus in more detail on Option 2. She noted that Working Document No 5 had just been distributed and asked one of the proposing delegations to introduce it.

63. **Mr Ding** (China) noted that his delegation was trying to make progress and find compromises and that is why the delegation of China had come up with this new proposal. He was of the opinion that there was no justification for distinguishing between applicants making direct applications and those making applications under Chapter III. He stated that the idea was to ensure that foreign applicants enjoy the same treatment as domestic applicants and that the most favourable legal assistance provided for by the law of the requested State would also be available to foreign applicants in child support cases. He stated that the declaration mechanism set out in paragraphs 6 and 7 of his delegation's proposal would allow States with a similar level of economic development to provide free legal assistance on the basis of reciprocity and a State with the resources and capability available may also dispense with the means test. He commented that this should provide sufficient flexibility for States that are willing to go further without denying other States the benefits of the Convention because of the overwhelming financial burden involved. He stated that when those States reached a sufficient level of economic development or had reformed their legal aid system they could, at that later stage, make a declaration to extend the free legal assistance provided. He stated that he considered this proposal to be a compromise and that it would be more acceptable to a wider range of States. He noted that it was important that the Convention not exclude the majority of States and also that it be understood that if States were excluded they could become havens for those wishing to avoid maintenance obligations.

64. **The Chair** noted that delegates may need more time to examine this proposal but that the issues involved would be revisited several times. She suggested moving the discussion to Articles 14 and 14 *bis* of Option 2. She noted that in Article 14 *bis*, paragraph 2, there were three possible exceptions from free legal assistance with regard to applications for maintenance for children. She recalled that it had been agreed that applications for recognition and enforcement would be free of charge for all child applicants, so these exceptions only related to the establishment of maintenance obligations. She referred to the proposal found in Working Document No 4 concerning the costs of genetic testing and asked that a representative of Mercosur introduce the proposal.

65. **Mr Moraes Soares** (Brazil) noted that this was a proposal from the delegations of Argentina, Brazil, Chile, Ecuador, Mexico, Peru, the Dominican Republic, Guatemala and El Salvador. He stated that the intention was to include an exemption for the costs of genetic testing when this testing is necessary in order to establish a maintenance decision in the requested State. He stated that in order to achieve this he proposed changing the definition of legal assistance to include exemptions of these costs and removing the exception from Article 14. He referred to the general rule of Article 14 *bis* to provide free legal assistance in child support applications and the exceptions found in Article 14 *bis*, paragraph 2, and he stated that he would like all the exceptions to be reconsidered. He stated that the basis for the general rule of free legal assistance for child support applications was a presumption of a lack of resources of those involved in maintenance applications and this was discussed in the Explanatory Report (paras 370 *et seq.*). He stated that while this was considered by the Drafting Committee when drafting Article 14 *bis*, it was not considered when drafting Article 14 *bis*, paragraph 2, sub-paragraph (a). He noted that if a child does not need to request an establishment of parentage then he or she will have entirely free legal assistance, but if the child did need to have his or her parentage established, then he or she will be charged for the genetic test. He stated that this would result in lesser protection for children who do not know their parents. He noted that the proposal also referred to Article 3, paragraph (c), and included an exemption from the costs of genetic testing in that Article. He then referred to Article 14 bis, paragraph 2, sub-paragraph (b), and stated that it should also be deleted because as drafted it provided for a re-examination of the merits by the requested State. He stated that it was unclear and, at best, a subjective provision that could be used in an incorrect manner.

66. **The Chair** asked that the discussion be restricted to issues relating to genetic testing.

67. **Mr Moraes Soares** (Brazil) stated that he would return later to these other issues.

68. **Mr Oliviera Moll** (Brazil) noted that there was a mistake in Working Document No 4. He referred to the proposal for Article 14, paragraph 5, and stated that the words "brought by the creditor" should be deleted.

69. **Mr Hellner** (Sweden) stated that as regards the costs of genetic testing, it was perhaps a comfort to note that the need for genetic testing was not very common in practice. He noted that in Sweden there were currently about 20,000 pending cases on maintenance but that there are only two or three requests for genetic testing every year. He also commented that while the cost of such testing was high at the moment, it was decreasing and there was good reason to believe that the costs would be negligible by the time that the Convention came into force. He stated that it was likely that it would not be an important question in the future.

70. **Ms Lenzing** (European Community – Commission) stated that she was sorry to say that the European Community was not yet in a position to delete this provision. She

noted that the only things that could be said to comfort the delegations of the Latin American States were the points made by the Delegate of Sweden, and also that if the applicant qualified for legal assistance under a means test as in Article 14 *ter*, the laws of most countries would include the cost of genetic testing in this assistance.

71. **Ms Nind** (New Zealand) stated that her delegation was also not yet ready to see the deletion of this exception, although she did understand that the costs would decrease over time. She remarked that in New Zealand there was not much competition for the provision of these services and so the cost was still very high. She stated that if they did reduce in the future, it was probable that the State could absorb it, but they were not ready to do so now. She also commented that she was not sure that moving genetic testing into the definition of legal assistance was conceptually correct.

72. **Mr Markus** (Switzerland) stated that his delegation was also not ready to delete Article 14 *bis*, paragraph 2, sub-paragraph (a). He noted that the issue depended on whether the request for genetic testing was made in the course of a judicial proceeding in the requested State. He noted that if it was so made then the request would be treated as a request for judicial assistance under the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* or, for States who did not ratify that Convention, under the Hague Convention of 1 March 1954 on civil procedure and would be a request of judicial assistance and for the obtaining of evidence. He stated that these Conventions foresaw their own rules for the costs of such measures, and in principle under the 1970 Evidence Convention, it would be carried out free of charge. He stated that if the request was made outside proceedings then this was more problematic, as there was no framework that would exempt the applicant from the cost, because it would not fall under prior Conventions and would have to go through the Central Authority, which would have to seek assistance from medical institutions and the cost of this would be too much of a burden for the Central Authority.

73. **M. Sanchez Trejo** (El Salvador) fait observer que la beauté d'une assemblée réside dans la vision que peut apporter chaque pays. Il indique que son pays a signé une Convention bilatérale en matière d'aliments avec les États-Unis d'Amérique.

Il mentionne que l'un des motifs ayant sous-tendu cet accord était la recherche de preuves ADN, et indique que des accords ont été signés en matière de gratuité de ces services.

Il indique que les négociations de ces textes ont duré trois ans et que ce fut la première Convention ratifiée unanimement par le Congrès d'El Salvador.

Il estime que dans la pratique, la notion de coûts pose de nombreuses difficultés.

Il propose de respecter la position de l'Amérique latine et tenir compte des besoins et des nécessités des autres pays.

74. **Mme Parra Rodríguez** (Espagne) indique que le but de son intervention est de marquer son accord avec la proposition de la délégation de la Communauté européenne. Elle estime qu'il ne serait pas approprié d'éliminer l'alinéa (a) du paragraphe 2 de l'article 14 *bis*.

Elle fait observer qu'actuellement en Espagne, les preuves génétiques sont à la charge des parties, c'est-à-dire les ressortissants espagnols.

Elle considère que l'idée d'éliminer ce paragraphe serait discriminatoire pour les ressortissants d'Espagne.

En guise de conclusion, Mme Parra Rodríguez mentionne qu'elle n'entrevoit pas la possibilité d'éliminer cette partie du texte.

75. **Mme Gonzalez Cofré** (Chili) indique qu'elle saisit cette occasion pour faire part des raisons avancées par les délégations des pays d'Amérique latine. Elle mentionne que contrairement à la Suisse, l'établissement de la paternité est un facteur très important. Elle souligne que si l'on ne garantit pas la gratuité des preuves génétiques, l'accès aux aliments sera difficile en Amérique latine.

Elle indique que si ce coût ne constitue pas un problème en Europe, la situation est différente en Amérique latine. Elle indique également que beaucoup d'enfants risquent de ne pas avoir accès aux aliments auxquels ils ont droit sans ces preuves.

Quant à l'intervention de la délégation de l'Espagne, au sujet du traitement discriminatoire, elle fait observer que la délégation de la Communauté européenne a mentionné lors de la dernière séance que des critères distincts devraient être appliqués lorsque les circonstances sont différentes, ce qui permettrait ainsi d'éviter toute discrimination.

76. **The Chair** noted that the delegations of the United States of America, Peru and Israel were still waiting to make interventions and that they would be heard after the lunch break.

The meeting was closed at 1.05 p.m.

Procès-verbal/Minutes No 2

Procès-verbal No 3

Minutes No 3

Séance du jeudi 8 novembre 2007 (après-midi)

Meeting of Thursday 8 November 2007 (afternoon)

The meeting was opened at 2.58 p.m. with Ms Kurucz (Hungary) in the chair, and Ms Degeling (Permanent Bureau) and Mrs Borrás (Spain) as co-*Rapporteurs*.

Article 14 bis*, paragraphe 2, alinéa (a) – Coût des tests génétiques /* Article 14 *bis*, paragraph 2, sub-paragraph (a) – Costs of genetic testing

1. **The Chair** invited the delegates to resume the discussion regarding the exception of genetic testing in Article 14 *bis*, paragraph 2, sub-paragraph (a). She noted that the list of speakers included the delegations of the United States of America, Peru and Israel. She invited the delegation of the United States of America to take the floor.

2. **Ms Carlson** (United States of America) emphasised that, in principle, her delegation completely supported the proposal of the Latin American States in Working Document No 4. She noted that in some countries the cost of genetic testing was so prohibitive as to constitute a denial of access to justice. She recalled that, as stated by the Delegate of El Salvador during the morning meeting, the bilateral treaty between the United States of America and El Salvador provides that the requested State shall bear the cost of genetic testing. This practice is reflected in other bilateral treaties that the Government of the United States of America has ratified or is in the process of finalising, including those with Costa Rica, Brazil and most of the Canadian provinces and territories.

With reference to the earlier intervention of the Delegate of Sweden, she stated that it was not the experience of her delegation that genetic tests are rare. Rather, she was of the view that genetic tests are required quite frequently. Nevertheless, she agreed with the observation of the Delegate of Sweden that the cost of genetic testing would fall over time and become less significant than at present.

On that note she informed the delegates of costs of genetic testing in the United States of America. She stated that to test both parents and a child costs approximately 150 United States dollars at present. She expressed the view that the reduction in costs was due to increased volume of tests and technological advances. She also indicated that the relaxation of court procedures for admitting genetic evidence has eliminated the added cost of expert evidence on the scientific value of DNA evidence. Ms Carlson maintained that costs would also fall in other States when developments similar to those pertaining to her own country's experience occur elsewhere. However, she added that in some Latin American States, the current cost was in excess of 150 United States dollars.

She concluded that, in principle, her delegation hoped that the proposal of the Latin American States would be endorsed. Nevertheless, she recalled that the delegation of the European Community had expressed hesitation to compromise on its position regarding this particular provision. She stated that, if necessary, her delegation could accept either position.

3. **M. Cieza** (Pérou) prend en considération les commentaires formulés par le Délégué de la Suède sur la réalité de l'application de la disposition et sur le coût économique d'un test génétique. La plupart des demandes d'aliments s'effectue avant tout depuis les pays à moyens limités vers les pays développés, soit en premier lieu l'Espagne puis l'Italie et ensuite d'autres pays d'Amérique latine.

L'argument de la délégation de la Suède semble être que les coûts vont progressivement diminuer dans les 30, 40 ou 50 prochaines années, et que les procédures sont de plus en plus simplifiées. Ces coûts pourraient être considérés par les pays développés comme peu importants. En revanche, il en ira différemment lorsque les pays, par exemple d'Amérique latine, recevrons des demandes. En effet, comme l'a indiqué le Délégué de la Suède, chaque État doit prendre ses responsabilités.

Le Délégué du Pérou souhaite aussi réagir aux remarques de la délégation de l'Espagne relative à la discrimination. Au Pérou, en cas d'assistance judiciaire, il revient à l'autorité compétente de supporter les coûts économiques d'une demande de test génétique. En ce qui concerne l'État du Pérou, il en résulterait aussi une discrimination à l'égard de l'État en quelque sorte. Le Délégué du Pérou ne pense pas que cela soit acceptable dans le cadre du traité proposé. Par conséquent, la délégation du Pérou soutient la position de la délégation de l'Argentine et de la délégation du Brésil, c'est-à-dire que le coût des tests génétiques ne doit pas être pris en compte.

4. **Mr Segal** (Israel) expressed his support for the proposal of the Latin American States. He drew the delegates' attention to the scope of Article 14 *bis*. He emphasised that this Article related only to free legal assistance to creditors since the square brackets surrounding the words "by a creditor" in paragraph 1 of that Article had been removed. He observed that in an application for recognition and enforcement the debtor would be the party that would request a genetic test. In that case there would be no need for legal assistance under this Article and normal procedures would apply.

On the matter of costs, the Delegate of Israel stated that international applications for establishment of maintenance obligations rarely require genetic testing. He added that if the defendant were to request a genetic test in these circumstances and the cost of testing was prohibitive to the debtor, the defendant would thereby likely win the case because the better proof would be successful. This would amount to a denial of maintenance to the creditor.

He expressed the hope that Article 14 would be discussed generally at a later stage in proceedings. He stated that at this juncture he wished to emphasise that a denial of genetic testing could also amount to a denial of parental contact. He emphasised that the financial issues were part of a bigger issue of a family relationship between the child and his or her putative parent. He insisted that the denial of assistance for genetic testing could allow parents to deny children contact by moving to a jurisdiction in which genetic testing is not provided for free. He concluded that in Israel

the importance of family life is part of the rationale for the provision of free genetic testing.

5. **The Chair** concluded that the proposal in Working Document No 4 to delete Article 14 *bis*, paragraph 2, and to add genetic testing to the definition of legal assistance in Article 3, paragraph (c), had received some support, but that it had not received considerable support. She therefore proposed to keep the text of the said Articles in their current form.

Article 14 bis*, paragraphe 2, alinéa (b) – Demandes manifestement mal fondées /* Article 14 *bis*, paragraph 2, sub-paragraph (b) – Manifestly unfounded applications

6. **The Chair** invited the delegates to discuss the second exception in Article 14 *bis*, namely, the possibility to refuse legal assistance in manifestly unfounded applications for the establishment or modification of a maintenance decision, or an appeal thereon. She invited the delegation of Brazil to explain the proposal of the Latin American States in Working Document No 4.

7. **Mr Moraes Soares** (Brazil) explained that the Latin American States would like to delete the provision that would permit Central Authorities to analyse the merits of requests. He noted that most Central Authorities do not have the means to perform this task and that the provision could be used abusively. He was of the view that Article 14 *bis*, paragraph 2, sub-paragraph (b), would empower Central Authorities to refuse requests before the matter had been considered in a judicial forum. He opined that this could amount to a denial of access to justice and that the potential for abuse militated in favour of the deletion of this sub-paragraph.

8. **Ms Lenzing** (European Community – Commission) suggested that the objection to this provision might stem from a misunderstanding of its meaning. She stated that the rationale for denying legal aid in manifestly unfounded cases was the importance of saving public funds; the concerns that the provision would be abused would not arise because the "manifestly unfounded" test was a benchmark that provided very limited discretion. She cited examples of manifestly unfounded claims. These could include matters that are not within the scope of the Convention, and cases where the debtor was deceased or otherwise permanently unable to pay due to a disability. She noted that the EC Directive on access to justice and legal aid (Council Directive 2002/8/EC of 27 January 2003) includes a similar exception and that no problems had been reported regarding its application.

9. **Mme González Cofré** (Chili) remercie la Présidente et souhaite revenir sur ce qui vient d'être dit par la délégation du Brésil.

La Déléguée du Chili indique qu'il n'y a pas les précisions nécessaires sur le critère pour rejeter la demande. Le terme « *unfounded* » est présent. Par conséquent, et à la différence de la délégation de la Communauté européenne, la Déléguée du Chili considère que refuser l'assistance juridique à ce stade consiste à nier l'accès effectif à la procédure. En effet, les termes « manifestement mal fondée » sont susceptibles d'entraîner des abus.

La Déléguée du Chili précise que les délégations des pays d'Amérique latine s'inquiètent du fait que l'assistance juridique gratuite puisse être refusée, car ce refus consisterait à nier un droit.

10. **Mr Beaumont** (United Kingdom) explained that the text of Article 14 *bis*, paragraph 2, of the preliminary draft Convention referred to States, not Central Authorities. Accordingly, States may decide which organ, a Central Authority or otherwise, would be empowered to decide whether or not to provide free legal assistance.

He noted that manifestly unfounded cases would not be heard in court, save through the use of private funds. He emphasised that the denial of assistance would be justified because the application had literally no chance of success. The competent State body would decide whether or not that threshold had been met. He added that this is normal in any system that contemplates restrictions to free legal assistance.

The Delegate of the United Kingdom then highlighted the fact that the present text of the preliminary draft Convention contains a very strict test, which was not the case in other options that had been considered previously. He reiterated that a "manifestly unfounded" case is one that has absolutely no chance of success, and that would therefore be a waste of public funds. He concluded that the United Kingdom supports the protection of the public purse against spurious applications.

11. **Ms Ménard** (Canada) stated that in the particular case of appeals, the delegation of Canada believed that States must retain discretion to limit access to free legal assistance in order to use their resources responsibly. She opined that States must have the discretion to determine the most appropriate appeal cases on which to spend public money. The Delegate of Canada was of the view that requested States are in the best position to assess the merits of a particular appeal request, taking into account all relevant factors, including the applicable law and the scope and standard of appellate review in that State. She concluded that her delegation would support some measure of discretion through a merit test for appeals.

12. **M. Markus** (Suisse) remercie la Présidente. Souhaitant intervenir brièvement, le Délégué de la Suisse soutient la position de la délégation de la Communauté européenne. La délégation de la Suisse pense que l'exception portant sur une demande « manifestement mal fondée » est une exception appliquée de manière très restrictive dans les États européens.

En ce qui concerne le traitement séparé de la demande en appel et de la demande originelle de première instance, la demande en appel peut être mal fondée, ce qui n'est pas nécessairement le cas de la demande originelle. De même, l'autorité compétente qui traitera la demande en appel pourra être différente de celle qui a traité la demande originelle. Par conséquent, il est extrêmement utile de différencier les deux demandes.

13. **Ms Matheson** (United States of America) expressed her delegation's support for the views expressed by the Delegate of Canada on the matter of appeals. She proceeded to enumerate examples of situations where appeals should not be supported through the provision of free legal assistance. The Delegate of the United States of America recalled that in her country, every state has guidelines for child support that set strict parameters for the levels of support that may be granted. In these scenarios she noted that there is very little scope for appeal, and that the cost of an appeal would be far greater than any benefit that might accrue. She added that a requested State should not be required to pursue an appeal where a reasonable person would not do so.

The Delegate of the United States of America also stated that there were cases where the facts might lead to a successful appeal that would set a bad legal precedent. She was of the view that it was important for States with a system of precedent to have the discretion to conduct a merits test, also to protect the integrity of their legal systems.

14. **Ms Lenzing** (European Community – Commission) intervened to comment on the contributions of the Delegate of Canada and the Delegate of the United States of America. She stated that it was the view of the European Community that appeals are an integral part of the judicial process. As such, she felt that the restriction of legal assistance to the first instance could constitute a denial of access to justice. She insisted that this could not work in most European systems. She recalled that she had not seen any complete drafting proposal to amend the sub-paragraph under examination, and added that at the Special Commission meeting held in May her delegation had been ready to accept the inclusion of the words "or any appeal" that appear in brackets in the text of the preliminary draft Convention. The Delegate of the European Community emphasised that appeals should also be subject to the "manifestly unfounded" test.

Finally, she stated that her delegation had understood the problem that a case with bad facts could create a bad binding precedent. She expressed her delegation's willingness to collaborate on the formulation of a text that would take this concern into account.

15. **M.Cieza** (Pérou) remercie la Présidente et prend en considération ce qui a été dit par la délégation du Royaume-Uni. Néanmoins, le Délégué du Pérou pose la question suivante à l'assemblée : quelle sera la sécurité de l'État demandeur si la discrétion est suffisamment large pour refuser une demande manifestement mal fondée ? Pour répondre à cette question, une certaine obligation de motiver le refus pourrait être imposée.

De plus, le Délégué du Pérou souhaite que l'on détermine si une deuxième instance peut être ou non prévue en cas de refus de la part de l'État requis.

16. **Mr Moraes Soares** (Brazil) thanked the Delegate of the United Kingdom for his intervention regarding the meaning of "manifestly unfounded" applications. He explained that the position of the Latin American States was based on a concern regarding how this provision would be handled in practice. He emphasised that developing countries were well aware that public funds should not be wasted. Accordingly, he agreed that manifestly unfounded claims should not be acceptable, but reiterated that it was necessary to clarify the meaning of a merits test in that context.

17. **The Chair** drew the delegates' attention to the draft Explanatory Report (Prel. Doc. No 32) which provides examples of manifestly unfounded applications. She proceeded to read the following excerpt from paragraph 429 of said Report: "an application may be 'manifestly unfounded' if the same applicant has previously applied for and been refused free legal assistance, and there has been no change in the applicant's circumstances to justify a reconsideration of his application. An appeal may be 'manifestly unfounded' if it is clear from the documents and the decision on appeal that there are no grounds in law for the appeal."

The Chair proposed that the draft Explanatory Report could further emphasise that the term "manifestly unfounded" should be construed narrowly. She added, however, that the term was intrinsically one of limited application.

18. **Mr Schütz** (Austria) sought to clarify the meaning of "manifestly unfounded" further. He cited the example of a case under the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* in which a demand was made for the hypothetical sum of 400 Euros, when the amount that could be awarded could not exceed the hypothetical sum of 150 Euros. He stated that in that case the Court of First Instance had determined that the application was manifestly unfounded. However, on appeal that decision was quashed because the substance of the application itself was not unfounded. Accordingly, he suggested that the Explanatory Report should clarify that the quantity of a request should not be a bar to the granting of free legal assistance.

19. **The Chair** stated that the example cited by the Delegate of Austria should be duly noted.

The Chair then concluded that the proposal to delete Article 14 *bis*, paragraph 2, sub-paragraph (b), had not been supported.

20. **M. Marani** (Argentine) remercie la Présidente et modifie quelque peu l'angle de son argumentation au sujet de l'article 14 *bis*, paragraphe 2, de l'avant-projet révisé de Convention. En effet, la délégation de l'Argentine exprime sa préoccupation en indiquant que ce qui est évoqué s'inscrit dans le cadre de l'assistance juridique gratuite. Or, le cas de l'article 12, paragraphe 8, de l'avant-projet révisé n'a pas été évoqué. Cet article porte sur la transmission, la réception et le traitement des demandes et des affaires par l'intermédiaire des Autorités centrales et le paragraphe 8 prévoit qu'« [u]ne Autorité centrale requise ne peut refuser de traiter une demande que s'il est manifeste que les conditions requises par la Convention ne sont pas remplies. Dans ce cas, cette Autorité centrale informe aussitôt l'Autorité centrale requérante de ses motifs. » On peut constater que l'article 14 *bis*, paragraphe 2, en comparaison avec l'article 12, paragraphe 8, présente un degré certain d'imprécision. Ainsi, le Délégué de l'Argentine aimerait que l'on détermine l'autorité compétente pour analyser le bien-fondé de la demande dans l'État requis. Par conséquent, il est nécessaire, soit de retenir cette possibilité, soit qu'une autre délégation s'exprime sur son souhait d'obtenir plus de précisions à ce sujet.

21. **M. Sánchez Trejo** (El Salvador) remercie la Présidente et admet que cet alinéa portant sur le refus d'une demande a une valeur politique, c'est-à-dire la préservation des deniers de l'État. Selon lui, il s'agit d'une décision fondamentalement politique que de déclarer ou non la guerre ou bien d'investir ou non dans le domaine social. Néanmoins, les pays en voie de développement fournissent un effort pour incorporer les valeurs de l'Europe comme le droit à l'accès à la justice et aussi pour faciliter les procédures. Par conséquent, il serait raisonnable d'établir comme postulat de base que tout est fait sérieusement par les Autorité centrales des États requérants. En effet, selon lui, personne ne va chercher à envahir la sphère juridique d'un État en déposant des demandes en grand nombre.

D'après ces différents éléments, il est nécessaire de s'intéresser au principe général qui porte sur l'accès à la justice plutôt qu'à une exception. M. Sánchez Trejo soutient que lorsqu'un État a pris en charge un enfant, il n'est pas raisonnable que l'État réponde ou refuse de répondre à ses besoins en invoquant des coûts financiers pour l'État. Il est, selon lui, indispensable d'évoquer le sujet avec la gravité

qu'il mérite. Il existe sans aucun doute une obligation morale de présenter les choses avec une certaine émotion. Le Délégué d'El Salvador remercie la Présidente.

22. **Mr Haťapka** (European Community – Commission) stated that he wished to address the question of uncertainty regarding which organ of the State should decide whether or not to refuse free legal assistance under the conditions prescribed in Article 14 *bis*, paragraph 2. He recalled that the text of the preliminary draft Convention previously empowered Central Authorities to make such decisions. However, the Special Commission had recognised that some Central Authorities were not able to perform this kind of test and it was therefore decided to allow States to decide which organ therein should be empowered to decide.

The Delegate of the European Community added that the refusal of legal aid under Article 14 *bis* did not constitute the end of a case. A case would then be considered under the merits test in Article 14 *ter* where a different conclusion could be reached on the matter of legal aid. He concluded that concerns were therefore not founded because Article 14 *ter* could operate to reverse preceding decisions taken under Article 14 *bis*.

He then cited an example of a manifestly unfounded claim in which an applicant sought maintenance from a Head of State whom it was clear she had never met or been in contact with because they had never been in the same country. Another example he had seen was one of a woman who found the address of her father who had died 30 years previously. He added that more realistic scenarios of manifestly unfounded claims involved situations where a court had already refused maintenance because it had found that there was no family relationship. Accordingly, he felt that the "manifestly unfounded" exception would be invoked only in rare cases where it would be fair to do so.

He then turned to the relationship of Article 14 *bis*, paragraph 2, sub-paragraph (b), with Article 12, paragraph 8. He noted that the two provisions are related but that the latter provision refers to whether or not a claim is formally within the material scope of the draft Convention. Conversely, he explained that the "manifestly unfounded" exception referred to the substance of a particular case that had passed the test in Article 12, paragraph 8, and was formally within the scope of the draft Convention, but might be substantively unfounded.

23. **Mme Mansilla y Mejía** (Mexique), après avoir entendu l'ensemble des observations, conclut qu'il s'agit bien, d'une part, de déterminer la question des moyens du demandeur et, d'autre part, la question du bien-fondé de sa demande. De plus, le concept de « manifestement mal fondée » est bien prévu pour éviter des demandes en justice qui seraient contraires aux objectifs de la Convention.

24. **M. Voulgaris** (Grèce) remercie la Présidente et souhaite répondre aux délégations qui se soucient du fait que cette référence ne serait pas juste. En effet, en cas de demande d'aliments, un recours est toujours ouvert dans la mesure où tous les textes relatifs aux droits de l'Homme assurent un deuxième degré de juridiction, même à travers des procédures particulières à l'État concerné. Il en résulte que l'on répondra rétroactivement à la cause du demandeur et celui qui aura pris la mauvaise décision en subira les coûts. Il s'agit là d'une soupape de sécurité non négligeable.

En outre, le Délégué de la Grèce considère qu'il ne faut pas autoriser n'importe qui à faire ce type de demande. Il en conclut qu'il s'agit de deux arguments appuyant le fait que cette clause est bien écrite. Elle est, d'autant plus, quasiment généralisée dans les textes internationaux.

25. **Mr Beaumont** (United Kingdom) explained that the "manifestly unfounded" test was very familiar. He noted that the *European Convention for the Protection of Human Rights and Fundamental Freedoms* uses this test to filter out matters that should not be heard by the European Court of Human Rights. He was therefore of the view that it was not tenable to argue that the test could constitute a denial of access to justice. The Delegate of the United Kingdom stated that the term "manifestly unfounded" is a well-known term of art that weeds out spurious cases, and was not a classical merits test. In this light, he was of the view that the attendant risk of including this test is inexistent or negligible. He opined that the alternative to including this test was unacceptable because it left the system open to vexatious claims in which applicants merely wasted public funds. Indeed, he added, courts also sometimes say that enough is enough and put an end to vexatious proceedings in matters where parties are spending their own private funds.

The Delegate of the United Kingdom added that this test worked perfectly well in the context of the EC Directive on access to justice and legal aid and the European Convention on Human Rights. Further, he referred to the intervention of the Delegate of Greece and recalled that there may also be judicial review of decisions, besides appeals.

26. **Mr Segal** (Israel) proposed that if the words "on the merits" were deleted from the draft, this could help to clarify that the "manifestly unfounded" test is not a merits test but rather refers to cases that are truly manifestly unfounded.

27. **Mme Mansilla y Mejía** (Mexique) précise qu'il est certain qu'elle connaît la différence entre un contrôle au fond et les termes « manifestement mal fondée ». La Déléguée du Mexique rappelle sur ce point qu'il est nécessaire d'éviter toute confusion et qu'il faut, par conséquent, préciser la disposition en question.

28. **Ms Ménard** (Canada) referred to the proposal of the delegation of the European Community to collaborate on a text that could accommodate concerns regarding the creation of precedents through appeals. She stated that her delegation wished to participate in that process.

29. **Ms Carlson** (United States of America) noted her agreement with the Delegate of Canada and stated that, if it were possible to address concerns regarding precedent, the question of legal assistance in appeals could be resolved. She made known her delegation's willingness to also assist in the development of an acceptable text.

30. **The Chair** concluded that the proposal to delete Article 14 *bis*, paragraph 2, sub-paragraph (b), had not been supported by other delegations. She also observed that there had been no objections to deleting the square brackets surrounding the words "or any appeal" in the same sub-paragraph.

31. **Ms González Cofré** (Chile) stated that, although no explicit objection had been made to the deletion of the square brackets, the spirit of the proposal in Working Document No 4 was clearly opposed to the language contained therein. In fact, she added that Latin American delegations had proposed to delete the entire sub-paragraph. She there-

Procès-verbal/Minutes No 3

fore felt that it was not pertinent to delete the square brackets.

32. **The Chair** noted the remarks of the Delegate of Chile and stated that the square brackets would be retained at this juncture. The discussion on the relevant sub-paragraph would be resumed at a later stage during the Commission. She added by way of conclusion that some delegations had agreed to work on the question of precedent.

Annonces de la part des délégués / Announcements by delegates

33. **The Chair** proposed to have a short break following announcements by the delegation of Australia and the delegation of the Netherlands.

34. **Ms Cameron** (Australia) announced that a meeting of the Working Group on Forms would be held immediately.

35. **Mr Struycken** (Netherlands) announced that he regretted that the planned tour of the Peace Palace could not be held on the following day because both court rooms would be in session. The tour would be held the following week.

36. **The Chair** welcomed the delegates back from the break and stated that the Deputy Secretary General wished to make an announcement.

37. **The Deputy Secretary General** reminded the delegates that the Ambassador of Japan to the Netherlands had kindly extended an invitation to all present to a reception at the Ambassador's residence. The Deputy Secretary General instructed the delegates on directions to the reception. He concluded by thanking the Ambassador of Japan for his kind invitation.

Article 14 bis*, paragraphe 2, alinéa (c) – Situation exceptionnellement confortable du demandeur* / Article 14 *bis*, paragraph 2, sub-paragraph (c) – Extraordinarily wealthy applicants

38. **The Chair** invited the delegates to resume the discussion regarding Article 14 *bis*, paragraph 2, sub-paragraph (c), concerning extraordinarily wealthy applicants. She noted that this matter had already been touched upon briefly in the general discussion. She recalled that the preliminary draft Convention now included three options. Option A empowered the requested State to decide whether the applicant is extraordinarily wealthy; in Option B that same determination would be made by the requesting State following a defined procedure. Option C proposed to delete sub-paragraph (c). She opened the floor to remarks and observations.

39. **Mr de Oliveira Moll** (Brazil) referred to Working Document No 4 and pointed out that in that document the Latin American States supported Option C which called for the suppression of Article 14 *bis*, paragraph 2, sub-paragraph (c). He stated that the authors of the working document were not convinced that there was any need for a specific mechanism for such rare cases. He noted that persons under the age of 21 were always in need of special attention and legal assistance. However, he added that, in the experience of the Latin American delegations, persons who are wealthy rarely opt to accept legal aid. He was also of the view that it would be complicated for States to examine the several criteria that could lead them to the conclusion that an applicant is extraordinarily wealthy.

On the matter of the distinction between Option A and Option B, the Delegate of Brazil stated that there were other differences besides which State was empowered to evaluate the economic situation of the applicant. He added that he could not understand or accept the requirement in Option A that account should be taken of the cost of living in the requesting State. He opined that the costs in the requested State would be more important. Notwithstanding his preference for Option B when compared to Option A, he emphasised that he supported the suppression of the entire sub-paragraph (Option C).

40. **Ms Ménard** (Canada) stated that her delegation shared the concerns that the delegation of the United States of America had aired previously. She observed that her delegation strongly supported Option C, but that it had considered Option B in a spirit of compromise. Her delegation had studied the matter and attempted to formulate appropriate criteria for a definition of extraordinary wealth that was applicable globally, but found that it could not do so. Noting that her delegation could not succeed, notwithstanding its best efforts, she proposed that other delegations should assist in this endeavour.

41. **Ms Lenzing** (European Community – Commission) recalled that on the previous day she had explained that her delegation was not ready to accept Option C as proposed by the Latin American States and Canada. She opined that there was a policy argument in favour of denying legal aid to extraordinarily wealthy applicants since this would constitute a misallocation of public funds. She therefore felt that there was no inconsistency in terms of policy.

The Delegate of the European Community then addressed the remark of the Delegate of Brazil in which the latter had stated that it would be complicated to evaluate whether or not an applicant was extraordinarily wealthy. She noted that Article 14 *bis*, sub-paragraph 2, employed the term "may", not "must"; States were therefore free to disregard this option if a cost-benefit analysis led them to the conclusion that this was preferable.

On the matter of wording that was raised by the Delegate of Canada, the Delegate of the European Community admitted that her delegation had not yet succeeded in finding appropriate wording either, but she expressed confidence that this would be possible.

Finally, the Delegate of the European Community addressed the concern that the cost of living in the requested State should be taken into account. The Delegate recalled that there was some concern that relatively wealthy persons by the standards of States having a low standard of living might be erroneously classified as not wealthy by the standards of States with a higher standard of living although they could not afford the costs of proceedings in that State. She stated that it would not be problematic to find a formula that took into account the cost of living in both States. However, she added that she could not produce exact figures or formulations at this stage.

42. **Ms Carlson** (United States of America) recalled that she had explained her reasons for supporting the deletion of Article 14 *bis*, paragraph 2, sub-paragraph (c), at the meeting held on the previous day. She stated that she would not repeat her arguments but would add a few points.

The Delegate of the United States of America recalled with approval the intervention of the Delegate of the United Kingdom. The latter had observed that the provision of free services is not only in the interest of children, but in the

long run is also in the public interest because it helps families to be self-supportive and facilitates both parents' supporting their children.

The Delegate of the United States of America added that some statistics might be helpful and put forward that in the United States of America, for every one United States dollar spent on child support, four United States dollars are collected. She opined that the system is therefore very cost-effective.

The Delegate of the United States of America then addressed the intervention of the Delegate of the European Community in which the latter observed that States may choose not to avail themselves of the option provided in Article 14 *bis*, paragraph 2, sub-paragraph (c). The Delegate of the United States of America stated that she drew little comfort from that statement as it would create an intolerable imbalance in the application of the Convention. She added that she understood that reciprocity is not necessarily one to one. Indeed, she insisted that the United States of America was willing to provide more services than some States that have less-established child support systems. Thus, she stated that she agreed and understood that reciprocity would be imperfect, but emphasised that there should not be a complete lack of reciprocity. Further, the Delegate of the United States of America argued that it would be very difficult to persuade decision-makers to take on such costs in the absence of reciprocity.

The Delegate of the United States of America also drew the delegates' attention to unsuccessful efforts of her delegation, like the delegation of Canada, to find appropriate wording on the basis of Option B to accommodate an exception for extraordinarily wealthy applicants. She stated that it was now for the States that would like to retain the exception to show that appropriate wording could be found and to take the initiative to start a conversation on that basis.

43. **Mr Segal** (Israel) observed that the sub-paragraph under examination was not the only provision that was relevant to the present discussion. He noted that sub-paragraph (b) provided a merits test and that sub-paragraph (c) provided a means test. The Delegate of Israel was of the view that there was a nexus between the two provisions in that there was a local and an international standard to be addressed for both. He added that Option A was more generous because it contemplated a declaration through which parties would be able to evaluate their rights in advance. He also observed that Working Document No 5 contemplated the possibility of providing free legal assistance in all maintenance cases and allowed States to declare that they will not conduct confusing international merits or means tests.

44. **The Chair** drew the attention of the Delegate of Israel to Article 51 of the preliminary draft Convention regarding the provision of information concerning laws, procedures and services. She observed that Article 51, paragraph 1, sub-paragraph (c), binds States to provide information regarding Article 14 to the Permanent Bureau. Accordingly, she stated that if States were to choose to apply the system in Article 14 *bis*, paragraph 2, sub-paragraph (c), this would appear in the description that they would provide to the Permanent Bureau.

45. **Mr Segal** (Israel) thanked the Chair for her clarification. However, he submitted that a declaration differed from the contemplated procedure because a change of internal practice within a State is not as transparent, despite the fact that this would be communicated to the Permanent Bureau. He added that Option B could be adjusted, but that he preferred Option C.

46. **Mr Markus** (Switzerland) recalled that he had presented his views on the provision during the general discussion of the previous day. He called the delegates' attention to the general comments on Article 14 in Preliminary Document No 36 which contained a modified version of Option B that was submitted by the delegation of Switzerland and the delegation of Israel at the preceding Special Commission meeting.

The Delegate of Switzerland stated that he supported that proposal, that he could accept Option A, but that he had difficulties with Option C. He maintained that there should be some form of means test, but that said test should be generous and should reflect the standard of living of the requesting State. He opined that Option B, as presently drafted in the preliminary draft Convention, was too complicated because it called for too high a degree of communication between authorities. He likened the procedure in Option B to a game of ping pong. He suggested that the logic behind the requesting State being empowered to decide was obvious because the situation of the creditor was to be taken into account.

Returning to his exposition of the proposal in Preliminary Document No 36, the Delegate of Switzerland emphasised that under that proposal, the higher standard of support in the requesting State and the requested State would be granted. He illustrated this with the example of a requesting State that applied a means test, and a requested State that did not. In such a case no means test would be applied because the higher standard of assistance did not include a means test.

47. **M. Voulgaris** (Grèce) souhaite présenter une remarque portant sur l'article 14 *bis*, paragraphe 2, alinéa (c), dans ses options A et B. Entre l'option A et l'option B, il existe bien une différence mais le Délégué de la Grèce demande qui prend en définitive la décision et quels sont les recours contre celle-ci.

En effet, dans l'option A, l'État requis prend effectivement la décision, avec l'existence d'un recours en droit interne.

En revanche dans l'option B, la décision est prise en définitive par l'État requérant et ceci sans recours car il n'existe pas d'intéressé. En effet, l'intéressé est *a priori* le demandeur qui ne pourra pas faire de recours contre ce qui l'intéresse. Inversement, l'État requis ne pourra pas présenter un recours contre un autre État. Ainsi, une entente doit être établie entre les deux Autorités centrales dans la mesure où l'Autorité requérante peut prendre une décision même aux dépens de l'État requis qui lui devra subir les coûts économiques de l'assistance juridique.

Le Délégué de la Grèce conclut que si l'on n'opte pas pour l'option A, alors il est nécessaire d'améliorer l'option B au moins au regard de ce qui vient d'être dit car cela n'a pas été clarifié dans l'article 14 *bis*, paragraphe 2, alinéa (c).

48. **Mr Hellner** (Sweden) proposed that it was clear that when a cost-benefit analysis is conducted, it was better not to conduct means testing. However, he was of the view that when political pressure came to bear, it would be difficult to accept free legal assistance for the extraordinarily wealthy applicant. He invited the delegates to rest assured that the proposal did not set out to introduce means testing through the backdoor. While he noted that he could not

suggest appropriate wording orally at the meeting, he was confident that appropriate wording could be found. He light-heartedly suggested pegging the quantum of extraordinary wealth to Forbes' annual list of the richest people in the world. He insisted that it was possible to draft the provision in a manner that would not be abused and stated that, although the final provision might appear strange in an international treaty, it would serve the intended purpose without being open to abuse.

49. **M. Heger** (Allemagne) remercie la Présidente et, en premier lieu, considère, à l'instar de la délégation de la Suède, que le but peut être d'aboutir au même point de vue que la délégation de la Communauté européenne. Il existe effectivement une solution pour comparer le coût de la vie entre les différents États concernés. À titre d'exemple, si une personne est dans le besoin dans un pays où le coût de la vie est très bas, alors il est certain de pouvoir recourir à l'assistance juridique dans un pays où le coût de la vie est plus élevé. En revanche, l'inverse serait plus difficile à établir. Le Délégué de l'Allemagne évoque cette situation afin de trouver un compromis et précise d'ailleurs que les États membres de l'Union européenne connaissent eux aussi ce problème.

En second lieu, il souhaite envisager la question de la réciprocité. Comme l'a évoqué la délégation des États-Unis d'Amérique, il s'agit d'une question qui est étroitement liée au droit à l'accès à la justice. Néanmoins, ce droit d'accès à la justice concerne autant les personnes ayant des moyens suffisant pour agir en justice que ceux qui n'en ont pas. Il est certain que le droit à l'accès à la justice sans l'existence d'une assistance juridique gratuite ne serait pas entièrement effectif. Néanmoins, l'assistance juridique gratuite n'est qu'un élément du droit d'accès à la justice, ce qui amène à ne pas lier trop intimement l'article 6 et l'article 14 de l'avant-projet révisé de Convention.

50. **Ms Ménard** (Canada) took the floor to provide statistics on the lines of those presented earlier by the delegation of the United States of America. She stated that in Canada the cost of maintenance to the government was 7 cents for every Canadian dollar collected. She maintained that it was therefore economically sound for provincial governments to be involved in the recovery of maintenance obligations.

51. **Mr Hayakawa** (Japan) stated that Option A was the most accessible because it allowed the requested State to take the relevant decision.

52. **Mr Ding** (China) stated that the delegation of China strongly objected to Option B. He stated that he had listened carefully to the interventions of other delegates and observed that there was a danger that Article 14 *bis*, paragraph 2, could be a disguised means test.

The Delegate of China made it known that he shared the views of the Delegate of Israel on the matter of the lack of flexibility of Article 14 *bis*. He urged the delegates to consider Working Document No 5 which contained a simpler and more flexible approach. He stated that the proposal in the said working document posed fewer problems to States and therefore encouraged ratification of the draft Convention.

53. **Ms Carlson** (United States of America) intervened to comment on the proposal of Switzerland in Preliminary Document No 36. She stated that the proposal was perfectly acceptable to her delegation. She added that her delegation had made submissions at an earlier date in which it was proposed that the more favourable of the conditions in the requesting and requested State would be applied. She opined that it was not discriminatory to offer better treatment to foreign applicants because their conditions were different to those of a local applicant. The Delegate of the United States of America also submitted that the granting of assistance must not only be objective and fair, but that it must also not be systemically burdensome to administer.

54. **Ms González Cofré** (Chile) noted that the concern of the Latin American States was not the protection of persons who are extraordinarily wealthy by international standards, but that persons who are wealthy by the standards of less developed States are not necessarily well-off by the standards of more developed States. She stated that the latter category of persons should not be denied free legal assistance. She was of the view that the drafts submitted to date did not reflect this concern and that there would be more to lose than to gain if said drafts were adopted. She concluded that the Latin American States required that the cost of living in both the requesting and requested States be considered, and that this must be done with particular reference to the cost of proceedings.

55. **Mr Segal** (Israel) stated that the proposal of the delegation of Switzerland and the delegation of Israel in Preliminary Document No 36 was far more flexible and made it clear that there was no burdensome requirement of scrutiny in every case.

The Delegate of Israel insisted that it was important to distinguish between local and international cases. He felt that, as members of the international community, it was important to adopt an international approach to international phenomena. Accordingly, he submitted that it was pertinent to adopt a fluid approach that would take into account the reality of persons crossing borders with a view to escaping their obligations; this could justify the granting of assistance to foreign applicants in preference to local applicants.

56. **The Chair** observed that there was no agreement as to whether it was necessary to provide specifically for the treatment of extraordinarily wealthy applicants. She observed that even those States that advocate Option A and / or Option B admitted that those options were not yet appropriately drafted. She expressed hope that written proposals would be submitted and discussed later in the Commission.

Article 14 ter – *Demandes ne permettant pas de bénéficier de l'article 14* bis / Article 14 *ter* – Applications not qualifying under Article 14 *bis*

57. **The Chair** drew the attention of the delegates to Working Document No 4, in which it was proposed to extend the protection of Article 14 *bis* to persons with disabilities. She suggested that, given the time constraints, it would be efficient to discuss this proposal in the context of Article 14 *ter* because the latter Article addressed the treatment of all persons not presently covered by Article 14 *bis* of the preliminary draft Convention. She explained that Article 14 *ter* applied to all cases where legal assistance was not granted under Article 14 *bis*. This included children over the age of 21, child support cases where legal assistance is refused under the exceptions to Article 14 *bis*, and maintenance obligations under the optional extended scope of the draft Convention such as spouses and other relatives. She added that the context was that of applications through Central Authorities. The Chair explained that a means or merits test could be applied in these cases.

The Chair then explained the particular discussions that would be necessary in the context of Article 14 *ter*, paragraph (b). Firstly, she cited the matter of whether there should be a reference to "an applicant" or "a creditor". Secondly, she noted that there had been a proposal to refer to entitlement to free legal assistance in the State of origin, as opposed to a prior benefitting from free legal assistance.

58. **Mr McClean** (Commonwealth Secretariat) stated that he was confused by the wording of Article 14 *ter*, paragraph (b). He explained that he understood that the present text could give rise to some injustice, and as such that he felt that referring to entitlement to legal assistance in the State of origin was sound in terms of policy. However, he was of the view that in practical terms this would be difficult to administer. He observed that it was easy to determine if one had benefited from free legal assistance in the State of origin, but that in the absence of a decision in that State it is difficult to assess entitlement.

The Representative of the Commonwealth Secretariat acknowledged that the text of Article 14 *ter* was based on another Convention. Nevertheless, he found that the text remained unclear and that the draft Explanatory Report did not elucidate the matter substantially. He referred, in particular, to the entitlement to benefit from free legal assistance "at least to the same extent". He noted that the draft Explanatory Report clarified that the term "extent" did not refer to the amount. However, he felt that the inclusion of an antecedent entitlement to benefit from assistance, as opposed to an antecedent benefit, confused the provision because the reference to "the same circumstances" thereby referred to circumstances that are in fact different. He questioned whether what was really intended was to provide that the law of the State of origin should actually be determinant. He concluded that the provision was confusing and difficult to follow.

59. **Mr Segal** (Israel) suggested that the proposal submitted by his delegation in conjunction with the delegation of Switzerland could clarify the questions posed by the Representative of the Commonwealth Secretariat, as the Delegate of Israel understood those questions. The proposal provided that the requesting Central Authority would be required to confirm that the applicant had benefited or was entitled to benefit from free legal assistance. He listed advantages of the proposal that his delegation had co-authored, including that the standards in the requesting State are adhered to, that entitlements are established with reference to entitlements in the requesting State, and that free legal assistance in recognition and enforcement proceedings is only for the benefit of the creditor.

60. **The Chair** invited the delegates to submit their remarks on the question of the treatment of persons with disabilities.

61. **Mme González Cofré** (Chili) informe l'assemblée qu'elle a été désignée pour prendre la parole au nom des délégations des pays d'Amérique latine.

Concernant l'article 14 *bis*, la Déléguée du Chili préconise une plus grande protection à l'égard de l'enfant en règle générale. Néanmoins, elle souhaite aussi que les enfants et les personnes handicapés soient protégés directement sans passer nécessairement par l'article 14 *ter*. Ainsi, il serait préférable d'élargir le champ d'application de l'article 14 *bis* aux enfants handicapés de moins de 21 ans et aux adultes handicapés car ils nécessitent la même protection.

62. **Mr Hellner** (Sweden) observed that there was a problem of definition regarding the term "disabled person". He recalled an anecdote in which an acquaintance of his suffered a paralysis to his lip through a dentist's injection and was declared to have a 1 percent disability. He observed that that acquaintance was financially independent, but that he would formally be considered to be a "disabled person". The Delegate of Sweden explained that the concept of disability is heterogeneous and included persons who are able to support themselves and others who are not. He insisted that not all disabilities preclude a person from working. He therefore drew a distinction between persons under the age of 21, who generally cannot support themselves, and persons with disabilities many of whom can support themselves. Accordingly, he was of the view that a simple rule that referred only to children was preferable.

63. **The Chair** asked the co-authors of Working Document No 4 to explain Article 14 *ter* as proposed in that Working Document.

64. **Mr de Oliveira Moll** (Brazil) first addressed the matters raised by the Delegate of Sweden. He stated that he could accept a restricted definition of a "disabled person" to ensure that the term would refer only to persons who cannot work.

Turning to Article 14 *ter*, paragraph (a), he explained that Working Document No 4 proposed to eliminate the possibility of a merits test, for the same reasons that were explained in the context of the elimination of means testing in Article 14 *bis*. He added that the working document proposed that Article 14 *ter*, paragraph (b), refer to an applicant rather than a creditor. He was of the view that it was not useful to make a distinction between creditors and debtors in this context because both parties should have equal access to procedures.

65. **Ms Lenzing** (European Community – Commission) urged the Latin American States to be realistic on the matter of including persons with disabilities in Article 14 *bis*. She noted that there was some hesitation on the part of certain States to accept Option 2 of Working Document No 2. She felt that the inclusion of persons with disabilities would make compromise harder.

The Delegate of the European Community also urged the Latin American States to reconsider the proposal to delete merits testing from Article 14 *ter*. She was of the view that, from a policy perspective, it was much easier to argue against a means test than a merits test. She insisted that States should only finance cases that are founded on the merits. She added that she supported the suggestion of the Delegate of Israel to delete the reference to "merits" in Article 14 *bis*, paragraph 2, sub-paragraph (b), and to thereby clarify the meaning of that provision. However, she felt that in the context of Article 14 *ter*, a merits test was standard procedure and she could see no added value in suppressing the language that provided for it.

66. **M. Sánchez Trejo** (El Salvador) remercie la Présidente et souhaite faire référence à ce qui a été dit par la délégation de la Communauté européenne. Sur le plan technique, les délégations des pays d'Amérique latine ont analysé l'opportunité de l'ajout, et cela est intéressant. Néanmoins, si la délégation de la Communauté européenne envisage la possibilité d'intégrer les handicapés ou un grand nombre d'enfants de moins de 21 ans et de personnes qui ne peuvent pas travailler (25 % de chômeurs au El Salvador), c'est qu'il existe un devoir moral de tenir compte de cet élément dans la Convention. Cela est extrêmement

Procès-verbal/Minutes No 3

important en termes de vulnérabilité et de protection financière. Il est donc nécessaire, selon lui, de réfléchir à la question suivante : qui pourra aider ces personnes si ce ne sont pas leurs parents ? Il est important que cela figure dans le texte malgré les interventions précédentes.

67. **Ms Albuquerque Ferreira** (China) stated that she strongly objected to Option 2 of Article 14, but that she was willing to discuss it in a spirit of compromise. She noted that her delegation's opposition to Option 2 stemmed from the principle that it is difficult to give to others that which one cannot afford to give to oneself.

The Delegate of China insisted that the inclusion of disabled persons should not be dismissed. She noted that there were similar policy arguments for the inclusion of persons with disabilities as for children. She added that it was clear that those persons who can support themselves, whether having a disability or otherwise, should be treated equally.

68. **Mr Helin** (Finland) intervened to comment on the proposal to include persons with disabilities in Article 14 *bis*. He observed that vulnerable adults were not included in the mandatory scope of the draft Convention. He was concerned that adding an obligation to give free assistance to vulnerable adults could constitute an obstacle to some States extending the scope of the Convention to persons not falling within the mandatory scope thereof.

69. **Mme Mansilla y Mejía** (Mexique) exprime quelques doutes quant à l'exclusion des adultes incapables. En effet, il est important de souligner que le titre de la Convention contiendra les termes « et d'autres membres de la famille ». Il y a des personnes sérieusement handicapées qui font partie de familles sans être nécessairement des enfants. La Déléguée du Mexique précise que dans le cadre du Protocole, une protection est prévue de manière générale, donc aussi pour ces personnes, et qu'il n'y a, par conséquent, aucune raison de leur refuser une protection dans le cadre de la Convention.

70. **Mr Beaumont** (United Kingdom) stated that he agreed that the matter of vulnerable adults should be taken seriously. However, he noted that Working Document No 5 provided that aid should not be less than that provided in domestic cases. Accordingly, he was of the view that Working Document No 5 did not guarantee anything in an international context and, as such, was no better than the benefits provided in Article 14 *ter*.

On the matters raised by the Representative of the Commonwealth Secretariat, the Delegate of the United Kingdom observed that the relevant provision of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, on which Article 14 *ter*, paragraph (b), is based, was also unclear in that Convention. He observed that the provision was ambiguous but that it was difficult to find better wording. He expressed the hope that the Representative of the Commonwealth Secretariat could propose wording that would be clearer, but would not deviate from the standards of protection intended by the current wording.

The Delegate of the United Kingdom then explained that Article 14 *ter* referred to matters not covered in Article 14 *bis*. He noted that Article 14 *ter*, paragraph (b), would not apply to children. He was therefore of the view that States that did not adopt the extended scope of the draft Convention would not be particularly affected by the provision under examination.

71. **Ms Doogue** (New Zealand) informed the Chair that she wished to make an announcement at the appropriate juncture.

72. **The Chair** noted that the time for the end of the meeting was approaching and asked if there were any further comments at this point.

73. **Ms Degeling** (co-*Rapporteur*) conceded that it was difficult to clarify the issues raised by the Representative of the Commonwealth Secretariat. She stated, however, that the proposal to refer to an entitlement to benefit, rather than an actual antecedent benefit, contemplated a statement by the legal aid body in the State of origin to the effect that the applicant is entitled to free legal assistance in that State.

74. **The Chair** concluded that the proposal to extend Article 14 *bis* to persons with disabilities had not been supported by other delegations because such persons could be addressed in Article 14 *ter*. She added that the proposal to delete a reference to a merits test in Article 14 *ter*, paragraph (a), had not received support either. Regarding Article 14 *ter*, paragraph (b), she observed that there had not been many interventions on that matter and that the Drafting Committee should therefore make no changes for the moment.

The Chair observed that it was 5.54 p.m. She stated that, since the delegates had been kindly invited to a reception that evening, it would not be pertinent to begin a discussion on the situation of debtors in the available time. She urged the delegates to attend the next meetings punctually. She stated that the agenda for the meeting would continue with effective access to justice, legal assistance for debtors, public bodies, and procedures for recognition and enforcement.

75. **Mme Doogue** (Nouvelle-Zélande) souhaite en tout premier lieu féliciter de la part de l'assemblée Mme Borrás, co-Rapporteur, pour sa récente nomination en tant que Membre associée de l'Institut de Droit international.

En second lieu, elle souhaite aussi informer les délégués de la tenue de la réunion du Comité de rédaction ce soir à 20 heures dans le bâtiment du Bureau Permanent.

76. **M. de Oliveira Moll** (Brésil) annonce aux délégations des États d'Amérique latine qu'elles sont invitées à se réunir à 8 h 30 au rez-de-chaussée du bâtiment de l'Académie de droit international.

77. **Mr Lortie** (First Secretary) recalled that the Ambassador of Japan had kindly invited the delegates to a reception at his residence and proceeded to instruct the delegates on the arrangements that had been made for that purpose.

78. **The Chair** stated that the meeting on the following day would begin promptly at 9.30 a.m.

The meeting was closed at 5.57 p.m.

Procès-verbal No 4

Minutes No 4

Séance du vendredi 9 novembre 2007 (matin)

Meeting of Friday 9 November 2007 (morning)

La séance est ouverte à 9 h 40 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Le droit du débiteur à l'assistance juridique gratuite (art. 14 bis *(2), 14(5), 14* bis *(1) et 14* ter *(b))* / Entitlement of the debtor to free legal assistance (Arts 14 *bis* (2), 14(5), 14 *bis* (1) and 14 *ter* (b))

1. **The Chair** observed that she was happy they were starting on time. She called the room to order. She expressed thanks to the Ambassador of Japan for the reception the evening before and asked to convey their gratitude. The participants applauded. She stated that they would move on by continuing yesterday's discussions on Article 14 *bis*, in particular the policy issue of to what extent a debtor is entitled to free legal assistance. She added that they would discuss in particular the text in brackets in Article 14 *bis*, paragraph 2, as well as the two options, and then the bracketed language in Article 14, paragraph 5, followed by Article 14 *bis*, paragraph 1, and Article 14 *ter*, sub-paragraph (b). She stated that the floor was open.

2. **M. Markus** (Switzerland) stated that his delegation was of the opinion that the debtor as a party to maintenance obligations proceedings must be protected, and is entitled to have certain procedural rights within international litigation. He queried whether this protection, however, must be more than that granted to other parties. He noted that in private international law rules, whether in international conventions or international procedural law, or in Hague Conventions such as the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, or certain European instruments, there is procedural protection for the creditor but no equal protection for the debtor. He added that in the substantial law of some countries there is no protection for the debtor, so he asked why the debtor should be freed from costs, that is, procedural costs or Central Authority costs. He further asked why taxpayers should be burdened by a debtor's costs related to maintenance obligations. He stressed that a question could be raised as to whether there should not be the same protection for both parties and if it were unjust to give assistance to a creditor but not a debtor. He observed that, in view of special protection for children as creditors, such unequal treatment would be justified and even seen as equal protection. He observed that Article 26 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* allows for completely free legal assistance for the left-behind parent who wants the child back but does not allow for it for the abductor. He observed that this was unequal treatment. He added, however, that in the system being discussed children must be protected to a greater extent regarding maintenance than other creditors, and that it would seem odd to protect a debtor more than a creditor who is not a child. He stated that it was clear that free legal assistance for debtors needed to be discussed in a larger framework, including on the topic of using taxpayer money. He concluded by noting that there may be some administrative systems differing from that of Switzerland where taxpayer money is used in favour of creditors, and that there may be some systems where there is less public money available and so the debtor may not have to pay anyway. He stressed that he had nothing against this but that it was not comparable to a court system that generated lots of costs. He stressed as well that he was not against giving a debtor help under another system, but that this could not be done in Switzerland.

3. **Ms Ménard** (Canada) stated that it was the view of her delegation that restricting services to creditors is not in the child's best interest because it appears unjust and may be discriminatory. She added that it would likely discourage debtors to participate in the process, lead to increased costs for the State, and may also lead to a lack of confidence in the system. She noted that excluding debtors may have a negative impact on creditors by resulting in enforceable orders where debtors would have no real access to modification procedures. Finally, exclusion of debtors in Article 14, in addition to the limitation on Article 15, creates a difficult situation at the political level. She concluded by stressing that services should be open to both creditors and debtors.

4. **Ms Bean** (United States of America) expressed her delegation's agreement with the delegation of Canada on this issue, noting that in the United States of America individuals, debtors, can apply for free legal services, including paternity determination. She noted that in the Convention, services would be limited to those in Article 14. She added that, for the poor, court orders can be too high cost-wise and that this would discourage them from paying maintenance. She concluded that it was in the best interests of the child to set maintenance at a level which the debtor can pay, and one of way of doing this was by ensuring that modification costs were free of charge.

5. **Ms Lenzing** (European Community – Commission) noted that the delegation of the European Community had listened closely to the interventions from the delegations of Switzerland, the United States of America and Canada, and that this issue had been discussed with controversy in Brussels. She added that her delegation understood that there were arguments for giving legal assistance to debtors but that some States were not able to go as far in this as others. She observed that there was a policy argument to be made that the Convention should aim to assist children but that these same privileges should not extend to adults. She added that the Convention should be no more extended to debtors than to vulnerable adults on this matter. She stated that Article 14 *bis* was ambitious and that the European Community supported it, but that it would not be realistic to extend this rule to debtors. She stressed that under Article 14, free legal assistance could not be extended to debtors, but that the delegation of the European Community had no problem with ensuring that under the Article there was no discrimination against debtors. Thus, for example, regarding the text in square brackets in paragraph 5, she noted that debtors should also benefit from this principle. She noted that the discussions had touched on Article 14 *ter*, sub-paragraph (b), at the end of the previous day, and added that the delegation of the European Community also believed here that the debtor, and not just the creditor, should also benefit, that is, the provision should apply to

any applicant. She clarified that under Article 14 *ter*, sub-paragraph (a), there was the possibility of a means test which Contracting States can apply to a debtor, which implies that debtors have some rights under the Convention. She confirmed, however, that the European Community could not go along with extending Article 14 *bis* to debtors but agreed with extending Articles 14, paragraph 5, and 14 *ter*, sub-paragraph (b), to debtors to ensure non-discrimination.

6. **Ms Cameron** (Australia) took the floor to state that Australia's very strong view is that this Convention must afford the same level of free legal assistance to debtors in child support cases as it does to creditors. She stated that for the first few years of negotiations of this Convention, her delegation had assumed that this would be the case and that this assumption had been made because in the Australian system of maintenance, debtors and creditors are treated equally and have the same entitlements to administrative and legal assistance. She stated that when her delegation heard at the last Special Commission meeting that some States did not share this approach, they had returned home and thought very carefully about the arguments before coming to the conclusion that they now presented. She stated that her delegation had three reasons for this that she wanted to share. She stated the first point she wanted to make was that it is not correct to say that, by definition, creditors are in need of free legal assistance and debtors are not. She added that the most common reason that debtors would seek modification of a decision was that they had experienced a change of circumstances and could no longer afford to pay in accordance with the decision. She observed that this might be because they had become unemployed, been seriously injured or been incarcerated in jail. She added that many debtors in this situation have a genuine need for free legal assistance. She stated that her second point was that a debtor seeking a modification under the Convention would face the very same particular obstacles in bringing the application as a creditor. She noted that these obstacles include language differences, lack of familiarity with the legal system and not being physically present within the jurisdiction. She added that these factors, which justify the provision of legal assistance to creditors, would apply equally to debtors when they were applicants. She stated that her third point was that a failure to provide effective access to justice to debtors could be to the direct detriment of the creditor, and she illustrated this by way of example. She observed that if there were a foreign decision subject to recognition and enforcement in Australia but the debtor could no longer afford to pay, the Australian authorities would encourage the debtor to bring an application for modification in the State of origin. She stressed, however, that if the debtor were practically unable to bring such an application, the only option would be for the debtor to seek a stay of enforcement in Australia. She observed that such a stay meant that the creditor received nothing and added that if the debtor had been assisted to bring the application for modification in the State of origin, the authorities in that State might have reduced the maintenance to a level that the debtor could afford, and the creditor would benefit by continuing to receive maintenance payments. She concluded by urging delegations to consider these points very carefully as this was a very important issue.

7. **Ms Saettem** (Norway) stated that the Delegate of Australia had expressed her own delegation's view and added that her delegation supported the views of the United States of America and Canada. She observed that if the debtor believed his interests were being taken care of, he would be pleased to help the creditor.

8. **Mme Mansilla y Mejía** (Mexique) estime que si les deux parties savent comment s'y prendre pour s'acquitter de leurs obligations, la justice sera mieux desservie. Elle conclut en affirmant qu'en vertu du principe d'égalité et de bonne administration de la justice, elle est favorable à ce que l'on donne les mêmes protections au débiteur et au créancier.

9. **Mr Beaumont** (United Kingdom) stated that his delegation supported the statement by the delegation of the European Community. He added that as a matter of principle, the creditor is a child, special protection was needed for children, and that no equality of arms issue arose. He responded to the first point in the intervention by the Delegate of Australia by noting that if a debtor were in need, the debtor under Article 14 *ter*, sub-paragraph (a), might qualify for assistance under a means test, but that if the debtor had money he would not need free legal aid and there was no reason to use the public purse because he would be able to meet his maintenance obligations. He responded to the second point in the intervention by the Delegate of Australia by noting that it seemed nonsensical to extend free legal assistance to debtors in international cases when such assistance was not always extended to children in domestic cases. He queried on the enforcement point whether, if Australia ratified the Convention, debtors could seek a stay of judgment when the Convention would require it to be enforced. He observed that there was nothing in Articles 14 and 19 enabling a debtor to obtain free legal assistance, including for having the opportunity to be heard. He added that there was a policy reason not to give a debtor assistance: it would give debtors a reason to bring modification proceedings at no cost to them, which would be an invitation to use State money to lower their maintenance obligations, and this would not be in the interests of the child. He concluded by stating that it was not a solution to give a debtor free legal assistance unless the Article 14 *ter* means test was used.

10. **M. Heger** (Allemagne) appuie la proposition de la délégation de la Communauté européenne. Il tient également à répondre aux commentaires des délégations de l'Australie, de la Norvège ainsi que d'autres délégations. Il estime qu'il est vrai que le principe d'égalité est important, et que normalement, il ne devrait pas y avoir de différence de traitement dans l'attribution de l'aide judiciaire. Cependant, il souligne qu'il s'agit d'une situation distincte dans la présente Convention. Il note que dans cette dernière, il est nécessaire d'accorder une aide à l'enfant parce que l'enfant est dans une situation spéciale et il précise que cela n'est pas vrai pour tous les débiteurs. Il ajoute qu'il a entendu les commentaires de la délégation des États-Unis d'Amérique et d'autres, relatifs au fait que le bien-être des enfants doit être pris en compte. Il note cependant que l'on ne peut pas utiliser les arguments spécifiques aux enfants pour les autres débiteurs. Il renvoie aux commentaires de la délégation de la Suisse, qui a rappelé que la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants* établissait des distinctions et dérogeait ainsi au principe d'égalité. Il souligne, comme l'a fait la délégation du Royaume-Uni, qu'il faut respecter les différences et il apporte donc son appui au compromis proposé par la délégation de la Communauté européenne.

11. **Mme González Cofré** (Chili) attire l'attention de l'assemblée sur le Document de travail No 4 présenté par les pays d'Amérique latine. Elle indique qu'elle soutient en partie la proposition de la Communauté européenne. Elle note cependant certains points de divergences, concernant l'article 14, paragraphe 5, qui selon elle devrait inclure

aussi bien le débiteur que le créancier. En ce qui concerne l'article 14 *bis*, elle estime qu'il devrait s'appliquer au créancier seulement. Elle ajoute qu'elle ne refuse pas l'assistance judiciaire gratuite au débiteur puisqu'elle appuie la proposition de la délégation de la Communauté européenne en ce qui concerne l'article 14 *ter*. Elle indique qu'elle est d'accord avec la délégation de l'Allemagne, à savoir que la Convention Enlèvement d'enfants de 1980 établit certaines différences pour prévoir l'égalité des armes. Elle note que dans la présente Convention, la situation est différente.

12. **Mme Mansilla y Mejía** (Mexique) précise qu'il est important de tenir compte de l'égalité des conditions d'accès des débiteurs et créanciers. Elle explique que dans cette Convention on se bat pour les droits, et qu'il est donc important de se battre pour l'égalité.

13. **Ms Nind** (New Zealand) stated that it was obvious from her delegation's written comments that they shared the views of the delegations of Canada, Norway and the United States of America, that the parties must be treated equally and that the debtor would respond better if treated fairly. She added that her delegation was prepared to consider the European Community's proposal and to see if they could live with it.

14. **Mr Segal** (Israel) observed that there were two positions on modification applications by debtors. He noted that the first position was that the creditor could obtain free legal assistance but not the debtor, but that if such assistance were available in his place of residence he could benefit from it. On the issue of the means test, he observed that there may well be different standards in different places, and that if the debtor needed help, he could receive free legal assistance or pay what he was able. He observed that in Israel, a debtor could misuse the modification procedure but that a creditor could as well; for example, they could request modification of the obligation every two to three months. He noted that if a father continued to pay and asked for modification, he did not see how one could say he was not entitled to legal aid. He concluded that when it came to modification, it should be provided to both debtors and creditors, and added that on this issue a way must be found to put the parties on equal grounds.

15. **Mr Lixiao** (China) stated that they supported the principal of equality between foreign and domestic applicants and creditors and debtors. He noted that in Working Document No 5, there was no distinction between a creditor and a debtor. He added that in response to the comment by the Delegate of the United Kingdom, frivolous claims by a debtor could be addressed by a merits test.

16. **Mr Schütz** (Austria) stated that in Article 14, paragraph 5, the words "brought by the creditor" in square brackets should be deleted as they were not related to equality of arms. He observed that in the tradition of related Conventions, if there is a way to recover costs, there is need for a bond, deposit or security. He concluded that paragraph 5 should be left without the words in square brackets.

Document de travail / Working Document *No 2*

17. **The Chair** asked the delegation of the European Community to introduce their proposal in Working Document No 2 on Article 14, paragraph 5.

18. **Ms Lenzing** (European Community – Commission) stressed that Article 14, paragraph 5, was only partially related to the debtor discussion. She clarified that, rather, it covered a technical issue analysed in Preliminary Document No 3. She noted that her delegation believed the scope of paragraph 5 was too large, that this was inadvertent and not a policy decision. She noted that the language copied the language in the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* but that the scope of this Convention was larger because it covered establishment cases. She added that if the scope was extended to cover applications by both, creditors and debtors, it should be refined so as not to go further than existing Hague Conventions. She concluded by noting that in national procedural law, a security, deposit or bond is often required for enforcement and that had nothing to do with whether the creditor comes from a foreign country. She added that they should keep the achievements in the Hague Conventions on security for costs and redraft this paragraph in line with that and in line with national procedure.

19. **Mr Markus** (Switzerland) referred to the proposal by the European Community to change Article 14, paragraph 5, and noted that his delegation could go along with it. He stressed that his delegation was not against extending the rule to debtors and that debtors should also be protected. He noted that this was an international standard mentioned in the Conventions that the Delegate of the European Community had mentioned, and also in the Hague Convention of 1 March 1954 on civil procedure. He noted that this was a system to free parties from paying costs in advance, but added that there must also be a system to render it possible to recover costs in the case of an application freed from security, in order to recover money from the losing party, as is usually the case in European systems. He observed that courts ask for deposits for parties coming from abroad because it was a problem to recover those costs if the applicant lost the case and was not entitled to free legal assistance under the means test. He noted that Article 15 of the *Hague Convention of 25 October 1980 on International Access to Justice* has just such a system. He noted, however, that he could not find such a system in the Convention under negotiation, but if it was in there he would withdraw his comment.

20. **The Chair** noted that such a provision did exist in the Convention under negotiation. This could be found in Article 16, paragraph 1, on the scope of Chapter V on recognition and enforcement: "[…] A decision may include automatic adjustment by indexation and a requirement to pay arrears, retroactive maintenance or interest and a determination of costs or expenses." She added that it was her understanding that this would cover the cases the Delegate of Switzerland had mentioned. The Chair gave the floor to the delegation of the Commonwealth Secretariat.

21. **Mr McClean** (Commonwealth Secretariat) stated that his delegation had a different view of Article 14, paragraph 5, and that to them it applied in two cases. The first case was when there was an application between Central Authorities because of Chapter III of the Convention, and the second was when there was a direct application under Article 34 to a competent authority. He observed that it was unnecessary to have a security for costs on enforcement so they were really just talking about costs between Central Authorities. He added that there was a trend against security for costs and not just in the non-discrimination cases raised by the delegation of the European Community but also in line with removing procedural complexities. He added that with the new system under the Convention there would be no need for security for costs.

22. **The Chair** asked if there were any more interventions.

23. **Ms Cameron** (Australia) took the floor to respond to comments from other delegations, including those of the United Kingdom on the adequacy of the means test under Article 14 *ter*, sub-paragraph (a). She noted that many delegations did not believe this alone was adequate and queried what, otherwise, the point would be of Article 14. Regarding the stay of enforcement issue and Chapter VI, she noted that enforcement must be in line with the national law of the State so that if that law states the debtor can obtain a stay of enforcement if he cannot pay, then this would not be prohibited by the Convention. She observed that the delegation of the European Community viewed its proposal as a compromise but queried what this meant, for example whether removing "brought by the creditor" would have no application to the debtor. She stated that the proposal under Working Document No 2 for Article 14, paragraph 5, would narrow a debtor's protections and requested more explanation on protection for the debtor. She raised the further question of the proposed rule in Article 15 which would limit the ability of debtors to bring modification applications in their home jurisdiction, and that this would be unattractive to Australia if the debtor could not get assistance in the State of origin.

24. **Ms Bean** (United States of America) expressed her agreement with the comment by the delegation of Australia on Articles 14 and 15, noting that there had been a problem in bilaterals with the requesting State modifying downward. She observed that if there was no free legal assistance, this would foster disrespect for Article 15 and make it harder to implement. She clarified that her delegation's view on the debtor was not about concern for the debtor but rather for the child and making sure that he or she would receive maintenance. Ms Bean added that without assistance, the debtor would be less likely to pay and would hide. She stated that on the proposal by the delegation of the European Community in Working Document No 2, her delegation understood it as narrowing protection in respect of paying costs and expenses, and that the text was narrower than the current text. She added that it was not inadvertent necessarily to have used language from the 1973 Maintenance Convention and her delegation supported the comments made by the Representative of the Commonwealth Secretariat. She concluded that her delegation was not prepared to limit Article 14, paragraph 5.

25. **Mr Beaumont** (United Kingdom) stated that the purpose of Article 15 was to avoid conflicting judgments as much as possible. He asserted that no one was suggesting that there should be no access for debtors to Central Authorities, and that if the debtor had a reasonable reason for modification and were poor, he would obtain legal assistance from the Central Authority and assistance to go to court in the country of the creditor's habitual residence. He queried why one should wish to help well-off debtors obtain free legal advice, and why the whole world should accept the middle class receiving legal assistance. He stated that this understanding did not undermine Article 15, and that everyone was interested in protecting the interests of children, but it was not necessary to do so by giving middle class debtors legal aid. He added that the proposal by the delegation of China was disingenuous because they would use a means test. He noted that it would be acceptable for some States to give free legal assistance to debtors but this would not always be the case for Latin American States and European Community members. He responded to the comments from the Delegate of Australia by expressing hope that Chapter VI would not be used to not enforce an enforceable order. He added that the idea that a State had the discretion to stay an enforcement should not be encouraged and maximum efforts should be used to properly apply Chapter VI, not minimum ones.

26. **Ms Ménard** (Canada) stated that the delegation of Canada saw a link between Articles 14 and 15, and expressed that it would be difficult for Canada if there was a limit on not opening Article 14 to debtors in conjunction with the limits in Article 15.

27. **Mr Segal** (Israel), speaking on the use of a means and merits test, expressed concern that a State could declare that the test did not apply to cases arising abroad because there would be no way to test this. He added that this would deprive an individual of the ability to seek modification and, therefore, it would be legitimate and reasonable to put the creditor and the debtor on the same ground in the Convention.

28. **Ms Kochowska** (Poland) stated that her delegation did not believe there was a link between Articles 14 and 15 and that they shared the views of the delegations of the European Community and the United Kingdom. She noted that it was true under Article 15 that the debtor, if applying for modification, would be forced to do so in a foreign jurisdiction but that this was not a sufficient reason for legal aid. She stressed that it should not be forgotten that debtors will have to fight establishment decisions on maintenance obligations in foreign jurisdictions and that no one cared about protection in these cases, and that no one had said anything about Article 14, paragraph 1, in establishment cases in foreign jurisdictions.

29. **The Chair** stated that she wished to conclude the discussion on Article 14, paragraph 5, and that there was agreement that the text in square brackets should be deleted. She instructed the Drafting Committee to do so. She observed that there was some support for the proposal by the delegation of the European Community on Article 14, paragraph 5, but that it was not considerable, and therefore there would be no changes to Article 14, paragraph 5. She also noted that there was no agreement on Article 14 *bis* on extending legal assistance to debtors, and that the discussion remained open. She observed that on Article 14 *ter*, sub-paragraph (b), Australia raised the issue that debtors may only apply for modification but not for recognition and enforcement. She suggested that this issue be kept outstanding until discussions took place on Article 10. The Chair concluded that the discussions were finished with issues related to sufficient access to justice, observing that the questions were complex and the Articles linked. She felt the delegates were coming closer to compromise but still needed intense discussions. She noted that plenary meetings had limits on intense discussions and that because complex issues had arisen, she would suggest creating a Working Group to find compromise on access to justice with special concern for Article 14, and to then report to the plenary as soon as possible. She suggested that the Chair of the Working Group be Ms Danièle Ménard from the Canadian Department of Justice, known for her experience in international recovery of maintenance. She also suggested that delegations from States with a strong interest and views on the matter should meet. She stressed that the list was not closed, and that if other delegations had a strong wish to participate, they may, but observed that a small group would be better for intense discussions. She invited the delegations of the following States and Organisation to join the working party: Russian Federation, China, Japan, the United States of America, Canada, the European Community, Germany, France, the United Kingdom, Aus-

tralia, Chile, Brazil, Switzerland and Israel. She invited a representative of the Permanent Bureau, the co-*Rapporteurs*, and the Chair of the Drafting Committee to also attend, and asked if everyone could meet Sunday at the Permanent Bureau. She asked if this would be acceptable.

30. **The Deputy Secretary General** requested, as a matter of logistics, delegations from any States that were not listed by the Chair to please give prior notice of their intended participation and to approach the Chair. He stressed that this was only a matter of logistics.

31. **The Chair** announced a coffee break and requested the participants to return at 11.10 a.m.

32. After returning from the coffee break, **the Chair** gave the floor to the Deputy Secretary General.

33. **The Deputy Secretary General** stated that he was embarrassed to announce that the group photo would have to be postponed until sometime next week and that as a consequence the lunch break would now be free. He stated that the weather looked good at that moment but could change. He reminded the delegates to fill out the various reply forms for different receptions and excursions and to return them to the front desk.

Organismes publics (art. 2(4), 10 et 33) / Public bodies (Arts 2(4), 10 and 33)

34. **The Chair** stated that they would now start discussion on public bodies and invited the co-*Rapporteur* to speak on this topic.

35. **The co-*Rapporteur*** (Mrs Borrás) queried whether applications by public bodies could be included in the Convention. She stated that the answer was yes for the following reasons. First, although the main responsibility of maintenance lay with the parents, public bodies may be called upon to provide maintenance, either temporarily or definitively, in place of the parents. Second, public bodies were excluded in the 1973 Maintenance Convention *exequatur* but the provisions now had to be modernised, and in 1973 there was another Convention on applicable law, the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*. She noted that difficulties would have to be faced because systems around the world differ largely from one to another. She queried how the Convention could provide for applications by public bodies and responded that this was the objective of Article 2, paragraph 4, on scope. She noted that the Convention shall not only apply to cases between creditor and debtor, but also to cases where a public body will claim the reimbursement of benefits provided in place of maintenance. She observed that the inclusion was made in a flexible way: the public body shall have the possibility to make a claim under the Convention for the same cases accepted under Article 2, paragraphs 1 and 2, and that paragraph 1 was a mandatory basis only for children. She queried what it would mean if a Contracting State extended the Convention to a maintenance obligation arising, for example, from a relationship based on affinity: a public body, in respect of a State which has made the same declaration, may make a claim for reimbursement according to Article 33. She noted that it needed to be clarified whether a Contracting State may, while extending the application in this way, exclude the provisions of Article 33. She noted that the exclusion of claims by public bodies was not unlimited, but was only possible under the conditions established in Article 33, paragraph 1. She observed that these limitations had not yet been discussed in the plenary. The first limitation is on the nature of the application: only for recognition and enforcement (Art. 10, para. 1, sub-para. (a)) and for enforcement (Art. 10, para. 1, sub-para. (b)). She added that it excluded the possibility for a public body to establish a decision by making an application under the Convention, and that this was open for further discussion.

The *co-Rapporteur* described the second limitation as being that a public body must be either acting in place of the creditor, or seeking reimbursement for benefits already provided to the creditor in place of maintenance. She queried under which conditions the public body would have the right to act and responded that, according to Article 33, paragraph 2, this was governed by the law to which the body is subject. She added, however, that the existence of the maintenance obligation and the extent of the obligation were subject to the law applicable to the maintenance obligation, whether internal or arising from the Convention. She queried in what situations a public body would be able to seek recognition or claim enforcement and responded that paragraph 3 of Article 33 envisaged two possible situations: when the public body was the applicant in the proceedings in which the decision was rendered against the debtor, or when the decision had been given between the creditor and the debtor and the intervention of the public body was limited to the possibility of seeking recognition and enforcement of that decision, to the extent of the benefits already provided by the public body. She noted that there were three important elements: 1) the existence of a maintenance obligation between the creditor and the debtor, 2) the law applicable to the public body entitled to seek recognition and enforcement, and 3) that the creditor had received benefits in place of maintenance. She added that it has an effect: the public body cannot act on behalf of a creditor to obtain recognition and enforcement, but can only act when benefits have been effectively provided. She concluded by noting that paragraph 4 of Article 33 established the requirement to prove the fulfilment of the conditions of paragraphs 2 and 3, without prejudice to the requirements of Article 21. She added that the proof need only be provided "upon request" and may be "any document".

36. **The co-*Rapporteur*** (Ms Degeling) stated that the general principle of Article 8 was that there should be no costs imposed for services provided by the Central Authority, that the general principle of cost-free administrative services for applicants and Central Authorities was well supported, and consistent with the Convention's aims for a simple, low-cost and rapid procedure. She noted that paragraph 2 of Article 8 applied to the Central Authority in both the requesting and requested States, that the "applicant" was a person or public body making an application under Article 10. She noted that if the applicant were a public body, the same principle of cost-free services would apply according to the current Convention text. She observed that there was no support in the negotiations for making any distinction under Article 8, paragraph 2, in relation to Central Authority services, between individual applicants and public bodies as applicants seeking reimbursement for welfare support payments made to creditors or children. She added that it was considered undesirable to penalise a State by imposing charges simply because that State had provided maintenance to children in advance of recovery from the debtor. She stressed that the most important issue for public bodies would be to ensure that they have access to the Central Authority route for applications to the Central Authority services, free of cost to an applicant, as provided for in Article 8, paragraph 2. She queried whether there was any justification for treating public bodies differently to other applicants, for example, because public bodies have money and can afford to pay. She noted that the advantages of

excluding public bodies from Article 8 benefits included more recovery of child support, more quickly and more effectively. The disadvantages would include, for the requested State, that different procedures would apply and that this would be less efficient and more costly. She added that, for the requesting State, public bodies might not make an application if they were charged but this would depend on how much might be recovered from the debtor. She observed that the Commission had not decided the question of whether Articles 14 to 14 *ter* (Option 2) should apply to a public body and, in particular, whether free legal assistance should be provided to public bodies in accordance with Article 14 *bis*. She stated that effective access to procedures is an overarching principle of the Convention and queried how exclusion of public bodies could be justified. She noted, however, that there might be implications if public bodies could have access to procedures but that access would not be onerous for the system, the numbers would not be huge, public body applications would only be used when the debtor could pay, and that in many cases where the public body has paid benefits in place of maintenance it was because the debtor could not afford to pay anything. She noted that it would be a policy question to grant free legal assistance to a public body whose access to procedures is not impeded by lack of funds. She observed that some experts had stated that their public bodies always provide benefits to creditors and children if a debtor does not pay, and that reimbursement would be sought whenever possible. She added that these experts believed that their public bodies should receive all the benefits of any other applicant and should not be penalised for supporting creditors in need, whereas other experts said their countries would not provide free legal representation to bodies which were not in need. She concluded that there seemed to be no disagreement, however, that public bodies could receive administrative assistance and co-operation from Central Authorities.

37. **The Chair** opened the floor for discussion.

38. **Ms Lenzing** (European Community – Commission) stated that she would present the proposal of her delegation on public bodies in Working Document No 2. She observed that the delegation of the European Community suggested amendments to Article 33 by linking them to the amendment to Article 14 *bis*, paragraph 2. She stated that the amendments addressed two issues raised by the co-*Rapporteurs* on the position of public bodies, namely which applications would be available to public bodies under Article 33 and whether Articles 14 to 14 *ter* would apply. She noted that public bodies should be able to apply for recognition and enforcement, but that her delegation did not see the need to extend Article 33 to establishment cases, with the exception of cases falling under Article 17, paragraph 4. In those cases, a public body should be able to apply for establishment. She observed that there was no practical need for a public body to make a request for establishment abroad because, with the exception of cases falling under Article 17, paragraph 4, the applications would be made in their own jurisdictions. She noted that this was reflected in the amendment to Article 33 which read: "For the purposes of applications under Article 10(1)(a) and (b) and Article 17(4), […]." She responded to the comment made by the delegation of the Commonwealth Secretariat by noting that there was no application procedure in Article 17, paragraph 4, and the drafting of the amendment did not therefore fit, but that this could also be amended to refer to "covered by Article 17(4)". She stated that it should not make a difference if it were a public body or individual making an application, that public bodies should be entitled to free legal assistance under Articles 14 and 14 *bis* and that the requesting State should not be able to request reimbursement. She added that the main policy reason for this was the difference of systems worldwide, including within the European Community. She observed that in some systems, public bodies intervene systematically but that in other systems they are less active and have a different role and that it would normally be the parent or child who would make the application. She added that it would not be fair to exclude one system from free legal assistance, and that the only way to proceed would be to include public bodies under Article 14. She stated that this approach is supported by a general principle of private international law, which also underlies Article 8, namely that there should not be money flowing between States, as this would be too complicated. She stated that her delegation believed this aim was achieved in the drafting proposal by way of including a new paragraph 5 in the text which made it clear that public bodies would benefit from services, and drew attention to Article 14, paragraph 2, which cross-referenced Article 14 *bis* on free legal assistance. She cautioned that she did not know how Article 14 *bis* would look but for now it would contain exceptions in view of financial circumstances, and this would be hard to apply to public bodies because they are normally not in trouble financially.

39. **Ms Bean** (United States of America) stated that the proposal by the European Community was clear and that the delegation of the United States of America was in agreement on public bodies receiving free legal assistance, but that they needed to discuss which services they could receive which would expand what public bodies could do. She referred to her delegation's comments on public bodies in Preliminary Document No 36, noting that her delegation believed that the definition of "creditor" should include a public body acting in place of an individual creditor for all child support cases, including establishment, recognition, enforcement and modification, and that this was where they would go beyond the proposal by the European Community. She gave an example of the practical need to extend the definition in this way: so long as the public body's recovery were restricted to benefits provided in lieu of child maintenance, the delegation would see no reason to treat the public body any differently than the individual creditor. She added that they understood this to mean that the public body could only recover what the debtor would be obliged to pay as child support (or, for prior periods, would have been). If the public body provided higher benefits than the debtor would be ordered to pay under the relevant child support guidelines, it would not be able to recover the excess from the debtor; if it provided lower benefits than the debtor was or would have been ordered to pay the individual creditor, it would not be able to recover more than it paid. She gave as an example a case where public benefits went to a family and the public body could not locate the debtor for whatever reason, but then the family could no longer receive benefits, and the public body found the debtor. The public body in this case should be able to apply for the establishment of retroactive benefits. She concluded by noting that, as a technical drafting matter, Article 33, paragraph 1, used the phrase "benefits provided in lieu of maintenance" while Article 33, paragraph 2, used the phrase "benefits provided […] in place of maintenance". She suggested that "in lieu of" be used in both paragraphs.

40. **Mr Markus** (Switzerland) noted that the delegation of Switzerland agreed with the proposal by the European Community with the exception of one point of disagreement or one needing further explanation: whether public bodies should obtain free legal assistance under Article 14 *bis*, which is for persons in need. He stated that public bodies were not in need and did not need financial support which

would otherwise be nothing else but a subsidy paid to the requesting State from the requested State. He stated that he could not understand the possibility of such a subsidy between two States, and that the discussions were trying to protect children, not public bodies.

41. **Mme Gervais** (Canada) note, tel qu'indiqué au Document préliminaire No 36 dans les commentaires de la délégation du Canada, que le Canada est d'avis que les organismes publics doivent pouvoir présenter des demandes au titre du chapitre III, non seulement pour la reconnaissance et l'exécution d'une décision, mais aussi pour l'obtention ou la modification d'une décision. Elle suggère donc de modifier le projet de Convention en conséquence. Elle est d'avis qu'une autre modification devrait être apportée, et ce, indépendamment de la décision qui sera prise concernant la possibilité qu'auront les organismes publics de présenter d'autres catégories de demandes. Elle indique que cette modification consisterait à ajouter, au paragraphe premier de l'article 33, le mot « paiement » avant le mot « remboursement », pour couvrir les cas où l'organisme public est en droit de recevoir, en plus du remboursement des prestations qu'il a déjà fournies à titre d'aliments, le paiement des prestations qu'il fournit actuellement et de celles qu'il fournira dans le futur. Pour conclure, elle note que sa délégation est d'avis que les organismes publics, agissant à la place des créanciers d'aliments, ont vocation à bénéficier des mêmes conditions d'accès effectif aux procédures que ceux-ci, soit les conditions prévues à l'article 14. De même, elle est d'avis que les organismes publics doivent pouvoir bénéficier de l'assistance juridique gratuite pour les demandes d'aliments relatives aux enfants, au titre de l'article 14 *bis*.

42. **Mr Lixiao** (China) stated that the delegation of China shared the observation made by the Swiss delegation, adding that it was important that free legal assistance be made available for people who cannot pay legal fees associated with maintenance procedures. He added, however, that Working Document No 5 would be acceptable if legal assistance was limited to public bodies under Article 14, paragraph 8, as proposed in that Working Document.

43. **Mr Hellner** (Sweden) stated that his delegation had two observations regarding free legal assistance for public bodies. First, he stated that his delegation concurred with that of the European Community. He queried what would happen if assistance were not provided and responded that if public bodies incurred costs, either they would not perform enforcement which would send a message to debtors that they could get away with not paying maintenance, which would not be in the best interests of the child, or alternatively, the child might be the applicant with the public body in the background. He stressed that to resort to such methods was not an open way of doing things. He concluded that it would be best for the child if public bodies could benefit from free legal assistance.

44. **Mr Helin** (Finland) associated his delegation with the comments made by the delegations of Sweden, the European Community, and the United States of America. He noted that granting free legal assistance to public bodies for the recovery of child support did not mean there would be an extra burden for the requested State because the public body would be acting in place of an individual.

45. **Mr Segal** (Israel) responded to the comments of the delegations of Sweden and Finland by noting that their reasoning could also apply to public bodies seeking free legal assistance for establishment cases. He stressed that his delegation did not want public bodies not to be able to support applications. He noted that even today public bodies were able to ask for an attorney and that the expense of the attorney could be higher than the maintenance itself and therefore the same system applying to individuals should also apply to public bodies. He stressed that he did not want to see the Convention limited to individuals, nor free legal assistance limited to only recognition and enforcement.

46. **Mr Schütz** (Austria) took the floor to add thoughts to the discussion. He stated that the question at hand was not only about treating public bodies in the same way as children for maintenance. He noted, rather, that there were also issues of reciprocity, international co-operation and whether the cost of accountants' salaries could be saved if States are not burdened with incoming and outgoing invoices when the public body is on the other side. He stressed that a cost-benefit analysis should be considered, and that the right decision on the matter would not be reached if they only thought in terms of whether public bodies were rich or not, and children the only deserving recipients of free legal assistance.

47. **The Chair** stated that the majority of the delegations could accept the provision of free legal assistance to the extent that public bodies could apply for recognition and enforcement and that there were no objections to the proposal of the European Community to cover Article 17, paragraph 4, cases under their proposal in Working Document No 2. The Chair asked the Drafting Committee to make the necessary adjustments. She noted that there was no agreement on whether public bodies may get free legal assistance on establishment. She asked the Drafting Committee to revisit the Article in the light of the proposal of the United States of America on the language "in lieu of" in Preliminary Document No 36 and the changes proposed by the delegation of the European Community in Working Document No 2 on Article 17, paragraph 4. She suggested that if this was acceptable, Commission I would now turn to Article 20, and asked the co-*Rapporteur* to introduce the Article.

48. **Mrs Borrás** (co-*Rapporteur*) observed that a Contracting State can extend benefits under the Convention to other types of family under Article 2, paragraph 2, by making a declaration. She raised the question of whether Article 33 would apply to public bodies or its application excluded, if a State does extend the Convention to others, based on, for example, a family relationship, parentage, marriage or affinity, but that extension is not accepted by another State.

49. **Mr Segal** (Israel) proposed that the Working Group on the issue of free legal assistance be given the additional task of determining whether Article 33 would apply to public bodies in such a case.

50. **The Chair** noted that the Working Group had a different task, but that they would be free to deal with the matter. However, she stressed that their main task was to address the matter of free legal assistance in cases of child maintenance.

51. **Mr Hať apka** (European Community – Commission) stressed that it would only be fair if States were allowed to make tailor-made declarations to include or exclude areas for which the Convention extended to public bodies. He added that it might be possible for States to make declarations that public bodies would not be covered by extensions of the scope of application under Article 2, paragraph 2.

52. **The Chair** asked if there were any objections to this approach. As this was not the case, she asked the Drafting Committee to take note of this proposal and to draft accordingly. She stated that the discussion would move on to Article 20, the procedure for recognition and enforcement. She asked the co-*Rapporteur* (Mrs Borrás) to introduce Article 20.

53. **The co-*Rapporteur*** (Mrs Borrás) stated that the procedure on all applications for recognition and enforcement had to be simplified, speedy and low-cost. If this were not the case, the rights of creditors would not have real effect at the international level. She noted that the current situation was marked by complexity and costs associated with many procedures in international cases, but that at regional levels simplified systems had been developed, especially within the European Community. She noted that several attitudes existed towards procedures: that they should not interfere with domestic laws, and that a partially harmonised procedure for recognition and enforcement needs to be developed to give real effect to decisions at the international level. She noted that the second option is followed in Article 20, as was largely discussed on previous occasions. But since the Convention would not harmonise all of its aspects, the procedure on an application for recognition and enforcement would be governed by the law of the requested State, according to paragraph 1.

Paragraphs 2 and 3 dealt with the two different possibilities for the process of recognition and enforcement. The first concerned an application made through the Central Authority and what would signify that the application has been processed, and not rejected, by the requested Central Authority under Article 12. Paragraph 2 made reference to the two different possibilities according to the particularities of different States: referring the application to the competent authority or, if the Central Authority is the competent authority, to declare the enforceability of the application. In any case, Central Authorities and competent authorities must act "promptly" and "without delay", but not "immediately": that would not be realistic. The second case is when a direct application is made to the competent authority, which in paragraph 3 is also required to act "without delay". At this stage, as set out in paragraph 4, neither the applicant nor the respondent are entitled to make any submissions and the grounds to refuse the declaration of enforceability are limited. It remained to be decided however what the grounds would be: a maximum, Articles 17 and 19, or a minimum, Article 19, paragraph (a). Other compromise positions were possible, such as a combination of Articles 17 and 19.

Under paragraph 5, the declaration of enforceability or the registration of the decision should be "promptly" notified to the applicant and the respondent. They would have the possibility to challenge or appeal, depending on whether the act was made in an administrative or judicial procedure, "on fact", "on a point of law", or "on fact and on a point of law". This was not a review of the merits, which is prohibited by Article 24, or a new finding on facts, which is prohibited by Article 23. According to paragraph 6 of Article 20 a time limit would be established to lodge the challenge or appeal, and at the stage of appeal the procedure would be adversarial (*contradictoire*), which meant that both parties would have the opportunity to be heard. The only grounds for challenge or appeal were set out in paragraphs 7 and 8. According to paragraph 7, a challenge or appeal may be founded on: the grounds for refusing recognition and enforcement under Article 19; the bases for recognition and enforcement under Article 17; the authenticity, veracity and integrity of documents as set out in Article 21. Paragraph 8 provided for another ground, applicable only to the respondent, in the event the respondent has discharged the debt.

The applicant and the respondent would, under paragraph 9, be promptly notified of the decision in order to decide whether to accept the decision or consider further appeal under paragraph 10, where this is possible. In fact, paragraph 10 only allowed further appeal if permitted by the law of the State addressed, which seemed unnecessary given the general rule in paragraph 1 of Article 20. The question of any further elaboration of this rule remained open, taking into account the potential for abuse of appeal procedures. New possibilities for appeal could undermine the efficiency of the application of the Convention and have a negative effect on the mutual confidence of States, as well as increase costs and delays. In order to avoid these consequences, consideration could be given to other possibilities: prohibitions on stay, or suspension of enforcement while any appeal is pending, or limiting appeals to points of law.

Finally, paragraph 11 clarified that a Contracting State may put in place simpler or more expeditious procedures. There was no contradiction or overlap with Article 46, paragraph (b), the most effective rule. Article 20, paragraph 11, allowed a Contracting State unilaterally to introduce simpler procedures, whereas Article 46, paragraph (b), allowed this unilaterally or by an agreement between the requested and the requesting States.

In closing, the co-*Rapporteur* brought to the attention of the Drafting Committee the question of whether there were provisions in Article 20 from which Contracting States should not be allowed to derogate.

54. **La Présidente du Comité de rédaction** remercie la Présidente de lui avoir donné la parole. She noted that those who had participated in the Special Commission would recall that an extensive amount of time had been allotted to discuss Article 20 and that it was important that time was spent on it because this Article, along with Article 14, was the linchpin of the Convention. It emerged from lengthy debate that there were basic misunderstandings about what these provisions meant, and that clarity and enlightenment were gained from the discussions. She added that her remarks would underscore the most important aspects of the provision. She noted that the starting point of the Article was that the application had been processed and not rejected. It was then assumed that the application was accompanied by the documents listed in Article 21. She noted that this Article was not to be confused with Article 28, which stated that enforcement measures would take place according to national law, whereas this Article dealt with an intermediate procedure. She noted that this was the key element which caused confusion. She observed that the specifics of the provision were discussed at length by the co-*Rapporteur* (Mrs Borrás). However, on Article 20, paragraph 10, she stressed that further appeals were only possible if permitted by the law of the State addressed. She queried whether this provision was really necessary and whether there should be further elaboration to deal with potential abuses. She noted that in Preliminary Document No 36, a range of options for doing so were listed: stay or suspension of enforcement might be prohibited while an appeal is pending and the decision given on the challenge or appeal might be contested only by a single appeal. Such an appeal might be limited to points of law; if there were a stay or suspension of enforcement, there might be a requirement for the posting of a security or a bond; if the

decision were not taken within a specified period of time, there might be an obligation, on request, to provide an explanation for the delay. Turning to Article 20, paragraph 11, she noted that in a previous draft, this was found after paragraphs 2 and 3 but that the Drafting Committee could not understand why it had been placed there and that it was better at the end of the Article. She observed that this provision should be read in conjunction with Article 46, paragraph (b), an overlap, and wondered about the necessity of Article 20, paragraph 11. She also underscored the policy question raised by the co-*Rapporteur* on whether there would be provisions in the Article from which States could not derogate.

55. **The Chair** observed that they were not discussing Article 21, only Article 20, and that Article 20 would be discussed as outlined in the agenda: paragraphs 2 to 5 on registration and declaration of enforceability, paragraphs 5 to 9 on challenge and appeal, and paragraph 10 on further appeal. She added that they would address paragraph 11 in conjunction with Article 46, paragraph (b), and then move on to the documents required by Article 21. She suggested that they start with paragraphs 2 to 5, noting that the big policy decision here was the text in square brackets in paragraph 4 on extension of *ex officio* control. She noted that there were two alternatives but that other combinations had been heard. She gave the floor to the delegation of Japan.

56. **Mr Hayakawa** (Japan) noted that as to paragraph 4 of Article 20, the delegation of Japan had submitted written comments, which appeared in Preliminary Document No 36. His delegation thought that the second sentence of paragraph 4 would be problematic and should be deleted. The main concern was if a foreign order were recognised and enforced without giving the respondent an opportunity to defend himself, which would be a problem. So his delegation's first preference was therefore the deletion of the second sentence. He added, however, that having talked with some other delegations, his delegation realised that even if an order has been registered or declared enforceable without hearing the parties, there would not be serious problems as long as the enforcement of the registered or declared order can be stayed / suspended during the possible procedure of challenge and appeal. He noted that his delegation would like to make sure in one way or another that the enforcement of a registered or declared order can be stayed / suspended until the end of possible challenge and appeal procedures. With respect to the two bracketed options in paragraph 4 of Article 20, his delegation preferred Articles 17 and 19 to Article 19, paragraph (a), only. He stated that it was now understood that practically it would be difficult for the court to examine *ex officio* the points other than public policy at this stage, but his delegation still had some hesitations about limiting the ground for refusal to public policy, for it might happen that the court notices by chance some problems, for example fraud in the procedure, and in those cases, they do not want to force the court to declare enforceability.

57. **Ms Bean** (United States of America) stated that it was important for the goals of the Convention to produce results which are, among other things, prompt and fair, and that in Article 20, the procedures for recognition and enforcement should be efficient and swift. It would do nothing for children if the procedure to recognise and enforce a valid order in the requested State takes a long time. She added that her delegation felt that Article 20 provided a good balance between the desire to obtain swift justice for children and the desire to be fair to the debtor, to provide the debtor due process. Article 20 requires the competent authority to, without delay, declare the decision enforceable or register the decision for enforcement. Article 20, paragraph 4, addresses the level of *ex officio* review allowed at this part of the process. Article 20, paragraph 4, is one of the most important in the Convention. Because one of the main goals of the Convention is to simplify the process for recognition and enforcement of foreign child support orders, she stated that her delegation believed that the level of review at this stage should be minimal. She added that, at most, her delegation believed that the review should be limited to the public policy reasons specified in Article 19, paragraph (a). She stated that her delegation worried that if the level of *ex officio* review is expanded to all of Article 17 and all of Article 19, there could and would be significant delays in getting child support to needy families. There is no need for a review at this stage of an order that is regular on its face and which has no apparent conflict with public policy. The parties cannot present evidence at this stage anyway so an extended review is unnecessary. Also, she noted that all delegations had agreed on the need to trust each other and presume the requesting State is complying and sending good orders. Article 20, paragraph 5, requires that the respondent be notified of the declaration or registration immediately and may bring a challenge on fact or point of law. This provides the debtor with adequate notice and opportunity to bring up defences of Articles 17 and 19, Article 20, paragraph 7, and Article 20, paragraph 8, to protect his or her interests. She noted that in the experience of her delegation, a procedure such as that found in Article 20 provides for the swift, efficient registration or declaration of enforceability in the vast majority of cases, and correspondingly provides for the more timely collection of child support for children. At the same time, for the very small number of debtors that object to the recognition and enforcement, it provides ample notice and opportunity to object to the order on proper grounds and to litigate his or her objections.

58. **Ms Albuquerque Ferreira** (China) noted that in the previous Special Commissions, this Article was seen as an important problem and that there was no consensus or agreement on any of the provisions in the Article. She stressed that she believed matters of civil procedure law should be left to the law of the forum. She added, however, that to have this procedure here would import something into a legal system and that this could bring problems regarding rights of defence and the structure of internal legal systems. She stated that some of the provisions of this Article go far beyond the real object and purpose of this Convention, which are not to harmonise substantive rules. Amputating parts of internal law systems without properly pondering their specific principles and structures can lead to distortions and unfairness. She noted that the Chair of the Drafting Committee had stated that there were misunderstandings of the provisions of the Article, but stressed that requests must be dealt with by the judicial system. Regarding the grounds for the *ex officio* revision of the application, she stated that her delegation was strongly in favour of admitting as grounds for *ex officio* revision those specified in Articles 17 and 19 but could not accept to reduce the *ex officio* grounds to public policy. She also added that the second sentence of paragraph 4 was difficult to accept because it was unjustified and unbalanced. Celerity cannot take precedence over the fundamental procedural right of being heard (*contradictoire*). She added that, furthermore, in the system of her country, the Public Prosecutor is also entitled to make submissions (and to appeal). She added that among its legal duties are, precisely, those of representing public interests and the interests of minors. If submissions are allowed only at the appeal stage, and if the effect of the appeal is not of staying the procedures, enforcement will be carried out, which may have serious con-

sequences to the respondent, as well as to the applicant. She stressed that the delegates must not forget fundamental procedures of law. Regarding paragraph 6, she stated that her delegation would have a problem with the deadlines specified here because, Macau, as a region of China, needs to go through its internal mechanisms. The Special Administrative Region of Macau could not cope with the deadlines in relation to mainland China, but she confirmed that this could be solved with the addition of more days to the provision. She noted that her delegation had other observations on documentation, including issues with language and translations but that their main concerns were with paragraph 4: that her delegation could not accept reducing *ex officio* review to public policy, nor could it accept the second sentence.

59. **Mr Markus** (Switzerland) recalled paragraph 2, which says that when there is an application for recognition and enforcement it should be referred promptly by the Central Authority to the competent authority. He noted that in Switzerland there is a very efficient practice where, before starting execution procedures, the Central Authority contacts the debtor to reach an amicable solution and invites him to make a "voluntary" payment. The debtor agrees to make a payment when a declaration from the country of the creditor is available. He stressed that this procedure is not always used, for example, sometimes the debtor does not co-operate at all and this gets referred to competent authorities for recognition and enforcement. He noted that he would propose a small change to this paragraph, making reference to Article 6, paragraph 2, sub-paragraph (d), encouraging amicable solutions by Central Authorities. He added that he would submit a written submission. He stated that on paragraph 4 it was his understanding that the delegations of Japan and China said there should be a possibility to suspend or stay enforcement during appeals. He stated that there should be quick and efficient proceedings for recognition and enforcement, but that this must somehow be balanced with an efficient appeal and that the appeal should not hinder execution of access to assets. He added that if a declaration of enforcement is registered without hearing the respondent, and that there should be a stay on execution when there is an appeal, then this says nothing about securing the assets of the respondent. He raised a last point on paragraph 4 in relation to the text between square brackets, and stated that the delegation of Switzerland did not have strong feelings but tended to support including just Article 19, paragraph (a), for the reasons given by the United States of America, to have effective proceedings, and that Article 19, paragraph (a), seems a better way to do this.

60. **The Chair** asked the delegation of Switzerland to submit its proposals in writing, and gave the floor to the delegation of Canada.

61. **Mme Ménard** (Canada) explique qu'une procédure administrative simplifiée a été mise en place au Canada. Elle indique que l'article 20 est important pour sa délégation et ajoute que sa délégation appuie le présent libellé de l'article 20. Elle note que sa délégation ne veut pas d'une révision d'office à l'enregistrement et que si une telle révision était prévue, elle devrait être limitée aux motifs de l'article 19, paragraphe (a). Quant aux motifs prévus à l'article 17 et autres paragraphes de l'article 19, elle note qu'ils ne feront qu'allonger les délais. Elle ajoute cependant qu'il serait possible de tenir compte des motifs des articles 17 et 19 au moment de la contestation et de l'appel par le défendeur. Elle rappelle que la future Convention est basée sur la confiance et la coopération entre les États.

62. **Ms Lenzing** (European Community – Commission) stated that this was an important Article for achieving the objectives of the Convention, and that it was not an option to leave it to national law. She added that the procedure to recognise and enforce a judgment had to be speedy and low-cost. She observed that some delegations had concerns with the text in Article 20 and that they were willing to work on some aspects of this to address those concerns, but that they needed to be certain that additional flexibility of the Article did not jeopardise speedy, low-cost procedures, which is the objective of the Article. Regarding the text in square brackets, she stated that she saw the benefits of limiting grounds of refusal to aspects of public policy. She added that it would be useful to examine the full grounds of refusal in the second stage. She noted that she was receptive to the argument by three delegations that the rights of defence have to be guaranteed in a two-step procedure. She noted that under the rules applicable within the European Community, during the delay for an appeal against a declaration of enforceability and until any such appeal had been determined, no enforcement takes place. She added that she was open to specifying and clarifying this. She also noted that it was possible that the current deadline of 30 days was too restrictive for some delegations and that the European Community could be flexible in this regard. She concluded by noting that if they worked to guarantee that the rights of defence are protected, they could elaborate on paragraph 11 and take care of concerns regarding Article 20 without giving up the principle of a speedy and effective procedure.

63. **Ms Kulikova** (Russian Federation) stated that her delegation was among those who believed that procedures for recognition and enforcement should be those of the law of the State addressed. She observed that the Russian Federation system for recognition and enforcement of foreign judgments is balanced and for the creditor and debtor, not lengthy. She noted that her country has general rules of recognition and enforcement for all civil matters and, thus, had problems with Article 20. On paragraph 2, she stated that they did not understand what is meant by competent authority because in Russia this authority is the court which has its own rules. She added that paragraphs 2, 3 and 4 do not coincide with these rules, and that they are not recognised in the Russian system at all. She noted that the step of registration in paragraph 2 does not exist in Russia. She observed that many countries may have different systems and that it would therefore be difficult to build a unified system of recognition and enforcement. She added that, rather, the main task was to ensure that applications for recognition and enforcement are dealt with efficiently and effectively, but that this should be done in line with national legislation. She added that her delegation was flexible on this and could find common ground up to paragraph 5, clarifying that the paragraphs after paragraph 6 were not yet being discussed. She stressed her delegation's agreement with the delegation of China that national procedures should be used for applications for recognition and enforcement.

The meeting was closed 1.15 p.m.

Procès-verbal No 5

Minutes No 5

Séance du vendredi 9 novembre 2007 (après-midi)

Meeting of Friday 9 November 2007 (afternoon)

La séance est ouverte à 14 h 45 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 20(1) à / to *(5) (suite /* cont.*)*

1. **The Chair** welcomed the delegations and indicated that discussions would continue in relation to the first five paragraphs of Article 20.

2. **Ms Cameron** (Australia) thanked the Chair and referred the delegations to Preliminary Document No 36 which contained a proposal that had been made by the Australian delegation in relation to paragraph 4 of Article 20 and supporting reasons. It was suggested that the grounds on which the competent authority in the requested State may review *ex officio* an application for recognition and enforcement should exclude Article 17, but include paragraphs (a), (c) and (d) of Article 19. Ms Cameron explained that in Australia, the competent authority for recognition and enforcement would likely be aware that there was either an inconsistent decision in existence, or, proceedings involving the same parties and for the same purpose as those pending before an authority in the State addressed, *i.e.*, that the circumstances in paragraphs (c) and (d) of Article 19 had been met. She noted that the competent authority would likely be aware of such circumstances without the need for submissions from either party.

Ms Cameron noted that if the competent authority was not able to refuse to make a declaration or registration, then the authority could be forced to register a decision that would be inconsistent with a prior decision that was also registered for enforcement. She explained that it would then be requisite upon the debtor to institute proceedings to bring a challenge in respect of any declaration and registration.

Ms Cameron further stated that in relation to the proposal that had been made by the delegation of Switzerland concerning Article 20, paragraph 2, sub-paragraph (a), Australia would consider accepting an addition to that Article to allow for a process of reaching amicable solutions between the parties, but that it had to be made in writing. Ms Cameron also said that in relation to any proposal that would include a stay on the enforcement of any decision during an appeal period, the delegation of Australia was open to that possibility but considered that the imposition of a stay should be optional.

3. **Ms Fisher** (International Association of Women Judges) thanked the Chair and informed her that the International Association of Women Judges wished to comment on paragraph 4 of Article 20. Ms Fisher expressed a concern that if any *ex officio* review were to be done by a judicial authority, there would be consequences that a judge would then have to be informed about to decide whether the conditions of Articles 17 and 19 had been met, possibly prolonging proceedings.

Ms Fisher did not consider that Articles 17 and 19 were necessary for the application of paragraph 4 of Article 20 but that if they would be the standard of an *ex officio* review, then extra words would need to be added into the Article stating for the benefit of a judicial authority that any application was to be determined on the face of the documents.

4. **Mr Segal** (Israel) thanked the Chair and stated that Article 20 was somewhat of a landmark in this Convention as it was the basis of co-operation between the State addressed and the requesting State. He further said that it was the debtor who should raise any objections to recognition and enforcement because otherwise, the court would have to act on behalf of the requesting State and a judge may have to consider Articles 17 and 19 without even being asked by a debtor to do so.

Mr Segal believed that some flexibility was needed with regard to the internal law of each State. He said that by adding further procedures into the recognition and enforcement process, the Convention would not retain its essence and would be impacting upon what was the duty of the State addressed. He stated that some procedural matters could be addressed by the internal law of the State addressed.

5. **Ms Bean** (United States of America) referred to the possibility of granting a stay of the recognition and enforcement of a decision until an appeal period had ended and even possibly until any appeal had been finalised. She further stated that a time frame should be incorporated into the Convention in relation to the period of existence of any stay. She made the suggestion of 120 days. Ms Bean indicated however that the delegation of the United States of America would want a prohibition on any stays for a further appeal.

6. **Ms Ménard** (Canada) thanked the Chair and noted that the delegation of Canada had not previously discussed the possibility of making a stay available within Article 20. She stated that the delegation of Canada would prefer that the Convention not contain any provisions concerning stays but that their delegation could accept the availability of a stay, so long as it were limited in time and utilised in circumstances where the debtor may otherwise be disadvantaged.

7. **Mme Mansilla y Mejía** (Mexique) estime qu'il serait beaucoup plus judicieux de prévoir une procédure relative à la reconnaissance et à l'exécution dans le texte de la Convention. Cependant, elle note que beaucoup d'objections ont été exprimées. En outre, elle indique qu'il existe au Mexique une Convention en matière de reconnaissance et d'exécution des décisions qui, sur un grand nombre de points, serait en contradiction avec l'article 20 de l'actuel avant-projet de Convention. Aussi le texte de l'avant-projet de Convention, tel qu'il est rédigé actuellement, leur poserait-il de grandes difficultés. C'est pourquoi elle pense qu'il serait préférable de s'en remettre au droit interne.

8. **The Chair** thanked Ms Mansilla y Mejía and asked whether any delegations wished to make any further interventions. She summarised the discussion that had occurred and stated that even though no agreement or consensus on

Procès-verbal/Minutes No 5

policy had been reached, there were many States who appeared interested in restricting a refusal for recognition and enforcement in paragraph 4 of Article 20 to those considerations outlined in paragraph (a) of Article 19. She requested that the delegation of Switzerland prepare written proposals of their verbal proposals that had been made and indicated her belief that delegations appeared willing and ready to work on solutions for paragraph 4 of Article 20.

Article 20(6) à (9) et article 21(1) et (2) – Document préliminaire No 36 et Document de travail No 7 / Article 20(6) to (9) and Article 21(1) and (2) – Preliminary Document No 36 and Working Document No 7

9. **The Chair** announced that the plenary would move on to the second stage of the process in relation to recognition and enforcement and which involved paragraphs 6 to 9 of Article 20, the challenge and appeal stage. She noted that some States had observed an error in paragraph 6 because within the text, the reference to paragraph 6 should have been a reference to paragraph 5. She invited the First Secretary, Mr Philippe Lortie, to explain the proposal in relation to the amendment to sub-paragraph (c) of paragraph 7 of Article 20.

10. **Mr Lortie** (First Secretary) commenced by stating that the Permanent Bureau suggested that the word "veracity" be removed from sub-paragraph (c) of paragraph 7 of Article 20 because an appeal on the basis of the veracity of a document would be contrary to Articles 23 (Finding of fact) and 24 (No review of the merits). Mr Lortie further explained that its removal was also an issue because of information technology considerations. He noted that the only aspects of a document that could be tampered with were the authenticity and integrity of a document, for example, whether parts of the document had been truncated, missed or deleted. The veracity of a document was not a feature that could be tampered with or tested physically. Mr Lortie also mentioned the addition of paragraph 2 of Article 21, relating to the summary of decisions, to paragraph 7 of Article 20. He stated that the addition of this provision to Article 20 was important so that an abstract or extract of a decision drawn up by the competent authority of the State of origin in lieu of a complete text of a decision would also be subject to the procedure under Article 20, paragraph 3, and that a complete copy of the decision would be made available within the context of that procedure.

11. **The Chair** thanked Mr Lortie and noted that his latter comments in relation to paragraph 2 of Article 21 would also be discussed by the plenary after discussion on Article 20 had been completed.

12. **Mr Lortie** (First Secretary) added that the comments he had made on behalf of the Permanent Bureau were available within Preliminary Document No 36.

13. **Ms Cameron** (Australia) thanked the Chair and explained the proposal suggested by the delegation of Australia for an amendment to paragraph 8 of Article 20. She noted that this proposal was contained within Preliminary Document No 36 although it had since been amended and the amended version could be read in Working Document No 7. Ms Cameron observed that in its form as it appeared in the preliminary draft Convention, paragraph 8 of Article 20 implied that an appeal could be brought against recognition and enforcement only where the application was for payments fallen due in the past. Ms Cameron recognised that recognition and enforcement might be applied for in respect of payments that fell due in the past as well as payments due in the future and that the revision proposed by the Australian delegation therefore took that into account.

14. **Ms Bean** (United States of America) thanked the Chair and directed her intervention to the Drafting Committee with respect to the phrase "challenge or appeal". She noted that the delegation of the United States of America had previously suggested that the phrase "or appeal" either be deleted or replaced with the phrase "appeal at first level" so that it would be clear that the "appeal" referred to was not an appeal from another body.

15. **Mr Markus** (Switzerland) responded to the proposal by the Permanent Bureau with respect to the removal of the word "veracity" from sub-paragraph (c) of paragraph 7 of Article 20. He stated that the immediate reaction of the Swiss delegation would be that they would support the deletion of the word.

In relation to paragraph 1 of Article 21, Mr Markus stated that he was concerned with the separate requirement for a document showing the amount of any arrears and the date such amount was calculated, referred to in sub-paragraph (d). He did not consider it necessary to extend the procedure of Article 20, paragraph 7, sub-paragraph (c). He also noted that sometimes the nature of the information contained within a document such as that referred to in sub-paragraph (d) could also be confirmed by the parties themselves.

Mr Markus further noted that the categories of documents referred to in sub-paragraphs (a) and (b) and the question of enforceability was a question that was normally decided by a court. A document similar to that referred to in sub-paragraph (d) would not be something that would stem from a court however, and so he expressed some concern about the accuracy and authority of such a document. He acknowledged that States were able to make a declaration with regards to accepting summaries under paragraph 2 of Article 21 but he nevertheless considered that Article 21, paragraph 1, sub-paragraph (d), remained a problem.

16. **Ms Ménard** (Canada) stated that in relation to Article 20, paragraph 7, sub-paragraph (c), the Canadian delegation agreed with the proposal made by the Permanent Bureau to delete the word "veracity". She also supported the proposal made by the Permanent Bureau that paragraph 7 of Article 20 include a reference to paragraph 2 of Article 21. She considered that that would be an improvement of the text.

17. **The Chair** asked whether there were any reactions to Working Document No 7 or in relation to the suggestion that had been made by the delegation of the United States of America concerning the appeal process referred to in paragraph 6 of Article 20.

18. **M. Cieza** (Pérou) souhaiterait des clarifications quant à la version espagnole du texte de l'avant-projet de Convention. En effet, suite à l'intervention de la Déléguée des États-Unis d'Amérique, il s'interroge sur l'opportunité des termes choisis dans la version espagnole. Bien qu'il ne s'agisse que d'un Document de travail pour le moment, il souligne que le choix des termes est important pour l'application ultérieure du texte.

Il indique qu'il existe en droit péruvien des différences selon le terme retenu. Ainsi, en droit péruvien, l'« *oposición* » désigne la procédure d'appel. Le mot « *apelación* » est normalement utilisé pour désigner un certain type de

recours. Il se demande quels sont les termes qu'il faudrait retenir : « *apelación* » ou bien « *oposición* ».

19. **Mme Borrás** (co-Rapporteur) répond au Délégué du Pérou que le même problème se pose en anglais puisque les termes « *challenge* » et « *appeal* » sont utilisés dans le but d'opérer une distinction essentielle entre les procédures administratives et les procédures judiciaires. Elle indique qu'en espagnol une distinction similaire s'impose. Aussi le terme « *apelación* » s'applique-t-il dans le cadre des procédures judiciaires, alors que pour les procédures administratives, le terme le plus approprié a semblé être « *oposición* ». Elle constate que le terme « *impugnación* » aurait aussi pu être retenu mais « *oposición* » semblait mieux adapté pour désigner une procédure par laquelle on s'oppose à ce qui a été dit en première instance. Elle précise que l'« *oposición* » ne s'applique pas aux recours judiciaires.

20. **Mr Hayakawa** (Japan) thanked the Chair and stated that in relation to paragraph 6 of Article 20, his delegation believed that this paragraph should be deleted as those considerations should be left to the internal law of a State to deal with. He believed that the respective 30-day and 60-day periods outlined in paragraph 6 were too long and that if they were to be shortened then the Japanese delegation would consider its support of this paragraph.

21. **The Chair** thanked the delegation of Japan for the comments and stated that if the deadlines for the lodging of a challenge or an appeal were shortened then that may be an expeditious procedure under the definition of paragraph 11 of Article 20. She noted however that this had to be discussed further with the Drafting Committee, especially in relation to note 8 of the revised preliminary draft Convention.

22. **Mrs Hoang Oanh** (Viet Nam) thanked the Chair and stated that her delegation was supportive of the comments that had been made by the delegations of Japan and the Russian Federation during the morning meeting. With regards to the recognition and enforcement of decisions, she noted that every State had laws for the recognition and enforcement of foreign judgments and so therefore queried the utility of several articles of the revised preliminary draft Convention. She also considered that in comparison to the internal laws of many States, the grounds for a refusal to recognise and enforce a decision within the preliminary draft Convention (Art. 19) were quite broad and sufficient.

23. **Ms Bean** (United States of America) thanked the Chair and the delegation of Australia for Working Document No 7. The delegation of the United States of America expressed their support for that proposal.

24. **Ms Nind** (New Zealand) expressed the support of the delegation of New Zealand for the proposal that had been made by the delegation of Australia in Working Document No 7.

25. **The Chair** asked the delegations whether there were any objections to the proposal made by the delegation of Australia in relation to paragraph 8 of Article 20 (Work. Doc. No 7). She also asked the delegations whether there were any remarks in relation to removing the word "veracity" as appeared in sub-paragraph (c) of paragraph 7 of Article 20 and as had been suggested by the Permanent Bureau.

26. **Mme Mansilla y Mejía** (Mexique) remercie la Présidente et indique que le Mexique est favorable à la proposition de suppression du mot "véracité". Elle reconnaît qu'un document peut être authentique mais il ne dit pas forcément la vérité.

27. **The Chair** thanked Ms Mansilla y Mejía and requested the views of delegates with regard to changing the wording of the phrase "challenge or appeal" as contained in Article 20.

28. **Mr Segal** (Israel) clarified that the word "appeal" within the legal system in Israel was usually used, but when referring to a review of an administrative order by a court, it was not referred to as an appeal. He suggested using the word "review" instead of "appeal", which had a specific terminology within some legal systems.

29. **Mr Schütz** (Austria) thanked the Chair and stated in response to the intervention made by the delegation of Israel that replacing the word "appeal" with the word "review" could make matters more complex for some States that regard a "review" as something completely different. He indicated his belief that the phrase "challenge or appeal" reflected a compromise that had previously been reached.

30. **Ms Nind** (New Zealand) queried whether the concern voiced by the delegation of the United States of America in relation to use of the phrase "or appeal" could be addressed by changing the wording that was currently contained in the Explanatory Report to the Convention.

31. **Mr Beaumont** (United Kingdom) stated that the word "review" had just as much technical meaning as the word "appeal". He explained that in common law a "review" did not apply to judicial proceedings but to administrative proceedings. He also thought that there should be an explanation within the Explanatory Report to the Convention of the usage of the word.

32. **Ms Bean** (United States of America) stated that the delegation of the United States of America could accept an addition to the Explanatory Report to the Convention of an explanation of the usage of the words.

33. **M. Moraes Soares** (Brésil) indique que le Brésil est disposé à soutenir la proposition du Bureau Permanent en faveur de la suppression du mot « véracité » au paragraphe 7, alinéa (c). Il indique en outre que le Brésil approuve la proposition de la délégation de l'Australie relative à l'article 20, paragraphe 8, en ce qu'elle permet de raccourcir le texte en anglais.

34. **The Chair** asked whether there were any other interventions. She concluded that Working Document No 7 proposed by the delegation of Australia had been accepted. She also concluded that the phrase "challenge or appeal" would remain in the text of the revised preliminary draft Convention and that an explanation of the usage of the words would be incorporated into the Explanatory Report to the Convention. She noted that there was some support for deleting the word "veracity" as proposed by the Permanent Bureau, but that discussions that had been held on sub-paragraph (d) of paragraph 1 of Article 21 and paragraph 2 of Article 21 had not reached a consensus.

35. **Mr Lortie** (First Secretary) thanked the Chair and stated that the Delegate of Switzerland had made a valid point with regard to his discussion of Article 21, paragraph 1, sub-paragraph (d).

Mr Lortie noted that anyone could draw up a document showing the amount of any arrears and that one solution was for a statement of arrears to be drawn up by a compe-

tent authority. He noted however that some States did not support this solution.

In relation to the suggestion to add paragraph 2 of Article 21 to paragraph 7 of Article 20, Mr Lortie explained that the operation of the text would then be that if an authority in the requested State had a problem with the extract or abstract of a decision provided under paragraph 2 of Article 21, then paragraph 3 of Article 21 would be invoked in order for that authority to receive a complete copy. Mr Lortie believed that was a sufficient manner by which an authority could obtain the complete information.

36. **The Chair** asked the plenary whether there were any other remarks.

37. **Mr Hať apka** (European Community – Commission) stated that in relation to the point that had been made by the Delegate of Switzerland regarding the document showing the amount of any arrears under paragraph (d) of Article 21, a contextual awareness of the process would need to be made. He explained that a document of the type referred to in Article 21, paragraph 1, sub-paragraph (d), usually set up by an applicant creditor, would only play a role in a "challenge or appeal" within paragraph 8 of Article 20 and which would involve a complete challenge to that document. Any question of partial fulfilment by the debtor of a decision against him related to the next stage of proceedings, where the debtor may prove that he had paid for example, and not in the recognition and enforcement stage of proceedings. In this way he explained that the term "veracity" in that context had no adverse effect in the manner that the Delegate of Switzerland had feared.

38. **Mr Markus** (Switzerland) thanked the Chair and expressed his gratitude for the explanation that had been provided by Mr Lortie and Mr Hať apka in relation to the provisions that he had previously discussed. He stated that regardless of this, his reservations regarding the word "veracity" within the context of the text of the revised preliminary draft Convention remained. His first concern arose in circumstances where the full amount of an order had already been fulfilled. He stated that the operation of the word "veracity" had to be seen clearly in this context because if the debtor did fulfil his maintenance obligations then the applicant creditor could nevertheless provide a document under Article 21, paragraph 1, sub-paragraph (d), evidencing that on the face of it, there remained an outstanding amount to be paid. He explained that in any subsequent challenge or appeal, there existed a contradiction between the options open to the debtor to found an appeal under paragraph 8 of Article 20 or under the "veracity" of that document under sub-paragraph (c) of paragraph 7 of Article 20.

Mr Markus then expressed his second concern with regards to the word "veracity". At least at the stage of execution, the debtor must have the opportunity to evidence that payments had in fact been made, perhaps during the stage of execution, or, perhaps the outstanding maintenance was not calculated correctly from the outset. He explained that within Article 20, paragraph 7, sub-paragraph (c), if the word "veracity" were deleted, then the debtor would not be allowed to found a challenge or appeal based on the veracity of the document and in this way, such deletion would create contradictions within the text. He therefore considered that the reference to Article 21, paragraph 1, sub-paragraph (d), in Article 20, paragraph 7, sub-paragraph (c), could be deleted. He stated that within paragraph 7, he supported the retention of the references to any document transmitted in accordance with sub-paragraphs (a) and (b) of paragraph 1 of Article 20.

In relation to paragraph 2 of Article 21, Mr Markus stated that he was not sure whether he had interpreted Mr Lortie correctly, but that if his interpretation was correct, there would be no issues with accepting an abstract or extract of a decision, unless a State had made a declaration under Article 58. He stated that whilst this seemed satisfactory, he believed that the complete text of a decision should have precedence over an extract or an abstract because otherwise it may create problems in that what was being relied upon was not the complete decision.

39. **The Chair** admitted that discussion had become complicated and that in relation to an abstract or extract of a decision, the discussion that would follow would include this topic and so for the time being, the meeting would continue with discussion concerning the word "veracity". In relation to the veracity of a document showing the amount of any arrears, as referred to in sub-paragraph (d) of paragraph 1 of Article 21, she considered that since the proposal made by the delegation of Australia and contained in Working Document No 7 had been agreed upon, it may also affect this discussion. She explained that since Working Document No 7 enabled the same type of challenge as a challenge to the veracity of a document, she considered that the word "veracity" could be deleted from sub-paragraph (c) of paragraph 7 of Article 20 and that the reference to sub-paragraph (d) of paragraph 1 of Article 21 should be retained in sub-paragraph (c) of paragraph 7 of Article 20. In that respect, she indicated that a document showing the amount of arrears could be the subject of a challenge or appeal under both Article 20, paragraph 7, sub-paragraph (c), and Article 20, paragraph 8.

40. **Mr Schütz** (Austria) thanked the Chair and supported her comments which he said were convincing, and so the word "veracity" could be deleted and discussion would continue.

Article 20(10) – Document préliminaire / Preliminary Document *No 36*

41. **The Chair** concluded that discussions on Article 20, paragraphs (6) to (9), would be suspended for the time being and that discussions would move on to paragraph 10 of Article 20. She reiterated the comments that had been made by the Chair of the Drafting Committee that as it then stood, paragraph 10 did not add much to Article 20. She informed the delegations of the suggestions and comments in relation to this provision that could be found in Preliminary Document No 36. She welcomed the position of delegates with respect to these suggestions.

42. **Ms Cameron** (Australia) thanked the Chair and stated that the Drafting Committee had made four suggestions that were reflected in Preliminary Document No 36. Ms Cameron noted that the delegation of Australia supported only the final suggestion. In relation to the prohibition of a stay or suspension of enforcement whilst an appeal was pending, she stated that Australia was not prepared to accept that suggestion and that whilst a stay or suspension of enforcement should not be automatic, it should certainly not be prohibited.

43. **Ms Albuquerque Ferreira** (China) stated that her delegation was opposed to the proposal made by the Drafting Committee in Preliminary Document No 36. She stated that she had thought an understanding had been reached in relation to the status of stays within the Convention. She

stated that paragraph 10 of Article 20 was simply a reference to the internal law of a State but that nevertheless it created conflict with what had been stated to be the law applicable to maintenance obligations in accordance with the preliminary draft Protocol. She therefore had issues with paragraph 10 of Article 20 itself, even without the consideration of adding anything further, as had been suggested by the Drafting Committee.

44. **Mr Segal** (Israel) supported the comments made by the delegation of Australia and stated that he could only see some benefit arising out of point 4 of the proposal of the Drafting Committee, but that all should be left for each State to decide.

45. **Mr Beaumont** (United Kingdom) thanked the Chair and clarified that firstly, the Drafting Committee had not made any proposals. Secondly, he stated that in earlier discussions, decisions had started to be reached with respect to what to do in the early stages of proceedings and with respect to stays of proceedings being mandatory or discretionary stays. He suggested that one answer would be to leave all of this to the national law of a State but noted that some delegations had considered it appropriate to decide how exactly to regulate the issues.

In relation to the question of stays and in relation to the first challenge or appeal of any recognition and enforcement of a maintenance decision, he reminded the meeting that a proposal was to be expected from the delegation of Switzerland. He noted however that even if the Commission decided to exclude the availability of a stay whilst a challenge or appeal was pending, there must be protective measures alongside the rules concerning stays to ensure that the assets of the debtor do not leave the jurisdiction for example.

46. **Ms Albuquerque Ferreira** (China) stated that her delegation was also waiting for the written proposal from the delegation of Switzerland as they wished to see the formulation of that proposal with respect to the question of challenges or appeals in order to consider whether, whilst a challenge or appeal was pending, there should be a stay of proceedings. In relation to protective measures, she agreed with the Delegate of the United Kingdom but noted that most jurisdictions already had such rules.

47. **Ms Bean** (United States of America) said that the delegation of the United States of America agreed with the comments that had been made by the Delegate of the United Kingdom. She noted that if the meeting was still considering the possibility of a stay of proceedings within paragraph 6 of Article 20, then it should not be taken off the table with respect to also appearing within paragraph 10 of Article 20.

48. **The Chair** thanked the delegations and noted that since there were no further interventions on the questions posed by the Drafting Committee, she concluded that there was no consensus for support for any amendment along the lines posed by the Drafting Committee.

49. **Mr Markus** (Switzerland) clarified that the written proposal to be produced by the delegation of Switzerland would be tabled as soon as possible and that he supported the comments that had been made by the Delegate of the United Kingdom.

50. **The Chair** stated that the delegations would look forward to the Swiss proposal and that the meeting would move on to discussion of paragraph 11 of Article 20.

Article 20(11)

51. **The Chair** summarised that the first question that had been raised was whether such a provision was necessary because more simple and expeditious procedures were allowed for under Article 46, paragraph (b). She noted that the Drafting Committee had added a footnote (note 8) to paragraph 11, which asked whether there were any provisions in Article 20 from which Contracting States should not be allowed to derogate.

52. **Ms Cameron** (Australia) thanked the Chair and stated that the delegation of Australia considered that the requirements for notification under paragraphs 5 and 9 of Article 20 were specifically important and should be guaranteed.

53. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that the delegation of the European Community had no firm position with regard to paragraph 11 of Article 20. She stated that this was to be expected since the remainder of Article 20 was not yet finalised. She proffered support however for the leeway that paragraph 11 enabled in relation to more simple and expeditious procedures. With regard to the question from the delegation of Japan and whether a Contracting State would be able to use shorter time frames for the lodging of a challenge or appeal, the Delegate of the European Community noted that minimum time frames would need to exist so as to protect the defendant. She expressed that she was not sure what such minimum time frames would be and so that both paragraphs 6 and 11 of Article 20 should be left open at that moment so as to enable further thinking.

54. **Ms Bean** (United States of America) thanked the Chair and stated that at first she was not able to locate the comments of the delegation of the United States of America in relation to paragraph 11 of Article 20 within Preliminary Document No 36, but that she later located them under the comments relating to paragraph 4. She stated that the delegation of the United States of America had no view as to whether the reference to simplified processes should be included within paragraph (b) of Article 46 or within paragraph 11 of Article 20. However, she considered that there had to be due process and suggested the addition of the following phrase to the end of paragraph 11: "[…] so long as the procedures include a ground for challenge or appeal under paragraphs 7 to 9 of Article 20".

55. **Mr Bonomi** (Switzerland) stated that the delegation of Switzerland supported the previous two interventions and that the right of defence needed to be preserved.

56. **The Chair** concluded that Article 20 was not yet clear and that it would be left open, although she noted that the majority of views from delegates were that there were at least some provisions from which no derogation should be allowed.

Pause / Break

57. **The Chair** welcomed back the delegations and summarised the discussions that had occurred with respect to Article 20. In relation to paragraph 11 of Article 20, concerning simpler or more expeditious procedures, she referred to the comments of the delegations of Australia and the United States of America with regards to the minimum requirements of Article 20 and from which parties should not be able to derogate, especially from requirements of due process. To this extent she requested that the Drafting Committee prepare a text that would guarantee due process

Procès-verbal/Minutes No 5

and that could not be derogated from. She asked that this proposal be inserted into the text of the revised preliminary draft Convention within square brackets. In relation to the Drafting Committee, the Chair nominated James Ding, Delegate of China as a member.

58. **Mr Ding** (China) indicated his acceptance at becoming a member of this Drafting Committee.

Article 21

59. **The Chair** invited Commission I to consider Article 21 relating to the documents required on procedures for recognition and enforcement. She introduced Mrs Borrás (co-*Rapporteur*), who would consider the underlying principles of the revised preliminary draft Convention.

60. **The co-*Rapporteur*** (Mrs Borrás) commenced by reminding the delegations that an application for recognition and enforcement had to be accompanied by the documents specified in Article 21. She noted that Article 21 presented two different solutions. Paragraph 1 of Article 21 presented a classical solution whilst paragraph 2 presented a more flexible solution.

In relation to paragraph 1, the co-Rapporteur stated that parties seeking recognition and enforcement must produce certain documents. A distinction has to be made between the documents required in all circumstances and those required only depending on the circumstances. In all circumstances they were to produce "a complete text of the decision" (Art. 21(1)(a)), not just the final order of the court (*dispositif*), as well as "a document stating that the decision [was] enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) [were] met" (Art. 21(1)(b)).

Mrs Borrás noted that it was not stated whether the complete text of the decision was an original or a copy, thus making the provision medium-neutral. Further, in accordance with paragraph 3 of Article 21, upon a challenge or appeal under Article 20, paragraph 7, sub-paragraph (c), or upon request by the competent authority in the requested State, a complete copy of the document concerned and certified by the competent authority of the State of origin shall be provided.

Mrs Borrás further explained that the other documents referred to in sub-paragraphs (c) to (f) of Article 21, paragraph 1, only need to be produced if necessary under the circumstances of the case.

Under paragraph 2 of Article 21, there was an increased amount of flexibility since States could receive an extract (verbatim excerpt) or an abstract (summary or *resumé*) of a decision drawn up by the competent authority in the State of origin in lieu of a complete text of the decision. In order for this to be acceptable, the State had to make a declaration to that effect under Article 58. Mrs Borrás noted that this solution had many advantages including the saving of translation costs and the non-inclusion of any unnecessary data.

61. **The Chair** thanked Mrs Borrás for her introduction and opened the floor to the delegation of Australia to commence discussions.

62. **Ms Cameron** (Australia) thanked the Chair and stated that the delegation of Australia had a proposal in relation to sub-paragraph (b) of paragraph 1 of Article 21. She noted that this was contained in Preliminary Document No 36 and related to the requirement to provide a document certifying an administrative authority. She explained that the proposal was in order to enable a Contracting State to make a declaration under Article 58 that such a document certifying an administrative authority was not required. A declaration would be voluntary she noted, but would be in accordance with a spirit of trust and understanding.

63. **Ms John** (Switzerland) referred to Preliminary Document No 36 which contained the comments of the delegation of Switzerland in relation to Article 21. These comments stated that "[f]or proceedings in courts of law and before other authorities, it [was] essential that certain documents [were] available in their original version or as a certified copy. Ordinary photocopies [were] not sufficient for this purpose. In addition, for the application to be efficiently processed, these documents should be systematically submitted together with the application and not produced only at the request of the competent authority, as [was] provided for in Article 21(3) as it [then provided]".

Ms John then made a further comment with regards to a power of attorney. She noted that a power of attorney was also required for the procedures of Article 20 and that that document therefore needed to be referenced somewhere within Article 21. Ms John asked the Chair whether she wished her to comment further on the power of attorney at that moment.

64. **The Chair** stated that the power of attorney would be discussed at another time, probably on Thursday 15 November 2007.

65. **M. Cieza** (Pérou) ne sait pas s'il convient de parler d'entrave ou d'empêchement vis-à-vis de l'article 21, paragraphe 1, alinéa (a). En effet, l'avant-projet de Convention fait référence au « texte complet de la décision ». Mais le projet de Rapport explicatif (Doc. prél. No 32, para. 553) indique, d'une part, qu'il n'est pas exigé que le document soit une copie certifiée conforme et, d'autre part, que le document peut prendre la forme d'un courrier électronique. Or au Pérou, aux fins de la reconnaissance et l'exécution des jugements étrangers, le texte de la décision ne peut être une simple copie ; il doit revêtir la forme d'une copie certifiée conforme. Cependant, l'avant-projet de Convention indique que dans certaines situations, en cas d'opposition, recours ou appel, l'autorité requise peut solliciter une copie certifiée conforme (art. 21(3)). Aussi le Délégué du Pérou émet-il des inquiétudes et ne sait pas quelle solution doit être appliquée.

66. **Mme González Cofré** (Chili) indique que sa délégation éprouve les mêmes préoccupations que celles émises par la délégation de la Suisse. Dans leur propre système, l'original ou la copie certifiée conforme de la décision sont exigés. Cependant, elle note que l'article 21, paragraphe 3, prévoit la possibilité de demander une telle copie certifiée conforme.

67. **Ms Albuquerque Ferreira** (China) stated that her delegation shared the same concerns as had been expressed by the delegation of Switzerland with regards to the provision of photocopied documents under this Article. She considered the increased speed at which the whole process would occur if originals or certified copies were automatically provided with the application and not only at the request of the competent authority. She further noted that she did not understand the proposal that had been made by the delegation of Australia and she sought clarification of this proposal.

68. **Mr Schütz** (Austria) stated that his delegation had similar problems with sub-paragraph (e) of paragraph 1 of Article 21. He noted that the text in this sub-paragraph was not clear, nor did it become clear when one read the Explanatory Report of the draft Convention. He suggested that a clear and reliable text was required. The second remark that Mr Schütz made was in relation to sub-paragraph (e) and paragraph 557 of Preliminary Document No 32, which stated that in terms of fulfilling the requirements of sub-paragraph (e), "[a]ny informal document, such as an e-mail or a fax would suffice". Mr Schütz stated that this would not be the case in Austria because under the internal law of Austria, any document provided must be an official document and the development of any indexation calculations would normally be certified and attached to the back of a decision. He therefore believed that the Explanatory Report to the draft Convention was misleading, especially in relation to Austria.

69. **Ms Lenzing** (European Community – Commission) thanked the Chair and suggested that in relation to paragraph 2, the mechanism that enabled Contracting States to accept an extract or an abstract of a decision drawn up by the competent authority of the State of origin in lieu of a complete text of the decision could be altered slightly. She stated that paragraph 2 was supported but that for members of the European Community, instead of making a declaration under Article 58, the obligation could be to instead "inform". She stated that this would make it easier for Member States of the European Community who see the benefit of providing an extract to do so. She believed that it would allow for a more flexible approach and the important factor would not be to declare but to "inform".

70. **Ms Cameron** (Australia) thanked the Chair and stated that she would respond to the query from the Delegate of China in relation to the proposal of the delegation of Australia in Preliminary Document No 36. Ms Cameron explained that the existing text in Article 21, paragraph 1, sub-paragraph (b), required that, "in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) [were] met" must accompany an application for recognition and enforcement under Article 20. Ms Cameron went on to state that under paragraph 3 of Article 16, "[…] 'administrative authority' [meant] a public body whose decisions, under the law of the State where it [was] established – (a) may be made subject of an appeal to or review by a judicial authority; and (b) [would] have the same force and effect as a decision of a judicial authority on the same matter".

Ms Cameron therefore explained that every time a State used an administrative system to make a decision related to maintenance obligations, that State would need to send a document stating that the requirements under paragraph 3 of Article 16 were met. Ms Cameron reiterated that the delegation of Australia had spoken against this provision previously but that other delegates wished for it to remain within the text of the revised preliminary draft Convention. She indicated that the delegation of Australia compromised on that point but that it would still like to see some flexibility within the rule so that a declaration could be made and Contracting States would be able to elect that they did not require such a document to be drafted and sent along with an application for recognition and enforcement.

71. **Ms Fisher** (International Association of Women Judges) thanked the Chair and stated that in her position as co-Chair of the Forms Committee, she wished to make some remarks in relation to the form that had been drafted for the purposes of Article 21.

72. **The Chair** noted that at that stage, an introduction only of the provisions was being made and a discussion of content would follow.

73. **Ms Fisher** (International Association of Women Judges) stated that although she would not discuss the content of the form that had been drafted and could be found on pages 9 and following of Preliminary Document No 31-B, she wished to recommend the position of the Forms Working Group and the usage of this form, "Abstract of a Decision". She stated that there had been wide representation on the Forms Working Group and that she recommended and put forward the Abstract of a Decision form in her capacity as a sitting judge in two countries, including sitting in one country that involved proceedings taking place in two languages.

Ms Fisher stated that the form was an advance on those forms previously available and since this Convention aimed to look to the future, the forms produced for use under the Convention were similarly forward-looking. The Abstract of a Decision form would not have to be mandatory and was flexible but could certainly be included as part of the Annex to the Convention. Its effect would be to reduce translation costs and increase the authority of the information contained within the document. Ms Fisher recommended the Abstract of a Decision form on the basis that it was fail-safe thanks to an amended provision that enabled any competent authority to receive a full copy of an order if necessary (Art. 21(3)). Ms Fisher recommended the form on those grounds and suggested that it be added to the Annex to the Convention.

74. **Mr Beaumont** (United Kingdom) thanked the Chair and stated that his delegation had sympathy for the delegation of Australia with respect to paragraph 3 of Article 16. He believed that evidencing that the requirements of paragraph 3 of Article 16 had been met was unnecessary, but if sub-paragraph (b) of paragraph 1 of Article 21 were to remain, then it would make sense for those States that were familiar with administrative authorities to not have to make certifications regarding their administrative authorities when other States were aware of and familiar with the administrative authorities in those States.

Mr Beaumont then said that he had less sympathy for the position expressed by the delegation of Switzerland. He explained that Article 21 had been discussed for four to five years and that no square brackets were found around this Article. He stated that matters concerning this Article had already been discussed, that they had already been given enough discussion and that a balance had been struck between costs and efficiency and judicial scrupulousness. Mr Beaumont recalled that the aim of the Convention was to be swift and contain no complicated requirements with respect to documentary requirements. As an example he suggested that there would be no insistence for a formal document or full extract in relation to indexation as was referred to in Article 20, paragraph 1, sub-paragraph (e).

Mr Beaumont noted that the aim was to change the law of States so that the vast majority of cases that would not be contested do not clog up the system and the public purse. He insisted that complexities should not be created for over 90% of cases in the first stage of recognition and enforcement. He acknowledged the conditions and grounds for the refusal of recognition and enforcement contained in Articles 17 and 19 but noted that the main aim of the Convention was to contain an almost automatic stage of initial recognition and enforcement and that the second stage would involve contested proceedings. He stated that if that

Procès-verbal/Minutes No 5

was what was still envisaged, discussion about Article 21 in the way the delegation of Switzerland had framed its comments in Preliminary Document No 36 should not take place. He emphasised that the process of recognition and enforcement should be kept simple.

75. **M. Heger** (Allemagne) se rallie à l'opinion exprimée par plusieurs délégations, dont la délégation de l'Autriche. En effet, de son point de vue, la référence à « un texte complet » dans l'article 21, paragraphe 1, alinéa (a), implique que le texte de la décision doit être un écrit. Il craint en effet que, si l'on suit le raisonnement du Délégué du Royaume-Uni selon lequel les courriels et autres formes sont admis, on ne puisse, dans de tels cas, vérifier l'authenticité et s'assurer de l'identité de la personne qui a envoyé le document. Il constate un trop grand nombre de lacunes même s'il reconnaît qu'il convient de se tourner vers l'avenir.

Il précise qu'il n'est pas nécessaire de modifier le texte de l'article 21, paragraphe 1, alinéa (a), car il n'est pas exclu que le texte complet auquel il est fait référence puisse prendre la forme, dans quelques années, voire plus tôt en ce qui concerne la Communauté européenne, d'un courriel. C'est pourquoi le libellé actuel de la disposition est satisfaisant.

Néanmoins, il partage l'opinion émise par les délégations de la Suisse et de l'Autriche concernant le paragraphe contenu dans le projet de Rapport explicatif (Doc. prél. No 32, para. 557) disant qu'un simple courriel pourrait suffire. Il indique que dans le système allemand, c'est au juge que revient la tâche décrite à l'article 21, paragraphe 1, alinéa (e), et non aux autorités administratives. Une certaine sécurité est donc nécessaire. Même s'il admet que dans quelques années les documents électroniques pourraient être admis, à l'heure actuelle, le projet de Rapport explicatif est encore trop optimiste et va trop loin.

76. **Mr Markus** (Switzerland) thanked the Chair and stated that the delegation of Switzerland supported the proposal made by the delegation of Australia in relation to sub-paragraph (b) of paragraph 1 of Article 21 as it appeared in Preliminary Document No 36. He followed the argument made by both the delegation of Australia and the delegation of the United Kingdom that the production of a document to state that the requirements of paragraph 3 of Article 16 had been met was superfluous. He agreed that it would not make sense that applications for recognition and enforcement of a decision by an administrative authority always be supported by confirmations of the nature outlined in Article 21, paragraph 1, sub-paragraph (b). Mr Markus suggested that perhaps the Permanent Bureau could take up the role of confirming whether Contracting States met the requirements of paragraph 3 of Article 16. In relation to the overall operation of Article 21, Mr Markus noted that the delegation of Switzerland supported the comments that had been made by the delegations of Austria and Germany.

77. **Ms Bean** (United States of America) agreed with the comments made by the delegate of the United Kingdom on the issue of providing certified copies of documents in the first instance. She agreed that the system should be as simple as possible. In relation to the proposal made by the delegation of Australia regarding sub-paragraph (b) of paragraph 1 of Article 21, the delegation of the United States of America agreed in principle with the language outlined in Preliminary Document No 36 and queried whether the idea could also be extracted to apply to documents in judicial proceedings. For example, she noted that in the United States of America, many of the child support agencies had stated that they did not require certain documents. She also suggested that the Permanent Bureau could also be informed as to what documents a Contracting State did or did not require and could maintain a summary of this information.

In relation to Article 21, paragraph 1, sub-paragraph (c), Ms Bean stated that the delegation of the United States of America did not disagree with the proposal that the delegation of Australia had made, also in Preliminary Document No 36, but considered that the drafting of the provision needed to be a little clearer.

78. **Ms Escutin** (Philippines) announced that she supported the proposal of the delegation of Australia in Preliminary Document No 36 because it simplified proceedings. Ms Escutin noted that the competent authority in the Philippines could recognise and accept original documents, certified copies or any equivalent documents including electronic versions of documents.

79. **Mme Mansilla y Mejía** (Mexique) note qu'en matière de transmission de documents, la simplicité et la rapidité sont des éléments essentiels. Cependant, ils ne peuvent aller à l'encontre de la sécurité juridique. Par conséquent, elle pense qu'il convient de prévoir l'authentification et la certification de ces documents.

80. **Mr Schütz** (Austria) thanked the Chair and said that he agreed with the delegation of the United Kingdom in relation to the aim to adopt a Convention that was for the future. However, he stated that Commission I was also obliged to produce a clear text and something that Contracting States would be able to interpret and understand in the same manner. He recalled Article 13 of the *Hague Convention of 30 June 2005 on Choice of Court Agreements*, an instrument that he believed had been drafted with some clarity, and emphasised that the related provision in this revised preliminary draft Convention was not clear and required clarification in order for all States to interpret the text in the same way.

81. **Mr Lortie** (First Secretary) thanked the Chair and noted that the Drafting Committee was given a mandate by the Special Commission to develop a text that would be medium-neutral and that this was what the Drafting Committee had done. He emphasised that upon a challenge or appeal under sub-paragraph (c) of paragraph 7 of Article 20, or upon request by the competent authority in the requested State, a complete copy of a document, certified by the competent authority in the State of origin, could be provided under paragraph 3 of Article 21. He noted that this meets the needs of both those that worked in the paper world and those that worked in the electronic world and he reiterated the comments that had just been made by the Delegate from the Philippines to the effect that the authorities in the Philippines could accept electronic versions of documents.

Mr Lortie noted that although it was rare that a copy of a decision was challenged, it can occur, usually in relation to the quantum of maintenance and the determination of parentage. Often the defendant in the requested State was aware of the decision because he had already been notified of the decision for appeal purposes and had either seen the text of the decision or was familiar with it. If it was not what had been seen before, then the text of the decision could be challenged or appealed under paragraph 7 of Article 20.

Mr Lortie observed that this procedure was similar to many legal provisions in many countries and all were comfortable with the provision that had been reflected here in the text of the revised preliminary draft Convention. Mr Lortie expressed his hope that his explanation had been clear and encouraged delegates to speak with him directly had they any further queries.

82. **M. Voulgaris** (Grèce) revient sur la discussion relative aux documents électroniques. Il demande si le formulaire joint à l'extrait de décision pourrait contenir des références électroniques permettant à l'État requis d'accéder au texte complet et authentifié de la décision par le biais d'un site sécurisé.

83. **M. Lortie** (Premier secrétaire) remercie M. Voulgaris. Il indique qu'il s'agit effectivement d'une question intéressante qui démontre une certaine connaissance technique du Délégué de la Grèce en la matière.

84. **M. Voulgaris** (Grèce) remercie M. Lortie pour le compliment. Il le corrige cependant en indiquant qu'il se considère plutôt « e-analphabète ».

85. **M. Lortie** (Premier secrétaire) souligne l'intérêt de l'idée avancée par M. Voulgaris pour l'avenir. En effet, selon lui, il serait tout à fait imaginable que les parties, lors de la transmission du texte de la décision, indiquent l'adresse d'un site Internet accompagné d'un nom d'utilisateur et d'un mot de passe permettant à l'autorité compétente d'accéder au texte complet de la décision de la même façon qu'il est possible d'accéder à des registres immobiliers en ligne. Il reconnaît cependant que de nombreuses années s'écouleront avant que ce ne soit réalisable. Néanmoins, il estime qu'il est important qu'en vertu de la Convention, les parties aient la possibilité de s'entendre pour transmettre des références électroniques sans avoir à envoyer les documents. Ce serait sans aucun doute la façon la plus économique et la plus efficace de procéder.

86. **Ms Lenzing** (European Community – Commission) thanked the Chair and as a result of the differing opinions that had been expressed by the delegations, made a suggestion in relation to requests for complete certified copies of decisions. She stated that the means to request a complete certified copy were already provided for but that an information requirement could also be added in order to specify that a Contracting State required something specific. For example, she suggested that an information note could be produced and so that, in the case of a State such as Switzerland, it would be known that there was no need to send documents enclosed within an application for recognition and enforcement unless a certified copy had also been enclosed.

Ms Lenzing suggested that if such a procedure for the provision of information were made flexible enough, Contracting States would be able to withdraw any information or declaration at a later time when they had, for example, more faith in electronic communications. Ms Lenzing said that in this way, the differences in opinions throughout the delegations could be addressed in a manner that was not unduly burdensome. This process could be drafted along the line of the proposal made by the delegation of Australia in relation to Article 21, paragraph 1, sub-paragraph (b), *i.e.*, that a Contracting State did or did not require certain documents.

87. **Mme González Cofré** (Chili) estime que la solution proposée par la délégation de la Communauté européenne est plus souple. Elle constate que l'objectif est effectivement d'éviter les retards. Or, dans un certain nombre de pays, comme le Pérou, une copie certifiée conforme du document est requise. Néanmoins, elle pense que davantage de souplesse dans le système permettrait d'éviter les retards actuellement constatés en pratique dans le cadre de la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger*. Aussi la proposition de la Communauté européenne lui semble-t-elle adaptée. Plutôt que d'avoir recours à des déclarations, elle pense qu'il serait possible de revenir à l'exigence de copie certifiée conforme.

88. **Mr Schütz** (Austria) thanked the Chair and in relation to the verbal proposal that had just been made by the Delegate from the European Community, he stated that it did appear to be a solution that would suit all delegates but that it remained somewhat confusing in relation to the provision of complete certified copies of decisions or abstracts or extracts of decisions. He said that in the case where a complete certified copy of a decision was provided, it may operate in the opposite manner, so that an authority in a Contracting State could indicate that they would be satisfied with an extract or abstract of a decision. But then in another case he noted that the requirements of the authority in a Contracting State could be different. Mr Schütz stated that he had more sympathy for a State that made declarations under a system that could be more officially tracked and that could be used in all cases, not just relevant for one case and then different in another.

89. **M. Cieza** (Pérou) indique que le Pérou est disposé à accepter la proposition de la Communauté européenne concernant le système des déclarations afin d'éviter cet écueil de la copie certifiée conforme. Il pense en effet que la simplification des procédures est essentielle dans ce contexte et doit donc être recherchée.

Il remarque que, dans de nombreux pays, des documents sont falsifiés ou faux. Il regrette cette situation mais constate qu'il s'agit d'une réalité. Certains pays sont déjà parvenus à résoudre ces problèmes ; d'autres sont en cours de simplification de leurs procédures judiciaires. Cependant, tous les États ne suivent pas le même rythme et il convient d'en tenir compte. Il pense que le système de déclarations proposé pourrait permettre de résoudre certaines difficultés.

90. **Mr Bonomi** (Switzerland) thanked the Chair and confirmed that the view of the delegation of Switzerland was that the verbal solution proposed by the Delegate of the European Community should solve many of the problems and differences that had arisen between States. In relation to the comments that had been made by the Delegate of Austria, he stated that the delegation of Switzerland had no fixed position. Mr Bonomi said that the delegation of Switzerland wished to see a written formulation of a text based on the suggestion that had been made by the Delegate of the European Community and that was neutral in relation to the availability of electronic processes for the provision of documents that supported applications. Mr Bonomi suggested that a neutral formulation could be made along the same vein as related provisions within the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*.

Mr Bonomi informed the delegation that the delegation of Switzerland would prepare a written proposal that would follow the proposal that the delegation of Australia had made in relation to administrative authorities and sub-paragraph (b) of paragraph 1 of Article 21.

91. **Mr Beaumont** (United Kingdom) thanked the Chair and thanked the Delegate of the European Community for suggesting a constructive way to move discussions forward. He considered that an information requirement in the manner suggested by the European Community was more suitable than a series of declarations. He suggested that Contracting States might ultimately be able to move forward to a process where no formal documents would even be required at the first stage of recognition and enforcement. Mr Beaumont pointed out however that the text currently being discussed was not in square brackets and so had gathered an overall consensus of support in the past.

92. **Mr Segal** (Israel) also wished to support the verbal proposal that had been made by the European Community. He noted that it stemmed from paragraph 3 of Article 21, the basis of which was to inform the debtor that a decision based on some authority had been made or to provide the competent authority of a Contracting State with a document that had not previously been required or that had not been previously seen.

Mr Segal referred to sub-paragraph (c) of paragraph 7 of Article 20, which enabled a challenge or appeal to be grounded on the authenticity, veracity or integrity of a document. He suggested that no formal requirements for the certification of documents be included within the informational note process suggested by the European Community unless a challenge had been made under the abovementioned sub-paragraph.

93. **M. Voulgaris** (Grèce) remarque que beaucoup pensent que les documents électroniques ne sont pas fiables. Or il s'avère que les documents électroniques offrent au contraire davantage de sécurité que les documents sur support papier. Cependant, il faudra du temps pour que les mentalités changent à cet égard. Il appuie son propos en prenant l'exemple de l'avion et en indiquant que certains se trompent encore en pensant qu'il est moins risqué de prendre sa voiture plutôt que l'avion.

94. **The Chair** thanked the delegations for their discussion and queried whether there were any further interventions. In relation to the increasing orientation of systems and procedures towards electronic means, she stated that the day before she left to come to The Hague, she participated in information technology training at the Ministry where she was shown an entire system of electronic case management. She stated that she was informed at this training that the system had been technically available for a year but the personnel is still having a hard time getting used to the idea of using an electronic system. She said that she herself had hesitations about using electronic faxes for reasons of authenticity and security, and she was told by experts of electronic communications that these were in fact more secure forms of sending communications. She expressed that she did not wish to draw correlations between the requirements of and what occurred within a Ministry of Justice and the requirements of judicial authorities under this Convention.

The Chair emphasised that the aim was for this Convention to last and be applicable for a long time. She noted the considerable support for the verbal proposal made by the Delegate of the European Community in relation to a system of declarations or informational notes for the notification of the individual requirements of Contracting States, especially in relation to the certification of documents. She agreed that these informational notes could be provided to the Permanent Bureau and withdrawn at any later stage. She therefore summarised that a flexible system needed to be created to account for changes in the future.

In relation to the proposal of the delegation of Australia with regards to sub-paragraph (b) of paragraph 1 of Article 21, she noted that it had been supported and that the delegation of Switzerland was going to provide a further written proposal that would go further than the Australian proposal. She confirmed with the delegation of Switzerland that this was correct.

95. **Mr Markus** (Switzerland) confirmed that the understanding of the Chair was correct.

96. **The Chair** continued and stated that even though there was overall support for the Australian proposal, she would wait until the written proposal from the delegation of Switzerland was produced. In the meantime, the Chair confirmed that the proposal made by the delegation of Australia in Preliminary Document No 36 would not be sent to the Drafting Committee. She would however send to the Drafting Committee the comments made by the delegation of the United States of America in relation to Article 21, paragraph 1, sub-paragraph (c), in order to improve the clarity of this sub-paragraph.

Article 20 (Doc. trav. / Work. Docs *Nos 13, 14)*

97. **The Chair** then stated that instead of moving on to discussion in relation to direct applications, discussion would return to consider Article 20. She summarised that Working Document No 13 was received from the delegation of Switzerland and that Working Document No 14 was received from the delegation of China. She gave the floor to the delegation of Switzerland in order to introduce their working document.

98. **Mr Markus** (Switzerland) asked whether the Chair wished for him to discuss Working Document No 13.

99. **The Chair** confirmed that this understanding was correct.

100. **Mr Markus** (Switzerland) commenced discussions by summarising that the topic of the afternoon's session had been whether to incorporate further uniformity into the procedures concerning recognition and enforcement. He observed that it had been said that many aspects of the recognition and enforcement process would be left to the law of the requested State. In order to achieve some unity and to enable a swifter procedure, Mr Markus explained that the delegation had decided that at the first stage of recognition and enforcement proceedings, the debtor should not be heard from. He noted that this was a restriction on the rights of the debtor, and so at the second stage of proceedings there should be some consideration of an equalising element for the benefit of the debtor. Mr Markus suggested that this equalising element should be that during the time of the appeal, there should be no full enforcement with regards to the assets of the debtor. If necessary, Mr Markus stated that the assets should be secured but that there should be no immediate enforcement.

Mr Markus referred to the square brackets that appeared in paragraph 6 *bis* of Article 20 in Working Document No 13. He noted that the text in square brackets would add a further autonomous element to the Convention that recognised that the law of the requested State could also give protective measures to a creditor to avoid the possibility that upon being notified of the decision, the debtor may try to hide his assets contained within that jurisdiction. He noted that

the text in square brackets therefore depended on the law of the requested State.

101. **The Chair** asked the delegation of China to introduce Working Document No 14.

102. **Ms Albuquerque Ferreira** (China) explained that the idea motivating the production of the proposal by the delegation of China was essentially the same as that behind the proposal from the delegation of Switzerland, although she noted that the proposal from the delegation of China did not contain the textual element in the square brackets in the proposal of the delegation of Switzerland.

She summarised that Article 20 was in balance and so that the rights of the debtor that cannot be defended at the first stage of recognition and enforcement proceedings may be protected at the second stage. She suggested that the two proposals could possibly be merged but in essence they were the same.

103. **Ms Lenzing** (European Community – Commission) indicated that it appeared the day could be finished on a positive note. She stated that the European Community supported the idea behind both proposals that had been made by the delegations of China and Switzerland. She indicated that the European Community had no problems with the wording of the proposals (outside of the square brackets), because it essentially already existed within the European Community. She noted that the proposal from the delegation of China had the same objective and effect as the proposal from the delegation of Switzerland but that it did not contain the term "protective measures". She stated that the final decision about which proposal to use could be left to the Drafting Committee.

In relation to the text contained in square brackets in the proposal of the delegation of Switzerland, she recognised the origins of that text and supported its policy although she did not believe it was essential. She observed that the first words of the text within the square brackets should in fact be: "The decision recognising and enforcing […]".

104. **Ms Bean** (United States of America) thanked the Chair and stated that the delegation of the United States of America had not had the opportunity to consider all proposals, but that she considered that four options existed as to what to do. Firstly, the availability of a stay of proceedings could be mandated so that all States had that option available. Secondly, Article 20 could be left silent as it currently stood. Thirdly, a stay of proceedings could be available but only for a certain number of days. She noted that this was essentially the proposal found within Working Document No 13 since it used the phrase: "During the time specified for an appeal / challenge". She noted that the proposal contained within Working Document No 13 did not state what that time frame was however. She reiterated her earlier suggestion for a 120-day time frame in this regard. She finalised her intervention by stating that the fourth option was to prohibit a stay of proceedings. Ms Bean stated that the preference of the delegation of the United States of America was for the fourth option.

105. **Mr Beaumont** (United Kingdom) considered that this issue required further consideration. In the context of the *Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* and the *Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters*, a stay of proceedings only applied to the first stage of recognition and enforcement proceedings and not the second stage. However, he did not believe that this was clear from the proposal made by the delegation of Switzerland. He further stated that a fifth option could be added to those considered by the Delegate of the United States of America, and that was to allow a stay of proceedings for a first appeal but not for any subsequent or later appeal. If this were not the case, a maintenance creditor might be barred from getting any money for a long period of time and until all appeal procedures had been exhausted.

On the issue of protective measures, Mr Beaumont welcomed the acceptance by the delegation of China of the proposal made by the delegation of Switzerland. He noted that this second aspect of the Swiss proposal, the explicit availability of protective measures, was valuable for the creditor in order to ensure that the assets of the debtor are not removed from the jurisdiction. Mr Beaumont supported this aspect of the proposal of the delegation of Switzerland.

106. **Mr Segal** (Israel) expressed the view that he was not sure that paragraph 6 *bis* added anything that was necessary to Article 20. He noted that if there was an appeal of a decision of a court, an order for a stay of proceedings was, generally, automatically made. In any event, he suggested that this proposed paragraph did not necessarily mean that a stay of proceedings would be granted automatically. Mr Segal said that the issue of stays should be left to each Contracting State to determine how they choose to protect defendants in their State. He noted that in Israel, the granting of a stay of proceedings would not be automatic.

107. **Ms Albuquerque Ferreira** (China) thanked the Chair and stressed that from the outset, the Chinese delegation had been stating that the question of stays of proceedings should be left to the internal law of a Contracting State. She observed that other delegates had noted that they would not accept having a stay of proceedings made available but she suggested that a balance must be reached. At the first stage of recognition and enforcement proceedings, Ms Albuquerque Ferreira emphasised that a debtor had no right to be heard and that it was an automatic process of recognition and enforcement. She believed that this went against the fundamental human rights of a debtor, because from a procedural view there was a need to enable people to make their submissions and respond to an application. She observed that perhaps it could be acceptable not to hear from the debtor at all in the first stage of proceedings as long as that person had the opportunity to challenge any recognition of a decision made against him or her and to then be heard as to his or her arguments. She considered it strange that whilst the meeting suggested that the needs of a child must be protected, the needs of a debtor are not also considered. If no balance were struck then Ms Albuquerque Ferreira stated that the delegation of China would support the entire deletion of all of Article 20.

108. **Ms Kulikova** (Russian Federation) stated that the delegation of the Russian Federation had problems with Article 20 and its applicability to their system. She supported this discussion on the basis that the question of stays of proceedings be left to the internal procedural rules of Contracting States.

109. **Mr Markus** (Switzerland) stated that in relation to the proposal of his delegation contained in Working Document No 13, he would be willing to incorporate a time frame indicating the duration of the operation of a stay of proceedings and as had been suggested by the Delegate of the United States of America. He noted that the amount of days that a stay of proceedings could apply had possibly already

been arrived at, being either 30 days or 60 days (depending on whether the debtor was located within or outside of the requested State), the time period that the debtor has at his disposal to appeal a decision for recognition and enforcement.

He considered that if an attempt were made to incorporate an overall time limit for the operation of a stay of proceedings, it may impact on appellate proceedings and specifically in circumstances where an appeal could be decided before the end of the time limit in relation to the operation of a stay of proceedings. In those circumstances, it may be to the detriment of the creditor since there would not be access to any assets until the time limit for the stay of proceedings had expired. He suggested that the question of such a time limit would therefore need to be further discussed.

Mr Markus clarified the question that had been asked by the Delegate of the United Kingdom and noted that the proposal of the delegation of Switzerland as contained in Working Document No 13 did not apply to any second appeal. He believed that what occurred procedurally, both with respect to stays of proceedings and other matters, upon a second appeal, should be left to the internal law of the requested State.

He reiterated the comments that had been made by the Delegate of China in regards to the presence and incorporation of more equitable rules and not just autonomous rules within the processes and procedures being discussed.

110. **The Chair** noted that she could see Australia, Brazil, El Salvador, the Commonwealth Secretariat, the United Kingdom and Canada asking for the floor. She therefore stated that discussion would be continued on Saturday 10 November 2007 and would deal with direct applications and private agreements, and then follow the draft agenda.

La séance est levée à 18 h 10.

Procès-verbal No 6

Minutes No 6

Séance du samedi 10 novembre 2007 (matin)

Meeting of Saturday 10 November 2007 (morning)

La séance est ouverte à 9 h 50 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 20 (suite / cont.)

1. **The Chair** noted that the discussion of Article 20 remained open from the previous day and she recalled that the delegations of China and Switzerland had each presented working documents. She noted that Working Document No 16 containing a proposal from the delegation of Australia was being distributed. She proposed to begin the discussion by hearing those who had wished to make interventions the previous afternoon.

2. **Ms Cameron** (Australia) noted that the proposal of the delegation of Australia regarding Article 20, paragraph 6, was in Working Document No 16 which had just been circulated. She referred to the proposals of the delegations of Switzerland and China which had been made the day before. She stated that she understood the reasons behind the proposal by the delegation of Switzerland and appreciated the concern expressed by the Delegate of China about the need to ensure that the debtor could be protected, particularly where he had not had the opportunity to be heard in respect of recognition and enforcement. She stated that she had three concerns about the proposal by the delegation of Switzerland. She stated that the first was as stated the previous day by the Delegate of the United States of America that, as drafted, the period during which the measures of enforcement would be suspended was entirely indeterminate and could go on for some months. She stated that the second was that suspending the measures of enforcement and the uncertain meaning of that phrase could have a negative effect on the Australian practice of seeking to engage in negotiations after the decision was first made enforceable. She expressed a third concern that there was no scope for the interests of the creditor in the immediate and short term to be taken into account and that there may be circumstances where the creditor is in immediate need. She noted that the proposal in Working Document No 16 was that the respondent would be guaranteed a right to seek a stay, rather than that there would be a stay. She stated that this would allow the competent authority to consider how long it was appropriate for the enforcement to be stayed and what measures should be involved in the stay. She stated that it would also allow the interest of the creditor to be taken into account. She stated that this was a better balance and hoped that it met the needs of other delegations. She referred to the specific proposal regarding protective measures and proposed that there would be a statement in the Explanatory Report that a stay of enforcement would not necessarily restrict the specific measures considered appropriate.

3. **Mr Moraes Soares** (Brazil) stated that he had wanted to take the floor the previous day to ask for more time for discussion of this Article as there were four available options at that time, and a new option had now been added. He said he was happy to see the discussion continue.

4. **Mr McClean** (Commonwealth Secretariat) recalled that the Delegate of the United States of America had the previous day outlined a number of options regarding Article 20 and that one of these options was for the Convention to remain silent on the issues of stays or suspensions. He stated that he did not think that this was a viable possibility because of the provision in Chapter VI on enforcement which provides that, although measures of enforcement are for the law of the State requested, once an order was enforceable there would be automatic enforcement. He remarked that if there was going to be an interruption of that step then there would have to be some express mention of it. He referred to the separate proposals of the delegations of Switzerland and China and stated that the previous day

there had seemed to be an assumption that these two proposals were to the same effect. He disagreed with this and stated that there was a critical difference between them. He noted that the proposal of the delegation of Switzerland dealt with the automatic postponement of enforcement until the 30- or 60-day period mentioned in paragraph 6 lapses, while the proposal of the delegation of China was that if there is a challenge or appeal then the enforcement would be suspended from that moment. He commented that given that the challenges were limited in scope and were likely to arise in only a small number of cases, he was of the opinion that the proposal of the delegation of China was to be preferred as it did less violence to the procedures set out in the preliminary draft Convention. He stated that his immediate reaction to the proposal of the delegation of Australia was that a statement that someone is entitled to apply would be too imprecise to meet the concerns that many delegations had expressed. He noted that there were no criteria given in the written proposal, although the Delegate of Australia did set out some orally, and that all that was on paper was that a person could ask. He stated that in some countries this could lead to all requests being refused. He noted that there were some advantages to the proposal but that it needed fuller exposition.

5. **Mr Beaumont** (United Kingdom) thanked the delegations that had put forward proposals on the issue of stays. He noted that the issue was very important, as was the issue of what happened at the second appeal. He stated that if a kind of mandatory stay of enforcement system were accepted for the first appeal, which he noted was not really an appeal but the first proper hearing of the case where both parties were present and able to make submissions, and this was coupled with the ability to get protective measures, then this would be a good balance. He stated that to maintain this balance it was important that the next appeal have no suspensive effect so that the ability of the creditor to obtain maintenance was not delayed for months or years. He stated that the next part of the package was that the first appeal should be dealt with promptly by the authorities in the State concerned. He requested that some kind of general statement be introduced to the effect that the decision on this appeal must occur quickly. He accepted that it would not be possible to set a specific time limit but rather exhortatory language that the appeal "should be decided quickly" should be used. He stated that if a whole package could be put together that would give a balance between the creditor's interests in obtaining money quickly and ensuring the minimum due process protection for the debtor, then this might be a good solution for Article 20.

6. **Mme Gervais** (Canada) indique qu'il lui paraît important de mentionner qu'une contestation ou un appel ne suspend pas l'exécution de la décision. Elle précise que dans certaines circonstances, une interruption est nécessaire pour assurer un équilibre entre les intérêts des parties. Elle propose en cas de besoin, qu'une suspension puisse être autorisée par une autorité compétente. Elle considère également que s'il n'y a aucun préjudice grave susceptible d'être subi par le débiteur, la décision devrait être exécutée. Elle indique à cet effet que la charge de la preuve pourrait incomber au débiteur. Elle note que ces cas constituent des exceptions et que la délégation du Canada va tenter de faire une proposition par écrit.

7. **Mr Markus** (Switzerland) referred to the criticism of the Delegate of Australia regarding the proposal of the delegation of Switzerland. He accepted the criticism that the period of the stay could be too long, but noted that the problem was not the period within which the appeal could occur, but was rather the length of time the appeals would last. He stated that the proposal of the delegation of the United Kingdom that there should never be stay on the second appeal could be helpful. He also agreed with the suggestion that the principle that the enforcement or *exequatur* proceedings should be completed in as short a time as possible should be included. He referred to the comment of the Delegate of Australia that a mandatory stay could prevent amicable solutions and stated that he did not understand why this would be so. He stated that, on the contrary, it would not hinder amicable solutions at all but would rather further such amicable solutions and was a positive incentive for parties to quickly try to resolve the problem amicably. He noted that as soon as an amicable solution was found for the request of the creditor the stay could immediately fall. He referred to the criticism relating to the position of a creditor who was in need and who should immediately have short-term support. He stated that this had to be seen against the background of the interests of both parties. He stated that the preliminary draft Convention provided for a system that was extremely favourable to the creditor in that there was no hearing for the debtor. He noted that the appeal was not a real appeal in that sense but rather the first time that the debtor would be heard, and stated that he thought it would be problematic from the point of view of the *European Convention on the Exercise of Children's Rights* if there were to be an immediate execution upon the first instance decision without any hearing of the debtor. He stated that it was nevertheless necessary to be careful and to try to keep the balance of the interests of both parties, and that the problem of short-term support could only be resolved to the extent of accelerating the hearings.

8. **Ms Bean** (United States of America) stated that her delegation was willing to support in theory the proposal of the Delegate of the United Kingdom. She expressed concern on the issue of automatic stays where the creditor could be unfairly disadvantaged. She referred to the proposal of the Delegate of the United Kingdom to include something like the word "promptly", and felt that this would be acceptable to deal with the issues of a stay. She stated that in relation to the issue of an automatic stay, her delegation would propose some language that may provide a compromise and should deal with the concerns of all the delegates that had spoken.

9. **Mr Mthimunye** (South Africa) agreed with the delegations that stated that the debtor should be heard before the first order is made by the requested State. He stated that he was of the view that the enforcement of this order should continue until amended by the competent authority on appeal.

10. **Ms Lenzing** (European Community – Commission) thanked the Delegate of the United States of America for the flexibility of her delegation and stated that she thought that the solution on this Article was not too far away. She reiterated the statement of the Delegate of the United Kingdom that it would be entirely acceptable to specify that for further appeals no stay would be allowed. She suggested using wording such as is found in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* that the hearing on the appeal has to be dealt with expeditiously. She suggested a third solution, which was that in principle there would be an automatic stay, but if it could be shown that the enforcement would not result in prejudice to the debtor then it would be allowed. She stated that this just involved the rearrangement of the principle and the exception. She noted that this would also depend on how far the delegations for whom the principle of a stay of enforcement was important would be

willing to go. She stated that she thought that revised solutions could be worked on, perhaps with the delegation of Switzerland, and the whole package could be re-examined.

11. **Mr Hayakawa** (Japan) stated that he would have a problem with the suggestion that no stay would be allowed during the second appeal, and that he would like to reserve his position on this point.

12. **The Chair** concluded the discussion on Article 20 by stating that it was useful because it clarified the positions to a greater extent than before. She stated that there was a way to find a compromise on Article 20 and noted that several suggestions had been made. She encouraged the delegations to continue their discussion and, if they can find compromise solutions, to submit working documents. She stated that the discussion would return to Article 20 later.

Demandes directes aux autorités compétentes / Direct requests to competent authorities

13. **The Chair** asked the co-*Rapporteur* to introduce the Articles concerning direct applications.

14. **Mrs Borrás** (co-*Rapporteur*) stated that nothing in Article 1 of the preliminary draft Convention precluded direct applications, but they were not mentioned in that Article. She noted that the reason for this was that it would be misleading to suggest that provision for direct applications was a primary objective of the Convention. She stated that Article 34, paragraph 2, dealt with applications for enforcement and recognition, and that these were possible under Article 16, paragraph 5. She noted that according to Article 34, paragraph 2, Chapters V, VI and VII applied in the cases of direct requests for recognition and enforcement, as well as the corresponding rules on effective access to procedures in Article 14. She stated that this was not the only possibility and stated that it would also be possible, under Article 34, paragraph 1, for an applicant to use the procedures available under national law which allowed him or her to seize a competent authority directly in order to establish or modify a maintenance decision.

15. **The Chair** recalled the question of the Drafting Committee as to what other Articles could be applied for direct applications, and also asked what the appropriate approach towards cost issues and legal assistance for direct applications would be. She stated that when discussing public bodies there had been no separate discussion on whether public bodies would be allowed to make direct applications in other States, and she asked for opinions on this. She noted that there were two working documents submitted on this subject, one from the delegation of Canada and one from the International Bar Association.

16. **Ms Morrow** (Canada) noted that the delegation of Canada had submitted a proposal in Working Document No 10. She acknowledged that direct applications were not a primary objective of the Convention but submitted that they should be allowed. She stated that the Convention should not impair any right to apply to competent authorities according to national law. She submitted that public bodies should have this right although they would probably not take advantage of this very often. She stated that direct applicants should not be given use of Central Authority services for free as this would not encourage use of the co-operation mechanism, and she suggested that the reference to Article 14, paragraph 5, and Article 14 *ter*, paragraph (b), should be deleted from the current text of Article 34, paragraph 2. She stated that the working document also proposed that in Article 34, paragraph 1, the words "internal law" should be substituted for the words "national law" as the latter was not suitable for States that had a division in their internal legislature. She also noted that this would make the English version more equivalent to the French version. She concluded by proposing that, in both the English and the French versions, the word "however" ("*toutefois*") at the beginning of Article 34, paragraph 2, should be deleted since each paragraph of Article 34 dealt with different things and linking them with "however" was not appropriate.

17. **Ms Dehart** (International Bar Association) noted that the proposal of her delegation had been presented nearly simultaneously with that of Canada and that it was nearly identical in that it suggested not providing legal assistance for those applicants who were making a direct request to a competent authority. She agreed with the explanation given by the delegation of Canada and noted that a great deal of time had been spent setting up the Central Authority system with assistance for those who need or want it, and this should not be given to those capable of proceeding themselves. She suggested a review of the whole preliminary draft Convention to ensure that those provisions that will help those who self-select to hire private attorneys are made applicable. She also suggested a change to Article 9 to make clear that direct applications to the Central Authority and to a competent authority are different things. She noted that at the moment it was required that the applicant apply to the Central Authority in their own State but that in some instances it might be convenient to agree to a direct application to the Central Authority in the requesting State, as this would prevent duplication of effort, and this would allow the flexibility to do that.

18. **The Chair** noted that the latter point dealt with a different issue, and that the current discussion was limited to a direct application to competent authorities and did not relate to whether an applicant may be allowed to turn to the Central Authority of a requested State.

19. **Ms Lenzing** (European Community – Commission) disagreed with the position of the delegation of Canada and the Observer from the International Bar Association. She stated that there was a good argument that direct requests should also benefit from the regime of legal assistance. She noted that her delegation had not made a written proposal, but would prefer to extend Article 34, paragraph 2, to ensure that applicants making direct requests would enjoy the full benefits of Article 14. She stated that she was reluctant to restrict the limited standard that could already be found in Article 34, paragraph 2. She stated that her concern was those situations in which Central Authorities that are set up did not work as they should, and an applicant resident in a Contracting State might be faced with a Central Authority that was not functioning properly. She noted that in this case, if that person was not given any assistance, he or she would virtually be prevented from having access to justice in the requested State because the Central Authority did not work correctly. She acknowledged that the idea was that Central Authorities would function but stated that situations where they did not should be taken into account and that applicants from those States should be put, at least partially, on an equal footing. She stated that it was also undesirable, from a policy point of view, to move backwards from the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* as it would send the wrong signals since the idea was for this Convention to be more ambitious. She asked whether there were other means by which to take into account that legal assistance is provided in some States by the Central Authorities themselves and not by external re-

sources. She concluded by stating that she could not yet provide a solution for these States but was not ready to delete the reference to Article 14 from Article 34.

20. **Ms Carlson** (United States of America) supported the proposals of the delegations of Canada and the International Bar Association. She stated that direct requests were not the main focus of this Convention, which was built around strong Central Authority systems. She stated that there should be nothing to prohibit direct requests but that it would undermine the whole scheme if it was just as easy to circumvent the Central Authority system and obtain the same assistance. She stated that it was part of the system that the two Central Authorities would work together. She strongly opposed giving free legal assistance to direct applicants and stated that she disagreed with those who claimed that this would be a step backwards from the 1973 Maintenance Convention, or represent a denial of justice. She stated that it was not possible to legislate for weak Central Authority systems as the purpose of this Convention was to build strong Central Authority systems and the solution for weak Central Authorities is to work with them to help them to strengthen. She supported the right of public bodies to make direct requests to competent authorities but stated that they would not be entitled to legal assistance. She stated that she thought she could support the proposal of the International Bar Association that a few more Articles be applicable to direct applications.

21. **Mr Beaumont** (United Kingdom) noted that it was important to bear in mind that the core scope of this instrument was different from that of the 1973 Maintenance Convention, and he was concerned that a step back should be avoided in relation to those things that were not in the core part of this preliminary draft Convention. He stated that it was important to have adequate arrangements for the parts of the Convention that people might optionally enter into beyond the core to ensure that the provisions in those parts would not be worse than in the 1973 Maintenance Convention. He stated that this was to ensure that State Parties to this latter Convention were not creating a law that gave people less legal assistance than in that Convention. He accepted the point made by the Delegate of the United States of America that it was important to find mechanisms to put pressure on States to ensure that the Central Authorities do function and that this would be relevant for the reviews of the Convention. He noted that if the Central Authorities do not function well then they would be the Achilles' heel of the Convention and a good provision on legal assistance could be made ineffective by weak Central Authorities. He stated that it was vitally important that everyone took the obligation seriously and that everyone could do the job that they had been asked to do under the Convention. He referred to the proposal from the International Bar Association and stated that on first reading it seemed sensible to include Articles 40, 41 and 43 in Article 34, paragraph 2, but he would be happy to stand corrected by those who saw difficulties. He stated that he did not see any harm in the proposal for Article 9, paragraph 2, in Working Document No 12, but he stated that he would stand corrected if other people saw difficulties.

22. **Mr Ding** (China) stated that his delegation adhered to the principle of non-discrimination and could see no reason to exclude direct applicants. He referred to Working Document No 5 and stated that this also applied to foreign applicants. He thought this was a fair proposal that could apply indiscriminately and urged all delegations to accept this proposal from the delegations of China, Japan and the Russian Federation, States which include a large part of the world's population.

23. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique partage l'opinion exprimée par la délégation de la Communauté européenne. Elle déclare que la délégation du Mexique est favorable à l'idée de fournir une assistance gratuite pour les demandes directes.

24. **M. Heger** (Allemagne) indique qu'il soutient la proposition des délégations de la Communauté européenne et du Royaume-Uni. Il estime que l'article 34 dans sa formulation actuelle, reflète un parfait équilibre. Il est d'accord sur le fait qu'on aboutit à un traitement bien différent lorsque le créancier saisit directement les Autorités centrales. Mais il rappelle que le but de cette Convention n'est pas de créer un système de coopération mais de proposer des moyens d'aide aux enfants.

25. **Mr Markus** (Switzerland) expressed reticence with regard to the proposal from the delegation of Canada and preferred to keep the text as it was. He stated that he did not think that Article 34 mandated that Contracting States create a second national system for this type of creditor. He stated that the text clearly provided for allowing access to such procedures as may be available, and if there were no other procedures available then the Contracting State would not have to provide such an alternative. He stated that if there were an alternative, the applicants should not be hindered from using this alternative if they wanted to. He stated that his delegation did not see this as a real problem of the Convention, as Article 34 was not mandatory at all. He agreed with the Delegate of the European Community that it was important not to retreat from the 1973 Maintenance Convention and stated that he would go further and say that the same level of free legal assistance should be offered. He stated that he was not making a formal proposal in that regard but that both kinds of requests should be treated in the same way if possible.

26. **Mr McClean** (Commonwealth Secretariat) stated that he was very surprised by the discussion and the proposal to extend Article 14 to a whole new set of applicants given the discussion on Article 14. He suggested that this should be seen worked out in writing. He noted that Article 14, paragraph 3, provided that the requested State would not be obliged to provide free legal assistance if the Central Authority provided such services as were necessary free of charge. He asked whether in a situation where there was a Central Authority route but a person chose to instruct private attorneys it would not always be the case that the Central Authority could say that the person should have used the Central Authority. He stated that he did not see that this would work and that for States with limited resources the idea of funding private solicitors was unacceptable.

27. **Mr Segal** (Israel) expressed his support for the position of the delegation of the European Community. He stated that it was not the aim of the Convention to exclude the possibility of persons having access to another State. He stated that people should not be told they have to use the Central Authority and that it did not seem that giving people the possibility of direct applications would prevent the establishment of the Central Authority. He expressed the opinion that it was too restrictive not to allow direct access to the competent authority. He stated that the question of free legal aid should be governed by Article 14 and the internal law of each State, but that the principle should be recognised.

28. **Ms Carlson** (United States of America) stated that it may be that her delegation had misunderstood. She referred to the intervention of the Observer from the Commonwealth Secretariat. She recalled that Article 34, paragraph 2,

currently stated that Article 14, paragraphs 5 and 6, shall apply or, with reference to Option 2, Article 14, paragraph 5, and Article 14 *ter*, paragraph (b). She stated that under Article 14 *ter*, paragraph (b), a creditor or applicant who had benefited from free legal assistance in any proceedings in the State of origin was entitled to benefit to at least the same extent for proceedings for recognition and enforcement in the requested State. She stated that if she could interpret this as saying that under their system the authorities of the United States of America would not have to provide free legal assistance as they do not have such a system set up, then her delegation would have no problems. She was asking for this clarification because if this meant that free legal services would have to be provided for applicants who made a direct request to the competent authority, then this would be the equivalent of doing away with Article 9. She noted that her State did not have another way of providing free legal assistance except through the Central Authority. She stated that this did not mean there was no access to the courts as anyone could always go directly to the courts. She stated that her delegation would not have a problem if the words "under the same circumstances" meant that her country's authorities would not have to provide free services.

29. **Mr Sello** (South Africa) stated that Article 34 was another flexible way to assist in cases of child maintenance and he did not oppose allowing direct requests. He referred to the provision of free legal assistance and expressed support for States that said that free legal assistance should be given to direct applicants. He stated that this was a matter where a child was in need of support and this should not be overridden by putting political issues before the interests of the child.

30. **The Chair** concluded that although there may be a solution as it was raised at the end of the discussion, no compromise had so far been found as to whether direct requests should receive the same level of assistance as those submitted through Central Authorities, so the question remained open. She noted that there were no objections to public bodies being able to submit direct requests but as this was already covered by paragraph 2 of Article 34, this did not require examination by the Drafting Committee. She stated that there were no objections to the proposal by the Delegate of Canada to change "national" to "internal" and delete "however" from the beginning of paragraph 2. She requested the Drafting Committee to make the necessary changes.

31. **Mr Beaumont** (United Kingdom) recalled that support had been expressed for the proposal submitted by the International Bar Association.

32. **The Chair** asked the Drafting Committee to make the necessary amendments to incorporate this proposal.

33. **Mr Hať apka** (European Community – Commission) stated that he did not think that this was a good conclusion as there had not been much discussion on the issue. He stated that more time should be spent discussing this issue and going through the draft to see which Articles should be included, as it was not a decision for the Drafting Committee but for Commission I.

34. **The Chair** agreed that this was not a decision for the Drafting Committee but she stated that this was the time for making submissions as it was one of the questions she had raised and she had heard no objections to the proposal by the International Bar Association, even if not considerable support, and there had been no other interventions on Articles that would apply. She stated that the draft should be put between square brackets and that the question remained open as to whether there were other Articles to be applied.

Article 26

35. **The Chair** asked the co-*Rapporteur* to introduce Article 26 on authentic instruments and private agreements.

36. **Mrs Borrás** (co-*Rapporteur*) noted that Article 16, paragraph 4, and Article 26 were in brackets. She stated that it remained to be decided whether authentic instruments and private agreements should be covered by the scope of the Convention and whether they should be subject to a separate provision allowing an opt-in mechanism. She noted that it was not necessary that the two should be linked to one another. She recalled that the difficulty with these provisions was that authentic instruments and private agreements were unknown in some countries, while in others they were very well-known and also that some States made use of only one and not the other. She noted that paragraph 1 provided that to be enforceable the authentic instruments and private agreements must be enforceable in the country of origin. She stated that there were a number of particularities relating to authentic instruments and private agreements and that not all the provisions of Chapter V should be applied to them. The first particularity is in paragraph 2 which provided for the documents that must accompany an application for the recognition and enforcement of an authentic instrument or private agreement, and she remarked that Article 21, paragraphs 1 and 2, did not apply to them. The second particularity refers to the grounds on which recognition and enforcement may be refused, found in paragraph 3, because not all the grounds in Article 19 were to apply. She noted that in fact only three of them applied: public policy, fraud and the incompatibility principle. She stated that the third particularity could be found in paragraph 4 which provided that Articles 17, 19, 20 (para. 7) and 21 (paras 1 and 2) would not apply in these cases. She commented that for the rest, the provisions of Chapter V would apply *mutatis mutandis* to authentic instruments and private agreements with two modifications. She stated that the first of these related to the basis for refusing a declaration or registration in accordance with Article 20, paragraph 4, and she noted that there were two options here: all the reasons specified in paragraph 3, or only public policy, found in paragraph 3, sub-paragraph (a). She stated that the second modification was in respect of Article 20, paragraph 6, and was that the challenge or appeal could be founded only on the grounds for a refusal in paragraph 3 and on the authenticity, veracity and integrity of any document transmitted in accordance with paragraph 2. She noted that paragraph 5 gave the opportunity of suspending the proceedings for recognition and enforcement if proceedings concerning the validity of the instrument were pending before a competent authority. She concluded by stating that paragraph 6 offered the possibility for States to make a declaration excluding authentic instruments and private agreements from the possibility of direct applications according to Article 34. She noted that the filtering process through the Central Authorities constituted an additional safeguard if authentic instruments and / or private agreements were to be included in the Convention.

37. **The Chair** stated that the main policy decisions to be made were whether such a provision was acceptable, whether there should be an opt-in provision, for one or both, and the extent of the *ex officio* review in paragraph 4, sub-paragraph (a).

38. **Ms Lenzing** (European Community – Commission) stated that Article 26 and the possibility of including authentic instruments were very important for the European Community. She noted that this was because there was a long legal tradition in some Member States where these were important instruments in practice which should be put at least partially on an equal footing with judicial decisions. It was also important because it would promote alternative means of dispute resolution as parties would not need to go to court to obtain a decision that they could enforce abroad, but could engage in mediation and conciliation and have the resulting agreement enforced abroad. She noted that in some Member States the parties typically did not go to court but agreed among themselves on the amount of maintenance that had to be paid. She stated that it would be a pity not to grant these agreements, that had been authenticated by public authorities, the benefits of the Convention. She stated that there was a working document being prepared that would show that the European Community no longer insisted on including purely private agreements in Article 26 and that reference to private agreements should be deleted from that Article. She suggested that what was needed here was a definition of authentic instruments and she stated that this would be contained in the forthcoming working document. She stated that this would clarify what it meant for those not familiar with the concept and it would also clarify that different types of agreements could be covered. She noted that the common denominator was that at some point a public authority had intervened to approve or authenticate these agreements. She stated that there should be no problem putting these on the same level as decisions. She indicated that she did not want to go into the different aspects of the definition until the working document had been distributed. She referred to paragraph 4 and stated that it was preferable to limit the grounds to public policy as expressed in the second set of square brackets. She stated that if private agreements were deleted from the scope of the Article, the other conditions listed would lose their importance. She noted, however, that she had some flexibility here if other delegations had strong objections.

39. **Mr Hayakawa** (Japan) noted that in the written comments from the delegation of Japan it was stated that an opt-in system under which Contracting States could make a decision should be adopted. He stated that he thought that there would be quite a few States like Japan where it was hard to treat authentic instruments as decisions as there was no guarantee that the contents would be appropriate. He referred to the words in square brackets in paragraph 4 and stated that the option of using all of paragraph 3 was to be preferred.

40. **Ms Hoang Oanh** (Viet Nam) stated that her delegation did not support the adoption of Article 26 since authentic instruments were unknown in her country. She stated that a private agreement was enforceable as a contract rather than a decision by the courts, and she would therefore like to propose that authentic instruments should not be covered by the general scope and that this Article should be deleted along with Article 16, paragraph 4. She stated that if the Commission did decide to retain this Article then there needed to be some amendment to paragraph 3, subparagraph (a), which provided that recognition and enforcement can be refused if the recognition and enforcement are manifestly incompatible with the public policy of the requested State. She noted that as recognition and enforcement are provided for in the national procedural law of every country, they could not be contrary to public policy and it was only when the causes of action or the consequences of the enforcement are manifestly contrary to public policy that the recognition and enforcement would be refused. She stated that this was similar to comments on Article 19, paragraph (a).

41. **Ms Kulikova** (Russian Federation) stated that her delegation would also welcome the inclusion of Article 26 in the Convention and that they would be in favour of keeping references to both authentic instruments and private agreements. She stated that she was looking forward to studying the working document containing the proposal of the delegation of the European Community, but she indicated that she did not think that it would be appropriate to delete private agreements. She stated that the Russian legal system was not familiar with authentic instruments but it had a well-developed system of private agreements and they were one of the means used to settle maintenance claims and were enforceable as decisions. She asked what was meant by approval of public authorities as in Russia the only requirement was the notary's form of the private agreement. She stated that if the notary's approval could be considered approval of a public body, it would not then be difficult to accept the necessity of having approval from a public body.

42. **Mr Segal** (Israel) stated that Israel did not have a system of private agreements. He noted that one of the reasons was that in cases of child maintenance there could be conflicts of interest between parents and children. He gave as an example a recent case where the husband had left his children with his wife in the United States of America and the wife had wanted a religious divorce. He stated that the husband had agreed on the condition that maintenance for the children would not be requested and the wife had accepted this. He stated that his legal system provided that in any agreement like this the agreement has to be examined to assess if there is a conflict of interests and he asked who would review this if these agreements were included in the Convention. He stated that the State where the children are located should look after them and he was afraid this Article would be contrary to the best interests of the child.

43. **Ms Carlson** (United States of America) noted that her State did not have authentic instruments and private agreements were not recognised as decisions, they were just contracts. She stated that when this concept was first introduced a few years ago, her delegation was reluctant to include such things. She stated that after having talked to the delegates from a number of States in Europe and also to those of Canada, they had learned more about them and decided that they would like to be as flexible as possible and allow them to be used. She gave the reasons for this as being that there were so many countries that do use them and also that this Convention should be forward looking and there may be more developments in alternative dispute resolution mechanisms in maintenance. She stated that having made that decision, her delegation then looked at the terms, and she felt that paragraph 5 was an important provision. She noted that this stated that proceedings for recognition and enforcement of an authentic instrument or a private agreement shall be suspended if proceedings concerning its validity were pending before a competent authority. She stated that while the drafting may need to be improved, it was important that an authentic instrument or private agreement not be given more deference than a decision of a court or administrative body. She indicated that there had been discussions with those that used these instruments to establish when parties had a chance to contest these instruments, as in the examples given by the Delegate of Israel, or if someone claimed to have signed the document under duress. She noted that it was not appropriate for the authority of the requested State to get into such a debate as it

would not be competent to determine these issues, but also there had to be some opportunity to contest the underlying agreement. She stated that she was happy to see paragraph 5, which she interpreted as saying that if a debtor received notice that he had to pay money because the authentic instrument is going to be enforced, he could immediately turn back to the State of origin and say that this is not valid. Recognition and enforcement would then be suspended. She stated that she was not sure if the drafting was tight enough and that it presupposed that wherever there are authentic instruments and private agreements, there would be a mechanism to oppose them, and she noted that she had been assured that there was. She noted that paragraph 6 provided that a State could declare that authentic instruments and private agreements could only go through Central Authorities and she commented that for States that were concerned this might be another protection. She indicated that there was a drafting problem in paragraph 3, subparagraph (c), as it provided that recognition and enforcement could be refused if incompatible with a decision rendered, but that there was no mention of timing. She noted that a similar problem arose with Article 19, paragraph (d), and stated that the issue would probably be discussed when that Article arose for discussion.

44. **Ms Morrow** (Canada) supported the inclusion of both authentic instruments and private agreements, although she noted that authentic instruments were rarely used for child support in Canada, but private agreements were. She stated that this provision was important as creditors enter into these in good faith on the basis of their enforceability under the law. She stated that she was satisfied that the safeguards were sufficient as the authentic instrument or private agreement must be enforceable in the State of origin. She noted that private agreements were commonly used in Canada and there was a growing trend to use them as they always involved the participation of both parties and the laws specifically provided that they were enforceable in the same manner as decisions. She stated that they were also subject to challenge and modification in the same manner as decisions, especially in relation to children. She stated that the current law allowed what was allowed by Article 26 and to exclude these instruments would impose an unnecessary burden on creditors who had in good faith set up their maintenance obligations in this way. She stated that there was no objection to including a definition of private agreements. She supported the additional safeguard found in paragraph 6 but noted that it would be necessary to amend both Article 10 and Article 14 *bis*, paragraph 2, to take account of these applications. She suggested that "in the State of origin" should be added to the end of paragraph 5 as it currently did not indicate the location of the competent authority.

45. **Mr Moraes Soares** (Brazil) stated that it was decided at the last Mercosur meeting that if there were not more clarifications then it would be better to delete the provision. He recalled the criticism made by the Delegate of Israel that private agreements were made by people who had a conflict of interest. He stated that Brazil did not have a similar instrument in family law but noted that the opt-in provision would be good as it would allow some States to declare that they would accept private agreements.

46. **Mr Ding** (China) expressed support for the inclusion of an opt-in mechanism. He noted that in China there were different legal systems and authentic instruments and private agreements can be recognised and enforced in some systems but not in others. He stated that the mechanism would provide maximum flexibility for China and other countries. He welcomed the suggestion from the Delegate of the European Community to include a definition. He noted that authentic instruments and private agreements were not subject to the same safeguards as orders. He also queried where the State of origin would be as regards private agreements because they could be made electronically and it might be difficult to determine where they were made. Laws would also determine this differently, so some clarification might be needed.

47. **Mme González Cofré** (Chili) se rallie aux propositions faites par les délégations d'Israël et du Brésil en ce qui concerne les accords privés. Elle indique qu'il existe au Chili une solution alternative en matière de conflits de famille. Elle estime qu'il se poserait un problème d'exécution des accords privés. Elle mentionne que la délégation du Chili comprend parfaitement les opinions soulevées par les autres délégations. Mais elle considère qu'il serait important d'avoir un système de déclaration lorsqu'on accède à ce genre d'instrument.

48. **M. Heger** (Allemagne) indique que l'Allemagne connaît depuis longtemps le système des actes authentiques et des accords privés. Il souhaite premièrement saluer l'esprit d'ouverture dont a fait preuve le Canada. Ensuite, il évoque la remarque faite par la délégation d'Israël qui invite à la prudence afin d'éviter les conflits d'intérêt. Il mentionne, à cet effet, la proposition de la Communauté européenne qui estime que ces accords ne sont pas totalement privés parce qu'ils nécessitent toujours l'approbation de l'État concerné. Il considère que l'autorité compétente de cet État apprécie toujours ces accords par rapport à son droit interne. Il précise qu'il n'utilise pas l'expression « ordre public » parce que cette notion varie d'un pays à un autre. Il partage l'opinion de la délégation de la Fédération de Russie en ce qui concerne cet article, et précise qu'il ne s'agit que des accords approuvés et authentifiés. Il considère aussi que même si ces accords sont des contrats qui reflètent les intérêts des parties concernées, on s'assure toujours qu'aucun facteur nuisible n'y figure. Il évoque le cas le plus fréquent en Allemagne, à savoir que les parties se rendent devant une autorité étatique qui est soit un notaire, soit une autre autorité compétente, pour y passer leur accord. Il mentionne que le contrôle étatique est toujours présent. Il considère également qu'il est essentiel, comme l'a indiqué la délégation de la Chine, d'avoir cette sécurité. Il fait remarquer que le but de cette procédure interne en Allemagne est de garantir l'équilibre nécessaire dans ce type de contrat. Il partage également, à ce sujet, l'avis de la délégation de la Communauté européenne qui estime qu'il n'est pas nécessaire d'alourdir les tribunaux en leur soumettant toute sorte de cas, même ceux qui peuvent être réglés et homologués dans l'État d'origine.

49. **Ms Cameron** (Australia) stated that the initial position of her delegation was a preference for the proposal that authentic instruments and private agreements be included on the basis of an opt-in provision. She stated that this was in some measure motivated by a lack of familiarity and understanding of authentic instruments and private agreements in the context of maintenance. She acknowledged that she had learned quite a bit already but stated that she was still seeking some clarification, particularly in relation to comments made by the Delegate of Germany. She stated that the main reason for concern with authentic instruments, more so than with private agreements, was that they may be enforceable as a decision without any avenue for judicial review of that instrument as to the adequacy of the maintenance that is provided for and whether the needs of the creditor and resources of the debtor had been taken into account. She noted that the Delegate of Germany had stated that there was a requirement in the authentic instruments

that the interests of the child be protected. She stated that if that was the case then her concern was greatly diminished. She remarked she would be grateful for further clarification on this issue and acknowledged that the proposal by the delegation of the European Community did go a long way towards giving a clearer explanation of authentic instruments for other States.

50. **Mr Markus** (Switzerland) stated that while his delegation was willing to accept the provisions relating to authentic instruments, they had hesitations with respect to private agreements for the reasons that were given by the Delegate of Israel, amongst others, especially concerning child support. He proposed excluding purely private instruments. He thanked the delegation of the European Community for their proposal and stated that a definition was absolutely necessary in view of the diversity of understandings of what authentic instruments mean around the world. He suggested that an additional element be added to the proposed definition that there should be a requirement for the debtor to expressly recognise that the instrument is subject to immediate recognition. He noted that this requirement would ensure further protection of the debtor and would avoid situations where obligations were agreed upon without sufficient reflection by the parties involved. He raised questions regarding the proposed Article 3, paragraph (e), sub-paragraph (ii), found in Working Document No 20, and suggested that situations where arrangements were concluded before an authority which had no influence on the content of the agreement, but whose role was to see that formal requirements are fulfilled, should be distinguished from situations where the administrative authority had authority to ratify the content of the agreement. He stated that this latter ratification would be on an equal par with the decision of an administrative or judicial authority and noted that it was important not to retreat from what was achieved in Article 16, paragraph 1, on the full recognition of instruments concluded or ratified by an administrative authority. He noted that it may be a problem of drafting but suggested that it should be made clear under paragraph (e), sub-paragraph (ii), that such instruments did not fall under authentic instruments but under the decision of an authority. He concluded by noting the importance of Article 26, paragraph 5, and stated that almost all of these instruments must be subject to objection by the debtor and to normal review by judicial authorities. He stated that paragraph 5 should be sufficient to guarantee such a review and he expressed support for the view that it was important to only encompass authentic instruments which are in principle always subject to judicial review. He suggested including in the proposed definition of "authentic instrument" in Working Document No 20 a requirement that authentic instruments must be subject to judicial review in their country of origin.

51. **Mme Subia Dávalos** (Équateur) appuie la proposition de la Communauté européenne. Elle estime que la définition de ces instruments est la plus appropriée. Elle reconnaît que beaucoup de pays connaissent, dans leurs législations nationales, le système des actes authentiques et des accords privés. Elle indique en revanche qu'il est difficile d'appliquer la réglementation nationale dans des situations internationales. Elle estime que le paragraphe 5 de l'article 26 est très ambigu dans sa rédaction actuelle et que son application pourrait prêter à confusion. Elle propose donc de le redéfinir.

52. **Ms Lenzing** (European Community – Commission) introduced the definition found in Working Document No 20. She acknowledged that many States were not familiar with authentic instruments, did not use them and perceived them as an unusual creature to include in such a Convention. She stated that she wanted to reassure the other States that this would not do any harm and thought it would bring some comfort to add a definition. She stated that the definition made it clear that in the establishment of the authentic instrument, or at some point in the process, a public authority was involved and approved the instrument. She noted that this was the difference to a purely private agreement where no public authority was involved. She acknowledged that States had not had much time to look through the different elements of the definition. She stated that the difference between sub-paragraphs (i) and (ii) was that in sub-paragraph (i) a public notary vested with specific powers authenticated an instrument formally drawn up in his presence and certified that the parties to the document are those who actually signed the document. She remarked that the obligations for those notaries were almost assimilated to those of a judge when it came to verifying the validity of the document. She noted that, in contrast, sub-paragraph (ii) did not refer to a public notary but to an administrative authority that was involved and which could either have approved the agreement or could have been involved in negotiating it from the beginning. She stated that in the European Community, in most situations where the initial perception was that it was a private agreement, there was actually an administrative authority involved, or one could easily be involved, in the process of authenticating. She expressed a hope that this definition would give more clarity to the concept and noted that the wording was taken from internal legislation but that her delegation would be flexible regarding suggestions to improve clarity. She next referred to paragraph 5 and stated that this clarified that the validity of an authentic instrument could be challenged before a competent authority, and that if the validity was challenged and the competent authority concluded that the authentic instrument was not valid it would not exist anymore and could not be enforced elsewhere. She pointed to the suspension on enforcement if there was a challenge and stated that paragraph 5 was a sufficient safeguard. She concluded by expressing the hope that Article 26 achieved a balance between the positions of those countries that did not know authentic instruments and of those countries for whom they are a very important concept and very relevant in practice for maintenance obligations.

53. **Ms Zavadilová** (Czech Republic) expressed support for the position of the delegation of the European Community. She referred to the intervention of the Delegate of Switzerland on the relationship between Article 16, paragraph 1, and the definition proposed in Working Document No 20. She stated that these two situations were different because for Article 16, paragraph 1, there were proceedings before a court or before an administrative authority, whereas authentic instruments were of a different nature because they were made without any proceedings. She noted that these were instruments made not only to settle disputes but also to allow the parties to make an agreement on their situation outside of court or administrative proceedings. She stated that since authentic instruments were different, this distinction needed to be made.

54. **Mme Mansilla y Mejía** (Mexique) indique que la législation mexicaine prévoit les accords privés et les actes authentiques. Mais elle précise que l'autorité publique présente au moment de leur signature n'y figure qu'en qualité de témoin. Sa présence ne confère aucun caractère authentique à ces accords. Elle mentionne que pour avoir la force d'actes authentiques, les accords privés doivent être présentés devant le juge compétent, pour être homologués.

55. **Mr Segal** (Israel) thanked the Delegate of the European Community for her explanations. He stated, however, that he still had difficulties with regard to child support agreements. He noted that the reason for court involvement was the belief that courts are guardians of the child. He stated that in many cases a parent would agree to forego child support if he or she could have sole custody of the child and stated that these agreements were not in the best interests of the child. He asked who would ensure the best interests of the child were being met in these instruments. He referred to paragraph 5 and he noted that it spoke only about validity. He stated that even an opt-in mechanism did not give protection to children in a State that accepted them as the authentic instrument could have been established in another State that did not have sufficient safeguards. He stated that this should not be automatically included in the Convention, and especially not for children.

56. **Mr Hayakawa** (Japan) stated that he was grateful to the delegation of the European Community but raised the question of whether notaries had the authority to review the content of an agreement.

57. **Mme van Iterson** (Pays-Bas) souhaite apporter une précision à une question posée par la délégation du Canada, à propos du lieu de conclusion de l'accord. Elle indique que comme mentionné par la délégation de la Communauté européenne dans le Document de travail No 20, si l'on définit l'acte authentique selon la définition proposée dans ce document, il n'y aura pas de problèmes pour localiser l'État d'origine. Elle précise qu'elle définit ici l'État d'origine comme étant celui qui a dressé et authentifié le document.

58. **Mr Markus** (Switzerland) referred to the intervention of the Delegate of the Czech Republic that the difference between instruments under Article 16, paragraph 1, and those in the proposed Article 3, paragraph (e), sub-paragraph (ii), in Working Document No 20 was whether there were controversial proceedings before the court and the decision was a result of that. He stated that he did not support this standpoint. He stated that the question of whether there were proceedings was difficult to answer and this could not be a valid delimitation. He noted that there could be proceedings where there was no controversial dispute. He stated that he understood Article 16, paragraph 1, to refer to where the authority had dealt with the content of the agreement and had given its consent to the content of the accord, and where the authority was free to reject the agreement between the parties. He stated that these cases had to be put on the same footing as decisions by an administrative authority because the content had been taken into account and they, therefore, should be given the benefit of the better enforcement and recognition provisions accorded to judicial decisions. He referred to the question raised by the Delegate of Japan of whether a notary public could review the content of an authentic instrument or was just limited to reviewing the formalities for the establishment of the instrument. He stated that all the instruments that would be dealt with in Article 3 would be of the kind with no review of the content of the instrument, as otherwise it would be a question not of an authentic instrument but of a decision by an authority.

59. **Mr Sami** (Egypt) stated that he was grateful to the delegations of the European Community and Germany but that he remained uncomfortable about authentic instruments and private agreements, as in his country's system the only authority that could enforce was the court. He understood that in other systems this was not the case but stated that it had to be borne in mind that this was to be a Convention to deal with international enforcement. He stated that the concerns raised by the Delegate of Israel were very valid in his system also.

60. **Mr Helin** (Finland) stated that in his country's system more than 90% of all maintenance issues were resolved outside the court and parties made agreements that were confirmed by the social welfare authority. He stated that this system had worked very well and the problems that the Delegate of Israel had put forward had not arisen as normally there was no conflict of interest since the child was represented by the primary caretaker and it was in his or her interest to obtain as much support as possible. He stated that in situations where one party had been unduly influenced it was possible to go to the court and argue that the agreement was not valid, but he noted that this rarely happened. He referred to the distinction between a decision and an authentic instrument and said that there was a borderline area where it was difficult to say whether something was one or the other. He stated that in Finland the social welfare authority did have some discretion whether to confirm an agreement or not, but that they did not go into a full investigation of all the conditions and only looked at whether it appeared at face value to be in the interests of the child. He stated that because of this it would not do any harm if the conditions for enforceability for authentic instruments and private agreements were almost the same. He stated the proposed conditions were quite similar so these borderline situations should not cause problems.

61. **Mr Ryng** (Poland) stated that he wanted to respond to the Delegate of Japan regarding the work of notaries and the contents of agreements. He noted that in Poland the concept of authentic instruments was used in relation to maintenance obligations. He stated that the authentic instrument was produced by the notary public in the form of a notarial deed and the first role of the notary public was to verify the identity of the parties, but that this was not the only task. He stated that the notary has to verify that the parties were aware of the consequences, give advice on the rights and obligations that will arise and also ensure that the agreement is not in violation of the mandatory rules of national law. He indicated that if a party did not agree with the decision of the notary public, the decision could be challenged in court. He noted that the notarial deed was not something that was written in stone because maintenance obligations were always driven by needs and resources. Therefore, if the circumstances changed then it would be possible to either have a new notarial deed produced, or if the other party did not agree, to go to the court and ask for a new order. This order would replace the obligations that derived from the authentic instrument.

62. **Ms Albuquerque Ferreira** (China) agreed with the Delegate of Switzerland that sub-paragraph (ii) in Working Document No 20 could be improved a little bit because otherwise decisions made by a court on the agreement of parties would be seen as authentic instruments and not decisions, and this would be wrong. She stated that the words "by them" were not needed at the end of the text as they were understood. She proposed that the definition should be redrafted as it might confuse the issue of what would come under Article 16, paragraph 1, and what would fall under Article 26.

63. **The Deputy Secretary General** noted that in most States an agreement concerning child support could be set aside or challenged and modifications were almost always permitted. He commented that he did not know of a State where it was possible for parents to contract out of obligations to support a child. He stated that if there was an agreement to provide for a child only three-quarters of what

the child would otherwise receive and it was not recognised, then the child would receive nothing, whereas at least if the agreement was recognised the child would receive that much and there would always be a possibility to change the agreement later. He also referred to the importance of the Drafting Committee looking carefully at the wording of Article 26, paragraph 3, sub-paragraph (c), to make certain that the decision would take priority.

64. **The Chair** stated that the feeling was that more delegations were willing to include these two concepts without an opt-in system, but that a considerable number of States preferred to have an opt-in system. She noted that the views differed concerning authentic instruments or private agreements and suggested an alternative to opting in to either authentic instruments or private agreements or both. She requested that the Drafting Committee draft such a provision. She referred to Working Document No 20 and the definition of authentic instruments that it contained, and she noted that delegations had not had enough time to consider it and it had caused some confusion. She stated that the definition should appear in a footnote in the draft text for the time being. She requested that the delegation of Canada make the proposal that they had mentioned of a definition of private agreements. She stated that regarding the policy concerning *ex officio* control, she had heard preference for use of paragraph 3, sub-paragraph (a), on public policy grounds only. She asked whether, as an opt-in mechanism was being created, it would be acceptable to have public policy as the only grounds of review and so retain only reference to paragraph 3, sub-paragraph (a).

65. **Ms Albuquerque Ferreira** (China) stated that she wished to retain the reference to all of paragraph 3.

66. **The Chair** stated that she was aware of this view but that there were States who preferred to only have public policy, and as the inclusion of authentic instruments was going to be on an opt-in basis perhaps the reference could be left as only to paragraph 3, sub-paragraph (a).

67. **Mr Hať apka** (European Community – Commission) requested clarification on the issue of an opt-in mechanism and asked whether the possibility of a reservation should be looked into. He stated that in a situation where a large majority was willing to include authentic instruments, there could perhaps be a reservation for those States that were not, as this would be more in line with the general attitude.

68. **The Chair** thanked the Delegate of the European Community for this suggestion and acknowledged there was more support in favour of the inclusion of authentic instruments.

69. **Mme Mansilla y Mejía** (Mexique) demande s'il est maintenant question du paragraphe 3, alinéa (b), ou du paragraphe 4 de l'article 26. Elle souhaite obtenir des éclaircissements sur ce qui est proposé à l'alinéa (b).

70. **The Chair** stated that she had not suggested that, and she did not want to delete paragraph 3, sub-paragraph (b). She stated that she was discussing Article 26, paragraph 4, and the words between square brackets. She noted that perhaps it was a premature question.

71. **Mr Segal** (Israel) thanked the Chair for this clarification.

72. **The Chair** gave a mandate to the Drafting Committee to make two drafts, one containing an opt-in mechanism and the other containing a reservations system and to put it all between square brackets.

73. **Ms Ménard** (Canada) reminded the delegates that the Working Group on effective access to procedures would meet on Sunday 11 November 2007 at 2 p.m. in the offices of the Permanent Bureau.

74. **Mr Paulino Pereira** (European Community – Commission) reminded European Community Members that the next co-ordination meeting would take place on Monday 12 November 2007 at 8.15 a.m.

75. **Mr Moraes Soares** (Brazil) reminded delegates of Latin American countries that they would meet directly after the end of the session.

76. **The Chair of the Drafting Committee** reminded members that the Drafting Committee would meet immediately following the session in the offices of the Permanent Bureau.

77. **The Chair** hoped that all delegates involved in this work would have fruitful discussions.

The meeting was closed at 1.09 p.m.

Procès-verbal No 7

Minutes No 7

Séance du lundi 12 novembre 2007 (matin)

Meeting of Monday 12 November 2007 (morning)

The meeting was opened at 10 a.m. with Ms Kurucz (Hungary) in the chair, and Ms Degeling (Permanent Bureau) and Mrs Borrás (Spain) as co-*Rapporteurs*.

1. **The Chair** informed the delegates that Mr Bonomi (Chair of Commission II) wished to ask the delegates to kindly submit working documents for Commission II at the earliest possible date as only one meeting had been planned for that Commission prior to the second reading.

On that note, the Chair recalled that this Commission, Commission I, was also in the second phase of discussions and that this phase was distinct from the discussions conducted in the previous week. In the first week the Commission had discussed open issues, whereas for the second week the agenda included matters that had already been discussed at length and had been widely accepted. She recalled that few items remained in square brackets and she asked the delegates to bear that in mind during the proceedings of the second week.

Discussion générale de l'article 6 / General discussion of Article 6

2. **The Chair** announced that the discussion would begin with Article 6 of the preliminary draft Convention. She emphasised that the discussion was without prejudice to matters regarding the appointment of Central Authorities, such as were raised in Working Document No 3.

The Chair invited Ms Degeling (co-*Rapporteur*) to give a brief introduction to Article 6.

3. **Ms Degeling** (co-*Rapporteur*) explained that Article 6 had been extensively debated during the negotiations and that there seemed to be a consensus that the Convention should contain a broad range of administrative functions for Central Authorities in child support cases, but at the same time, Central Authorities should not be expected to act beyond their powers and resources, or be unreasonably burdened with too many functions. The text in Article 6 had been carefully drafted to achieve the balance of these factors.

She stated that the functions listed in Article 6 were administrative functions, and that, with the possible exception of Article 6, paragraph 1, sub-paragraph (b), the obligations they imposed related to administrative co-operation. She added that Article 6 was not intended to impose any unrealistic "judicial" functions on Central Authorities. On this note she referred the delegates to the explanations of Article 6, paragraph 2, sub-paragraph (c), and Article 6, paragraph 2, sub-paragraph (g), in the draft Explanatory Report (Prel. Doc. No 32).

The co-*Rapporteur* noted that the choice of flexible verbs in Article 6, such as "facilitate", "encourage", or "help", as well as the use of the term "all appropriate measures", was deliberate. The language in Article 6 allowed Contracting States some flexibility in organising (through Central Authorities or other bodies) the performance of these functions in order to fulfil their responsibilities to the extent possible.

She then briefly described the functions in Article 6, giving particular attention to those provisions which were the subject of comments in Preliminary Document No 36.

Ms Degeling observed that Article 6, paragraph 1, imposed two distinct obligations. The first was a direct obligation on Central Authorities to provide assistance with any of the categories of applications in Article 10 and any other procedures described in Chapter III. The second obligation related to the important functions which were particularised or listed in Article 6, paragraph 1, sub-paragraphs (a) and (b): transmitting and receiving applications, and initiating or facilitating legal proceedings.

Turning to Article 6, paragraph 2, she explained that this contained an obligation in relation to Chapter III applications to take "all appropriate measures" to provide the kinds of assistance listed in Article 6, paragraph 2, sub-paragraphs (a) to (j). It obliged Contracting States to do what is possible within their State. This would be determined by available resources, legal or constitutional restraints, and the manner in which different functions are distributed within the State. It was expected that only a small number of the listed functions would be requested for any one case. She added that there was no expectation that Central Authorities themselves must perform these functions, as Article 6, paragraph 3, made clear.

The co-*Rapporteur* stated that in Article 6, paragraph 2, the obligations were less specific, and allowed Central Authorities or bodies more discretion as to how the functions would be performed – hence the term "all appropriate measures". Nevertheless, she explained that the obligation remained to do everything possible within the powers and resources of the Central Authority to provide the assistance requested. She emphasised that the word "shall" meant there was a strong obligation to "take all appropriate measures". There was flexibility in how an obligation could be carried out, but not whether it would or would not be carried out.

She then explained that Article 6, paragraph 2, sub-paragraph (i), was the only sub-paragraph that remained in square brackets. She stated that it was still in square brackets as some experts required further explanation of the meaning and effect of the provision.

Ms Degeling stated that a provisional measure referred to in Article 6, paragraph 2, sub-paragraph (i), might be sought in the State to which an application for the recovery of maintenance had been made, or in another Contracting State in which assets of the debtor were located. Provisional measures included measures to prevent the dissipation of assets, or measures to prevent the debtor leaving the jurisdiction to avoid legal proceedings.

She emphasised that the measures requested under Article 6, paragraph 2, sub-paragraph (i), must be both "provisional", meaning interim or temporary, and "territorial in nature", meaning that their effect must be confined to the territory of the requested State, that is, the State which takes the measures. Further, the measure must also be "necessary" to "secure the outcome of a pending maintenance application". This requirement implied that the requesting State must justify the request by showing that the measures were indeed necessary for the recovery of maintenance. She added that a maintenance application must be "pending" at the time when assistance under Article 6, paragraph 2, sub-paragraph (i), was sought.

She concluded that the words of Article 6, paragraph 2, sub-paragraph (i), left open the possibility that a maintenance application could be purely domestic in nature or could be an international case. Assistance could be sought in relation to current applications under Article 10.

4. **The Chair** noted that it was clear from the explanation that the *chapeau* of Article 6, paragraph 2, had been drafted with a view to allowing flexibility and in a manner that would enable States to gradually improve the functions of Central Authorities. She added that Article 6 did not define how the functions are to be performed. Before opening the floor to contributions, she drew the delegates' attention to the fact that only Article 6, paragraph 2, sub-paragraph (i), remained in brackets.

5. **Ms Lenzing** (European Community – Commission) stated that the delegation of the European Community supported the existing text of Article 6, but that her delegation wished to present Working Document No 15 regarding Article 45. She opined that the said Article was closely linked to the provisions on the taking of evidence and service of documents abroad, namely, Article 6, paragraph 2, sub-paragraph (g), and Article 6, paragraph 2, sub-paragraph (j).

She explained that the proposed amendment in Working Document No 15 sought to clarify that the new Convention would not affect the *Hague Convention of 15 November*

1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters or the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*. She recalled that the draft Explanatory Report explained that the relationship between the Convention and those instruments was dealt with in Article 45. The Delegate opined that, notwithstanding the draft Explanatory Report, there remained uncertainty regarding the exact import of Article 45, paragraph 1, of the preliminary draft Convention. She was of the view that the reference to "matters governed by this Convention" did not suffice to clearly exclude any impact on the Conventions governing evidence and service of documents. She added that within the European Community there were arguments on both sides of the debate regarding whether or not the latter Conventions were exclusive of other means of obtaining evidence or serving documents abroad. She emphasised that Working Document No 15 did not seek to settle the underlying issues concerning the exclusivity of these Conventions. Accordingly, through the proposed Article 45, paragraph 1 *bis*, the delegation of the European Community sought to reassure the delegations of other States that they could employ existing channels for the international taking of evidence and service of documents without thereby breaching their international obligations.

6. **The Chair** asked the delegation of the European Community whether its statement of support for Article 6 included support for the removal of the square brackets that were contained therein.

7. **Mr Guerra** (Portugal, Presidency of the Council of the European Union) affirmed that the European Community supported the deletion of the brackets and the retention of the text because it allowed debtors to enforce their claims.

8. **M. Lortie** (Premier secrétaire) remercie la Présidente et salue l'ensemble des délégués. Il souhaite apporter quelques informations au sujet de la proposition de la délégation de la Communauté européenne, exposée dans le Document de travail No 15.

M. Lortie indique aux délégations qu'une modification a été apportée vendredi dernier au Rapport explicatif. Cette modification a été reportée sur le site web de la Conférence de La Haye de droit international privé. Ainsi, le Rapport explicatif évoque aujourd'hui les mécanismes « complémentaires » et non plus les mécanismes « parallèles » au sujet des Conventions en matière de coopération judiciaire. Le Bureau Permanent est à l'origine de cette modification car selon le Bureau Permanent, il s'agit bien de mécanismes complémentaires. L'avant-projet révisé de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille ne contient aucune disposition spéciale portant sur la signification et la notification ou sur l'obtention de preuves. À l'inverse, la *Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale* et la *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale* forment un ensemble complet contenant toutes les règles nécessaires au bon déroulement des procédures qu'elles régissent respectivement. Le Bureau Permanent ne relève donc pas de conflit possible entre ces deux Conventions et l'avant-projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille. Ainsi, le Bureau Permanent considère qu'il n'est pas nécessaire de coordonner l'avant-projet de Convention et les deux précédentes Conventions sur la signification, la notification et l'obtention des preuves. M. Lortie indique que ce qui importe ici est que le fonctionnement de l'Autorité centrale puisse faire la distinction entre l'application des règles domestiques et internationales dans le domaine.

Afin de mieux éclairer les délégués sur ce point, M. Lortie donne l'exemple de l'application de la Convention Notification de 1965. Les situations visées par l'avant-projet de Convention nécessiteront très rarement une notification internationale. En effet, la demande de reconnaissance et d'exécution sera transmise à l'Autorité centrale de l'État requis qui sera l'État de résidence habituelle du débiteur. Par conséquent, l'État requis appliquera une procédure de notification purement domestique. En ce qui concerne la demande d'établissement d'une obligation alimentaire, la demande présentée auprès de l'État d'origine sera transmise à l'État requis qui sera l'État de résidence habituelle du débiteur. Par conséquent, l'État requis appliquera là aussi sa loi interne en matière de signification et notification. Si la loi de l'État sur le territoire duquel le débiteur a sa résidence habituelle prévoit une notification en cas d'appel, la Convention de 1965 s'appliquera à la signification si cet État est un État contractant de la Convention de 1965.

M. Lortie évoque le même exemple quant à l'application de la Convention Obtention des preuves de 1970. En effet, si le créancier de l'obligation alimentaire apporte une preuve pour l'exécution et la reconnaissance d'une décision, alors le créancier ne demande pas l'établissement de nouvelles preuves et par conséquent la Convention de 1970 ne s'applique pas. Il en est de même dans le cas d'une demande d'établissement. L'obtention de preuves à l'étranger interviendra très rarement, éventuellement dans le cas de demandes de modification de décisions, tout en restant exceptionnelle.

M. Lortie relève pour conclure que le risque de prévoir une règle spécifique est de se limiter à ces deux Conventions tandis que plusieurs autres conventions multilatérales et bilatérales pourraient être invoquées. Néanmoins, il considère qu'il ne devrait pas y avoir de conflit à la source.

9. **M. Markus** (Suisse) souhaite dans un premier temps réagir à la proposition de la délégation de la Communauté européenne (Doc. trav. No 15) quant à la question de l'entraide judiciaire. La délégation de la Suisse est favorable à l'amendement de l'article 45 tel qu'il ressort du Document de travail No 15 car il existe des problèmes portant sur l'entraide judiciaire et sur la délimitation de l'avant-projet de Convention. Il existe en l'occurrence deux voies d'entraide judiciaire qui sont la Convention Notification de 1965 d'une part, et la Convention Obtention des preuves de 1970 d'autre part. À ces deux voies, il est d'ailleurs raisonnable d'en ajouter une troisième qui est celle de la *Convention de La Haye du premier mars 1954 relative à la procédure civile*, toujours en vigueur.

Le Délégué de la Suisse précise qu'au regard de l'expérience de la Suisse, plusieurs cas de conflits entre ces Conventions se sont déjà présentés. Il cite l'exemple d'une demande effectuée par la Suisse aux fins de reconnaissance et d'exécution d'une décision dans un autre État partie à la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger*. Dans cet exemple, le débiteur a demandé dans cet autre État la modification de la décision suisse qui aurait dû recevoir l'exequatur. La notification auprès du débiteur s'est faite, comme c'est très souvent le cas, par la voie de la Convention de New York.

S'ajoute aux cas de conflit de Conventions, le risque d'une violation des droits de la défense en raison d'un délai trop court pour répondre à une notification. Ce risque est particulièrement présent en cas de demande de modification d'une décision relative à une obligation alimentaire lorsque le défendeur réside dans un État très éloigné géographiquement de l'État sur le territoire duquel la demande de modification a été déposée.

M. Markus relève qu'il est donc question ici du noyau dur des Conventions d'entraide judiciaire, c'est-à-dire la protection des droits de la défense, comme nous le rappellent les articles 15 et 16 de la Convention Notification de 1965. L'inquiétude qu'évoque la délégation de la Suisse est relative au respect des voies d'entraide judiciaire mais surtout au respect de principes fondamentaux et matériels de ces Conventions d'entraide judiciaire. Sur cette base, la délégation de la Suisse appuie la proposition de la délégation de la Communauté européenne.

Dans un second temps, le Délégué de la Suisse souhaite mentionner que la proposition de la délégation de la Communauté européenne pourrait être complétée par une référence à la Convention toujours en vigueur de 1954 relative à la procédure civile et qui s'ajouterait à la Convention Notification de 1965 et à la Convention Obtention des preuves de 1970. De plus, cet ajout ne serait pas suffisant dans la mesure où il est aussi nécessaire de prendre en considération le cas des traités bilatéraux ainsi que les cas dans lesquels il n'existe aucun instrument applicable. Dans ce dernier cas, les principes du droit international public doivent être pris en considération, en l'occurrence le principe selon lequel l'État requis applique son droit interne. Par conséquent, la délégation de la Suisse considère qu'il serait préférable d'amender la proposition afin d'y introduire la Convention Procédure civile de 1954, les autres instruments ainsi que les cas extraconventionnels.

À ce propos, la délégation de la Suisse souhaite ajouter que la proposition formulée dans le Document de travail No 21 essaie de résoudre selon une autre perspective le problème posé. Cette perspective n'est d'ailleurs pas en contradiction avec la proposition de la délégation de la Communauté européenne. En effet, la proposition de la délégation de la Suisse a pour but de clarifier les fonctions des Autorités centrales en cas d'entraide judiciaire. En effet, le délégué propose d'amender l'article 6, paragraphe 4, en y ajoutant le cas de l'assistance judiciaire (« *or by way of judicial assistance* ») afin de s'assurer que ses compétences ne sont pas mises en péril par l'article 6, ce qui constituerait une protection encore supérieure à celle proposée par la délégation de la Communauté européenne.

M. Markus demande à la Présidente s'il est approprié d'évoquer d'autres points que la délégation de la Suisse souhaite évoquer et de discuter de l'article 6 en général.

10. **The Chair** asked the Delegate of Switzerland whether he wished to comment on Article 6, paragraph 3, or on other matters.

11. **M. Markus** (Suisse) précise qu'il souhaite par exemple intervenir sur l'article 6, paragraphe 2, alinéas (b), (c), (g) et (h), et l'alinéa (i) entre crochets, et souhaite une discussion ouverte à cet égard.

12. **The Chair** suggested that the delegates should first resolve matters related to judicial assistance and address other matters at a later stage.

13. **M. Heger** (Allemagne) remercie la Présidente et précise que la délégation de l'Allemagne peut se rallier à la proposition de la délégation de la Communauté européenne mais aussi, en substance, à la position de la délégation de la Suisse. M. Heger précise que la délégation de l'Allemagne souhaite aussi pouvoir déterminer avec clarté les conséquences de l'avant-projet de Convention sur le système d'entraide judiciaire. Sur ce point, M. Lortie a bien indiqué les modifications du texte du Rapport explicatif. La suppression du terme « parallèle » est effectivement la bienvenue. Néanmoins, le thème impose des précisions supplémentaires car il est question ici des relations entre différentes conventions internationales mais aussi et surtout du respect des droits fondamentaux. Comme l'a évoqué la délégation de la Suisse concernant l'article 15 la Convention Notification de 1965, il est absolument nécessaire d'être clair au sujet de ces garanties procédurales. Il en va de même de l'article 13 de cette même Convention. Concernant la Convention Obtention des preuves de 1970, la question est encore plus importante lorsque, par exemple, il est nécessaire de présenter un témoin résidant à l'étranger dans le cadre d'une procédure sur l'établissement ou l'exécution d'un document existant.

Ainsi, les parties, les témoins, et les États concernés doivent être protégés. Le risque le plus important serait en l'occurrence celui d'un vide juridique. Il est de même important de ne pas oublier la Convention Procédure civile de 1954. Le Délégué de l'Allemagne remercie la Présidente.

14. **Ms Matheson** (United States of America) highlighted her delegation's concern that Article 6 had been accepted as a significant compromise, and that opening up language that had been accepted would consequently pose great difficulties given that the text was already particularly flexible.

On the matter of Article 6, paragraph 2, sub-paragraph (i), the Delegate of the United States of America stated that her delegation supported the deletion of the brackets and the retention of the text contained therein.

Ms Matheson then stated that, for the reasons given by Mr Lortie (First Secretary), her delegation did not support the proposal of the delegation of the European Community regarding Article 45. She noted that the proposed amendment could cause confusion if it only referred to two Conventions. She submitted that the intervention of Mr Lortie was very helpful and that the examples given should be included in the Explanatory Report, particularly in so far as they clarify when the Conventions do or do not apply.

She concluded that, if one were to consider adding anything to Article 6, the proposal of the delegation of Switzerland would be preferable. However, she emphasized that her delegation accepted Article 6 as it was drafted in the preliminary draft Convention.

15. **The Chair** noted that the sub-paragraphs that referred to the taking of evidence abroad were not in square brackets. Following the intervention of Mr Lortie (First Secretary), she stated that she believed that the questions raised were pertinent in the context of Article 7 regarding requests for specific measures, whereas Article 6 was concerned with cases where an application under Chapter III has already been submitted.

She then addressed the intervention of the Delegate of Switzerland. She stated that the proposal in Working Document No 21 would be better placed in Article 7 than in Article 6.

16. **Mme Borcy** (Belgique) considère que la délégation de la Belgique est en parfait accord avec les positions de la délégation de la Communauté européenne, de la délégation de l'Allemagne et de la délégation de la Suisse.

La délégation de la Belgique a eu des craintes à la lecture du Rapport explicatif au sujet des fonctions des Autorités centrales régies par l'article 6, paragraphe 2, alinéas (g) et (j). La délégation de la Belgique soutient que les fonctions des Autorités centrales doivent être claires et que le système qui sera établi ne doit pas prêter à confusion. Comme l'ont évoqué d'autres délégués, la délégation de la Belgique souhaite que la Convention Notification de 1965 et la Convention Obtention des preuves de 1970 soient préservées car elles apportent des garanties sur la forme, les délais et les traductions. Le respect des droits fondamentaux sur cette question doit être clairement prioritaire.

Par ailleurs, la Déléguée de la Belgique considère que l'on peut exprimer des préoccupations en matière de notification car les Autorités centrales peuvent être différentes d'une Convention à l'autre. Elle considère, bien entendu, que les Autorités centrales qui seront chargées de satisfaire aux obligations imposées par la future Convention sur le recouvrement des aliments envers les enfants et d'autres membres de la famille fourniront tous les efforts nécessaires pour remplir leurs missions. Néanmoins, il existe bien un risque de limiter cette mission par l'application d'autres Conventions. La Déléguée de la Belgique remercie d'ailleurs M. Lortie pour les clarifications qu'il a pu apporter.

17. **M. Heger** (Allemagne) suit avec une grande attention la position de la délégation des États-Unis d'Amérique. La délégation de l'Allemagne est elle aussi très rassurée par l'intervention de M. Lortie. Néanmoins, il s'agit bien ici du respect des droits de la défense, d'où le soutien de la délégation de l'Allemagne aux positions de la délégation de la Belgique et de la délégation de la Suisse.

De même, les Autorités centrales qui seront désignées par la future Convention sur le recouvrement des aliments pourront être différentes de celles désignées par les autres Conventions déjà évoquées, bien que cela soit peut-être secondaire.

Enfin, M. Heger revient sur le fait que la délégation de l'Allemagne est revenue sur ce point à chaque Commission spéciale et la délégation de l'Allemagne n'a jamais été en accord malgré l'absence de crochets autour de ces dispositions de l'avant-projet de Convention.

18. **Ms Albuquerque Ferreira** (China) noted that her delegation shared the concerns of the delegation of Switzerland and hoped that the proposal of the latter delegation would be considered at greater length.

19. **Mr McClean** (Commonwealth Secretariat) stated that he would appreciate clarification from the delegation of Switzerland regarding the proposed addition of the phrase "or by way of judicial assistance" at the end of Article 6, paragraph 4. He observed that if one added the proposed phrase, this might exclude the services contemplated in Article 6, other than those referring to the taking of evidence. He apologised to the delegation of Switzerland if he had not understood their proposal, but added that it was not perfectly clear.

20. **Mr Markus** (Switzerland) responded to the question posed by the Observer of the Commonwealth Secretariat. The Delegate of Switzerland stated that the purpose of the proposed additional language in Article 6 was to clarify the different competences of the authorities within States. Accordingly, the proposed language set out to clarify whether the Central Authorities or judicial authorities were competent to deal with a matter under Article 6. It was intended that matters covered by the 1965 Service Convention or the 1970 Evidence Convention would be dealt with by judicial authorities. In such matters, and only in such matters, judicial authorities would be competent to deal with any questions that needed to be forwarded to another State.

He added that there were cases, albeit rare ones, where mistakes would be made and where there would be violations of the right of defence of creditors. He stated that, notwithstanding Article 15, there would remain cases where there were possibilities to make requests for modifications of decisions in which the giving of timely notice to creditors was necessary.

Recalling the intervention of the Delegate of Germany, the Delegate of Switzerland stated that judicial assistance might not be possible in all proceedings because evidence might only be available in a third country.

He concluded that if any delegates could propose better wording to provide for the intended scope of the amendment contemplated in Working Document No 21, his delegation would be happy to accept it.

21. **Mme Ménard** (Canada) est d'accord avec la rédaction de l'article 6 de l'avant-projet de Convention. Cependant, elle précise que les Autorités centrales au Canada n'offrent pas les services prévus à l'article 6, paragraphe 2, alinéa (i). La délégation du Canada souhaite quand même retenir l'article 6, paragraphe 2, alinéa (i), tout en comprenant la position des autres délégations.

22. **The Chair** suggested that it was the common understanding of the delegates that Central Authorities were not obliged to serve documents or provide evidence themselves, but that they were merely obliged to do all that was necessary to assist in those functions. Accordingly, if a Contracting State to another Convention required the taking of evidence or the service of documents abroad, it could address another State through the Central Authority contemplated in another Convention. She added that this would be clarified through the information that would be made available per Article 51 of the preliminary draft Convention.

23. **Ms Albuquerque Ferreira** (China) stated that her delegation supported the deletion of Article 6, paragraph 2, sub-paragraph (i). She observed that, while the obligation contemplated therein was flexible, it was an obligation nevertheless and that the meaning of the obligation "to facilitate" was unclear.

She added that the preliminary draft Convention referred to the giving of proper notice in several of its provisions, but that it did not refer to service. She suggested that there remained several discrepancies and that the lack of clarity was also reflected in the draft Explanatory Report.

Ms Albuquerque Ferreira concluded that the preliminary draft Convention sought to create strong co-operation, not to create a string of Central Authorities.

24. **M. Heger** (Allemagne) considère que le nécessaire a été dit à propos de l'article en question et que les positions ont bien été éclaircies. C'est pourquoi la délégation de l'Allemagne considère qu'elle en restera là.

25. **Ms Matheson** (United States of America), commenting on the intervention of the Delegate of Switzerland, observed that the Convention should not cater for extreme mistakes in its application.

She stated that, in a spirit of compromise and in order not to prolong proceedings, her delegation accepted the proposal of the delegation of the European Community, provided that the Explanatory Report gave a full explanation that included the clarifications made in the earlier intervention of Mr Lortie (First Secretary).

26. **The Chair** observed that there was agreement among the delegates on the policy to be adopted and that any differences concerned drafting. She stated that the delegates agreed that, when complying with their obligations under Article 6, paragraph 2, sub-paragraph (g), and Article 6, paragraph 2, sub-paragraph (j), States could insist on the application of the 1965 Service Convention or the 1970 Evidence Convention. She suggested that the Drafting Committee should consider the proposal of the European Community in Working Document No 15 as a compromise on this issue.

27. **Mr Markus** (Switzerland) stated that his delegation did not oppose the suggestion of the Chair to send the proposal of the delegation of the European Community to the Drafting Committee. However, he reiterated that the Convention should provide for judicial assistance in cases that are not covered by the 1965 Service Convention or the 1970 Evidence Convention. Accordingly, he suggested that the Drafting Committee should also consider situations where other treaties apply, as well as where there was no treaty basis for judicial assistance between two particular States. He added that Working Document No 21 would cover every situation in the framework of judicial assistance. However, in a spirit of compromise, he stated that he could agree that the Drafting Committee would address the matter with Working Document No 15 as a basis, provided that the situations that he cited were also taken into account.

28. **Mr Beaumont** (United Kingdom) opined that he did not believe that it was appropriate to ask the Drafting Committee to account for bilateral agreements and practices between States, the contents of which it could not know. He emphasised that it was reasonable to ask for clarification regarding well-known Conventions concluded under the auspices of the Hague Conference on Private International Law, but that this was not the case for other agreements. He stated that the United Kingdom was opposed to an open-ended provision of that nature as a matter of policy, and that it was also impractical to request that the Drafting Committee perform such a task.

29. **Ms Albuquerque Ferreira** (China) stated that she agreed in principle that the Drafting Committee should consider the proposed amendments to Article 45. She was of the view that Article 45 should be more explicit and that, with better wording, the proposal could be accepted.

30. **Ms Matheson** (United States of America) stated that, following the intervention of the Observer from the Commonwealth Secretariat, she was convinced that the proposal of the delegation of Switzerland in Working Document No 21 was not workable.

She added that she agreed with the delegation of the United Kingdom that Article 45 should not be extended beyond the scope contemplated in Working Document No 15.

31. **Mr Segal** (Israel) agreed that the proposal of the delegation of Switzerland was misplaced and that the proposal of the delegation of the European Community was more appropriate. He stated that the relationship with other international agreements and Conventions should not be dealt with in Article 6 and that he could not see why it was necessary to do so when the proposal of the delegation of the European Community resolved the matter elsewhere.

32. **The Chair** asked the delegates if there were any objections to the insertion of the proposal of the delegation of the European Community regarding Article 45 that was set out in Working Document No 15. Noting that there were no objections, she concluded that this was accepted.

33. **Ms Matheson** (United States of America) emphasised that acceptance was conditional on the inclusion in the Explanatory Report of a clear explanation and the examples cited by Mr Lortie (First Secretary).

34. **The Chair** took note of the intervention of the delegation of the United States of America with approval.

Article 6, paragraphe 2, alinéa (i) / Article 6, paragraph 2, sub-paragraph (i)

35. **The Chair** invited the delegates to submit their remarks on Article 6, paragraph 2, sub-paragraph (i). She observed that this was the only provision in Article 6 that remained in square brackets. She noted that some comments had already been made earlier and asked if there were any further remarks.

36. **Ms Nind** (New Zealand) stated that her delegation supported the deletion of the brackets and the retention of the language in Article 6, paragraph 2, sub-paragraph (i).

37. **Mr Segal** (Israel) noted his agreement with the immediately preceding intervener and highlighted the importance of the relevant provision as one of the substantive functions of Central Authorities.

38. **M. Markus** (Suisse) souhaite attirer l'attention de la Commission I sur le Document de travail No 21. Il s'agit d'une proposition d'amendement de l'article 6, paragraphe 3, consistant en l'ajout des mots « *or persons* » à la suite de « *The functions of the Central Authority under this Article may, to the extent permitted under the law of the State, be performed by public bodies, or other bodies* » et de « *The designation of any such public bodies or other bodies* », car la délégation de certaines obligations de l'Autorité centrale peut aussi se faire auprès des personnes physiques et non pas seulement des personnes morales. Il s'agit donc d'une simple clarification.

Par la suite, la délégation de la Suisse rappelle qu'elle se prononce contre le maintien de l'alinéa (i) déjà discuté car elle considère que cet élément n'a pas sa place dans l'article 6 et qu'il manque de clarté quant au champ d'application des mesures qui pourraient être requises malgré le caractère interne d'une demande pendante d'aliments. Il en va de même en matière d'établissement d'une obligation alimentaire lorsque les parties ont leur résidence habituelle dans le même État contractant et qu'il est question seulement de la localisation des biens du débiteur dans un autre État contractant. Il est difficile de considérer que ce dernier élément caractérise l'ensemble du litige comme véritablement international au regard de l'avant-projet révisé de Convention.

Enfin, le Délégué de la Suisse précise que plusieurs discussions ont déjà eu lieu au sein de la Commission spéciale et exprime des doutes sur la rédaction de l'article 6, paragraphe 2, alinéa (b), portant sur la localisation du débiteur et du créancier. La délégation de la Suisse se demande s'il est nécessaire de maintenir la référence au « créancier » car, en effet, aucun mécanisme n'est perçu par la délégation comme étant applicable au créancier dans ce contexte. De plus, cette critique est liée au fait que la délégation de la Suisse considère que l'aide qui devrait être apportée par l'Autorité centrale devrait être en faveur du créancier de l'obligation alimentaire et non en faveur du débiteur. C'est sur cet aspect que la délégation de la Suisse remet en question les termes de l'article 6, paragraphe 2, alinéa (b).

39. **The Chair** explained that there could be an obligation to provide assistance in an internal case where it was necessary to freeze bank accounts held in another State in support of said internal case. She drew the delegates' attention to the fact that this scenario was provided for in Article 7, paragraph 2, which she noted was in square brackets. She added that this clause was optional because it provided that Central Authorities "may" render the services contemplated therein. The Chair noted that in Article 6 the requested State would already be involved because that Article referred to applications that had already been submitted. This was to be distinguished from Article 7, paragraph 2, which referred to a scenario where no application was pending. She added that the latter provision was not the topic of discussion at that point.

On the matter of Article 6, paragraph 2, sub-paragraph (b), the Chair emphasised that there had been general agreement. She therefore asked the delegates if there was any support for the reopening of discussion regarding that sub-paragraph.

40. **Ms Cameron** (Australia) stated that she was in agreement with the immediately preceding intervention of the Chair and that she therefore had nothing to add.

41. **Mr Schütz** (Austria) opined that it was unnecessary to add the language that Working Document No 21 proposed to insert in Article 6, paragraph 3. He observed that where a Central Authority appoints a lawyer on a one-off basis, it would be cumbersome to ask the lawyer to inform the Permanent Bureau of his functions as an assistant to the Central Authority. He therefore made known his opposition to the proposal in Working Document No 21.

On the question of reopening discussion regarding Article 6, paragraph 2, sub-paragraph (b), he observed that the provision was not in square brackets and should therefore not be discussed.

42. **Ms Albuquerque Ferreira** (China) stated that she supported the proposal of the delegation of Switzerland to discuss Article 6, paragraph 2, sub-paragraph (b). She observed that it is possible to discuss matters that were not in square brackets because the removal of square brackets had sometimes been difficult.

On the matter of Article 6, paragraph 2, sub-paragraph (i), the Delegate of China observed that paragraph 184 of the draft Explanatory Report stated that a case could be purely domestic. Following the Chair's explanation, the Delegate of China felt that there was some need for clarification.

43. **Ms Matheson** (United States of America) highlighted her delegation's strong support for the ground rules proposed by the Chair. She observed that the work of the Commission could never be completed if matters that were no longer in square brackets were reopened. She recalled that there had been opportunities to object to the removal of brackets in the past.

44. **The Chair** reiterated that the provisions where square brackets had been removed had been the subject of general agreement. She submitted that they could only be reopened if there were written submissions together with a majority of delegates that supported the reopening of the discussion that was larger than the majority and that had supported the removal of the square brackets.

45. **Ms Albuquerque Ferreira** (China) observed that the proposal in Working Document No 21 to add the words "or persons" was intended to include both natural and legal persons.

46. **Mr Segal** (Israel) associated himself with the previous intervention of the Delegate of Austria. He stated that public bodies may appoint private persons to perform their functions, but that this did not change the fact that responsibility remained with the Central Authority. Accordingly, he felt that adding private persons would obscure the meaning of Article 6, paragraph 3. He therefore stated that the said provision should remain as it was drafted in the preliminary draft Convention.

47. **Mr Beaumont** (United Kingdom) observed that the possibility of the delegation of powers to other public bodies is standard practice in several other Conventions, including the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* and Article 31 of the *Hague 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*. However, he observed that it would be a considerable change to delegate functions to private parties such as a lawyer. He questioned the practicality of informing the Permanent Bureau every time a lawyer was appointed.

48. **Mr Sello** (South Africa) supported the removal of the square brackets and the retention of the text in Article 6, paragraph 2, sub-paragraph (i).

49. **M. Markus** (Suisse) remercie la Présidente et souhaite s'exprimer sur les remarques qui ont été avancées par rapport à la proposition de la délégation de la Suisse.

D'une part, concernant l'article 6, paragraphe 3, la délégation reste d'avis que l'avocat est une personne physique et que, par conséquent, il est nécessaire de permettre à une Autorité centrale de lui déléguer ses pouvoirs. Il existe, par ailleurs, une autre formule dans la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants* qui n'implique pas les Autorités centrales, avec un champ d'application plus large. Néanmoins, si les autres délégations considèrent que les avocats peuvent agir au lieu et place des Autorités centrales, alors la délégation de la Suisse n'y voit pas d'inconvénient. Dans ce cas, la délégation de la Suisse propose que ceci soit clarifié dans le Rapport explicatif.

D'autre part, au sujet de l'article 6, paragraphe 2, alinéa (i), le Délégué de la Suisse remercie la Présidente ainsi que la délégation de la Chine pour leurs explications. Sur ce point, la délégation de la Suisse maintient sa proposition de biffer l'ensemble du texte car elle reste dubitative quant à l'application concrète de cet alinéa.

Enfin, il est important de retenir que le paragraphe 184 du Rapport explicatif introduit un malentendu portant sur le champ d'application de l'article 6, paragraphe 2, alinéa (i), dans la mesure où le Rapport énonce que : « Les termes de l'alinéa (i) laissent ouverte la possibilité d'une demande d'aliments à caractère purement interne ou d'une affaire à caractère international. » Ainsi, le Rapport explicatif devrait être corrigé et, si une majorité de délégations le soutient, il pourrait être possible de biffer l'alinéa (i) et d'appuyer la proposition de la délégation de la Suisse.

50. **The Chair** asked if there were any further interventions. Noting that there were none, she concluded that the proposal in Working Document No 21 to amend Article 6, paragraph 3, had not been supported by other delegations and that the text was therefore not to be amended.

Regarding Article 6, paragraph 2, sub-paragraph (i), the Chair concluded that most of the delegates wanted to delete the brackets and retain the text, and that those who opposed doing so had declared that they would be flexible on this matter if they were in a minority. She asked if there were any objections to deleting the square brackets and retaining the text.

51. **Mr Ding** (China) stated that his delegation still hesitated at this stage because they were of the view that this discussion needed to be held in relation to Article 14.

52. **The Chair** therefore concluded that the text would be kept in square brackets, bearing in mind that a majority were in favour of keeping the text.

Article 7 – Requêtes de mesures spécifiques / Article 7 – Requests for specific measures

53. **The Chair** invited Ms Degeling (co-*Rapporteur*) to present Article 7 concerning requests for specific measures.

54. **Ms Degeling** (co-*Rapporteur*) explained that Article 7 concerned requests for specific measures and that such a request was a request for limited assistance rather than an application of the kind referred to in Article 10 concerning available applications. She noted that a request under Article 7 must be made through a Central Authority. It was not the intention to allow applicants to apply directly to a requested State for specific measures.

She then explained that the request could be made preliminary to, or in the absence of, a formal Chapter III application. Hence it was placed in Chapter II rather than Chapter III. The assistance to be offered in Article 7 was discretionary and no specific procedures or forms were prescribed for specific measures or requests. She emphasised that one might expect that applications under this heading would not have the same degree of formality as a Chapter III application.

The co-*Rapporteur* stated that it was useful to recall that an application for limited assistance had been included in Article 10 in early drafts of the Convention. However, concerns were expressed that it could be too burdensome on Central Authorities to be obliged to provide this type of assistance. As a compromise, and to give a treaty basis to this form of limited assistance for those countries wishing and able to provide it, the "application for limited assistance" in Chapter III became the "request for specific measures" in Chapter II.

Further, she noted that the operation of the provision was narrowed to make it more acceptable to the majority of experts. She recalled that one expert had noted that these specific measures referred to in Article 7 can already be accomplished on a voluntary basis under the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*.

Ms Degeling added that, as a discretionary service, no unmanageable obligations were imposed on Central Authorities, and there could be great benefits generated from having a wider range of services available under Article 7, paragraph 1. Hence a reference to Article 6, paragraph 2, sub-paragraphs (g), (h), (i) and (j), had been added to Article 7, paragraph 1, but was in square brackets as consensus has not been reached on its inclusion.

The co-*Rapporteur* enumerated situations in which a request for specific measures could be made by a Central Authority: a request that is preliminary to an application for the establishment, modification or enforcement of a maintenance decision; where establishment, modification or enforcement of a maintenance decision was being undertaken in the requesting country and help from the requested country was needed for the proceedings; a request for assistance in the context of a purely internal maintenance matter in which, for whatever reason, there was a need for assistance from another State.

She opined that it was likely that the most common request for specific measures would relate to Article 6, paragraph 2, sub-paragraph (b), and location of the debtor. This had the potential to be a significant cost-saving measure. Many Central Authorities and the creditors they were assisting would want to ascertain that a debtor was in fact residing in a particular country before expending time, effort and money in preparing and translating a Chapter III application.

Ms Degeling added that an Article 7 specific measure request was not a Chapter III application. Therefore the Central Authority obligation in Article 6, paragraph 1, to provide assistance in relation to applications under Chapter III, would not apply. If an application had been made under Article 10, a Central Authority would rely on assistance under Article 6, paragraph 2, which was mandatory, and not on assistance through specific measures under Article 7.

On the matter of Article 7, paragraph 1, she explained that a requesting Central Authority could request "appropriate specific measures" in relation to one or more of the functions specified in Article 6, paragraph 2, sub-paragraphs (b), (c), (g), (h), (i) and (j). No Article 10 application would need to have been made or be in preparation. Furthermore, she recalled that the request would be supported by reasons.

The co-*Rapporteur* also noted that the second sentence of Article 7, paragraph 1, described the required response of the requested Central Authority. She maintained that it would have to be satisfied, from the reasons given, that the specific measures requested were necessary to assist in making, or deciding to make, an Article 10 application. The extent of assistance to be provided is whatever may be "appropriate" measures in the requested State. It was for the requested Central Authority to decide what measures were "appropriate" in the circumstances. The requested Central Authority therefore had discretion to refuse assistance when it was not "satisfied". However, when the Central Authority was "satisfied" it was bound to take appropriate measures.

She then explained that two issues remained to be resolved in Article 7, paragraph 1. Firstly, whether or not to remove the square brackets around sub-paragraphs (g), (h), (i) and (j)

and, secondly, whether or not to remove the square brackets in the second sentence to allow requests for specific measures to be made in order to assist an applicant in making an Article 10 application. She observed that it seemed very strange to her that the Convention would assist a person to decide to make an application but would not assist them to actually make the application.

Ms Degeling stated that Article 7, paragraph 2, had already been discussed in the context of the taking of evidence. She stated that she would therefore only address the question of parentage. She noted that when a request for specific measures to establish parentage was submitted under Article 7, paragraph 1, assistance under Article 6, paragraph 2, sub-paragraph (h), would have to be offered if such measures "are necessary to assist a potential applicant [in making an application under Article 10 or] in determining whether such an application should be initiated". She drew the delegates' attention to the paragraphs of the draft Explanatory Report which dealt with this matter (paras 171-180).

She explained that the pending case to which Article 7, paragraph 2, referred was an internal case concerning the recovery of maintenance in the requesting State, and for which there was a need for assistance from another State. She noted that the words "concerning the recovery of maintenance" were added after negotiations in 2005 to make clear that the scope of this provision was restricted to those cases so described, and not simply to "any" internal case. She clarified that although it was understood that if a request was made to a Central Authority in another Contracting State, there existed already an "international element" in the case, the words "having an international element" were added by the Drafting Committee in its meeting of September 2006 to give greater certainty to the conditions for making a specific measures request concerning an international case.

The co-*Rapporteur* also noted that the obligation created by the word "may" in Article 7, paragraph 2, was a discretionary obligation and not a direct obligation of the kind imposed by the word "shall" in Article 7, paragraph 1. The reason for this was that the specific measures referred to in Article 7, paragraph 2, could be any of the measures in Article 6, paragraph 2, and are not restricted to those mentioned in Article 7, paragraph 1.

Moreover, she explained that Article 7, paragraph 2, could apply even if both the debtor and creditor lived in the requesting State. She observed that there were circumstances where information or measures in the requested State, such as the location of assets or evidence from a foreign witness, would be needed for legal proceedings in the requesting State. By way of example, she explained that Article 7, paragraph 2, would permit a specific measures request for provisional territorial measures, as referred to in Article 6, paragraph 2, sub-paragraph (i), to be made for a purely internal maintenance claim, but if assets cannot first be secured in the requested State (or another State), it would be pointless for a creditor to proceed with the internal application. Ms Degeling concluded that it would be logical to use an established network of Central Authorities, even for a purely internal matter, provided it would not create an unacceptable burden on the requested Central Authority. Moreover, she observed that it would be useful to include this provision in a Convention whose primary aim is to improve the recovery of maintenance for children.

55. **Mr Guerra** (Portugal) presented Working Document No 15. He explained that the working document proposed to delete the remaining square brackets in Article 7, paragraph 1, as well as to add the words "as are appropriate". He explained that the added text would further clarify the discretionary nature of the provision and afford Central Authorities a double test: the requested Central Authority would first determine whether any measures were necessary and would then take such action as would be appropriate.

Turning to Article 7, paragraph 2, which was still in square brackets, the Delegate of Portugal observed that the text of the paragraph only gave the requesting Central Authority the power to ask for measures to be taken. He emphasised that the text was very clear as it used the word "may", rather than "must", when describing the action to be taken by the requested Central Authority. He added that the substance of that request had been clarified through a preceding addition of the requirement that the cases for which specific measures were requested should have an international element. The Delegate of Portugal was of the view that Article 7, paragraph 2, would allow requests to be made at a preliminary stage that would thereby reduce the expenditure of unnecessary costs, because the findings of those requests would be relied upon in the choice of proceedings thereafter.

56. **Mr Hayakawa** (Japan) stated that his delegation supported the deletion of the square brackets and the retention of the text in Article 7, paragraph 1. He observed that the measures that were contained in the brackets were particularly useful for applicants.

The Delegate of Japan added that he had no preference concerning the rest of the square brackets in Article 7.

57. **Mr Tian** (China) submitted that his delegation supported the suppression of Article 7, paragraph 2. He felt that this provision would cause problems for the requested State to distinguish between an international case and a purely internal one. Notwithstanding the discretionary nature of the provision, the Delegate of China was of the view that it would cause problems where requests were in fact made.

58. **Mr Ding** (China) added that the delegation of China supported the deletion of the references in Article 7, paragraph 1, to Article 6, paragraph 2, sub-paragraphs (g), (i) and (j). The delegate was of the view that the services that were referred to in said sub-paragraphs were not appropriate where there was no pending application.

59. **Ms Matheson** (United States of America) agreed with the observations of the Delegate of Portugal regarding Article 7. She reiterated that the text should be acceptable given that Article 6 was so flexible and Article 7 was discretionary. She recalled that her delegation had submitted written comments that were to be found in Preliminary Document No 36. Quoting from paragraph 217 of the draft Explanatory Report, the Delegate of the United States of America opined that "[i]t would be unfortunate if [Article 7, paragraph 2,] were omitted from a Convention whose primary aim is to improve the recovery of maintenance for children".

60. **Mme Ménard** (Canada) est en faveur du maintien des termes de l'article 7, convaincue que les Autorités centrales bénéficient d'une grande discrétion dans leur prise de décisions. De plus, la délégation du Canada souhaite le retrait des crochets qui entourent les termes « (g), (h), (i) et (j) » et le maintien du texte. En ce qui concerne la seconde phrase de l'article 7, paragraphe premier, il est important que le texte entre crochets faisant référence à un demandeur

qui présente une demande prévue à l'article 10 soit conservé. En ce qui concerne le paragraphe 2 de l'article 7, la délégation du Canada souhaite le maintien du texte qui se trouve entre crochets. Enfin, la délégation du Canada soutient le texte de la proposition de la délégation de la Communauté européenne figurant dans le Document de travail No 15.

61. **Mr de Oliveira Moll** (Brazil) stated that the delegation of Brazil supported the deletion of all of the square brackets in both paragraphs of Article 7 and to maintain the text. His delegation also had no objections to the inclusion of the words "as are appropriate" that Working Document No 15 proposed to add to Article 7, paragraph 1.

62. **M. Markus** (Suisse) confirme que les termes de l'article 7, paragraphe premier, permettent à l'Autorité centrale de l'État requérant de prendre une décision en toute discrétion. En effet, il est prévu qu'« une Autorité centrale peut ». En revanche, la délégation de la Suisse n'est pas certaine qu'il en soit de même pour la décision prise par l'Autorité centrale de l'État requis. En effet, l'article 7, paragraphe premier, ne prévoit rien concernant la discrétion de cette dernière Autorité centrale. Ainsi, la délégation de la Suisse considère que ce point devrait être éclairci.

En outre, la délégation de la Suisse a des hésitations concernant le retrait des crochets autour du texte « (g), (h), (i) et (j) ». En effet, s'il est possible, sous ces alinéas, de prendre des mesures obligatoires et générales, alors ces mesures sont réservées aux autorités d'entraide judiciaire et le prévoir si tôt dans la procédure peut être problématique. La délégation de la Suisse hésite car si aucune procédure judiciaire n'est pendante, alors il n'est pas possible de prendre des mesures de nature judiciaire. La délégation de la Suisse est donc en faveur de la suppression du texte entre crochets.

Dans le même temps, la délégation de la Suisse soutient la proposition de la délégation de la Communauté européenne, car elle s'inscrit dans la démarche des propositions de la délégation de la Suisse portant sur la discrétion de l'État requis. Néanmoins, le Délégué de la Suisse considère qu'il n'est pas suffisant d'évoquer seulement les « mesures appropriées ». Il est nécessaire d'apporter plus de clarté au texte. De plus, l'utilisation des termes « Une Autorité centrale peut également » manque autant de clarté en ce qui concerne la discrétion des Autorités de l'État requis dans leur prise de décision.

Concernant le paragraphe 2 de l'article 7, la délégation de la Suisse préférerait le biffer. En effet, le paragraphe 2 porte sur la situation dans laquelle le débiteur et le créancier résident habituellement dans le même État. Cette situation est interne et il n'est pas approprié qu'elle soit couverte par l'avant-projet de Convention principalement pour des raisons pratiques. Ceci pourrait impliquer une charge de travail immense pour les Autorités centrales car il existe un nombre important de demandes d'aliments à caractère interne dans lesquelles il peut être nécessaire de sécuriser un bien situé sur le territoire d'un autre État. Selon le paragraphe 2, la Convention s'appliquerait à ces cas et entraînerait la mise en œuvre du système des Autorités centrales seulement pour cette procédure bien connue. La délégation de la Suisse ne dit pas qu'elle n'y est pas favorable, mais craint la surcharge du système des Autorités centrales et propose donc la focalisation de l'avant-projet de Convention sur les cas véritablement internationaux en supprimant le paragraphe 2 de l'article 7.

63. **Ms Nind** (New Zealand) agreed that all square brackets should be deleted because, as had been explained, Article 7 was particularly discretionary. She added that Article 7 could reduce costs because it could pre-empt recourse to Article 10.

64. **Ms Cameron** (Australia) stated that the delegation of Australia also supported the deletion of the square brackets and the retention of the text in Article 7, paragraph 1. Her delegation supported the relevant proposals in Working Document No 15.

She emphasised that her delegation also strongly supported the deletion of the square brackets and the retention of the text in Article 7, paragraph 2. She opined that the provision was permissive and intended to allow useful co-operative arrangements between States. She did not accept the concern of the delegation of Switzerland that States that did not offer the discretionary services would be burdened nevertheless. She explained that other States would be aware of what services were offered and what were not, and that they would not request services from States that were known not to offer them.

Ms Cameron voiced some concerns regarding the degree of clarity in Article 7, paragraph 1. She observed that the second sentence of said provision was confusing and that the draft Explanatory Report was also confusing in that respect. She referred the delegates to her delegation's proposal in Preliminary Document No 36, in which it was suggested to amend the second sentence of Article 7, paragraph 1, to read: "The Requested Central Authority shall take such measures if satisfied that they are necessary to assist a potential applicant under Article 10". Despite her concerns, she stated that her delegation could accept Article 7.

She then referred with approval to the intervention of the delegation of Switzerland in which the latter observed that Article 7 was not entirely permissive. She stated that the draft would be improved through the adoption of the proposal in Working Document No 15. She reiterated that the employment of the word "shall" in the second sentence of Article 7, paragraph 1, imposed an obligation.

65. **The Chair** concluded that the proposal of the delegation of the European Community to add the words "as are appropriate" in Article 7, paragraph 1, had been accepted. She therefore instructed the Drafting Committee to include that wording.

Concerning the square brackets in the second sentence of Article 7, paragraph 1, the Chair observed that there was wide support to delete the brackets and to retain the text.

She added that there was very wide support to delete the square brackets in the first sentence. However, she observed that it was necessary to retain the reference to Article 6, paragraph 2, sub-paragraph (i), in square brackets until the discussion regarding Article 6 itself was concluded.

She also concluded that there was strong support for the deletion of the brackets and the retention of the text in Article 7, paragraph 2, provided that it was clarified that this provision was totally discretionary.

She asked the delegates if they agreed with her conclusions. Noting that there were no objections she concluded that only the reference to Article 6, paragraph 2, sub-paragraph (i), was to be kept in square brackets.

66. **Mr Tian** (China) stated that he agreed with the Chair's conclusions, but on the condition that there has to be a discussion regarding Article 14.

67. **The Chair** explained that there was a common understanding that Article 14 did not relate to Article 7.

68. **Mr Tian** (China) felt that the functions of Central Authorities in Article 6 and the provisions of Article 7 were interlinked with Article 14 and that they must be considered in tandem. He emphasised that there had not been any final decision regarding Article 6, paragraph 2, sub-paragraph (i), or Article 14, and that these matters must be considered as a whole. He concluded that if there were a majority in favour of retaining Article 7, paragraph 2, the delegation of China could show flexibility but that it could not do so at that stage.

69. **The Chair** observed that in both Option 1 and Option 2 of Article 14, it is clear from paragraph 1 thereof that Article 14 only related to applications under Chapter III of the Convention. She added that the same could be said of Article 12, which did not refer to requests for specific measures either. She therefore understood that there were no objections to the removal of the square brackets as explained in her conclusions.

70. **Ms Albuquerque Ferreira** (China) stated that her delegation was not ready to accept the deletion of the square brackets in Article 7 at that stage.

71. **The Chair** stated that her conclusion that only the reference to Article 6, paragraph 2, sub-paragraph (i), was to be kept in square brackets was based on a wide agreement, and not necessarily on unanimity. She therefore reiterated said conclusion.

72. **Mr Markus** (Switzerland) stated that he shared the concerns of the delegation of China concerning the deletion of the brackets in the first sentence of Article 7, paragraph 1, and in Article 7, paragraph 2.

73. **The Chair** concluded that the square brackets in the first sentence of Article 7, paragraph 1, should be retained, but that there had not been any real strong objections to the deletion of the brackets around Article 7, paragraph 2, because it was clear that the latter provision was discretionary. She observed that the only concern was that there might be over-burdening of Central Authorities through the discretionary tasks.

74. **Ms Albuquerque Ferreira** (China) stated that the Drafting Committee should re-evaluate the wording of Article 7, paragraph 2, and that the square brackets should only be removed if the drafting were improved.

75. **Mr Beaumont** (United Kingdom) requested that delegates should submit written proposals at that juncture in proceedings, or at least make it clear what they required of the Drafting Committee through their verbal interventions. He emphasised that the Drafting Committee could not surmise its mandate without clear instructions.

76. **The Chair** made known her agreement with the immediately preceding intervention.

77. **Ms Albuquerque Ferreira** (China) stated that if her delegation were to submit a working document, that document would in principle propose to delete Article 7, paragraph 2. However, she opined that the reference to "an international element" should be improved because it could be misinterpreted.

78. **The Chair** then concluded that the square brackets in Article 7, paragraph 2, should be retained, provided that it was borne in mind that a majority favoured the deletion of the brackets and the retention of the text. She invited the delegates to submit working documents if they had any proposals.

Noting that it was 12.56 p.m., the Chair proposed to close the meeting because a working group had been formed to discuss effective access to procedures and the working group needed time to work. She added that, for the same reasons, the afternoon session would commence at 3.30 p.m.

79. **Ms Ménard** (Canada) announced the arrangements for the meeting of the working group.

80. **The Deputy Secretary General** added that catering arrangements had been made and that the meeting of the working group could therefore commence immediately.

The meeting was closed at 12.58 p.m.

Procès-verbal No 8

Minutes No 8

Séance du lundi 12 novembre 2007 (après-midi)

Meeting of Monday 12 November 2007 (afternoon)

La séance est ouverte à 15 h 45 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 10

1. **The Chair** welcomed everyone back. She suggested to continue the discussion with Article 10 on the applications available in a requesting State to a creditor who is seeking to recover maintenance obligations. She pointed out that there were currently no square brackets within this Article. She also reminded the delegates that this Article was the result of long discussions and a delicate balance had been achieved as reflected in the draft Convention. She stated that Article 10 outlined those applications that shall be made available first to creditors in paragraph 1. She further pointed out that Article 10, paragraph 2, provided for applications available to debtors, which were basically for modification of decisions. The Chair then stressed that para-

graph 3 was also important because it provided that the application shall be determined under the law of the requested State and such applications were subject to jurisdictional rules of the requested State. She noted that the Commission had received a suggestion from the Drafting Committee with regard to available applications. She therefore gave the floor to the Chair of the Drafting Committee to enable her to explain the rationale behind this suggestion.

2. **The Chair of the Drafting Committee** stated that the Drafting Committee had proposed to the delegates that consideration be given to the inclusion of applications by the debtor for the establishment of a decision or for the recognition of a decision. She cited two examples to illustrate this suggestion. The first example was where it may be fair for a debtor to apply for the establishment of a decision. She gave the example where a creditor and a debtor may have been parties to a voluntary agreement where the debtor had been paying voluntarily for some time, and such debtor subsequently either lost his job or became sufficiently unwell as to be unable to earn an income. She stated that under these circumstances it was conceivable that it would be fair to such a debtor to enable him to apply to seek a level of maintenance obligation that he could discharge with regard to his new circumstances. The second example cited by the Chair of the Drafting Committee related to recognition. She stated that in her opinion it was conceivable that it would be fair to a debtor who had obtained a modification decision to be able to have that decision recognised in the requested State to enable him to pay the level of maintenance that he is able to discharge having regard to his new circumstances. She concluded that the Drafting Committee sought the views of the delegates on whether it was appropriate to offer these applications to debtors.

3. **The Chair** thanked the Chair of the Drafting Committee and declared the floor open on applications. She gave the floor to the delegation of the European Community.

4. **Ms Lenzing** (European Community – Commission) stated that her delegation was grateful to the Drafting Committee for the proposal on the inclusion of applications for recognition as the delegation was going to make the same proposal as previously discussed that morning. She stated that her delegation considered that this was an application for which the assistance by a Central Authority under this Convention would be justified and desirable. She queried whether the Drafting Committee had already thought about language but considered that it should not be too difficult to draft. She expressed her delegation's support for the policy behind the Drafting Committee's suggestion and for the current text of Article 10.

5. **The Chair** sought clarification from the delegation of the European Community on whether their support for the Drafting Committee's proposal was in respect of both the proposals on establishment and recognition applications.

6. **Ms Lenzing** (European Community – Commission) apologised for the ambiguity and clarified that her delegation was in favour of the Drafting Committee's proposal to include under Article 10, sub-paragraph 3, an application for the debtor for the recognition of a modification decision.

7. **The Chair** queried whether there were any more comments. She then gave the floor to the delegation of Australia.

8. **Ms Cameron** (Australia) expressed the hope that the Chair would allow her to make a few separate comments, firstly as a delegate and secondly as one of the co-Chairs of the Forms Working Group, and that her comments would not lead to confusion. Her first comment was in relation to the question from the Drafting Committee about whether there should be applications for recognition, enforcement and establishment of a modification decision available for a debtor in a requested State. She stated that the delegation of Australia would support and propose that both of these application types be available to a debtor. She stated that the delegates had been informed of certain circumstances in which the debtor may seek for an application for recognition and enforcement of a decision. However she also gave an explanation of circumstances where a debtor may wish to seek establishment of a decision. She explained that an application for the establishment of a decision was not unusual in a domestic context in Australia. She explained that this situation could arise in cases where, upon separation, the debtor may wish to have some certainty and finality in relation to financial affairs and the amount of maintenance that should be payable was certainly an important aspect of that. She stated that it was not correct to say that it was only a creditor who may wish to seek the establishment of a decision and added that in some cases it will be the debtor who wishes to have that matter set down and decided to enable him to have some finality to carry forward with. She stated that this was the reason behind the proposal of the delegation of Australia that an application for establishment of a decision should be allowed.

9. **Ms Cameron** (co-Chair of the Forms Working Group) drew the attention of the delegates to the fact that one of the recommendations of the Forms Working Group in Preliminary Document No 31-A was that an application for recognition of a decision by a debtor be available under the Convention. She stated that this recommendation was a result of discussions within the Forms Working Group that there would be circumstances in many of the States that were members of this Working Group where such an application would be justified.

10. **Ms Cameron** (Australia) also made reference to a comment made by her delegation in relation to the drafting of Article 10, paragraph 1, sub-paragraph (d), on applications by a creditor. She drew the attention of the delegates to that comment in Preliminary Document No 36, to the effect that Article 10, paragraph 1, sub-paragraph (d), was limited to States where the basis for refusal to recognise and enforce a prior decision was lack of jurisdiction under Article 17 or the grounds specified in Article 19, paragraphs (b) or (e). The proposal was that this provision should also apply where the ground for refusal was Article 19, paragraph (a), which was related to the recognition and enforcement of a decision being manifestly incompatible with public policy. She explained that the rationale behind this proposal was that recognition and enforcement of a decision would be refused on the basis of such decision being manifestly incompatible with public policy. She also stated that a decision could be established in the State addressed for the same parties under different conditions, and added that the delegation of Australia had included in its comments two examples to illustrate this. She expressed her intention not to go through these examples in detail and stressed that this ground was one which the delegation of Australia could live without. She concluded that she would not be predisposed to open a long and detailed discussion about this proposal although the delegation of Australia had made this proposal and stood by it.

11. **The Chair** thanked the co-Chair of the Forms Working Group. She sought to clarify the comment of the Drafting Committee. She stated that based on her interpretation

she thought that the consideration was whether applications for recognition and establishment should be allowed for debtors. She stated that in her opinion the question was not about an application for recognition and enforcement, but the recognition of a negative declaratory judgment. She sought to clarify whether her interpretation was accurate or whether the Chair of the Drafting Committee would like to make an additional comment.

12. **The Chair of the Drafting Committee** confirmed the Chair's conclusion and had no further comment.

13. **The Chair** thanked the Chair of the Drafting Committee and gave the floor to the delegation of Switzerland.

14. **Mr Markus** (Switzerland) commented on the proposed amendment to Article 10. He stated that his delegation had an interest in this proposal. He drew the attention of the session to the comments by the delegation of Switzerland in Preliminary Document No 36. He stated that his delegation had indicated in those comments that the main goals of the Convention were to support the creditor's application and to facilitate a creditor's ability to obtain an early maintenance decision, or to have an already existing decision recognised and enforced in the country of the debtor. He further stated that his delegation found it difficult to accept the development of the same level of activity in favour of a debtor as it currently existed for creditors with reference to activities of the Central Authority or other authorities involved in this Convention. He stated that the reluctance of his delegation to accept such levels of activity for the debtor would persist even if such activities would only be in relation to Central Authorities. He emphasised that very often the first reaction of the debtor to an application coming from a creditor to recognise and enforce a maintenance decision was to file for a modification, which can be done in the country of recognition under certain circumstances, or most often in the requested State where the creditor lived. He envisaged that this would create a situation where very often Central Authorities would have to deal with applications coming from the creditor and debtor simultaneously. He stated that for small Central Authorities such as that of Switzerland it would be quite difficult to deal with these contradicting interests. He envisaged that such contradicting applications could result in a conflict of loyalty as these Central Authorities would have to serve two adverse parties at the same time. He explained that this was the reason behind the opposition of the delegation of Switzerland to the availability to a debtor of an application for modification of a decision under Article 10, paragraph 2. He clarified that while his delegation did not oppose the creation of some level of activity in favour of the debtor which could help the debtor, he maintained that his delegation disagreed that the same level of activity should be developed for the debtor. He also stated that his delegation objected to the establishment of decisions on merit in favour of the debtor for the reasons which he had indicated earlier.

15. **Ms Ménard** (Canada) expressed her delegation's support for all the comments made by the delegation of Australia with regard to Article 10. She further stated that as already mentioned by the delegation of Australia, she would also suggest that private agreements and authentic instruments be inserted in Article 10. She concluded by answering the question of the Drafting Committee to the effect that her delegation would like Article 10, paragraph 2, to provide for applications by debtors for establishment and recognition of a decision.

16. **Mme Mansilla y Mejía** (Mexique) appuie le Comité de rédaction, et cela, en raison du principe d'égalité.

17. **Mr Beaumont** (United Kingdom) stated that his delegation was persuaded of the need to allow debtors to seek recognition of a modification decision. He stated that this was simply a logical continuation of allowing such debtors to seek a modification decision. He explained that this was because where a debtor sought a modification decision and there was an existing prior decision, this could result in a potential conflict of decision at the recognition stage. He further stated that if the delegates were not to clarify that the debtor could obtain recognition of such later modification decision, this could result in some very undesirable consequences. Furthermore, he stated that his delegation was convinced of the real need for such clarification. He said that his delegation was, however, not convinced of the real need for debtors to be able to establish decisions. He continued by stating that he had taken into consideration the need to carry on board those delegations (in the light of what the Delegate of Switzerland had said) who were reluctant to go as far as the discussions were tending to proceed to at the moment. He maintained that there were good reasons for stating that there was no necessity for States to provide services to help the debtor establish a decision. He was of the opinion that the benefits were potentially outweighed by debtors trying to use the forum best suited to them to establish a decision. He made clear that the Convention did not seek to regulate jurisdictional rules apart from some limited constraints on debtors in Article 15. He opined that while the provision of services to help debtors establish a decision might be helpful, he believed that it was unwise to commit public resources to such a course of action. He expressed recognition of the fact that such services may eventually be provided to debtors, as the Delegate of Australia had said, but added that this did not mean that the delegates had to agree to provide these services under the Convention with all the implications involved.

18. **Mme González Cofré** (Chili) appuie l'idée du Royaume-Uni. Par ailleurs, elle pense qu'il est important d'ajouter « l'obtention d'une décision » pour le débiteur.

19. **The Chair** queried if there were any more comments on Article 10. The Chair then gave the floor to the delegation of China.

20. **Mr Tian** (China) sought clarification on paragraphs 1 and 2 regarding modification decisions. He stated that the concept of modification decisions was unknown within China's legal system. He explained that in China, whenever an applicant needs to modify a decision or the court needs to decide whether an order of modification ought to be made, reference must be made to the court to apply for a new decision. He therefore asked that an explanation be made in the Convention to make it clear that when "modification" was mentioned in the context of the Convention, it might be interpreted in some legal systems as making a new decision. He emphasised his delegation's wish to have China's position on the concept of "modification" of decisions noted in the Explanatory Report.

21. **Ms Bean** (United States of America) welcomed the suggestion of the Drafting Committee to extend applications for debtors to establishment of a decision. In response to the question by the delegation of China, she stated that her delegation would also suggest that the Explanatory Report contain an explanation about how "modification" of a decision might be carried out in the various States that are Parties to the Convention.

Procès-verbal/Minutes No 8

22. **Ms Escutin** (Philippines) stated that her delegation objected to the proposal of the Drafting Committee that the applications under Article 10, paragraph 2, be extended to the debtor. She opined that it was not sound public policy to use public money to give debtors an opportunity to modify decisions via Central Authorities, particularly where such modification decision might not benefit the child involved.

23. **Ms Lenzing** (European Community – Commission) responded to the comments made by the Delegate of China. She stated that her understanding of the challenge for the delegation of China was in relation to the use of the term "modification of a decision" in Article 10, paragraphs 1 and 2. She stated that based on her understanding, Article 10, paragraph 3, clarified that this application shall be determined under the law of a requested State. She was therefore of the opinion that if in a given Contracting State, the concept of "modification" is unknown under national law and cannot be made, the Convention would not oblige such Contracting State to change its law. She stated that in view of Article 15, the result in such a State could then be a new decision which would take into account the change in circumstances on either the creditor's or the debtor's side. She opined that the expression "modification of a decision" should therefore not do any harm as paragraph 3 clarified that this does not mean that the law of the Contracting State had to recognise the concept of modification of a decision. She expressed the hope that her explanation had addressed the concerns of the delegation of China.

24. **Ms Kulikova** (Russian Federation) directed her comments to the definition of the concept of "modification of a decision" given by the delegation of the European Community. She stated that if the interpretation of Article 10 were consistent with the explanation given by the delegation of the European Community, this could pose a problem for the Russian Federation. She stated that this difficulty would arise because her delegation's interpretation of paragraph 3 was that there would be no applications of this nature in a Contracting State if such a State national law does not provide for modification of a decision. She recalled that at the time this Article was being drafted, and during the course of discussions at the meetings of the Special Commission, her delegation had stressed that the law of the Russian Federation prohibited the modification of a decision of a foreign court and that the courts of the Russian Federation would be unable to make a decision if there was a prior decision of a foreign court on the same matter. She emphasised that her delegation's interpretation of paragraph 3 and paragraph 290 of the Explanatory Report was subject to jurisdictional rules, some of these applications (such as an application to modify a decision) should not be mandatory if they contradict the jurisdictional rules of a State. She stated that if her delegation's interpretation of Article 10, paragraph 3, were correct, then the language of this Article would be acceptable to the Russian Federation. She stated however that if the interpretation of this Article were different from that of her delegation, this would create problems for the courts of the Russian Federation because such courts are only permitted to establish a new decision under Russian national law.

25. **The Chair** responded to the query of the delegation of the Russian Federation and clarified that as drafted in the *chapeau* of paragraphs 1 and 2, applications for modification of a decision shall be made available in a Contracting State. She maintained that if modification is not possible due to the lack of jurisdiction, this case would be covered by paragraph 3. The Chair then gave the floor to the delegation of China.

26. **Mr Tian** (China) thanked the Delegate of the European Community for her clarification of the concept of "modification". He stated that Article 10, paragraphs 1 and 2, which provide that these "applications shall be available" in a Contracting State, meant that such applications must be available in such States either in the jurisdictional rules or in the substantive rules. He also said that where a State does not have the concept of "modification of a decision", such State cannot apply this concept. He therefore requested interpretation as to the definition of "modification" in States which do not know this concept. He noted that in Article 15 a new order needed to be made, and therefore "modification of a decision" should be interpreted to include making a new decision. He stated that Article 10, paragraph 3, provided that the applications in paragraphs 1 and 2 should be determined under the provisions of the requested State. In his opinion, this provision could be given various interpretations because when reference is made to the method of determination under the law, this necessarily would involve how applications should be put in place and such applications were governed by law. He also clarified that this had nothing to do with whether the law allows the existence of this legal concept. He therefore insisted that this issue be made clear in the Explanatory Report, or as an alternative, the delegation of China would prepare a proposal to the effect that this be made clear in the text of the Convention.

27. **The Chair** stated that her impression was that there would be no problem in making this clear in the Explanatory Report. She referred the delegates to Article 15 in which the concept of modifying a decision had already been used to include making a new decision. She therefore opined that if China's internal law only allowed for the making of a new decision, this would not pose a problem and she did not envisage that it would be difficult to accept the position of the delegation of China in this context. She added that this could be made clear in the Explanatory Report with regard to Article 10, paragraph 2. She expressed the hope that this sufficiently answered that delegation's query. She gave the floor to the delegation of Japan.

28. **Mr Hayakawa** (Japan) stated that the delegation of Japan might have some problems with the application for recognition because the law of Japan did not provide for such applications for debtors. He therefore stated that this would pose a problem for Japan if the extension of available applications to debtors under Article 10 required that applications of this nature should be available under Japanese national law. He queried whether Japan could avoid this point by applying its own interpretation of paragraph 3. He requested clarification on this point.

29. **The Chair** stated that she did not understand the question from the delegation of Japan. She asked whether that delegation sought clarification on Article 10, paragraph 3.

30. **Mr Hayakawa** (Japan) confirmed that his query referred to Article 10, paragraph 3, and specifically whether Japan could avoid the requirement under this provision, that is, whether the applications outlined under paragraph 2 must be made available by a Contracting State irrespective of such State's national law, or whether such States will be excused from complying with this provision if their national law does not provide for this application.

31. **Mr Beaumont** (United Kingdom) stated that the answer to the query of the delegation of Japan was no. He stressed that each Contracting State had a duty under the Convention to make particular types of applications available if the delegations decide that this should be so. He

opined that Japan could not therefore decide against having such applications under its national law. He also stated, however, that it was not possible to have flat contradictions between paragraph 2 and paragraph 3. He stated that if paragraph 2 were amended to say that a debtor can seek recognition, then Japan was allowed to provide under its national law for a debtor to seek recognition and could thereby control the substantive rules that would apply.

32. **Mr Tian** (China) stated that the concern of his delegation had been pointed out by the Delegate of the United Kingdom. He stated that in mainland China there was no mechanism for modification of decisions. He stated that as a result of this, how such decisions were interpreted was important to China. He further stated that the need for this interpretation had not been obviated by the interpretation of paragraph 3 provided by the delegation of the European Community, regarding whether China is obliged to provide applications for modification of a decision or whether China is free to do this in a different way. He noted his colleague's suggestion that while modification may be impossible, it was still possible to make a new decision. He also stated, however, that, based on his interpretation of the text of Article 10, paragraphs 1 and 2, these paragraphs seemed not to permit new decisions as such decisions do not fall within paragraph 1, sub-paragraphs (c) and (d). He explained that this was because while a decision may already exist and a mechanism of enforcement may be permitted, the intention in the context of these sub-paragraphs was to modify a decision, which could pose a problem. He emphasised that some countries do not include applications to modify a decision in their legal systems and he was therefore doubtful as to whether such new legal rules should be imposed on such countries, particularly as every country had different ways of treating such applications. He concluded that such States should not be compelled to include this application.

33. **Mr Helin** (Finland) presented his interpretation of paragraph 3 in relation to the problem expressed by the delegation of China, that is, whether the State is obliged to accept applications for modification of decisions in cases where such State's national law does not provide for modification of a decision. He referred to the portion of the Explanatory Report (para. 290) which explained that when paragraph 3 states that applications "shall be determined under the law of the requested State", the "law" referred to in that context would also include conflict of law rules. In his opinion, the effect of this was that if the applicable law referred to "modification", then it should be permitted. He explained that if the applicable law in question were, for instance, Chinese law, and such law did not provide for modification, China would not be obliged to make such an application available. He explained that the requirement to "modify" would be entirely dependent on the applicable law. As a further example, he stated that if China were to accept the draft Protocol which makes provisions for the applicable law, the national law of China would still be applied to determine what constitutes the applicable law.

34. **The Chair** queried if there were any more comments on this issue and gave the floor to the delegation of China.

35. **Mr Tian** (China) responded to the interpretation of Article 10, paragraph 3, given by the delegation of Finland. He stated that the interpretation of paragraph 3 by the delegation of China with regard to the "law of the requested State" did not extend to choice of law rules. He stated that in his opinion, as a general rule under the Convention, where reference was made to the "law of the requested State" it referred to the substantive law rather than the choice of law rules. He stated that even if such an interpretation were possible, the delegation of China would still require further explanation on paragraph 3, apart from the definition of the concept of "modification".

36. **Mr Beaumont** (United Kingdom) commented that the Chair had ruled earlier that in relation to the concerns of the delegation of China, the Chair would treat an "establishment decision" in mainland China as a modification if China did not have modification decisions *per se* under its legal system. He stated that while the Chair's ruling was a rational conclusion, such conclusion could be reached in a different way. He expressed the view that this issue might still need to be addressed. He stated that if the problem at hand was that while certain States were not prepared to create an application for modification, such States were prepared to regard such an application as an establishment decision, then the delegates might have to find a formula to ensure that this was a legitimate way of interpreting the Convention. He stated that it was difficult to ascertain whether this would be a legitimate way of interpreting Article 10, paragraph 3, from the text of the Convention. He reiterated that while he was aware that the Chair's ruling would guide the Explanatory Report, he was of the opinion that this was not a clear question.

He further stated that with regard to the relationship between Article 10, paragraphs 1 and 3, and paragraphs 2 and 3, the applicable law rules set out therein will only apply in countries that apply those applicable law rules set out in paragraph 3. He explained that a number of countries apply the law of the forum, which rendered the applicable law rule irrelevant. He also stated, however, that the key point was the idea of the Convention that had been set out in several of the Special Commission meetings and in the Explanatory Report, to the effect that while the Convention sought to create uniform rules regarding the applications that are available in requested States, the Convention did not seek to create uniform rules on the content of those issues apart from recognition and enforcement. He opined that the Convention contained broadly uniform rules on recognition and enforcement which explained why, in response to the question from the delegation of Japan, there was no room for manoeuvre in paragraph 3. He stated that this was because if recognition of decisions were brought under the purview of the Convention, this would leave very little to national law. He explained that in contrast, national law largely regulated matters related to the establishment and modification of decisions. He further explained that the Convention only stipulated that countries must have particular applications and did not regulate how establishment or modification is to be carried out by such countries. He opined that there was huge room for the application of national law in these circumstances. He advised that the delegates should not concentrate too much on terminology and added that, as a way forward, a possible solution could be to provide that applications for modification of a decision would also cover applications for establishment by a debtor. Should this suggestion be accepted, he did not envisage that there would be any policy objection to its implementation. He expressed doubts, however, as to the sufficiency of the current language to deal with the queries raised by the delegation of China.

37. **The Chair** thanked the Delegate of the United Kingdom. She stated that her interpretation of the query of the delegation of China was that paragraph 2 referred to "modification" of a decision allowing the debtor to have the prior decision changed. She clarified, however, that the Convention does not determine how this is achieved. She opined that in the event that the courts in China were able to make

a new decision which effectively changed the previous one (either by making a new decision, or by modification), the provision of an explanation in the Explanatory Report would be sufficient to address the concerns of the delegation of China. She then gave the floor to the delegation of the Russian Federation.

38. **Ms Kulikova** (Russian Federation) stated that in the light of the ongoing discussions on Article 10, paragraph 3, she was doubtful whether her delegation's interpretation of this paragraph 3 was accurate. She opined that the wording "the application shall be available" meant that if an application were referred, for instance, to the Russian Central Authority to modify a decision, the obligation on that Central Authority would be to transmit such an application to court. She stated that if, however, due to national legislation, the Russian Federation court decided that it was not in a position to change the foreign decision, or such court decided not to establish a new decision, the Central Authority would still have complied with the Convention. She explained that regardless of the court's refusal to enforce such an application, the Central Authority would be deemed to have complied with the Convention by virtue of its transmission of such an application to the court. She maintained that any contrary interpretation would pose problems for Russian Federation courts with respect to applications on modification. She opined that, in such circumstances, Russian Federation courts would be able to do very little with foreign decisions. She explained that this was because Russian Federation courts could either recognise and enforce a decision, or refuse such recognition and enforcement, only on the grounds expressly stated in an international treaty. She stated that if, however, what is required under the Convention was modification of a decision, she was doubtful whether the Russian Federation court was capable of doing this.

39. **The Chair** suggested that the delegates should take a tea break and resume discussions at 4.55 p.m. She expressed the hope that the tea break would give the delegates some light on this issue.

40. **The Chair** welcomed everyone back. She stated that having given further thought particularly to the concern of the delegation of China regarding the making of a new decision and not modifying a decision, she would propose that this be made clear in the Explanatory Report to the effect that if the internal law of a State allows courts to only make a new decision, and not modification decisions, such State would be in compliance with its obligation to provide for modification decisions under the Convention. She queried whether such clarification in the Explanatory Report would be sufficient for the delegation of China. She gave the floor to the delegation of China.

41. **Mr Tian** (China) expressed his delegation's support for the Chair's proposal.

42. **The Chair** queried whether there were any more comments on Article 10. She then gave the floor to the delegation of Switzerland.

43. **Mr Markus** (Switzerland) expressed the support of his delegation for the proposal of the delegation of Australia to insert Article 19, paragraph (a), into Article 10, paragraph 1, sub-paragraph (d). He stated that his delegation felt that it was only logical to have reference in this Article to the "general public order" clause in such cases. He explained that this is because reference had already been made to specific aspects of public order in Article 19, paragraphs (b) and (e), on notification to the debtor. He asked why there was no provision under this Convention for a reference to public order in general.

44. **The Chair** queried if there were any reactions to the statements of the Delegate of Switzerland. She gave the floor to the delegation of Japan.

45. **Mr Hayakawa** (Japan) reiterated that his delegation would have problems with extending applications for recognition to a debtor.

46. **The Chair** gave the floor to the delegation of Mexico.

47. **Mme Mansilla y Mejía** (Mexique) apporte son appui aux délégations de l'Australie et de la Suisse.

48. **Ms Lenzing** (European Community – Commission) stated that she was uncertain whether her interpretation of the proposal by the delegation of Australia with regard to reference to public order was correct. She stated that in her view, the addition proposed by the delegation of Australia did not seem appropriate at any point in Article 10. Thus, she strongly urged the delegation of Switzerland not to tamper with the text of Article 10, particularly in view of the fact that this provision did not have square brackets.

49. **Mme van Iterson** (Pays-Bas) se demande si une partie des problèmes de l'Australie n'est pas couverte par l'article 16, paragraphe 2, qui stipule que « [s]i la décision ne concerne pas seulement l'obligation alimentaire, l'effet de ce chapitre reste limité à cette dernière ». Ainsi, elle conclut que si le mariage sous-jacent n'est pas reconnu, seule l'obligation alimentaire serait acceptée.

50. **Ms Cameron** (Australia) responded to the question posed by the delegation of the European Community by directing the delegates to the proposal of the delegation of Australia in Preliminary Document No 36, to the effect that a reference to a public policy ground be added to sub-paragraph (d) of Article 10, paragraph 1. She pointed out that sub-paragraph (d) included reference to some of the other grounds for refusal of a decision. She stated that her delegation's proposal was that the "public policy" ground be added solely as an additional ground on the basis that her delegation could perceive circumstances in which the basis for refusal would be public policy, and an application for establishment to which paragraph 1, sub-paragraph (d), was concerned could still be brought in those circumstances. She then provided a response to the question posed by the Delegate of the Netherlands. She disagreed with the statement made by the delegation of the Netherlands. She explained that the example which the delegation of Australia had provided was a situation where the maintenance obligation and the recognition of such maintenance obligation would be contrary to public policy. She clarified that this was not a case of recognising the underlying marriage but rather it related to recognition of the maintenance obligation. She expressed the hope that her clarification was helpful.

51. **Ms Lenzing** (European Community – Commission) stated that the explanation given by the delegation of Australia had shed more light on the issue and given her delegation a better understanding of the proposal on public policy. She added that in the light of this, her delegation's earlier position on this proposal might not have done justice to Switzerland if that delegation's idea was consistent with that presented by the delegation of Australia. She queried both the delegation of Australia and the delegation of Switzerland on whether, in practice, there were any cases where the recognition and enforcement of a decision in a requested State had actually been refused on grounds of public

policy under Article 19, paragraph (a), and nevertheless, there was the least chance of success for an application for establishment in such circumstances. She queried whether the delegation of Australia had any concrete examples which would illustrate the practical need to cover these types of situations.

52. **The Deputy Secretary General** addressed his comments to the first example cited by the delegation of Australia in Preliminary Document No 36 on the marriage of same-sex couples. He opined that Australia could deal with this by not extending the scope of its application of the Convention to such relationships. He stated that the question of "public policy" would only arise if Australia decided to extend the scope toward such couples. He further stated that if Australia did not extend the scope, the question of recognition of a decision and enforcement in this circumstance would not arise. He explained that in this situation the existing Article 10, paragraph 1, sub-paragraph (d), would apply, making it possible to proceed to the establishment of a decision.

53. **Ms Cameron** (Australia) explained to the delegation of the European Community that the Deputy Secretary General in his comments had made reference to two examples provided in the written comments of the delegation of Australia where her delegation perceived that this proposal would be applicable. She again referred the delegates to Preliminary Document No 36. She explained that the reason for her delegation's example of a situation of same-sex marriage was that at a federal level in Australia, the recognition of a same-sex marriage was prohibited in any circumstances. She stated that she had not considered the solution suggested by the Deputy Secretary General. However, she had conceived that an extension of the scope on the basis of marriage would include situations where such a marriage was between same-sex persons. Therefore, a declaration to extend the scope of the Convention to spousal maintenance obligations would need to be quite particular in order to exclude such marriages. She stated that she had not ruled out the possibility that this problem could be resolved by adopting the solution offered by the Deputy Secretary General. She cited another example provided by her delegation relating to ex-nuptial children. She also explained, however, that she would not go into lengthy discussions on this issue as her delegation's proposal did not contain a detailed presentation on this issue. She reiterated her earlier statement made in the course of the discussions that though her delegation believed that there was some benefit to this issue, this ground was not indispensable.

54. **Mr Beaumont** (United Kingdom) stated that his delegation had read the proposal submitted by the delegation of Australia. He stated that while his delegation could see the theoretical advantages of this proposal, his delegation also recognised that in a vast majority of cases, it was counter-intuitive to establish a case after refusing to recognise and enforce it on the grounds of public policy. He stated that his delegation considered that it would be a "difficult sell" to say that this is something that the Convention should deal with because there was a great likelihood that such applications would be completely rejected. He further stated that in his delegation's opinion, on a cost-benefit analysis, lots of spurious applications are not worth having in comparison to almost one in a million applications that may succeed. He stated that his delegation therefore urged Australia to continue to show flexibility and not to press the point.

55. **The Chair** queried whether there were any more comments on Article 10. She observed that there was silence and therefore concluded that on the question raised by the Drafting Committee, there was considerable support to include recognition applications for debtors in Article 10, although there was no agreement on this point. However, she requested that the Drafting Committee draft an addition to Article 10 on applications for debtors, but ensure that such addition remained in square brackets. She also ruled on the solution put forward by the delegation of China, which she observed was either supported or not objected to, that a clarification should be inserted in the Explanatory Report to the effect that the word "modification" should also include the concept of "making a new decision" if the internal law of a Contracting State permits only this concept instead of "modification". She gave the floor to the delegation of Canada.

56. **Ms Ménard** (Canada) expressed her delegation's wish to have private agreements and authentic instruments added to Article 10. She stated that her delegation would appreciate it if this addition is kept in brackets in the Convention.

57. **The Chair** queried if there were any reactions to the comments made by the Delegate of Canada. After observing that there was silence, the Chair stated that her interpretation of authentic instruments and private agreements under Article 26, paragraph 1, was that such instruments were entitled to recognition and enforcement as a decision, provided they were enforceable as a decision in the State of origin. She further stated that in her view the current draft of Article 10, paragraph 1, sub-paragraph (a), would also include the recognition and enforcement of authentic instruments and private agreements. She then gave the floor to the delegation of the European Community.

58. **Mr Hať apka** (European Community – Commission) concurred with the Chair and added that Article 16, paragraph 4, also clarified that authentic instruments were also included in the scope of the Chapter, in his opinion, therefore, that interpretation had always been clear. He stated, however, that in the context of an application, it was possible to apply for recognition and enforcement of such an instrument. He concluded that in the light of this, the delegation of the European Community did not think it necessary to mention this again in Article 10.

59. **Mr McClean** (Commonwealth Secretariat) expressed his doubts as to whether what had been discussed by the previous delegations was correct. He opined that Articles 10 and 26, which both make reference to authentic instruments, were under Chapter V on recognition and enforcement and not under Chapter III on applications. He opined that it was a different question whether the Central Authority system in Chapter III should extend to authentic instruments. He stated that he had no view on the substance but maintained that Articles 10 and 26 did not have the effect presented by the previous speakers on this issue.

60. **The Chair** queried if there were any reactions to the statement by the Representative of the Commonwealth Secretariat. After noting that there was silence, she responded to the Representative's statement. She opined that the policy decision in the context of Articles 10 and 26 is that an applicant may also apply through the Central Authorities for the recognition and enforcement of authentic instruments and private agreements. She stated that the policy decision was already in existence and the issue would simply be a drafting matter. She gave the floor to the delegation of Israel.

61. **Mr Segal** (Israel) stated that he had read Article 26, paragraph 6, and as pointed out by the Chair, reference to

Article 26, paragraph 6, on applications for recognition and enforcement seemed to coincide with Article 10 with regard to the policy decision mentioned by the Chair.

62. **Mr Tian** (China) stated that the delegates had not reached a consensus on authentic instruments and private agreements. He also stated, however, that the delegation of China could agree with a condition that China cannot make a declaration under Article 58. He concluded that if this was acceptable to the majority of delegations, the delegation of China would agree to the inclusion of authentic instruments and private agreements under Article 10 but it should be made subject to Article 58.

63. **The Chair** clarified that the position adopted by delegates with respect to authentic instruments and private agreements was that the choice of the opt-in or opt-out systems would not be mandatory for all Contracting States and that such applications will be available only with regard to the States that had opted in and did not opt out of the system. The Chair gave the floor to the delegation of Austria.

64. **Mr Schütz** (Austria) opined that it would be sufficient for the Explanatory Report to provide clarification that the decisions covered by Article 10 extend to authentic instruments and possibly, private agreements. He also wanted the Explanatory Report to clarify the opt-in or opt-out system also applied under Article 26 with regard to the options of opt-in or opt-out systems between the two States concerned. He opined that it might be too cumbersome to mention authentic instruments in Article 10.

65. **The Chair** stated that she felt that the issue raised by the delegation of Austria was a drafting matter which could be resolved under the Convention by making a provision for applications for recognition and enforcement of private agreements and authentic instruments through Central Authorities. She also stated, however, that the delegates had not yet reached a decision with regard to whether a Contracting State would be able to accept this instrument by an opt-in or not accept it by an opt-out. The Chair decided to address this question to the Drafting Committee by giving the Committee the mandate to make these possibilities clear in the text of the Convention. She stated that if her suggestion were acceptable to the delegates, she would suggest that the delegates proceed to discuss Article 15 on the limit on proceedings. She called upon the co-*Rapporteur* to give the delegates a brief introduction to Article 15.

Article 15

66. **Mrs Borrás** (co-*Rapporteur*) stated that in view of the fact that it was 5.30 p.m., her introduction had to be especially brief. She stated that the aim of Article 15 was to prevent the misuse of jurisdiction. She explained that such a rule was especially needed in the absence of direct rules on jurisdiction in the Convention. She further stated that the rule had to be read jointly with Article 17 because it was necessary to have decisions capable of being recognised under Article 17. She explained that the provisions in Article 15 included a general rule in paragraph 1 and the exceptions to the general rule in paragraph 2. She stated that the general rule was that once a decision had been given in the country of the habitual residence of the creditor, the debtor had no possibility of bringing proceedings for a new or modified decision in another Contracting State as long as the creditor maintains habitual residence in that State. She stated that the provision could be seen as a certain trend towards *perpetuatio jurisdictionis* which constitutes a benefit for the creditor. She stated that she had not provided an explanation in respect of the exception in paragraph 2 as she believed that the drafting of these four exceptions contained in Article 15 are rather clear. She observed that there was a mistake in paragraph 455 of the Explanatory Report as it appeared that a word was omitted, which therefore rendered the paragraph ambiguous. She stated that the text of paragraph (a) provided that the agreement would be an exception except in disputes relating to maintenance obligations in respect of children. She stated that paragraph 455 of the Explanatory Report says exactly the contrary, which is a mistake.

67. **The Chair** pointed out that there were no square brackets in the text of Article 15 of the Convention. She also recalled that the Drafting Committee had reminded the delegates that this Article also applied to direct applications. She declared the floor open to discuss Article 15. She then gave the floor to the delegation of Australia to present their proposal on Article 15.

68. **Ms Cameron** (Australia) stated that she had taken the floor to present the proposal of her delegation on Article 15, as contained in Working Document No 22. She reminded the delegates that, as she had stated during a session in the previous week, her delegation's view was that there was an important relationship between Articles 15 and 14. She stated that while her delegation acknowledged that Article 15 was not within square brackets, and further that her delegation had initially strongly supported this Article, that support was given in the context of a mistaken understanding of other provisions in the Convention covering the provision of free legal assistance to debtors. She reminded the delegates that her delegation's view on Article 14 was that free legal assistance should be provided to debtors to bring modification applications in child support cases. She stated that the position of the delegation of Australia was tied directly to Article 15, which would, in the Australian context, severely limit the right of a debtor to bring modification proceedings in his own jurisdiction. She stated that if a debtor were not guaranteed free legal assistance under Article 14, such debtor would have to rely on Article 14 *ter* which would make the provision of free legal assistance subject to a means or merit test. She also stated, however, that the real position was much worse because there was no overriding obligation to make a system of free legal assistance available. She stated that this obligation was subject to a means and merit test in States in which it is available but she was aware of the fact that some States that will join the Convention will have no general system of free legal assistance or legal aid. She further explained that in the situations which she had highlighted the debtor may not be able to obtain free legal assistance no matter how impecunious or in need he may be. She stated that her delegation found this position unacceptable. She explained that this was the rationale behind her delegation's proposal in Working Document No 22 that Article 15 be subject to a further exception to guarantee free legal assistance to a debtor in such a situation.

Ms Cameron made two comments about the drafting of the proposal of her delegation in Working Document No 22. She drew the attention of the delegates to the fact that her delegation's proposal had tied this proposed exception to the obligation under the Convention to provide effective access to procedures. She explained that the effect of this is that in the vast majority of cases where effective access to procedures is provided, the exceptions will not apply. She explained that her delegation intended that this exception will be available only in the most exceptional circumstances. Secondly, she drew the attention of the delegates to the second aspect of her delegation's proposal to the effect that this section had been drafted to apply only where the debtor

had been unable to apply to obtain effective access to procedures, or where the debtor was obliged to attempt to gain effective access to procedures in the State of origin. She further stated that her delegation's proposal also covered situations where the debtor had applied to the competent authority for establishment of a decision in another State, explaining his inability to obtain effective access to procedures. She stated that the delegation of Australia had heard from the delegations of a number of States who were concerned about political implications of other provisions in the Convention. She emphasised that this situation was a real political issue in Australia because debtors and non-custodial parents were a potent and organised political force in Australia, and the concerns of this sector could easily prevent Australia from becoming a Party to this Convention. She stressed that the delicate position which Australia would find itself in would be further exacerbated in the light of the compromise on free legal assistance to debtors. Ms Cameron therefore urged the delegates to carefully consider her delegation's proposal.

69. **The Chair** queried if there were any reactions to the comments made by the Delegate of Australia. She then gave the floor to the delegation of the European Community.

70. **Ms Lenzing** (European Community – Commission) stated that her delegation had not been able to co-ordinate on the proposal of the delegation of Australia so her delegation would require more time to consider this further. She also stated, however, that her delegation understood the policy considerations behind the proposal made by the delegation of Australia. She stated that her delegation would find it difficult to accept the proposal as presently drafted because of the reference to effective access to procedures. She explained that Article 14 actually obliged Contracting States in all situations to grant effective access to procedures to both creditors and debtors. She stated that if an exception is formulated to apply to a debtor who had been unable to obtain effective access to procedures, it would either mean that there was no situation in which this could apply because the Convention already provided for this, or it could mean that the State of origin had violated its obligations under the Convention. She opined that using the generic term "effective access to procedures" in Article 14 would not work and another formula will need to be found. She further stated that it may be possible to come up with a draft of such an exception which would not refer to a term already used in Article 14 and which would deal with the obligations of every Party to the Convention. She also stated, however, that her delegation saw the obvious link between Articles 14 and 15 on the question of debtors and that the delegation of Australia had made this clear in the course of their discussion of Article 14. She made it clear that while her delegation was not prepared to give debtors free legal assistance under Article 14, her delegation was certainly open to consider whether any compromise could be reached on this issue in the context of Article 15. Ms Lenzing opined that a way of resolving the concerns of the delegation of Australia could be by an amendment of Article 15.

71. **Ms Morrow** (Canada) expressed her delegation's support both for the proposal of the delegation of Australia in Working Document No 22 and for the principle behind this proposal. She welcomed any suggestion regarding a possible redraft of this proposal.

72. **Ms Nind** (New Zealand) echoed the comments of the delegation of the European Community. She expressed her delegation's understanding and support of the sentiment behind the working document proposed by the delegation of Australia. She further stated that the delegation of New Zealand would be interested in exploring some drafting changes which might help make that proposal work better.

73. **Mr Tian** (China) stated that his delegation was still considering the proposal made by the delegation of Australia but the doubts expressed by the delegation of the European Community suggested that it would appear that only a very rich debtor would be able to make an application in another State, thereby reducing the protection of the creditor under this Article.

74. **M. Heger** (Allemagne) se demande si la proposition de la délégation de l'Australie est vraiment nécessaire si l'on considère l'article 15, paragraphe 2, alinéa (c). Il ajoute qu'il a peut-être mal compris l'idée de la délégation de l'Australie, mais que pour le moment il ne croit pas qu'il soit nécessaire d'ajouter quelque chose à l'article 15.

75. **Ms Kasanová** (Slovakia) stated that her delegation concurred with the statements of the previous speaker and that Slovakia would require more time to understand the proposal made by the delegation of Australia. She stated that as result she would not be opposing the proposal. She queried, however, whether the obvious objection or obvious target of Article 15 was not to avoid conflicting judgments and whether the proposal made by the delegation of Australia would not prevent the achievement of this objective.

76. **The Chair** said that more time should be given to consideration of the proposal made by the delegation of Australia as the proposal had only been distributed during that meeting. She stated however that she would take account of the comments already made in subsequent discussions on this issue. She queried whether there were any more comments on Article 15. She observed that there was silence and so stated that if there were no further comments, deliberations on Article 15 would be concluded.

77. **The Chair** rearranged the order of the items on the agenda to aid smooth and effective discussions. She directed the delegates to deliberate on the subject of forms before discussing Article 11 on application contents. She stated that it was logical for the delegates to take a decision on whether to have mandatory forms or just recommended forms, which would then determine how to draft Article 11 on application contents. She noted that the delegates were aware of the existence of the Forms Working Group. She drew the attention of the delegates to the Report of this group contained in Preliminary Document No 32. She noted that the number of the Preliminary Document she had announced might be incorrect and then requested Mr Lortie (First Secretary) to refer the delegates to the appropriate number of this document.

Formulaires obligatoires ou non obligatoires / Mandatory or non-mandatory forms

78. **Mr Lortie** (First Secretary) apologised and clarified that the Report of the Forms Working Group could be found in Preliminary Document No 31-A. He informed the delegates that annexed to this Preliminary Document was an acknowledgement form that the Working Group proposed to be mandatory. He further stated that the balance of the forms for all the applications under Article 10 could be found in Preliminary Document No 31-B. He notified the delegates that the transmittal form was set as an Annex to the revised preliminary draft Convention, which was contained in Preliminary Document No 29.

79. **The Chair** thanked Mr Lortie (First Secretary) for the clarification. She stated that for an introduction to the

subject, she would ask the co-Chair of the Forms Working Group to give the delegates a brief presentation of the forms developed by the Working Group, in particular with regard to the question of whether such forms would be recommended or mandatory. She gave the floor to the co-Chair of the Forms Working Group.

80. **The co-Chair of the Forms Working Group** stated that while she would prefer to give a brief but general presentation of the work of the Working Group, she would be happy to give that brief introduction later if the discussions would continue the following day. She therefore proposed to focus on the question of recommended or mandatory forms, subject to the Chair's consent.

81. **The Chair** directed the co-Chair of the Forms Working Group to focus on the issue of mandatory or recommended forms.

82. **The co-Chair of the Forms Working Group** drew the attention of the delegates to the recommendations of the Working Group with respect to mandatory or recommended forms in the Report of the Forms Working Group, at paragraphs 28 to 33 of Preliminary Document No 31-A. She presented two forms which are recommended by the Forms Working Group to be mandatory. She said that the first form which had been introduced by Mr Lortie (First Secretary), was the transmittal form annexed to Preliminary Document No 29, while the second form was the acknowledgement form, set out in part B of the Report of the Forms Working Group and referred to in Article 12, paragraph 3. She further stated that the balance of the forms which were developed by the Forms Working Group were not proposed to be mandatory but recommended. She said the first of the recommended forms was the abstract of a decision and that the Special Commission had engaged in discussions about this form. She explained that the remainder of the forms pertained to applications under the Convention and the documents which generally needed to be supplied with such applications. The recommendation of the Working Group with respect to such forms was that these forms would be recommended and standardised, but that the use of such forms should not be mandatory.

83. **The Chair** then gave the floor to Mr Lortie (First Secretary) to make an announcement.

84. **Mr Lortie** (First Secretary) observed that during the course of the presentation of the co-Chair of the Forms Working Group, a number of delegates were looking for the forms being referred to in the presentation. He informed delegates that the documents were not in their binder as these documents had been made available on the website of the Hague Conference since July. He stated that he would ensure that copies of these forms were available to the delegates the following morning or in the alternative, delegates could stop by the information desk later that evening to obtain copies of these forms. With regard to the delegates from Spanish-speaking countries, he stated that the forms were reviewed earlier that day and would be made available to these delegates the following morning.

85. **The Chair** queried whether there were any comments on the proposals of the Forms Working Group: that is, whether it was possible to reach an agreement to either make the acknowledgement form mandatory or recommended. She gave the floor to the delegation of the United States of America.

86. **Ms Bean** (United States of America) commended the work of the Forms Working Group. She stated that it was clear from the review of the forms that the Forms Working Group had made an attempt to accommodate the forms of the civil and common law States as well as of judicial and administrative systems. She pointed out that in the United States of America, standardised forms have been found to be particularly useful in internal and cross-border proceedings. She stated that each of the 50 states of the United States of America used one set of forms in their inter-state child support cases. She further noted that the United States of America also had a standard transmittal and acknowledgement form as well as petitioner and testimony forms. She said that these forms helped caseworkers assess cases much more efficiently by guiding the caseworkers as to the information that must be provided. In addition, she stated that the forms also helped to ensure that the applications are complete so the corresponding state obtains all the information it needs. She stated that the forms also helped the judges and administrative decision-makers because once caseworkers were familiar with the forms they knew where to obtain the information sought about the parties and, because the forms are based on the United States inter-state legislations, the courts can rest assured that all the information is contained in that set of forms. She stated that her delegation believed that the forms developed by the Forms Working Group would have similar beneficial impact. She stated that model forms were especially useful in an international context because, despite the language differences, people know where to look for the form to get the information needed. She expressed her delegation's support for the recommendation of the Forms Working Group and added that in general the forms should be made optional, with the exception of the "acknowledgement" and "transmittal" forms which should be mandatory. She stated that her delegation's support for mandatory transmittal and acknowledgement forms was based on the belief that these two forms work hand in hand.

87. **Ms Lenzing** (European Community – Commission) expressed her delegation's support for the proposal of the Forms Working Group that the transmittal and receipt forms should be mandatory. As to the other forms, she stated that her delegation believed that such forms should not be mandatory with reference to Option 1 in Article 11. She queried whether the Chair would prefer to deal with the recommendation of the other forms now, or delay this to a later stage.

88. **The Chair** indicated her wish to restrict the discussion to the decision with regard to whether the acknowledgement form should be mandatory as well. She gave the floor to the delegation of Switzerland.

89. **Mr Markus** (Switzerland) stated that his delegation could not give a precise opinion at this stage as it seemed that the delegates had yet to receive the forms for reflection. He said that his delegation would wait until they could review the transmittal and acknowledgement forms. He also stated, however, that in principle the delegation of Switzerland had nothing against the two forms being mandatory. He stated that his delegation's query which would be addressed to the Forms Working Group could reasonably be answered after all the delegates had received these forms. He added that, in his opinion, the acknowledgement form was merely to acknowledge the receipt of applications. He queried why this form was so long and complicated. He stated that the reason he had raised this issue might be because of his delegation's wish to save his country's Central Authority from too much workload.

90. **The Chair** queried whether there were any more comments on these forms or whether there was a firm decision

to accept the acknowledgement form as mandatory. She gave the floor to the delegation of Chile.

91. **Mme González Cofré** (Chili) est favorable à l'idée de rendre obligatoire le formulaire de transmission de la demande et le formulaire accusant réception de la demande.

92. **Mr Segal** (Israel) stated that in his delegation's opinion the forms were the most effective way of making the Convention universal. He added that these forms should be made mandatory in order to ensure the universality of the Convention.

93. **Mme Mansilla Y Mejía** (Mexique) appuie l'idée du caractère obligatoire du formulaire de transmission de demande et du formulaire d'accusé de réception. Elle ajoute que cela contribuera à la rapidité des procédures.

94. **Ms Ménard** (Canada) expressed the support of the delegation of Canada for the work of the Forms Working Group. She stated that her delegation's preference was for the transmittal and acknowledgement forms to be mandatory and for the other forms to be recommended.

95. **The Chair** stated that she would not close the discussions on the issue at that meeting to give the delegates an opportunity to obtain the documents referred to. She then gave the delegations pointers to the sequence for the deliberations scheduled for the following morning. She stated that at that time discussions would commence on the issue of the mandatory or recommended forms and then proceed to Article 11. She stated that after dealing with these issues, the meeting would proceed to deal with the other questions related to forms, such as their amendment. She stated that subsequently, they would proceed to deliberate on Article 12. She stated that once all these issues have been dealt with, the Commission's deliberations would follow the sequence outlined in the agenda. The Chair stated that she would close the discussion after allowing the announcements. She then gave the floor to the Chair of the Drafting Committee.

96. **The Chair of the Drafting Committee** advised members of the Drafting Committee that their meeting scheduled for that evening had been cancelled. She stated that after the following day's session, the members of the Committee should make themselves available for a meeting, if necessary at 8.00 p.m.

97. **Ms Ménard** (Canada) invited the members of the Working Group on effective access to procedures to a meeting at the Permanent Bureau that night. She informed members that dinner would be provided.

98. **M. Pereira Guerra** (Communauté européenne – Présidence) indique qu'il y aura une réunion de coordination à 8 h 15 le lendemain.

99. **The Chair** then gave the delegation of Brazil the floor.

100. **Mr Tuma Junior** (Brazil) invited the delegations of Latin American States to meet at 9.00 a.m. the following day.

101. **The Chair** thanked everyone and stated that Tuesday's meeting would start at 9.30 a.m.

The meeting was closed at 6.06 p.m.

Procès-verbal No 9

Minutes No 9

Séance du mardi 13 novembre 2007 (matin)

Meeting of Tuesday 13 November 2007 (morning)

La séance est ouverte à 9 h 50 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 12(3) – Formulaire d'accusé de réception / Acknowledgement Form

1. **The Chair** welcomed the delegates and reminded them that deliberations had not been completed at the end of Monday 12 November 2007 in relation to the "acknowledgement form" under Article 12, paragraph 3, being made mandatory in the same way as the "transmittal form" under Article 12, paragraph 2. She noted that some delegates had required some extra time to consider whether the acknowledgement form should be made a mandatory form and she gave the floor to those countries who had not yet expressed their views in relation to that issue. She asked the delegations if it was agreed that the acknowledgement form should be mandatory and opened the floor.

2. **Mr Segal** (Israel) stated that on Monday 12 November 2007 he had suggested the possibility that all forms become mandatory. He noted that he had not participated in the Forms Working Group and so he suggested that the co-Chair of the Forms Working Group present all of what had been produced. In the alternative, he stated that he would be happy to discuss his suggestion.

3. **The Chair** thanked the Delegate of Israel and noted that if there were no further comments, there had been general support to make the acknowledgement form mandatory.

4. **Mr Segal** (Israel) noted that perhaps he had not been clear. He reiterated that he thought that the plenary should discuss whether a clause could be included that would make all of the forms put forward by the Forms Working Group mandatory. He noted that the question to be considered was whether it was better to make all forms to be used under the Convention mandatory, yet flexible to change, rather than making two forms mandatory whilst all others would only be recommended. He noted that this consideration was important as it would be difficult to discuss this issue in a diplomatic setting after the Convention was adopted. He suggested that having all forms made mandatory also made the Convention more practical. He emphasised the need to ensure that the Convention would be practical and universal and the mandatory use of forms would form a large component of that practicality.

5. **The Chair** thanked the delegate of Israel for his comments and noted that there had previously been long discussions in relation to the question of mandatory forms and it

had appeared that only the transmittal form and acknowledgement form could be agreed upon to be made mandatory. She emphasised that there had been no support to make all forms mandatory for all of the different types of applications. She reiterated that the floor was open but noted that if there were no further interventions with respect to this issue, there was general support for also making the acknowledgement form mandatory. She therefore requested that the Drafting Committee remove the square brackets that appeared in Article 12, paragraph 3, and add to the paragraph so it was clear that there was a mandatory acknowledgement form to be used.

The Chair stated that she had heard no support for making any of the other forms mandatory so she stated that Option 1 of Article 11, which related to the content of applications, would be discussed next.

Article 11 – Option 1 (Contenu de la demande / Application contents)

6. **The Chair** pointed out that in Option 1 there was one set of square brackets surrounding sub-paragraph (h). She noted that the Forms Working Group had suggested this text be inserted in order to include "the name and contact details of the person or unit from the Central Authority of the requesting State responsible for processing the application" on applications under Article 10. The Chair opened the floor with respect to discussion of Article 11, Option 1.

7. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique est favorable à la suppression des crochets à l'article 11, paragraphe 1, alinéa (h).

8. **Ms Cameron** (Australia) thanked the Chair and stated that the Australian delegation supported the removal of the square brackets in Article 11, paragraph 1, sub-paragraph (h), and the retention of the text. Ms Cameron also put forward a proposal that an addition be made to Article 11, paragraph 1, sub-paragraph (e), in relation to the grounds upon which an application was based. She noted that there were many different types of applications under the Convention, the main type being an application for recognition and enforcement, and that such an application might refer to the bases for recognition and enforcement under Article 17, *i.e.*, the grounds upon which a decision was entitled to be recognised and enforced under the Convention. She noted, however, that for an application to modify a decision, the grounds for such an application could be that an applicant's financial circumstances had changed. She explained that in this context, the Explanatory Report to the revised preliminary draft Convention created some confusion because it referred to the term "grounds", with respect to the latter application, as being the grounds of the maintenance obligation in question: parentage, for example (see para. 312 of the Explanatory Report).

Ms Cameron explained that the delegation of Australia had therefore made a proposal that Article 11, paragraph 1, would include separate requirements for the legal basis of a maintenance obligation and the grounds upon which an application was based. She noted that her proposal was discussed in full in Preliminary Document No 36.

9. **Mr Schütz** (Austria) thanked the Chair and stated that his delegation was not convinced that Article 11, paragraph 1, sub-paragraph (h), was needed since an application was made by a creditor, not a person or unit from the Central Authority of the requesting State who was only responsible for processing the application. He also noted that the information would be provided to the requested State on the transmittal form, and so he did not consider it necessary to also include it on a further form. He noted that this was a duplication of information and that, in any event, sometimes this information could be subject to change, especially if reference was made to an individual purporting to be dealing with the application in the Central Authority of the requesting State. Mr Schütz suggested that sub-paragraph (h) should therefore be deleted.

10. **Mr Sello** (South Africa) thanked the Chair and stated that the delegation of South Africa supported the inclusion within the Convention of the text in square brackets in Article 11, paragraph 1, sub-paragraph (h). He queried whether, in relation to the contact details of the person or unit within the Central Authority of the requesting State being provided, the reference number for the case in the requesting State could also be included.

11. **The Chair** noted that in relation to the question that had been raised by the delegation of South Africa, the reference number already appeared on the transmittal form that would be annexed to the application.

12. **Ms Morrow** (Canada) thanked the Chair and noted that her intervention would focus on Article 11, paragraph 1, sub-paragraph (b), in relation to the address of the applicant. She expressed the view that even though the confidentiality provisions of the Convention would confer protection upon the applicant with respect to his or her details, such provisions could be strengthened by not requiring an applicant to provide their personal address on documents that would be sent to the Central Authority in the requested State and in circumstances where the applicant chose to make their application through the Central Authority of the requesting State. She suggested in the alternative that the address of the Central Authority in the requesting State could meet the requirements of sub-paragraph (b) and be an acceptable address to be forwarded to the Central Authority of the requested State, particularly where the applicant's safety or liberty were concerned. She noted that this alternative would avoid there being any burden on the Central Authority of the requested State to ensure that the applicant's personal address was not inadvertently disclosed in proceedings in the requested State.

Ms Morrow further explained that if an applicant's personal address was required by a competent authority in the requested State or because of the law of the requested State, the Central Authority of the requested State could inform the Central Authority of the requesting State of this requirement. The Central Authority of the requesting state could then inform the applicant and the applicant could then decide whether to provide such details or to discontinue the application. Ms Morrow also noted that if this process could not be made clear within the text of the Convention, then it could be included within the Explanatory Report.

Ms Morrow completed her intervention by referring to paragraph 305 of Preliminary Document No 32 and stated that, as was noted there, a recommendation had been made that further consideration should be awarded to the provision of mechanisms that ensured that the Central Authority of the requesting State was informed of all direct contact between the Central Authority of the requested State and the applicant, *i.e.*, where the former sought additional information or documentation.

13. **The Chair** thanked the Delegate of Canada and queried whether the delegation of South Africa wished to take the floor again.

14. **Mr Mthimunye** (South Africa) confirmed that this was the case and that under Article 11, paragraph 1, sub-paragraph (c), the South African delegation would also like a photograph of the respondent to be provided. He stated that many names in South Africa were very similar and that the provision of a photograph, where possible, would be very useful and could be included as part of the application bundle that was forwarded to the requested State. He further suggested that the provision of a short description of the respondent under this sub-paragraph including, for example, his or her appearance and height, would also be very useful.

15. **The Chair** asked the delegation of South Africa whether they wished to provide a written proposal of their suggestion in relation to the provision of a photograph and short description of the respondent within the bundle of application documentation. She noted however that Article 11, paragraph 3, already accounted for the provision of any necessary supporting information or documentation in an application and that this would account for a photograph and short description to be provided.

16. **Ms Bean** (United States of America) thanked the Chair and stated that the delegation of the United States of America supported the deletion of the square brackets around Article 11, paragraph 1, sub-paragraph (h), and the retention of the text. In relation to the concerns raised by the delegation of Canada with respect to the non-disclosure of an applicant's personal contact details within an application where there was concern for the person's safety and security, Ms Bean noted that the addition of some extra text into the Explanatory Report to the Convention would address such concerns.

17. **M. Heger** (Allemagne) éprouve quelques difficultés à accepter la proposition de la délégation du Canada concernant la possibilité de donner l'adresse de l'Autorité centrale requérante en lieu et place de l'adresse du demandeur. Il pense en effet que la rédaction actuelle de l'article 11 offre un juste équilibre et que l'article 37 (Non-divulgation de renseignements) de l'avant-projet de Convention permet de régir les situations évoquées de manière adéquate. Il observe que dans certains États comme l'Allemagne, la procédure de reconnaissance est une procédure judiciaire. Il paraîtrait alors très curieux de ne disposer d'aucune adresse et donnée relatives au demandeur. Il reconnaît qu'il est important de protéger le créancier dans des cas concrets mais il souligne que l'article 37 vise justement à couvrir ces situations. Il souhaite donc que l'équilibre obtenu à l'article 11 soit maintenu tel quel.

18. **Ms John** (Switzerland) thanked the Chair and stated that in relation to Article 11, paragraph 1, sub-paragraph (h), the delegation of Switzerland was in support of the deletion of the text since they believed that what was noted in that sub-paragraph was already noted in the transmittal form, and so such duplication was not necessary.

In relation to Working Document No 27 that had been submitted by the delegation of Switzerland, Ms John noted that this was a proposal that was suggested to be added to Article 11, paragraph 1, and which required the parties' nationalities also to be noted when their other contact details were provided. She observed that the proposal would simplify the questions of the location and identification of a person and that this information would be useful to possess at the beginning of the process when an application was first transmitted.

The Delegate of Switzerland further stated that a power of attorney would be an additional document to the application and was also a necessary document for proceedings in accordance with Article 20, as she had mentioned last week. She stated that the delegation of Switzerland would reserve their position on this point until Article 39 was to be discussed.

19. **The Chair** confirmed that a separate discussion on Article 39 and powers of attorney would take place.

20. **Ms Lenzing** (European Community – Commission) questioned, in relation to Article 11, paragraph 1, sub-paragraph (h), and given that the mandatory transmittal form already contained the information appearing in this sub-paragraph, whether sub-paragraph (h) was therefore necessary. She stated that it was not a terribly important point, however, and so the delegation of the European Community had no problem with the deletion of the square brackets and the retention of the text in that sub-paragraph.

In relation to the proposal that had been made by the delegation of Switzerland in Working Document No 27, Ms Lenzing did not consider it necessary to require additional information in relation to the nationality of the debtor to be provided within the context of Article 11, especially when further information could already be requested under the Convention via other means.

21. **Mr Moraes Soares** (Brazil) thanked the Chair and stated that he supported the deletion of the square brackets in Article 11, paragraph 1, sub-paragraph (h), and the retention of the text found there.

22. **Mme González Cofré** (Chili) indique que la délégation du Chili rejoint les propos de la Déléguée de la Communauté européenne en ce qui concerne l'alinéa (h) du paragraphe 1 de l'article 11. En effet, elle pense que la disposition contenue à l'alinéa (h) n'est pas vraiment pertinente mais qu'elle peut néanmoins être maintenue.

En ce qui concerne la proposition faite par la délégation du Canada d'indiquer l'adresse de l'Autorité centrale de l'État requérant, la délégation du Chili l'approuve et pense que cela pourrait être précisé dans le Rapport explicatif. Effectivement, malgré les remarques du Délégué de l'Allemagne à l'encontre de cette proposition, Mme González Cofré pense qu'il serait tout à fait possible d'inclure l'adresse de l'Autorité centrale. D'après elle, cela fonctionnerait parfaitement en pratique.

23. **Mr Funabashi** (Japan) stated that the delegation of Japan would like to support the proposal made by the delegation of Switzerland in Working Document No 27. He considered it appropriate to include the nationalities of the parties in the bundle of application documentation.

24. **Ms Svantesson** (Sweden) thanked the Chair and stated that the delegation of Sweden supported the suggestions that had been made by the delegation of Canada in relation to providing the address of the Central Authority in the requesting State rather than the personal address of the creditor.

25. **Mrs Hoang Oanh** (Viet Nam) thanked the Chair and stated that she supported the forms that had been produced by the Forms Working Group, including both the mandatory forms and the recommended forms. She considered that these forms would increase the usage of the procedures under the Convention in the future. Mrs Hoang Oanh supported Option 1 of Article 11 as well as the proposal made

by the delegation of Switzerland in Working Document No 27 to make additions to Article 11, paragraph 1, sub-paragraphs (b) to (d). She also noted her support for the deletion of the square brackets in Article 11, paragraph 1, sub-paragraph (h), and the retention of the text. She also suggested that explanatory references be made to both the mandatory and recommended forms in a practical handbook to be produced at a later stage.

26. **Ms Bean** (United States of America) stated that the delegation of the United States of America was concerned with Working Document No 27, produced by the delegation of Switzerland. She considered that the Country Profiles referred to in Article 51 were sufficient to list any extra information that may be required by a State in relation to the operation of the Convention in that State: for example, a requirement by Switzerland for the provision of the nationality of the parties. She did not consider that Working Document No 27 should cause a change in the text for the reason noted, as well as due to the fact that it would carry with it some immigration issues.

27. **Mme Subia Dávalos** (Équateur) observe que, effectivement, dans un souci d'économie et de rapidité des procédures, les formulaires devraient être obligatoires. Concernant le texte entre crochets à l'alinéa (h) du paragraphe 1 de l'article 11, la délégation de l'Équateur approuve la suppression des crochets et le maintien du texte. Enfin, Mme Subia Dávalos approuve la proposition d'ajouter une photographie montrant les traits du visage de la personne concernée.

28. **Mr Segal** (Israel) stated that in relation to the proposal made by the delegation of Switzerland in Working Document No 27, he believed that it should be opposed because it may cause differences in how the Convention was applied to different cases in certain countries. He noted that information in relation to a person's nationality may cause there to be unequal treatment or prejudices in relation to that person's case, *i.e.*, in some cases, the knowledge of a person's nationality may mean that they would not be awarded their full rights under the Convention. He noted his experience of this occurring in Israel. He believed that the focus should be on the requested State that the application was being sent to, not on the applicant's nationality.

29. **M. Manly** (Burkina Faso) souhaite préciser, suite aux interventions des délégations des États-Unis d'Amérique et d'Israël, que la nationalité ne devrait pas constituer un élément obligatoire pour l'identification du défendeur. Il remarque que si cela s'avère nécessaire dans certains pays, alors l'alinéa (c) du paragraphe 2 de l'article 11 devrait permettre de résoudre les difficultés.

30. **The Chair** queried whether Ecuador wished to take the floor again.

31. **Mme Subia Dávalos** (Équateur) souhaite ajouter qu'une photographie pourrait permettre de faciliter la localisation du défendeur.

32. **The Chair** noted in relation to the comments made by the delegation of Ecuador that the delegation of South Africa had raised the same point and that she had requested the latter delegation to produce a written proposal. In the production of a written proposal however, the Chair clarified that it should be considered that a photograph would not be required to be produced in every case but only in those where there was some difficulty in locating the debtor. In any event, she noted that such further information could already be provided under Article 11, paragraph 2, sub-paragraph (c), which might affect the necessity for a written proposal on this point.

33. **Ms Cameron** (co-Chair of the Forms Working Group) thanked the Chair and stated, firstly, in relation to the query noted by the European Community and some other delegations as to the necessity of Article 11, paragraph 1, sub-paragraph (h), when that requirement and information can already be seen on the transmittal form, that the Forms Working Group was informed by members of its group that it would be wise for such information to appear on both documents since it had been identified that both forms would not necessarily "travel" together at all times. For example, one document with that information relating to the details of the person or unit from the Central Authority of the requesting State may be forwarded on to a competent authority within a requested State, whilst the other document containing that information may be retained by the Central Authority of the requested State.

Secondly, the co-Chair of the Forms Working Group made a practical point regarding the further information required to be included under Article 11, paragraph 1, sub-paragraph (h), to the effect that this information would be provided on a standard form during the compilation of the application in the requesting State, including the details of the Central Authority of the requesting State, and so it was not an addition of a burdensome requirement.

Thirdly, the co-Chair of the Forms Working Group supported the proposal that had been made by the delegation of Canada in relation to protecting the address details of a creditor in an application.

In relation to the proposal made by the delegation of Switzerland in Working Document No 27, the Delegate of Australia stated that Australia would not be in support of requiring such information to be provided since the nationality of a person could be sensitive information.

Lastly, with regards to the verbal proposal that had been made by the delegation of South Africa in relation to the provision of a photograph of the respondent, Ms Cameron stated that this information could already be provided via Article 11, paragraph 2, sub-paragraph (c), and so if the delegation of South Africa desired, it could be stated within the Country Profile under Article 51 that all applications forwarded to South Africa must contain such further information, including a photograph.

34. **Ms Kasanová** (Slovakia) noted, in relation to the suggestion made by the delegation of South Africa for the provision of a photograph of the respondent with an application, that under the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* this provision existed and was redundant and never used. She urged against creating another redundant provision that would not be used by Contracting States. Ms Kasanová supported the last point that had been made by the delegation of Australia that the ability to provide and request a photograph of a respondent already existed under Article 11, paragraph 2, sub-paragraph (c), and made reference to the case of the Country Profiles.

35. **Ms Lenzing** (European Community – Commission) noted that in relation to the proposal made by the delegation of Canada concerning the confidentiality of the personal details of an applicant, Article 37 already provided for and conferred such protection. She agreed with the comments that had been made by the delegate of Germany in this regard and that a situation of domestic violence was

an exact example of a situation that Article 37 was designed to protect against, and further, that where appropriate, Article 37 would limit the operation of Article 11. The delegation of the European Community had suggested that no change be made to Article 11 and that, if necessary, some extra comments concerning the relationship between Article 11 and Article 37 could simply be added to the Explanatory Report to the Convention.

36. **Mme Dabresil** (Haïti) indique que la première option de l'article 11 constitue la solution la plus appropriée à ses yeux. En outre, elle approuve la suppression des crochets à l'article 11, paragraphe 1, alinéa (h), et le maintien du texte.

37. **Mr Mthimunye** (South Africa) thanked the Chair and stated that the delegation of South Africa would present a written proposal in relation to South Africa's verbal suggestion and in accordance with the comments that had been made by the Chair. In relation to the comments that had been made by other delegates concerning the availability of existing procedures in the Convention to provide further information including a photograph, the Delegate stated that he was not persuaded by these arguments since in a South African context, the provision of a photograph could expedite matters greatly. He noted that South African society was very diverse and so it would be useful if this Convention were to contain provisions for the production of further information which would be of great utility within South Africa. He stated that a written proposal would be presented.

38. **The Deputy Secretary General** thanked the Delegate of South Africa for his helpful comments. He stated that he would not comment on the content of their foreshadowed proposal but that even if the written proposal were not accepted, the current provisions of the Convention left open the ability for South Africa to note that such further information (including a photograph of the respondent) was required at the time of ratification, via the exchange of information through the procedures of the Convention.

39. **Mr Ribeiro Zerbinatti** (Brazil) wished to stress in relation to the verbal proposal made by the delegation of South Africa that under Article 11, paragraph 2, sub-paragraph (c), any other information that may assist with the location of the respondent could be included in an application, including a photograph if necessary. In relation to Working Document No 27, regarding the proposal made by the delegation of Switzerland on including a requirement to state the nationality of the parties in Article 11, paragraph 1, sub-paragraphs (b) to (d), Mr Ribeiro Zerbinatti stated that the delegation of Brazil supported the comments that had been made by the Delegate of Israel because of the problem that knowledge of one's nationality may cause prejudices.

40. **The Chair** observed that there were no further interventions. She considered that there had been general agreement for the removal of the square brackets around Article 11, paragraph 1, sub-paragraph (h), and the retention of the text, especially after the explanation that had been given by Ms Cameron, the co-Chair of the Forms Working Group. In relation to Working Document No 27, the proposal that had been introduced by the delegation of Switzerland, she noted that there had been some support but that there was not general agreement to include the proposed text in Article 11. The Chair suggested that if the nationality of a party was information that was required by a contracting State, then such an information requirement could be indicated via the use of the Country Profiles.

The Chair went on to note that in relation to the proposal that had been made by the delegation of Canada not to reveal a creditor's personal address in the application documentation, she had heard some hesitations expressed by delegations because of the availability of the provisions contained in Article 37. She therefore had a feeling that it was not generally supported but that it could be returned to when Article 37 was discussed. She also noted that she had heard no reactions on the proposal that was made by the delegation of Australia in relation to the clarification of the grounds upon which an application would be based under Article 11, paragraph 1, sub-paragraph (e).

41. **Mr Beaumont** (United Kingdom) asked the Chair for clarification regarding her ruling in relation to the proposal that had been made by the delegation of Australia in relation to Article 11, paragraph 1, sub-paragraph (e). He suggested that debate perhaps had to be invited.

42. **The Chair** asked the floor whether there were any reactions to the proposal made by the delegation of Australia to change the wording of Article 11, paragraph 1, sub-paragraph (e), to that found in Preliminary Document No 36.

43. **Mr Beaumont** (United Kingdom) believed that the above proposal made by the delegation of Australia was unnecessary because the grounds upon which an application was based should cover both legal and factual grounds and it should be noted that the reference to "grounds" in Article 11, paragraph 1, sub-paragraph (e), was a reference to both. He suggested that this could be clarified in the Explanatory Report to the Convention.

44. **Mr Segal** (Israel) thanked the Chair and stated in relation to the proposal by the delegation of Australia that clarification as to the term "grounds" appearing in Article 11, paragraph 1, sub-paragraph (e), be placed in the Explanatory Report to the Convention but that no amendment be made in accordance with the proposal of the delegation of Australia. He stated that this was because "grounds" could be both legal and factual and that in any event, the term "legal basis", as contained within the proposal, did not provide sufficient clarification.

45. **The Chair** asked the floor whether there were any further objections to adding clarification to the Explanatory Report to the Convention in relation to Article 11, paragraph 1, sub-paragraph (e), and retaining the text as it currently appeared. She noted that that was to be the case. With regard to the question of forms and how to now deal with the forms produced by the Forms Working Group in the context of this Diplomatic Session, and in relation to the Report that had been produced by the Forms Working Group, the Chair handed the floor to the co-Chair of the Forms Working Group to deliver an introduction.

Article 11 – Formulaires (Rapport du Groupe de travail chargé des formulaires, Doc. prél. No 31 ; Doc. trav. No 30) / Forms (Report of the Forms Working Group, Prel. Doc. No 31; Work. Doc. No 30)

46. **Ms Cameron** (co-Chair of the Forms Working Group) thanked the Chair and stated that whilst she would attempt to be succinct, the work of the Forms Working Group had been anything but brief. She noted that the Report of the Forms Working Group had been split into two documents: Preliminary Document No 31-A containing the Report and Preliminary Document No 31-B containing the Recommended Forms. She noted that the Report was the result of a significant amount of work and that its members were

experts from Australia (co-Chair), Canada, Costa Rica, France, Germany, The Netherlands, the United Kingdom, the United States of America, Slovakia, Sweden, the German Institute for Youth Human Services and Family Law (DIJuF), the International Association of Women Judges (IAWJ) (co-Chair) and the National Child Support Enforcement Association (NCSEA). The co-Chair therefore noted that the Forms Working Group included members from a wide array of States and legal traditions and that the co-Chair, Ms Fisher from the International Association of Women Judges, consulted a wide array of judicial members with regards to the forms.

The co-Chair also noted the work of and administrative support that had been provided by the Permanent Bureau and especially by Philippe Lortie (First Secretary), who had guided the group to produce forms that would be medium-neutral and that were internally standardised, and who had arranged meetings for members that were located across many time zones.

The co-Chair noted that at first, the Forms Working Group had hoped that there would be a full discussion of the forms within the Diplomatic Session. She said that this would not be possible but asked all delegates to support the forms which had been drafted to be immediately available for use as soon as the Convention entered into force. She acknowledged that the standard and quality of the forms had benefited by the many comments that had been forthcoming, both from members of the Forms Working Group and experts from outside. She stated that the Forms Working Group had gone to great lengths to ensure that all of the forms met the language requirements of the Convention but noted that, if necessary, further discussions could occur.

47. **The Chair** thanked the co-Chair of the Forms Working Group as well as all the members of the Group for their hard work. She noted that there was no time now to enter into a discussion of all the forms but that she would open the floor for any interventions regarding the way that the forms should now be dealt with within this Diplomatic Session, *i.e.*, whether they would be supported or whether there would be a recommendation for further discussions to take place at a Special Commission meeting.

48. **Mr Beaumont** (United Kingdom) thanked the Chair and suggested that as an interim position, if some time could be set aside so that a meeting could occur of delegations of those States that had concerns with any of the forms, then the conclusions could be brought back to this Diplomatic Session. The Delegate of the United Kingdom made this suggestion as an alternative to taking up a whole Special Commission meeting in relation to forms, which may not be a good use of resources. He considered the large amount of work that had been done by the Forms Working Group and noted that since the forms were to be recommended only, some form of agreement in relation to their status could be reached within this Diplomatic Session. He emphasised that this would not be done through the plenary but would occur within a smaller group of those delegations that had any concerns, and that agreement could be reached more quickly.

49. **The Deputy Secretary General** referred to the comments made by the Delegate of the United Kingdom and stated that he held no objection to his proposal but, in relation to the holding of a Special Commission meeting in the future, its purpose would not simply be to consider the forms recommended for use under the Convention. There would be many other topics of discussion that would need to occur within the context of a Special Commission. In this regard he gave the examples of the Guides to Good Practice for both the implementation of the Convention and the operation of cases through the Convention.

50. **Ms Bean** (United States of America) extended her congratulations to the Forms Working Group and stated that if possible, and as had been suggested by the Delegate of the United Kingdom, it would be preferable to achieve some consensus within the context of this Diplomatic Session as to the support, or otherwise, of the recommended forms. If this were not feasible, she noted that the delegation of the United States of America would support these discussions occurring in the context of a future Special Commission.

51. **Ms Lenzing** (European Community – Commission) appreciated the work that had been done by the Forms Working Group and the added value of the forms because of their internal congruence and standardisation. She considered that a recommendation of the forms could and should be arrived at through the context of this Diplomatic Session. She emphasised that for this to be the case, it would be important for anyone who had any concern with the forms to attend and participate in this additional meeting so that such matters would not be dealt with within the context of the meeting of Commission I. As an alternative, she stated that the delegation of the European Community would also be happy with a proposal to make a declaration that would support the work done by the Forms Working Group but that discussions would be continued at the next Special Commission.

52. **Mr Voulgaris** (Greece) congratulated the co-Chair and members of the Forms Working Group for the work that they had completed. He emphasised that there was no need to occupy a Special Commission specifically for the purpose of discussing the recommended forms. He noted that the forms were not mandatory and that therefore, the plenary could trust the excellent work that had been done by the Forms Working Group and make them part of the Annex to the Convention. He further stated that if revision or amendment of the forms was desired, however, then that could occur at the future Special Commission meeting along with a discussion on the Guides to Good Practice on the implementation of the Convention and operation of cases through the Convention. In either event, he suggested that those discussions should not continue now so that the discussions could move on to other matters.

53. **Mr Segal** (Israel) thanked the Chair and also expressed his appreciation for the work that had been completed by the Forms Working Group. He considered that it had been tremendous and useful work but suggested that before these forms became recommended, there should be an opportunity to consider their practical usage and that discussion should therefore be continued within the context of a Special Commission.

He also referred to the proposal that the delegation of Israel had made in Working Document No 30. He believed that further forms should be able to be put forward in the context of a Special Commission and so the proposal of the delegation of Israel related to the ability to annex additional forms to the Convention in order to improve the efficient practice of the Convention, this in accordance with Article 49, paragraphs 1 to 3. He noted that the presence of this mandate in the Convention was important and in accordance with the proposal that had been made for forms to be considered and added to the Convention at a Special Commission. The Delegate of Israel referred to the internal pro-

cesses of Israel whereby laws would often be amended before formally being presented to the Government of Israel.

54. **Mme Subia Dávalos** (Équateur) convient qu'un certain consensus a été atteint concernant les exigences contenues dans les formulaires (art. 11). Cependant, comme le Délégué du Royaume-Uni, elle pense qu'il serait préférable de convenir d'une autre réunion afin d'offrir aux délégations la possibilité d'une réflexion plus approfondie sur ces formulaires.

55. **The Deputy Secretary General** expressed his appreciation of the work that had been completed by all those involved with the Forms Working Group and noted specifically the fact that their meetings had been occurring at all different times of the day as a result of members being located in different time zones. He also expressed his appreciation of the work that had been done by his colleague Philippe Lortie (First Secretary). He stated that the question of the discussion of the recommended forms within the context of this Diplomatic Session was a question of feasibility and suggested that delegates take the opportunity of the coffee and tea break to discuss it with their peers.

56. **The Chair** announced that before the meeting adjourned for a short coffee and tea break, she would hand the floor to Mr Struycken who wished to make a short announcement.

57. **Mr Struycken** (Netherlands) expressed his awareness that some delegates were interested in attending a tour of the Peace Palace. He noted that for those interested, a tour would occur on Tuesday 13 November 2007 and that delegates were to meet at 1.00 p.m. in the hall of the main entrance to the Academy Building.

58. **The Chair** noted that prior to the coffee and tea break, there had been a willingness expressed to establish a working group to discuss the recommended forms produced by the Forms Working Group. The Chair requested that if delegates were interested in being part of this working group, they should either contact or speak with Philippe Lortie (First Secretary) or Zoe Cameron (co-Chair of the Forms Working Group). She noted that as a minimum, it appeared that delegates were willing to give a general endorsement of the forms in the Final Act of the Diplomatic Session and subject to the formal adoption of these forms at a Special Commission meeting. The Chair asked the delegations whether there were any objections to the understanding that she had explained, even though an additional working group to consider the recommended forms may be established.

59. **M. Markus** (Suisse) indique qu'à l'heure actuelle il lui semble difficile de pouvoir accepter pleinement les formulaires même s'ils étaient éventuellement revus par un groupe de travail en cours de constitution. Il craint en effet de ne pas disposer de suffisamment de temps pour étudier ces formulaires avant la fin de la Session diplomatique.

Aussi M. Markus se demande-t-il s'il ne serait pas préférable de prévoir qu'une Commission spéciale se réunisse ultérieurement afin d'étudier les formulaires, comme cela a été proposé par le Secrétaire général adjoint. Cependant, il précise qu'il ne souhaite pas que la procédure visée à l'article 49 (Amendement des formulaires) et qui prévoit que les décisions sont prises à la majorité des États votants s'applique dans ce cas. Selon lui, la Commission spéciale qui examinera les formulaires et les propositions du Groupe de travail sur les formulaires, devrait plutôt reposer sur le principe du consensus ou de l'unanimité.

60. **The Deputy Secretary General** confirmed that he considered the interpretation made by Mr Markus to be correct. The establishment of a Special Commission to consider the recommended forms as produced by the Forms Working Group would not necessarily be a Special Commission under Article 48 of the Convention. He offered the nearest precedent as being the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. He noted that with respect to that Convention, one year after the Convention was ratified, a Special Commission meeting was held in relation to the implementation of the Convention and many forms were agreed upon. He explained that that would be the kind of Special Commission that would be contemplated in the context of the current Convention and in order to discuss the recommended forms.

61. **The Chair** asked whether there were any further interventions on the topic of the recommended forms and the establishment of a working group. She stated that the question of a working group on the recommended forms would be left open so that it could firstly be seen how many delegates would be interested in attending a meeting of such a group. She reiterated that those delegates who were interested and had some concern with the recommended forms should contact Philippe Lortie (First Secretary) or Zoe Cameron (co-Chair of the Forms Working Group).

Article 49 – Amendements des formulaires (Doc. trav. No 12) / Amendments of forms (Work. Doc. No 12)

62. **The Chair** suggested that the discussions move on to the subject of the amendment of forms and highlighted Article 49 in this context. She also noted the proposal made by the Permanent Bureau to change the reference in Article 49, paragraph 2, from "the Secretary General" to "the depositary". The Chair invited Philippe Lortie (First Secretary) to give an introduction to Article 49.

63. **Mr Lortie** (First Secretary) stated that he would introduce the suggestion made in the proposal by the Permanent Bureau. He noted that the depositary, which had an interest in this Article and had followed discussions, supported the amendment.

64. **The Chair** asked the floor whether there were any interventions in relation to the amendment of forms. Since there were no interventions, she also concluded that the delegates agreed with the proposal made by the Permanent Bureau in relation to Article 49, paragraph 2, and asked the Drafting Committee to make that change in the text. She then stated that discussions would move to Article 12 in relation to the transmission, receipt and processing of applications and cases through Central Authorities.

65. **Mr Segal** (Israel) asked the Chair whether she wished for him to discuss the proposal of the delegation of Israel in Working Document No 30 at that point in time.

66. **The Chair** apologised and stated that the proposal by the delegation of Israel would be discussed next.

67. **Mr Segal** (Israel) thanked the Chair and noted that there were occasions where there was a need not just to amend a form but also to annex further forms to the Convention. Mr Segal explained that his proposal, as contained in Working Document No 30, was that the addition of forms would be regulated by the same procedures as those for the amendment of forms. His delegation therefore added paragraph 4 to Article 49, which would state: "Additional forms

may be annexed to the Convention according to procedures specified in paragraphs 1 to 3."

68. **M. Voulgaris** (Grèce) souhaiterait revenir sur l'article 49, paragraphe 3, qui prévoit la possibilité pour un État de faire une réserve concernant l'amendement d'un formulaire. Selon cette disposition, il résulterait de la réserve faite par un État que cet État ne serait pas considéré comme un État partie à la Convention tant que cette réserve ne serait pas retirée. M. Voulgaris s'étonne du maintien d'une telle disposition dès lors qu'il a été décidé que les formulaires ne seraient pas obligatoires et que la deuxième option de l'article 11, qui prévoyait le caractère obligatoire des formulaires, n'a pas été retenue. Ainsi, M. Voulgaris ne comprend pas qu'un État puisse être exclu de la Convention par la simple formulation d'une réserve alors même que le formulaire amendé n'est de toute façon pas obligatoire. En effet, si un formulaire n'est pas obligatoire, c'est qu'il est simplement commun aux États parties mais que les États peuvent ne pas être liés par ce formulaire, puisque dans le cas contraire le formulaire serait dit obligatoire.

M. Voulgaris précise qu'il n'a pas participé aux travaux précédents mais que la situation visée à l'article 49, paragraphe 3, lui semble incompréhensible.

69. **The Chair** thanked the Delegate of Greece and stated that she would attempt to clarify the situation. She noted that Article 49 was in relation to the amendment of mandatory forms. She noted that Commission I agreed for there to be two mandatory forms and that the forms to be used for an application would remain as recommended forms. She explained that Article 49 only regulated the amendment of mandatory forms and in accordance with Article 49, paragraph 3, a Contracting State could make a reservation, via the delivery to the depositary of a notification in writing, with respect to any amendment to a form. She further explained that this would mean that that Contracting State would then not be a Party to the Convention with respect to the amendment to that mandatory form.

70. **Mr Voulgaris** (Greece) thanked the Chair and noted that he appreciated her explanation. He noted, however, that it may be necessary to amend the text so that it was clear that Article 49 applied to mandatory forms and so that the provision is perceived correctly. He suggested that the Drafting Committee could play a role in this regard.

71. **The Chair** thanked Mr Voulgaris for his suggestion and explained that Article 49 dealt only with those forms annexed to the Convention. As mandatory forms only would be annexed to the Convention, that reference accordingly implied that the procedure for the amendment of forms was only available for mandatory forms. She suggested that in order for all confusion to be avoided, an explanation could be provided in the Explanatory Report to the Convention if the delegates considered that necessary.

72. **Mr Tian** (China) thanked the Chair for her explanation and stated that when he considered Article 49, he shared the same concern as the Delegate of Greece and sought two clarifications. Mr Tian expressed firstly that Article 49, paragraph 1, stated that "[t]he forms annexed to this Convention may be amended by a decision of a Special Commission […]". He therefore asked whether forms annexed to a Convention by the consensus of Contracting States to that Convention could ultimately be amended by a Special Commission which did not possess the same mandate as Contracting States at a Diplomatic Session.

The Delegate of China expressed secondly, in relation to Article 49, paragraph 3, which provided that if a Contracting State made a reservation in relation to an amendment of a mandatory form, then that State would not be a Party to the Convention with respect to that amendment, that he had doubts as to the rationale of this provision from a legal point of view. Mr Tian stated that once a Contracting State was a Party to the Convention and agreed to the mandatory forms annexed to that Convention, unless it denounced the Convention, it remained a Party to the Convention including any amendments made. Mr Tian believed that those two issues required clarification and that Article 49 perhaps required further amendment. He also queried whether Article 49 was even necessary for the smooth operation of the Convention. Mr Tian noted that he would be interested to hear the views of other delegates.

73. **The Secretary General** suggested that he would provide some clarification of the questions raised by the Delegate of China and he hoped it would help. The Secretary General noted that he would explain the background to what was contained in the Convention in relation to the amendment of mandatory forms. He explained that until 1980, if a form that was included in a Convention required amendment because it was not operating satisfactorily in a practical context, the process was quite difficult because it meant that the Convention needed to be amended. So a lighter procedure was designed, in Article 30 of the *Hague Convention of 25 October 1980 on International Access to Justice*. The procedure outlined in that Article was essentially the same as that replicated in the new Convention.

The Secretary General stated that he had no concerns with respect to the amendment of mandatory forms under Article 49 of the Convention. He reaffirmed the comments that had been made by the Chair to the effect that Article 49 was not applicable to the recommended forms because they were not annexed to the Convention. Therefore, he noted that only the mandatory forms that had been agreed upon were subject to the procedure under Article 49.

The Secretary General further clarified that if a Contracting State did not feel that an amendment to a mandatory form was suitable, it would not be bound to use the amended form and would continue to use the old form. He summarised by stating that Article 49 was an established method for amending forms.

74. **The Chair** thanked the Secretary General for his explanation and handed the floor to the delegation of the European Community.

75. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that the delegation of the European Community supported the comments made by the Secretary General in relation to the intervention by the Delegate of China. She noted that the traditional manner of amending forms was cumbersome and that it was preferable to allow such amendments to be made by a Special Commission meeting.

The Delegate of the European Community further noted that in accordance with Article 49, paragraph 2, amendments to mandatory forms had to be adopted by a majority of the Contracting States present and voting at the Special Commission meeting. She also explained that the understanding of the delegation of the European Community with respect to the wording of Article 49, paragraph 3, was that if a Contracting State did not agree to an amendment to a mandatory form then the old version would continue to apply for their use. This meant that there would be no ad-

verse effect on a Contracting State that did not agree to an amended form as the old form would continue to govern their processes under the Convention.

Ms Lenzing did note, however, that given that the status of the recommended forms produced by the Forms Working Group was currently not clear, and including whether they would be put forward, Article 49 needed to remain open. She noted that depending on what occurred and was decided with regards to the recommended forms by the additional working group that had been established, the language of Article 49, paragraph 1, would need to be considered for amendment. Ms Lenzing suggested that to avoid confusion, Article 49 could be amended so that it made reference to those forms relevant to Article 12 of the Convention and not those forms annexed to the Convention.

76. **Mr Beaumont** (United Kingdom) stated that he agreed with the comments that had been made by the Delegate of the European Community. In relation to Working Document No 30, the proposal of the delegation of Israel, Mr Beaumont said that the problem was that Article 49 only related to mandatory forms, not recommended forms. He believed that Article 49 was a suitable provision for the amendment of mandatory forms but was not suitable for the addition of mandatory forms.

He explained that sometimes recommended forms operated so well in practice that there was support for the idea that those forms should become mandatory. Therefore, there should be procedures to be able to make such forms mandatory. Mr Beaumont did not believe that Article 49 was a suitable provision for that task, however.

In relation to the suggestion made by the delegation of Israel to be able to add recommended forms to the group of recommended forms that already existed, Mr Beaumont stated that was an open question because there was no procedure within the Convention for adding to the group of non-mandatory forms. In relation to adding mandatory forms to the Annex to the Convention, the delegation of the United Kingdom would support there being a provision in the Convention to enable this. However, Mr Beaumont reiterated that Article 49 was not the correct vehicle to do this.

77. **Ms Bean** (United States of America) supported the comments made by the Secretary General and stated that there was a need for an expedited procedure to deal with mandatory forms, including a procedure for the amendment of these forms given their complex nature. She noted the point that had been made by the Secretary General that Article 49 of the Convention was a replication of Article 30 of the 1980 Access to Justice Convention. She explained further that in 1980, the rules of the Hague Conference as well as other international organisations relied on the voting mechanism, whereas now the mechanism of consensus was relied upon in order to make decisions. Ms Bean suggested a small amendment to Article 49, paragraph 2: that the phrase "[a]mendments adopted by a majority of the Contracting States present and voting at the Special Commission" be simply replaced by "[a]mendments adopted by the Contracting States at the Special Commission", but otherwise, the delegation of the United States of America did not mind Article 49. She emphasised that the notion of consensus should be utilised to resolve all matters in accordance with the Rules of Procedure.

78. **Mr McClean** (Commonwealth Secretariat) thanked the Chair and noted that he had asked for the floor in order to comment on Working Document No 30, the proposal put forward by the delegation of Israel. Mr McClean considered that his comments were similar to those made by the Delegate of the United Kingdom but that he had considered the issue in a different way. He explained that Article 12 was the relevant provision that made forms mandatory and their inclusion in an Annex to the Convention followed on from that provision. Therefore, the addition of mandatory forms to the Convention should start, at first instance, with Article 12. He noted that the proposal by the delegation of Israel, as set down in Working Document No 30, proposed the addition of forms to the Annex to the Convention but did not consider their addition to Article 12 and so the operation of the Convention became complicated. He did not believe that Working Document No 30 was a feasible proposal.

79. **Mr Tian** (China) thanked the Chair and the Secretary General for providing the background to Article 49 in this Convention. Mr Tian noted, however, that the Chinese delegation still held issues with matters of procedure. He stated that this Convention could be adopted at the end of this Diplomatic Session on the basis of consensus and, therefore, the delegation of China could not agree that an amendment to the mandatory forms annexed to this Convention could be adopted by "a majority of the Contracting States present and voting at [a] Special Commission". He did not consider that an amendment to a Convention could or should occur at a Special Commission at which a non-Contracting State can participate and, in effect, decide upon the legal affairs of a Contracting State. He believed that this was unreasonable. He shared the concern expressed by the delegation of the United States of America in relation to Article 49, paragraph 2, but believed that any amendment to the Convention or mandatory forms annexed to the Convention should be adopted by Contracting States and not by a Special Commission.

80. **M. Heger** (Allemagne) indique que sa délégation partage pleinement les propos du Secrétaire général. Il remarque d'ailleurs que cette procédure d'amendement leur est familière au sein de la Communauté européenne. Il émet en revanche des doutes quant à la possibilité de créer de nouveaux formulaires obligatoires par le biais de tels mécanismes. L'amendement de formulaires et la création de nouveaux formulaires sont en effet des procédures différentes. M. Heger observe que la procédure accélérée décrite à l'article 49 est normalement réservée aux seuls amendements car ceux-ci sont d'ordre technique. Aussi M. Heger approuve-t-il le Secrétaire général lorsqu'il indique que ces amendements sont purement techniques et non de nature politique. M. Heger en conclut que la procédure décrite à l'article 49 doit être restreinte aux seuls amendements et se déclare réticent à étendre cette procédure à d'autres mécanismes. Il appuie ses propos en se fondant sur leur expérience satisfaisante dans le cadre de précédentes Conventions de La Haye.

81. **Mr Segal** (Israel) stated that it appeared to him that Article 49, paragraph 3, would put the Convention in a position where there may be two mandatory forms to the Convention (depending on the outcome of discussions to be held by the additional working group to discuss the recommended forms produced by the Forms Working Group), but after an amendment to one or both of these forms occurred under Article 49, there would then be more versions of these mandatory forms. He therefore explained his rationale that if there were already going to be two or more mandatory forms, there should be a procedure available to be able to add mandatory forms to the Annex to the Convention after it had entered into force.

In relation to the proposal made by the delegation of Israel in Working Document No 30, he noted that it rested on an existing formula. Mr Segal also responded to the comments that had been made by the Observer of the Commonwealth Secretariat and suggested that perhaps in relation to the addition of mandatory forms, there could be an additional Article created to enable such a process. In this way, there would be a process under Article 12 for the addition of mandatory forms to the Annex to the Convention before it entered into force, and there could then be a separate process created for the addition of mandatory forms to the Annex to the Convention after it had entered into force.

82. **The Chair** responded to the proposal and comments that had been made by the Delegate of Israel and stated that what forms should become mandatory forms and should be annexed to the Convention had been discussed and decided upon. She noted that the current procedures within the Convention that allowed for amendment of these mandatory forms could not also extend to the addition of further mandatory forms for adoption within the procedures of a Special Commission. The adoption of further mandatory forms could simply not occur within the context of a Special Commission.

83. **Ms Bean** (United States of America) thanked the Chair and stated that she would be interested in hearing a response to the proposal made by the delegation of the United States of America to change the wording of Article 49, paragraph 2. She noted that there had been no policy debate on this Article and so asked the Secretary General what the rationale was for the voting mechanism that had been incorporated within the wording of Article 49, paragraph 2. She queried whether it was deliberate or whether it was simply because it replicated the wording that appeared in Article 30 of the 1980 Access to Justice Convention.

84. **The Secretary General** thanked the Delegate of the United States of America for her query. He stated that there had been no conscious decision with respect to the wording that appeared in Article 49, paragraph 2, and that it had not previously been discussed in this arena from a policy perspective. The Secretary General stated that in order to make a proposal, the wording was simply taken from the 1980 Access to Justice Convention. He confirmed that taking account of the proposal that had been made by the delegation of the United States of America to amend Article 49, paragraph 2, in its new form it would read: "Amendments adopted by the Contracting States at the Special Commission […]".

85. **Mr Tian** (China) thanked the Chair and stated that he considered that some clarification within Article 49, paragraph 2, was required. He said that the paragraph should be amended so that it was clear that any amendments to the mandatory forms annexed to the Convention must be adopted by consensus on the part of the Contracting States. He referred to the Rules of Procedure for a Diplomatic Session of the Hague Conference and that stated that to the furthest extent possible, all decisions shall be taken by consensus. The Rules of Procedure allowed for a decision to be taken by a vote where it was not possible to attain consensus. Mr Tian therefore emphasised that any necessary amendments to the mandatory forms contained in the Annex to the Convention must be adopted by the consensus of Contracting States and not in the context of a Special Commission where different circumstances existed.

86. **Mme Mansilla y Mejía** (Mexique) indique que sa délégation est favorable à la proposition des États-Unis d'Amérique de supprimer le concept de vote de l'article 49. Ainsi, tout amendement devrait être adopté par consensus (art. 49(2)). Elle remarque en revanche que des doutes ont été exprimés concernant le paragraphe 3 de l'article 49. Bien que cette disposition leur semble claire, il convient de prendre en considération ces inquiétudes et de tenter de mieux rédiger cette disposition comme cela a été demandé par les délégations de la Grèce et de la Chine.

87. **The Chair** thanked Ms Mansilla y Mejía and asked whether there were any further interventions. She then gave the floor to the Secretary General.

88. **The Secretary General** stated in response to the last comments made by the Delegate of China that he understood the concern expressed but that the Delegate could be reassured that the Rules of Procedure that had been amended at the last Diplomatic Session contained decision-making processes that were the same for both Diplomatic Sessions and Special Commission meetings. He explained that decision-making was to occur by consensus in both settings and that voting was resorted to only in circumstances where a decision could not be reached by consensus. He noted that the only instance where different rules applied was in the context of financial matters. He explained that a specific voting rule for the amendment of mandatory forms annexed to the Convention in the context of a Special Commission meeting was therefore not necessary, nor was it necessary to provide for the amendment of the Convention itself.

89. **Mr Beaumont** (United Kingdom) supported the comments made by the Secretary General and noted that he was going to say exactly the same thing.

90. **Mme Subia Dávalos** (Équateur) pense que la rédaction de l'article 49 est suffisamment claire. Elle approuve les explications données par le Secrétaire général à ce sujet. Elle constate que le mécanisme prévu à l'article 49 constitue une procédure expéditive afin d'apporter des modifications aux formulaires. En vertu de cette disposition, si un État n'approuve pas ces amendements, alors il appliquera le formulaire qui aura été adopté par la présente Session diplomatique.

91. **The Chair** noted in respect of the proposal that had been made by the delegation of the United States of America, on the basis of the discussions of Commission I, particularly those interventions made by the delegation of China, that there was support for this proposal. She stated that the proposed amendment to Article 49, paragraph 2, was acceptable and would therefore be adopted. She also concluded that the proposal made by the delegation of Israel and contained in Working Document No 30 had raised some concerns and was not accepted for procedural reasons.

Article 12 – Transmission, réception et traitement des demandes / Transmission, receipt and processing of applications

92. **The Chair of the Drafting Committee** noted that the additional text in square brackets in Article 12, paragraph 2, was added as a result of the extra mandate of the Drafting Committee to ensure that the language of the Convention was "media-neutral". She noted that the text contained within the square brackets had no effect on the substance of the Article but rather that its aim was to ensure the swift transmission of applications and necessary supporting documentation, regardless of the media used to transmit such applications and supporting documentation to the authority of the requested State and as had been noted by the Chair.

93. **The Chair** thanked the Chair of the Drafting Committee and asked the co-Chair of the Forms Working Group to discuss the proposal to amend Article 12, paragraph 2, on behalf of the Forms Working Group, and the proposal to amend Article 12, paragraph 9, on behalf of the delegation of Australia.

94. **Ms Cameron** (co-Chair of the Forms Working Group) thanked the Chair and stated that she firstly wished to discuss the proposal of the Forms Working Group in relation to Article 12, paragraph 2. She said that the suggestion for amendment was that the first sentence of paragraph 2 should read: "The Central Authority of the requesting State shall, when satisfied that the application complies with the requirements of the Convention, transmit on behalf of and with the consent of the applicant the application to the Central Authority of the requested State." The co-Chair noted that this recommendation arose out of the work of the Forms Working Group in relation to the attestation to be included at the end of the forms. A number of States at the Forms Working Group had considered it important to be noted on the application form that the application was sent on behalf of an applicant. The purpose of the amendment to paragraph 2 was therefore to ensure that the text of the Convention was consistent with what was included on the forms.

95. **Ms Cameron** (Australia) went on to state that in relation to the proposal of the delegation of Australia concerning Article 12, paragraph 9, and the period of time during which the requested Central Authority was able to seek further documentation from the requesting Central Authority, there was some confusion with respect to the precise length of the period to be allowed for this to occur. The Delegate of Australia noted that the text as it then stood suggested that the requested Central Authority must allow the requesting Central Authority a period of "at least" three months, and could allow a greater period. At paragraph 364 of the draft Explanatory Report however, it suggested that three months was the maximum period allowed. To resolve this uncertainty as to the fact that the time period of three months was in fact the maximum period allowed, it was suggested that the words "at least" be removed from paragraph 9 as well as the word "may" so that the sentence would then read: "However, the requested Central Authority shall promptly ask the requesting Central Authority to produce these within a period of three months."

96. **The Chair** thanked Ms Cameron and requested that Mr Lortie (First Secretary) present a rationale on the proposal made by the Permanent Bureau for the amendment of Article 12, paragraph 7.

97. **Mr Lortie** (First Secretary) thanked the Chair and noted that the proposal made by the Permanent Bureau in relation to Article 12, paragraph 7, was contained in Preliminary Document No 36. He explained that since May 2007 the Permanent Bureau had consulted experts in the area of information technology and had recognised that whilst a means of communication can be rapid, it was also important to realise at the same time that differing means of communication had differing levels of efficiency. He noted that the aim of the provision would not be changed but that the proposal for amendment simply suggested, for example, that using a secured means of communication, *i.e.*, an efficient means of communication, was as important as using a rapid means of communication.

98. **The Chair** opened the floor on Article 12.

99. **Mr Hayakawa** (Japan) noted in relation to the proposal made by the Drafting Committee to add further text to Article 12, paragraph 2, that his delegation was supportive of the proposal.

100. **Ms Bean** (United States of America) stated that in relation to Article 12, paragraph 2, the delegation of the United States of America supported the deletion of the square brackets and the retention of the text as proposed by the Drafting Committee. Ms Bean also stated that the delegation of the United States of America supported the acknowledgement form as a mandatory form but felt that the language used in Article 12, paragraph 3, with respect to the acknowledgement form was cumbersome. The delegation of the United States of America therefore suggested that the language from paragraph 2 be carried over to paragraph 3 by the Drafting Committee.

The Delegate went on to state that the delegation of the United States of America supported the proposal made by the Forms Working Group in relation to Article 12, paragraph 2, and that several members of the Forms Working Group had considered this an important amendment. Lastly, that support was also given to the two proposals for amendment to paragraphs 7 and 9 of Article 12.

101. **Mme Mansilla y Mejía** (Mexique) approuve la proposition d'ajout à l'article 12, paragraphe 7, et note que le terme « rapide » permet de renvoyer au temps de l'action alors que le terme « efficace » renvoie à l'effet escompté.

102. **Ms Lenzing** (European Community – Commission) thanked the Chair and noted that the delegation of the European Community supported the deletion of the square brackets in Article 12, paragraph 2, and the retention of the text within those square brackets. With respect to the proposal that had been made by the Forms Working Group in relation to Article 12, paragraph 2, she agreed with what had been suggested and noted that the addition of the text "on behalf of and with the consent of the applicant" was probably the necessary compliment to the fact that the forms did not require the signature of the applicant. She also noted that the delegation of the European Community supported the proposal that had been made by the Permanent Bureau in relation to Article 12, paragraph 7, as she stated it would impart a level of flexibility upon the Central Authority in selecting the most secure or efficient means of communication.

In relation to the proposal that had been made by the delegation of Australia concerning Article 12, paragraph 9, to reduce the time period within that paragraph to a strict three-month period, Ms Lenzing noted that there could also be other ways to clarify the text. For example, she suggested that "[…] the required Central Authority shall set a deadline for the requesting Central Authority of not more or less than three months to […]". She stated that if, however, there was support for the proposal of the delegation of Australia, the delegation of the European Community would not be in opposition to the amendment.

103. **Mr Moraes Soares** (Brazil) supported the removal of the square brackets in Article 12, paragraph 2, and the retention of the text, as well as the proposal that had been made by the Permanent Bureau in relation to Article 12, paragraph 7. He noted that the delegation of Brazil also supported the proposal to clarify the time period requirement in Article 12, paragraph 9.

104. **The Chair** noted that if there were no further interventions, then it appeared to be easy to draw a conclusion

Procès-verbal/Minutes No 9

since all proposals were supported. She therefore asked the Drafting Committee to insert the addition to Article 12, paragraph 2, as had been suggested by the Forms Working Group and to also delete the square brackets contained within this paragraph so that the text therein was retained. She also suggested, in relation to Article 12, paragraph 3, that since the mandatory nature of the acknowledgement form had been decided upon, if the Drafting Committee considered it necessary, and in accordance with what had been suggested by the delegation of the United States of America, changes could also be made to the wording of Article 12, paragraph 3.

The Chair also requested that the Drafting Committee make changes to Article 12, paragraph 7, in accordance with the proposal made by the Permanent Bureau. In relation to the proposal of the delegation of Australia and regarding Article 12, paragraph 9, the Chair queried whether there were any objections to this proposal.

105. **Mr Hat'apka** (European Community – Commission) stated that in relation to Article 12, paragraph 9, the proposal made by the delegation of Australia evidenced that the language of the paragraph had to be formulated differently but that there needed to be an awareness of what was being deleted. He said it would be fine to clarify the language in order to address the concerns that the delegation of Australia had evidently possessed, but that the paragraph had to be clear so that it would not suggest that the three-month time period was a fixed period.

106. **The Chair** thanked the delegation of the European Community and stated that there appeared to be agreement that the proposal made by the delegation of Australia in relation to Article 12, paragraph 9, was provisionally agreed upon, but that it would be sent to the Drafting Committee in order to improve its drafting.

Article 13 – Moyens de communication – Recevabilité / Means of communication – Admissibility

107. **The Chair** then suggested that discussion move to Article 13 relating to the admissibility of the means of communications. She noted that this Article had been added by the Drafting Committee on the basis of a recommendation made by the Permanent Bureau. She invited Mr Lortie (First Secretary) to introduce the provision.

108. **Mr Lortie** (First Secretary) noted that as had been mentioned by the Chair of the Drafting Committee, there was a general mandate given to the Drafting Committee to make certain that the text of the Convention was "media-neutral". He explained that Article 13 therefore came about as a result of this. He suggested that delegates turn to the introduction and to paragraphs 365 to 369 of Preliminary Document No 32 to better understand what was envisaged by the drafting of a media-neutral text.

Mr Lortie explained that the idea of Article 13 was to ensure that communications sent to Central Authorities or competent authorities under the Convention were not rejected on the basis that they had been sent electronically. He noted that this type of provision was frequently included in the legislation of many States. He clarified that just because this provision would be within the text of the Convention, it did not mean that an authority in the requested State was under an obligation to become equipped with an e-mail address in order to receive applications, but that if an authority could receive electronic communications then it must accept an application sent via this medium. He also noted that all other conditions contained within procedural law and rules of evidence would still need to be met regarding for example the validity of documentation and whether a stamp was required or not, *i.e.*, such rules would not be displaced.

Mr Lortie further explained that Article 13 was based upon Article 30 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which was already "media-neutral" in some respects. He said that since some States were in an electronic age, it had to be made clear that applications made electronically were not to be rejected. He referred the delegates to the comments made by States in Preliminary Document No 36 and the proposals contained therein regarding linguistic modifications to be made to the provision and the removal of the provision from Chapter III to Chapter VIII, the latter relating to the General provisions. He noted that the second proposal responded to concerns that had been raised by the Drafting Committee in Preliminary Document No 36 as to how Article 13 would interact with Articles 12 and 21. He stated that the Permanent Bureau considered that Article 13 should be applicable to both as well as to cases of applications made directly to a competent authority, and that Article 13 should therefore be moved to Chapter VIII. Mr Lortie emphasised that Article 30 of the 1980 Child Abduction Convention was also located in the General provisions section.

109. **The Chair** thanked Mr Lortie and suggested that discussion on Article 13 take place after lunch. The Chair drew the attention of delegates to the comments in relation to Article 13 to be found in Preliminary Document No 36. She said that with approval, she would send the linguistic proposals related to Article 13 to the Drafting Committee and noted that if any of the changes entailed policy discussion, then the proposal would be sent back to the plenary. The Chair adjourned the meeting and stated that the discussions would resume at 2:30 p.m. on Tuesday 13 November 2007.

The meeting was closed at 1:00 p.m.

Procès-verbal No 10

Minutes No 10

Séance du mardi 13 novembre 2007 (après-midi)

Meeting of Tuesday 13 November 2007 (afternoon)

La séance est ouverte à 14 h 45 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 13

1. **The Chair** recalled the intervention of Mr Lortie before lunch on Article 13, which was still in square brackets. She opened the floor for discussion on this issue.

2. **Mr Ding** (China) stated that his delegation did not object in principle but noted that they had concerns with the rule because it might introduce a substantive rule into domestic laws. He remarked that issues of admissibility were governed by national law and it was not the role of the preliminary draft Convention to change this. He commented that the judiciaries in some States were reluctant to accept electronic documents and this Article might result in precluding some States from joining the preliminary draft Convention as they would not want to change the laws relating to these issues.

3. **Ms Lenzing** (European Community – Commission) thanked Mr Lortie for his explanation but stated that she still did not quite understand what this rule meant. She stated that she had similar concerns to those raised by the delegation of China. She asked how this would reflect on national rules on civil procedure relating to admissibility of electronic documents as evidence. She stated that there was a similar issue in Article 21 where the Central Authority was entitled to request a certified copy of documents that were transmitted. She stated that this provided some reassurance but it related to recognition and enforcement only, and if the same reassurance in respect of establishment existed then the potential problems from Article 13 would be removed. She noted that the rule found in Article 13 was also found in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, but in that Convention she understood it as being of more practical relevance for common law countries and their rules on evidence.

4. **Ms Carlson** (United States of America) stated that her delegation was also confused as to how Article 13 would work and she acknowledged that it could perhaps be due to a lack of understanding of the technological issues. She noted that in internal consultations in her State it was clear that this Article was not understood and she stated that it needed to be clarified. She expressed support for the policy choice that the fact that something was transmitted electronically should not make any difference to its admissibility, but she stated that she did not think that Article 13 accomplished this and only this. She stated that one particularly confusing aspect was the use of the term "admissibility" when all this meant was that the content of the transmission could not be challenged on the grounds of the method of transmission. She stated that another confusing aspect was in paragraph 366 of the Explanatory Report, where the rule was explained by stating that domestic rules of evidence would still be applicable with regard to the substance of the documents and information. This suggested that Article 13 was supposed to take care of all form objections but it only takes care of one: the means of communication. She recalled that the Delegate of the European Commission had pointed out another objection relating to the requirement of certification. She stated that the Explanatory Report needed to be more precise and say that the substance and other aspects of form could be challenged. She remarked that the United States of America would not oppose a broader article that would have a broader rule on admissibility, but she stated that she understood the goal of this Article was for documents not to be considered inadmissible solely on the grounds that they were transmitted electronically, which at present was not what the Article said.

5. **Ms Morrow** (Canada) supported the inclusion of Article 13 and moving it into the General provisions. She stated that her delegation did not agree that this should be applicable to direct applications but should only apply to applications made through Central Authorities. She noted that the language was borrowed from Article 30 of the 1980 Child Abduction Convention, but noted that Article 13 really focussed more on the means of communication rather than being a general admissibility provision like that found in Article 30 of the 1980 Convention. She expressed support for making Article 13 a more general provision, which would perhaps be subject to requests for more formal confirmation if required. She stated that this could also allow documents that were not typically in use in a requesting State to be allowed if they came through the preliminary draft Convention system. She noted that these comments were set out in Preliminary Document No 36.

6. **Mr Beaumont** (United Kingdom) noted that the origins of this idea could be found in Article 30 of the 1980 Child Abduction Convention. He stated that as far as he was aware it had never had any use in the United Kingdom and did not have any value in their common law State. He stated that he was not sure whether it served any great purpose. He commented that if others have experience of this Article adding some value then it should be considered. But if all it says is that documents, whether electronic or otherwise, were admissible, then the big questions were left open such as what weight was to be given to the document or whether the court could reject it and on what grounds. He stated that he was open to persuasion but, as things stood, it seemed to be a relatively moribund provision in the 1980 Convention and he failed to see its practical utility. He remarked that one of the problems with Article 13 was that it was much less clear than Article 30, and this did not add to the attractiveness of the proposal. He noted that, however, the fundamental question was why we needed a rule saying that documents coming through the Central Authorities were admissible when the real question was what weight they should have, and this was not being regulated.

7. **Mr Lortie** (First Secretary) stated that the comments made so far were useful to the discussion. He stated that, as he had mentioned earlier, it was clear that nowhere in this provision did it say that a court was obliged to receive electronic documents. If courts do not accept electronic documents they are simply not equipped to receive them by e-mail or otherwise. He stated that this Article was inspired by similar provisions in domestic laws used to counter individuals that use as a defence the means by which the documents were deposited in court. He commented that the world was in transition and many electronic documents were either sent to the court electronically where the court accepted this or were sent to Central Authorities electronically and then presented to the court, but there were still many States struggling with electronic communications. He stated that a defendant should not be allowed to object to a document solely on the ground that it was transferred electronically to the Central Authority before being deposited in court. He acknowledged that the Explanatory Report could have been clearer. He stated that the Article provided that there was one matter of form that an individual should not be allowed to raise and that was the means of communications. He noted that all other questions were questions of evidence such as certification and validity. He stated that this provision was in no way trying to interfere with the rules of evidence in domestic law. He referred to the suggestion for a provision that a request could be made for a document to be certified in establishment matters. He stated that, while this could be done in relation to recognition and

enforcement, this was a treaty for private international law that can provide rules for the latter but, when it comes to establishment, the only element the preliminary draft Convention provided for was an application in this regard. He stated that all rules for establishment were found in domestic law, and if a document needed to be certified under domestic law then it needed to be certified. He remarked that the delegate of Canada raised a valid point that Article 13 should be made more general, but noted that he did not feel the international community was in a position where Article 13 would be read as medium-neutral by all States. He commented that in the coming years of transition a provision like this would not be necessary; he gave the example of fax machines in the 1970s when everyone was making rules by which documents sent by fax would be acceptable, and nowadays there was no question about their acceptability. He stated that there was currently a state of transition and this Article would help some States and not hurt others, although he acknowledged that there was room for improvement and stated that those willing to submit working documents should do so.

8. **Ms Lenzing** (European Community – Commission) thanked Mr Lortie for his clarification. She stated that the statement that Article 13 did not affect national rules on civil procedure gave comfort and took into account the concerns of her delegation. She noted that, while it may not be written that the provision would affect national rules of procedure, it was also not stated anywhere that it would not. She asked whether this could be changed and suggested that "challenged" should be changed to "challenged by the other party", as this would allow it to be challenged by the court. She remarked that she was not suggesting that the Article should include a rule on certified copies but wanted to clarify that it did not affect national rules on evidence, particularly regarding the acceptance of electronic documents.

9. **Mr Ding** (China) stated that it was good to hear that Article 13 did not affect national procedures. He asked whether it was really useful with such a narrow application and suggested putting it somewhere in the Explanatory Report instead of in the text.

10. **Mr McClean** (Commonwealth Secretariat) stated that when reading the draft provision it did not seem to a common law lawyer to say what Mr Lortie had hoped. He remarked that the Article talked about the admissibility of information and he stated that this related to evidence. He noted that if it was dealing with the rejection of documents then this was not quite the same as the admitting of information, and if the Article was just talking about the rejection of documents it was a bit of a non-issue. He stated that he did not know of any jurisdictions where a problem would arise because a document was sent from one person to another electronically before being presented to the court.

11. **The Chair** asked if there were any reactions to the proposal of the European Community to amend the text to state "may not be challenged by the defendant".

12. **Mr Ding** (China) stated that the decision should not just be on the proposal of the European Community to improve the drafting; whether this Article was really needed should also be considered.

13. **The Chair** asked whether there were other delegations that objected to this Article.

14. **Ms Carlson** (United States of America) stated that her delegation did not object to this Article and she noted that she appreciated the comments of Mr Lortie that the Explanatory Report could be clarified to state that this provision addresses one issue of form only. She noted that she shared the concerns expressed by the Delegate of the United Kingdom and the Representative of the Commonwealth Secretariat but stated that she did not object to the Article.

15. **Mr Beaumont** (United Kingdom) stated that no answer had yet been given as to this provision's practical utility. He noted that if it caused confusion then it would be difficult for the Drafting Committee to make it clear, and this would result in their spending time on a provision that did not add anything. He stated that he knew that people were reluctant to be negative, but that no positive comments had been voiced by any delegation on this Article.

16. **The Chair** stated that the delegation of Canada had supported the inclusion of this Article and they were firm on this. She asked if there were any delegations in addition to that of Canada who would like to have such a provision in the Convention. She suggested that the Article should be left in square brackets for the time being since this problem could not be resolved.

Article 42

17. **The Chair** stated that this Article was a new approach to where translation was to be provided and how the costs would be borne. She noted that there had been general agreement on this provision and it contained no square brackets, but some comments had been made on the provision and so she opened the floor for discussion.

18. **Ms Carlson** (United States of America) noted that the comments of her delegation could be found in Preliminary Document No 36. She stated that she supported the flexibility provided by Article 42, paragraph 1, in allowing Central Authorities to work out who would do the translation and she wanted to increase this flexibility. She noted that the United States of America had an agreement with Norway that documents should not be translated into Norwegian in the United States of America, since it was preferable to do so in Norway or to just use the English version. She suggested, in the light of this, inserting "or generally" after "in an individual case" to allow for such agreements. She referred to Article 42, paragraph 3, and stated that the rest of the sentence after the words "related documents" should be deleted. She noted that while the United States of America did not charge its own applicants for translation costs, it appeared inappropriate for the preliminary draft Convention to be regulating the entirely internal procedures that govern the relation between the requesting Central Authority and its own applicant.

19. **Ms Lenzing** (European Community – Commission) stated that in principle she supported the Article as it stood. She stated that she did not have a problem with the amendment proposed for Article 42, paragraph 1, and noted that it seemed to make sense in the light of the example given. She stated that she would have to consider the proposal for Article 42, paragraph 3, and its repercussions in a given case, and noted that her delegation reserved its position on this.

20. **Ms Kulikova** (Russia) stated that she would need to reflect further on the last proposal made by the Delegate of the United States of America.

21. **The Chair** stated that there were no objections to the amendment of paragraph 1 to allow for the possibility of

having general agreements with regard to translation and translation costs, and she asked the Drafting Committee to make that addition. She noted that there was no agreement on the suggestion regarding paragraph 3, and so it would remain as is for the time being.

Article 17

22. **The Chair** noted that this was an Article that had been the subject of long discussions, and agreement had been reached on the present wording so there were no square brackets in the text. She noted that the Drafting Committee had raised a question with regard to Article 17, paragraph 1, and she asked the Chair of the Drafting Committee to explain the rationale for this question.

23. **Ms Doogue** (Chair of the Drafting Committee) noted that the question related to Article 17, paragraph 1, sub-paragraph (e), where there was an exception for agreements to jurisdiction when they related to children. She stated that the policy question was whether there should also be an exception for vulnerable adults.

24. **The Chair** opened the floor for discussion on Article 17.

25. **Mr Hayakawa** (Japan) stated that with respect to paragraph 6, his delegation had submitted Working Document No 29 which proposed the addition of a provision to the end of the paragraph as follows: "Any Contracting State may declare in accordance with Article 58 that it will not recognise and enforce a decision if the decision is or can be appealed in the State of origin." He stated that his concern was that it would be difficult to recognise or enforce orders that were not final in the State of origin, and he noted that his delegation had included a rationale in Working Document No 29.

26. **Mr Moraes Soares** (Brazil) referred to the comments of Mercosur in Preliminary Document No 36. He stated that the Mercosur States had decided against including private agreements to establish jurisdiction as in Article 17, paragraph 1, sub-paragraph (e), because private agreements were contrary to public policy in some States and would make it difficult for them to recognise decisions made on that basis.

27. **Mr Keith** (United States of America) noted that the comments of his delegation in Preliminary Document No 36 were essentially points of clarification. He expressed support for the substance of Article 17, paragraph 4, and stated that it would help to promptly establish an order. He stated that he would like to clarify that if a Contracting State was unable to recognise a decision then the authorities would proceed directly to establish one. He noted that in the Explanatory Report at paragraph 271, it was stated that States may wish to submit simultaneous applications for recognition and enforcement and establishment if they think that the decision would not be recognised and stated that this contradicted paragraph 4 under which the State could proceed without a fresh application. He stated that there was also a possible ambiguity in the last sentence of the paragraph and in the Explanatory Report where it seems that it would be necessary to make an application under Article 10, paragraph 1, sub-paragraph (d), where the application for recognition and enforcement was made directly by the applicant. He noted that this was entirely correct if the applicant wanted to go through the Central Authority for the establishment decision, but it was always open for the applicant to go directly to the competent authority. He asked that it be clarified that the applicant would not have to go back to the Central Authority. He referred to paragraph 5 and noted that the provision was to benefit a child that had an order in another State, and the attempt was to make it clear that under the preliminary draft Convention that same child would be able to bring an action in the requested State even if the *lex fori* did not allow a child under the age of 18 to bring an action. He expressed concern over what establishing the eligibility of the child actually meant. He referred to paragraphs 500 and 501 of the Explanatory Report and stated that they made it more confusing. He remarked that the essential point was that the child was eligible to initiate and obtain a decision notwithstanding the *lex fori*, but the child was not eligible per se. He noted that paragraph 5 suggested that the only question was the quantum but in fact there may not have been a hearing on the merits. He gave the example of a debtor in the United States of America who would not have to enter an appearance in a case in another State as that other State would not be considered to have jurisdiction. He pointed out that if that decision were then sent to the United States of America, the debtor may never have refuted the claim and may argue before the court in the United States of America that he was not the father. He noted that the decision coming from the requested State established that the child was owed maintenance but did not answer the question of who owed that maintenance. He stated that he believed that the Explanatory Report was incorrect and he suggested that this should be clarified.

28. **Mr Moraes Soares** (Brazil) clarified that the comments of the Mercosur States on Article 17 in Preliminary Document No 36 are located under Article 15, paragraph 2, sub-paragraph (a).

29. **The Chair** asked if there was not already a solution to this problem in Article 17, paragraph 2, where a reservation was allowed in respect of paragraph 1, sub-paragraph (e), so that those States that have public policy concerns about agreements on jurisdiction may make a reservation. She asked if this would be a solution to the problem.

30. **Mr Moraes Soares** (Brazil) agreed that this was probably the solution but he wondered if other countries would have the same trouble.

31. **Mr Segal** (Israel) referred to Article 17, paragraph 1, sub-paragraph (f), and basing jurisdiction on the nationality of one of the parties, and he stated that perhaps it could also be based on the personal law of one of the parties as this could be a reason for a State to act in favour of one of the parties. He referred to paragraph 491 of the Explanatory Report and asked if that was another proposal for sub-paragraph (f) and whether that matter should be discussed.

32. **The Chair** asked the Delegate of Israel to put it in a working document and then it could be considered more carefully.

33. **Ms Lenzing** (European Community – Commission) stated that her delegation in principle supported the existing text of Article 17. She referred to sub-paragraph (e) and stated that her delegation strongly supported the principle of party autonomy but agreed that it was necessary to carefully consider appropriate limitations and appropriate safeguards, and so they wanted to further consider whether vulnerable adults should be included. She referred to the proposal of the Delegate of Japan for an addition to paragraph 6 and stated that she thought the policy concern of the delegation of Japan was probably already taken into account by the fact that the revised preliminary draft Convention did not harmonise rules on enforcement. This meant that in the case where there was a judgment in the State of origin which was provisionally enforceable even if an appeal

could be made, there was nothing to prevent the State of enforcement from staying enforcement under these circumstances. She stated that she did not think that recognition and enforcement should not be allowed in such circumstances, although she acknowledged the validity of the point made by the Delegate of Japan that it could be difficult to get the money back. She stated that there should be recognition of the decision and the appeal could be taken into account by the national rules on enforcement. She stated that she was not yet ready to respond to the points made by the Delegate of the United States of America.

34. **The Chair** noted that there was not much to conclude on this discussion. She stated that Working Document No 29 did not receive support and that the proposal of the United States of America would be further considered. She noted that there was no discussion on the issue of whether Article 17, paragraph 5, meant nothing but age as far as eligibility was concerned so that it was hard to conclude whether it should appear in the Explanatory Report. She stated that as far as the question of the Drafting Committee was concerned, the exclusion of an agreement of jurisdiction for maintenance obligations for vulnerable adults was still an open question. She stated that the discussion would return to some of these proposals.

Article 19

35. **The Chair** noted that the list of the possible grounds for refusing recognition and enforcement had been agreed upon and there were no square brackets in this Article. She stated that some written comments had been received from certain delegations and she opened the floor for discussion on Article 19.

36. **Ms Albuquerque Ferreira** (China) asked whether the Chair had concluded that Article 17, paragraph 1, sub-paragraph (e), would be revisited.

37. **The Chair** responded that that sub-paragraph would be re-examined in relation to vulnerable adults.

38. **Ms Albuquerque Ferreira** (China) stated that her delegation wanted the exception to be broader and cover cases where there were non-disposable rights involved. She noted that this was similar to what Brazil and the Mercosur countries had requested.

39. **The Chair** stated that she had understood that the concerns of the delegation of Brazil could be dealt with by simply making a reservation under paragraph 2, and she noted that there were no other interventions from Latin American States so she concluded that this point would not have to be revisited, although the question of vulnerable adults still had to be discussed. She stated that she did not understand clearly what the concern was and encouraged the delegation of China to submit working documents on bases for non-recognition.

40. **Ms Cameron** (Australia) noted that the written comments of her delegation on Article 19, paragraph (e), could be found in Preliminary Document No 36. She stated that she was not proposing an amendment to the text but that there should be a clarification of issues in the Explanatory Report. She stated that this paragraph made reference to proper notice of proceedings and of the decision, but there was no definition of what proper notice was or under which law the question would be determined. She stated that it should be proper notice in accordance with the law of the State of origin but the Explanatory Report was not clear on this point.

41. **Mr Keith** (United States of America) stated that he would like a similar point of clarification with regards to paragraph (d). He stated that it was noted in the Explanatory Report in paragraph 516 that there was no indication of the date of the decisions. He stated that there was a typographical error in the comments of his delegation in Preliminary Document No 36, which should state that it was the later decision that should be determinative. He stated that this should be clarified in the text or in the Explanatory Report.

42. **The Chair** recalled that the issue raised by the delegation of Australia regarding proper notice was still open for discussion.

43. **Ms Barkley** (National Child Support Enforcement Association) invited all delegates to a reception that evening at the residence of the Ambassador of the United States of America to the Netherlands at 6.30 p.m. She stated that she was grateful to the delegation of the United States of America and to the Ambassador for their support. She noted that her organisation was an international membership organisation and had been an observer for all the proceedings relating to the preliminary draft Convention. She stated that there would be an international training conference held in Vancouver in March 2008 where the next practical steps in implementing the Convention would be discussed and she stated that all delegates were welcome to attend. She stated that she looked forward to seeing everyone at the reception.

44. **The Deputy Secretary General** stated that this was a good occasion to express thanks for the involvement of non-governmental organisations in general and particularly those that represented child support communities in different countries, such as the National Child Support Enforcement Association. He stated that those involved in negotiating the preliminary draft Convention had benefited enormously from their practical help and generosity.

45. **The Chair** noted that one and a half hours remained until it was time to leave for the reception and that Article 19 had to be discussed further. She recalled the issue raised by the Delegate of the United States of America of the timing of incompatible decisions in Article 19, paragraph (d).

46. **Mr McClean** (Commonwealth Secretariat) referred to Article 19, paragraph (e), and the proposal of the Delegate of Australia. He stated that he was surprised to hear the argument that proper notice meant proper notice according to the law of the State of origin. He stated that the general interpretation in common law States was that in this sort of rule the court of the requested State was invited to make a factual appreciation of the notice given and the law of the State of origin was not determinative. He remarked that this meant that the requested State did not have to investigate the procedural law of the State of origin unless this was relevant to the factual appreciation. He stated that, as notice was always relevant to the ability to challenge recognition and enforcement, compliance with a particular set of service rules was not the ultimate test. He commented that if clarification was desirable, and perhaps it was not since the text should not be overloaded, he would suggest that this did not go along the lines suggested.

47. **Mr Beaumont** (United Kingdom) stated that he would like to echo what was said by the Representative of the Commonwealth Secretariat. He referred to the concerns of the Delegate of the United States of America over the absence of a reference to time in the priority provision in Article 19, paragraph (d). He stated that this was an im-

portant question which would not be best resolved by the Explanatory Report. He commented that it was best to leave the matter as it stood in the current text since it was possible to take different positions regarding priority and it was a sufficiently complex and complicated issue, and it would be unwise at this stage to try and resolve the question by a simple priority view. He stated that it was best to leave it to the wisdom of the judge to resolve in individual cases as it was not necessary to devise a definitive ruling on this point in the Convention.

48. **Mr Keith** (United States of America) stated that he appreciated the comments of the Delegate of the United Kingdom and that, while it was usually the later decision that would have priority, he could conceive that there could be other situations and it could not be an absolute rule and so he had no difficulty with leaving it to domestic law.

49. **Mr Moraes Soares** (Brazil) stated that he had not seen the comment of the delegation of the United States of America in Preliminary Document No 36 and that his delegation had submitted a working document to state which decision should be recognised. He stated that it would be better to include a set of criteria. He suggested that the paragraph should be amended to say that recognition could be refused if the decision was incompatible with another decision, provided that the latter decision was the first to be instituted and fulfilled the conditions for recognition and enforcement of the State concerned.

50. **The Chair** noted that the working document had not yet been received.

51. **Mr Moraes Soares** (Brazil) stated that it was currently being processed.

52. **Ms Hoang Oanh** (Viet Nam) stated that she had a technical comment relating to paragraph (a). She remarked that it was better to say that recognition and enforcement could be refused if the effect of the decision was manifestly incompatible, as recognition and enforcement would not be incompatible in itself.

53. **Mr Keith** (United States of America) stated that he did not wish to invite debate on what public policy meant, but he did wish it to be noted for the record that the United States of America believed that the public policy exception under Article 19, paragraph (a), should not be used systemically to reject an entire category of applications. He requested that the Explanatory Report reflect this understanding.

54. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique partage l'opinion selon laquelle l'ordre public peut concerner non seulement la reconnaissance et l'exécution, mais aussi l'acte même de la décision. Elle indique, en outre, que sa délégation est en désaccord avec la proposition faite à ce sujet par les États-Unis d'Amérique.

55. **The Chair** stated that the conclusions of this discussion were to leave the text as it was. She noted that this meant that there would be no time factor determined for paragraph (d) and it would be left to the internal law or judges to decide which of the incompatible decisions have priority, and also that the text in paragraph (e) would not be amended but there would perhaps be a clarification in the Explanatory Report with regard to proper notice.

Chapitre / Chapter *VI*

56. **The Chair** noted that there was only one paragraph in brackets which was Article 30, paragraph 2, and that everything else had been agreed.

57. **Ms Doogue** (Chair of the Drafting Committee) stated that the question about Article 28, paragraph 3, was whether there should be a provision that enforcement would proceed without further cost to the applicant.

58. **Mme Ménard** (Canada) indique que la délégation du Canada approuve le texte de l'article 32 dans sa rédaction actuelle. Quant à la question posée par le Comité de rédaction au sujet de l'article 28, paragraphe 3, sa délégation estime préférable d'inclure un libellé selon lequel l'exécution d'une décision en application du chapitre V de la présente Convention n'entraîne aucuns frais pour le demandeur. Elle propose également de remplacer le terme « *domestic* » par « *internal* » dans le texte anglais, afin d'assurer une concordance entre le texte anglais et le texte français.

59. **The Chair** asked if the Delegate of Canada was referring to Working Document No 33.

60. **Mme Gervais** (Canada) confirme qu'elle se réfère au Document de travail No 33.

61. **Mr Hayakawa** (Japan) noted that his delegation had submitted comments in Preliminary Document No 36 proposing the deletion of Article 28, paragraph 3, as he thought this prohibited the requirement of any action by any person to start the enforcement and it should be completely automatic. He stated that if this actually meant that someone other than the applicant, such as the Central Authority, could make an application to the court to start enforcement, then it would be acceptable. He also suggested that Article 28, paragraph 5, should be deleted because the question it dealt with should be left to the choice of law rules of the forum.

62. **Ms Lenzing** (European Community – Commission) stated that with respect to the bracketed text, she supported it as it stood and agreed to the deletion of the brackets. She referred to the question of the Drafting Committee regarding costs and stated that she believed that there should not be an additional provision but that it was covered by Article 14 *bis* where it was agreed that, for child support cases, there were no costs for applications under Article 10, paragraph 1, sub-paragraphs (a) and (b), which referred to applications for enforcement. She stated that in other cases Article 14 *ter* allowed States to make the granting of legal assistance subject to a means or merits test, and she believed that this would also apply to costs of enforcement.

63. **Mr Keith** (United States of America) stated that he joined the European Community in recommending that the brackets be removed. He stated that this was an extremely important Article and that without strong, prompt and effective enforcement proceedings all the other work would have been of little effect. He stated that he had no difficulty with the suggested language of the Drafting Committee, and as long as it was crystal clear that the enforcement should proceed without further cost that was fine.

64. **Mr Beaumont** (United Kingdom) agreed with the European Community regarding the link with Articles 14 *bis* and 14 *ter*. He referred to the suggestion of the Delegate of Japan to delete Article 28, paragraph 5. He recalled the background where the Working Group on Applicable Law

suggested that this should be in the reviewed preliminary draft Convention, and this was accepted without dissent. He stated that he hoped it would be maintained because it was a useful clarification that the limitation period of either the State of origin or the State addressed, whichever was longer, could be used. He stated that the fact that it was an applicable law rule was not a bad thing because there would be many States that would not ratify the Protocol, so that if it was transferred back to that instrument it would have much less influence than it would here. He stated that it had its utility in the current context and he hoped that States would continue to see the wisdom of regulating the matter in this way since difficulties had arisen in practice because there was no clear rule.

65. **The Chair** asked the delegation of Japan whether their concern related also to Article 28, paragraph 3.

66. **Mr Hayakawa** (Japan) apologised that he had not heard the question.

67. **The Chair** stated that as she understood his intervention he had expressed concerns about Article 28, paragraph 3, and asked him to repeat them.

68. **The Deputy Secretary General** stated that he had understood the concern of the Delegate of Japan in relation to paragraph 3 to be whether it would be possible, given that the idea was for a seamless process, for a system to operate with the Central Authority making an application for enforcement.

69. **Mr Hayakawa** (Japan) agreed with this summary of his concerns.

70. **The Deputy Secretary General** stated that the purpose of paragraph 3 was to avoid placing additional burdens on the creditor. He noted that in some States at the enforcement stage the creditor was obliged to institute new proceedings and the main concern was to avoid the burden being placed on the individual applicant. He stated that he did not read this Article as precluding the Central Authority or another competent authority from making an application on behalf of the applicant.

71. **Mr Ding** (China) stated that he shared the concerns of the Delegate of Japan. He referred to the problem raised by the Delegate of the European Community regarding the issues of costs, and agreed that it should not be mentioned here as it related more to Article 14.

72. **Ms Ménard** (Canada) referred to Article 30, paragraph 2, and stated that she supported the interventions of the Delegates of the European Community and the United States of America that the wording was important and should be maintained. She agreed with the comments of the delegation of Australia in Preliminary Document No 36. She suggested that the words "domestic law" should be changed to "internal law" here to make it consistent with the French version.

73. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique souhaite faire quelques observations au sujet de l'article 28. Elle propose que le terme « interne » contenu dans le titre de cet article soit remplacé par « national » ; c'est-à-dire qu'au lieu d'« Exécution en vertu de la loi interne », il serait préférable de mentionner « Exécution en vertu de la loi nationale ». En ce qui concerne l'article 30, paragraphe 2, elle indique que sa délégation est en faveur de la suppression des crochets. Elle indique également qu'elle apprécie la proposition faite par la délégation du Brésil, exposée au Document de travail No 34 et relative à l'article 19, paragraphe (d). Elle ajoute que cette disposition est mieux rédigée dans cette proposition.

74. **Mr Ding** (China) suggested that the illustrative list in Article 30, paragraph 2, should be deleted because his delegation did not accept some of the enforcement measures and would have problems agreeing to a Convention with a provision that "may include" things which they did not accept. He stated that if this paragraph were merely an illustrative list, then there was no reason not to just put it in the Explanatory Report. He agreed with the proposal to change "domestic" to "internal".

75. **M. Cieza** (Pérou) souhaite intervenir dans le même ordre d'idées que la délégation de la Chine. Il explique que le Pérou rencontrerait des difficultés en ce qui concerne l'article 30, paragraphe 2, parce que sa législation nationale ne connaît pas certaines mesures internes d'exécution. Il indique que dans le souci d'aboutir à un compromis, sa délégation pourra accepter la suppression des crochets. Mais il estime important que le Rapport explicatif mentionne qu'il ne s'agit que d'une liste illustrative.

76. **Mr Markus** (Switzerland) stated that while he was aware that Article 30, paragraph 2, was an illustrative list, his delegation would like to see it deleted and shown in the Explanatory Report because that would be the more appropriate place for a purely illustrative list. He stated that this was his delegation's opinion, but it was not a strong one. He agreed to the proposal to change "domestic" to "internal".

77. **Mr Moraes Soares** (Brazil) stated that he had no objection to Article 30, paragraph 2, as it was a non-mandatory list.

78. **M. Heger** (Allemagne) intervient pour rappeler à ceux qui ont participé aux Commissions spéciales des années précédentes ce qu'avait déclaré la délégation de l'Allemagne. Il informe qu'il y a eu un changement depuis lors. Il attire l'attention des délégations de la Chine et de la Suisse sur le fait que le texte actuel de l'article 30, paragraphe 2, prévoit que : « De telles mesures *peuvent comprendre* […] ». D'une part, il estime que cette liste est importante. Mais d'autre part, il fait observer que l'Allemagne ne connaît pas ces mesures, qu'elles ne sont pas possibles dans son droit, même sur le plan constitutionnel. Il indique toutefois que la délégation de l'Allemagne estime que ces mesures vont dans le sens du progrès et qu'il serait judicieux de les conserver. Il ajoute que dans le souci de trouver un compromis, cet article serait acceptable pour sa délégation.

79. **Mr Segal** (Israel) suggested that Article 30, paragraph 1, should be amended to read "the most effective measures to enforce decisions", and this would give Article 30, paragraph 2, some normative meaning. He stated that this would mean that each State should use the most effective measure. He commented that there was a possibility of imprisonment for maintenance debts in Israel and adding the word "most" would mean that, although it was not in paragraph 2, if it were the most effective it could still be used. He stated that this would clarify that each State was permitted to use the most effective measure that it had.

80. **M. Voulgaris** (Grèce) souhaite faire une brève remarque en ce qui concerne l'article 30, paragraphe 2, alinéa (h). Il indique qu'il éprouve une certaine réticence à propos du refus de délivrance, de la suspension ou la révocation de divers permis (le permis de conduire par exemple). Il indique qu'il comprend que cette mesure permette

de faire pression sur le débiteur. Mais il craint qu'une telle mesure puisse soulever des difficultés d'ordre constitutionnel dans certains pays.

81. **Ms Escutin** (Philippines) stated that although the Explanatory Report stated that the list under Article 30, paragraph 2, was neither mandatory nor exhaustive, she proposed that the list should be deleted. She stated that some of the measures were not found in the law of her State. She agreed with the suggestion of the Delegate of Israel that the adjective "most" should be inserted.

82. **Mr Keith** (United States of America) stated that he believed this to be a very important part of Article 30, and he had not yet heard a complaint as to why it should not be included. He stated that it was not a mandate and the measures did not have to be adopted, and he acknowledged that there may be constitutional problems with some of them. He stated that he viewed this part of Article 30 as a great compromise since he would have preferred if the reviewed preliminary draft Convention had mandatory enforcement proceedings. He noted that this set the bar and that this was the first Hague Convention that had a separate chapter on enforcement. He stated that he was not asking States to adopt any of these, but noted that they had been tested and were internationally recognised.

83. **Ms Hoang Oanh** (Viet Nam) stated that all measures listed under paragraph 2 were provided for in Viet Nam and she supported deleting the brackets. She stated that the ideas of conciliation and mediation were also important and it would be good if these could be included in the text of this Article as well.

84. **Mr Beaumont** (United Kingdom) stated that, like the delegation of the United States of America, his delegation was committed to the value of this illustrative list in Article 30, paragraph 2. He noted that there were many States that would like to go further but that it was a compromise to accept that the sort of measures that could effectively enforce maintenance obligations could be outlined. He commented that no one was required to adopt any of those measures, so that if there were constitutional issues then States were free not to adopt them. He stated that the key was Article 30, paragraph 1, under which effective measures had to be provided, but there was no obligation to use any of the measures listed as long as those used would be effective. He referred to the proposal to use the term "most effective" and noted that it had already been used in the Explanatory Report. He stated that it was difficult to make this a treaty standard because it was difficult to determine when something was the most effective. He stated that since everyone had different views on what constituted the most effective method, it should not be put in the text of the preliminary draft Convention. But he acknowledged that the idea of the Explanatory Report was a good one, and that the aim was to keep pushing forward to have the most effective measures. He noted that one value of outlining the measures was that it provided guidance to States on the types of measures that they might use.

85. **Mr Schütz** (Austria) stated that in the spirit of compromise and knowing that this list was of great importance, his delegation agreed to have the list in the text. He referred to the doubts expressed by other delegations concerning the last measure and stated that it might be wise to delete that one to make the list more acceptable to all States. He referred to the proposal to add the word "most" and stated that he had the same doubts as expressed by the Delegate of the United Kingdom. He stated it was clear from the Explanatory Report what was meant by effective measures and so in this respect the text should remain unchanged.

86. **Mme González Cofré** (Chili) indique que la délégation du Chili souhaite faire objection à la proposition des délégations du Japon et du Canada. Elle se déclare également en faveur de l'élimination des crochets à l'article 30, paragraphe 2. Elle propose de maintenir le texte parce que le Rapport explicatif précise qu'il s'agit d'une liste illustrative.

87. **Mme Subia Dávalos** (Équateur) indique que la délégation de l'Équateur réfléchit à la possibilité de supprimer le paragraphe 2 de l'article 30 parce que la liste est illustrative et non exhaustive. Elle estime que l'on aboutirait au même résultat. Mais elle ajoute que dans le souci de parvenir à un consensus, sa délégation serait en faveur de l'élimination des crochets.

88. **Mr Mthimunye** (South Africa) stated that he would like to add the voice of his delegation to the proposal that the brackets should be deleted. He noted that some of these provisions had been tested in South Africa and were found to be useful and effective. He supported maintaining the text as it stood.

89. **Mr Ding** (China) stated that he should further explain the constitutional difficulties that should not be taken so lightly. He stated that his delegation had a serious concern because they could not accept something that they constitutionally could not do. He gave the example of the death penalty and noted that everyone would have a difficulty if this were included. He stated that if the list had to be included then his delegation would have to go through it and see what was not acceptable. He agreed that mediation and conciliation should also be included. He said that the simplest solution was to delete the list and include it in the report.

90. **Mr Segal** (Israel) stated that it seemed that the word "most" was important because the implication of the list should not be to prevent States from using imprisonment as it was not on the list. He referred to the objections of the Delegates of China and other States, and stated that perhaps "may include as permitted" should be added to clarify that the measure was to be interpreted according to the law of each State. He stated that since it was only an illustrative list, this should perhaps be further clarified.

91. **Mme Dabresil** (Haïti) indique qu'elle partage la même préoccupation que la délégation de la Chine. Elle propose le maintien du paragraphe premier de l'article 30. Mais elle mentionne que certaines dispositions du paragraphe 2 lui paraissent contraignantes, particulièrement l'alinéa (d), qui prévoit le gage sur les biens ou la vente forcée.

92. **M. de Leiris** (France) souhaite ajouter quelques mots pour appuyer les propositions des délégations précédentes sur le caractère indicatif du paragraphe 2. Il estime que le fait d'ajouter des termes « les mesures les plus efficaces » conduirait à rendre la liste impérative. Il explique que le lien qui s'établirait alors entre les deux paragraphes rendrait la liste impérative. Il indique que l'obligation des États est de fournir les moyens pour aider le créancier à obtenir les aliments. Il estime donc qu'il appartient à chaque État de prendre des mesures efficaces à cet effet.

93. **The Chair** recalled that long discussions had already taken place on this list.

94. **Ms Cameron** (Australia) stated that she wanted to add the voice of her delegation to the support for Article 30, paragraph 2. She stated that she supported adding mediation to the list and noted that it was clearly mentioned in the Explanatory Report. She referred to sub-paragraph (h) and stated that, although they would be reluctant to open discussion of each item, if deletion of this one section would mean that the meeting would not spend any more time discussing this Article then her delegation would accept it.

95. **The Chair** stated that a considerable majority of the delegations were in favour of deleting the square brackets, but there were a number of delegations who objected so the paragraph would remain in square brackets. She referred to the question from the Drafting Committee and stated that the addition of a provision that the enforcement should take place without further cost was rejected and it should be dealt with in Article 14. She noted that the drafting proposals from the delegation of Canada were supported and asked the Drafting Committee to make the necessary changes to the draft. She stated that she was hesitant to open further items because she thought that people were tired, and that the meeting was adjourned until the following morning at 9.30 a.m. when it would commence with Country Profiles.

96. **Mr Lortie** (First Secretary) noted that all the Minutes from Commission II had now been distributed. He recalled that he had explained on the first day that all the delegates were invited to read their interventions and provide corrections if necessary, and to leave these corrections at the information desk at the entrance to the building.

97. **Ms Doogue** (Chair of the Drafting Committee) stated that there would be a meeting of the Drafting Committee at 8.00 p.m. in the offices of the Permanent Bureau.

The meeting was closed at 5.25 p.m.

Procès-verbal No 11

Minutes No 11

Séance du mercredi 14 novembre 2007 (matin)

Meeting of Wednesday 14 November 2007 (morning)

The meeting was opened at 9.55 a.m. with Ms Kurucz (Hungary) in the chair, and Ms Degeling (Permanent Bureau) and Mrs Borrás (Spain) as co-*Rapporteurs*.

1. **The Chair** welcomed the delegates. On behalf of all of the delegates, she thanked the Ambassador of the United States of America and the delegation of the United States of America for the reception that the Ambassador had hosted on the previous evening.

She invited Ms Ménard (Canada) to make an announcement concerning the Working Group on Access to Procedures.

2. **Ms Ménard** (Canada) announced that there would be a meeting of the Working Group on Access to Procedures immediately after lunch.

Article 51 – Informations relatives aux lois, procédures et services / Provision of information concerning laws, procedures and services

3. **The Chair** stated that the discussion would commence with an analysis of Article 5, paragraph (b), Article 32 and Article 51. She observed that Article 51 was a general provision. She added that the Drafting Committee had observed that, should Article 51 be adopted, Article 5, paragraph (b), and Article 32 would be rendered redundant. She therefore requested that the delegates focus their attention on Article 51. She added that the discussion would also address Country Profiles. She invited the delegates to consider the report of the Administrative Co-operation Working Group's Country Profile Sub-committee. She invited the co-Chairs of the Sub-committee to report upon their progress.

4. **Ms Ménard** (co-Chair of the Sub-committee on Country Profiles) explained that the Sub-committee included representatives from Australia, Belgium, Canada, Germany, the National Child Support Enforcement Association (NCSEA), the Netherlands, Romania, the United Kingdom, the United States of America, and the Permanent Bureau. She added that the co-Chairs of this Sub-committee were herself, Senior Counsel and Coordinator, Support Enforcement Policy and Implementation Unit, Family Children and Youth Section of the Department of Justice Canada and Ann Barkley, Consultant and NCSEA representative.

She reported that in 2004 the Sub-committee drafted a Country Profile form that included relevant country-specific information so that other countries could understand the administrative, operational, and policy requirements for processing cases with that country. A first draft of the Country Profile form was presented at the Special Commission meeting held in June 2004 and subsequent drafts were presented to the Special Commissions in April 2005 and June 2006.

Ms Ménard added that the Sub-committee continued to refine the Country Profile form between the 2006 and 2007 Special Commission meetings. The work done by this Sub-committee was accomplished by e-mail, conference calls, and two in-person meetings held in Ottawa, Canada on 13 and 14 March 2006 and London, England on 14 and 15 March 2007. She noted that these very successful meetings were sponsored by the Canadian Department of Justice. Participants in the two meetings included representatives from Australia, Austria, Barbados, Belgium, Canada, China, Costa Rica, Czech Republic, Poland, Romania, Sweden, the United Kingdom, the United States of America, NCSEA and the Permanent Bureau. At the London meeting, observers, who also commented during the discussions, included representatives from Brazil, Costa Rica, the European Community (Commission), Finland, Israel, New Zealand, Norway and Slovenia.

5. **Ms Barkley** (co-Chair of the Sub-committee on Country Profiles) explained that Contracting States could use the Country Profile form to fulfil their obligations to provide information to the Permanent Bureau under the Convention.

She observed that the form was divided into two parts or stages. Stage 1 included information that addressed the compulsory requirements of the Convention and other information that would be necessary for implementation of the Convention. Stage 2 included additional information which could facilitate implementation of the Convention.

She noted that the Country Profile form was a standardised document that would be available to States to complete, view, and update electronically. The Country Profile form was intended to facilitate: a) timely compliance with the obligations of the Convention with a minimum of administrative effort; b) information exchanges between Contracting States; c) cost-effective translation of the information provided by Contracting States into English, French, Spanish, and other languages as required by Contracting States; d) accurate and prompt case processing by well-informed caseworkers; e) knowledgeable service to applicants under the Convention; f) prompt updates of the information provided.

Ms Barkley drew the delegates' attention to the fact that the draft Country Profile form was based on Preliminary Document No 29 of June 2007. She stated that it would be amended to accurately reflect the decisions of the Diplomatic Session of November 2007.

She informed the delegates that the consensus of the London meeting was that the Country Profile form should not be annexed to the Convention. She emphasised that participants thought it unwise to wait for years between amendments to the Convention in order to update the document. She added that participants at the meeting had recognised that the Country Profile form presented to the Diplomatic Session in November 2007 would need to be modified to reflect the final decisions of the Diplomatic Session. Therefore, the Sub-committee suggested that the Country Profile form be recommended in Article 51, paragraph 2, and published by the Permanent Bureau. The Sub-committee suggested using the same wording as that in Option 1 of Article 11, paragraph 4.

With regard to the timing for submittal of the information required by the Convention, she reported that the Sub-committee supported the language of Article 51, paragraph 1, of the revised preliminary draft Convention dated June 2007.

The Sub-committee agreed with Article 51, paragraph 3, which provided that: "Information shall be kept up to date by the Contracting States." Further, she noted that the Sub-committee recommended that any changes in the information provided about the Central Authority be made available immediately. She observed that the electronic format of the recommended Country Profile form provided an easy means of making those changes quickly and accurately. The consensus of the London meeting and the recommendation of the Sub-committee was that countries should be reminded to update their required information annually.

Ms Barkley then invited Mr Lortie (First Secretary) to give a visual presentation of a model that would be used in future.

6. **Mr Lortie** (First Secretary) thanked the co-Chairs of the Sub-committee on Country Profiles. He also drew the delegates' attention to the invaluable work of Mr Patrick Gingras (official seconded by the *Ministère de la Justice du Québec* to the Permanent Bureau).

He explained that a demonstration had been developed for the Sub-committee meeting in London, and that further work had been carried out in the production of the final product.

Mr Lortie stated that, together with Mr Gingras, he had looked for a service provider that would be able to provide the necessary services at low cost. He announced that Alphinat, a software publisher that had developed the SmartGuide suite, had been identified as a suitable service provider. He explained that Alphinat's products were used by experts to roll out the services, applications and resources needed to automate complete business processes through a single-access platform. He stated that the services of Alphinat were used in the banking and other service sectors. He added that with its SmartGuide software, Alphinat had developed an innovative online government solution. This solution was chosen, out of various applications submitted by 189 countries, to receive IBM's Top Star Award for online government solutions. Alphinat solutions had also been recognised by the Organisation for Economic Co-operation and Development (OECD) under its "best Internet practices" category.

Turning to the technical aspects of the software, Mr Lortie stated that the application had taken less than 20 working hours to produce. He stated that the Country Profiles would be available on the website of the Hague Conference. He then demonstrated a draft Country Profile that already appeared in PDF format. He explained that these documents would also be readily available in Word format, or HTML through the easy instructions that accompany the SmartGuide. He emphasised that it had taken less than one hour to place a complete Country Profile on the online database.

Mr Lortie explained that the end result would allow States to input their information by logging on to the website and identifying their country. They could then select the language of the submission form and input data primarily by ticking the appropriate boxes in the form. This format would also make it easy to read the data in several languages. He then demonstrated how, once the first phase of data input was complete, one could click a button, go to another screen and submit further information. At this point, he also demonstrated that, when inputting data concerning Article 51 of the Convention, a "?" symbol on the screen provided easy access to the text of the Article. He then entered data in French and showed the user-friendly features of the software, including how the data that had just been entered was immediately available to be viewed.

He informed the delegates that the software had been completed in the preceding week and that it was his first time viewing it. He emphasised that it was fast and easy to use. He explained that the system was operational, and that it would be finalised once the preliminary draft Convention was adopted. He observed that the system had not yet been fully tested but that it appeared to be an excellent tool. He reiterated that, as soon as the preliminary draft Convention would be adopted, the online system would be updated and available for use.

7. **The Chair** thanked all the persons that had worked on the compilation of the Country Profile forms.

8. **Ms Barkley** (co-Chair of the Sub-committee on Country Profiles) reiterated the ease with which information

Procès-verbal/Minutes No 11

could be entered into the database. She emphasised that it was mostly to be done through the ticking of boxes. She added that one could input data in a given language and immediately be able to view it in another language. She likened the ease of use to booking an airline ticket online.

9. **The Chair** asked the co-Chairs of the Sub-committee on Country Profiles to present Working Document No 28.

10. **Ms Barkley** (co-Chair of the Sub-committee on Country Profiles) explained that the working document would be presented by Ms Cameron (Australia).

11. **Ms Cameron** (Australia) explained that Working Document No 28 contained two distinct proposals. Both proposals concerned amendments to the Preamble of the revised preliminary draft Convention. The first was a proposal of the Forms Working Group and of the Observer for the International Association of Women Judges. The second proposal was submitted by the Sub-committee on Country Profiles, and it was this latter proposal that she would refer to at that juncture. She stated that the Sub-committee on Country Profiles wished that the prospective benefits of the Country Profiles would be reflected in the Preamble of the revised preliminary draft Convention.

12. **The Chair** recalled that the Sub-committee on Country Profiles had also proposed that the Country Profile form be recommended in Article 51, paragraph 2, and would not be an Annex to the Convention. She stated that she understood that Article 51, paragraph 2, would refer to the Country Profile which would be published by the Permanent Bureau.

13. **Mr Schütz** (Austria) stated that he appreciated the revisions to the Country Profile form and that he considered the present draft to be a considerable improvement over the previous form. He also welcomed the new structure that contemplated two stages of data submission, with a minimal first phase and a more extensive second phase. He added that the online system that was based on the ticking of boxes in the first stage and the submission of further information in the second phase was most commendable.

He also stated that he appreciated the qualification of the Country Profile form as a recommended form, rather than an Annex to the preliminary draft Convention.

Mr Schütz concluded by thanking the Sub-committee on Country Profiles for its work.

14. **Ms Bean** (United States of America) thanked the Sub-committee on Country Profiles for its hard work and congratulated its members for the results of their efforts. She observed that there was a wide representation of States in the Sub-committee and that this was reflected in the positive outcome. She also thanked Mr Lortie (First Secretary) for the work he had performed regarding electronic solutions that would be adopted in future.

She emphasised that the Country Profile form was a positive development because it enabled caseworkers in requesting States to easily understand the services provided in requested States. She also observed that the solution was a good tool to provide information to the Permanent Bureau because it doubled up as a checklist of the obligations contemplated in the Convention. She felt that the electronic solution would allay any fears that the information system would be too burdensome because the system was fast and easy to use. In addition, she observed that the electronic solution increased accessibility to information since it eliminated the language barrier. She agreed with the Delegate of Austria that the two-stage system for the submission of data was commendable.

The Delegate of the United States of America also supported the recommendations of the Sub-committee on Country Profiles to amend Article 51, paragraph 2, as well as the Preamble. She asked the Drafting Committee to adopt these proposals.

15. **Mr Pipe** (United Kingdom) welcomed the development of the Country Profile form, and specifically the electronic solutions, as he felt that it would make the work of Central Authorities easier. He observed that the facilitation of expeditious work by Central Authorities went to the heart of the aims of the preliminary draft Convention.

He added that his delegation supported the flexible approach to Article 51, paragraph 2, as recommended by the Sub-committee on Country Profiles.

16. **Ms Ménard** (Canada) thanked Mr Lortie (First Secretary) for his efficient and effective demonstration. She observed that the demonstration illustrated the ease of use of the electronic solution.

Ms Ménard added that her delegation supported the retention of Article 51, with the amendments proposed by the Sub-committee on Country Profiles. Her delegation also supported the proposed addition to the Preamble in Working Document No 28.

17. **M. Markus** (Suisse) remercie la Présidente. La délégation de la Suisse est extrêmement reconnaissante envers le Sous-comité chargé du Profil des États pour son travail. Par conséquent, la délégation de la Suisse est en faveur du retrait des crochets qui entourent l'article 51 de l'avant-projet révisé de Convention. De plus, elle est tout à fait favorable à l'intégration du Profil des États comme texte recommandé et non en annexe de la Convention.

En outre, en ce qui concerne l'introduction d'une référence au Profil des États dans le préambule de la future Convention, la délégation de la Suisse souhaite exprimer certaines réticences d'ordre général. En effet, un préambule consiste normalement à démontrer et à clarifier l'objet de l'instrument en question. Or, la référence à un « format uniformisé » (Doc. trav. No 28) dans le préambule semble évoquer les moyens de la future Convention. Il en résulte que la délégation de la Suisse n'est pas favorable à l'intégration de ce considérant au préambule de la future Convention.

18. **La Présidente** remercie la délégation de la Suisse.

19. **Mr Tian** (China) commended the work of the Sub-committee on Country Profiles. He stated that it would be very useful and helpful for countries to provide information for the implementation of the Convention. He stated that his delegation also supported the proposal to designate the Country Profile form as a recommended form published by the Permanent Bureau, rather than as an Annex.

On the matter of Working Document No 28, the Delegate of China felt that it should be clear that the Country Profile form should be used by Contracting States, but he did not feel that he could comment further.

20. **M. Heger** (Allemagne) remercie chaleureusement le Sous-comité chargé du Profil des États pour le travail qu'il a effectué. La délégation de l'Allemagne croit sincèrement que le Profil des États va véritablement faciliter l'applica-

tion de la future Convention et la collecte des informations nécessaires pour aider les personnes qui souhaitent le recouvrement d'obligations alimentaires. En effet, ces personnes, tout autant que les États contractants, pourront, grâce au Profil des États, avoir accès aux règles et procédures d'un autre État contractant. Ceci est sans aucun doute un très grand progrès.

En ce qui concerne le Document de travail No 28, la délégation de l'Allemagne considère que la référence à cette démarche est une bonne idée. Le Délégué de l'Allemagne partage le souci évoqué précédemment par la délégation de la Suisse et par la délégation de la Chine, portant sur le risque d'introduire trop de détails au sein du préambule. Cependant, il est aussi possible de considérer que la proposition du Sous-comité chargé du Profil des États porte sur l'échange des informations, élément essentiel au fonctionnement de la future Convention. Cet échange d'informations est sans aucun doute un élément important et a pour but que la future Convention fonctionne de la meilleure manière possible. Par conséquent, le Profil des États s'inscrit d'une certaine manière dans l'objectif poursuivi par la future Convention et une référence à celui-ci pourrait donc être inscrite dans son préambule.

21. **Mr Segal** (Israel) stated that he appreciated the work of the Sub-committee on Country Profiles and stated that it would facilitate the implementation of the preliminary draft Convention. He added that he supported Working Document No 28 because he felt that its content properly reflected the function of the Convention in practice. He therefore recommended that the proposal be included in the Preamble of the revised preliminary draft Convention.

22. **Mme González Cofré** (Chili) remercie la Présidente et salue l'assemblée. La Déléguée du Chili intervient afin d'appuyer l'article 51 de l'avant-projet révisé de Convention et féliciter les membres du Sous-comité chargé du Profil des États pour le travail effectué. Elle souhaite aussi remercier M. Lortie (Premier secrétaire) pour sa démonstration.

Le Profil des États apportera des solutions opportunes afin de faciliter le travail des Autorités centrales. Ceci permettra d'utiliser un format tout à fait convivial et d'obtenir des informations claires ainsi que des mises à jour.

La délégation du Chili souhaiterait que le Profil des États figure en annexe de la future Convention. Néanmoins, elle peut accepter qu'il soit dans un texte recommandé.

23. **M. Manly** (Burkina Faso) remercie la Présidente. À l'instar des autres délégations, la délégation du Burkina Faso souhaite remercier le Sous-comité chargé du Profil des États pour le travail qu'il a effectué ainsi que M. Lortie (Premier secrétaire) pour sa présentation.

Comme les autres délégations, celle du Burkina Faso est pour le retrait des crochets qui entourent l'article 51.

Le Profil des États permettra aux pays africains d'avoir accès aux mêmes informations que les pays plus avancés bénéficiant d'un accès aux nouvelles technologies. Les difficultés que connaît en l'occurrence le Burkina Faso en matière de traduction sont importantes, d'où l'apport essentiel de cette nouvelle méthode.

24. **La Présidente** remercie le Délégué du Burkina Faso.

25. **Mr Helin** (Finland) thanked the Sub-committee on Country Profiles and Mr Lortie (First Secretary) for their work. He noted that the Country Profile would be very helpful as a source of information that was required to enhance co-operation.

While reiterating his appreciation and support for the proposed form, as well as the laudable flexibility thereof, he stated that the Finnish Central Authority would have to tick the box marked "Other. Please specify" for several of the questions in the Country Profile form. He noted that this would not be particularly helpful and suggested that further alternatives be added to the possible responses.

Mr Helin concluded by emphasising his gratitude for the work of the Sub-committee on Country Profiles, and added that his delegation was of the view that it would be useful to refer to the Country Profile form in the Preamble, since his delegation acknowledged the value of a reference therein.

26. **M. Lortie** (Premier secrétaire) relève que les remerciements sont en tout premier lieu à adresser à Patrick Gingras (fonctionnaire en détachement, Ministère de la Justice du Québec) et surtout à la société Alphinat. Le Premier secrétaire précise d'ailleurs que la publicité gratuite effectuée au profit d'Alphinat est motivée par le fait que la démonstration a elle aussi été fournie gratuitement. Le Premier secrétaire remercie chaleureusement l'assemblée.

27. **The Chair** observed that there was general support for the proposal of the Sub-committee on Country Profiles concerning Article 51, paragraph 2. She therefore asked the Drafting Committee to make the necessary changes.

She added that a vast majority of delegates supported the inclusion of a reference to the Country Profile form in the Preamble. She noted that there were some delegates that hesitated on this matter. She asked those delegates if they had strong objections.

28. **M. Markus** (Suisse) considère que ce sujet n'est effectivement pas très important et qu'il est possible d'intégrer la proposition dans le préambule si cela est nécessaire.

29. **La Présidente** remercie le Délégué de la Suisse. The Chair suggested that the text proposed in Working Document No 28 be included in the Preamble without square brackets. Noting that there were no objections, she took this to be agreed by the delegates.

She asked those present if they wished to add anything regarding Article 51.

30. **The Chair of the Drafting Committee** observed that in the introduction by the Chair, the latter had asked the delegates to comment upon the relationship between Article 51 on the one hand, and Article 5, paragraph (b), and Article 32 on the other. She noted that the Chair had suggested that Article 5, paragraph (b), and Article 32 were rendered redundant by the inclusion of Article 51. She asked the Chair whether this was the appropriate time to discuss this matter.

31. **The Chair** confirmed that this was the correct time. She added that, if it could be accepted that the square brackets surrounding Article 51 be removed, it was pertinent to consider the question of the necessity of the related Articles.

32. **Ms Lenzing** (European Community – Commission) stated that her delegation supported the retention of Article 51 and the deletion of Article 5, paragraph (b), and Article 32, because the latter Articles were redundant. She

recalled that it was the intention of the Drafting Committee to replace Article 5, paragraph (b), and Article 32 with a more general provision, namely Article 51. She added that there was some concern that Article 51 might be too burdensome, but that, following the work of the Sub-committee on Country Profiles, the Member States of European Community were satisfied that the reporting requirements were acceptable.

Ms Lenzing added that she wished to take this opportunity to thank the Sub-committee on Country Profiles for its work.

33. **Ms Cameron** (Australia) stated that her delegation supported the deletion of the brackets and the retention of the text in Article 51.

The Delegate of Australia also proposed to delete Article 5, paragraph (b), and Article 32. She noted, however, that she remembered that there had been a proposal of the Working Group on Applicable Law in Preliminary Document No 27 to add wording to Article 32 addressing the duration of a maintenance obligation in order to allow Article 28, paragraph 5, to be implemented. Ms Cameron explained that there had been some concern that if additional language were not included to provide for the furnishing of information concerning rules applicable to the duration of a maintenance obligation in the State of origin, it would be difficult to contemplate a basis for the provision of such information. She suggested that this concern might need to be reflected in the drafting of Article 51.

34. **The Chair** observed that this matter might be solved because the Country Profile form did include a question concerning the duration of a maintenance obligation.

35. **Ms Cameron** (Australia) stated that she agreed with the Chair's observation in part. She stated that the first stage of the Country Profile form only concerned information that was mandatory under the Convention. Accordingly, she was of the view that it would not be appropriate to include this requirement in the first stage of the Country Profile form without a Convention basis to do so.

36. **Mr Schütz** (Austria) stated that he agreed with the deletion of Article 32 and the retention of Article 51. However, he observed that there was a slight difference between Article 32 and Article 51, namely that Article 51, paragraph 1, sub-paragraph (d), did not include a reference to debtor protection rules. He was of the view that it was important to refer to such rules in Article 51, paragraph 1, sub-paragraph (d).

37. **The Chair** stated that Article 51, paragraph 1, sub-paragraph (d), could be made clearer but that she understood that the reference therein to any limitation on enforcement should be construed as including rules on debtor protection.

38. **M. Manly** (Burkina Faso) relève que la délégation du Burkina Faso est favorable à la suppression des crochets entourant l'article 51 car cet article fournit un plus grand nombre d'informations que ne le font les articles 32 et 5, paragraphe (b). La délégation du Burkina Faso souhaite par conséquent aussi biffer les articles 32 et 5, paragraphe (b), de l'avant-projet révisé de Convention.

39. **Ms Escutin** (Philippines) thanked the Sub-committee on Country Profiles, as well as Mr Lortie (First Secretary) and the company Alphinat, for their work. She emphasised the importance of information technology as a tool for the sharing of information.

Ms Escutin stated that she supported the deletion of the square brackets in Article 51, as well as the deletion of Article 32 that would thereby be rendered redundant. She added that she concurred with the view of Ms Cameron (Australia) concerning debtor protection.

40. **Ms Bean** (United States of America) supported the retention of Article 51 and the deletion of Article 5, paragraph (b), and Article 32.

She then referred to the concern aired by the Delegate of Austria on the matter of debtor protection. She stated that her delegation had made it known in comments in Preliminary Document No 36 that it felt that the wording of Article 51, paragraph 1, sub-paragraph (d), was unclear. She reiterated the view expressed thereat, namely that the Explanatory Report should clarify the meaning of this provision. She felt that this was an appropriate means to clarify that debtor protection was included in the meaning of Article 51, paragraph 1, sub-paragraph (d), and that a drafting change was not necessary.

41. **Mme Subia Dávalos** (Équateur) considère qu'il serait bienvenu de supprimer les crochets autour de l'article 51 de l'avant-projet révisé de Convention. Ainsi, la délégation de l'Équateur est aussi favorable à la suppression de l'article 5, paragraphe (b), et de l'article 32 de l'avant-projet révisé de Convention.

42. **Mr Sello** (South Africa) congratulated the Sub-committee on Country Profiles for its work. He stated that his delegation supported the retention of Article 51 and the deletion of Article 5, paragraph (b), and Article 32.

43. **Mr Moraes Soares** (Brazil) also congratulated the Sub-committee on Country Profiles for its work, and thanked Mr Lortie (First Secretary) for his earlier presentation.

The Delegate of Brazil expressed support for the retention of Article 51 and the deletion of Article 5, paragraph (b), and Article 32. He also supported the proposal to include a reference to the Country Profile form in the Preamble. However, he stated that he preferred that the Country Profile be an Annex to the preliminary draft Convention, rather than taking the form of a separate recommended text.

44. **Ms Ménard** (Canada) addressed the question raised by the Chair of the Drafting Committee. She stated that her delegation agreed with the proposal to delete Article 5, paragraph (b), and Article 32. She recalled the intervention of the Delegate of the United States of America and stated that she felt that it was better to have all of the information requirements in one article. She added that she agreed with the earlier intervention of the Delegate of the European Community.

She also expressed support for the intervention of the Delegate of Australia regarding the matter of references to the duration of a maintenance obligation.

Turning to the question of information concerning debtor protection rules that was raised by the Delegate of Austria, Ms Ménard stated that she felt that it would be better to clarify this in the Explanatory Report, where a fuller narrative on such matters as ungarnishable assets could be provided.

45. **The Chair** concluded that there was general agreement that the square brackets surrounding Article 51 should be deleted, and that Article 5, paragraph (b), and Article 32 should therefore be suppressed. She therefore instructed the Drafting Committee accordingly.

46. **Mme Mansilla y Mejía** (Mexique) remercie la Présidente. La délégation du Mexique soutient la proposition de la délégation de l'Autriche en faveur d'une prise en considération des règles de protection du débiteur auxquelles l'article 32 fait référence. Comme le souhaite la délégation de l'Autriche, la délégation du Mexique souhaite d'ailleurs que cette référence soit incorporée au texte de la future Convention et non simplement au texte du Rapport explicatif.

47. **The Chair** agreed that there seemed to be considerable support to clarify the text in Article 51, paragraph 1, sub-paragraph (d). She asked the Drafting Committee to consider whether it was necessary to provide a clearer text. She added that the Drafting Committee should also include a reference to debtor protection rules.

The Chair suggested that the next item on the agenda should be addressed following a coffee break.

48. **M. Pereira Guerra** (Communauté européenne – Conseil) informe les délégués que la réunion de coordination de la Communauté européenne n'aura pas lieu ce midi car le Groupe de travail se réunit à 14 heures. Par conséquent, la réunion de coordination de la Communauté européenne se déroulera pendant la pause-café.

Protection des renseignements / Protection of information

49. **The Chair** announced that the discussion would proceed with the provisions concerning protection of information in Articles 35, 36 and 37. She noted that Working Document No 36 contained a proposal of the Forms Working Group regarding Article 37, paragraph 3. She invited the co-Chair of the Forms Working Group to present the working document.

50. **Ms Cameron** (co-Chair of the Forms Working Group) drew the attention of the delegates to the passage in Preliminary Document No 36 in which the Forms Working Group proposed the following wording for Article 37, paragraph 3: "Nothing in this provision shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under this Convention." She stated that there had been concern that the wording of the revised preliminary draft Convention did not provide the necessary flexibility for gathering of information by and between authorities and commended the proposal to the delegates as a solution that would clarify the matter.

51. **The Chair** observed that the delegation of the European Community had submitted Working Document No 36 that had been distributed during the meeting. She invited that delegation to present the Working Document.

52. **Ms Lenzing** (European Community – Commission) stated that Working Document No 36 set out few changes that were nevertheless of importance to the European Community. She recalled that Article 35 and Article 36 were based on provisions in the *Hague 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* and the *Hague Convention of 13 January 2000 on the International Protection of Adults*. She observed that there were potentially significant changes in the revised preliminary draft Convention that she did not believe to be based on any stated rationale. In the absence of a conscious departure from the original texts, she proposed a return to the wording of the aforementioned 1996 and 2000 Conventions.

In Article 35, she proposed that the term "personal data" would be more appropriate than "personal information". She observed that the term "personal data" is clearer and more precise.

Regarding Article 36, Ms Lenzing noted that all "information", rather than only "personal information", was subject to the duty of confidentiality under the 2000 Protection of Adults Convention. She proposed a return to this formula because "information" was considered to be a wider concept than "personal information" or "data".

She then reported that there had been much discussion within the European Community concerning Article 37. She stated that the proposed amendment to Article 37, paragraph 2, was of great importance to the European Community. Her delegation advocated a change that would no longer make the determination of one Central Authority concerning non-disclosure of information binding upon another Central Authority, but that the latter would only have to take the said determination into account. She stated that the formulation in the revised preliminary draft Convention conflicted with constitutional and procedural principles of several Member States of the European Community.

Ms Lenzing explained that she was aware of the concerns regarding the protection of persons who were in danger of domestic violence, and she emphasised that a requested Central Authority would be informed of any such circumstances and act appropriately. She added that the duty to take the determination of the requesting Central Authority into account could possibly be qualified with words such as "seriously" or "duly". However, she insisted that the requested Central Authority must have some leeway for constitutional and procedural reasons. She observed that, at a later stage, it would be pertinent to ascertain that the Explanatory Report would reflect this understanding if the amendment proposed by the delegation of the European Community were accepted.

53. **Mme Ménard** (Canada) relève que la délégation du Canada approuve la proposition du Groupe de travail chargé des formulaires.

Concernant la reformulation de l'article 37, paragraphe 3, la discussion de l'article 37 entraîne un retour sur l'article 11. En effet, l'article 11, paragraphe premier, alinéa (b) (première option), porte sur « le nom et les coordonnées du demandeur, y compris son adresse et sa date de naissance ». Par conséquent, si une Autorité décide en application de l'article 37 de ne pas divulguer de renseignements, car elle juge que la santé, la sécurité ou la liberté d'une personne pourrait être compromise, alors il est aussi nécessaire de s'assurer de la protection des coordonnées du demandeur et particulièrement de son adresse.

La délégation du Canada soutient la proposition de la délégation de la Communauté européenne dans sa formulation de l'article 37 figurant au Document de travail No 36. Cependant, la délégation du Canada demande que des explications détaillées figurent dans le Rapport explicatif au sujet de la possibilité pour l'Autorité centrale requérante de ne pas transmettre l'adresse du demandeur. Par conséquent, la

délégation du Canada s'adresse à la Présidente du Groupe de travail chargé des formulaires afin qu'elle puisse préciser ce point relatif à l'application de l'article 37.

54. **Ms Morrow** (Canada) intervened with respect to the concerns that her delegation had raised on the previous day concerning Article 11, paragraph 1, sub-paragraph (b), regarding the transmittal of the applicant's address. She recalled that some delegations had indicated that Article 37 would address her delegation's concerns.

In this respect, her delegation sought clarification concerning the interpretation of Article 37 on the following question. She stated that, if read together, one could interpret Article 37, paragraph 1, and Article 37, paragraph 2, as follows:

Under Article 37, paragraph 1, if the requesting Central Authority determined that disclosure of information gathered from the applicant in accordance with Article 11 could jeopardise the health, safety, or liberty of the applicant, that Central Authority could make the decision that it would not disclose specific information such as the applicant's address to the requested Central Authority. She observed that, according to Article 37, paragraph 2, the requested Central Authority would be bound by this determination and, as a consequence, could not refuse to process the application by claiming that that application did not comply with the requirements of the Convention under Article 12, paragraph 2.

Ms Morrow recalled that, as her delegation had mentioned in its intervention of the previous day, it would be open to the requested State to inform the requesting State that the applicant's address was required by the competent authority or the law of the requested State. The applicant could then decide if she wished to have her address provided to the requested Central Authority or if her concern was so grave that instead she preferred to discontinue the application.

The Delegate concluded that her delegation wished that the Explanatory Report would address this type of situation.

55. **M. Markus** (Suisse) considère que la proposition de la délégation de la Communauté européenne semble être équilibrée. Il en résulte que la délégation de la Suisse est en accord avec cette proposition mais uniquement en ce qu'elle porte sur l'article 37, paragraphe 2. Selon la délégation de la Suisse, le principe de base de l'article 37, paragraphe premier, est qu'une Autorité centrale ne doit pas divulguer de renseignements si la santé, la sécurité ou la liberté d'une personne peut être compromise. Ainsi, l'Autorité centrale devrait respecter ce principe et s'en tenir à l'article 37, paragraphe premier. Mais dans le même temps, la délégation constate que les termes de l'article 37, paragraphe 2, de l'avant-projet de Convention semblent équivaloir à une obligation de reconnaissance de la décision prise par l'Autorité centrale requérante. Ainsi l'Autorité centrale requise doit accepter cette décision sans même pouvoir s'informer des motifs de la décision de l'Autorité centrale requérante de ne pas divulguer ces renseignements.

D'après la délégation de la Suisse, cette procédure rappelle le mécanisme de reconnaissance d'une décision d'une autorité judiciaire. Néanmoins, dans le cas de l'article 37, paragraphe 2, il s'agit uniquement d'une décision d'une Autorité centrale. Ainsi, comment la décision doit-elle être suivie, communiquée et quelles sont ses formes ? La délégation relève que ces éléments ne sont pas prévus dans l'avant-projet révisé de Convention.

La délégation de la Suisse en conclut que la rédaction de l'article 37, paragraphe 2, semble trop stricte et que le libellé de la proposition de la délégation de la Communauté européenne apporte une solution à cette problématique. Enfin, la délégation de la Suisse considère que si l'on modifie les termes de l'article 37, paragraphe 2, conformément à la proposition de la délégation de la Communauté européenne, il ne devrait pas y avoir de problèmes en pratique car l'Autorité centrale requise aura comme référence la décision de l'Autorité centrale requérante sans pour autant être liée juridiquement par elle.

56. **Ms Albuquerque Ferreira** (China) supported the proposal of the European Community concerning an amendment to Article 37, paragraph 2. She stated that the proposal in Working Document No 36 was more balanced because it accounted both for the legal requirements persisting in the requested State and the needs of applicants involved in relevant cases.

She also agreed with the proposal of the delegation of the European Community to replace the term "personal information" with "personal data" in Article 35. She observed that the proposed term was the correct term, and it was one that was used in domestic law. She also concurred with the proposal to replace the term "personal information" with "information" in Article 36.

Finally, the Delegate of China made known that her delegation had no objection to the proposal of the Forms Working Group in Preliminary Document No 36. She stated that the adoption of that proposal would also protect the confidentiality of information.

57. **Mr Segal** (Israel) stated that he did not object to the proposals in Working Document No 36 regarding Article 35 and Article 36.

However, he agreed with the delegation of Canada on the matter of Article 37, paragraph 2. He observed that the determination of a Central Authority could sometimes have a specific influence that the requested State would not be aware of. This was not to say that the requested State could not ask for reasons, but he emphasised that it must be clear that the appropriate channel for determinations concerning certain information was a single Central Authority. He added that the existing text fit the required purpose and did not preclude communication between Central Authorities. He concluded that he supported the retention of the text in the revised preliminary draft Convention.

58. **Ms Bean** (United States of America) supported the proposal of the Forms Working Group regarding Article 37, paragraph 3.

She also had no objections to the proposals in Working Document No 36 regarding Article 35 and Article 36.

However, on the matter of Article 37, paragraph 2, she agreed with the delegation of Canada that it was important to retain the text of the revised preliminary draft Convention in order to protect applicants in cases involving domestic violence. She cited two possible situations in which the operation of Article 37, paragraph 2, would be relevant: i) in the process of applying, an applicant would make known her concern regarding her health, safety or liberty. The Delegate stated that, if the proposal of the delegation of the European Community did not change the possibility of withholding information at this stage, the said proposal could be acceptable. However, she emphasised that her delegation required assurances in this respect; ii) after sending

an application, the requesting Central Authority could become aware that there was a concern for the health, safety or liberty of the applicant. The Delegate stated that in this scenario it was not clear what effect a determination of the requesting Central Authority would have in the requested State. She opined that it was important that the creditor be given an opportunity to withdraw from the process before information was released to the competent authority or to the debtor.

59. **Mr de Oliveira Moll** (Brazil) expressed his support for the views submitted by the Delegate of Israel. He therefore supported the proposals in Working Document No 36 regarding Article 35 and Article 36, but opposed the proposed amendment to Article 37, paragraph 2. He added that he supported the views expressed by the delegation of Canada on Article 37, paragraph 3.

60. **M. Heger** (Allemagne) comprend les positions des délégations d'Israël, des États-Unis d'Amérique et du Canada. La délégation de l'Allemagne a les mêmes soucis et le même objectif. La seule difficulté porte sur les moyens mis en œuvre pour atteindre ce but et sur ce point, M. Heger suit la position de la délégation de la Communauté européenne.

Si la position de la délégation des États-Unis d'Amérique et de la délégation du Canada était retenue, le paiement ne s'effectuera pas en pratique. En effet, l'Autorité centrale requérante informera l'Autorité centrale requise qu'elle ne recevra pas l'adresse de la partie requérante et l'Autorité centrale requise aura bien des difficultés pour entamer une procédure judiciaire. Les autorités judiciaires de l'Allemagne exigeront cette adresse afin d'engager une procédure judiciaire. Sans celle-ci, la procédure judiciaire ne verra pas le jour.

Si la délégation des États-Unis d'Amérique et la délégation du Canada préfèrent refuser la transmission de l'adresse, alors il faut éviter que cela arrive.

Dans une situation identique, si la Commission I fait le choix d'amender l'article 37, conformément au Document de travail No 36, alors l'Autorité centrale du Canada informera l'Autorité centrale requise qu'il existe un danger au domicile d'une personne. L'Autorité centrale requise sera bien consciente de cette situation et ne divulguera pas l'adresse. Dans le même temps, une procédure judiciaire et un procès équitable pourront être entamés devant les juridictions de l'État requis.

Grace à cette formulation, il sera possible de condamner le débiteur au paiement des obligations alimentaires dont il est redevable envers le créancier.

La délégation de l'Allemagne propose aux délégations réticentes de réfléchir une nouvelle fois à cette proposition qui semble appropriée aux différents besoins évoqués.

61. **Mme González Cofré** (Chili) remercie la Présidente et souhaite exprimer son soutien à la proposition de la délégation de la Communauté européenne concernant l'article 35 et l'article 36.

Malgré les explications de la délégation de l'Allemagne portant sur l'article 37, la délégation du Chili considère qu'il n'est pas si certain que, sans l'adresse personnelle du demandeur, il ne soit pas possible d'engager une procédure. La transmission de l'adresse de l'Autorité centrale pour remplacer l'adresse personnelle du demandeur dans la transmission des courriers peut être une solution au problème. Néanmoins, il n'est pas certain que l'on puisse répondre aux attentes de chacune des délégations ici présentes.

62. **M. Marani** (Argentine) partage la position de la délégation de la Communauté européenne concernant l'article 35 et l'article 36 telle qu'elle est exprimée dans le Document de travail No 36. En revanche, concernant l'article 37, la délégation de l'Argentine comprend que la situation puisse être délicate surtout dans le cadre du paragraphe 2, mais n'est pas certaine que la proposition de la délégation de la Communauté européenne assure la protection des renseignements sensibles. Le Délégué de l'Argentine considère que les renseignements sensibles retenus ne poseront pas moins de problèmes s'ils étaient transmis. De plus, il semble compréhensible que l'État de l'autorité requérante souhaite garder un contrôle sur un certain nombre de données. C'est pour ces différentes raisons que la délégation de l'Argentine souhaite maintenir l'article 37, paragraphe 2, dans sa formulation d'origine, c'est-à-dire celle de l'avant-projet révisé de Convention.

63. **Ms Cameron** (Australia) expressed her support for the intervention of the delegation of Canada and stated that she agreed with the interpretation of Article 37 as expressed therein.

She also did not object to the proposals in Working Document No 36 regarding Article 35 and Article 36.

However, she stated that she preferred the existing text of Article 37, paragraph 2. Nevertheless, she stated that if it were necessary to make the proposed changes, it was essential that the Explanatory Report make it clear that significant weight should be given to the determination of the requesting Central Authority. She agreed with the Delegate of the United States of America that a requesting Central Authority could not refuse an application merely on the grounds of a missing address.

64. **Ms Albuquerque Ferreira** (China) asked Ms Cameron (Australia) to clarify the immediately preceding statement. She asked what could be done by a requested Central Authority if a court refused to process an application that did not include the applicant's address.

65. **Ms Cameron** (Australia) explained that the mere absence of an address was not enough to justify the refusal of an application by a Central Authority. She stated that further discussion between Central Authorities would be necessary in order to try to resolve the matter.

66. **Ms Lenzing** (European Community – Commission) expressed her gratitude to the Delegate of Australia for the flexibility the latter had expressed in respect of the proposed changes to Article 37, paragraph 2. She stated that she would be happy to accept the necessary amendments to the Explanatory Report wherein it would be shown that a requested Central Authority could only derogate from the decision of the requesting Central Authority in exceptional circumstances.

She added that she would reflect further on the suggestion of a two-stage approach proposed by the Delegate of Australia if it was clear that a Central Authority was not obliged to submit an application to the court that was procedurally precluded from receiving applications not containing the applicant's address. She emphasised that it was necessary to reflect further on this matter.

67. **Ms Degeling** (co-*Rapporteur*) asked the delegates for clarification. She stated that she understood that the delegates were referring to Central Authorities revealing an applicant's personal address in applications as per the requirements of Article 11. She asked the delegates why they understood the reference to the applicant's address in Article 11, paragraph 1, sub-paragraph (b), to be a reference to the applicant's personal address, rather than an address for the service of documents. She asked if the Explanatory Report should refer to a personal address, or if it should also refer to an address for communication or the service of documents.

68. **Ms Morrow** (Canada) recalled her delegation's intervention of the previous day. She stated that her delegation wished to make it clear that the address required under Article 11, paragraph 1, sub-paragraph (b), could be the address of the requesting Central Authority. Accordingly, she felt that there was nothing on the face of Article 11 that required the transmission of a personal address. She wished for this possibility to be retained in States that are organised in this way and she stated that the Explanatory Report should reflect this possibility.

69. **Ms Lenzing** (European Community – Commission) stated that at that juncture she could not agree that the reference to an address could be wider than a reference to a personal address because she first needed to ascertain that this was possible under the procedural laws of the Member States of the European Community.

70. **The Chair** concluded that the proposal of the Forms Working Group regarding Article 37, paragraph 3, as well as the proposals in Working Document No 36 regarding Articles 35 and 36 had been supported. She instructed the Drafting Committee to make the necessary changes.

However, she observed that it was clear that there was no agreement on the proposal in Working Document No 36 to amend Article 37, paragraph 2. She noted that there were suggestions that could bridge the gap between the different views, such as through clarifications in the Explanatory Report. However, she stated that this matter should be left open at that juncture.

Article 27 – Arrangements réciproques impliquant des ordonnances provisoires et de confirmation / Reciprocal arrangements involving the use of provisional and confirmation orders

71. **The Chair** recalled that Article 27 had been included in the revised preliminary draft Convention on the basis of a working document that had been submitted by the Representative of the Commonwealth Secretariat. She observed that Working Document No 9 proposed to amend this Article further and invited the Delegate of the Commonwealth Secretariat to present it.

72. **Mr McClean** (Commonwealth Secretariat) congratulated all present for the progress that had been made in addressing the agenda of the Diplomatic Session.

He observed that Article 27 contemplated a situation that was familiar to some States but strange to others, whereby a decision would be the product of the combined work of courts in two States. He stated that a hypothetical example might clarify how the system worked. He illustrated through the example of a wife in Jamaica whose husband in England stops sending maintenance payments. She would go to her local court and present a claim there. On the basis of her submissions the Jamaican court would make a provisional decree. This decree would have no effect at that stage of proceedings, but would be sent to the local court in England where the husband's side of the argument would be heard and a decision would then be made. Mr McClean observed that there would be one hearing that would be divided, and that the matter would sometimes be shuttled to and from the courts of two States. The final outcome would be the result of the combined work of the two courts.

Mr McClean noted that in Preliminary Document No 36, under Article 27, paragraph (c), the co-*Rapporteurs* suggested that "further discussion has to take place as to the possibility of limiting the use of these procedures to applications through Central Authorities". He respectfully submitted that this was a misunderstanding of the situation contemplated in Article 27. He explained that the Article under examination was intended to deal with the likely persistent situation where, with reference to his hypothetical example, Jamaica was not a Party to the Convention but the United Kingdom was. In such case, he stated that the decision should be enforced elsewhere because the United Kingdom was part of the family of the Convention. He added that in that same hypothetical scenario, Jamaica would not have a Central Authority if it were not a Party to the Convention. Accordingly, he requested that the reference to Central Authorities be set aside.

Mr McClean explained that Working Document No 9 dealt with an additional problem that was noted upon further reflection. He observed that the provisions of Article 15 were not easily accommodated where a decision was produced by two States. It was therefore suggested that Article 15 be limited by the proposed Article 27, paragraph (d), which provided that Article 15 would not prevent the commencement of proceedings for modification in either of the States involved in the reciprocal system. He observed that the drafting deliberately employed the term "commenced" rather than "brought", since proceedings for modification could be commenced in the court that was addressed in the second stage of the proceedings for establishment.

He concluded that the system that he had described sounded complicated but that it worked. He hoped that States would assist in the system's ongoing functionality by accepting the proposal in Working Document No 9.

73. **Ms Morrow** (Canada) stated that her delegation agreed with all of the intervention by the Representative of the Commonwealth Secretariat. She added that Working Document No 9 also suggested that the title of Article 27 be changed. She stated that her delegation supported that proposal.

74. **Mr Ding** (China) agreed that the system described by the Representative of the Commonwealth Secretariat sounded complicated but worked in practice. He observed that the system was familiar in Hong Kong but not in other parts of China, and that it was necessary to explain the operation of the system to his own delegation. He stated that his delegation supported the amendments proposed in Working Document No 9.

75. **Ms Lenzing** (European Community – Commission) agreed that the Convention should not prevent the operation of a functioning system such as that contemplated in Article 27. She therefore stated that her delegation supported the arguments made by the Representative of the Commonwealth Secretariat. However, she required clarification regarding a situation where the court that confirmed the order was not a Contracting State. She understood that other Contracting States would be obliged to recognise an order

where the confirming court was the court of a Contracting State, but was not certain that this was the case where the situation was reversed. She noted that she had not yet considered the full implications of this question, but that she would appreciate some clarification.

76. **Mr Markus** (Switzerland) stated that in principle his delegation supported the retention of Article 27, as well as the proposed amendments in Working Document No 9.

He added, however, that he shared the concerns raised by the delegation of the European Community in the immediately preceding intervention. He observed that it was not absolutely clear that the Convention could apply if the confirming court were not the court of a State that was a Contracting Party. He asked if the confirming jurisdiction was in any way bound by the decision of the court that delivered the provisional order. He also asked if the other court would be bound by the findings of the court that was first seized, or if it could reach its own conclusions on the facts of the case.

77. **Mr Pipe** (United Kingdom) noted that the situation contemplated in Article 27 was familiar in the United Kingdom and that his delegation therefore supported the views expressed by the Representative of the Commonwealth Secretariat.

78. **Mr McClean** (Commonwealth Secretariat) stated that he would attempt to answer the questions raised by the Delegate of Switzerland and the Delegate of the European Community. He observed that the questions that were raised struck at the core of the academic debate as to which court the final decision would be deemed to emanate from. He explained that the provisional order would be considered by the other court along with all the factual and legal submissions in order for the rest of the case to be heard. He recalled that the procedure was sometimes likened to a game of badminton and referred to as the "shuttlecock procedure". He added that it was not always clear on which side of the court the shuttlecock would end. He emphasised that Article 27, paragraph (a), had the effect of treating both courts as the court of origin for the purposes of the Convention. He emphasised that the system guaranteed the right of defence and due process.

Mr McClean insisted that it would be unfortunate if the reciprocal system, which was the system that was at the time the most widespread system in the world, were disrupted by the system that it was hoped would eventually replace it.

79. **Ms Carlson** (United States of America) expressed her support for Working Document No 9. She added that the system was quite familiar in the United States of America because provisional orders of the type contemplated had often been dealt with in connection with some Canadian provinces.

80. **The Chair** observed that there was general support for the removal of the brackets around Article 27, as well as for the inclusion of the substantive amendments and the change of title proposed in Working Document No 9. She instructed the Drafting Committee accordingly.

Article 43 – Systèmes juridiques non unifiés / Non-unified legal systems

81. **The Chair** noted that there was to be a further submission of a working document regarding co-ordination with other instruments and therefore suggested that the discussion of Article 45 be postponed to the afternoon session.

She asked the delegates to discuss Article 43 at that juncture. She noted that there were no square brackets in the Article and that it was a standard provision of Conventions of the Hague Conference.

82. **Mme Riendeau** (Canada) rappelle tout d'abord que l'article 43 porte sur les systèmes juridiques non unifiés.

Dans le paragraphe premier, il est question d'un certain nombre de règles d'interprétation qui visent un État contractant dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la Convention s'appliquent dans des unités territoriales différentes.

Le paragraphe 2 établit que l'État contractant qui est en présence d'un système juridique non unifié n'est pas tenu d'appliquer la Convention aux situations qui impliquent uniquement ses différentes unités territoriales.

Le paragraphe 3 établit que l'État contractant, en présence d'un système juridique non unifié, n'est pas tenu de reconnaître ou d'exécuter une décision d'un autre État contractant au seul motif que la décision a été reconnue ou exécutée dans une autre unité territoriale du même État contractant selon la Convention.

Ensuite, la délégation du Canada considère que les paragraphes 2 et 3 de l'article 43 traitent de questions de fond différentes des règles d'interprétation établies au paragraphe premier. La délégation du Canada propose donc que les paragraphes 2 et 3 soient autonomes, comme c'est le cas dans d'autres Conventions de La Haye portant sur le droit de la famille.

Enfin, la délégation du Canada estime que le terme « tribunal » est trop strict pour la bonne application de ce paragraphe, car les autorités compétentes peuvent être de nature administrative ou judiciaire. C'est pourquoi la délégation du Canada propose que les termes « Un tribunal » soient remplacés par les termes « Une autorité compétente » comme elle le propose dans le Document préliminaire No 36.

83. **The Chair** asked if there were any objections.

84. **Ms Burgess** (United Kingdom) stated that the United Kingdom also had a non-unified legal system and that Article 43 was therefore important to her delegation.

On the matters raised by the Delegate of Canada, the Delegate of the United Kingdom stated that her delegation could be flexible regarding Article 43, paragraph 2, and Article 43, paragraph 3. She agreed that the reference to a "court" in Article 43, paragraph 3, was restrictive and that it would be better to refer to the "competent authority".

85. **The Chair** concluded that the proposals of the delegation of Canada had been accepted and instructed the Drafting Committee to make the appropriate changes. She listed those changes as follows: (i) a new article should be included to replace Article 43, paragraph 2, and Article 43, paragraph 3; (ii) the reference to a "court" was to be replaced with a reference to a "competent authority" in Article 43, paragraph 3, as subsequently renumbered.

Article 50 – Dispositions transitoires / Transitional provisions

86. **The Chair** observed that Article 50 was still contained in square brackets as it had not yet been discussed. She added that the Article was self-explanatory and did not require introduction.

87. **Ms Carlson** (United States of America) stated that her delegation supported the deletion of the brackets and the retention of the text in Article 50, save for one matter: she drew the attention of the delegates to her delegation's proposal in Preliminary Document No 36 that Article 50, paragraph 2, be deleted. She opined that there was no reason to exclude from the Convention payments falling due prior to the entry into force of the Convention. She observed that to exclude such overdue payments would penalise custodial parents and children with existing cases that involved arrears. She emphasised that it would also create an administrative burden on the competent authority which would have to carve out those arrears accruing prior to the Convention from those arrears accruing after the Convention. She concluded that children should not be penalised in that way.

88. **Mr Segal** (Israel) expressed his support for the views aired by the Delegate of the United States of America. He stated that children should be helped to recover arrears, and questioned the logic of excluding such payments from the support systems provided in the preliminary draft Convention. Accordingly, he advocated the deletion of Article 50, paragraph 2.

89. **Mr Hať apka** (European Community – Commission) stated that he understood the policy foundations of the proposal of the delegation of the United States of America and that he felt that it was reasonable. However, he had to reserve the position of his delegation, pending co-ordination of the Member States of the European Community.

90. **Mr Moraes Soares** (Brazil) supported the proposal to delete Article 50, paragraph 2.

91. **Mme Subia Dávalos** (Équateur) approuve la proposition de la délégation des États-Unis d'Amérique de supprimer le paragraphe 2 de l'article 50, car il ne serait effectivement pas judicieux de permettre à un État contractant d'exclure du mécanisme de la future Convention certains paiements au seul motif qu'ils seraient échus avant l'entrée en vigueur de la Convention.

92. **The Chair** noted that there was general support for the deletion of Article 50, paragraph 2. However, she stated that the matter would have to be returned to at a later stage since the delegation of the European Community was not in a position to express its views.

She announced that the meeting would be closed in order to give the Working Group on Article 14 and effective access to procedures time to work.

93. **The Deputy Secretary General** announced that the group photo had been scheduled for Friday 16 November 2007 during the coffee break of the morning session.

The meeting was closed at 12.53 p.m.

Procès-verbal No 12

Minutes No 12

Séance du mercredi 14 novembre 2007 (après-midi)

Meeting of Wednesday 14 November 2007 (afternoon)

La séance est ouverte à 15 h 16 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 52

1. **The Chair** welcomed everyone to the session. She noted that the Working Group on Article 14 had concluded its meeting and therefore the session deliberations could proceed by dealing with Article 52 concerning signature, ratification and accession to the Convention. She explained that this Article provides for two Options for accession, with Option 1 permitting both States that are already Members of the Hague Conference and participants in the negotiation of the Convention to become Party to the Convention. She further stated that this Option provides that States or organisations that were neither existing Members of the Hague Conference nor participated in the negotiation of this Convention could accede to the Convention and have treaty relationships with the first group of States Parties if there were no objections (para. 5, first option) or an acceptance (para. 5, second option). She explained that Option 2 of Article 52 would allow all States to become Parties without difference of treatment. She noted that Option 2 was quite broad and had implications for existing Members of the Hague Conference. She declared the floor open for deliberations on this issue.

2. **Ms Bean** (United States of America) stated that Article 52 is of great importance to the delegation of the United States of America as this Article regulates the countries with which Contracting States will enter into treaty relationships. She stated that the delegation of the United States of America had a strong preference for Option 1, which provides the United States of America with a treaty relationship with the States with which it is prepared to enter into a treaty relationship, namely, the current Member States of the Hague Conference or the participants in the negotiation of this Convention, and to choose to have treaty relationships with other States. She explained that this provision was particularly important to her delegation due to the way Article 6, which governs Central Authorities, had been drafted. She stated that, at the time it was being drafted, her delegation was persuaded to agree to a flexible draft of Article 6 based on the overwhelming support in favour of such flexibility. She stated that the result of this choice was that Article 6 did not guarantee results with regard to a Contracting State's Central Authority obligations. She stated that she recognised the possibility that some potential Contracting States who may not have Central Authorities could become Parties to this Convention, and this would consequently affect the reciprocity which the United States of America would expect from such countries. She stated

that the preference of the delegation of the United States of America for Option 1 of Article 52, second option of paragraph 5, was based on the fact that, once the Convention is made applicable to non-Member States or States that have not participated in the negotiation of this Convention, it would have effect only with the States for which the United States of America would have accepted accessions to the Convention. She added that Option 1 might provide an incentive to potential Contracting States to actually understand their obligations under the Convention and measure their ability to meet them.

3. **Ms Ménard** (Canada) stated that while her delegation was aware that the aim of the Convention was to seek judicial and administrative co-operation, she noted that an efficient co-operation under the Convention was dependent on co-operation between Member States. She further pointed out that while such co-operation could be secured between Member States of the Hague Conference and participants in the negotiation of this Convention, she could not guarantee that such co-operation could be achieved with other States acceding to the Convention under Option 2 of Article 52. She expressed her preference for Option 1. She also stated that Canada's experience in child abduction cases had also informed her delegation's support of the second option of paragraph 5.

4. **Ms Lenzing** (European Community – Commission) stated that the initial preference of the delegation of the European Community was for Option 2 of Article 52 as the delegation was of the view that the safeguards contained in Option 1 were not essential. She stated that in view of the objection raised by the delegation of the United States of America, her delegation would prefer to further discuss the available options before making a choice. She pointed out that the answer to the position of the delegation of the United States of America may lie in Articles 14 and 14 *bis*, which were still open for discussion. She concluded that the potential effectiveness of a State's Central Authority would be complemented by Article 14. She accepted however that some potential Contracting States that have not participated in the negotiation of the Convention might have difficulty understanding the policy considerations behind some of its provisions.

5. **Mr Markus** (Switzerland) stated that the issue raised by the delegation of the United States of America could not be decided without prior settlement of Article 14 *bis*, because of the relationship between Articles 14 and 58. He further expressed his preference for Option 1 of Article 52. He noted that there is a modern trend in international law that favours the first option of paragraph 5. He cited the *Hague 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*, and the *Hague Convention of 13 January 2000 on the International Protection of Adults*. He queried whether the objections to this option raised by the delegation of the United States of America related to the responsibilities that would be assumed by Central Authorities of Contracting States who wished to accede to this Convention, but who did not participate in its negotiations. He stated that if this were the case, in the opinion of the delegation of Switzerland, the obligations of a Central Authority under this Convention and those in previous Conventions, such as the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, were parallel. He concluded by stating his preference for Option 1 of Article 52 and the first option of paragraph 5.

6. **Mr Segal** (Israel) stated his preference for Option 2 of Article 52.

7. **Mr Tian** (China) stated that he preferred Option 2 of Article 52. He explained that his delegation's preference was informed by the fact that the goal of the Convention and of the States involved in negotiating it was to create a universal and global instrument. He stated that this preference for Option 2 was based on the desire of his delegation for a truly global Convention.

8. **Mme Mansilla y Mejía** (Mexique) indique que sa délégation se situe à contre-courant de ce qui a été dit jusqu'à présent. Elle rappelle l'objectif d'application universelle de la Convention et souligne l'importance d'encourager l'adhésion du plus grand nombre de pays. Elle considère que la première option n'encourage pas l'universalité de la Convention. Elle appuie donc l'adoption de la deuxième option afin d'assurer l'universalité de la Convention.

9. **Ms Carlson** (United States of America) responded to the comments of the delegation of Switzerland about the 1996 Protection of Children Convention and the 2000 Protection of Adults Convention in relation to the first option of paragraph 5. She stated that the similarity of obligations under this Convention and the previous Conventions as perceived by the Swiss delegation had not created a trend and that, further, the obligations under these Conventions were not comparable. She further stated that this Convention imposed quite strenuous obligations compared to the previous Conventions. She stated that the United States of America was currently undertaking studies of these Conventions with the aim of becoming a Party to them; however, she was not unaware of the obligations of Central Authorities contained therein. She stated that her delegation's preference for the second option of paragraph 5 did not mean that the United States of America did not seek a global relationship, particularly since her delegation was aware that some of the Central Authorities of States participating in this session had varying levels of responsibilities. She clarified that the United States of America did not have the intention of declining treaty relationships with other countries as discussions were under way with certain countries on how their Central Authorities would be set up to enable them to comply with their obligations under this Convention. With regard to the connection between Article 14 and Option 2 of Article 52 highlighted by the delegation of the European Community, the delegation of the United States of America stated that this position was correct as there were systems that did not provide an automatic right to free legal services. She further stated that even if free legal services were available in all Contracting States, the level of services provided would vary in the different States and therefore countries who wished to accede to the Convention should be given time to evaluate the obligations they would assume.

10. **The Chair** ruled that, in view of the issues raised by the delegation of the United States of America, she would conclude that the session had not reached an agreement on this point but she noted that the positions of the delegations on this issue were clear. She directed the session to proceed to discuss the proposal of the delegation of the United States of America on Articles 44, 45 and 46 on co-ordination. She also stated that the Drafting Committee had asked whether a reference should be made in this Convention to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. She stated that the Permanent Bureau had prepared a proposal in this regard, contained in Working Document No 38.

11. **The Secretary General** stated that the provision being considered referred to Article 44 as detailed in the Permanent Bureau's proposal in Preliminary Document No 36, and Working Document No 38 which was the Permanent Bureau's secondary proposal. He made reference to the wording of the principal proposal found in Preliminary Document No 36 as follows: "In relations between the Contracting States, this Convention replaces the *Convention of New York of 20 June 1956 on the Recovery Abroad of Maintenance*, in so far as its scope of application as between such States coincides with the scope of application of the Convention." He explained that this proposal had come at a late stage in the work because the Permanent Bureau had to secure the prior consent and support of the United Nations Legal Advisor in order to enable the Permanent Bureau to make this reference to the New York Convention in the text of this Convention. He stated that the rationale behind the proposal of the Permanent Bureau was that co-ordination with the New York Convention would further consolidate the object of this Convention as a truly global one. He clarified that in a situation where the scope of application of this Convention coincided with that of the New York Convention, as between Parties to this Convention and Parties to the New York Convention, the new Convention would apply instead of the New York Convention. He stated that with the scope of the new Convention not yet settled, the last limb of the proposal found in Working Document No 36 would need to be reviewed in due course.

Finally, he proposed to add a reference to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* to the Preamble of this Convention.

Article 45

12. **The Chair** gave the floor to the Chair of the Drafting Committee in respect of Article 45, paragraph 1.

13. **The Chair of the Drafting Committee** apologised for the disparity between the French and English texts of Article 45, paragraph 1. She stated that the true sense of the text was reflected in the English version of this Article. She stated that in the French the use of the future tense was misleading because the Drafting Committee had omitted to delete the words "*ou seront*", and therefore the English version was the accurate version.

14. **The Chair** noted that the delegation of the European Community had prepared a proposal in Working Document No 39. She asked the delegation of the European Community to introduce the proposal.

15. **Ms Lenzing** (European Community – Commission) stated that the proposal of her delegation concerned amendments to Article 45, paragraph 4, and that it would not involve any substantive changes to this Article. She noted that, due to the nature of the European Community as being a Regional Economic Integration Organisation, the European Community had special needs and would require special rules. She then stated that the policy behind this proposal was set out in paragraph 4, which provides that: "This Convention shall not affect the application of instruments of a Regional Economic Integration Organisation that is Party to this Convention." In her view, paragraphs 1 and 2 of Article 45 did not apply to the European Community and the delegation of the European Community sought to maintain this position. She further stated that for future and institutional reasons, the European Community would need to formulate its own rules and therefore, should this proposal be accepted, the flexibility it grants to the European Community under this Convention would not affect other Contracting States.

16. **The Chair** stated that this was a complex issue on which a decision could not be reached at the moment. She gave the floor to the delegation of Switzerland.

17. **Mr Markus** (Switzerland) expressed support for all the proposals that had been presented by the previous delegations, including the proposal by the European Community. He concurred with the delegation of the European Community that the flexibility granted to it would not affect its relationship with other Contracting States. He further stated that there was still some confusion with regard to the English version of Article 45, paragraph 1. He stated that by inference Article 45, paragraph 1, also covered Conventions concluded before this Convention. He further queried whether this Article referred to those Conventions which have not yet entered into force, that is, which have not received enough ratification to enable them to enter into force. He added that, based on the interpretation of his delegation of the English version of Article 45, paragraph 1, such prior Conventions would not be covered under this Article. He cited an example of such Conventions, namely the *Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, which was concluded in October 2007 but had yet to come into force. He therefore proposed that paragraph 1 of Article 45 should be amended for clarity as follows: "any international instrument which is concluded before […]". He stated that his delegation was prepared to make a proposal to this effect if necessary.

18. **The Chair** requested the delegation of Switzerland to prepare a proposal in respect of Article 45, paragraph 1. The Chair then gave the floor to the delegation of the United States of America.

19. **Ms Carlson** (United States of America) drew the attention of the session to the proposal of her delegation in respect of Article 45, paragraph 3, referring to a draft suggestion contained on in Preliminary Document No 36 and detailing the comments of her delegation. She stated that the last limb of Article 45, paragraph 3, which reads "based on special ties between the States concerned", could be connected to the term "reciprocity schemes". She noted that the term "special ties" was not only superfluous but could have an unintended effect of being misleading.

The drafting suggestion proposed by the delegation of the United States of America was based on the explanation found in Working Document No 9 concerning Article 27, submitted by the Commonwealth Secretariat and other delegations. She proposed that the word "arrangements" be inserted in place of the word "schemes" in Article 45, paragraph 3. She stated that this was because, in the United States of America, the term "reciprocity arrangements" was that usually employed in relation to matters covered by this Article. She concluded that the term "schemes" should be deleted from Article 45, paragraph 3.

20. **The Chair** stated that, based on her interpretation of Article 45, the term "special ties" only related to "uniform laws". She requested comments on the proposal of the delegation of the United States of America. She observed that there was silence; she therefore concluded that there was general agreement to the proposal of the Permanent Bureau to have an additional Article 44 *bis* providing for co-ordination with the New York Convention, and for a reference in the Preamble to the New York Convention. She also concluded that there was no objection to changing the

term “reciprocity schemes” to “reciprocity arrangements” in Article 45, paragraph 3.

21. **Ms Carlson** (United States of America) stated that her delegation had omitted to provide a response to the proposal of the delegation of the European Community. She stated that the delegation of the United States of America did not have any experience of this disconnection and as such it would consult further with regard to this proposal.

22. **Ms Lenzing** (European Community – Commission) stated that in order to guide the consultation of the delegation of the United States of America, she should clarify that only the first sub-paragraph of the proposal of her delegation was new but that the second sub-paragraph had been taken from the existing draft of Preliminary Document No 29.

23. **The Chair** directed the meeting to leave this issue open to give more time to deliberations on the proposal of the delegation of the European Community. She explained that the word in brackets in Article 55, paragraph 1, related to the date when the Convention would enter into force. She further stated that Article 60 on notification was reflective of the Commission’s deliberations on the method of accession to the Convention, that is, either by positive declaration or via an objection as set out in the two options of paragraph 5 in Option 1 of Article 52. She stated that, due to the fact that the Commission could not conclude its discussions on Article 52, deliberations on Article 60 would not take place immediately.

24. **The Chair of the Drafting Committee** queried whether the Permanent Bureau intended to pursue its query on the term “uniform laws” in Article 45, paragraph 3.

25. **Mr Lortie** (First Secretary) stated that the query of the Permanent Bureau was whether it was necessary to use the term “uniform laws”. He stated that, through discussions with certain delegates, he understood that some Nordic countries wished to maintain this term in Article 45, paragraph 3. He queried whether delegations from the Nordic countries wished to respond to this.

26. **Mr Helin** (Finland) explained that the term has never been used in the context of maintenance obligations in Finland. He stated that the use of this term in the Convention is more complicated when three Nordic countries are Parties to the Convention with varying levels of competencies. He requested that the current text of the Convention be retained, as it could be a useful means of recovering maintenance in Nordic countries.

27. **Mr Hellner** (Sweden) expressed support for the proposal of the delegation of Finland.

28. **The Chair** stated that, following from the discussions, she concluded that the reference to “uniform laws” should be retained in the text of the Convention.

29. **Mme Riendeau** (Canada) rappelle à la Présidente que la délégation du Canada a soumis une proposition dans le Document de travail No 37 en relation avec l’article 46 et demande si elle peut intervenir à ce sujet.

30. **The Chair** gave the floor to the delegation of Canada.

31. **Mme Riendeau** (Canada) présente le Document de travail No 37 et explique le contexte dans lequel il a été préparé. Elle rappelle que chacun des territoires et provinces du Canada est régi par son propre système de reconnaissance et d’exécution de décisions. Elle indique qu’au cours des années, les provinces et les territoires canadiens ont conclu des ententes de réciprocité entre eux et également avec des États étrangers. Elle explique que ces ententes de réciprocité permettent de mieux recouvrer les créances alimentaires. Elle donne l’exemple des ententes conclues entre les provinces canadiennes et les États-Unis d’Amérique, Hong Kong et l’Allemagne pour ne citer que ceux-ci. Elle estime que ce type d’entente est très efficace et qu’il est important qu’il soit protégé et tenu en compte par la nouvelle Convention. Elle explique qu’au début le Canada voulait qu’une disposition concernant les ententes de réciprocité soit insérée à l’article 45 de la Convention. Cependant, après réflexion, elle souligne qu’il serait plus approprié de l’insérer à l’article 46 de la Convention. Elle suggère d’ajouter les mots « ou des ententes de réciprocité adoptées en vertu de telle loi ». Elle explique que ces termes permettent aux systèmes juridiques des pays non unifiés de continuer d’utiliser des ententes de réciprocité.

Mme Riendeau se demande également si les paragraphes (a), (b) et (c) de l’article 46 sont d’application cumulative. Elle explique que dans la proposition du Canada, ces paragraphes ne sont pas d’application cumulative. Ainsi il n’est pas nécessaire que les trois paragraphes soient présents. Elle conclut en affirmant qu’il est nécessaire de pouvoir conclure des accords sur différents aspects de l’article 46.

32. **Ms Carlson** (United States of America) expressed her support for the proposal of the delegation of Canada. She further stated that the replacement of the word “scheme” with the word “arrangement” had been previously agreed between the delegation of Canada and her own. She then added that, in the light of the proposal of the delegation of Canada to include reciprocity arrangements to the text of the Convention, it was clear that reciprocity is recognised under the Convention.

33. **Ms Lenzing** (European Community – Commission) expressed support for the proposal of the delegation of Canada. She pointed out that Article 45, paragraph 3, was different from reciprocity arrangements whereas Article 43 would only cover reciprocity arrangements in different States. She agreed with the delegation of Canada that the paragraphs in Article 46 were not cumulative and that this would require clarification. She then suggested that these paragraphs be amended.

34. **Mr Markus** (Switzerland) expressed support for the proposal of the delegation of Canada.

35. **Mr Tian** (China) expressed his support for the proposal of the delegation of Canada and added that the rationale behind its proposal should be included in the Explanatory Report.

36. **The Chair** stated that she was of the opinion that the proposal of the delegation of Canada had gained support. The Chair then referred the question of when this Convention should come into force.

37. **The Deputy Secretary General** stated that he supported that the Convention should come into force when two States will have joined the Convention.

38. **The Chair** queried whether there were any comments on this issue.

39. **Ms Lenzing** (European Community – Commission) stated that her delegation was flexible as to the number of

Procès-verbal/Minutes No 12

ratification instruments required to make this Convention come into force.

40. **Mme Mansilla y Mejía** (Mexique) souhaite que la Convention entre en vigueur après la deuxième ratification.

41. **The Chair** concluded that there was flexibility on the time at which the Convention would come into force. She then queried whether there were any objections to a second instrument of ratification. After observing that there was silence, the Chair directed that the Drafting Committee should note that this Convention would come into force on the deposit of ratification. She then announced that the agenda for that afternoon had come to an end. The Chair reminded the session of the invitation to the reception being given by the Mayor of The Hague. She stated that the Working Group should be given some time to continue with its work. The Chair then opened the floor for announcements.

42. **Ms Ménard** (Canada) invited members of the Working Group on Article 14 to reconvene at the same venue they had occupied at lunch.

43. **M. Pereira Guerra** (Communauté européenne – Présidence) rappelle qu'il y aura une réunion de coordination le lendemain à 8 h 15.

44. **Mr Lortie** (First Secretary) invited delegates to prepare documents in respect of Commission II. He also announced that Minutes No 2 of Commission I was available and that delegates were welcome to procure copies of the minutes and register any amendments as soon as possible.

45. **The Chair of the Drafting Committee** announced that a meeting of the Drafting Committee would take place that evening at 8.00 p.m. at the Permanent Bureau.

46. **The Chair** closed the session.

La séance est levée à 17 h 25.

Procès-verbal No 13

Minutes No 13

Séance du jeudi 15 novembre 2007 (matin)

Meeting of Thursday 15 November 2007 (morning)

La séance est ouverte à 9 h 50 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

1. **The Chair** welcomed the delegations and expressed her gratitude for the reception held on the evening of Wednesday 14 November 2007 at the City Hall of The Hague. She asked the Secretary General to transmit the gratitude of the delegates for the reception that was hosted by the Mayor and Aldermen of The Hague.

2. **The Secretary General** replied that he would be pleased to transmit the assembly's thanks to the Mayor and Aldermen of The Hague.

3. **The Chair** thanked the Secretary General and turned to discuss the draft agenda for the discussions to take place on Thursday 15 November 2007. She noted that discussion would commence with Article 1, the "object" provision of the Convention. She noted that the Preamble of the Convention would also be discussed, and in particular Working Document No 41, in which the Drafting Committee made changes to the Preamble based on the previous discussions that had taken place. She noted that further discussions on the Preamble would take place after delegates had had time to consider Working Document No 41.

Article 1 – Objet / Object

4. **The Chair** observed, in relation to the objectives of the Convention, that there were no square bracketed provisions and no working documents. She opened the floor for discussion on Article 1. There were no interventions and so she concluded that Article 1 was acceptable to the delegates.

Article 2 – Champ d'application (Doc. trav. Nos 8, 43 et 48) / Scope (Work. Docs Nos 8, 43 and 48)

5. **The Chair** then moved on to consider Article 2 of the Convention and requested that the Chair of the Drafting Committee introduce Article 2, the "scope" of the Convention.

6. **The Chair of the Drafting Committee** thanked the Chair and noted that Article 2 reflected the consensus that had been reached after many hours of debate over several Special Commission meetings. She explained that the consensus was that there should be a core to the scope of the Convention and that this core recognised the importance of maintenance payments arising from a parent-child relationship towards a child under the age of 21 years.

In relation to Article 2, paragraph 1, she noted that it fixed the scope of the Convention. She stated that it conferred obligations but that these were only to recognise a decision that related to maintenance payments arising from a parent-child relationship towards that child until the age of 21 years had been reached.

In relation to the first area of consensus, Article 2, paragraph 1, which contained square brackets, the Chair of the Drafting Committee understood the meaning of "in combination with" to be that the claim for maintenance in respect of a child and the claim for spousal support were related but were not required to be made contemporaneously. She noted that paragraph 1 reflected that situation in some countries; claims for maintenance in respect of a child and claims for spousal support were not made contemporaneously but were linked.

The Chair of the Drafting Committee went on to note the second area of consensus contained in Article 2, paragraph 2, where a Contracting State could declare in accordance with Article 58 that it would extend the application of the whole

or any part of the Convention to other forms of maintenance obligations. She noted that a question could arise in relation to a situation where one Contracting State made a declaration but another did not and whether the former had to accept applications from the latter. She explained that a Contracting State that had made such a declaration to extend the application of the Convention had to accept applications from a Contracting State that had also made such a declaration. She also said that a Contracting State that had made a declaration could accept an application from a Contracting State that had not made a declaration.

In relation to the third area of consensus that could be seen within the text contained in square brackets in Article 2, paragraph 3, the Chair of the Drafting Committee reminded the delegates that whether or not those words arose in the remainder of the Convention, it recognised that all children had a right to be supported through the provision of maintenance. She referred to Articles 3 and 27 of the *United Nations Convention of 20 November 1989 on the Rights of the Child* as support for that recognition.

In relation to the fourth area of consensus contained in Article 2, paragraph 4, the Chair of the Drafting Committee noted that that provision had been previously discussed and so she would not further discuss it at that point in time.

7. **The Chair** thanked the Chair of the Drafting Committee and also noted the fact that discussion on Article 2, paragraph 4 (public body applications), had already occurred on Wednesday 14 November 2007 and so the focus for Thursday 15 November 2007 would be on the first three paragraphs of Article 2, especially in relation to the square brackets contained therein.

8. **Mr Hayakawa** (Japan) thanked the Chair and stated that the delegation of Japan supported the text contained within Article 2 of the Convention and so suggested the removal of the square brackets.

9. **Mme Mansilla y Mejía** (Mexique) souhaiterait des clarifications concernant l'application concrète de l'article 2, paragraphe 2. Plus précisément, elle demande quelle serait la situation à l'égard d'un autre État, si le Mexique faisait une déclaration visant à étendre l'application de la Convention aux relations de famille, de mariage ou d'alliance en vertu de l'article 2, paragraphe 2.

10. **The Chair** reaffirmed the comments that had been made by the Chair of the Drafting Committee and pointed out that if a Contracting State had declared to extend the whole or any part of the Convention under Article 58 to other forms of family maintenance, the extended scope would only apply to applications originating from a Contracting State that had also made a declaration to extend the scope in the same manner.

11. **Mme Mansilla y Mejía** (Mexique) exprime sa gratitude pour l'explication donnée par la Présidente.

12. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that she supported the comments made by the Delegate of Japan and that the delegation of the European Community supported the removal of the square brackets in Article 2 and the retention of the text.

13. **Ms Carlson** (United States of America) thanked the Chair and stated that she supported the comments made by the Delegates of Japan and the European Community and that the delegation of the United States of America supported the removal of the square brackets in Article 2 and the retention of the text.

14. **Ms Kulikova** (Russian Federation) asked the Chair whether she was correct in understanding that she was now able to discuss Article 2 of the Convention.

15. **The Chair** stated that she was aware that the delegation of the Russian Federation had made a proposal which was contained in Working Document No 8 and that the floor was free to discuss that proposal.

16. **Ms Kulikova** (Russian Federation) thanked the Chair and stated that a proposal had been made by the delegation of the Russian Federation that could be found in Working Document No 8. She stated that the main idea of that document was to give all delegations that presently had some difficulties with the scope of the Convention a certain amount of flexibility. She observed that three options had been drafted and that all options gave flexibility to the delegations in relation to what the age of a child would be and the nature of the maintenance obligations to which the Convention would apply.

As had been previously stated at the Special Commission meeting, Ms Kulikova noted that the delegation of the Russian Federation would be ready to agree to the application of the Convention to maintenance obligations arising from a parent-child relationship towards a child under the age of 18 years. She noted, however, that the delegation of the Russian Federation understood that other Contracting States wished to extend the scope of the Convention further. She noted that some delegations wished to extend the scope of the Convention either to a child under the age of 21 years and / or to other forms of maintenance payments arising from different types of family relationships. From this viewpoint, she stated that the proposal made by the delegation of the Russian Federation had been drafted to incorporate a level of flexibility.

Ms Kulikova noted that Option 1 of Article 2 included the concept of a minimum standard which was that the Convention had to apply to maintenance obligations arising from a parent-child relationship towards a child under the age of 18 years. She noted that under Option 1, paragraph 2 enabled a Contracting State to make a declaration under Article 58 to extend the scope of the Convention to a child under the age of 21 years, which proposal was made in order to import a positive approach into Option 1.

In relation to Option 2, she explained that a Contracting State could make a declaration under Article 58 of the Convention to extend the scope of the Convention to include other forms of maintenance arising out of different family situations. This would be in addition to maintenance obligations arising from a parent-child relationship towards a child under the age of 18 years, as suggested by the proposed new paragraph (e), sub-paragraph (i), of Article 3 in Option 2. She pointed out that Option 2 also took into account the rights of an incapacitated person beyond the age of 18 years who could not support him- or herself and who had a right to maintenance from the "parents under the law of the Contracting State of his residence", according to the proposed new paragraph (e), sub-paragraph (ii), of Article 3.

With regard to Option 3, Ms Kulikova noted that she believed it was the broadest of the three Options as it would make the Convention applicable to maintenance obligations arising from a parent-child relationship towards a child under the age of 21 years as well as, with the exception of Chapters II and III, to spousal support. She noted that under

Option 3, however, a Contracting State could limit the application of the Convention to maintenance obligations arising from a parent-child relationship towards a child under the age of 18 years only.

Ms Kulikova welcomed comments from other delegates in relation to the proposal made by the delegation of the Russian Federation.

17. **The Chair** thanked Ms Kulikova and explained that she understood that for all three options in Working Document No 8, the Convention would be applicable as a minimum to a core maintenance obligation arising from a parent-child relationship towards a child under the age of 18 years. She noted that there had been many discussions on this topic and queried whether any delegates offered support to reopen this issue via Working Document No 8 proposed by the delegation of the Russian Federation.

18. **Ms Kulikova** (Russian Federation) responded to the Chair and noted that she was not reopening discussions by proposing Working Document No 8 because of note 1 found in the revised preliminary draft Convention. She stated that the position contained in Working Document No 8 had always been expressed previously by the delegation of the Russian Federation, as indicated by note 1.

19. **The Chair** thanked Ms Kulikova and stated that note 1 indicated that this issue had not been finally resolved but that there was wide agreement. She clarified, however, that the proposal by the delegation of the Russian Federation as contained in Working Document No 8 was definitely on the table.

20. **Mr Tian** (China) stated firstly that he did not believe that there was general agreement with respect to Article 2, especially with regard to paragraph 1 and in relation to the age determining when a person had attained majority. Secondly, he noted that as was stated on the first day of the opening of Commission I, the scope of the Convention necessarily related to many other articles of the Convention and so it was important to outline clearly what the scope of the Convention was.

Mr Tian noted that for the delegation of China, Article 2 went too far in setting the age of a child to whom maintenance obligations were owed, because of the existence of a parent-child relationship, to that of 21 years. He confirmed on behalf of the delegation of China the belief that it should be set at 18 years and that this belief was shared by other delegations. He accepted that differing national laws with respect to the age of a child existed, but that the unified rule espoused in the *United Nations Convention on the Rights of the Child* set the maximum age of a child at 18 years and that that Convention had been ratified by more than 190 States Parties, therefore indicating the major support of the international community, and should be adhered to.

Mr Tian referred to Working Document No 8 as well as Working Document No 25, the proposal of the delegation of Israel in relation to Article 3 of the Convention. He stated that he supported both proposals even though he would like to discuss further which option in Working Document No 8 the delegation of China would like to support.

In relation to Article 2, paragraph 3, Mr Tian supported the removal of the square brackets and the retention of the text. He invited his colleague, the Delegate of the Special Administrative Region of Macau, to discuss Article 2, paragraph 1.

21. **Ms Albuquerque Ferreira** (China) stated that the delegation of China had a query with regard to the phrase "in combination with" in square brackets in Article 2, paragraph 1. She said that she understood that the Chair had explained that the phrase meant that an application for maintenance arising from a parent-child relationship towards a child could be made at the same time as a claim for spousal support, but that this was not always the case. However, she queried the explanation in relation to this phrase that appeared in paragraph 47 of Preliminary Document No 32, the Explanatory Report to the revised preliminary draft Convention. She stated that whilst this paragraph explained that "in some countries spousal support [was] applied for at the same time as child support but in others not", she believed that some sort of example should be provided for such situations because the Explanatory Report to the Convention was vague with respect to the meaning of the phrase "in combination with".

22. **The Chair** reminded the delegations of what had been explained by the Chair of the Drafting Committee in relation to the age that was noted in Article 2, paragraph 1, and that this did not compel States to change their internal law with respect to the age at which they recognised that a child had attained majority. She explained, however, that if a State became a Contracting State to the Convention, and where the scope of the Convention extended to maintenance obligations towards a child under the age of 21 years, then despite that Contracting State recognising the age of majority as being 18 years in its internal law, there would also be an obligation upon that State to recognise applications made under the Convention for recognition and enforcement of decisions concerning those persons aged between 18 and 21 years.

23. **Mr Markus** (Switzerland) agreed with the delegations of China and the Russian Federation in so far as Article 2, paragraph 1, was a very important provision and had to be further discussed. Mr Markus noted that the comments of Switzerland in relation to the age of majority of a child to be included in the Convention could be found in Preliminary Document No 36. He drew the attention of the delegations to Working Document No 43, a proposal by the delegation of Switzerland in relation to Article 2. He agreed with the comments that had been made by the Chair with respect to the fact that Article 2, paragraph 1, did not deal with the substantive law of States; it merely related to the recognition and enforcement of decisions under this Convention.

In relation to Working Document No 43, Mr Markus stated that in this Convention, the delegation of Switzerland wanted to see the recognition and enforcement of decisions in relation to maintenance obligations towards young people up until the age of 25 years. The reasons for this had been explained in Preliminary Document No 36 and Mr Markus said that he would not repeat those comments but that briefly, they reflected the fact that often young people were involved in higher education up until the age of 25 years and that they had no financial means of their own because of this. He finalised his comments by stating that he believed there should be a definite age limit and not just a flexible rule because a clear age limit for the scope of the Convention would increase the clarity and legal certainty of the Convention.

24. **Ms Lenzing** (European Community – Commission) thanked the Chair and said that the European Community wished to better understand the concerns of the delegations of China and the Russian Federation in relation to the present text and whether their concerns were of substance or

because of terminology with respect to the age expressed in Article 2, paragraph 1. In the case of the former, then for the delegations of those countries that did not recognise the award of maintenance payments to persons above the age of 18 years from their parents, Ms Lenzing wished to remind them of the comments that had been made by the Chair. She reiterated the explanations of the Chair that the Convention did not require Contracting States to change their internal law, but rather to recognise the entitlement of 18 to 21 years in the recognition and enforcement of foreign orders.

Ms Lenzing queried whether perhaps the concerns that had been expressed by some delegates may be related to terminology, for example, whether in those countries a child was not recognised to be someone above the age of 18 years. If that were the case, then Ms Lenzing suggested that Article 2, paragraph 1, could be changed from "child under the age of 21" to "person under the age of 21". She noted that this would only be a matter of tweaking paragraph 1. She also reiterated that if it were the case, however, that the internal law of some countries did not recognise the payment of maintenance to those above the age of 18 years, then it would not matter as the Convention required no change by States to their internal legislation.

In relation to the proposal that had been made by the delegation of Switzerland in Working Document No 43, Ms Lenzing stated that this had been discussed previously. She noted that the payment of maintenance to young people by their parents until the time they finished higher education was found throughout the European Community. She reminded the delegation of Switzerland that this was not acceptable to the majority at this Diplomatic Session and so therefore, in the spirit of compromise, she urged the delegation of Switzerland to accept the age of 21 years as being the age limit applicable under this Convention.

25. **Mme Mansilla y Mejía** (Mexique) souhaite préciser que la discussion ne porte pas sur un problème de citoyenneté ou d'âge. En réalité, lorsqu'une personne atteint l'âge de la majorité elle se voit octroyer des droits, tels que les droits politiques, mais elle perd également des droits, tel que le droit aux aliments. Aussi insiste-t-elle sur le fait que la question débattue n'est pas celle de l'âge de la majorité mais plutôt de la perte des droits aux aliments.

En relation avec ce qui a été dit par la Déléguée de la Communauté européenne, Mme Mansilla y Mejía indique qu'au Mexique, l'âge de la majorité est de 18 ans. À partir de cet âge, l'obtention d'aliments n'est plus obligatoire au Mexique, notamment lorsque la personne concernée ne suit pas d'études. En outre, Mme Mansilla y Mejía souligne qu'il ne serait pas possible d'exécuter une décision étrangère d'obligation alimentaire en faveur d'une personne de plus de 18 ans, dès lors que leur législation interne ne le permet pas.

En ce qui concerne la proposition de la délégation de la Fédération de Russie, Mme Mansilla y Mejía observe que l'option 2 correspond relativement bien au droit du Mexique et aux attentes de la délégation mexicaine à l'égard du projet de Convention.

26. **Mme Ménard** (Canada) indique que la délégation canadienne se joint aux délégations du Japon, de la Communauté européenne et des États-Unis d'Amérique et approuve la suppression des crochets à l'article 2 et le maintien du texte tel quel.

27. **M. Marani** (Argentine) indique en premier lieu que la délégation de l'Argentine approuve la proposition de suppression des crochets au paragraphe premier de l'article 2.

En second lieu, il souhaite présenter la proposition rédigée par les États du Mercosur et les autres États membres associés concernant les personnes incapables, dans le Document préliminaire No 36. Il précise que l'intention sous-jacente à cette proposition est d'introduire les personnes incapables dans le champ d'application de la Convention pour les mêmes raisons que celles précédemment exprimées par les délégations. En effet, il pense qu'il est essentiel de protéger les personnes incapables. Or, les pays du Mercosur disposent d'une *Convention interaméricaine de Montevideo du 15 juillet 1989 sur les obligations alimentaires* qui reconnaît l'octroi d'aliments aux personnes majeures atteintes d'incapacité en vertu de la loi applicable. M. Marani pense que ce cas devrait être couvert par le projet de Convention. Il propose donc de modifier le paragraphe premier de l'article 2 à cette fin.

Enfin, en ce qui concerne la question de l'âge, M. Marani estime que, comme cela a été indiqué par la délégation de la Communauté européenne, le projet de Convention n'a pas pour objet de définir la majorité mais détermine simplement un âge en dessous duquel l'obtention des aliments est protégée par la Convention.

28. **M. Voulgaris** (Grèce) indique que sa délégation est favorable à l'extension de l'âge limite en vue de l'obtention d'aliments dans le cadre du projet de Convention. Afin de faciliter l'obtention d'un compromis sur cette question, il pense que les États qui ont des difficultés à accepter cette extension de l'âge devraient avoir la possibilité d'émettre une réserve. Il insiste sur l'importance de cette question et souligne que l'âge de la majorité a souvent été abaissée pour des raisons essentiellement politiques en vue d'octroyer le droit de vote mais qu'à l'heure actuelle, les enfants ont besoin d'être soutenus par leurs parents ou d'autres personnes jusqu'à un âge beaucoup plus avancé, pour diverses raisons parmi lesquelles la prolongation des études.

29. **Mr Mthimunye** (South Africa) thanked the Chair and stated that the delegation of South Africa would like to echo its position in relation to the age limit of a child seeking recognition and enforcement of an order for maintenance under this Convention. He noted that the national law of South Africa recognised an age limit of 18 years until which a parent owed a child an obligation with respect to the payment of maintenance. He explained, however, that maintenance in South Africa may also be awarded to a child over the age of 18 years until required, or until they were "self-supporting". Mr Mthimunye explained that the "self-supporting" element of their national law meant that in circumstances where a child was still at school, or could not support themselves for some other reason, the parent of that child would be obligated to continue the payment of maintenance. He was therefore sympathetic with the position of the Delegate of Argentina. He suggested that the Convention could incorporate this idea of "self-supporting" so that maintenance decisions would be recognised and enforced under this Convention in respect of a child who had not reached the age of 18 years, or in respect of a child who had reached the age of 18 years but who was not "self-supporting". He noted that there would be a requirement of proof upon the creditor to establish that they were not yet "self-supporting".

30. **Mr Segal** (Israel) thanked the Chair and stated that he supported the proposal of the delegation of the European

Community to change the word "child" to "person" in Article 2, paragraph 1. He noted that the proposal by the delegation of Israel contained in Working Document No 25 had been along those same lines. He stated that it was not clear in the Convention what the age of majority was. He noted that when speaking about a child, it was generally accepted that they would be under the age of 18 years, but that the application of the Convention may be broader than this. Mr Segal also observed that the needs of a child under the age of 18 years were the same as the needs of a person under the age of 18 years.

Mr Segal also observed that this discussion had some impact on other areas of the Convention, *i.e.*, would free legal assistance be given to a child under the age of 18 years seeking the recognition and enforcement of a maintenance decision as well as a spouse seeking the recognition and enforcement of an order for spousal support? If not, then applications would each be given different reactions in the requested State, where divisions would be made with respect to the relative core importance of maintenance obligations in different family relationships, under the Convention.

Mr Segal noted that in Israel, a maintenance obligation owed by a parent to a child under the age of 18 years was different to a maintenance obligation owed by a parent to a child who was over the age of 18 years. He believed that this basic distinction should be kept, but that it was not currently seen in this Convention. Mr Segal noted that the delegation of Israel was not averse to broadening the scope of the Convention, however, just so long as the scope was clear and there was a clear age limit with respect to the recognition and enforcement of maintenance decisions.

31. **Mr Beaumont** (United Kingdom) commenced his intervention by noting that this Convention had been debated for four and a half years. He quoted Ecclesiastes and stated, "There is nothing new under the sun." He continued by emphasising that the point that the delegations had reached was because a lot of time had been spent looking for a consensus and that the focus should now be on the provisions with square brackets.

He added that the age limit in Article 2, paragraph 1, of 21 years was a compromise between those States that wanted the Convention to recognise and enforce maintenance decisions in respect of children under the age of 18 years only and those States that wanted the Convention to recognise and enforce maintenance decisions in respect of young adults up to the age of 25 years.

Mr Beaumont focussed the delegations on the fact that it was normal in private international law to allow for recognition and enforcement of decisions despite differences between the internal laws of States.

With regard to the verbal suggestion that had been made by the European Community to change the word "child" to "person" in Article 2, paragraph 1, Mr Beaumont stated that whilst it may remove any linguistic misunderstanding, that was not the point. The point was that the revised preliminary draft Convention meant that if someone who was 19 years of age received maintenance payments in their country, that decision could be recognised and enforced elsewhere.

The second issue that Mr Beaumont raised was in relation to vulnerable persons. He stated that it was important to acknowledge that if a vulnerable person was over the age of 21 years that Article 2, paragraph 1, would not be of assistance, but that Article 2, paragraph 2, would be applicable. Therefore, he said that Contracting States who wanted vulnerable persons to be respected with regard to the enforcement and recognition of maintenance decisions for their benefit, regardless of the fact that they were above the age of 21 years, could do this through making a declaration under the Convention. However, he noted that it was a lot to require all States to do this and that some States were simply not geared to change their systems to also assist vulnerable persons. Despite this, Mr Beaumont noted that just because a State awarded maintenance to a vulnerable adult within their national law, it did not mean that the recognition and enforcement of such awards would fall under the scope of this Convention. The question of respecting vulnerable persons in the context of what was being discussed should therefore be done by those States that wished to do so via a declaration with respect to Article 2, paragraph 2.

With respect to the suggestion that had been made to incorporate the idea of the additional recognition and enforcement of those persons who were not yet "self-supporting", even though they had reached the age of 18 years, Mr Beaumont noted that this point had also been discussed previously and that the difficulty lay with defining the term. He emphasised that this was to be an international Convention, not the national law of a State, and so it was impractical to incorporate criteria in order to determine whether someone was "self-supporting".

32. **Ms Carlson** (United States of America) stated that she agreed with what the Delegate of the United Kingdom had just said and that she was going to say exactly what he had stated. She noted that the age of 21 years within Article 2, paragraph 1, was a delicate compromise and if previous discussions continued to be raised, it would be a problem because there would be no chance of ever reaching a compromise. Ms Carlson suggested that the focus be on those provisions with square brackets. She noted that the delegation of the United States of America had made compromises on issues where consensus could not be reached but for those concessions and so she urged the delegates to return to the idea that had previously been mentioned by the Chair, *i.e.*, that there had been support for Article 2, not consensus, rather majority agreement, and it was unlikely that any further agreement could be reached.

With respect to the ongoing discussion, the delegation of the United States of America raised a serious issue of process. Ms Carlson stated that there should be no further discussion. She emphasised that an age limit of 21 years in Article 2, paragraph 1, did not require States to change their internal law and that the delegation of the United States of America was happy to change the word "child" to "person" in Article 2, paragraph 1, if that was the consensus.

33. **Ms Snizhko** (Ukraine) thanked the Chair and stated that whilst she understood the explanation that had been provided by the Delegate of the United Kingdom, she retained some concerns with respect to the application of the Convention to persons between the age of 18 and 21 years in relation to the recognition and enforcement of a maintenance decision in a State where the relevant domestic age limit for the provision of maintenance payments was 18 years. She asked whether that meant that foreign applicants for recognition and enforcement would be treated more favourably than domestic applicants. Ms Snizhko was supportive of Contracting States simply making declarations where they were willing to recognise and enforce maintenance decisions in relation to children in a parent-child relationship and who were over the age of 18 years.

34. **Mr Tian** (China) thanked the Chair and expressed the belief that the meeting was now in a situation where no one wished to reopen discussions on an issue where problems still remained. He noted that in China, maintenance obligations arising out of a parent-child relationship could only be supported legally until a child reached the age of 18 years. He observed that whilst young people who required help to complete further education, for example, also needed support, it was a different type of support and obligation to that provided from a parent to a child who was under the age of 18 years. He noted that the latter was a primary obligation and that perhaps it was necessary to clarify the different types of obligations that arose under this Convention.

Mr Tian stated that the obligation for a parent to pay maintenance to a child who was under the age of 18 years should be guaranteed. For those persons aged between 18 and 21 years, he stated that Contracting States should make a declaration under the Convention if they wished to recognise maintenance decisions towards persons in that category. He suggested that that was the best way to move forward but that the delegation of China was open to any further flexible solutions that may be presented.

35. **Ms Kulikova** (Russian Federation) thanked the Chair and stated that she also wished to clarify the system in the Russian Federation. She noted that there was no obligation for a parent to pay maintenance to a child over the age of 18 years in the Russian Federation unless that child was incapacitated or unable to support themselves. The general principle was that maintenance obligations existed until a child reached the age of 18 years, however. She noted that the delegation of the Russian Federation understood that Article 2, paragraph 1, did not require States to change their internal law but asked the plenary to be realistic. She explained that this obligation to recognise and enforce maintenance decisions from another Contracting State was an international obligation that was taken very seriously by the Russian Federation. The delegation of the Russian Federation had therefore studied what it could agree to under the Convention.

Ms Kulikova expressed the belief that the proposal made by the delegation of the Russian Federation in Working Document No 8 was a very realistic proposal in that it ensured flexibility for the differing viewpoints. She noted that the proposal did not prevent those States that supported the idea of an extended scope for the Convention to elect for that to occur via the making of declarations, and the proposal also recognised the concerns of those States that wished for the scope of the Convention to extend only to the recognition and enforcement of maintenance decisions in respect of children under the age of 18 years. Ms Kulikova believed that the proposal in Working Document No 8 was rational and realistic through the flexibility of a system where States could make declarations in relation to this issue if they so desired.

36. **The Chair** noted that a tea and coffee break would be taken and that following this, discussions would proceed in relation to the square bracketed provisions in Article 2.

Pause / Break

37. **The Chair** stated that discussions would continue in relation to the scope of the Convention.

38. **Mr Segal** (Israel) stated that the question of the age of a child had been discussed previously but the issue was that it was now causing difficult policy situations for some States. He observed that policy issues arose as a result of the fact that some States only recognised maintenance obligations towards a child in a parent-child relationship until they had reached the age of 18 years but would have to implement a Convention in which Contracting States agreed to recognise and enforce maintenance decisions with respect to persons up until the age of 21 years.

Mr Segal referred to the proposal that had been made by the delegation of the Russian Federation in Working Document No 8 and contained three separate options, each separately offering Contracting States the ability to declare to extend or limit the scope of the Convention. He noted that the basic core of the proposal accounted for the recognition and enforcement of maintenance decisions towards children in a parent-child relationship under the age of 18 years but that, depending upon which Option were adopted, Contracting States could extend the scope to persons under the age of 21 years or to vulnerable persons. He also referred to Option 3 that enabled the recognition and enforcement of maintenance decisions towards a child in a parent-child relationship until they had reached the age of 21 years, and which also provided that a Contracting State could limit the application of the Convention to those under the age of 18 years only via the making of a reservation. Mr Segal noted that Working Document No 8 could therefore be a compromise in order to help the Convention become more universally accepted in a manner where Contracting States could agree to what they wanted to obligate themselves to.

39. **Mme González Cofré** (Chili) souhaite attirer l'attention des délégations sur la proposition du Mercosur visant à modifier le paragraphe premier de l'article 2 en vue d'y inclure les personnes incapables. Mme González Cofré indique que sa délégation est consciente des difficultés rencontrées pour parvenir à un consensus mais insiste sur l'importance de cette question. Elle constate que la Convention protège les personnes en dessous d'une limite d'âge mais estime que cette limite d'âge ne peut être appliquée aux personnes incapables. Elle souligne que les personnes ayant une incapacité physique ou mentale ne peuvent bien souvent pas travailler. Il lui paraît donc essentiel que ces personnes bénéficient d'une certaine protection et plus particulièrement qu'un droit aux aliments leur soit reconnu.

Elle précise que le Chili est souvent parvenu à conclure des accords régionaux avec d'autres pays afin d'harmoniser leurs pratiques en la matière. Il lui semble donc primordial de parvenir à un consensus sur cette question et de modifier le paragraphe premier de l'article 2 afin que les personnes incapables soient également visées et puissent bénéficier de la protection offerte par la Convention. Elle espère que la préoccupation de la délégation chilienne sera entendue.

40. **Ms Kristensen** (Norway) thanked the Chair and stated that the delegation of Norway had listened to the interventions of States that had concerns with the recognition and enforcement of foreign maintenance payments with respect to children who were over the age of 18 years when that same recognition was not afforded to children located within their jurisdiction.

Ms Kristensen stated that in Norway, the obligation of a parent to financially support their child ended when they reached the age of 18 years although if that child continued further education, a support order could be made so that the payment of maintenance obligations continued with respect to those children. With respect to Article 2, Ms Kristensen stated that the delegation of Norway supported firstly the deletion of the square brackets and retention of the text, and secondly the verbal suggestion that had been made by the Delegate of the European Community in relation to

paragraph 1 so that it read "person under the age of 21" rather than "child under the age of 21".

41. **Mr Ding** (China) asked a question in relation to the operation of the phrase "in combination with", contained in square brackets in Article 2, paragraph 1, to the effect that if a claim for maintenance in respect of a child and a claim for spousal support were not made simultaneously in the same proceeding, then how would it be known that the two claims were in combination with each other. He suggested that there was a need to clarify the operation of this provision or to give an example of how this occurred.

42. **The Chair** asked the delegations whether there were any reactions to the question posed by the Delegate of China.

43. **Ms Matheson** (United States of America) thanked the Chair and explained that in the United States of America, when claims for the recognition and enforcement of both spousal support and maintenance in respect of a child were made, sometimes the claims occurred at the same time, and sometimes one was made before the other. She clarified, however, that in the United States programme, there was an allowance for the enforcement of a claim for spousal support and a claim for maintenance in respect of a child, even if they arose out of separate proceedings but as long as they related to the same time period.

44. **Ms Lenzing** (European Community – Commission) stated in response to the question raised by the Delegate of China that a requested State would always know if there was both a claim for maintenance in respect of a child and a claim for spousal support, even if one came after the other and on separate pieces of paper. She stated that it could be verified by the requested State that they were claims pending simultaneously.

45. **Mr Ding** (China) thanked the delegates who had offered explanations to his question. He suggested that an explanation be added to the Explanatory Report to the Convention.

46. **The Chair** noted that if there were no further interventions, discussion on Article 2 would be closed. She noted that it was clear that the proposals for an extension of the scope of the Convention beyond what was already contained in the text were not supported. She noted the concern of many Contracting States in relation to the age limit being 21 years in Article 2, paragraph 1, and that support for the text that appeared within the square brackets in paragraph 1 was not clear. She therefore stated that the square brackets would not yet be removed.

The Chair acknowledged the support for changing the word "child" to "person" in Article 2, paragraph 1, and asked the Drafting Committee to give effect to that. She also noted the support for the removal of the square brackets in Article 2, paragraph 3, and the retention of the text and asked the Drafting Committee to make that change as well.

Préambule (Doc. trav. No 41) / Preamble (Work. Doc. No 41)

47. **The Chair** noted that discussions would move to the Preamble of the Convention which was originally the first item on the draft agenda. She referred the delegates to Working Document No 41, a proposal by the Drafting Committee to amend the Preamble. She observed that the proposed amendment now included references to the forms to be used under the Convention, to the notion of the sharing of information, and to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. The Chair handed the floor to the Secretary General.

48. **The Secretary General** raised a question and concern in relation to the paragraphs that had been added to the Preamble and which were underlined in Working Document No 41. He noted that the Drafting Committee had made the amendment requested of it but asked the delegates to compare the added paragraphs to the remainder of the Preamble. He recognised the importance of the forms and the exchange of information in the operation of the Convention but queried whether the Preamble was the appropriate place for such recognition. He stated that the purpose of a preamble was to evidence the spirit of a convention, and that whilst a convention's forms were important, he queried whether the preamble was the place to refer to such forms and the exchange of information. He expressed his unhappiness with the addition of the reference of the Convention forms to the Preamble.

49. **Mr Ding** (China) expressed the same concern as that expressed by the Secretary General and stated that the Preamble should not include unnecessary references, especially those that had been included in the added paragraphs of Working Document No 41.

50. **Ms Lenzing** (European Community – Commission) noted that her delegation was flexible with what was included in the Preamble. She stated that they thought it important to retain the reference to the New York Convention but were happy to delete the references to the forms of the Convention as well as the notion of the sharing of information.

51. **M. Markus** (Suisse) approuve les propos tenus par le Secrétaire général de la Conférence de La Haye concernant le rôle d'un préambule. En effet, il pense que le préambule de la future Convention devrait contenir les objectifs et le contexte de la Convention. En revanche, les moyens que l'instrument utilise pour atteindre ces objectifs sont l'objet même du contenu de la Convention et n'ont donc pas lieu d'être cités au sein du préambule.

Aussi, M. Markus préférerait que les deux paragraphes proposés concernant l'utilisation des formulaires et l'échange d'informations n'apparaissent pas dans le préambule. En revanche, il souhaite que la référence à la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger*, établie par les Nations Unies, soit maintenue dans le préambule.

52. **Mme Mansilla y Mejía** (Mexique) partage le point de vue du Secrétaire général et souhaite donc que le mode traditionnel de rédaction des préambules soit respecté. Aussi convient-il de ne pas conserver les deux paragraphes relatifs aux formulaires et à l'échange d'informations dans le préambule.

53. **Ms Carlson** (United States of America) thanked the Chair and said that like many other countries, when discussing the forms to the Convention, the United States of America had noted the importance of these forms and the extremely valuable and important work of the Forms Working Group. She stated that the preference of the delegation of the United States of America was to retain the wording of the Preamble as amended in Working Document No 41, but that the delegation had some flexibility on this since references to these matters were to remain in the text of the Convention itself.

Ms Carlson asked whether the delegates had considered also including in the Final Act a reference to the matters currently being discussed, including to the forms of the Convention and the notion of the sharing of information. If the consensus were to take the references to these matters out of the Preamble, then the delegation of the United States of America strongly suggested that they be retained in the Final Act of the Convention.

54. **The Deputy Secretary General** said that a decision had been made to include in the Final Act a reference to the work of the Forms Working Group, and that the Group would continue its work to reflect the fact that a Special Commission would be convened and the forms would be discussed in that forum. In relation to the inclusion of references to the other matters in the Final Act, he stated that he did not think it had been decided that they would be added.

55. **Ms Cameron** (Australia) thanked the Chair and stated that the delegation of Australia was flexible as to the inclusion or otherwise of the underlined paragraphs in Working Document No 41. She noted that her delegation would take seriously the reticence that had been expressed by the Secretary General with regard to the references to certain matters in the Preamble.

Ms Cameron noted that as the co-Chair of the Forms Working Group, and a member of the Administrative Co-operation Working Group and of the Sub-committee on Country Profiles, she considered that the inclusion of the references to certain matters in the Preamble to the Convention, and as had been added by the Drafting Committee in Working Document No 41, was to recognise the new and innovative work that had been completed on those matters. She stated that members of the Forms Working Group, Administrative Co-operation Working Group and the Sub-committee on Country Profiles would not be in a position to insist on the appearance of references to certain matters in the Preamble, but their appearance in the Final Act would be desired.

56. **Ms Albuquerque Ferreira** (China) stated that in relation to referencing certain issues in the Final Act of the Convention, the delegation of China believed that some references should be in the Final Act but that the language used for such references should be natural. She believed that reference should be made to the Forms Working Group in relation to the continuation of its work and with a view to discussion at the next Special Commission meeting. She noted that currently the language was more conclusory with respect to the Forms Working Group and that it did not reflect the fact that there would be a continuation of the Group's work.

57. **The Deputy Secretary General** noted that a proposal for the wording of the Final Act of the Convention would certainly be distributed to delegates for their consideration. He said that exactly as the Delegate of China had observed, the wording of the Final Act would endorse the work that had been completed by the Forms Working Group, the work to be continued as well as the fact that such work would be discussed by a Special Commission in the future.

58. **Ms Carlson** (United States of America) agreed with the Delegate of China and the Deputy Secretary General and stated that if both of the paragraphs that had been added to the Preamble by the Drafting Committee in Working Document No 41 were to be removed, then references to those matters, as well as to the Country Profiles, should be included in the Final Act. She stated that the delegation of the United States of America would be happy to leave the drafting of the Final Act to the Permanent Bureau.

59. **Ms Barkley** (National Child Support Enforcement Association) stated that as co-Chair of the Sub-committee on Country Profiles, she supported the comments that had been made by the Delegate of the United States of America. She noted that the delegates should work on the wording of the Final Act in order for it to converge with the Convention and that it should include the important reference to the fact that the work of the Forms Working Group would continue and would be discussed by the next Special Commission.

60. **Mme Subia Dávalos** (Équateur) approuve le point de vue du Secrétaire général et considère que le préambule de la Convention doit contenir les principes directeurs de la Convention et non des aspects de procédure telle que la référence aux formulaires.

61. **Mr Tian** (China) agreed that references should be made to the work of the Forms Working Group and the Country Profiles in the Final Act, as well as to the work of other committees if necessary, but that the language adopted should not be the same as that used in the paragraphs that had been added to the Preamble by the Drafting Committee. He believed that the language to be used in the Final Act should be media-neutral and, in the main, should simply reflect the fact that the work of the Forms Working Group would continue and would be reviewed by the next Special Commission.

62. **M. Cieza** (Pérou) indique que la délégation du Pérou est surprise qu'il ne soit fait aucune référence à la reconnaissance et à l'exécution des décisions dans le préambule. Or la reconnaissance et l'exécution des décisions en matière d'aliments constituent un pan important de la Convention. De plus, il note que la coopération entre les États, visée au paragraphe (a) de l'article premier, est mentionnée dans le préambule, de même que l'obtention de décisions, visée au paragraphe (b) de l'article premier, et les mesures efficaces, visées au paragraphe (d) de l'article premier. Aussi ne comprend-il pas la raison pour laquelle tous les principes énumérés à l'article premier font l'objet d'une mention dans le préambule à l'exception de la reconnaissance et de l'exécution des décisions qui figurent également à l'article premier, au paragraphe (c).

À la lumière de ce qui précède, M. Cieza propose d'ajouter à la fin du deuxième considérant du préambule la référence suivante : « […], la reconnaissance et l'exécution des décisions ». Cependant, il précise que cette référence pourrait être incluse dans un autre considérant du préambule, l'essentiel étant que ce but important de la Convention fasse l'objet d'une mention dans le préambule.

63. **Ms Ménard** (Canada) thanked the Chair and supported what had been said by the Delegate of the United States of America and the Representative of NCSEA in relation to including a reference to the Country Profiles in the Final Act.

64. **Mr Beaumont** (United Kingdom) believed that the Delegate of Peru had made a fair point in his intervention in relation to the fact that recognition and enforcement was the most significant aspect of the Convention and was linked to the administration of the Central Authority system, but that the Preamble to the Convention and the intention of the Convention expressed therein was not necessarily congruent.

65. **The Chair** believed, in relation to the intervention that had been made by the Delegate of Peru, that the reference to "procedures" in the Preamble included the reference to procedures for recognition and enforcement that produced results and were "accessible, prompt, efficient, cost-effective, responsive, and fair". She noted that there were no further interventions and that there was agreement to delete from the Preamble the two paragraphs that had been added by the Drafting Committee in relation to the forms of the Convention and to the notion of the sharing of information. She also noted that the Final Act would endorse the work that had been completed so far in relation to the forms of the Convention and the Country Profiles, and that such work would continue.

Article 3 – Définitions (Doc. trav. Nos 25 et 46) / Definitions (Work. Docs Nos 25 and 46)

66. **The Chair** noted that discussion would move to Article 3 which outlined the terms defined under the Convention. She reminded the delegates that the definition of "legal assistance" had been established on the first day of Commission I and so would not be discussed again. She noted that discussion would focus on the remaining three definitions present in Article 3, including any proposals for the inclusion of further definitions.

67. **Mr Segal** (Israel) thanked the Chair and referred to the proposal of the delegation of Israel in relation to Article 3 contained in Working Document No 25. He stated that since the definition of "legal assistance" had been previously discussed, he would leave it to the Drafting Committee to decide whether some value or utility could be gleaned from his proposed definition of "legal assistance" in Working Document No 25.

In relation to the definition of a "child", Mr Segal suggested that reference should be made to the *United Nations Convention on the Rights of the Child* and the *Hague 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* in relation to the definition of a child and the legal basis of a maintenance obligation towards a child arising from a parent-child relationship.

Mr Segal noted, with reference to Working Document No 25, that he thought that it needed to be recognised in the definition of a "creditor" that a creditor could also specifically be a child. He therefore suggested that the definition of "creditor" be changed from "an individual" to "a child or a person". For the sake of consistency with that definition, he suggested also changing the definition of "debtor" to "a person". In Working Document No 25 Mr Segal also suggested two further definitions, namely, of "maintenance" and "proceedings". He noted that his delegation's proposed definition of "maintenance" was devised to explain what was meant by maintenance in the context of the fact that the term was referred to in both the definitions of a "creditor" and a "debtor". He noted that there was an implicit objective criterion of the obligation to pay maintenance as well as the right to receive maintenance, which arose out of certain familial relationships.

The second additional definition that had been suggested by the delegation of Israel in Working Document No 25 was for the term "proceedings". He noted that sometimes proceedings were judicial and sometimes they were administrative and so this had been reflected in the proposed definition. He also noted that it had been suggested by the delegation of Israel in Working Document No 25 that the definition of "legal assistance" also include references to proceedings.

68. **Ms Morrow** (Canada) thanked the Chair and indicated that in relation to Article 3, the delegation of Canada supported the existing text that appeared in the Convention but that they were open to considering other proposals in relation to the definition of terms. She noted that the delegation of Canada had also made a proposal which was contained in Working Document No 46. She stated that this proposal had been submitted to address concerns in relation to the making of private agreements under the Convention. She noted that the proposal suggested that the term "private agreement" be changed to "maintenance agreement" to shift the focus from an agreement being private to something that more clearly indicated what the purpose of the agreement was, *i.e.*, for maintenance.

Ms Morrow explained that the proposed definition of "maintenance agreements" in Working Document No 46 contained two elements: firstly, that it must be an agreement in writing, and secondly, that the agreement required the payment of maintenance. She noted that the proposed definition set out safeguards that had to be met for a maintenance agreement to be recognised under the definition. These were that it had to be "determined to be enforceable as a decision under the law of the State of origin by a competent authority of the State of origin", that it had to be "registered or filed with a competent authority in the State of origin" and that it was "subject to review and modification by a competent authority in the State of origin". She stated that the delegation of Canada was happy for the Drafting Committee to adjust the language that had been used in outlining these safeguards if it considered that there was some repetitiveness.

Ms Morrow explained that in Canada other controls were also present in that an agreement was reviewed if and when divorce proceedings were commenced. She believed that the existence of the safeguards that had been added into the proposal made by her delegation meant that those parties who genuinely wished to reach an agreement would be assisted, guided and protected by this provision in the Convention. She noted that if there were no control over agreements, then reaching one would be a waste of time and money as it may not ultimately be recognised and enforced, either in the requesting or the requested State.

Ms Morrow believed that the advantage of agreements made between parties was that it possibly took some burden off the systems and procedures for both obtaining a maintenance decision, and the recognition and enforcement of such a decision both at a domestic and international level. No matter what the quantum of the maintenance was that had been agreed by the parties, something was always better than nothing, especially where the parties had been able to reach an agreement themselves. Ms Morrow also stated that the delegation of Canada had no objection to the issuance of a statement to the effect that agreements between parties were to be sent through Central Authorities.

69. **Mr Sami** (Egypt) stated that the delegation of Egypt could agree with the issues that had been discussed but that in relation to the issue of the age of a child under this Convention, he noted his support for an age limit of 18 years. He understood that no consensus on this issue had been reached but he wished to put on record what the preference of the delegation of Egypt was.

70. **Mr Tian** (China) thanked the Chair and stated that the delegation of China supported the proposal that had been

made by the delegation of Israel in Working Document No 25, especially in relation to the definition of a "child", although he noted that the definition of "legal assistance" as proposed may require further consideration.

In relation to the proposal of the delegation of Canada in Working Document No 46, he stated that the delegation of China wished to seek two clarifications. Firstly, with regard to the definition of a "maintenance agreement", Mr Tian queried whether it would be relevant to all countries. He asked whether, if there were a specific maintenance agreement, it would only have relevance to certain countries. In relation to Article 26 (Authentic instruments and private agreements), contained in square brackets in the text of the Convention and to which the delegation of Canada had proposed to make amendments in Working Document No 46, Mr Tian noted that the delegation of China had not yet decided its position and whether authentic instruments and private agreements should be in the Convention. He noted that the delegation of China had simply agreed that subject to declarations made under Article 58, the issue of authentic instruments and private agreements could provisionally be included in the Convention. He suggested that this aspect of the proposal of the delegation of Canada be discussed at the same time as Article 26 rather than when Article 3 was to be dealt with.

71. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that the European Community supported the text of Article 3 as it currently stood in the Convention, subject to the addition of any further definitions. She noted that the proposal made by the delegation of Canada should be discussed when Article 26 was addressed. She stated that the delegation of the European Community had also made a proposal in relation to authentic instruments and private agreements but intended to leave discussion of that Article until it was addressed in the context of the draft agenda.

In relation to the proposal of the delegation of Israel, Ms Lenzing stated that the definition of a "child" contained therein was not acceptable to the delegation of the European Community. She believed that that definition should not be touched. With regard to the definitions of "debtor" and "creditor" suggested in the same proposal, Ms Lenzing noted that she did not see an important difference between the proposal that had been made and what was already currently contained in the text of the Convention. She indicated that her understanding of the word "individual" was that it included both a parent and a child and that the national law of each country would determine whether a child could also be regarded as a creditor.

Ms Lenzing observed that in relation to the definition of "maintenance" contained in the proposal of the delegation of Israel, it was a question of whether everything mentioned in the text of the Convention required a definition in Article 3. She noted that "maintenance" had not been defined in the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and that no issues had arisen as a result.

Finally, in relation to the definition of "proceedings", Ms Lenzing stated that she had not yet been through the text of the Convention in full to determine whether any reference to proceedings created any doubt as to whether the reference was to judicial proceedings or to administrative proceedings. She noted, however, that no issue with regard to this problem had been detected in the text of the Convention so far and that if that situation did not change, there would not necessarily be a need to define the word "proceedings".

72. **The Chair** stated that discussions and any decisions in relation to proposals concerning authentic instruments and private agreements would be delayed until discussion on Article 26 occurred.

73. **Mme González Cofré** (Chili) approuve la position de la délégation de la Communauté européenne quant à la proposition de définition de « l'enfant » de la délégation d'Israël. En effet, elle note que la définition proposée aurait pour objet de restreindre le champ d'application même de la Convention. Aussi, cette proposition de définition n'est pas acceptable pour la délégation du Chili. Elle ajoute que sa délégation serait favorable à l'extension de l'âge limite, ainsi que l'a proposée la délégation de la Suisse.

74. **Ms Carlson** (United States of America) stated that she would be brief and that the delegation of the United States of America agreed with the comments made by the Delegate of the European Community. She summarised her delegation's position with respect to Article 3 as being that they did not believe it required amendment, but for the possible addition of definitions and, further, that any discussion on authentic instruments and private agreements should be deferred until discussion on Article 26 occurred.

75. **The Chair** thanked the delegates and stated that if there were no more interventions then the text in Article 3 would remain as it stood, and the definition of "maintenance agreement" as proposed by the delegation of Canada in Working Document No 46 would be considered at the same time as discussions in relation to Article 26.

76. **Mr Ding** (China) noted in relation to the definition of "legal assistance" that it remained within square brackets.

77. **The Chair** responded to Mr Ding and noted that when the notion of legal assistance was discussed, it was agreed that the first sentence of the definition of "legal assistance" in Article 3 would be removed from the square brackets but that the status of the second sentence contained in the definition still had to be considered and therefore remained in square brackets. She noted that when a consensus was reached, the Drafting Committee would be instructed accordingly as to what action to take with regards to the remaining square brackets in Article 3.

Article 25 – Présence physique de l'enfant ou du demandeur (Doc. trav. Nos 44 et 47) / Physical presence of the child or applicant (Work. Docs Nos 44 and 47)

78. **The Chair** moved the discussion to Article 25 of the Convention, concerning the non-requirement of the physical presence of the child or applicant in any proceedings in the requested State. She noted that proposals contained in Working Documents Nos 44 and 47 had been made by the delegation of Canada in relation to Article 25. She therefore handed the floor to the delegation of Canada.

79. **Mme Gervais** (Canada) présente la proposition de la délégation du Canada contenue dans le Document de travail No 44 et portant sur l'article 25 de l'avant-projet de Convention.

La délégation du Canada propose dans un premier lieu de supprimer les crochets de l'article 25 et de conserver le texte afférent.

Ensuite, elle indique que sa délégation propose de supprimer le mot « physique » qui vient qualifier la présence de l'enfant ou du demandeur. En effet, la présence de l'enfant ou du demandeur, sous quelque forme que ce soit, ne devrait pas être exigée dans le cadre de procédures de demandes d'aliments introduites dans l'État requis.

La délégation du Canada souhaiterait également que cette disposition soit déplacée et intégrée au sein du chapitre VIII de l'avant-projet de Convention (Dispositions générales) afin qu'elle s'applique non seulement aux procédures de reconnaissance et d'exécution des décisions mais également aux procédures de demandes de décision ou de modification d'une décision en matière d'obligations alimentaires.

Mme Gervais indique que cette règle, selon laquelle la présence de l'enfant ou du demandeur ne peut être exigée, est conforme à une pratique bien établie au Canada, grâce à la conclusion d'accords sur cette question.

80. **Mr Hayakawa** (Japan) thanked the Chair and stated that the delegation of Japan would prefer to delete Article 25. However, his delegation could be flexible, he stated, if it was made clear that the Article simply prohibited the requested State from requiring the presence of the child or applicant in any proceedings in their State, and did not prevent the child or applicant being present if they wished to be.

81. **Mme González Cofré** (Chili) indique que la délégation du Chili est favorable à la proposition de la délégation du Canada concernant l'article 25. Elle précise que depuis plusieurs années au Chili, la présence physique de l'enfant n'est pas requise dans le cadre de procédures de demandes d'aliments provenant de l'étranger.

82. **Mr Moraes Soares** (Brazil) thanked the Chair and stated that the delegation of Brazil supported the proposal that had been made by the delegation of Canada in Working Document No 47.

83. **Ms Carlson** (United States of America) offered the support of the delegation of the United States of America for the proposals made by the delegation of Canada in Working Documents Nos 44 and 47. She stated that the delegation of the United States of America had made a similar proposal. She observed that it would undermine the process and intention of the Convention if a requested State required a child or applicant to be physically present in any proceedings in the requested State, which would of course be a foreign country. She noted that the proposal that had been made by the delegation of Canada went one step further and also removed the word "physical" from Article 25. Ms Carlson stated that her delegation also supported the removal of that word.

84. **Ms Lenzing** (European Community – European Commission) thanked the Chair and stated that in relation to Article 25, the delegation of the European Community supported the existing text of the Article and suggested that the square brackets be removed. She stated that Article 25 was useful in the context of proceedings for recognition and enforcement and that the delegation of the European Community could not agree with the proposal of the delegation of Canada in Working Document No 44 to also extend the application of Article 25 to all types of applications under the Convention. She noted that it could not be accepted to restrict all possibilities arising in applications of all types where the physical presence of a child or applicant in any proceedings in the requested State was necessary. For example, Ms Lenzing suggested that there were some situations where a judge may find such physical presence necessary and, therefore, the Convention should not restrict the civil procedure rules contained in certain jurisdictions. Ms Lenzing therefore agreed with the current text of Article 25 not to require the physical presence of a child or applicant in applications for recognition and enforcement in the requested State, but did not agree with extending this provision to other applications made under the Convention.

In relation to the comments made by the delegation of Japan, Ms Lenzing noted that their interpretation was not how Article 25 was to be understood, but that the effect of the Article was only that a requested State shall not require the physical presence of a child or applicant in any proceedings in that State. It did not mean that a child, applicant or their lawyer would be prevented from being present if they wished.

85. **The Chair** thanked the Delegate of the European Community for her clarification and noted that the delegation of the European Community would not support the relocation of Article 25 to Chapter VIII. The Chair queried the position of the delegation of the European Community in relation to the proposal of the delegation of Canada to delete the word "physical".

86. **Ms Lenzing** (European Community – Commission) stated, in relation to the question from the Chair, that if the word "physical" were deleted from Article 25 in accordance with the proposal made by the delegation of Canada, there was a risk that the Article may be interpreted in a manner similar to that of the delegation of Japan. As an example, she suggested that the deletion of the word "physical" from Article 25 may be interpreted as meaning that the appearance of a lawyer representing a child or applicant would not be required in any proceedings in the requested State. She suggested that there perhaps was a need to clarify Article 25 in the Explanatory Report to the Convention, but did not consider there to be a need to remove the word "physical".

87. **Mr Ding** (China) agreed with the comments made by the Delegate of the European Community. He did not believe that Article 25 should be moved to Chapter VIII and in relation to the phrase "physical presence" in Article 25, he noted that the delegation of China could not imagine how else a child or applicant could be present if they were not present in the proceedings in a physical form.

88. **Mr Beaumont** (United Kingdom) agreed with the Delegate of the European Community and also supported the retention of the word "physical" in Article 25. He noted that the word "presence" would normally imply physical presence anyway, but if, by deletion of the word "physical", the Convention would prevent a child or applicant from being required to be present in proceedings in the requested State via video-link for example, then that would be the opposite of what was desired under the Convention. He noted that the ability of a child or applicant to give evidence via video-link was certainly technically possible and allowable in some jurisdictions, and so, if by deletion of the word "physical" from Article 25, such evidence would be prevented even if it were allowable, then that would be contrary to legal processes and notions that prioritise the direct giving and availability of evidence. Mr Beaumont noted that the intention of Article 25 was to prevent the requested State from requiring the presence of a child or applicant in any proceedings in the requested State, not to prevent their presence, physical or otherwise, if it was possible and allowable.

89. **Ms Cameron** (Australia) noted that the delegation of Australia supported the deletion of the word "physical" as it could see some added benefit in doing that. She noted that Article 25, even without the word "physical", would not mean that evidence via video-link would be prevented if it were possible and allowable, but simply that a requested State could not require the presence in proceedings for recognition and enforcement in the requested State. Ms Cameron stated that the delegation of Australia did not support the relocation of Article 25 to Chapter VIII.

90. **Ms Carlson** (United States of America) queried whether the Delegate of Australia had stated that her delegation did or did not accept the relocation of Article 25 to Chapter VIII.

91. **Ms Cameron** (Australia) clarified that the delegation of Australia did not support the relocation of Article 25 to Chapter VIII.

92. **Ms Carlson** (United States of America) thanked the Delegate of Australia and stated that the delegation of the United States of America could be flexible with regard to the retention of the word "physical" in Article 25, and that if there was an issue with the interpretation of the provision in a manner that had been highlighted by the delegation of Japan for example, then further clarification could always be included in the Explanatory Report to the Convention.

Ms Carlson was concerned and alarmed however, that delegates were not willing to extend the application of Article 25 to the whole of the Convention through its being moved to Chapter VIII. She emphasised that applications for the establishment or modification of an existing decision, for example, could be meaningless if the presence of a child or applicant was required by a requested State and in circumstances where this was not paid for by the requested Central Authority.

Ms Carlson noted that the delegation of the United States of America believed that Article 25 should also apply to applications for the establishment or modification of a decision. She stated that her delegation was flexible with regards to the removal of the word "physical" or otherwise, but that the extension of Article 25 to other applications made under the Convention was crucial. She stated that if it were not extended, then the Central Authority of the requested State would, by necessary conclusion, be forced to pay for a child or applicant to be present in proceedings in the requested State when it was deemed necessary.

93. **Mme Mansilla y Mejía** (Mexique) demande des éclaircissements concernant la version espagnole du projet de Convention. En effet, l'article 25 vise toutes les procédures ; or cela peut comprendre non seulement les procédures de reconnaissance et d'exécution de demandes mais également les demandes d'aliments. Il conviendrait alors de définir ce qu'est une procédure afin de viser uniquement les procédures de reconnaissance et d'exécution. En outre, elle indique être favorable à la proposition de la délégation d'Israël concernant les procédures de reconnaissance et d'exécution des décisions (Doc. trav. No 25).

94. **Ms Lenzing** (European Community – Commission) referred to the comments made by the Delegate of the United States of America to the effect that the delegation of the United States of America was alarmed that delegates were not willing to extend the application of Article 25 to the whole of the Convention through its relocation to Chapter VIII. Ms Lenzing stated that this provision had always been located within Chapter V in relation to recognition and enforcement and that the delegation of the European Community, along with other delegations, had simply stated that Article 25 should be left where it currently was. She noted that a requested State within the European Community would not necessarily require the presence of a child or applicant in proceedings in the requested State but that any sensible judge would leave the requirement for the presence of a child or applicant open as an option when national procedural rules allowed them to do that.

95. **M. Heger** (Allemagne) indique qu'il se rallie aux positions exprimées par les délégations de la Communauté européenne et du Royaume-Uni. Il tient à préciser, cependant, qu'en pratique, l'objectif de cette discussion n'est pas de permettre à un juge d'exiger, pour chacune des affaires présentées devant lui, qu'un enfant parcourt des milliers de kilomètres pour se rendre au tribunal. Il s'agit ici essentiellement de laisser aux juges la possibilité d'utiliser les moyens mis à sa disposition, telle que la vidéoconférence. Il souligne que l'indépendance et la souveraineté des juges doivent être respectées.

M. Heger donne l'exemple d'une délégation d'outre-mer qui, lors de la réunion de la Commission spéciale de 2006 sur le fonctionnement de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*, avait insisté sur l'importance de l'indépendance des juges et refusait que l'on puisse y porter atteinte d'une quelconque manière. M. Heger considère qu'il s'agit également d'une question cruciale dans ce contexte.

96. **Mr Segal** (Israel) thanked the Chair and supported what had been said by the Delegate of the United States of America. He believed that Article 25 should also be applicable to applications for the establishment and modification of a decision and that the Article should therefore be moved to Chapter VIII, the "General provisions" of the Convention.

97. **Ms Escutin** (Philippines) thanked the Chair and stated that the delegation of the Philippines supported the deletion of the square brackets in Article 25 and the retention of the text, including the word "physical". She noted that this approach to Article 25 gave a judge some flexibility to hear evidence from a child or applicant via video-link in proceedings for the recognition and enforcement of a decision in the requested State, when that was necessary and allowable through the internal procedural law of that requested State.

98. **Mr Ryng** (Poland) supported the comments that had been made by the Delegate of the European Community and noted, as one additional argument, that it was important that Article 25 be limited to cases involving only recognition and enforcement since it was in those cases only that the presence, physical or otherwise, of a child or applicant was not as important, *i.e.*, because a decision had already been made in another jurisdiction where the child or applicant was presumably present to either make or defend their claim. Mr Ryng added that in any event, in most cases it was difficult to imagine the requirement for the presence of a child or applicant being necessary.

99. **M. Gil Nievas** (Espagne) approuve les propos de la délégation de la Communauté européenne et de celle de la Pologne. Il pense que cette position est directement liée à la complexité qui résulte des différences entre les systèmes. Dans la procédure espagnole, la demande d'aliments implique une procédure judiciaire et non administrative. Par conséquent, la présence des parties peut être requise. Cependant, l'article 25 est acceptable en raison du fait qu'il a

été inséré au sein du chapitre relatif aux seules procédures de reconnaissance et d'exécution.

100. **Mr Sello** (South Africa) supported the deletion of the square brackets in Article 25 and the retention of the text as it currently stood.

101. **M. Markus** (Suisse) souhaite le maintien du texte bien qu'il ne soit pas si essentiel de son point de vue. En effet, il note qu'en matière d'entraide judiciaire internationale il n'est pas possible de contraindre une partie ou un témoin à comparaître dans un pays, en matière civile ou commerciale. La seule latitude dont le juge dispose est de prendre des mesures désavantageuses à l'égard de la partie qui aura refusé de se présenter devant le tribunal ou la cour. Comme il n'est pas souhaitable que de telles mesures soient prises à l'encontre d'un enfant, l'article 25 demeure utile. Mais dans tous les cas, il n'est pas possible de contraindre une partie à se présenter dans un pays.

102. **Mme Dabresil** (Haïti) indique que le titre de l'article 25 est en contradiction avec le libellé de l'article lui-même. En effet, le titre se lit comme suit : « Présence physique de l'enfant ou du demandeur », alors que l'article 25 indique que la présence de l'enfant ou du demandeur n'est pas obligatoire lors de procédures introduites en vertu du présent chapitre dans l'État requis. Le titre de l'article 25 devrait donc être rédigé ainsi : « Présence non obligatoire de l'enfant ou du demandeur ».

103. **The Chair** thanked the delegations and said that if there were no further interventions, then she had observed definite agreement to retain Article 25 in its current form and delete the square brackets. She therefore asked the Drafting Committee to delete the square brackets in Article 25 and to revisit the title of this Article if it was considered necessary to reflect the fact that the provision was discussing the opposite to requiring the physical presence of the child or applicant in cases for recognition and enforcement. The Chair also stated that there had been no consensus to relocate Article 25 to Chapter VIII. The Chair adjourned the meeting until 2.30 p.m.

104. **Ms Ménard** (Canada) invited those members of the Working Group on effective access to procedures to meet in the working room for lunch.

The meeting was closed at 1 p.m.

Procès-verbal No 14

Minutes No 14

Séance du jeudi 15 novembre 2007 (après-midi)

Meeting of Thursday 15 November 2007 (afternoon)

La séance est ouverte à 15 h 50 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 39

1. **The Chair** noted that the next item on the agenda was Article 39 which related to a request for a power of attorney and was still between square brackets. She noted that the Forms Working Group had made a suggestion with regard to this related to Article 11 on the contents of an application, and she asked the co-Chair of the Forms Working Group to present it.

2. **Ms Cameron** (co-Chair of the Forms Working Group) noted that this proposal could be found at paragraph 24 of the Report of the Forms Working Group (Prel. Doc. No 31-A) and also in Preliminary Document No 36. She stated that the proposal was to address the principle of Article 39, which was that the Central Authority in the requested State could obtain from the applicant a power of attorney when necessary, and that the provision of such a power of attorney, where necessary, could be included in the list of application contents given in Article 11. She stated that the proposal was to add a paragraph to Article 11 to allow for this. She commented that the advantage was that this would make it clear that the power of attorney would be part of the application in circumstances where it was necessary, and it would be known from the Country Profiles when that was the case. The other advantage of moving away from specific mention of power of attorney to a more general authority was that it would be technologically neutral and would not rely on a particular piece of paper.

3. **The Chair** noted that two working documents had been submitted on this issue by the delegations of the European Community and Switzerland. She asked the Delegate of the European Community to present their proposal.

4. **Ms Lenzing** (European Community – Commission) stated that the proposal of her delegation could be found in Working Document No 45 and noted that the suggestion would at least partially align the language with that found in Article 28 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. She stated that she felt that the term "legal representative" was potentially misleading since it could also refer to the custodial parent of the child, but in this respect that was not what was meant. She stated that to express the concept intended here, which was to represent as a lawyer, would be clearer than the wording of Article 28 of the 1980 Child Abduction Convention. Ms Lenzing suggested adding a second limb to the phrase to make it clear that a power of attorney could be

required in order for the Central Authority to designate a representative to act in this manner. She stated that she would support the text of the Article with these modifications.

5. **Ms John** (Switzerland) stated that her delegation had made reference to powers of attorney in previous interventions and had submitted written comments, which could be found in Preliminary Document No 36 as well as in Working Document No 50. She noted that the Article currently read that the Central Authority of the requested State may require a power of attorney from the applicant only if it acts as a legal representative in judicial proceedings or before other authorities, but under the system in Switzerland the representative of the applicant should always produce a power of attorney whether or not he represents him in court or before other bodies. She stated that this would also apply to bodies that operated under the Convention as they represented the applicant against the defendant. She noted that it was possible that there would be an out of court settlement and therefore no need for judicial proceedings or proceedings before another authority. She commented that in Switzerland it is believed that the application must always arise out of the unequivocal will of the person, and the person must always be aware of the power he is giving. She stated that the power of attorney should be maintained and that it was also necessary for Article 20. She noted that amendments in this respect should also be made to Article 11. She then presented Working Document No 50 which reads: "A Central Authority may require a power of attorney from the applicant if the Central Authority of the requested State acts as legal representative on behalf of the applicant in judicial proceedings or before other authorities, or designates a representative so to act." She stated that like this it would be reduced to cases of legal representation in judicial proceedings or before other authorities.

6. **Mr Takebayashi** (Japan) supported the proposal of the delegation of the European Community.

7. **Mr Ding** (China) asked whether this Article was needed because the preliminary draft Convention did not require the request for the power of attorney by the Central Authority.

8. **Ms Lenzing** (European Community – Commission) responded to the question raised by the Delegate of China by stating that Article 39 had added value because, while it still referred to national law in the context of whether the power of attorney would be required to represent an applicant in judicial proceedings, it makes it clear that a power of attorney should not be required by the Central Authority to fulfil its duties. She noted that the power of attorney should only be sought if the required actions go beyond the core activities of the Central Authority. She gave the example of locating the debtor and stated that the Central Authority should not require a power of attorney to do this. She noted that powers of attorney required paper work and delays, and it was useful to have a provision that a power of attorney was not required for a Central Authority to start its work but a request for a power of attorney was allowed if the Central Authority was to represent the applicant in judicial proceedings.

9. **Mr Segal** (Israel) supported the proposal of the delegation of the European Community.

10. **Ms Morrow** (Canada) supported the proposal of the Forms Working Group.

11. **Ms Carlson** (United States of America) expressed support for the proposal of the Forms Working Group.

12. **The Chair** remarked that, according to her understanding of the proposal of the Forms Working Group, there would be a requirement in every case, under Article 11, for the application to contain the indication that the requested Central Authority may act on behalf of the applicant or designate a representative to act. She asked whether this solution was acceptable.

13. **Ms Lenzing** (European Community – Commission) stated that she was not sure if she had entirely understood the proposal, but her understanding was that there would be a box to tick in the application form to demonstrate that the applicant authorised the Central Authority of the requested State to act as its legal representative in judicial proceedings. She noted that if she were correct, she had a concern that this may conflict with the requirements in certain States that the power of attorney could not be given just by ticking a box on an application form and, if the law of the requested State so provides, the requested State should be able to require some additional form of paper work. She stated that her delegation could not agree to this proposal. She noted that the suggestion to specify under the Country Profiles when a power of attorney would be required would speed up the process since, if it were known that legal proceedings would be necessary, the power of attorney could be included with the application, and that would not be objected to.

14. **The Chair** stated that having heard this she would reverse this question. She asked whether the proposals of the delegations of Switzerland and the European Community, which were quite close, were acceptable.

15. **Ms Cameron** (Australia) noted that Australia did not require powers of attorney. She stated that the difference between these two proposals was that the proposal of the delegation of Switzerland deleted the word "only" so that it allowed powers of attorney to be requested in other circumstances as well, and that would be significant.

16. **Mr Markus** (Switzerland) thanked the Delegate of Australia for pointing out this difference but he noted that there was another one. He stated that according to the proposal of his delegation it was possible for either Central Authority to ask for a power of attorney, while under the proposal of the delegation of the European Community only the Central Authority of the requested State could ask for a power of attorney. He stated that it was important for the requesting State to be allowed to ask for a power of attorney as it could be important to show that the application was based on the free will of the party. He stated that it must be documented, for the protection of any authority acting in the requested State on behalf of the applicant, that the application was made by the free will of the party.

17. **Mr Segal** (Israel) stated that he wanted to explain why he supported the proposal of the delegation of the European Community. He stated that it was more suitable to ask for a power of attorney than to automatically tick a box because in many States a court would not accept this. He stated that the Delegate of Switzerland had noted that this might be needed in the requesting State, but he remarked that this could be regulated by national law and there was no need to include it in the revised preliminary draft Convention. He stated that for the requested State, getting the power of attorney marked a different stage of a proceeding. He noted that when the State was going to start court proceedings, the creditor may prefer that another method be used and

may not want to be bound to court proceedings. He commented that being asked for a power of attorney provided him with an opportunity to reconsider and make a distinction between administrative work and court proceedings.

18. **The Chair** stated that there had been several proposals and she noted that those delegates who had taken the floor to express their preference for the different proposals had given no indication of being able to accept the other proposals. She stated that Article 11, paragraph 1, subparagraph (g), provides that any information or document specified by declaration in accordance with Article 58 may be requested by the requested State. She noted that if the power of attorney were required, this provision would allow this. She wondered whether there were any objections to the proposal of the delegation of the European Community in this context, because if Contracting States wanted to have a power of attorney then it should be accepted under Article 11. She asked whether there were any objections to the proposal of the delegation of the European Community.

19. **Mr Markus** (Switzerland) stated that his delegation could support the proposal of the European Community.

20. **The Chair** thanked the delegation of Switzerland and asked if there were any more views. There were no more remarks and she concluded by asking the Drafting Committee to insert the proposal of the delegation of the European Community into the text and to remove the brackets around the text.

Article 48

21. **The Chair** noted that Article 48 related to the monitoring and review of the Convention and she noted that it was not between square brackets. She stated that this issue was discussed in the Report of the Administrative Co-operation Working Group (Prel. Doc. No 34) and she asked the co-Chair of the Sub-committee on Monitoring and Review of the Operation and Implementation of the Convention to introduce it.

22. **Ms Matheson** (co-Chair of the Sub-committee on Monitoring and Review of the Operation and Implementation of the Convention, Administrative Co-operation Working Group) referred to Preliminary Document No 34 and stated that it was important that everyone understood the level of commitment involved and the extent of the resources, time and effort that had been shared over the last few years.

She noted that that the Administrative Co-operation Working Group became a fully constituted Hague Special Commission Working Group in 2004, although it had operated informally before then. She commented that any Member of the Hague Conference and any State or international organisation invited to participate in the Special Commission could have taken part in the Working Group, and approximately 60 individuals from 24 States and organisations had participated since the June 2006 Special Commission.

Ms Matheson stated that the goals of the Working Group were to improve administrative co-operation between countries that handled international maintenance, and to work on recommendations in relation to administrative co-operation for the drafting of the preliminary draft Convention. She commented that there were two sub-committees and that the Forms Working Group had originally started as a sub-committee of the Administrative Co-operation Working Group. She stated that there was a focus on improving administrative communication. She remarked that most of the work was carried out through teleconferences but that the Working Group had also benefited from the resources of Canada to meet in London in March 2007. She stated that the Administrative Co-operation Working Group was to be regarded as a work in progress.

She noted that the Report of the Sub-committee on Monitoring and Review of the Operation and Implementation of the Convention made many detailed recommendations, though not all were necessarily supported by all members of the Sub-committee or the Working Group on Administrative Co-operation. But all members had recognised the need to continue to work, with the guidance of the Diplomatic Session. She noted that the meeting in March 2007 had been very helpful and three main issues were discussed in great depth: the development of streamlined processes that minimise costs as a means of providing effective access to procedures, the development of Guides to Good Practice, and the establishment of a Central Authority co-operation committee. She stated that the 14 States that are listed in Preliminary Document No 34 participated in the London meeting, along with the European Community and international organisations, and they worked under the guidance of the Permanent Bureau.

Ms Matheson stated that she would not go into detail on the Report since there were so many valuable parts, but rather would focus on a few. She referred to the development of Guides to Good Practice and stated that this was considered an essential aspect of post-Convention work to help countries gain information from the experiences of other States. She stated that the guide to implementation was the first Guide to Good Practice that was recommended and she commented that a draft would hopefully be developed about six months after the end of the Diplomatic Session, and that a final version could hopefully be presented to a Special Commission meeting convened 18 months after the Diplomatic Session. She stated that two other Guides to Good Practice, on the practical operation of the Convention and on operating a Central Authority, were considered a high priority.

She referred to the recommendation for the establishment of a case law database and mentioned INCADAT, and stated that this would demonstrate how valuable such a database would be. She referred to the recommendation for an electronic case management and communication system and stated that this was one of the most effective means to enhance casework between countries. She remarked that she did not have to say much on this after the presentation of Mr Lortie (First Secretary) and that of the Country Profiles Sub-committee had shown how user-friendly this type of technology could be. She stated that iChild was a good example of such a case management system under the 1980 Child Abduction Convention.

Ms Matheson referred to the recommendation to collect statistics and noted that the delegation of Switzerland had submitted a written comment expressing concern that the statistics necessary should place a minimum burden on Contracting States in terms of data collection. She stated that this was always the first thing that was considered and she remarked that it could be seen from the report that the data elements for reporting were minimal but essential.

She stated that the last major aspect was the establishment of a Central Authority co-operation committee under the Convention. She stated that much time had been spent over the last four years talking about this issue and she remarked that she did not think that there was a country involved in the Administrative Co-operation Working Group that did

not see the benefit of this. She noted that it would help Contracting States and there was strong support for this idea. She stated that there was little opportunity for the Diplomatic Session to fully consider the establishment at this time of such a committee. She stated that, while the recommendation was for this type of committee in the future, for the time being, until the first Special Committee meeting subsequent to this Diplomatic Session, it was proposed that the Administrative Co-operation Working Group continue its work and would only ask that the Final Act mention the possibility for this Working Group to continue its work. She noted that this proposal was strongly supported by the members of the Administrative Co-operation Working Group.

23. **The Chair** thanked all the members of the Administrative Co-operation Working Group and opened the floor for discussion.

24. **Ms Ménard** (Canada) thanked the members of the Administrative Co-operation Working Group for advancing the work on administrative co-operation. She supported having a Guide to Good Practice and stated that Canada was willing to contribute to this work. She stated that, in relation to the work of the Administrative Co-operation Working Group when the Central Authority co-operation committee would be in place, it would be a good idea to have an advisory committee under the direction of the Special Commission. She also stated that co-operation was essential for the good operation of a Convention concerning inter-jurisdictional enforcement.

25. **The Deputy Secretary General** thanked all the members of the Administrative Co-operation Working Group, including the co-Chairs and past co-Chairs such as Ms Kurucz, Ms Degeling and Mr Aguilar Castillo, on behalf of the Permanent Bureau. He thanked the Office of Child Support Enforcement in the United States of America for funding the conference calls which made the work possible. He noted that the work of the Permanent Bureau on post-Convention matters had become more and more intense as time went on, particularly in relation to the 1980 Child Abduction Convention.

He stated that he welcomed the report of the Administrative Co-operation Working Group and that he supported all the recommendations. He commented that the Permanent Bureau would like to start working on the Guides to Good Practice as soon as possible, subject to available resources, and he stated that the development of such a guide, particularly a practical guide for case workers, would be useful. He stated that it was a complex Convention and that it needed to be interpreted in a way that made sense to those who would be working with it.

He stated that he supported the other recommendations, and noted that INCADAT was a great success and that he would want it, subject to resources, to extend to the new Convention. He referred to the establishment of a Central Authority co-operation committee and stated that he thought this would be a very helpful initiative. He noted that the work of the Administrative Co-operation Working Group had itself shown that this kind of networking did produce results and helped to establish the links and friendships that were necessary for the Convention to work properly and to build up co-operation between States. He stated that it would also be a support for the Permanent Bureau and an invaluable source of advice regarding good practice, and that it would cement international co-operation.

26. **Ms Cameron** (Australia) stated that her delegation endorsed the work of the Administrative Co-operation Working Group and the Sub-committee on Monitoring and Review of the Operation and Implementation of the Convention and would support all of its recommendations. She stated that the delegation of Australia had invested a significant amount of time into the work and would continue to do so. She stated that the practical benefits were equally as great as those from the mechanisms created under the future Convention. She noted that the Deputy Secretary General had mentioned friendships, and remarked that she thought that those would prove valuable in the future.

27. **Ms Bean** (United States of America) stated that she wished to join the prior speakers in thanking the Administrative Co-operation Working Group and its sub-committees as well as current and prior chairs. She stated that as a member of the Working Group she remembered being on conference calls with people in different time zones where it was very early for some and very late for others. She referred to the friendships mentioned and stated that part of this was the feeling that they had gone through a very hard time together, and this would help going forward. She stated that the Deputy Secretary General aptly summarised the feelings about the Administrative Co-operation Working Group. She stated that she agreed with all the recommendations, subject to funding, and she supported including these in the Final Act.

28. **Mr Markus** (Switzerland) noted that he was a member of the Administrative Co-operation Working Group but was not a member of this sub-committee, and he stated that this entitled his delegation to add their thanks to those already expressed.

He stated that he was convinced of the usefulness of what had been done and of the ideas proposed, such as a Guide to Good Practice including a Guide to implementation. He stated that these were necessary and useful. He noted that he had always had a certain concern not to overburden the Central Authorities, and this was important especially for States that have restricted roles for Central Authorities. He stated that he would never want to see States refrain from ratification because they were afraid of the burden. He stated, however, that these items were useful and the work had to be done. He recommended that the guides be as short as possible so as to be handled more easily, and that the collection of statistics not be too burdensome for Central Authorities.

Mr Markus referred to the establishment of an advisory committee of Central Authorities and stated that this was a good idea at first view. He noted that it was a new idea, that no other Convention had such a committee, and that it was normally for the Special Commissions organised by the Permanent Bureau to provide a forum for Central Authorities to communicate with each other and to discuss problems. He stated that this had provided a good system and asked what the additional framework for the advisory committee would be. He asked whether it would be a committee that worked as efficiently as the Administrative Co-operation Working Group had and whether it would have a comparable framework that featured teleconferences. He stated that he would favour this as it would be efficient, useful and cost- and time-saving.

29. **M. Heger** (Allemagne) indique que la délégation de l'Allemagne a également pris part à ce groupe et qu'elle se réjouit du résultat. Il relève qu'il était très agréable pour sa délégation de participer à ces conférences téléphoniques et se déclare admiratif de ceux qui ont dû y participer à minuit

ou à quatre heures du matin. Il exprime sa gratitude envers tous les responsables de ce groupe, ainsi qu'au Secrétaire général adjoint du Bureau Permanent pour le travail accompli.

En ce qui concerne les travaux futurs, il indique que sa délégation appuie l'élaboration d'un Guide de bonnes pratiques, et précise que son pays connaît déjà ce mécanisme à travers la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*. M. Heger indique également apprécier l'éventualité d'une base des données statistiques qui facilitera le travail de mise en œuvre de la présente Convention, sur le modèle d'INCADAT. Il estime que l'établissement d'un comité de coopération des Autorités centrales sera d'une grande utilité, et exprime son optimisme quant à sa création. Le Délégué de l'Allemagne évoque le Document préliminaire No 34, lequel dispose que ce comité prêtera assistance au Bureau Permanent de la Conférence de La Haye et considère que l'initiative est excellente. Il relève également qu'au regard des expériences de ces dernières années, ce mécanisme est prometteur. Pour conclure, il indique que la délégation de l'Allemagne est prête à fournir son assistance pour que l'établissement de ce comité soit un succès.

30. **The Chair** stated that it was clear that there was general support for the Administrative Co-operation Working Group and she found that there was agreement that the Final Act should mention that the Diplomatic Session endorsed the work done by the Working Group and supported the continuation of its work. She stated that the draft of the Final Act would include such provision and could be examined when it would be presented. The Final Act would include an endorsement of the continued operation of the Administrative Co-operation Working Group.

The Chair noted that the meeting had finished all the items on the agenda, but that there remained some working documents that had not been discussed.

31. **Mr Tian** (China) asked if it could be added that the Administrative Co-operation Working Group could continue its work but that this needed to be undertaken under the guidance of a future Special Commission.

32. **The Chair** thanked the Delegate of China and stated that it would certainly be under the guidance of the Special Commission and this would be included.

Document de travail No 18 (Titre de la Convention) / Working Document No 18 (Title of the Convention)

33. **The Chair** noted that some working documents had been submitted in relation to articles not covered by the agenda. She proposed to start with Working Document No 18, submitted by the delegation of Canada and related to the title of the preliminary draft Convention. She asked the Delegate of Canada to present the proposal.

34. **Ms Ménard** (Canada) noted that French and English were the two official languages of Canada, and that the two official titles of the preliminary draft Convention were not exactly the same. She stated that the proposal was to make the title of the two versions consistent and to better describe the subject matter of the preliminary draft Convention.

35. **The Chair** noted that the proposed new English title was "Convention on the International Recovery of Child Support and Maintenance for Other Family Members". She asked whether there were any reactions to this, whether it was acceptable.

36. **Mr Mthimunye** (South Africa) stated that the new English wording as regards family members was a bit confusing or complicated for his delegation. He noted that, in a South African context, "family members" was too broad as it referred to the extended family, such as uncles and aunts and a range of other relatives, and this may cause problems. He asked if it would be possible to find a better translation for other languages.

37. **Ms Carlson** (United States of America) stated that she could not presume to comment on the French title, but she noted that, perhaps because she was so accustomed to seeing this title on documents for the past few years, the original title sounded smoother and better. She remarked that she thought that it was not necessary to have a precise, exact translation. She added that she did not feel too strongly about it, but slightly preferred the current version.

38. **Mr Tian** (China) requested clarification. He asked why the English title of the preliminary draft Convention should be changed to make it the same as the French, and why it could not be the other way around.

39. **Mr Hat'apka** (European Community – Commission) noted that the title was usually decided at the end of the conference. He suggested reflection on the practical aspect, and noted that a long title would be abbreviated anyway so that perhaps a short title should be adopted. He stated that there were many short titles that could be considered, and he suggested that the Drafting Committee could come up with a list of short but precise titles to choose from.

40. **The Chair** asked if there were any strong views on the title at this point.

41. **Mr Markus** (Switzerland) stated that he did not have a strong view but shared the impression that was expressed by the Delegate of the United States of America. He stated that he agreed with the Delegate of the European Community and the decision should be deferred until later.

42. **M. de Leiris** (France) souhaite juste rassurer les délégations qui s'inquiètent de ce que le titre en français puisse gouverner le titre anglais. Il fait remarquer que le français est logé à la même enseigne que l'anglais, à savoir que dans le Document préliminaire No 36, le Bureau Permanent a également proposé une modification du titre français. Mais il indique que sa délégation va améliorer le titre français suivant les suggestions du Bureau Permanent.

43. **Ms Escutin** (Philippines) joined the other delegations in preferring to retain the present title. She noted that it had the comfort of the familiar, and also took into consideration that some countries might opt out as regards other forms of family maintenance and so it would not extend to other family members.

44. **Mr Beaumont** (United Kingdom) stated that he did not think it was worth spending time on this, or even worth the Drafting Committee spending time on it. He stated that if there was no clear preference to change the title, then the current title should be kept.

45. **The Chair** stated that the current title would be kept but perhaps the issue would be revisited.

Document de travail No 26 (art. 16, para. 3) / Working Document No 26 (Art. 16, para. 3)

46. **The Chair** asked the Delegate of Switzerland to present Working Document No 26 on Article 16, paragraph 3.

47. **Mr Markus** (Switzerland) stated that the proposals of the delegation of Switzerland were minor. He referred to Article 16, paragraph 3, sub-paragraph (a), and stated that the proposal was for an amendment of the Explanatory Report for the reasons that had been explained by his delegation in the Special Commission. He noted that decisions by administrative authorities in his country were not subject to immediate appeal to a judicial authority. He stated that there was first an administrative appeal or review of the decision, and then at a second stage there was a judicial appeal. He stated that he thought it was already covered by Article 16, paragraph 3, sub-paragraph (a), but would like to see it clarified in the Explanatory Report. He referred to the proposal for Article 16, paragraph 3, sub-paragraph (b), and stated that it would replace the words "the same force" with "a similar force", because decisions by administrative authorities sometimes do not have the same force but a comparable force. He noted that there were differences in the execution and *exequatur* law of Switzerland where these might be treated slightly differently but still similarly. He stated that this amendment was proposed in order to avoid any difficulty with respect to decisions by administrative authorities in Switzerland.

48. **Ms Cameron** (Australia) stated that she would like to support both proposals. She remarked that for a State with administrative authorities, both of these clarifications seemed appropriate.

49. **The Chair** asked if there were any objections. There were no remarks and the Chair concluded that the proposal of the delegation of Switzerland was accepted. She asked the Drafting Committee to make the changes proposed in Working Document No 26.

Document de travail No 47 (chapitre V) / Working Document No 47 (Chapter V)

50. **The Chair** asked the Delegate of Canada to present Working Document No 47, which contained a proposal about the terminology used in Chapter V.

51. **Ms Gervais** (Canada) noted that there was a corrected version of Working Document No 47 and also that the delegation of Canada had provided written comments which could be found in Preliminary Document No 36 under comments on Chapter VIII. She noted that in Articles 17, 20, 21, 25 and 26, the term "requested State" appeared to have been inappropriately used instead of the term "State addressed". She stated that the term "requested State" was used when talking about administrative co-operation, but that "State addressed" should have been used when talking about competent authorities that were responsible for recognition and enforcement. She noted that this difference did not raise the same concern in French as the same term was used for both.

52. **The Chair** asked if there were any objections to this change of terminology. She noted that it was a Drafting Committee matter, and so if there were no interventions she would send it to the Drafting Committee and they would make the changes.

53. **M. Heger** (Allemagne) indique qu'il n'a rien contre la proposition du Canada. Il estime qu'il lui aurait fallu préalablement une petite recherche. Il indique que dans le contexte de la Convention Enlèvement d'enfants de 1980, on ne parle que d'État requis et non d'État adressé. Il reconnaît qu'il s'agit d'une tâche du Comité de rédaction, mais souhaite juste signaler ce fait en se référant aux autres Conventions. Il estime que la formulation proposée par la délégation du Canada risque de ne pas être très adéquate. Mais il indique que sa délégation s'en remet au Comité de rédaction, tel que l'a mentionné la Présidente.

54. **Mr Voulgaris** (Greece) stated that he had taken the floor to agree with what had been said. He stated that he preferred to always have the same terminology as before because it was the same matter, namely administrative and judicial co-operation. He stated that if there was an "addressed State" then there must be an "addressing State", but he would prefer that the Drafting Committee use the same wording as before.

55. **Mr Beaumont** (United Kingdom) stated that the Delegate of Canada was correct and that it was a mistake by the Drafting Committee, which had been inconsistent in its use of language. He noted that "requested" was mostly used in Chapter V and that it was an oversight on the part of the Drafting Committee. He stated that the fact that it was used in the 1980 Child Abduction Convention was not surprising, as that Convention did not deal with recognition and enforcement. He thanked the delegation of Canada for their proposal and stated that it would be dealt with in the Drafting Committee.

56. **Mme Mansilla y Mejía** (Mexique) indique qu'elle n'a pas d'opinion en ce qui concerne le changement de formulation en anglais proposé par la délégation du Canada. Elle se demande quelle serait la traduction en espagnol. Elle craint qu'il puisse se poser un problème d'interprétation.

57. **The Chair** stated that this would be left to the Drafting Committee.

Document de travail No 24 (art. 4, para. 3) / Working Document No 24 (Art. 4, para. 3)

58. **The Chair** noted that there was another working document submitted by the delegation of Canada, Working Document No 24, related to Article 4.

59. **Ms Riendeau** (Canada) stated that this proposal was for an amendment to Article 4, paragraph 3. She noted that the preliminary draft Convention imposed an obligation on Contracting States to inform the Permanent Bureau of their Central Authority designations at the time of ratification or accession. She commented that the purpose was to ensure that there was a functioning Central Authority at this time. She stated that the concern of her delegation was that, as drafted, the paragraph did not take into account the position of States that did not have unified legal systems and that may extend application of the Convention to their territories in stages, as might be the case in Canada. She remarked that, as a result of this, at the time of ratification the State may not be able to identify the Central Authorities for all provinces and territories. She remarked that they would be able to identify the Central Authorities for those provinces and territories to which it was to apply straight away, and they would be able to identify the others later when it was extended to apply to them. She suggested that it should be provided that this information would be supplied to the Permanent Bureau when the application of the Convention was so extended, and that Article 4, paragraph 3, should be amended by adding "or when a declaration is submitted in accordance with Article 56 of the Convention".

60. **The Chair** asked if there were any objections. There were no remarks and the Chair asked the Drafting Committee to make the necessary change to the text.

Article 50

61. **The Chair** stated that she would like to return to one more item that had not been completed the previous day. She noted that this related to transitional provisions, and in particular to Article 50, paragraph 2. She recalled that the previous day there had been no agreement on the issue of whether there would be a special rule regarding payments falling due prior to the coming into operation of the Convention. She referred to Working Document No 49 submitted by the delegation of the European Community and asked that delegation to present its proposal.

62. **Ms Lenzing** (European Community – Commission) stated that her delegation could not agree to the proposal to delete paragraph 2, and after consultations they still could not agree, but they had made a proposal that should take into account the concerns of the delegation of the United States of America. She noted that in the recognition and enforcement of child support decisions, there was no policy argument that a person should not be able to enforce arrears falling due prior to the entry into force of the Convention, and so in respect of parent-child obligations her delegation would agree that paragraph 2 would not apply. She stated that since the scope of the paragraph went beyond child support obligations, and since her delegation believed that, as between spouses and other family members it was less acceptable to be able to enforce arrears which may be worth a considerable amount and which may stem from proceedings in a State where the debtor did not defend himself because he did not think that the decision would be enforceable in his State, the transitional provision in paragraph 2 should be retained. She stated that the suggestion was to maintain the text but to carve out an exception for children. She stated that this linked in with the core scope of the preliminary draft Convention, which could be extended, but for such extensions the exception would apply.

63. **Ms Carlson** (United States of America) thanked the delegation of the European Community for its proposal and expressed support for it.

64. **Mr Tian** (China) stated that he would like to keep the content of paragraph 2 and delete the brackets. He stated that his delegation could not support the proposal of the European Community in Working Document No 49. He remarked that it needed to be kept clear that States should not be bound to enforce a decision in regard of payments which were due prior to the coming into force of the Convention. He noted that this was a normal rule for any treaty.

65. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique estime que le fait d'appliquer la proposition de la Communauté européenne entraînerait une application rétroactive de la Convention. Elle considère qu'une telle application serait contraire au principe de droit.

66. **Ms Cameron** (Australia) stated that she was happy to see the proposal of the delegation of the European Community and she would strongly support it.

67. **Mr Segal** (Israel) stated that in order to compromise he would accept the proposal of the European Community, although he would have preferred to keep to the formal decision to delete paragraph 2.

68. **Mme Riendeau** (Canada) appuie l'amendement proposé par la délégation de la Communauté européenne, dans le Document de travail No 49.

69. **Mr Oliveira Moll** (Brazil) stated that he had no problem with the proposal of the Delegate of the European Community and he would support it.

70. **M. Marani** (Argentine) indique que sa délégation aurait préféré que le paragraphe 2 soit biffé. Mais il ajoute que dans le but d'obtenir un consensus, sa délégation pourra appuyer la proposition de la délégation de la Communauté européenne.

71. **Ms Nind** (New Zealand) expressed appreciation and support for the working document from the delegation of the European Community.

72. **M. Markus** (Suisse) indique que la délégation de la Suisse n'a pas d'avis prononcé sur le paragraphe 2, et que sa délégation soutient la proposition de la délégation de la Communauté européenne, qui lui semble raisonnable. Il observe qu'il est important de s'assurer que les anciens instruments applicables à la reconnaissance et à l'exécution des décisions relatives aux obligations alimentaires ne soient pas complètement écartés. Il mentionne notamment la *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires* qui, à son avis, pourrait être utilisée pour la reconnaissance et l'exécution des décisions sur des obligations qui ne tomberaient pas dans le champ d'application de la présente Convention. Il indique qu'un article du présent instrument prévoit que ce dernier remplace la Convention Obligations alimentaires de 1973 dans son champ d'application. Il considère que le Rapport explicatif doit fournir des précisions au cas où certaines prétentions ne tomberaient pas dans le cadre de cette Convention.

73. **Mme González Cofré** (Chili) indique que sa délégation n'a pas d'objections à formuler sur ce paragraphe. Elle appuie la proposition de la délégation de la Communauté européenne.

74. **The Chair** stated that as there were no more interventions, she would conclude that the vast majority of the delegates were in favour of the proposal. She asked the Drafting Committee to make the amendment as proposed and delete the square brackets around this Article.

75. **Mr Tian** (China) stated that his delegation was hesitant about this and needed to confer with the delegation of the European Community. He asked that the decision not be made now as they needed time.

76. **The Chair** stated that she understood and suggested that Article 50, paragraph 1, would be without square brackets and Article 50, paragraph 2, would be kept in square brackets, with the text amended as set out in Working Document No 49.

She stated that she would adjourn the Commission for the day. She noted that the next day there would only be a meeting of Commission I in the morning, and Commission II would be meeting in the afternoon. She stated that the important point was that the Working Group on Article 14 would present the result of its work and that this would be distributed in the morning and then discussed. She stated that the plan was also to take up the definition of private agreements as proposed by the delegation of Canada in Working Document No 46, and then look again at the question of public bodies. She stated that Working Documents

Nos 19 and 40 from the delegation of Switzerland would also be discussed.

77. **The Chair of the Drafting Committee** stated that there would be no meeting of the Drafting Committee that evening.

78. **M. Pereira Guerra** (Communauté européenne – Présidence) annonce aux membres de sa délégation la tenue d'une réunion de coordination dans dix minutes.

79. **Mr Moraes Soares** (Brazil) invited the Latin American States to have a meeting after the conclusion of this meeting.

80. **Ms Dehart** (International Bar Association) stated that in Working Document No 12 the International Bar Association had made a suggestion involving Article 9. She noted that this was presented when the discussion related to Article 34 and the examination of the proposal was deferred. She recalled that the proposal was to add a second paragraph to Article 9 that any two States could agree on proceedings to allow a direct application to the Central Authority of the requested State. She stated that she did not know whether there was a wish to discuss it but she wanted to call attention to the proposal.

81. **The Chair** stated that she had not forgotten that working document and she would get back to it.

The meeting was closed at 5.30 p.m.

Procès-verbal No 15

Minutes No 15

Séance du vendredi 16 novembre 2007 (matin)

Meeting of Friday 16 November 2007 (morning)

The meeting was opened at 9.55 a.m. with Ms Kurucz (Hungary) in the chair, and Ms Degeling (Permanent Bureau) and Mrs Borrás (Spain) as co-*Rapporteurs*.

1. **The Chair** welcomed the delegates. She recalled that on that day only the morning session would be dedicated to Commission I, in which time the Commission would address some of the remaining open issues.

Document de travail / Working Document No 46

2. **The Chair** stated that the discussion would begin with an analysis of the proposal in Working Document No 46 to re-designate "private agreements" as "maintenance agreements". She recalled that the delegation of Canada had already explained its reasons for proposing the amendment contained in the working document and stated that it would be appropriate to discuss the matter in conjunction with Article 26 of the revised preliminary draft Convention. She added that it had been decided to adopt an opt-in or opt-out approach to private agreements and authentic instruments. In this context she also called the attention of the delegates to the definition of authentic instruments in Working Document No 20 that had been submitted by the delegation of the European Community.

She added that it would be pertinent to discuss the extent of *ex officio* review that Central Authorities could exercise over private agreements and authentic instruments. The Chair explained that Article 26, paragraph 4, sub-paragraph (a), contained bracketed language concerning grounds for refusal of recognition and enforcement of authentic instruments and private agreements, particularly whether grounds for refusal should be limited to public policy or whether they should include grounds such as fraud and falsification.

3. **Ms Lenzing** (European Community – Commission) stated that as a matter of policy regarding Working Document No 46, her delegation would reciprocate the deference that the delegation of Canada had shown to it on the matter of the definition of authentic instruments.

However, Ms Lenzing asked whether it would be possible to merge the definitions of authentic instruments and private agreements. She noted that there were similar concerns in the context of private agreements as had been encountered regarding authentic instruments. Notwithstanding this, she concluded that if the delegation of Canada was not open to merging the two definitions, her delegation would accept to keep the definitions separate.

4. **Mme Mansilla y Mejía** (Mexique) indique qu'en ce qui concerne le contrôle d'office, la délégation du Mexique souhaite qu'il soit tenu compte de tous les motifs de refus.

5. **Ms Carlson** (United States of America) stated that authentic instruments and private agreements were not used in the United States of America in this context, but that her delegation would be flexible to the needs of others and would consider the definition proposed by the delegation of Canada.

On the matter of *ex officio* control, she was of the view that this should be limited to public policy. She stated that no greater degree of control could be exercised at the relevant phase because the Central Authority would not have additional information to evaluate the case.

6. **Mr Beaumont** (United Kingdom) stated that his delegation was sympathetic to the proposal of the European Community to streamline the definitions of authentic instruments and maintenance agreements because there was room for easier and clearer language to encompass the two definitions. He suggested that further work on a bilateral basis would be useful.

7. **M. Markus** (Suisse) relève que la délégation de la Suisse est en faveur de l'amélioration de la définition. De plus, la délégation de la Suisse est particulièrement favorable au remplacement des termes « accords privés » par les termes « accords en matière d'obligations alimentaires » comme le prévoit la proposition de la délégation du Canada (Doc. trav. No 46).

Procès-verbal/Minutes No 15

8. **The Chair** observed that the proposal of the delegation of Canada had been positively received. She first suggested that the proposed definition be placed in a footnote in the reviewed preliminary draft Convention. However, on further reflection, she concluded that the matter would be left open given that there were suggestions to revise the definition. Bearing that in mind, she emphasised that the proposal had been supported. On the matter of *ex officio* control, she concluded that there had been different views and that the square brackets should therefore be retained.

Document de travail / Working Document *No 19*

9. **The Chair** invited the delegation of Switzerland to present Working Document No 19. She noted that this working document concerned Articles of the revised preliminary draft Convention that had already been discussed.

10. **Mr Markus** (Switzerland) explained that the proposal of his delegation was intended to facilitate proceedings with respect to declarations by administrative authorities. He drew the attention of the delegates to Article 21 of the preliminary draft Convention. That Article provided that Central Authorities that were submitting administrative decisions for recognition and enforcement were bound to annex documents that confirmed that the requirements of Article 16, paragraph 3, had been satisfied. His delegation was of the view that this procedure was cumbersome and that it would be better for the requesting State to make a one-off declaration to the Permanent Bureau stating that all decisions of administrative authorities met the requirements of Article 16, paragraph 3. In this manner a single declaration would replace the submission of documents in every case.

11. **Ms Cameron** (Australia) supported the proposal to delete the requirement of submitting documents in every case, as was provided in Article 21, paragraph 1, sub-paragraph (b). However, she suggested that it would be better to deal with this through the information requirements in Article 51 of the revised preliminary draft Convention, rather than in Article 21.

12. **Mr Beaumont** (United Kingdom) agreed with the Delegate of Australia. He stated that a declaration was a very heavy way of dealing with this matter, and that the provision of information under Article 51 should be sufficient. He observed that this information would appear in the Country Profiles and other States would thereby be aware that decisions of administrative authorities satisfy the requirements of Article 16, paragraph 3.

13. **Mr Hayakawa** (Japan) observed that Working Document No 19 left room for a small problem, namely the situation where no declaration would be made under the proposed amended Article 21. In the latter case there would be no guarantee that the decision of an administrative authority met the requirements of Article 16, paragraph 3. He also questioned whether or not it was possible to say in abstract that all administrative decisions satisfied the said requirements, or if it would be more pertinent to deal with this matter on a case-by-case basis.

14. **Mr Tian** (China) stated that he shared the concerns expressed by the Delegate of Japan. He opined that, if the proposed Article 21, paragraph 1 *bis*, were added, the requesting State would lose control of whether the requirements of Article 16, paragraph 3, had been met and there would therefore be no guarantee to that effect.

15. **Mr Beaumont** (United Kingdom) stated that he could not think of any administrative system where it would be necessary to ensure that the requirements of Article 16, paragraph 3, had been satisfied on a case-by-case basis. He observed that in common law jurisdictions this would be satisfied through the one-time provision of information to the Permanent Bureau. He emphasised that this should be sufficient to States that had expressed concerns, and he questioned how one would review the decision of an administrative authority in recognition and enforcement cases. He asked why it would be necessary to open up the merits of each case when one had a systemic statement. The Delegate reiterated that this was a systemic question that need not be addressed on a case-by-case basis.

16. **Mr Ding** (China) explained that the preliminary draft Convention was not only intended for the States that were represented at the Diplomatic Session. He observed that there might be States that were not represented that had administrative systems which the delegates were not aware of. In his view, the possibility of the existence of different systems militated in favour of case-by-case declarations concerning the satisfaction of the requirements of Article 16, paragraph 3.

17. **Ms Carlson** (United States of America) stated that she strongly supported the views expressed by the Delegate of the United Kingdom. Her delegation also supported the proposal in Working Document No 19, as proposed to be revised by the Delegate of Australia. She observed that the hypothetical example proposed by the delegation of Japan and the delegation of China could not occur in practice. She added that Article 16, paragraph 3, sub-paragraph (b), provided that administrative decisions had the same force and effect as a decision of a judicial authority. She questioned why it would not be enough for a State to say that all of its administrative decisions satisfied the requirements of Article 16, paragraph 3. She asked why a State would make a statement to that effect if this were not so in all cases. She added that she was not aware of systems where some decisions would be sufficient and others would not. She emphasised that this was a systemic matter, and that it would not be right to force States to submit paperwork every time if they could deal with the matter systemically.

18. **Ms Lenzing** (European Community – Commission) observed that there was a theoretical possibility that there existed States whose administrative systems included a plurality of administrative authorities that made decisions regarding maintenance obligations. However, she was of the view that this could also be dealt with by means of information requirements whereby those States would communicate which administrative authorities' decisions always satisfied the requirements of Article 16, paragraph 3, and which would have to be confirmed on a case-by-case basis. She concluded that better drafting could resolve the theoretical problem.

19. **Mme Mansilla y Mejía** (Mexique) partage les préoccupations de la délégation de la Chine ainsi que de la délégation du Japon. En effet, il existe des exigences à l'article 16, paragraphe 3, de l'avant-projet révisé de Convention. Par conséquent, il est essentiel d'être certain que ces exigences seront respectées en contrôlant leur effectivité à chaque présentation d'un acte.

20. **Mr Hayakawa** (Japan) thanked the delegation of the United Kingdom, the delegation of the United States of America and the delegation of the European Community for clarifying the matter of case-by-case review of decisions. However, he noted that States that employed admin-

istrative systems should be obliged to declare that their administrative decisions satisfied the requirements of Article 16, paragraph 3, rather than only having the option to do so as the term "may" in the revised preliminary draft Convention implied.

21. **Mr Segal** (Israel) supported the views expressed in the immediately preceding intervention of the Delegate of Japan. He also supported the proposal of the delegation of Switzerland. He was of the view that Article 51 was of a general nature and did not deal with the distinction between authentic instruments and private agreements. He observed that the requested State would not be in a position to distinguish between an authentic instrument and a private agreement emanating from another State and therefore suggested that this matter should be dealt with separately from Article 51.

22. **The Secretary General** suggested the addition of the following words to Article 21, paragraph 1, sub-paragraph (b): "unless a Contracting State has by declaration informed the Permanent Bureau of the Hague Conference on Private International Law that all its administrative decisions meet the requirements of Article 16, paragraph 3". He proposed that this alternative solution could satisfy the concerns of the delegation of Japan and the delegation of China, while also giving States the opportunity to declare that their administrative decisions satisfied the requirements of Article 16, paragraph 3. He added that the wording could be tweaked to also include the qualification proposed by the Delegate of Australia concerning the means of information.

23. **Mr Markus** (Switzerland) stated that his delegation could agree with the proposal to provide information under Article 51, rather than a declaration under the proposed Article 21, paragraph 1 *bis*, since his delegation had no strong feelings on the method to be employed. He then referred to the intervention of the Delegate of Israel and explained that more specific information could be required under Article 51 of the preliminary draft Convention. He emphasised that the information should be specific enough to convey the information needed in the requested State.

Mr Markus then added that the question raised by the Delegate of Japan was an important one. He questioned whether the instrument that would be transmitted would be recognisable in the absence of a declaration. He asked what would be done if a Central Authority had forgotten to provide information under Article 51, and what effect this might have on the recognition of the said instrument. He suggested that in such a scenario the instrument would not necessarily be incapable of recognition, but that the requested State could either ask for more information on a bilateral basis or refuse recognition. Noting the lack of clarity, he suggested that States should be obliged to provide the necessary information.

Turning to the suggestion of the Secretary General, he stated that he was not sure if he had fully understood the import of the proposal. Mr Markus began to comment upon the proposal, but noted that the Secretary General had gestured that the understanding of the Delegate of Switzerland was different to that which had been intended. The Delegate therefore surrendered the floor.

24. **The Secretary General** explained that his idea was to retain the present text, which covers cases where a one-off declaration was not possible, and to cover situations where this was possible by adding the words "unless a Contracting State has by declaration informed the Permanent Bureau of the Hague Conference on Private International Law that its administrative decisions meet the requirements of Article 16, paragraph 3".

25. **Mr Beaumont** (United Kingdom) supported the solution proposed by the Secretary General. However, he urged that this should be done through the means of information, rather than a declaration. Accordingly, he suggested language to the following effect: "unless a Contracting State has provided information to the Permanent Bureau of the Hague Conference on Private International Law that all its administrative decisions meet the requirements of Article 16, paragraph 3". He reiterated that his delegation supported the use of information requirements, as opposed to declarations, because the provision of information was an easier solution.

He added that the policy of making the provision of information mandatory, as suggested by the delegation of Japan, was sound. However, he added that this was a somewhat theoretical concern as in practice all States would find that the provision of information on a one-off basis was more convenient.

26. **Mme González Cofré** (Chili) remercie la Présidente et salue l'ensemble des délégués. La délégation du Chili est en principe favorable au texte tel qu'il est présenté dans l'avant-projet révisé de Convention (Doc. prél. No 29). Néanmoins, la délégation du Chili prend en considération les préoccupations exprimées par plusieurs délégations et considère que le texte peut effectivement être amélioré. Cependant, elle souhaite maintenir le texte de l'avant-projet révisé de Convention.

27. **Mr Ding** (China) supported the proposal of the Secretary General. He noted that it was acceptable to have an option to choose between a systemic approach and a case-by-case solution. He added that it was important for States to make a declaration.

28. **Mme Mansilla y Mejía** (Mexique) soutient la proposition du Secrétaire général.

29. **Ms Lenzing** (European Community – Commission) stated that her delegation agreed with the observations of the Delegate of the United Kingdom. She emphasised that a system of declarations could be very complicated for the European Community and that her delegation therefore preferred an information system. She observed that she was not sure if it was very important for China to have a system of declarations, and she added that she understood that declarations added legal certainty. However, she emphasised that the provision of information would also satisfy the requirement of legal certainty.

30. **Ms Cameron** (Australia) made known her agreement with the proposal of the Secretary General. She added that her delegation preferred the use of information through Article 51.

31. **The Chair** concluded that the delegates were in agreement with the proposal of the Secretary General. In this context she noted that there was a preference expressed for the provision of information rather than a declaration. She therefore proposed to add the following text to Article 21, paragraph 1, sub-paragraph (b): "unless a Contracting State has provided information to the Permanent Bureau of the Hague Conference on Private International Law that all its administrative decisions meet the requirements of Article 16, paragraph 3". Noting the delegates' acceptance of this approach, she asked the Drafting Committee to

include said text and to make the necessary improvements thereto.

Document de travail / Working Document *No 40*

32. **The Chair** invited the delegation of Switzerland to introduce Working Document No 40 which proposed to amend Article 45 concerning co-ordination with other instruments.

33. **Mr Markus** (Switzerland) noted that he had explained the motivation for the proposed amendment on the previous day. He observed that on the previous day there had been agreement that the revised preliminary draft Convention would not affect international agreements that had been concluded before the Convention. However, he observed that the formulation of Article 45, paragraph 1, of the revised preliminary draft Convention would not refer to instruments concluded before the Convention but to instruments to which States were Parties. The Delegate submitted that there were instruments that had been concluded but that were not yet in force, such as the revised *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* that had been signed in March but had not yet been ratified. Noting that the Lugano Convention dealt with maintenance obligations, he opined that it would be appropriate to make it clear that the future Convention did not affect the Lugano Convention. He emphasised that there were no major contradictions between the regime of the Lugano Convention and that of the revised preliminary draft Convention, but that, for the sake of clarity, it was pertinent to adopt the proposed amendment.

34. **The Chair** asked the delegates if there were any objections.

35. **Ms Lenzing** (European Community – Commission) stated that she fully supported the policy proposed by the delegation of Switzerland. However, she added that she had some doubts as to whether anything was missing from the proposal. She suggested that the Drafting Committee should be empowered to scrutinise the proposed text to make sure that it would function as proposed, and that the Drafting Committee should refer to wording provided in the *Hague Convention of 30 June 2005 on Choice of Court Agreements*.

36. **The Chair** noted that there were no objections and suggested that the Drafting Committee should effect the proposed changes, subject to any necessary drafting improvements.

She stated that there would be a break at that juncture in which a group photo would be taken on the steps of the Peace Palace.

She drew the attention of the delegates to Working Document No 51 that had been submitted by the Working Group on Article 14 and effective access to procedures. She asked the delegates to read this working document as it would be discussed immediately after the coffee break.

Document de travail / Working Document No 51

37. **The Chair** invited the Chair of the Working Group on Article 14 and effective access to procedures to introduce Working Document No 51.

38. **Ms Ménard** (Canada, Chair of the Working Group on Article 14 and effective access to procedures) began by thanking the members of the Working Group for their hard work and openness. She also thanked the Permanent Bureau, and in particular the Deputy Secretary General, for their support.

Ms Ménard explained that, although other States had been invited by the Chair to join the Working Group, only those participants that had been announced by the Chair during the meeting took part in the Working Group.

She recalled that the mandate of the Working Group was to find possible compromises on effective access to procedures and to look at Article 14. The Working Group was to report back to the meeting as soon as possible. The Working Group was also asked to look at the question of public bodies in Article 14, time permitting. Unfortunately, there was no time to address this.

Ms Ménard described how, in order to fulfil its mandate, the Working Group decided to address the issues in two parts. In the first part, the members of the Working Group discussed Option 2 of Article 14. In the second part, the members of the Working Group looked at other possible solutions to address effective access to procedures. She added that the Working Group met on seven occasions and that it divided its time equally between the two issues.

She explained that certain things became evident at the Working Group's first meeting. On the matter of wealthy applicants in Article 14 (Option 2), it became clear that a new approach was necessary. It also became clear that genetic testing and manifestly unfounded appeals could be dealt with simultaneously. With regard to other possible options, she explained that certain States announced that they would favour a child-centred approach which would place the emphasis on the means of the child rather than the parents in determining the entitlement to free legal assistance.

Ms Ménard pointed out that this was why the proposal that was submitted in Working Document No 51 was divided into four parts: (i) the problem of the wealthy applicant, (ii) further amendments to Article 14 (Option 2), (iii) the child-centred approach, and (iv) the text of Articles 14 to 14 *quater* and Article 40, containing all the proposals of the Working Group. She proposed to introduce the four parts of the working document.

Regarding Part I of Working Document No 51, the Chair of the Working Group explained that when discussing the problem of the wealthy applicant, the basis of discussion was twofold. Firstly, States had agreed that they should not have to bear the costs of a wealthy applicant's child support application. Secondly, they agreed that it was unlikely that wealthy applicants would use the Central Authority route, but that such applicants would usually hire a private lawyer. She recalled that the Working Group had encountered two major difficulties in establishing a filter system: deciding on international criteria to define a wealthy applicant, and deciding on a procedure to assess the wealthy applicant's means. She explained that it became clear that any filtering system would be too complex, too costly, would create too much delay, and that the disadvantages were greater than the advantages.

She announced that it was agreed to adopt a cost-recovery approach where a wealthy applicant would apply for establishment or modification through a Central Authority. The costs would then be recovered by way of an order for costs made following a decision. She added that this approach was in conformity with the revised preliminary draft Con-

vention as it was then drafted, and that only minor amendments to Article 40, which dealt with the recovery of costs, would be needed.

Ms Ménard then explained that Part II of Working Document No 51 was quite simple. She stated that it had been observed that it was necessary to have an exception for genetic testing since costs could be recovered under Article 40. Accordingly, it was proposed to delete Article 14 *bis*, paragraph 2, sub-paragraph (a), and to delete the square brackets and retain the text in Article 14 *bis*, paragraph 2, sub-paragraph (b).

Concerning Part III of Working Document No 51, she stated that it achieved an important compromise between Option 1 and Option 2 of Article 14. She observed that it provided an alternative to the provision of free legal assistance in child support cases by allowing States to apply a child's means test.

Ms Ménard drew the attention of the delegates to the proposed text of a new Article X, which was referred to thereafter and in Part IV of Working Document No 51 as Article 14 *ter*. She then explained that Article 14 *ter*, paragraph 1, provided that States may declare that they would use a child means test. Article 14 *ter*, paragraph 2, provided that such States would provide the necessary information to the Permanent Bureau concerning the manner in which the State would assess the child's means or income, and the threshold above which free legal assistance would not be provided. Article 14 *ter*, paragraph 3, provided that the applicant could submit a statement that the child's means or income was below the threshold. Ms Ménard pointed out that an interesting feature of this declaration by the applicant was that the requested State could only request further evidence of the child's means or income if the information submitted was inaccurate. Lastly, she observed that Article 14 *ter*, paragraph 4, provided that a State that had made a declaration under Article 14 *ter*, paragraph 1, shall provide the most favourable legal assistance provided for by the law of the requested State in respect of all applications under Chapter III of the revised preliminary draft Convention.

Ms Ménard stated that the Working Group believed that Part III of Working Document No 51 represented an important step forward. However, she also drew the attention of the delegates to the fact that there remained words in square brackets in the proposed text. The bracketed language referred to the question of whether it would be the "means" or the "income" of a child that would be tested. She also noted that there was bracketed language in Article X (14 *ter*), paragraph 1, where it had to be decided if the declaration covered all applications, or if the declaration could not allow derogation from the principle of free legal assistance in applications for recognition and enforcement. Finally, she added that consideration could be given to the possibility of further safeguards to ensure that the child's means or income test would not be too low.

Turning to Part IV of Working Document No 51, she explained that this part compiled all of the proposals together as a draft for discussions.

Ms Ménard concluded that the Working Group had been given a difficult mandate. She stated that she was very proud of the work that had been accomplished. She added that the members of the Working Group believed that the working document included the best compromise proposals that they could bring forward for discussion.

39. **The Chair** thanked all those who had contributed to Working Document No 51. She acknowledged that the Working Group's mandate was very difficult and that its members should therefore be proud of what they had achieved. She opened the floor to discussion.

40. **Ms Lenzing** (European Community – Commission) stated that the European Community had been represented by four Member States in the Working Group and therefore warmly welcomed the results of the Working Group's work. She thanked Ms Ménard (Canada, Chair of the Working Group on Article 14 and effective access to procedures) and the Permanent Bureau who had helped to articulate the compromise that had been achieved. She added that Working Document No 51 had almost resolved all of the difficult issues on effective access to procedures.

Regarding Part I of Working Document No 51, the Delegate of the European Community stated that she fully supported the proposal to deal with wealthy applicants through cost recovery. She noted that this was a compromise to some Member States, but that her delegation now stood firmly behind this workable solution that she felt would not cause unnecessary delays in assessing which applicants were wealthy.

Ms Lenzing observed that the two issues that were important to her delegation were reflected in the explanatory note in Working Document No 51. These issues were that the system was designed to deal with wealthy applicants and should not be misused to recover costs from poor applicants who had been unsuccessful. Secondly, she observed that the possibility of cost recovery from the wealthy applicant would work in practice. She stated that it was important that States could use the system of co-operation established by the Convention to recover costs from wealthy applicants.

Regarding Part II, the Delegate observed that it was positive that genetic testing and appeals were addressed through the same solution as wealthy applicants. Her delegation fully accepted this. She also agreed with the proposed text of Article 14 *bis*, paragraph 2, sub-paragraph (b), and supported the deletion of the square brackets surrounding that provision. She thanked the delegation of the United States of America and the delegation of Canada for their flexibility.

Turning to Part III of Working Document No 51, she thanked the delegation of China, the delegation of the Russian Federation and the delegation of Japan for the enormous improvement that had been made through the adoption of the child-centred approach that made Option 1 of Article 14 equivalent to Option 2 of that Article.

As for the bracketed language in Part III, Ms Lenzing observed that there had not yet been conclusive discussions on two questions. The first question concerned whether or not it was possible to narrow Article 14 *ter*, paragraph 1, as proposed in Part IV of Working Document No 51. She reiterated that, as she had stated during the deliberations of the Working Group, she would invite the delegations of China, the Russian Federation and Japan to consider whether it was possible to, first, narrow Article 14 *ter*, paragraph 1, to the income, rather than the means of the child, and, secondly, to only apply Article 14 *ter* to cases concerning establishment and modification, rather than recognition and enforcement. She observed that it had not been possible to make further concessions in the context of the Working Group, but that these concessions could be considered in the context of a wider package.

Procès-verbal/Minutes No 15

She added that for the delegation of the European Community it was important not to filter out deserving applicants. She trusted that this obligation would be taken seriously by the delegations of China, the Russian Federation and Japan, but that it was important to ensure that other States would not misuse the system, and therefore requested further safeguards.

Finally, the Delegate of the European Community concluded that she felt that the delegates were very close to achieving a compromise and she reiterated that she appreciated the significant improvements of Part III of Working Document No 51.

41. **Ms Morrow** (Canada) thanked the members of the Working Group, the Deputy Secretary General and Ms Ménard (Canada, Chair of the Working Group on Article 14 and effective access to procedures). She stated that the delegation of Canada supported Parts I and II of Working Document No 51, and that her delegation was open to further discussion regarding Part III thereof.

42. **Ms Carlson** (United States of America) stated that she thought that the proposal in Working Document No 51 was very promising and that she was very grateful for all of the progress that had been made. She added that Working Document No 51 provided an extremely good basis for further discussion in order to resolve outstanding issues. She emphasised that her delegation would give due consideration to the proposal.

The Delegate of the United States of America observed that some aspects of Working Document No 51 were totally consistent with her delegation's position, particularly in that almost all children would be provided free legal assistance. Other aspects required compromise. She stated that for many States, including the United States of America, Article 14 was one of the key core issues of the revised preliminary draft Convention. She recalled that Article 14, Article 20 and some other Articles were of fundamental importance. She stated that these provisions would be considered as one package, and that the resolution of one issue would help the resolution of others. She stated that she would first highlight the positive aspects of Working Document No 51 and then turn to her delegation's concerns that could be addressed with more discussion.

Primarily, she felt that it was positive that the overarching principle was that children would be provided assistance except if the children were extremely wealthy. Secondly, she welcomed the fact that it had been recognised that a system of recovery of costs was better than any hypothetical *a priori* system that would have been burdensome. Thirdly, she applauded Working Document No 51 because it allowed sufficient flexibility for additional countries to become Parties to the future Convention. She thanked the delegations of China, the Russian Federation and Japan for their extraordinary efforts and commitment to produce a compromise between Option 1 and Option 2 of Article 14. She concluded that she welcomed the principle of the provision of free services, and the flexibility that allowed wider ratification.

Ms Carlson then turned to the concerns that her delegation had. She emphasised that the final decision of her delegation would depend on how its concerns were addressed, as well as how other key issues were addressed. Firstly, she mentioned the matter of appeals. She recalled that her delegation and others had wanted to have discretion on whether or not to grant free legal assistance in appeals. She noted that, in the context of a wider compromise, her delegation could compromise on this issue, too. Secondly, she noted that Article 14 *ter* contained two sets of square brackets. She observed that delegates had to decide on the exception to the general rule that a State could make a declaration stating that it would assess income or means. Delegates also had to decide if such a declaration could be made for all applications, or if recognition and enforcement proceedings would always be supported by free legal assistance.

Concerning Article 14 *ter*, paragraph 1, Ms Carlson stated that her delegation was not overly concerned about the distinction between means and income. However, she emphasised that the understanding of all delegations was that the system was intended to filter out rare wealthy children. She opined that it was not intended to have a means test that filtered out other children. She emphasised that she had no doubt that the delegations of China, the Russian Federation and Japan wished only to filter out the rare wealthy applicant. However, she was concerned that, if the language of Article 14 *ter* was not tightened, or the Explanatory Report not clarified, many other children might be filtered out. She reiterated that she was certain that this was not the intention of the proposal of the delegations of China, the Russian Federation and Japan. She therefore proposed that there might have been a loophole that could be addressed by referring only to children's income. She recalled that in many countries children have bank accounts, and indeed that her own grandchildren had bank accounts to which she contributed small sums that added up over the years. She noted that she had learned that this also occurred in China. She insisted that the existence of savings in such bank accounts should not exclude their holders from benefiting from free legal assistance. She therefore submitted that further safeguards were required in order to achieve the agreed goal of only excluding the rare wealthy applicant.

She then referred to Article 14 *ter*, paragraph 4. She observed that the common understanding was that this provision was intended as an additional safeguard to guarantee that more children would be granted free legal assistance. Nevertheless, she was concerned that the provision could be read as a derogation from Article 14 *ter*, paragraph 1, and Article 14 *ter*, paragraph 2. She felt that it should be clarified that this provision only referred to the rare wealthy applicant, rather than constituting a derogation from the general rule of free legal assistance.

The Delegate of the United States of America added that, while in principle the exceptions should only be used to recover costs from the rare wealthy applicant, she was concerned that the exceptions might be employed to recover costs from unsuccessful poor applicants in a case that was founded on the merits. She hoped that the Explanatory Report could address these concerns and expressed confidence that a suitable solution would be adopted.

Ms Carlson concluded that her delegation welcomed Working Document No 51 and that it would consider it as part of a package of core issues. She reiterated her gratitude to the delegations of China, the Russian Federation and Japan for their efforts to facilitate the achievement of a truly global Convention.

43. **Ms Nind** (New Zealand) noted that her delegation had not participated in the Working Group. She thanked the participants for their work and the spirit of compromise in which they performed their task. She observed that there remained issues to be resolved, but she expressed strong support for the basis provided in Working Document No 51. She stated that the working document provided the opportunity to not throw out the baby or the bathwater.

44. **Mr Ding** (China) urged all delegations to adopt a child-centred approach, in particular on this issue. He emphasised the need to look at the child from a global perspective. He stated that the delegates had come to the Diplomatic Session to help children and to ensure that they were given enough support, as well as to make sure that children's parents would not easily evade the responsibility towards their children by crossing a border.

He therefore stated that one must not put too much emphasis on reciprocity and comparing the level of services provided by different Central Authorities. He insisted that it was not the goal of the delegate to help Central Authorities by providing them the opportunity of reciprocal co-operation. Rather, he reiterated that the goal was to help children, whether or not they lived in a country that did not have a very good Central Authority or legal assistance system.

Mr Ding recalled that different countries had different economic resources, as well as different governments and political structures. He stated that it had to be acknowledged that some countries were simply unable to provide the same level of services and free legal assistance to all child support cases, in spite of their best intentions to do so. He observed that it was of no use to them to have a Convention providing for such very high standards, but requiring them to provide the same standard on reciprocity. He insisted that the Convention could not benefit these countries, in spite of how attractive and how high the level of services they could receive under the Convention because such countries would be unable to join the Convention due to the difference in economic resources and political structure.

He emphasised once again the essential need for a global Convention. His delegation wanted the Convention to be ratified by as many States as possible because it did not consider it fair to deprive children of the benefits under the Convention simply because they lived in States that were unable to provide the same level of services or legal assistance. His delegation did not consider it fair to allow parents to evade their obligations towards their children by moving to States that had a high level of services and leaving the poor children in a place which did not provide the same level of services or legal assistance. He reiterated that if the Convention did not become a global Convention, it would mean that there would be many safe havens for such parents to move to in order to circumvent their maintenance obligations.

The Delegate of China stated that in such a case, it would also mean that for a large part of the world, there would be no administrative assistance, no expedited reciprocal recognition and enforcement of maintenance decisions or even any recognition or enforcement at all, no possible reimbursement to public bodies, no equal treatment for legal assistance for applicants in foreign countries or no legal assistance at all.

He added that at the end of the day, it was not just the States that did not get these benefits, but it was the children who would not get such benefits wherever they lived. He recalled that for a country that was unable to provide the same level of services or legal assistance, that country probably would not have a very satisfactory level of social welfare for the children either. He insisted that if the children did not receive the benefits of the Convention and receive support from their parents overseas, these children would suffer very much.

Mr Ding therefore urged all delegations not to insist on further safeguards on the new Article 14 *ter*, and to allow a State the flexibility to declare that it might make an assessment on the basis of the means of the child only, and such declaration would not be limited to applications for establishment and modification. He stated that this would facilitate wider acceptance of the Convention at a global level and, most importantly, would help the children of the world.

45. **Mr Segal** (Israel) thanked the members of the Working Group on Article 14 and effective access to procedures for their patience and openness. He also thanked the Deputy Secretary General for facilitating discussions. He added that he appreciated the spirit of the proposal of the delegation of China, but he also shared the concerns expressed by the delegation of the United States of America.

Mr Segal noted that Article 14 *ter*, paragraph 4, should provide that a creditor who had the right to free legal assistance in his own State should not lose that right simply because the case was of an international nature.

Regarding Article 40, paragraph 2, the Delegate of Israel pointed out that this was a standard clause in many States and that it should not be employed as a system of recovery of costs from State to State. He proposed to add a further safeguard that required that an application be unreasonable, in addition to being unsuccessful. He also proposed that it might be possible to only refer to the unsuccessful debtor. He noted that, although the system was intended only for the recovery of costs from wealthy applicants, States might be tempted to use it as a broader means for the recovery of costs.

46. **Mr Bavykin** (Russian Federation) recalled that his delegation had participated in the Working Group on Article 14 and effective access to procedures and stated that he would therefore be brief. He thanked the Delegate of Canada and the Permanent Bureau for their time and effort in elaborating the proposed text. He applauded the text as providing a very good basis for a breakthrough, and he added that such a breakthrough was close to being achieved.

He submitted that further steps were required. He stated that his delegation did not intend to play a game of give-and-take, but that it would try to accommodate the needs and concerns of other delegations. He stated that this was because States had different legal systems and there was no comparative study to show that any one system was better than the others. Accordingly, all legal systems needed to be taken into account and accommodated. He stated that, in this spirit of openness and transparency, his delegation was willing to forge forward and work with its colleagues and friends.

47. **Mr Markus** (Switzerland) noted that he had also participated in the Working Group on Article 14 and effective access to procedures. He thanked the Delegate of Canada and the Deputy Secretary General and stated that they had been a great help. He noted that what the Working Group had achieved was a considerable result. He added that although the text was not a great change, it engendered a concept that had been successfully illustrated by previous speakers.

The Delegate of Switzerland stated that his delegation could accept Parts I and II of Working Document No 51, with some clarifications that needed to be addressed. He felt that his delegation still needed to consider Part III of the working document in some more detail. He also noted that the proposed child-centred approach merited discussion, including on the question of means or income tests.

On the matter of Article 14, paragraph 2, he submitted that there should be a provision or reservation with regard to Article 40, paragraph 2, that would provide for the possibility of the recovery of costs; it was not clear if this provision contained some contradictions regarding the possibility to recover costs after proceedings. He therefore proposed to include language regarding the recovery of costs from unsuccessful parties.

The Delegate of Switzerland was of the view, on the matter of the bracketed language in Article 14 *bis*, paragraph 1, that the revised preliminary draft Convention should be in favour of the creditor. He stated that he wished to see the creditor favoured by Article 14 *bis* and that the creditor should also be provided with free legal assistance when he or she was a defendant.

Concerning the choice between a reference to "paragraph 1" or "paragraph 2" in Article 14 *ter*, paragraph 1, the Delegate was of the view that there should not be any means test in recognition and enforcement proceedings and that free legal assistance should always be provided in such cases.

On the matter of Article 40, paragraph 2, Mr Markus noted that he had already remarked on this matter. He recalled that there had been proposals to change the language of the provision, but he stated that his delegation was reluctant to do so. He added that a reference to the unsuccessful creditor should also be included.

48. **Ms Carlson** (United States of America) began by observing that to sweep differences under the rug would not do any good towards reaching a successful conclusion.

The Delegate of the United States of America stated that she was becoming somewhat frustrated every time the issue of costs was characterised as wealthy nations asking other countries to provide the same services as they did. She stated that this was a false premise. She also expressed frustration at the description of countries that favoured the provision of free legal assistance as not having a child-centred approach. She stated that this, too, was false. She reiterated that her delegation did not want exact reciprocity and that she assumed that it was obvious that countries would take time to develop better systems. She added that the goal of the future Convention was to help States to develop their child support systems. The Delegate of the United States of America repeated that it was frustrating to hear statements to the effect that developed countries wished to exclude others. She emphasised that it was perfectly acceptable that there would not be one-to-one reciprocity.

Ms Carlson then explained that there was a second matter of importance that she wished to express. She stated that to the United States of America, if there was no meeting of the minds that the goal of the future Convention was to provide free legal assistance in virtually every case, this would constitute a return to the situation where delegates where attempting to formulate a definition of the wealthy applicant that they wished to exclude from the provision of free legal assistance. She emphasised that in the absence of free legal assistance, in reality no services at all would be provided. She insisted that it was wrong to say that the requirement of free legal assistance would exclude children from the benefits of the future Convention; if children would not be given free legal assistance, it would be impossible for them to procure any assistance at all. She added that if the proposed changes intended to exclude free legal assistance that would not be a child-centred approach at all.

She concluded that it was wrong to label the different views as a conflict between one-to-one reciprocity and a child-centred approach. She was of the view that the goal of the future Convention had to be the provision of free legal assistance to children.

49. **Mr Moraes Soares** (Brazil) began by stating that his delegation wished to thank the Chair for having invited his delegation to participate in the Working Group on Article 14 and effective access to procedures. He congratulated the Delegate of Canada, the First Secretary and the Deputy Secretary General for their excellent work. He observed that their position at the meetings was unenviable.

The Delegate of Brazil recalled that in the last few years there had been many meetings to discuss the revised preliminary draft Convention. He added that there were many points of view for each aspect of the agreement. He stated that besides the political concerns that were raised in these meetings, there were also problems regarding classic differences and antagonisms between common law and civil law or between judicial systems and administrative systems. In addition there were concerns that some concepts of the revised preliminary draft Convention would not fulfil the requirements of domestic law.

Mr Moraes Soares also noted that, with respect to the cost of the proceedings, there was the same concern. He observed that after long discussions on Article 14, the delegates then had three options. As far as Option 1 was concerned, in all applications for free legal assistance the financial circumstances of the applicant would be considered. He observed, however, that there is an exception: according to paragraph 5 of Option 1, the creditor who received free legal assistance in his own country would also be granted free legal assistance for recognition and enforcement, as provided for the law of the requested State in the same circumstances. With respect to Option 2, the Delegate of Brazil observed that any application concerning child support would be granted free legal assistance, with some exceptions. He noted that, as provided in Article 14 *ter*, the means test would consider financial circumstances, but it would not be applied to child support applications. As for Option 3 that was presented by the Working Group, he explained that the general principle of free legal assistance for child support applications remained, but States would declare that they would provide free legal assistance in respect of such applications after a child-centred test.

He recalled that his delegation had stated in the Commission meeting and in the Working Group that it considered the general principle of free legal assistance for child support applications as a fundamental background in the future Convention. Accordingly, his delegation still considered Option 2 to be the best solution to this very important issue in the Convention, as his delegation had in fact proposed in Working Document No 4. However, in a spirit of compromise, the delegation of Brazil could support the proposal of the Working Group on Article 14, and would therefore support the draft Article 14 *bis* and Article 40 as presented in Part IV of Working Document No 51.

Nevertheless, Mr Moraes Soares emphasised that his delegation strongly supported the expression "paragraph 2" in Article 14 *ter*, paragraph 1, of the new proposal, and the deletion of the expression "paragraph 1", in order to guarantee free legal assistance for applications for recognition and enforcement of foreign decisions. He added that this was also motivated by the fact that Article 14, paragraph 5, of Option 1 contained a rule that guaranteed that a creditor

who has benefited from free legal assistance in the State of origin would be entitled to the same benefit in any proceedings for recognition and enforcement.

In addition, the Delegate of Brazil observed that in Article 14 *ter*, paragraph 2, of the new proposal, his delegation would also support the word "income" and the exclusion of the expression "means".

50. **Mr Beaumont** (United Kingdom) thanked the Working Group on Article 14 and effective access to procedures, and made particular mention of Ms Ménard (Canada, Chair of the Working Group on Article 14 and effective access to procedures) and the Permanent Bureau. He stated that it was worth recalling that the intellectual property for the idea to adopt a cost recovery system belonged to the Deputy Secretary General and that without that idea the proceedings of the Working Group would have taken very long indeed.

The Delegate of the United Kingdom insisted that this was the time to narrow differences between delegations. He observed that there were only two or three open issues and pleaded with members of the Working Group not to add more issues. He pleaded in particular that delegates should not try to resolve every possible question regarding the recovery of costs. He stated that it was understandable to try to resolve consensual questions, but he opined that matters where consensus was not possible should be left to national laws.

He observed that the delegation of the United Kingdom thought it highly unlikely that any State would expend its time and effort trying to recover costs from poor applicants. He emphasised that the proposed procedure was useful for the relatively, or indeed extremely, wealthy applicant. He added that it was useful not to articulate a Convention-based system for the recovery of costs because this helped to avoid the creation of a filter. He added that an excessive zeal for precision would lead back to the original problem of defining a rule to filter out the extremely wealthy applicant.

He urged the delegates not to try to achieve the impossible. He applauded that the Working Group had brought wide differences far closer than they had been. The Delegate called to mind the fact that there remained only one more week before the intended date of signing of the future Convention. He also recalled that Article 14 was the most important Article to many delegations. He noted that there remained bracketed language in the proposed Article 14 *ter*. He stated that all delegations would have to demonstrate some flexibility in order to achieve an acceptable compromise.

Mr Beaumont observed that in Part III of Working Document No 51, the possibility of further safeguards had been left open. He stated that it was important for States to put the necessary mechanisms in place, but that it was not strictly necessary that further safeguards be tied to this issue.

The Delegate of the United Kingdom recalled that the delegation of China had stated that the overriding objective was to allow children in both developed and less developed nations to receive money from their parents. He urged the delegates to avoid rhetoric and to focus instead on substance. He also called on delegates to not be sensitive to rhetoric and to recognise that all delegates were negotiating in good faith. He was of the view that with a little more effort a solution would be reached. The Delegate of the United Kingdom admitted that before this Diplomatic Session he was anxious, but that following the formulation of Working Document No 51, the delegates had achieved a virtually cost-free system and this was an enormous achievement. He reiterated the importance of concentrating on positive elements because a solution was close at hand.

The Delegate of the United Kingdom also recalled that ten years previously a Diplomatic Session had considered whether or not to include a Convention on maintenance obligations in the aims of the Hague Conference on Private International Law. He stated that many had felt that this would be a difficult objective. Indeed, he admitted that he too had been sceptical. He observed that the delegates should be delighted that they were producing something that would make a difference, not only to wealthy States, but hopefully to the whole world. He opined that the governments and people that the delegates represented would be pleased with what the delegates had achieved.

51. **M. Manly** (Burkina Faso) remercie la Présidente et souligne que la délégation du Burkina Faso est très agréablement surprise par le travail qu'ont fourni les membres du Groupe de travail sur l'article 14 et l'accès effectif aux procédures. En effet, le Délégué du Burkina Faso concède que, lorsque la Commission I a pris la décision de constituer ce Groupe de travail, il s'est inquiété de la possibilité d'aboutir à un compromis en raison des divergences et de la diversité des systèmes juridiques représentés au sein du Groupe de travail. Ainsi, la délégation du Burkina Faso remercie les délégations membres de ce groupe pour leur souplesse.

Concernant le choix entre le terme « moyens » et le terme « revenus » de l'article 14 *ter*, la délégation du Burkina Faso est en faveur du maintien du terme « revenus ». En effet, le terme « moyens » connaît deux définitions dans le système du Burkina Faso. Une première définition est juridique, l'autre est économique. Par conséquent, le terme « revenus » est plus approprié.

La délégation du Burkina Faso conclut que l'article 14 est extrêmement important pour les pays en voie de développement. Si cet article n'existait pas dans la future Convention, il faudrait le créer car il est indispensable pour donner la possibilité à un enfant burkinabé de recouvrer à l'étranger une obligation alimentaire envers sa famille ou ses parents comme cela est souvent le cas.

À l'issue de la Conférence, les enfants du Burkina Faso vont pouvoir de nouveau accéder aux aliments qui leur sont dus.

52. **M. Heger** (Allemagne) remercie la Présidente et reprend les paroles du Délégué du Burkina Faso. M. Heger, lui aussi, s'était inquiété de l'issue des travaux du Groupe de travail lorsqu'il a été désigné par la Commission I au regard des divergences de départ.

M. Heger souhaite profiter de cette occasion pour remercier très chaleureusement la Présidente du Groupe de travail sur l'article 14 et l'accès effectif aux procédures ainsi que les membres du Bureau Permanent pour leurs travaux car, sans eux, il n'aurait pas été possible de présenter un tel document de travail.

Enfin, la délégation de l'Allemagne se rallie à la délégation de la Communauté européenne et ne réitère pas la position de la délégation du Royaume-Uni qui a effectivement évoqué le point le plus important. Le Délégué de l'Allemagne souscrit pleinement à la position de la délégation du Roy-

aume-Uni. C'est effectivement cet esprit qui donne toutes ses chances à l'établissement d'une Convention qui permettra aux enfants qui se situent dans un pays de recouvrer des obligations alimentaires auprès de leurs parents, ou des personnes qui en sont responsables, se trouvant dans un autre pays.

53. **M. Marani** (Argentine) précise que la délégation de l'Argentine n'a pas fait partie du Groupe de travail sur l'article 14 qui a présenté le Document de travail No 51 mais profite de la réunion plénière pour remercier la Présidente du Groupe de travail ainsi que les membres du Bureau Permanent et les délégations membres du Groupe de travail.

Concernant la fourniture de l'assistance juridique gratuite, celle-ci est essentielle et la manière dont elle est évoquée par le Document de travail No 51 l'est tout autant. La délégation soutient la position de la délégation du Royaume-Uni et considère qu'il est aujourd'hui possible de faciliter le recouvrement des obligations alimentaires à un niveau véritablement mondial.

La délégation de l'Argentine a quelques inquiétudes à l'idée qu'une déclaration puisse suffire pour se soustraire à cette obligation des États contractants de fournir une assistance juridique gratuite. Cependant, la délégation de l'Argentine souhaite aller de l'avant et promeut elle aussi le consensus. Bien que cet aspect constitue une régression à leurs yeux, la délégation de l'Argentine est en faveur de la proposition formulée par le Groupe de travail sur l'article 14.

En ce qui concerne l'article 14 *ter*, paragraphe premier, comme la délégation du Brésil, la délégation de l'Argentine est en faveur du retrait des crochets autour du terme « paragraphe 2 ». En effet, la délégation de l'Argentine considère que l'assistance juridique gratuite en ce qui concerne les demandes de reconnaissance et d'exécution doit être exclue du système de déclarations.

Enfin, concernant le choix entre le terme « revenus » ou le terme « moyens », la délégation de l'Argentine est en faveur du maintien du terme « revenus » et non du terme « moyens ».

54. **Ms Escutin** (Philippines) thanked the Working Group for the compromise that it had achieved. She also thanked the Delegate of the United Kingdom for putting the work of the Diplomatic Session into perspective.

She stated that she supported the proposal in Working Document No 51. Concerning Article 14 *ter*, she was of the view that a test based on the child's income was preferable because this better reflected the child's situation than a test based on the child's means.

55. **M. Voulgaris** (Grèce) remercie la Présidente et souhaite intervenir brièvement. Il remercie chaleureusement le Groupe de travail de l'article 14 pour son excellent travail, présenté dans la proposition sur l'accès effectif à la justice régit par l'article 14. Cette proposition facilitera beaucoup les travaux portant sur la future Convention. Enfin, la délégation de la Grèce suit la position exprimée par les délégations de la Communauté européenne, des États membres de la Communauté européenne et des États non membres de la Communauté européenne. Ainsi, il semble que l'ensemble des délégations soit en accord sur ce point.

56. **The Chair** stated that she was very pleased to see the positive approach that had been adopted. She congratulated the Working Group and the Permanent Bureau for their work, and applauded the tremendous effort that was made to produce the solution in Working Document No 51.

She observed that there was not complete agreement, but that there had been wide support for Article 14 and Article 14 *bis*. She added, however, that there had been some hesitation in respect of Article 14 *ter*. She stated that the revised preliminary draft Convention would be submitted for the second reading including the proposal in Working Document No 51, with square brackets to show the outstanding issues. She added that the delegates were close to achieving a compromise that would produce a great development over previous Conventions.

The Chair noted that this was the last meeting of Commission I that would be held before the following Monday. She added that the following Monday would be the last day of the first reading of Commission I, and that it was intended to address all the remaining open issues then in order to find solutions before the second reading. She listed the following matters that would have to be addressed: (i) continuing the discussion regarding public bodies, and costs of public bodies, (ii) the scope of the preliminary draft Convention, (iii) the definition of legal assistance, (iv) the remaining square brackets in Article 6, (v) Article 7, (vi) a discussion of Article 19 on the basis of Working Document No 53, which had been distributed on that day, (vii) Article 20, which she stated was the most important matter to be addressed, (viii) Article 26, (ix) Article 30 regarding the list of enforcement measures, (x) Article 37 regarding the disclosure of information, and (xi) the Article concerning signature, ratification and accession.

57. **The Chair of the Drafting Committee** asked the Chair to clarify whether the Drafting Committee should put the formulation proposed in Working Document No 51 in the revised preliminary draft Convention at that stage.

58. **The Chair** confirmed that the Drafting Committee should do so, retaining the square brackets therein.

59. **Ms Ménard** (Canada, Chair of the Working Group on Article 14 and effective access to procedures) asked if the list of open Articles was complete. She proposed to add Article 13 and Article 34.

60. **The Chair** stated that other Articles would be addressed if there was enough time to do so, but that the Articles that presented the most difficulties would be addressed first.

61. **Mr Ding** (China) expressed hesitation regarding the suggestion to send Working Document No 51 to the Drafting Committee because delegations that had participated in the Working Group had agreed that there remained some policy issues to be considered. He stated that there were matters other than those in brackets that needed to be considered. He added that Article 14 related to other Articles and that it would be pertinent to address this Article in the Working Group before sending it to the Drafting Committee.

62. **The Chair** asked if the delegation of China would accept to include Working Document No 51 if the entire proposal were contained in square brackets.

63. **Mr Tian** (China) expressed concerns that the Working Group needed to continue to work before a result could be decided. He therefore felt that it would be better not to send Working Document No 51 to the Drafting Committee.

64. **Mr Beaumont** (United Kingdom) explained that he had understood that the work of the Working Group had been completed. He stated that there could be bilateral and multilateral discussions over the weekend, but that these would not be held under the auspices of the Working Group.

He suggested that the text proposed in Working Document No 51 should be included in the revised preliminary draft Convention because this is what all the delegations that had participated in the discussions, including the delegation of China, had wanted. He added that the open issues would remain open.

65. **The Deputy Secretary General** observed that the advantage of sending the proposed text to the Drafting Committee was that this would give the Drafting Committee the opportunity to improve the text. Consequently, if the text would eventually be accepted, the Drafting Committee would have had the opportunity to put it in good shape. Conversely, he observed that it might be too late for the Drafting Committee to do so if it were only given the opportunity at a later stage. He explained that this was the main advantage of sending the working document to the Drafting Committee.

66. **Mr Ding** (China) opined that his delegation preferred Option 1 of Article 14 as drafted in the preliminary draft Convention. He therefore insisted that the Drafting Committee should not be allowed to insert the proposal in Working Document No 51.

67. **The Chair** submitted that the vast majority of delegates preferred the proposal in Working Document No 51 to the Options of Article 14 in the revised preliminary draft Convention. She therefore held that this text was necessary for the second reading and stated that the entire Article would be included in the revised preliminary draft Convention, but contained in square brackets.

Annonces / Announcements

68. **Mr Pereira Guerra** (European Community – Presidency) announced that there would be a co-ordination meeting of the European Community at 1.45 p.m.

69. **Mr Lortie** (First Secretary) announced the arrangements that had been made for the tour of Amsterdam that was to be held on Saturday 17 November 2007.

The meeting was closed at 1.15 p.m.

Procès-verbal No 16

Minutes No 16

Séance du lundi 19 novembre 2007 (matin)

Meeting of Monday 19 November 2007 (morning)

La séance est ouverte à 9 h 50 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

1. **The Chair** greeted the delegates and welcomed them to the third week of the Diplomatic Session. She thanked the Permanent Bureau for the excursion to Amsterdam that occurred on Saturday 17 November 2007 and special thanks were given to Willy de Zoete for her wonderful organisation that contributed to the success of the excursion. The Chair expressed her hope that the delegates had been able to rest over the weekend because she noted that the upcoming three days required focus in order to discuss the open issues remaining in Commission I.

The Chair explained that she would suggest a plan as to how discussions would proceed for the morning of Monday 19 November 2007. She commenced this explanation by noting that it was the last full day before the second reading of the revised preliminary draft Convention. As a result of this, the Chair noted that the Drafting Committee might require some extra time to complete a draft Convention, for the second reading. She also noted that after the second reading had occurred, the Drafting Committee would require some further time in order to finalise the text of the Convention. To allow time for that to occur, the second reading had to be completed by lunchtime on Wednesday 21 November 2007.

The Chair noted that she was aware that a group of States had been working hard on a working document in relation to Articles 14 and 20 and that that group also required some extra time to complete the proposal. To allow for that, the Chair explained that the morning session on Monday 19 November 2007 would end at 11.30 a.m. for both the coffee and lunch break and that the afternoon session would commence slightly earlier than normal, at 2.00 p.m.

2. **Ms Carlson** (United States of America) announced with great pleasure that the President of the United States of America had signed the instrument for the ratification by the United States of America of the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. She stated that the instrument would be lodged with the depositary on 12 December 2007 and that the delegation of the United States of America was excited because of that.

Article 19, paragraphe (e) (Doc. trav. Nos 53 et 54) / Article 19, paragraph (e) (Work. Docs Nos 53 and 54)

3. **The Chair** stated that discussion would start with reference to Working Document No 53, the proposal made by

the delegations of Australia, China, Israel, Japan, the Russian Federation and Switzerland in relation to Article 19, paragraph (e). The Chair gave the floor to the delegation of Switzerland.

4. **Mr Markus** (Switzerland) thanked the Chair and greeted the delegates. He commenced by stating that he would introduce Working Document No 53 but that another delegate from one of the other contributing delegations may also wish to add something to his explanation. He noted that the proposal contained in Working Document No 53 was essential for the protection of the debtor in claims for maintenance. He noted that as it currently stood, Article 19, paragraph (e), enabled a foreign decision to be recognised and enforced even where there was no proper notice of the proceedings or an opportunity to be heard provided to the debtor, and that this was why the delegation of Switzerland had a problem with the paragraph.

Mr Markus observed that a foreign decision may be recognised and enforced even where no proper notice of the proceedings was given to the debtor because the requirements of Article 19, paragraph (e), sub-paragraphs (i) and (ii), were cumulative and not in the alternative. This meant that even if there was no proper notice of the proceedings given to the debtor, as long as there was proper notice of the decision given to the debtor as well as an opportunity to challenge it on fact and law, then the decision could still be recognised and enforced.

The Delegate of Switzerland also noted that an inconsistency existed as between the English text and French text with regard to Article 19, paragraph (e), sub-paragraphs (i) and (ii), and that according to the French text of this Article in the revised preliminary draft Convention, the requirements under sub-paragraphs (i) and (ii) had been in the alternative and not cumulative. He noted, however, that this was not yet sufficiently clear.

Mr Markus further noted that Article 19, paragraph (e), of the revised preliminary draft Convention indicated implicitly that a maintenance decision could only be challenged by the debtor according to the laws of the forum before it may be recognised and enforced in another Contracting State. Mr Markus observed that challenging a maintenance decision at the second stage of the process, after a decision had been recognised and enforced in a foreign State, was very different than challenging proceedings at the first stage, in the jurisdiction of first instance. He noted that the procedural laws of some jurisdictions may also place restrictions on a debtor within the context of appellate procedures and the debtor would therefore not be able to effectively challenge a decision in the jurisdiction of first instance.

He noted that the proposal as contained in Working Document No 53 had been drafted in a manner similar to Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I"). However, in the European Community, States generally knew the procedural rules of other States within the Community and he noted that this was not necessarily the case in a worldwide context.

Mr Markus explained that the proposal as contained in Working Document No 53 was based on the requirement for proper notice that could be found in Article 6 of the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. He noted that the proposal took into account specific situations where although there may not be proper notice of proceedings given to the debtor, there was a generous and efficient possibility for challenging a decision. He referred to the administrative procedures existing in Australia as an example of this.

The Delegate of Switzerland mentioned that the drafting of Working Document No 53 could be improved by the Drafting Committee and that some other delegations also had other proposals in relation to Article 19, paragraph (e). He summarised by stating that the important idea to focus upon was that proper notice of proceedings should be given to debtors to ensure that they were protected in a manner that gave rise to due process.

5. **The Chair** noted that the floor was open for delegates to discuss Working Document No 53.

6. **Mme Mansilla y Mejía** (Mexique) souhaite indiquer que la délégation du Mexique est favorable à la proposition de la délégation de la Suisse figurant dans le Document de travail No 53.

7. **Ms Lenzing** (European Community – Commission) thanked the Chair and noted that the delegation of the European Community was not very happy to see Working Document No 53. She stated that their delegation preferred the substance of Article 19, paragraph (e), as it currently stood in the text of the revised preliminary draft Convention. The current text went beyond what was contained in the 1973 Maintenance Convention by increasing the possibility for recognition and enforcement under this Convention. The delegation of the European Community did not want to see this Convention go backwards from the position adopted under the 1973 Convention that offered additional protection to defaulting debtors.

In relation to the policy behind the text of what was contained in the revised preliminary draft Convention, Ms Lenzing noted that these were principles that were used in the European Community and what was currently contained in the text could certainly be extended to a worldwide context.

Ms Lenzing noted that she had listened to the concerns expressed by the delegation of Switzerland which had led to the production of the proposal contained in Working Document No 53, and added that some small amendments could be made to the current text in order to reach a compromise. For example, she suggested that a judge could be given the discretion to decide whether the opportunity of a debtor to challenge a decision both on fact and law was adequate in a cross-border context, *i.e.*, the judge could decide, before the recognition and enforcement of a decision, whether a debtor had a real opportunity to challenge a decision in the State of origin.

Ms Lenzing offered a second example of how Article 19, paragraph (e), could be amended so as to address the concerns of the delegation of Switzerland: she suggested that some clarification could be incorporated into the paragraph to account for a situation where even though no notice of the proceedings was given to a debtor, he or she nevertheless appeared and defended himself in those proceedings. She noted that in these circumstances, a judge should not necessarily refuse recognition and enforcement on the basis that the debtor had no formal notice of proceedings since in effect, he or she in fact appeared and defended themselves in the proceedings.

Ms Lenzing stated that the delegation of the European Community was not in support of any amendments to Article 19, paragraph (e), but that the above were two sugges-

tions for amendment that could be considered, in the light of the concerns that had been raised by the delegation of Switzerland.

8. **Ms Ménard** (Canada) stated that in relation to Working Document No 53, the delegation of Canada supported the proposal generally but suggested that the wording be formulated slightly differently and that the formulation of Article 19, paragraph (e), by the delegation of Canada could be seen in Working Document No 54: "Recognition and enforcement may be refused – […] (e) – (i) if the respondent did not receive proper notice of the proceedings and an opportunity to be heard, or (ii) where the law of the State of origin does not provide for such notice, the respondent did not receive proper notice of the decision and the opportunity to challenge it on fact and law […]". She emphasised that this was an alternative wording to Working Document No 53.

9. **The Deputy Secretary General** thanked the Chair and referred to the drafting in Working Document No 53, especially with regard to the use of the word "or" between Article 19, paragraph (e), sub-paragraphs (i) and (ii). He suggested that under this proposal it would be possible that administrative decisions regarding maintenance that arose from Australia for example, and where there was no notice of proceedings given to a debtor by an administrative authority responsible for an original assessment, may not end up being recognised and enforced under this Article since the sub-paragraphs were in the alternative and were not cumulative. He observed that in the original text in the revised preliminary draft Convention, the words "neither" and "nor" were utilised to avoid this situation and so that unless both sub-paragraph (i) and sub-paragraph (ii) were satisfied, then it would not be possible to refuse recognition and enforcement. He noted that it was the opposite situation in the proposal contained in Working Document No 53 and that even if only one of the sub-paragraphs were not fulfilled in that proposal, the decision would not be recognised and enforced in a foreign State.

10. **M. Manly** (Burkina Faso) déclare que la délégation du Burkina Faso est favorable à la proposition des délégations de l'Australie, de la Chine, d'Israël, du Japon, de la Fédération de Russie et de la Suisse, exposée dans le Document de travail No 53 avec toutefois une remarque d'ordre rédactionnel. Ainsi, il constate que le membre de phrase « si un tel avis n'est pas prévu par la loi de l'État d'origine » a été ajouté à l'article 19, paragraphe (e), alinéa (ii). Or par souci de parallélisme des formes avec l'alinéa précédent, il serait préférable de placer cette partie de phrase à la fin de l'alinéa afin que l'article 19, paragraphe (e), alinéa (ii), soit rédigé comme suit : « si le défendeur n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester en fait et en droit, si un tel avis n'est pas prévu par la loi de l'État d'origine ».

11. **Mr Markus** (Switzerland) thanked the Chair and stated that he would react to what had been said in relation to Working Document No 53. He noted that the Delegate of the European Community had said that it would be a step backwards from the 1973 Maintenance Convention, but he denied that that was the case. He believed that the proposal contained in Working Document No 53 was a step forward from the 1973 Convention because the latter only prevented the recognition and enforcement of a maintenance decision that had been rendered by default, and where the defaulting debtor had not been given notice of the proceedings or sufficient time in order to defend the proceedings. He noted that the proposal contained in Working Document No 53 broadened the protection of a defendant in the recognition and enforcement of claims since it took into account those States with administrative decision-making processes and allowed for the refusal of recognition and enforcement where the debtor had not been given proper notice of a decision and the opportunity to challenge it on fact and law.

He stated that he had heard the interesting comments made by the Delegate of the European Community and that he believed that the proposal contained in Working Document No 53 should be able to work as it currently stood. He said that the opportunity to challenge a decision should be a real and adequate one. He observed that the task of a court requested to recognise and enforce a decision was to determine what the system was in the foreign State and whether this law provided for a real and adequate opportunity for a debtor to challenge a decision. He noted that this may be possible within the European Community where States were more familiar with each other's legal systems but that it may be more difficult on a global framework.

The Delegate of Switzerland referred to the example that had been given by the Delegate of the European Community where, even though a debtor had had no proper notice of proceedings, he or she did in fact challenge such proceedings anyway. He noted that the Delegate of the European Community had proposed that this situation should possibly be considered within Working Document No 53. Mr Markus suggested that this verbal proposal could be considered but that such a rule may leave it as an incentive to a debtor not to challenge a decision in the State of origin. Mr Markus summarised and stated that although the delegation of Switzerland was not persuaded that the verbal proposals made by the Delegate of the European Community were sufficient, the delegation of Switzerland was willing to co-operate.

In relation to the proposal of the delegation of Canada in Working Document No 54, the delegation of Switzerland considered that it contained satisfactory language and may be an improvement from Working Document No 53, but that conferral would need to occur with those supporters of Working Document No 53.

Mr Markus referred to the comments made by the Deputy Secretary General and stated that he was not entirely sure what the Deputy Secretary General had meant. Mr Markus stated that he believed the proposal contained in Working Document No 53 provided for a harmonisation of all systems of law and that it provided for the integration of such systems together so that all debtors from across the globe would be treated in the same way, *i.e.*, the harmonisation of administrative legal systems where no notice of proceedings was given to the debtor with other legal systems where it was. Mr Markus noted that Article 19, as it appeared in the revised preliminary draft Convention, did not account for Contracting States that possessed administrative systems and that under the current text, decisions from those legal systems would be more frequently refused for recognition and enforcement than first stage decisions that had been made in a judicial context, since there was never any notice of proceedings given to the debtor in the former. Mr Markus stated that the intention of Working Document No 53 was to ensure that debtors under all systems of law would be treated in the same manner.

12. **Mr Moraes Soares** (Brazil) stated that the delegation of Brazil had concerns with Working Document No 53. He noted that in some legal systems, decisions concerning claims for maintenance were entered without notice of the proceedings being given to the debtor. He stated that those systems were structured so as to decide and render an order

and guarantee the rights of a creditor. He noted that these decisions could not simply be recognised and enforced in a foreign State however, and that the current text of the revised preliminary draft Convention already protected a debtor in that sense. He noted that the delegation of Brazil therefore preferred the text as it currently stood in the revised preliminary draft Convention.

13. **Mr Beaumont** (United Kingdom) thanked the Chair and stated that many references had been made to the 1973 Maintenance Convention. He clarified that Article 6 of the 1973 Convention had been drafted in a different way to Article 19 of the current revised preliminary draft Convention. He noted that Article 6 was a default provision, which only applied where a decision against a debtor had been given in default of appearance. He also noted that it was possible for a debtor not to be given notice of proceedings but to nevertheless appear and contest the proceedings and that this situation was not accounted for by either proposal that had been made by the delegations of Canada and Switzerland. He observed that it was a problem because the debtor could then appear at the second stage and say that he had not been given notice of proceedings, even though and despite the fact that he did appear and challenge proceedings at the first stage.

Mr Beaumont stated that if the proposals that had been made by the delegations of Canada and Switzerland were supported, then they would need to be changed to be a default provision in the same way that Article 6 of the 1973 Maintenance Convention was framed.

In relation to the proposal of the delegation of Canada, the Delegate of the United Kingdom suggested that whether or not proper notice had been given to a debtor was a question of fact and not law. He suggested that just because a debtor had no physical notice of the proceedings in his hand, it did not mean that he was not necessarily given proper notice because of what had potentially occurred and been attempted in order to notify him of the proceedings. Mr Beaumont therefore suggested that the proposal made by the delegation of Canada had to be careful with its use of language.

Mr Beaumont reminded the delegates that Article 19, paragraph (e), was not in square brackets and that the current text of the revised preliminary draft Convention protected a debtor by enabling and recognising the necessity for a debtor to be able to defend himself in proceedings at either the first stage or the second stage. Mr Beaumont encouraged the delegates to return to the text of the revised preliminary draft Convention, but that if it was really not supported, the proposals made by the delegations of Switzerland and Canada would need to be redesigned as a default provision in accordance with the 1973 Maintenance Convention.

14. **Mr Segal** (Israel) thanked the Chair and emphasised two matters that seemed to remain unclear with regard to the proposal contained in Working Document No 53. Firstly, he emphasised that when an administrative decision was made, the fact that it could be challenged in a court of law was what was important and substantial in order to make the administrative decision enforceable "like" a judicial decision, since no notice of the administrative proceedings was given at the first stage of the process. Mr Segal secondly observed that procedural rules regarding the giving of proper notice should be in accordance with the law of the "State of origin", which was why that phrase appeared in the proposal contained in Working Document No 53. He stated that the two observations that he had made were basic elements of the proposal contained in Working Document No 53.

15. **Mr McClean** (Commonwealth Secretariat) thanked the Chair and urged the delegates to take the comments of the Deputy Secretary General seriously. He noted that long discussions in relation to Article 19 had occurred at the last Special Commission and that it was he himself who had suggested the use of the words "neither" and "nor" as they appeared in the current text of the revised preliminary draft Convention. He stated that the presence of these words was critical to the operation of the current text.

Mr McClean observed, in relation to the strands of discussion that had occurred during the morning meeting, that there had been a concern expressed regarding the administrative decision-making process and that no notice of administrative proceedings was given to the debtor. He noted that what had been stated by the Delegate of Israel in relation to being able to challenge an administrative decision in a court of law in the requested State was an issue because a debtor sometimes had the ability to challenge an administrative decision by reopening and challenging the decision in the State of origin, after having been given notice of it.

In any event, Mr McClean expressed the belief that what should be being discussed in relation to Article 19, paragraph (e), was in fact simpler than what had so far been indicated by the interventions and concerns of the delegates. He firmly believed that the current text of the revised preliminary draft Convention was correct and should be retained.

16. **Ms Nind** (New Zealand) stated that the delegation of New Zealand supported the comments made by the Deputy Secretary General and the Representative of the Commonwealth Secretariat. She said that the understanding of the delegation of New Zealand was that Article 19, paragraph (e), of the current text in the revised preliminary draft Convention had been drafted to address and take account of both administrative and judicial systems. She expressed her concern should the text of the revised preliminary draft Convention be changed.

17. **Mme Dabresil** (Haïti) indique que la délégation d'Haïti soutient la proposition des délégations de l'Australie, de la Chine, d'Israël, du Japon, de la Fédération de Russie et de la Suisse telle que contenue au Document de travail No 53, concernant l'article 19, paragraphe (e), alinéas (i) et (ii). Elle constate que la solution proposée s'avère en effet plus souple au regard du système juridique haïtien.

18. **The Chair** thanked the delegates and stated that there was some support for the proposal contained in Working Document No 53 but that it was not considerable. She noted that the intention of Article 19, paragraph (e), was to provide for the recognition and enforcement of decisions arising from both systems, in which the judiciary made decisions regarding claims for maintenance, and from an administrative system where proper notice of proceedings was not necessarily given to a debtor but where there was notice of and an opportunity to challenge an administrative decision. The Chair therefore left the issue of Article 19, paragraph (e), open to delegates to possibly improve the text of the revised preliminary draft Convention if that was what was supported. She encouraged the delegates to work informally with one another, especially with regard to the proposals that had been made in Working Documents Nos 53 and 54 in order to reach a compromise. In the mean-

time, she noted that the text of Article 19, paragraph (e), would not be amended.

Article 34 – Demandes présentées directement aux autorités compétentes (Doc. trav. Nos 12 et 51) / Direct requests to competent authorities (Work. Docs Nos 12 and 51)

19. **The Chair** stated, in relation to Article 34 concerning direct requests to competent authorities, that the issue had been discussed during the second week of the Diplomatic Session, but that it was not completed. She noted that a question that remained related to what Articles in Chapter VIII should apply to requests made directly to a competent authority. She stated that to determine this, all Articles in Chapter VIII had to be considered. The Chair said that the International Bar Association had submitted Working Document No 12 in relation to this topic, and so asked them to introduce their proposal.

20. **Ms Dehart** (International Bar Association) noted that the proposed changes to Article 34 were set out in Working Document No 12. She noted that a reference to Chapter IV was included within Article 34 as well as references to Articles 40, 41, paragraphs 1 and 2, and 43, such that all Articles that related to direct requests were referred to in the same provision. Ms Dehart also clarified that the proposal for Article 34 would extend to all applications and not just those for recognition and enforcement.

Ms Dehart also observed that within Working Document No 12, a proposal had also been presented to make an addition to Article 9 that related to applications made through Central Authorities. She stated that the proposal added some flexibility to the Article so that two Contracting States could agree to permit an applicant to apply directly to the Central Authority in the requested State rather than requiring an applicant to make the application via the Central Authority in the Contracting State in which he or she resided.

In relation to Article 34 and a party making requests directly to a competent authority and in the context of the provision of legal assistance, Ms Dehart observed that the belief of the International Bar Association was that the Convention should not provide that a party making a direct request, with or without private counsel, must receive free legal assistance from the requested State. Ms Dehart explained the proposal contained in Working Document No 12 as meaning that a party in need of free legal assistance should make an application through the Central Authority system which would be subject to the national law of the State involved.

21. **The Chair** thanked Ms Dehart and stated that as she understood the proposal contained in Working Document No 12, it accounted for and added Articles 40, 41, paragraphs 1 and 2 (*i.e.*, language requirements), and 43 as also applying to direct requests. The Chair suggested that the confidentiality provisions in the Convention as well as Article 38, in relation to the non-legalisation requirement, should also be considered for their application to direct requests made to competent authorities.

22. **Mr McClean** (Commonwealth Secretariat) queried the application of Article 41 to direct requests to competent authorities. He observed that the language requirements of Article 41, paragraph 1, essentially outlined that applications and any related documents were to be in their original language and were to be accompanied by a translation into an official language of the requested State or in another language that the requested State had indicated, by way of declaration under Article 58. He noted that this provision did not necessarily fit in with the idea of direct requests because if a request was made directly to another State, then the applicant ought to comply with the procedures, including the language requirements, of that State.

23. **Ms Lenzing** (European Community – Commission) stated that the delegation of the European Community was grateful to the International Bar Association for raising the question of what provisions in Chapter VIII should apply to direct requests. Ms Lenzing noted however that the European Community preferred the opposite approach, namely that in principle all of Chapter VIII should apply to direct requests, except for any specific provisions which were not appropriate. This was because the delegation of the European Community was of the opinion that the bulk of Chapter VIII would and should in fact apply to direct requests. Ms Lenzing also agreed with the Chair and stated that she considered that Article 38 in relation to the requirement for the non-legalisation of documents should also apply to direct requests.

Ms Lenzing noted that the European Community had made a list of provisions from Chapter VIII that would not apply to direct requests. They were: Article 37, paragraph 2 (as it referred to Central Authorities); Article 39 (*id.*); Article 40, paragraph 3; Article 41, paragraph 3 (*id.*); Article 42 (*id.*); and Article 49. Ms Lenzing noted that all other provisions in Chapter VIII should apply to requests made directly to a competent authority.

Ms Lenzing then stated that the delegation of the European Community was flexible as to the proposal contained in Working Document No 12 to replace "person" with "creditor, debtor or public body" in Article 34, paragraph 1.

Ms Lenzing summarised by stating that the delegation of the European Community preferred to change the wording of Article 34, paragraph 2, so as to exclude certain provisions of Chapter VIII in their application to requests made directly to a competent authority rather than referencing those provisions that positively had applicability. In relation to the other issues and proposals raised in Working Document No 12, Ms Lenzing stated that with regard to adding paragraph 2 to Article 9, the European Community believed that that should be dealt with in the context of Article 46, and if amendments were required to be made they should be made to Article 46 instead.

In relation to the extension of Article 34 to other types of proceedings under the Convention, Ms Lenzing noted that she would prefer to retain the scope of the provision as it currently stood in the revised preliminary draft Convention.

24. **Mr Beaumont** (United Kingdom) agreed with the Delegate of the European Community. He responded to the concern that had been raised by the Representative of the Commonwealth Secretariat in relation to the applicability of Article 41, paragraph 1, to requests made directly to competent authorities and suggested that perhaps it was the language of the paragraph that made it resonate with Chapter III which did not apply to direct requests. Mr Beaumont stated however that Article 41, paragraphs 1 and 2, had some value for requests made directly to competent authorities because Contracting States would be able to state how the language requirements in Article 41 applied in the context of direct requests within their State.

25. **The Chair** stated that she understood that it was a complex discussion and asked whether there were any other interventions, including any comments with regard to the opposite approach suggested by the delegation of the Euro-

Procès-verbal/Minutes No 16

pean Community to exclude provisions in Chapter VIII from their applicability to direct requests rather than to note those that positively had applicability to direct requests. She also asked whether any delegations had any comments with regard to stating that Article 38, in relation to the requirement for the non-legalisation of documents, had applicability to requests made directly to a competent authority.

No comments were offered and so the Chair proceeded to ask the Drafting Committee to amend Article 34 in a way that would make it clear that Chapter VIII applied as a whole to direct requests, with the exceptions of Article 37, paragraph 2; Article 40, paragraph 3; Article 41, paragraph 3; Article 42; and Article 49. The Chair noted that she had heard no objection to the suggested excluded provisions that had been proposed by the delegation of the European Community. The Chair handed the floor to the delegation of New Zealand.

26. **Ms Doogue** (New Zealand) wished to clarify, based on the intervention of the delegation of the European Community, which provisions had to be referred to as not being relevant to direct requests. Ms Doogue noted that she had thought that the Delegate of the European Community had also mentioned Article 39.

27. **The Chair** noted that that was correct and that Article 39 would also be excluded from direct requests. The Chair handed the floor to the delegation of Switzerland.

28. **Ms John** (Switzerland) asked the Chair to repeat exactly what provisions would be excluded from being relevant to direct requests. Ms John mentioned that the delegation of Switzerland would like Article 39, concerning a power of attorney, to also be relevant to direct requests.

29. **The Chair** summarised, based on her understanding, the provisions that would not be applicable to direct requests as follows: Article 37, paragraph 2; Article 39; Article 40, paragraph 3; Article 41, paragraph 3; Article 42; and, Article 49. Therefore, the Chair stated that Article 39, in relation to a power of attorney, would be excluded from relating to direct requests since it concerned a process that related to the Central Authority of a requested State.

As for the proposal made by the International Bar Association as contained in Working Document No 12 in relation to Article 9, the Chair gave a reminder that the delegation of the European Community had verbally suggested that that amendment be moved to Article 46 in order to simplify procedures. The Chair noted that she had heard no objections to this suggestion. The Chair handed the floor to the delegation of the United States of America.

30. **Ms Carlson** (United States of America) queried whether the verbal suggestion made by the delegation of the European Community was to amend Article 46. Ms Carlson asked for that suggestion to be explained.

31. **The Chair** asked the delegation of the European Community to respond to the question that arose from the delegation of the United States of America.

32. **Ms Lenzing** (European Community – Commission) stated that the appropriate place for the addition to Article 9 that had been proposed by the International Bar Association in Working Document No 12 was not in fact Article 9 but Article 46. Ms Lenzing therefore confirmed that, yes, an amendment would need to be made to Article 46.

33. **The Chair** noted that the proposal made by the International Bar Association in Working Document No 12 also dealt with the idea that direct requests made under the Convention should not be restricted to requests for recognition and enforcement only. The Chair recalled that this was not supported by the delegates and therefore stated that the Convention would regulate only direct requests for the recognition and enforcement of a decision and that the text of the revised preliminary draft Convention in relation to that aspect would remain as it then stood. The Chair noted that discussions in relation to direct requests to competent authorities had been concluded.

The Chair suggested that discussions move to Article 2 in relation to the scope of the Convention. The Chair reminded the delegations that a long discussion had occurred on this topic during the second week of the Diplomatic Session and that it had been decided to delete the square brackets around Article 2, paragraph 3, and to retain the text contained therein. The Chair gave the floor to the delegation of Canada.

34. **Ms Morrow** (Canada) apologised because the flag for the delegation of Canada was not visible to indicate their intention to intervene in relation to Article 34. Ms Morrow wished to confirm that in relation to Article 34, paragraph 2, the proposal of the International Bar Association as contained in Working Document No 12 to also strike out the reference to Article 14, paragraph 5, was also accepted. Ms Morrow stated that she did not hear any discussion on that point and asked whether there were any interventions on that proposal. She noted that Article 14, paragraph 5, was in relation to free legal assistance in proceedings for recognition and enforcement where the creditor had benefited from such assistance in the State of origin, but that discussion in relation to Article 14 was not settled.

35. **Ms Lenzing** (European Community – Commission) stated that, in order to clarify the position of the European Community, her delegation believed that the reference to Article 14, paragraph 5, should be retained in Article 34, paragraph 2, and should not be struck out in accordance with the proposal of the International Bar Association.

36. **Ms Morrow** (Canada) stated that the delegation of Canada supported the deletion of the reference to Article 14, paragraph 5, in Article 34 and in the context of direct requests.

37. **Mr Moraes Soares** (Brazil) noted that the delegation of Brazil had no objection to the deletion of the reference to Article 14, paragraph 5, in accordance with the proposal contained in Working Document No 12 but that his delegation queried whether Chapter IV of the Convention was to also be referred to in the list of provisions that would not be applicable to requests made directly to competent authorities. He queried whether the Chair had asked the Drafting Committee to also include that Chapter in the list of the excluded provisions.

38. **The Chair** stated that Chapter IV in fact contained only one Article which was Article 15, and that a change would not be made to the list of provisions that had been handed to the Drafting Committee to note as being non-applicable to requests made directly to competent authorities. She noted that Chapter IV in fact appeared as an addition to Article 34, paragraph 2, in Working Document No 12, and so was applicable to an instance of a direct request.

39. **Mr Beaumont** (United Kingdom) wished to clarify whether in discussing Article 14, paragraph 5, reference

was being made to Option 2 which stated that "[n]o security, bond or deposit […] shall be required to guarantee the payment of costs and expenses in proceedings [brought by the creditor] under the Convention".

40. **The Chair** apologised for interrupting the Delegate of the United Kingdom but wished to clarify his misunderstanding in that, concerning the proposal of the International Bar Association in Working Document No 12, the proposal was to delete Article 14, paragraph 5, of Option 1 should Option 1 be adopted. If Option 2 were to be adopted, their proposal would be to retain Article 14, paragraph 5, as was explained in the footnote in Working Document No 12. The Chair stated that her understanding was that Option 1 was being discussed.

41. **Mr Beaumont** (United Kingdom) stated that it was therefore fine if Option 2 of Article 14 was not being discussed because Article 14, paragraph 5, of Option 2 was in relation to security and bonds and would be a different matter. He noted that the question therefore became one of whether a creditor who made a request directly to a competent authority and who had benefited from free legal assistance in the State of origin should be entitled to free legal assistance in proceedings for recognition and enforcement as provided for by the law of the State addressed under the same circumstances. He noted that whether to include Article 14, paragraph 5 (Option 1), on the list of provisions that would not apply to direct requests was a question for consideration by the Drafting Committee.

42. **The Chair** attempted to clarify her understanding that the proposal of the International Bar Association was to therefore remove the reference to Article 14, paragraph 5 (Option 1), meaning that a creditor applicant that made a direct request to a competent authority would not receive free legal assistance in proceedings for recognition and enforcement even if they had benefited from free legal assistance in their State of origin. The Chair stated that she thought she understood that there was an agreement that the provision in relation to security and bonds, *i.e.*, Article 14, paragraph 6 (Option 1), would apply to direct requests to a competent authority.

43. **Ms Carlson** (United States of America) wished to clarify with the Chair exactly what paragraph was being discussed. She asked the Chair whether what was currently being discussed was Article 14, paragraph 5 (Option 1), which stated: "Subject to paragraph 2, a creditor, who in the State of origin had benefited from free legal assistance, shall be entitled, in any proceedings for recognition and enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances." Ms Carlson understood that to be the case.

44. **Mr McClean** (Commonwealth Secretariat) stated that he would raise a slightly separate point to what was being discussed. He observed that the Chair had previously stated that Chapter IV was relevant to direct requests for the recognition and enforcement of a maintenance claim, but in fact, Mr McClean suggested that Chapter IV was limited to proceedings to modify a decision or to make a new decision.

45. **The Chair** acknowledged the comments of the Representative of the Commonwealth Secretariat and stated that there was a reference to Article 15 of the revised preliminary draft Convention in Article 34, paragraph 1, which stated: "This Convention [did] not exclude the possibility of recourse to such procedures as may be available under the national law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by this Convention including, subject to Article 15, for the purpose of having a maintenance decision established or modified." She observed that the Convention therefore did not hinder such direct requests but that the text did not say much more than that. The Chair stated that Article 34, paragraph 2, fixed those Articles that would be applicable to requests made directly to a competent authority in a Contracting State for recognition and enforcement. The Chair noted that the reference to Article 15 would remain in Article 34, paragraph 1, since it was a logical reference considering that Article 15 only related to the modification or establishment of a decision in the context of a request made directly to a competent authority. She clarified that the reference to Article 15 in paragraph 2 of Article 34 in Working Document No 12 would not be sent to the Drafting Committee as it was incorrect.

46. **Ms Escutin** (Philippines) greeted the Chair and explained her understanding of the proposal that had been made by the International Bar Association in Working Document No 12, stating that the delegation of the Philippines did not support the proposals contained therein. However, as a result of Working Document No 51 which also related to Article 14 and the question of legal assistance and effective access to procedures, it was still a matter that was being considered by the Drafting Committee, especially in relation to an amendment to potentially be made to Preliminary Document No 29. Ms Escutin therefore suggested that further discussion of the proposal made by the International Bar Association be put on hold until the Drafting Committee had finalised their proposal with regard to Article 14.

Ms Escutin noted that in the Philippines, it may not even be practical to require a request to be made through a Central Authority. She suggested that sometimes requests were appropriately made directly to a competent authority. As a result of this, Ms Escutin did not consider it fair that free legal assistance would not be afforded to requests simply because they were made directly to a competent authority.

47. **Mr Ding** (China) thanked the Chair and stated that the discussion had been very confusing. He noted that many Articles were being referenced and that changes were being proposed to Chapters V and VIII and therefore at this stage it was not appropriate to make any decisions. This was especially considering that the suggestions for Article 14 had not yet been finalised by the Drafting Committee. It therefore made sense to return to this discussion after other important issues had been decided.

48. **Ms Carlson** (United States of America) noted that the delegation of the United States of America had also been confused by the different strands of discussion but that they were hopefully starting to understand. Ms Carlson referred to the comments that had been made by the Observer of the Philippines, concerning the deletion of Article 14, paragraph 5 (Option 1), from the list of provisions that would apply to direct requests made to a competent authority. She noted that its deletion meant that free legal assistance would not be available for applicants who made direct requests to a competent authority for the recognition and enforcement of a maintenance claim, even where they had benefited from such assistance in their State of origin. Ms Carlson noted that whether Article 14, paragraph 5 (Option 1), was applicable to direct requests for recognition and enforcement or not had little effect on the situation in the United States of America since all direct requests made within their jurisdiction would not be entitled to free legal assistance.

Ms Carlson continued her explanation and stated that the phrase "under the same circumstances" in Article 14, paragraph 5 (Option 1), had no relevance to the application of this Convention in the United States of America because whether an applicant had been entitled to receive free legal assistance in their State of origin or not, it would not mean that they would receive free legal assistance if they made a request directly to a competent authority in the United States of America. She emphasised that the United States of America did not provide free legal assistance for any request made directly to a competent authority.

Ms Carlson explained the policy behind this situation and stated that the United States of America believed that the best use of their resources for matters relating to child support, including those covered by this Convention, was to invest all of that money in the Central Authority system because it was that system that was more streamlined and designed to cost less than making a request directly to a competent authority in the United States of America. She noted that the whole process for the provision of free legal assistance in the United States of America was designed to go through the Central Authority system and so, therefore, the delegation of the United States of America supported the deletion of Article 14, paragraph 5 (Option 1), from Article 34, paragraph 2, so that provisions in relation to free legal assistance would not be applicable to requests made directly to a competent authority.

49. **Ms Morrow** (Canada) noted that the delegation of Canada supported all comments made by the Delegate of the United States of America.

50. **Ms Lenzing** (European Community – Commission) thanked the Delegate of the United States of America for explaining the policy that was essentially behind the proposal of the delegation of Canada and which they now understood. She stated that the delegation of the European Community supported the provision of free legal assistance, as outlined in Article 14 *quater*, paragraph (b), for requests made directly to competent authorities. She noted that this type of provision could be seen in other Hague Conventions and certainly had much value even though it may leave some room for interpretation.

Ms Lenzing noted that the delegation of the European Community had listened to the explanation given by the delegation of the United States of America in relation to Article 14 *quater*, paragraph (b), namely that within their jurisdiction free legal assistance was only given by the Central Authorities and therefore would not be provided for applicants who made requests directly to competent authorities. Ms Lenzing mentioned that in the European Community an applicant who made a request directly to a competent authority would still be given free legal assistance. She noted that the delegation of the European Community saw some benefit in that and so would wish to retain the reference to Article 14 *quater*, paragraph (b), but could be flexible on that point if it was an important issue to the delegation of Canada.

51. **The Chair** noted that the reference to Article 14, paragraph 5 (Option 1), in Article 34, paragraph 2, would be retained. The Chair noted that there may be some further consideration on this issue after the finalisation of the proposal that was being put together by the Drafting Committee in relation to Article 14.

52. **Ms John** (Switzerland) asked for two points of clarification. Firstly, in relation to Working Document No 12 and the proposal therein regarding Article 9, Ms John wished to confirm that it was the case that that would be discussed at another stage. Secondly, an amendment had been proposed in relation to Article 46 and she asked for that to be repeated.

53. **The Chair** stated that she had no objection to moving the discussion of Article 9 as was contained in Working Document No 12, the proposal of the International Bar Association, to the discussion that would eventually occur in relation to Article 46. She noted that this discussion was in relation to the proposed addition to Article 9 that enabled a Contracting State to make an agreement "with another Contracting State to establish procedures to permit a party in the requesting State to make an application directly to the Central Authority of the requested State". She asked the Delegate of Switzerland whether that suggestion was acceptable to her delegation.

54. **Ms John** (Switzerland) stated that the delegation of Switzerland agreed with the approach suggested by the Chair.

55. **The Chair** clarified that the second question from the Delegate of Switzerland was in relation to the list of excepted provisions from Chapter VIII that would not be applicable to direct requests made to competent authorities.

56. **Ms John** (Switzerland) clarified that her question was whether it was proposed to exclude the applicability of Article 46 to direct requests made to competent authorities and add that Article to the list of provisions from Chapter VIII that were excluded from application to the direct request procedures, given that proposed Article 9, paragraph 2, would be added to Article 46, under Working Document No 12.

57. **The Chair** thanked Ms John for her question and confirmed that Article 46 would be applicable to requests made directly to competent authorities. The Chair suggested that the meeting move from direct requests to a discussion on Article 2, the scope of the Convention.

Article 2 (Doc. trav. / Work. Doc. *No 48)*

58. **The Chair** noted that long discussions had previously occurred with regard to the scope of the Convention and that square brackets were still contained in paragraph 1 of Article 2 in relation to the application of the Convention to "[[…] claims for spousal support [that were] made in combination with claims for maintenance in respect of […] a child]". The Chair noted that the second outstanding issue was in relation to the core scope of the Convention. On that point, the Chair noted that the majority of States were in favour of the text of the revised preliminary draft Convention as it then stood although some States believed that the core scope of the Convention should be towards a child under the age of 18 years and not 21 years. The Chair asked the delegations whether, firstly, there were any interventions in relation to the square brackets contained in Article 2, paragraph 1.

59. **Ms Carlson** (United States of America) suggested that the square brackets contained in Article 2, paragraph 1, be removed and the text retained. She stated that the benefit of the text was that in countries that sent applications to the United States of America for recognition and enforcement, for example, even though the United States of America would not be making a declaration to extend the scope of the Convention under Article 2, paragraph 2, beyond maintenance claims in respect of children, their system would deal with claims for spousal support in combination with

claims for maintenance in respect of a child. Therefore, she summarised that a claim for spousal support in combination with a claim for maintenance in respect of a child sent by a Contracting State to the United States of America would be recognised and enforced because of this obligation under the Convention.

60. **Mr Beaumont** (United Kingdom) emphasised that the text contained in the square brackets in Article 2, paragraph 1, had to be properly understood. He noted that the effect of the removal of the square brackets would be to extend the scope of claims for spousal support to the whole of the Convention when such claims were made in combination with claims for maintenance in respect of a child. Regardless of the removal of the square brackets however, Mr Beaumont noted that the recognition and enforcement of claims for spousal support came within the general scope of the Convention. Mr Beaumont noted that the delegation of the United Kingdom would wish to delete the square brackets appearing in Article 2, paragraph 1, and retain the text.

61. **Mme Mansilla y Mejía** (Mexique) précise que la délégation du Mexique est favorable à la suppression des crochets à l'article 2, paragraphe premier, et au maintien du texte. Cependant, elle constate que la référence à l'âge limite de 21 ans dans l'article 2, paragraphe premier, demeure un problème pour sa délégation.

62. **Ms Kulikova** (Russian Federation) thanked the Chair and stated that the position of the Russian Federation with respect to the square brackets in Article 2, paragraph 1, was dependent on any solution with regard to the making of reservations under Article 57 and that such a position could not yet be expressed.

63. **Mme González Cofré** (Chili) indique que la délégation du Chili est favorable à la suppression des crochets à l'article 2, paragraphe premier, et au maintien du texte. Elle ajoute qu'elle ne souhaite pas que soit modifié l'âge limite de 21 ans. En revanche, elle souhaite attirer de nouveau l'attention des délégations sur la proposition des pays du Mercosur et autres membres associés visant à inclure dans le champ d'application de la Convention les personnes incapables de plus de 21 ans, auxquelles la loi applicable reconnaît un droit aux aliments (Doc. trav. No 48).

64. **Mr Schütz** (Austria) thanked the Chair and stated that the delegation of Austria was in favour of deleting the square brackets located in Article 2, paragraph 1, and retaining the text. Mr Schütz noted that from his practical experience, it was for the benefit of spouses that with a claim for maintenance in respect of a child, they can also use the channel of the Central Authority system.

65. **Mr Sello** (South Africa) thanked the Chair and stated that the delegation of South Africa supported the deletion of the square brackets in Article 2, paragraph 1, and the retention of the text.

66. **Mr Moraes Soares** (Brazil) stated that as had been proposed in Working Document No 48 by the delegations of Argentina, Brazil, Chile and Peru, albeit within a different structure and using different language, the delegation of Brazil supported the deletion of the brackets in Article 2, paragraph 1, and the retention of the text. He noted that the delegation of Brazil had no objection to the age of 21 years being used in Article 2, paragraph 1, and also stated that his delegation would like to support the proposal that was contained in Working Document No 48 so as to extend the scope of the Convention to claims for maintenance in respect of a disabled person, even if they had already reached the age of 21 years. Mr Moraes Soares also referred to the support of the delegation of Brazil for the proposal contained in Working Document No 48 that proposed that the Convention, with the exception of Chapters II and III, shall also apply to "analogous situations to marriage according to the applicable law" in addition to spousal support.

67. **Mme Dabresil** (Haïti) émet encore certaines réserves concernant la suppression des crochets à l'article 2, paragraphe premier. En outre, elle indique que la fixation de l'âge limite à 21 ans constitue un problème pour la délégation d'Haïti puisque dans son pays, l'âge de la majorité est fixé à 18 ans révolus.

68. **Ms Lenzing** (European Community – Commission) thanked the Chair and responded to the delegations of Argentina, Brazil, Chile and Peru who had proposed Working Document No 48. She emphasised that the existing core scope of the Convention was the result of many compromises that had already been made by Contracting States. She stated that it was important to realise that an extended core scope for the Convention was not acceptable to States on a global scale and that the compromises therefore had been made so that consensus would be obtained. The Convention therefore had a limited scope but Contracting States had the opportunity to extend the core scope of the Convention via the process of making declarations. She stated that the proposal contained in Working Document No 48 to extend the scope of the Convention to disabled persons was therefore not an acceptable extension of the core scope of the Convention for the majority of Contracting States. Ms Lenzing urged the delegations that had contributed to Working Document No 48 not to insist on the proposal and instead to agree to the compromised core scope of the Convention. If they wished, she suggested that they could extend the scope of the Convention by making a declaration that would be applicable to their jurisdictions so that the Convention would be extended to maintenance claims in respect of whatever category of persons they also wished to protect.

69. **Ms Carlson** (United States of America) stated that in light of the comments made by the Delegate of the United Kingdom, it appeared that the United States of America had misinterpreted the square brackets contained in Article 2, paragraph 1. She understood then that claims for the recognition and enforcement of spousal support were already included within the non-bracketed text of the Convention. She therefore stated that the delegation of the United States of America supported the deletion of the text contained within the square brackets.

70. **The Chair** stated that the last intervention therefore created a different situation with regard to the support for the deletion of the square brackets contained in Article 2, paragraph 1, and the retention of the text. The Chair stated that the floor would be given to the Delegate of Ecuador before discussions had to be completed on this topic.

71. **Mme Subia Dávalos** (Équateur) attire l'attention des délégations sur la proposition des pays du Mercosur (Doc. prél. No 36 et Doc. trav. No 48) d'inclure dans le champ d'application de la Convention les situations analogues au mariage ainsi que les personnes incapables qui ne sont pas en mesure d'exercer les activités fondamentales de la vie.

Mme Subia Dávalos précise également que la délégation de l'Équateur soutient la fixation de l'âge limite à 21 ans et est favorable à la suppression des crochets et au maintien du texte à l'article 2, paragraphe premier.

72. **Mr Tian** (China) thanked the Chair and stated that the delegation of China would agree to the removal of the square brackets and the retention of the text. In relation to the age of majority, as it appeared in Article 2, paragraph 1, Mr Tian stated that his delegation preferred the age of 18 years being included but at the same time, could show some flexibility with regard to that point. He suggested that if the age of 18 years was included within Article 2, paragraph 1, if Contracting States desired, they could extend the scope of the Convention to maintenance claims in respect of those persons between 18 and 21 years.

73. **Mr Beaumont** (United Kingdom) stated that he hoped that his intervention explaining to the delegation of the United States of America the operation of Article 2, paragraph 1, had not caused problems. He added that he had wanted to clarify that Article 2, paragraph 1, meant that the scope of the Convention outlined therein applied to direct applications made in respect of claims for spousal support, but not to applications being made through the Central Authority system because of the exclusion in that paragraph of Chapter III.

Mr Beaumont wished to clarify with the delegation of the United States of America what they were willing to accept via their Central Authorities. He said that his understanding was that in the United States of America, the Central Authority could accept all applications for a claim for spousal support when it was made in combination with a claim for maintenance in respect of a child. If that was not the case, and only recognition and enforcement of combined claims was possible, then Mr Beaumont noted that the text of the revised preliminary draft Convention could be changed slightly to take account of the situation of the United States of America. He also stated that slight language amendments could be made so as to clarify exactly what type of application under the Convention was being referred to.

74. **The Chair** stated that she observed that the Delegates of Peru and Argentina wished to intervene although she had previously stated that the morning session on 19 November 2007 would be completed at 11.30 a.m. She therefore asked those delegates to be brief.

75. **M. Cieza** (Pérou) appuie la proposition de la délégation du Brésil d'inclure dans le champ d'application de la Convention les personnes incapables majeures. Il exprime en outre le regret de devoir ajouter qu'au Pérou, l'âge limite est fixé à 18 ans.

76. **Mr Marani** (Argentina) stated in relation to Article 2, paragraph 1, that the delegation of Argentina wanted to delete the square brackets that appeared therein and retain the text. He noted his approval at previously hearing that the delegation of the European Community would declare to extend the text of the Convention to disabled persons, but that his delegation was therefore surprised when the delegation of the European Community spoke against the proposal made by the delegations of Argentina, Brazil, Chile and Peru as contained in Working Document No 48. The delegation of Argentina believed it was important to protect vulnerable persons by extending the scope of this Convention to maintenance claims in respect of that category of persons. Mr Marani therefore asked the delegation of the European Community whether they were really against the extension of the scope of the Convention in that regard or whether the delegation of the European Community had simply compromised their position in order to reach a consensus.

77. **Ms Carlson** (United States of America) thanked the Chair and apologised for all of the confusion that she had caused. She clarified that the Central Authorities in the United States of America would accept and process claims for the recognition and enforcement of a maintenance decision in respect of spousal support when they were made in combination with a claim for the recognition and enforcement of a maintenance decision in respect of a child. In this sense she noted that Chapter V of the Convention would apply. She explained that the courts of the United States of America were available for the recognition and enforcement of maintenance decisions in respect of spousal support only.

Ms Carlson also noted that some states of the United States of America may also establish a maintenance decision in respect of spousal support when made in combination with a claim to establish a maintenance decision in respect of a child when made directly to that state. She noted however that the delegation of the United States of America considered that the square brackets contained in Article 2, paragraph 1, should only apply to claims for the recognition and enforcement of the types of decisions outlined therein.

78. **The Chair** expressed her thoughts that a lunch break would now be appropriate. She noted that any remaining confusion being experienced by delegates could be clarified during this time. She noted that coffee and tea were available and that the afternoon session for Monday 19 November 2007 would commence at 2 p.m.

The meeting was closed at 11.50 a.m.

Procès-verbal No 17

Minutes No 17

Séance du lundi 19 novembre 2007 (après-midi)

Meeting of Monday 19 November 2007 (afternoon)

La séance est ouverte à 15 heures sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

1. **The Chair** apologised for the delay. She stated that the group of delegations that were working during the lunch break had worked out a proposal and that the working document was being finalised. She suggested that there would be a tea break in an hour and it should be finalised and distributed then and there could be an introduction of the document after the tea break.

Article 37

2. **The Chair** suggested starting the session with a discussion of Article 37 which concerned the non-disclosure of information. She stated that there was one open question in paragraph 2 and there was no agreement on the question of whether the determination of non-disclosure made by one Central Authority should be binding on another Central Authority. She noted that there was a proposal from the delegation of the European Community which provided that "[a] determination […] shall be taken into account by another Central Authority" but shall not be binding on the other Central Authority. She asked if there were any interventions on this Article.

3. **Ms Lenzing** (European Community – Commission) referred to the proposal of her delegation for Article 37, presented in Working Document No 36, and stated that an amendment should be made to paragraph 2 in the terms that the Chair had mentioned. She noted that the amendment was controversial when previously discussed. She stated that the concern was raised by the delegation of Canada that in cases of domestic violence they would want to be sure that the address of the applicant was protected. She stated that another possibility was to allow the requesting Central Authority not to disclose the real address, *i.e.*, the address where the applicant was resident, in the first place. She stated that her delegation could not finally commit to this solution as the European Community had not yet coordinated on it but the problem of domestic violence could possibly be resolved in the context of Article 11, and the meaning of "address" could be clarified in the Explanatory Report. She commented that she understood from her discussions with the delegation of Canada that the modification her delegation had suggested to Article 37, paragraph 2, would be acceptable in the light of these other suggestions.

4. **Mme Gervais** (Canada) indique que la délégation du Canada est d'accord avec la délégation de la Communauté européenne pour poursuivre les discussions relatives à la protection du demandeur.

5. **The Chair** stated that as there were no further interventions, she understood that further discussions would take place to resolve these issues and then the meeting would return to them.

Document de travail / Working Document *No 57 (Art. 50)*

6. **The Chair** suggested moving on to Working Document No 57 from the delegation of the European Community which concerned transitional provisions, in particular Article 50.

7. **Mr Hať apka** (European Community – Commission) stated that it was pointed out in previous discussions that in the relationship between the Contracting States to the preliminary draft Convention who are also Contracting States to either the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* or the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, situations might arise where a decision would qualify as recognisable and enforceable under either of those Conventions but would not qualify as recognisable and enforceable under the new Convention. He remarked that this possibility arose because slight changes had been made in the approach to the bases of jurisdiction and also to the grounds for refusal with respect to the procedural rights of the debtor. He noted that the policy approach was the intent to enable recognition and enforcement of as many decisions as possible, so that the consequence described would be an unfortunate one.

Mr Hať apka commented that the proposal of the delegation of the European Community was a solution for those States who will be bound by the new Convention, as well as the previous Conventions that are to be replaced by it. He stated that the principle would be that the Convention rules on recognition and enforcement would primarily apply, but in those cases where the decision would be refused recognition and enforcement the competent authority would look at the previous Convention and if the decision could be recognised under the previous Convention then it would be recognised. He stressed that what was important was that there was a reference to conditions for recognition and enforcement only and this meant that under the rule in Article 50, paragraph 1, the procedure for recognition and enforcement would still be governed by the new Convention, mostly Article 20, and it would be just the conditions which would be governed by the previous Convention, namely the conditions covered by Articles 17 and 19. He noted that the provision could possibly be better drafted. He noted that there was a reference to Article 44 as that Article was an absolute replacement provision and therefore that rule had to be made subject to what was proposed for the transitional provision. He stated that he was willing to clarify any questions that arose.

8. **The Chair** asked if there were any objections to this proposal. There were no remarks and the Chair concluded by asking the Drafting Committee to make the amendments suggested in Working Document No 57.

Article 30

9. **The Chair** suggested moving to Article 30 where there was one open question which concerned the list of possible effective measures of enforcement. She recalled that there had been long discussions already on this provision and that the majority of the delegations were in favour of keeping this list but there were still concerns about the necessity of such a list in the Convention.

10. **Mr Segal** (Israel) stated that there was support for adding the use of alternative dispute resolution, such as mediation and conciliation, among those measures that could be used for enforcement. He stated that with regard to paragraph 1, the question was still open as to whether the word "most" should be added, as in "most effective measures". He stated that as far as he remembered these two matters were not finalised but were still open.

11. **Mr Ding** (China) stated that his delegation did not think that Article 30, paragraph 2, was necessary and it would cause concerns for States that had difficulties in accepting the measures listed. He noted that paragraph 2, sub-paragraphs (a) and (b), were acceptable to his State so if it was really necessary to have measures listed, they would agree to keep those two measures there.

12. **Ms Carlson** (United States of America) recalled that her delegation felt that the compromise had already been made in relation to this Article, namely that the list was not mandatory but merely illustrative. She stated that the entire Chapter was very soft and did not mandate any enforcement measures. She stated that her delegation would strongly object to the removal of paragraph 2. She referred to the proposals of the Delegate of Israel and stated that in her recollection they had not received much support the first

time they were mentioned, but she would defer to the Chair on that issue.

13. **Ms Lenzing** (European Community – Commission) supported the retention of the language in Article 30, paragraph 2, and wanted to see the brackets removed. She stated that this was part of a compromise and the compromise lay in the *chapeau* of the paragraph which stated that "[s]uch measures may include", so that no Contracting State would be obliged to have all of these measures. She noted that as far as she was aware in the Member States of the European Community, a measure such as the revocation of a driving licence for not paying maintenance did not exist, and other measures might exist in some but did not exist in all Member States. She stated that this list did not do any harm because it was obvious that the measures did not have to be taken if they did not exist under national law. She commented that this paragraph could just serve as a list to inspire the national legislature and be a menu of effective enforcement measures that they could select from if they wanted to, but there was no obligation to do so. She stated that it was an important point for the delegation of the United States of America so she would support maintaining this text.

14. **Mr Beaumont** (United Kingdom) noted that the United Kingdom had recently introduced legislation allowing for the revoking of driving licences for people who did not pay their maintenance, but he stated that the point was well made by the Delegate of the European Community that a State did not have to have any of these measures as long as it had effective measures. He stated that the obligation was in paragraph 1 and paragraph 2 was simply an illustrative list and it was very difficult to see why States would have any real objection to an illustrative list. He remarked that they may not agree with any particular item on the illustrative list but by signing the Convention they would not be expressing support for any of the measures listed because the list was only illustrative. He stated that the importance of having some illustration was to encourage people to think about how to achieve the objective in paragraph 1. He stated that it was important to get States to do what the Delegate of Israel suggested, which was to have the most effective measures, *i.e.*, measures which were truly effective.

Mr Beaumont noted that it was difficult to change the obligation to "most effective" because that would require knowledge of what was the most effective measure and there was no agreement on this. He remarked that there was agreement that there were a variety of measures that were effective but that there could be no agreement on what was the most effective measure. He stated that the spirit of this suggestion was good: everyone agreed that it should be ensured that there are effective measures and that was the obligation in paragraph 1, but which measure to use was a matter of choice. He asked that the list be kept because it did not do anyone any harm.

15. **M. Heger** (Allemagne) indique qu'il souhaite apporter un soulagement aux délégations qui se montrent encore réticentes par rapport à l'article 30, paragraphe 2. Il relève qu'une ou deux des mesures qui figurent sur la liste iraient à l'encontre de la Constitution allemande. Mais il indique que la délégation de l'Allemagne est favorable à ce compromis et partage l'opinion exprimée par les délégations de la Communauté européenne et des États-Unis d'Amérique qui font observer que le terme utilisé dans le texte est « peuvent ». Il mentionne également que lors des dernières sessions, sa délégation avait manifesté des hésitations au sujet de cet alinéa mais qu'elle est dorénavant soulagée et heureuse du compromis.

16. **Ms Ménard** (Canada) stated that her delegation would like to see Article 30, paragraph 2, kept in the text and the brackets deleted. She supported the Delegate of the United States of America and agreed with what she had said regarding the compromise that had been reached in this Article. She stated that it was important to keep this illustrative list of most effective measures.

17. **Mme González Cofré** (Chili) indique que la délégation du Chili appuie la proposition d'enlever les crochets et de garder le texte dans sa forme actuelle. Elle indique également que sa délégation partage l'opinion exprimée par la délégation de l'Allemagne sur le fait que le compromis dispose que : « De telles mesures peuvent comprendre ». Elle considère que cette liste est illustrative et estime que cela peut faciliter son acceptation par plusieurs États.

18. **Mr Ding** (China) stated that his delegation was aware that the *chapeau* of this Article read "may include" so that it did not impose any obligation on States, but the problem was that his State did not recognise some of the measures listed as effective measures. He stated that it was necessary that there would be a clear explanation in the Explanatory Report on the illustrative nature of this list. He stated that he would also like to see conciliation and mediation in this list as they are quite commonly used in China and were effective.

19. **The Chair** asked if there were any views on the proposal to include in the list alternative dispute resolution methods.

20. **Ms Escutin** (Philippines) stated that as the Explanatory Report would state that Article 30, paragraph 2, would not be mandatory, in the spirit of compromise and openness her delegation would support deleting the brackets and retaining the text.

21. **Ms Cameron** (Australia) supported the suggestion to add alternative dispute resolution to the list in Article 30, paragraph 2, and she recalled that her delegation had supported this the last time it was raised and it had seemed that the session was quite close to consensus in favour of that.

22. **Mr Markus** (Switzerland) agreed with the previous speaker.

23. **Ms Carlson** (United States of America) thanked the delegation of China for their flexibility and supported adding alternative dispute resolution means or mediation into the illustrative list, and having the Explanatory Report clarify that these truly are illustrative.

24. **Mr Fucik** (Austria) stated that he had no objection in the substance to include alternative dispute resolution as a measure of recovering maintenance but he remarked that the concept was unfamiliar as a method of enforcing maintenance payments. He stated that mediation was not used to enforce a decision but to avoid enforcing a decision. He commented that this may be resolved as a drafting issue but to say that mediation was a kind of enforcement would not be correct for all concepts of mediation. He stated that, however, as an effective measure for recovering maintenance without enforcement there would be no objection to its inclusion.

25. **Mme Parra Rodriguez** (Espagne) indique que sa délégation appuie l'opinion exprimée lors des interventions

précédentes sur la médiation. Elle considère que c'est un moyen alternatif de recouvrement des aliments. Elle ajoute que la liste, au paragraphe 2, fournit des exemples et estime que ce fait doit être mentionné dans le Rapport explicatif.

26. **Mme Fernandez Pereyro** (Uruguay) indique que sa délégation est favorable au maintien de l'article 30 et à la suppression des crochets. Mais elle ajoute qu'elle ne partage pas l'opinion selon laquelle la médiation pourrait être introduite dans cet article. Elle indique que le paragraphe premier dispose que : « Les États contractants rendent disponibles dans leur droit interne des mesures efficaces afin d'exécuter les décisions en application de la Convention. » Elle rappelle que la médiation a pour but d'obtenir un accord entre les parties. Elle estime donc que la médiation ne constitue pas un moyen efficace d'obliger le débiteur d'aliments à s'exécuter.

27. **M. Rodriguez Liberato** (République dominicaine) indique que sa délégation souhaite faire écho aux propos de la délégation de l'Uruguay. Il rappelle que cet article porte sur les mesures d'exécution des décisions. Il indique que sa délégation estime que si l'on veut utiliser la médiation comme mesure alternative de recouvrement des aliments, cela doit figurer dans un autre article.

28. **Mme Dabresil** (Haïti) rappelle que lors des dernières discussions au sujet de cet article, la délégation d'Haïti avait marqué son désaccord sur les mesures énumérées au paragraphe 2, notamment l'alinéa (d), qu'elle estime trop contraignant. Toutefois, elle ajoute que dans un esprit de compromis, elle propose la suppression des crochets et suggère que le Rapport explicatif puisse mentionner qu'il s'agit d'une liste illustrative.

29. **Ms Burgess** (United Kingdom) stated that in terms of legal traditions, it depended on how enforcement was viewed. She remarked that she understood the problems that had been raised by other delegates. Mediation could be used as a means of enforcement if a debtor was told that there was a decision and he or she could face other methods of enforcement or it could be discussed in mediation. She stated that it could be viewed as a method of enforcement in persuading the debtor to pay through another method.

30. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique partage l'opinion exprimée par les délégations de la République dominicaine et de l'Uruguay. Elle estime que ces arguments sont logiques et juridiques et précise que sa délégation y adhère.

31. **Ms Dang** (Viet Nam) stated that her delegation strongly supported the inclusion of alternative dispute resolution as a method to facilitate the enforcement of decisions and she noted that this was quite effective in Viet Nam. She noted that this method encouraged voluntary payment from debtors and was quite effective.

32. **The Chair** stated that it seemed that there was agreement that the square brackets around Article 30, paragraph 2, could be removed, bearing in mind that this was an illustrative list and did not introduce an obligation on States to adopt any of these measures, but that the obligation was just to have effective enforcement measures. She stated that there was agreement on alternative dispute resolution as an effective means to avoid the necessity of enforcement measures. She remarked that there was agreement on this policy and stated that this would be left to the Drafting Committee to decide where it should be placed and how it should be formulated.

Article 26

33. **The Chair** noted that there was a new working document distributed on Article 26, Working Document No 59, and that it was a joint proposal from the delegations of Canada and the European Community. She asked that one of these delegations introduce the proposal.

34. **Ms Morrow** (Canada) stated that Working Document No 59 proposed the definition of a new term, "maintenance arrangement". She remarked that this definition was worked on to merge the necessary or core elements of authentic instruments and private agreements that were previously referred to in Article 26. She stated that the definition of the new term would set out the core requirements for such an instrument. She noted that a "maintenance arrangement" would be an agreement in writing relating to the payment of maintenance where, in the State of origin, the maintenance arrangement was enforceable as a decision, was subject to review and modification by a competent authority, and had been formally drawn up or registered as an authentic instrument by a competent authority or had been authenticated by, or concluded, registered or filed with, a competent authority. She stated that the rest of the working document contained the consequential amendments to the related provisions in Articles 16 and 26, *i.e.*, changes of the terms "authentic instruments and private agreements" to "maintenance arrangements". She noted that there was one further change set out in Article 26, paragraph 5, and this was to identify that the State of origin was the place where the challenge concerning the arrangement would be made. She commented that it was open to the delegation of the European Community to add any comments relating to this proposal.

35. **The Chair** noted that there was now a new term proposed with a new definition and that there was still an old question concerning the *ex officio* review, and whether it should only be of public policy or whether the competent authority in the State addressed should *ex officio* examine whether a maintenance arrangement was obtained by fraud or falsification, or whether there was any incompatible decision. She noted that it had already been agreed that the recognition and enforcement of such instruments would not be mandatory but an opt-in or an opt-out system would be created.

36. **Mr McClean** (Commonwealth Secretariat) referred to Article 3, paragraph (e), sub-paragraph (ii) as proposed in Working Document No 59 and asked whether "subject to review and modification by a competent authority" meant that it would be subject to review on application or whether it was an essential element of the definition that the initial agreement was subject to review at the outset without anyone making an application to an authority for that to happen.

37. **Ms Morrow** (Canada) responded by stating that the interpretation was that it was subject to review upon application.

38. **Mr Hayakawa** (Japan) expressed support for an opt-in system.

39. **Ms Carlson** (United States of America) stated that there had not been much time to look at this proposal but that in principle there would be no objections to it. She asked whether in the proposed Article 3, paragraph (e), there should be an "and" after sub-paragraph (ii) so that the conditions would be cumulative.

40. **Ms Lenzing** (European Community – Commission) stated that the conditions were cumulative and there probably should be an "and". She stated that her delegation would prefer a reservation or opt-out system as it seemed that there were more delegations who felt comfortable with the idea of recognising and enforcing these types of instruments.

41. **Mr Markus** (Switzerland) referred to the proposed Article 3, paragraph (e), sub-paragraph (iii), and asked whether the second indent was correct in referring to an arrangement concluded with a competent authority, or in French "*conclue avec*". He stated that agreements were not concluded with the competent authority but before the competent authority. He commented that he was not sure whether this was just a misunderstanding of the language or whether it should read "concluded before" the competent authority.

42. **The Deputy Secretary General** stated that he thought that the Delegate of Switzerland was correct that the word should be "before" but that this would raise a problem that agreements that are concluded before an authority also come within Article 16, paragraph 1, and qualify as decisions, and so there was a question of whether there was an overlap and whether that overlap was of any importance.

43. **Ms Lenzing** (European Community – Commission) stated that there was no overlap and no error in the language, that what had been meant were agreements concluded with a competent authority. She stated that these agreements existed in some Member States of the European Union and were not covered by Article 16, and that was why it was desirable to cover them here. She noted that the wording "with a competent authority" could also be found in internal legislation such as the Brussels I Regulation and could possibly also be found in the *Lugano Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*.

44. **Ms Cameron** (Australia) stated that her delegation was very satisfied with the new definition of "maintenance arrangements" proposed by the delegations of Canada and the European Community. She supported the preference of the Delegate of the European Community for a reservation or opt-out system as an alternative, even though her delegation had previously supported an opt-in system.

45. **Mr Segal** (Israel) supported the preference of the Delegate of Japan for an opt-in mechanism. He raised the question of whether the requested State was able to verify who represented the interests of the child and stated that nothing had been mentioned as to who had represented the child in the State where the maintenance arrangement had been entered into on the child's behalf. He asked whether the requested State would have the possibility of looking at who really represented the child's interests. He stated that these matters had been completely left out of the revised preliminary draft Convention, and he remarked that when dealing with child support arrangements something should be clarified on this matter.

46. **Mr Schütz** (Austria) stated that the delegation of Austria supported the proposal of the delegations of Canada and the European Community. He referred to the intervention of the Delegate of Switzerland and stated that Austria was one of the States with a system where an agreement was concluded with a competent authority, that is, with a child welfare authority which was an administrative authority. He stated that this wording was necessary to cover this situation in Austria and that there might be other States for whom it was important, too. He commented that as the Delegate of the European Community had already mentioned, this wording could be found in the text of the Brussels I Regulation and in the Lugano Convention. He stated that this wording should be kept.

47. **Mr Tian** (China) stated that his delegation had some concerns with this proposal. He affirmed that it was not appropriate to add the new definition of "maintenance arrangements" to Article 3 but that that definition should be placed, if there was agreement, in Article 26. He stated that his delegation could not accept that the provision on maintenance arrangements in this proposal should be mandatory, in that it had to be applied by Contracting States. He stated that his delegation preferred the declaration or opt-in system. He stated that this proposal went a little further than could be accepted.

48. **Ms Albuquerque Ferreira** (China) stated that if there was an opt-in system, she had some concerns regarding the grounds provided for in Article 26, paragraph 3. She stated that in line with what had been said by the Delegate of Israel, in maintenance arrangements there was one ground that should be provided for and that was equality between the parties to the agreement. She stated that she did not know how it should be drafted and that it would be left to the Drafting Committee. She said that this was not fraud but something different. She stated that she was not familiar with arrangements that were concluded with an authority, but in those cases she would imagine that the authority could ensure this equality. She stated that in paragraph 4 there should be another ground for *ex officio* review in these exceptional circumstances.

49. **The Chair** stated that now there was a new definition and in sub-paragraph (iii), in both possible types of maintenance arrangements, a competent authority was somehow involved. She asked whether this would be enough of a guarantee, since these were no longer totally private agreements but in both cases a competent authority was involved.

50. **M. Heger** (Allemagne) souhaite intervenir dans le même ordre d'idée que la Présidente. Il indique que sa délégation considère également la participation des autorités étatiques comme une garantie du respect des droits fondamentaux des deux parties. Il souhaite s'adresser aux délégations encore réticentes pour préciser que les garanties de l'article 26, paragraphe 2, notamment de l'alinéa (b), sont déjà prévues à l'article 16. M. Heger mentionne enfin que sa délégation se rallie aux propos de la délégation de l'Autriche parce que l'Allemagne connaît aussi le type d'accord conclu avec les autorités administratives.

51. **M. Markus** (Suisse) indique que comme cette pratique est connue en Autriche et en Allemagne, il n'est pas non plus question pour sa délégation d'exclure les instruments conclus avec les autorités compétentes. En revanche, il se demande s'ils ne sont pas en train de créer une lacune. Il constate que l'article 26, tel qu'amendé par les délégations du Canada et de la Communauté européenne, ne mentionne plus les instruments conclus devant une autorité compétente. Il indique que ces instruments sont déjà couverts par l'article 16, paragraphe 3, en tant que décisions des autorités compétentes. Il considère qu'il serait plus approprié d'essayer d'établir une délimitation entre l'article 3, paragraphe (e), et l'article 16, paragraphe 3. Il propose de différencier d'une part, les accords et arrangements conclus devant une autorité administrative, qui tomberaient sous le coup de l'article 16, paragraphe 3, et d'autre part, les arrangements conclus avec les autorités compétentes, qui

seraient régies par l'article 3. Il estime qu'en agissant ainsi, on éviterait une lacune.

52. **Mr Moraes Soares** (Brazil) stated that it had not been decided if private agreements, authentic instruments or maintenance arrangements could be recognised and enforced according to the internal law of the State. He referred to the idea of indisposable rights, which could arise especially when there are the rights of a child involved in the private agreements or maintenance arrangements. He stated that it would be preferable if Article 26, paragraph 6, could be extended in order to create a possibility that a State may declare that applications for recognition or enforcement of maintenance arrangements should not be made directly to a competent authority and should not be made through a Central Authority.

53. **Mr McClean** (Commonwealth Secretariat) referred to the case raised by the Delegate of China where the arrangement was obtained not by fraud or falsification but by duress, the overbearing power of one party over the other. He commented that it had been stated that there were safeguards, in both sub-paragraphs (ii) and (iii) of Article 3, paragraph (e). He stated that sub-paragraph (iii) only talked about registering or filing with an authority, which did not involve any check but simply meant that the agreement was registered and was in the file. He referred to his previous question and whether sub-paragraph (ii) provided for *ex officio* review when the agreement was initially concluded, and recalled that he was assured that it meant only that there was a procedure under which one of the parties could ask for a review. Mr McClean noted that neither sub-paragraph (ii) nor sub-paragraph (iii) gave the safeguard some delegations had identified. He remarked that the point raised by the Delegate of China still stood and that the addition of the word "duress" to Article 26, paragraph 3, sub-paragraph (b), was the sort of thing that was needed.

54. **Mme González Cofré** (Chili) indique qu'elle a eu l'impression qu'il s'était dégagé un compromis, après les dernières discussions relatives à l'article 26. Elle ajoute que la délégation du Chili est en faveur d'un système de déclaration plutôt que d'un système de réserve.

55. **Mr Hellner** (Sweden) referred to the problem of unequal bargaining power between parties and duress and other unfortunate circumstances surrounding the conclusion of agreements. He noted that under the second indent of the proposed Article 3, paragraph (e), sub-paragraph (iii), the word "filed" did not mean much by way of scrutiny. He noted that when an agreement was entered into before a court, recognition and enforcement of which had not been objected to, this did not necessarily mean that it would have to be scrutinised at any length and there could also be a problem of underlying duress or unequal bargaining power in these cases. He stated that a Swedish authority would do a rapid control check to see that parties are who they say they are and that the agreement was not manifestly unfair but that was all. He remarked that there would always be the problem of unfair agreements. He stated that there should be a cost-benefit analysis and that agreements provide a benefit in making payment of maintenance much smoother, and there was only the occasional case where they were unfair. He stated that there was always the power to refuse recognition and enforcement on the ground of public policy under Article 19.

56. **Ms Morrow** (Canada) referred to the comment of the Representative of the Commonwealth Secretariat and noted that there was an inconsistency between the French and the English versions of the proposal. She stated that the intention was that the French version of Article 3, paragraph (e), sub-paragraph (ii), was correct and the English version should say "may be made subject to review". She stated that she would also like to confirm what the Delegate of Sweden had said and urged the States that were interested in opting in to consider the cost-benefit analysis, and that in these types of arrangements it would be the creditor asking to have them recognised and enforced. She stated that a critical part of the definition was that the arrangement was enforceable as a decision in the State of origin and that this meant that the government, the legislature, or the decision-making authorities in that State have decided that these types of arrangements would be enforced as decisions, and that they were not problematic for the best interests of children. She reminded the delegates who had concerns that these provisions would be subject to declaration or reservation, so if there was something they found problematic with the nature of these arrangements they could make the choice not to opt in to using them. She stated that for States that found it acceptable, they could decide, within this definition, what met their criteria.

57. **Mr Segal** (Israel) stated that the judges in Israel were not different from judges in Sweden in this respect and did not scrutinise an agreement, but he noted that when the judges saw that child maintenance was below a threshold that would be considered reasonable they would look into the matter. He stated that even judges that frequently register those agreements in a court would examine this issue because they have some responsibility towards children. He remarked that judges in the other State would not know anything about the standard of living in the State of origin and therefore would not be able to challenge the matter. He stated that his delegation was not satisfied with what had been said about the involvement of a competent authority as this was just a formal check and would not take care of the interests of the child.

58. **The Chair** concluded that the definition in Working Document No 59 had been generally accepted with some drafting amendments. She noted that these amendments included that the proposed Article 3, paragraph (e), sub-paragraph (ii), should state "may be made subject to review […]", and that it should end with "and" to make clear that these were cumulative conditions. She stated that this proposal would be sent to the Drafting Committee as it was agreed and the Drafting Committee would make the drafting changes that were necessary.

59. **Mr Ding** (China) stated that his delegation wanted to make sure that Article 26 would be subject to an opt-in mechanism. He stated that the definition should be in Article 26 as some States would not opt in and it was not appropriate to have the definition in the general provisions.

60. **The Chair** noted that she had not completed her conclusions. She stated that, as it had been agreed previously, the provision would not be mandatory and it was necessary to decide whether an opt-in or an opt-out system was more feasible. She stated that the majority did not seem to have objections to the definition appearing in Article 3 but the Explanatory Report could further clarify that all Contracting States did not have to recognise and enforce maintenance arrangements just because they are defined in the general definition section. She referred to the question about the extent of the *ex officio* review and stated that she thought a conclusion could still not be drawn about this issue and that the square brackets should remain in the text.

61. **Mme Subia Dávalos** (Équateur) souhaite réagir par rapport au commentaire de la délégation de la Chine. Elle

indique que la délégation de l'Équateur préfère le système de déclaration à celui de réserve.

62. **The Chair** stated that a decision would not be made now as to whether it should be an opt-in or an opt-out mechanism and that this would be left for the second reading.

Document de travail / Working Document *No 62 (art. /* Arts *14 et /* and *20)*

63. **The Chair** noted that Working Document No 62 contained a compromise proposal on Articles 14 and 20 from an informal working group of delegations. She noted that the list of States participating in the informal working group was given in the working document. She asked that this proposal be introduced.

64. **Ms Lenzing** (European Commission – Community) stated that she was proud to be able to present this compromise proposal on Articles 14 and 20 which was worked out by an informal working group consisting of delegations from Canada, China, the European Community, Japan, the Russian Federation, Switzerland and the United States of America. She noted that it was a difficult compromise for all delegations. She commented that these were two of the most difficult issues in the revised preliminary draft Convention but after some struggle an overall balanced compromise had been achieved and she asked that the meeting endorse it. She stated that she would like to highlight the key compromises. She apologised because she had realised that later changes had not been included in the working document and she stated that she would set them out orally.

Ms Lenzing stated that in Article 14 the compromise was essentially as set out in Working Document No 51 but with the removal of a number of the square brackets. She noted that on the issue of the possibility of using a child-centred means test, the lifting of the brackets had led to an important improvement. She stated that States making use of the declaration would provide free legal assistance for applications for recognition and enforcement and for cases covered by Article 17, paragraph 4, and this meant that the means test would only be used in establishment cases. She noted that this was a big concession from the delegations of China, the Russian Federation and Japan and that it was much appreciated.

Ms Lenzing stated that on Article 20 the other delegations made a big concession because there was now a genuine alternative to the procedure for recognition and enforcement set out in Article 20 and that a new Article, Article 20 *bis*, had been added. She remarked that this new Article contained a one-step procedure in which both parties were immediately given the opportunity to be heard and to make submissions and in which the competent authority could review the grounds for refusing recognition and enforcement. She stated that the provisions for refusing recognition and enforcement were different as the authority may review the order on the basis of Article 19, paragraphs (a), (c) and (d), of its own motion and the other grounds could be reviewed if raised by the defendant or if concerns relating to these grounds arose from the face of the documents submitted.

The Delegate of the European Community noted that Article 20 had been amended so that, both under the procedure for that Article and for Article 20 *bis*, there was an obligation to act expeditiously which figured in Article 20, paragraph 11, and Article 20 *bis*, paragraph 7. She noted that it had been provided that if there was an appeal under Article 20 *bis*, or a further appeal under Article 20, this would not have the effect of staying enforcement. She stated that essentially a Contracting State could choose between the two-step procedure and the one-step procedure. She noted that some safeguards were added in Article 20 *bis* to ensure that the one-step procedure would be expeditious and that there would not be undue delay caused during the review of the grounds of the refusal.

She commented that she had just been told that a corrigendum would be distributed, but she stated that she would highlight what had been amended. She referred to Article 14 *ter*, paragraph 4, and stated that on the last line the words "that level of legal assistance" should read "the most favourable legal assistance". She referred to Article 20 *bis* and noted that there were two modifications. She stated that in paragraph 1 the reference should be to Article 20, paragraphs 2 to 11, instead of just Article 20. She stated that in Article 20 *bis*, paragraph 3, notice should not only be "promptly", but also "duly" given.

Ms Lenzing invited the other delegations to consider this compromise proposal and to endorse it.

65. **The Chair** thanked all the members of the informal working group and stated that they had worked hard to achieve a compromise on these difficult Articles. She suggested that there would be an initial discussion on this proposal and that other members of the working group could take the floor.

66. **Ms Carlson** (United States of America) stated that she would like to thank the Delegate of the European Community and the Delegate of the United Kingdom for their extraordinary efforts, patience and creativity over the previous few days in order to come up with a compromise over these very difficult issues. She commented that this compromise was far from a first choice for her delegation. She noted that her delegation had strongly supported free legal services for all child support cases and had strongly supported Article 20 as it was in the original draft and that there were major departures from both of those in this proposal. She remarked that there were many delegations that had different problems with Articles 14 and 20 and that her delegation recognised the importance of an instrument that could be widely ratified. She stated that while this was not the first choice of her delegation, this was counterbalanced by the hope that if it were approved it would allow for a wider ratification. She stated that the compromise was delicately drafted and fragile and that all the delegations had made major concessions, and that it would not survive if there were many attempts to amend it. She remarked that there had been a fairly large number of countries representing wide differences in viewpoint involved in the informal working group. She asked that other delegations recognise how dangerous it would be to unravel it or to start making changes to any part of it. She stated that it was a good compromise and went a long way to meeting many of the major concerns of her delegation and many of the concerns of States that had different points of view. She commented that the result was a package that would be a significant improvement in international recovery of child support over what was in place now.

67. **Mr McClean** (Commonwealth Secretariat) stated that he had a question for clarification concerning the relationship between Article 14 *bis* and Article 14 *ter*. He noted that Article 14 *ter*, paragraph 1, began with the phrase "[n]otwithstanding paragraph 1 of Article 14 *bis*", but the declaration would state that free legal assistance would be given subject to a test based on the means of the child. He

asked whether the declaration was meant to exclude the manifestly unfounded ground for refusal of legal assistance in Article 14 *bis*, paragraph 2, or if that stood even if the declaration was made.

68. **Ms Fisher** (International Association of Women Judges) stated that she had additional questions for clarification. She referred to Article 20, paragraph 10, and Article 20 *bis*, paragraph 6, and the effect of an appeal on a stay. She noted that in Article 20, paragraph 10, it would appear that the mere fact of filing an appeal would not give rise to an automatic stay but that would not mean that if there were not other good grounds for a stay it could not occur. She stated that if this was read in conjunction with Article 20 *bis*, paragraph 6, which allowed for a stay in exceptional circumstances, it looked as if exceptional circumstances would in fact not be covered under Article 20, paragraph 10, and no stay could be granted at all.

She noted that her second question concerned Article 20 *bis*, paragraph 3, where both parties were to be given an adequate opportunity to be heard. She asked whether it was anticipated that both parties would appear and if this required the applicant to travel to the State where the application was being made.

Ms Fisher remarked that there had been a recommendation made with regard to Article 20, paragraph 7, sub-paragraph (c), that in addition to the reference to Article 21, paragraph 1, sub-paragraphs (a), (b) and (d), there should be a reference to Article 21, paragraph 2, which would cover the incorporation of an abstract. She asked whether Article 21, paragraph 2, had been purposely excluded to exclude the possibility of using the abstract so that the original was required, or was that an oversight.

69. **Mr de Oliveira Moll** (Brazil) stated that his delegation had been following and participating in the discussion on Article 14, that is, with the Working Group on Article 14 and effective access to procedures, but he remarked that his delegation had not participated in the negotiation of this new proposal and had not had time to examine it with the other Latin American delegations. He stated that he would reserve his position and could not accept it before discussing it with the other Latin American States. He stated that those delegations had some problems with Article 20 and had to see whether Article 20 *bis* addressed those concerns correctly.

70. **The Chair** noted that this was just an initial discussion and that she was aware that it was a complex proposal and that more time was necessary to consider it.

71. **Ms Ménard** (Canada) thanked the Delegates of the European Community and the United Kingdom for their hard work and good ideas. She also thanked all the members of the informal working group for their openness and willingness to find a solution for children across the world. She stated that this was not the first choice for her delegation but it was the best compromise that had been achieved, and she was optimistic that this would work in the future.

72. **Mr Beaumont** (United Kingdom) stated that he would try to answer some of the questions that had been raised, subject to what others in the informal group would say. He referred to the question raised by the Representative of the Commonwealth Secretariat and he noted that the drafting of the cross-reference between Article 14 *bis* and Article 14 *ter* was difficult and he was not sure that it was the best that could be achieved. He stated that the intention was that countries that had made a declaration could also provide for the manifestly unfounded test, and there was no doubt about that.

Mr Beaumont referred to the question raised by the Representative of the International Association of Women Judges and stated that the interpretation of Article 20, paragraph 10, was that no stay was permitted and it was correct to infer this from the different language used in Article 20 *bis*, paragraph 6. He noted that perhaps it could be drafted better. He stated with regard to the question of whether the party would have to travel, judges were used to people being represented by others and that it was not necessary for a party to travel if he or she was being represented. He stated that this paragraph did not mean that parties would have to be present, just that they would have an opportunity for a case to be presented on their behalf. He stated that he was not sure what the issue was in the last point because Article 21, paragraph 2, just provided for a declaration that an abstract would be accepted but it was not a ground for the refusal of recognition. He stated that perhaps if there was further clarification it could be better understood.

73. **Mr Segal** (Israel) stated that he wanted to join with what was said by the Delegate of Brazil and that this would have to be examined further. He stated that he wanted to clarify the distinction between paragraph 4 of Article 20 and paragraph 4 of Article 20 *bis*. He noted that in Article 20, paragraph 4, a competent authority could base a refusal only on Article 19, paragraph (a), while in Article 20 *bis*, paragraph 4, a competent authority was given further possibilities for review. He asked what the distinction was between the two procedures set out by these Articles and the authority of the competent authority under the two Articles.

74. **Mr Beaumont** (United Kingdom) responded by stating that the difference was that in the context of Article 20 there was a two-step system and in the first stage there was only review on the basis of public policy because it was not a complete *ex officio* procedure. He noted that under this Article there was no obligation to review and many States would only register the decision at this step, but if the order was reviewed that review was restricted to public policy considerations. He stated that in Article 20 *bis* it should not be restricted only to public policy as there was only one step and one opportunity to review. He remarked that the paragraphs of Article 19 that were suitable for a judge to review *ex officio* were picked out and that a judge might be aware of pending proceedings or an incompatible decision. He noted that the other grounds for review could only be raised by a defendant or examined if concerns emerged from the documents that had been sent. He commented that the documents might have revealed problems regarding jurisdiction and if there was some sign from those documents that there was a problem then the judge could make a decision on that ground. He stated that the difference arose because they were two different systems, a one-step and a two-step system.

Mr Beaumont thanked the other members of the informal working group and he thanked the delegation of China for compromising a great deal from their original position. He stated that he hoped that when people considered the proposal they would realise that it was a good compromise. He stated that in virtually all cases children would get free legal assistance and procedures for recognition and enforcement would be expeditious and also take proper care of the rights of the defendant. He stated that a proper balance had been achieved but that he realised that it would take time for people to think it over and properly analyse it.

Procès-verbal/Minutes No 17

75. **Mr Bavykin** (Russian Federation) stated that as members of the informal working group, his delegation would like to express their satisfaction with the text that was produced and presented to the delegates. He stated that all the members of the informal group had worked in a very dedicated and transparent fashion which had at last produced the result that was presented. He acknowledged that a great change had been made from the previous text and previous proposals and he stated that he appreciated the understanding of the other delegations in the group who accommodated the concerns of his delegation to the highest possible extent, and understood the difficulties his delegation in particular would face if this compromise proposal was not elaborated. He stated that it was really a major step forward and opened the door for the participation of a number of countries that had difficulties because of differences in their legal systems, and opened the door for those States to become Parties to the Convention. He commented that this was something that all the delegations should bear in mind when considering the proposals that they had in front of them. He stated that he hoped that, with the explanations which were addressed in a highly professional and expert manner by the Delegate of the United Kingdom, everyone in the room would be convinced that this was a very good proposal and that it would be acceptable to all.

76. **Ms Cameron** (Australia) stated that she would like to join the other delegations in congratulating the informal working group. She acknowledged that this represented a significant step forward and recognised that it was a delicate balance that would not allow much amendment. She asked if she could introduce the proposal of her delegation for Article 14, which could be found in Working Document No 52.

77. **The Chair** stated that she was aware of this working document and suggested that the general discussion on Working Document No 62 take place first, and then the meeting would return to that proposal later.

78. **Ms Cameron** (Australia) asked if she could make comments on the amendments to Article 20 or if detailed discussion on that Article would be delayed until another time.

79. **The Chair** stated that the Delegate of Australia could proceed with her observations.

80. **Ms Cameron** (Australia) referred to the issue raised by the Representative of the International Association of Women Judges and further clarified by the Delegate of the United Kingdom relating to the comparison between Article 20, paragraph 10, and Article 20 *bis*, paragraph 6. She stated that she had concerns with regard to Article 20, paragraph 10, and that this would be the Article that would apply to Australia. She noted that she had stated before that in the Australian system, an appeal at this stage would proceed through a court granting leave to appeal. She stated that it would be perverse to the Australian legal system to allow a court to grant leave to appeal but forbid that court from considering whether a stay was appropriate or to be considered. She stated that there could also be possible problems with the wording found in Article 20 *bis*, paragraph 6, that a stay could only be allowed in exceptional circumstances.

81. **Mr Markus** (Switzerland) stated that his delegation was also a member of the informal working group and would like to convey their gratitude to the Delegates of the European Community and the United Kingdom for their preparations and guidance of the work. He stated that the text was also a compromise for his delegation but that as all parties were equally unsatisfied, then this indicated it was a good compromise. He stated that his delegation supported the compromise and would like to encourage all delegates to accept it. He referred to a proposal on a minor point that had been submitted by his delegation in Working Document No 11 but stated that it had nothing to do with the general discussion and that he would be ready to present it later.

82. **Mme Subia Dávalos** (Équateur) remercie le groupe de travail qui a proposé le Document de travail No 62. Elle indique que sa délégation ne doute pas qu'il s'agit d'une excellente proposition, mais elle a besoin de temps pour l'analyser. Par conséquent, elle se réserve la possibilité de donner son avis ou de commenter ce Document de travail.

83. **The Chair** stated that the delegations that were involved in the work of the informal working group were very supportive of this compromise proposal, but she understood completely that those delegations that were not involved needed more time to digest the proposal. She noted that the next morning the second reading would begin, and this meant that it would be wise to give the Drafting Committee the possibility of looking at this proposal from a drafting point of view. She asked if there was approval to submit the proposal to the Drafting Committee to make any drafting changes required, without touching any policy issues, and to insert this text in square brackets into the draft Convention which would be the basis for the second reading. She stated that the plan was that the draft would be received at 9.00 a.m. the next morning and that it would include this proposal, as it was based on the support of a number of delegations, but it would be in square brackets as other delegations had not had time to scrutinise it.

84. **Mr de Oliveira Moll** (Brazil) stated that it was too early to insert this into the text, even in square brackets, and his delegation would prefer to keep the original text.

85. **The Chair** stated that the understanding was that there had not been enough time for discussion and that the discussion of these Articles would be more extensive than was usual under a second reading.

86. **M. Marani** (Argentine) indique qu'il se rallie aux propos de la délégation du Brésil sur le fait qu'aucun pays d'Amérique latine n'a participé à ce groupe informel. Il ajoute qu'il est, de ce fait, très difficile pour sa délégation d'exprimer son opinion. Il estime qu'il n'est pas convenable de confier immédiatement la proposition de ce groupe au Comité de rédaction, parce que certaines préoccupations sont exprimées, notamment quant à la forme que revêtiront les articles 20 et 20 *bis*. En guise de conclusion, il indique que sa délégation préfère que cette proposition ne soit pas soumise au Comité de rédaction.

87. **Mr Beaumont** (United Kingdom) noted that he was now speaking as a member of the Drafting Committee. He stated that he did appreciate the concerns of the delegations of Brazil and Argentina and asked their forbearance for the Drafting Committee. He noted that that evening was a key opportunity to draft and that it was desirable to move forward. He stated that there was no suggestion that these States were not going to be able to raise any concerns about the text, but that it would facilitate the working of the Drafting Committee considerably if this text could be put into the draft so that a proper French text could be obtained, and this would also assist in getting a proper Spanish text as well. He commented that he could not imagine that the other States would say that this proposal should be

torn up and the discussion should begin from the original position. He noted that the intention was to put this proposal in square brackets. He apologised that there was no Latin American State involved in the informal working group. He stated that it would be helpful if this text could be in the document that would be scrutinised the next day.

88. **Mme Fernandez Pereyro** (Uruguay) indique qu'elle partage l'opinion exprimée par les délégations de l'Argentine et du Brésil. Elle précise que les délégations des États membres de Mercosur ont reçu le mandat d'avoir une position commune. Elle ajoute que sa délégation a été surprise par cette proposition et qu'elle a besoin de temps pour l'analyser. Elle indique également qu'elle comprend parfaitement les explications données par la délégation du Royaume-Uni. Elle estime cependant que cette proposition pose un problème substantiel, qui paraît à première vue formel. Elle considère que, comme l'a mentionné le Délégué du Brésil, il est un peu tôt pour l'insérer dans le projet de Convention, même entre crochets.

89. **Mme Subia Dávalos** (Équateur) estime que l'idée d'incorporer la proposition faite par le groupe de travail informel est prématurée. Elle précise que le Document de travail No 51 a obtenu l'approbation d'un grand nombre de délégations et qu'il serait peut-être mieux de l'incorporer. Elle indique que sa délégation partage l'opinion exprimée par les délégations de l'Argentine, du Brésil et de l'Uruguay, à savoir qu'il est prématuré d'inclure la proposition du Document de travail No 62 dans le projet de Convention.

90. **The Chair** stated that she was not sure if she understood these interventions. She stated that her suggestion was not to insert the text without square brackets but in square brackets.

91. **Mr Fucik** (Austria) stated that perhaps in the spirit of compromise, if it was premature to include it in the draft but necessary to work on it, then it could be put in a footnote.

92. **Mme Subia Dávalos** (Équateur) propose que ce soit plutôt le texte du Document de travail No 51 qui soit inscrit entre crochets dans le projet de Convention. Elle considère comme excellente l'idée du Délégué du Royaume-Uni de laisser le temps aux différentes délégations d'analyser la proposition du Document de travail No 62.

93. **M. Heger** (Allemagne) indique que sa délégation a été membre du premier groupe de travail sur les articles 14 et 40. Il ajoute que sa délégation n'a pas pris part au groupe de travail informel qui a produit le Document de travail No 62. Par conséquent elle n'a pas pu suivre le développement de ce document. Mais il suggère, à l'instar de la délégation du Royaume-Uni, de faciliter le travail du Comité de rédaction en gardant à l'esprit le fait que ce comité a besoin de gagner du temps.

Il estime que la meilleure approche consisterait à insérer la proposition entre crochets. Il rappelle que c'est une coutume du Bureau Permanent de la Conférence de La Haye, pour indiquer qu'un texte n'est pas finalisé, discuté en profondeur et pour lequel la discussion devra se poursuivre. Il indique que sa délégation se rallie à la proposition de la Présidente et de la délégation du Royaume-Uni d'insérer le texte entre crochets. Il estime que cela facilitera le travail du Comité de rédaction et permettra à toutes les délégations d'avoir un texte de base.

94. **The Chair of the Drafting Committee** suggested that perhaps the delegations of the Mercosur States would agree to the Drafting Committee working on the text, retaining it in square brackets and adding in a footnote that it was without prejudice to the content of these two Articles.

95. **M. Marani** (Argentine) indique qu'il apprécie les explications et les interventions des délégations du Royaume-Uni et de l'Allemagne. Mais il observe qu'il n'est pas facile pour sa délégation de partager ce point de vue parce qu'aucun pays d'Amérique latine n'a participé à ce groupe de travail. Sa délégation préfère que ce texte ne soit pas inséré dans le projet de Convention, même entre crochets, et souhaite que la question reste ouverte.

96. **Mme Dabresil** (Haïti) souhaite obtenir une version française de la proposition faite dans le Document de travail No 62, afin de mieux l'analyser.

97. **The Chair** referred to the idea of the Delegate of Austria that a footnote could be used for this purpose. She stated that the most important thing was to allow the Drafting Committee to make the changes that they would find necessary and it would also mean that a French text would be available. She asked whether it would be acceptable if the proposal appeared in a footnote.

98. **Mr de Oliveira Moll** (Brazil) stated that it seemed strange to include this as a footnote and that his delegation would really prefer at this point not to have any mention of the proposal in the draft.

99. **Mr Beaumont** (United Kingdom) stated that he wanted to point out that the alternative to having the proposal inserted into the text was to maintain the original text, because a complete redraft could not be done based on Working Document No 51. He stated that it was not productive to leave it as it was and that there was not much time left. He stated that a text that was supported by a large number of delegates should appear in the draft Convention for the second reading, because otherwise it did not help the discussion to move forward. He commented that it was quite apparent that not everyone agreed with the new proposal and that objections could be made. He stated that it was clear that the text should be available for the second reading and that it would not put the Latin American delegations in a bad position if this proposal was found in the draft. He stated that it had to be recognised that there were time constraints and that it was necessary to help each other, that this was not about using tactical games. He commented that this was not about tactics but about making a Convention.

100. **Mr McClean** (Commonwealth Secretariat) stated that he was not interested in tactics but had seen a lot of these negotiations and he felt that people perhaps did not realise how little time was left. He stated that the Latin American States felt strongly that they had not been given an opportunity to consider this proposal, and that had to be respected. He stated that on the other hand, the drafting of the proposal did have to be dealt with and the cross-referencing would have to be adjusted. He suggested having the text of the draft Convention with no Article 14 or 20 and that the Drafting Committee would be allowed to produce a redrafted working document with a translation so that that text would be available. He stated that he hoped that this met the practical concerns and gave proper honour to the position of the Latin American States.

101. **The Deputy Secretary General** stated that his observation would follow on from the suggestion of the Representative of the Commonwealth Secretariat. He stated that there was a group of States who had quite reasonably said

that it was premature for this proposal to appear in the draft, while on the other hand there was a quite legitimate concern about the need of the Drafting Committee to work on the proposal in case it was adopted. He stated that this might mean that there would be a slight delay on the second reading. He suggested beginning the next day with the first reading of this proposal, and that the Drafting Committee would have the first 13 Articles ready for a second reading which would be commenced as soon as possible. He stated that the main thing was to answer the two concerns raised, both for the States that did not want this to appear in the draft and for those who wanted the Drafting Committee to have time to consider it. He stated that the Drafting Committee could bring forward the proposals in a working document and that this would satisfy everyone.

102. **The Chair** asked if this suggestion was acceptable.

103. **Mr de Oliveira Moll** (Brazil) stated that his delegation did not want to obstruct the work of the Drafting Committee and that it was acceptable that the Drafting Committee work on the proposal as a working document. He stated that it was not acceptable for it to be put into the text, even in square brackets, but it would be acceptable as a proposal of those States.

104. **The Chair** asked if this was acceptable to all the other delegations.

There were no remarks and she stated that the second reading would be delayed and the discussion would start on this working document in the morning. She noted that by 9 a.m. the next morning there would be a new version of the draft Convention available, or at least the Articles other than Articles 14 and 20. She stated that the meeting would begin at 9.30 a.m., but if the delegates arrived earlier they would be able to read the new version produced by the Drafting Committee.

105. **Mr de Oliveira Moll** (Brazil) invited the delegates of the Latin American States to meet directly after the meeting.

106. **Mr Pereira Guerra** (European Community – Presidency) stated that a co-ordination meeting for the delegations of Member States of the European Community would take place the next morning at 8.15 a.m.

107. **The Chair of the Drafting Committee** asked if the Drafting Committee was free to prepare an additional working document containing the relevant cross-references so that, in the event the compromise solution was ultimately accepted, this work would already be done.

108. **The Chair** stated that the Drafting Committee was free to submit a working document. She reminded the delegates that there would be a French version of the compromise proposal available shortly and a Spanish version available within a half-hour, and that this should help further.

109. **The Chair of the Drafting Committee** stated that there would be a meeting of the Drafting Committee in the offices of the Permanent Bureau immediately after the meeting.

110. **The Chair** stated that the Commission would recommence at 9.30 a.m. on Tuesday 20 November 2007 with the continuation of the first reading.

The meeting was closed at 6.30 p.m.

Procès-verbal No 18

Minutes No 18

Séance du mardi 20 novembre 2007 (matin)

Meeting of Tuesday 20 November 2007 (morning)

La séance est ouverte à 10 h 05 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

1. **The Chair** welcomed the delegates. On behalf of the delegates, she thanked Mr Struycken (Netherlands, President of the Diplomatic Session) for the reception and the theatre performance that he had hosted on the previous evening. She noted that it was positive that the delegates were treated to a joyful and fun event before the most intensive part of the Diplomatic Session.

Documents de travail / Working Documents *Nos 62 et* / and *64*

2. **The Chair** observed that the Commission was still in the first reading phase in which the compromise proposal contained in Working Document No 62 was to be discussed. She also noted that Working Document No 64 had been submitted by the Drafting Committee and that the latter working document contained drafting proposals concerning Article 14. The Chair invited the Chair of the Drafting Committee to present Working Document No 64.

3. **The Chair of the Drafting Committee** explained that the first change that was made concerned Article 14 *bis*, paragraph 1. That provision was aligned with the scope of the revised preliminary draft Convention through the insertion of the term "person" in place of the term "child".

She then observed that the Drafting Committee had considered the proposal of the Representative of the Commonwealth Secretariat concerning the relationship between Article 14 *bis* and Article 14 *ter*. It had been concluded that it was sufficiently clear that Article 14 *bis*, paragraph 2, applied to Article 14 *ter*.

The changes that had been effected in Article 20, paragraph 3, simply made that paragraph consistent with all other provisions of the revised preliminary draft Convention concerning direct requests to competent authorities. Specifically, the amendment replaced a reference to the "requested State" with a reference to the "State addressed".

Article 20, paragraph 7, sub-paragraph (c), contained two changes. The first proposed change, which was not yet reflected in the proposal of the Drafting Committee, concerned the reference to the veracity of a document transmitted. She observed that "veracity" was different from "authenticity" and "integrity" since "veracity" referred to the substance and should therefore be excluded, since an evaluation of the veracity of a document would entail a review of

the merits. The second proposed change was contained in Working Document No 64. This proposed amendment was the addition of a reference to Article 21, paragraph 3, subparagraph (b), regarding an abstract of a decision.

Ms Doogue added that Article 20, paragraph 10, had been rearranged. She recalled that there had also been discussions regarding whether this paragraph should read like Article 20 *bis*, paragraph 6. She noted that this would have had a policy effect because Article 20, paragraph 10, was previously more flexible than Article 20 *bis*, paragraph 6.

4. **The Chair** opened the floor to discussion.

5. **Mr de Oliveira Moll** (Brazil) asserted that from the beginning of the negotiating process, his delegation had worked with others in a spirit of compromise for the sake of the children and vulnerable creditors that the future Convention was intended to protect, as well as for the sake of the respect of the needs of States and their legal systems. He noted that this spirit of compromise was particularly reflected in the manner in which his delegation approached discussions concerning core provisions of the revised preliminary draft Convention. On that note, the Delegate observed that the preoccupation that his delegation had expressed on the previous day in respect of Working Document No 62 was founded in a genuine concern that the future Convention should be ratified by as many States as possible, including the Latin American States. He emphasised that the Latin American States did not wish to become safe havens for maintenance debtors.

He added that his delegation had serious concerns regarding the proposals contained in Working Document No 62, and stated that he was sorry to say that his delegation could not accept certain elements of the proposal. He asked his colleague to present the substantive concerns of his delegation.

6. **Mr Moraes Soares** (Brazil) observed that according to Article 20 and Article 20 *bis* as drafted in Working Document No 62, States could choose between complete acceptance of applications through the Convention, or alternatively through their internal rules.

The delegation of Brazil was of the view that, in the context of Article 20, paragraph 4, it was preferable to use the procedure contemplated in Article 17 rather than that contemplated in Article 19, as Working Document No 62 provided. The Delegate observed that the choice between the two Articles was not reflected in Working Document No 62.

Regarding Article 20 *bis*, paragraph 6, as proposed in Working Document No 62, the Delegate was concerned about the rule that precluded staying of proceedings pending appeals. He noted that the policy motivation for Article 20 *bis* was to allow States to declare that they would deal with applications for recognition and enforcement according to their internal laws. He stated that he was not sure that the law of the State addressed would allow the Court to enforce a Convention-based rule that precluded it from staying proceedings pending appeals. He opined that the effect of appeals should be regulated per the internal rules of said State.

Mr Moraes Soares observed that the Latin American States would probably not make declarations according to Article 20 *bis*. However, he was of the view that the Brazilian Congress might choose to use Article 20 *bis*. He suggested that Article 20 *bis*, paragraph 1, should be drafted to the same effect of Article 20, paragraph 10.

7. **Mr Beaumont** (United Kingdom) attempted to explain the purpose of Article 20 *bis* for the benefit of those delegations that had questioned the import thereof. He emphasised that not all internal rules should apply to the proceedings for recognition and enforcement. He opined that some Convention provisions would regulate proceedings, and that residual national rules would apply to such situations as are not regulated by the Convention. Accordingly, he explained that Article 20 and Article 20 *bis* would govern some elements of recognition and enforcement proceedings, and that whatever situations were not provided for in Article 20, paragraphs 1 to 11, or by Article 20 *bis*, paragraphs 2 to 7, would be regulated by national law.

He observed that the distinction between Article 20 and Article 20 *bis* was that they contained different procedures; the former contained a one-step procedure and the latter a two-step procedure. He observed that a two-step procedure allowed reviews at the second stage. Accordingly, the first step in that procedure would be simple and limited to review on the grounds of public policy, whereas the second step would be more complex.

Turning to the concerns that had been expressed in respect of Article 20, paragraph 4, he was of the view that Article 20 *bis* had been formulated to address those very concerns. States that had concerns on these lines could therefore opt for Article 20 *bis*.

Mr Beaumont added that the delegation of the United Kingdom supported the policy that gave States a choice because both Article 20 and Article 20 *bis* contained sufficient procedural guarantees, while empowering States to evaluate which system suited them best.

The Delegate of the United Kingdom also explained that Article 20 *bis*, paragraph 6, provided that national law would regulate whether or not there was a possibility of appeal, but that the staying of proceedings would be limited by the obligations that the State had assumed by virtue of the future Convention. He emphasised that enforcement of decisions was the norm, and that decisions would not be enforced only in exceptional circumstances. In contrast, he noted that under the regime of Article 20, enforcement of decisions would occur in almost every case.

8. **Mme González Cofré** (Chili) remercie la Présidente et salue l'assemblée. La délégation du Chili souhaite attirer l'attention sur le fait qu'elle a toujours recherché le consensus en faisant un grand nombre de concessions.

9. **The Chair** noticed that there was a problem with the translation in French.

10. **Mme González Cofré** (Chili) reprend donc la parole et précise que les délégations des pays d'Amérique latine ont fait un grand nombre de compromis et fourni des efforts non négligeables. Selon elle, ces délégations en ont parfois payé le prix. Concernant le groupe informel, les délégations des pays d'Amérique latine n'ont pas eu le temps d'exprimer leurs avis sur le test centré sur les ressources de l'enfant. Or de nombreuses difficultés semblent déjà se poser dans son rapport avec le droit interne. Par conséquent, la délégation du Chili reste favorable au test centré sur les ressources de l'enfant tel qu'il est présenté au Document de travail No 51.

Les délégations ayant présenté le Document de travail No 62 ont paru peu réalistes quant à la réaction des délégations des États d'Amérique latine. Malgré les objections, la délégation du Chili considère qu'il n'est pas possible d'accepter

ce texte sans en discuter préalablement. De plus, la délégation du Chili rappelle que les délégations des États d'Amérique latine ont toujours accordé, ce à plusieurs reprises, le temps nécessaire à la délégation de la Communauté européenne pour se coordonner avec les délégations de ses États membres. Selon la Déléguée, il est donc logique de permettre aux délégations des États d'Amérique latine d'étudier les conséquences de cette nouvelle proposition sur les intérêts de leurs demandeurs.

La Déléguée du Chili exprime le sentiment que chaque État présent bénéficie du même droit de se faire entendre. Certaines délégations n'ont en effet pas fait preuve de réalisme, par exemple, en ne permettant pas aux délégations des États d'Amérique latine de lire le Document de travail No 62 dans leur langue. Or, le travail portant sur ces articles et cette Convention intéresse aussi les enfants de ces États. Ainsi, dans un souci de respect de l'égalité entre les États, la délégation du Chili souhaite un délai supplémentaire dans le but de permettre à ces délégations d'étudier cette proposition. Enfin, la délégation du Chili soutient la position de la délégation du Brésil et considère que les préoccupations que cette dernière a exprimées doivent être prises au sérieux.

11. **The Chair** recalled that the most important decision of the discussion of the previous day was to give the Drafting Committee the opportunity to draft improvements to the proposals in Working Document No 64. She added that, given that the Commission was in the first reading, all points of view could be expressed.

12. **Mr Segal** (Israel) apologised that there were several points that he needed to raise. He observed that he could not have raised these issues earlier since Working Document No 62 had only been submitted at a late stage.

He began with Article 14, paragraph 5, and its correlation with Article 14 *quater*, paragraph (b). He observed that there previously had been a bracketed reference to proceedings "brought by the creditor" and that the delegates had to choose whether or not to apply the prohibition of the provision of security or bonds to one or both parties. However, he noted that Working Document No 62 and Working Document No 64 no longer referred to a "creditor". He asserted that this choice had not been discussed by the delegates. He stated that his delegation preferred a reference to a "creditor". He added that this would be consistent with the approach adopted in Article 40, as it would allow for an easier recovery of costs from an unsuccessful debtor.

Concerning the question that had been raised by the Representative of the Commonwealth Secretariat regarding Article 14 *bis*, paragraph 2, and its correlation to Article 14 *ter*, Mr Segal was of the view that, on a sensible reading of Article 14 *ter*, it would appear that an obligation was incumbent upon States to provide free legal assistance.

Mr Segal also observed that Article 14 *ter*, paragraph 4, in Working Document No 51 was clearer than the equivalent provision in Working Document No 64.

The Delegate of Israel was of the view that it should be made clear which paragraphs of Article 20 were mandatory. He added that both Article 20 and Article 20 *bis* were based on the internal law of States and that States that had a one-step system would adopt the Convention's one-step procedure, and that States that had a two-step system would adopt the Convention's two-step procedure. However, he questioned the necessity of a declaration regarding Article 20 *bis* when the provision of information under Article 51 could suffice.

He questioned why some matters were left open with regard to Article 20 and Article 20 *bis*. He noted that competent authorities should have some options to stay proceedings per Article 19, paragraph (a), and Article 21, paragraph 1, sub-paragraphs (b) and (d). He recalled that on the previous day, the delegation of the United Kingdom had stated that in the one-stage procedure there would be a possibility of appeal under Article 20, paragraph 7. In that case the judge would consider whether or not there were grounds for the staying of proceedings. In the absence of a decision by the judge to stay proceedings, the respondent could still raise the matter because his right to make any pleadings would not be affected.

He questioned why there were time limits in Article 20, but not in Article 20 *bis*. He stated that the Articles might be different in some ways but that they should contain the same time limits. He also queried whether the staying of enforcement pending appeals should be left to internal law, rather than being regulated by the future Convention. He noted that, in Israel, enforcement of a decision would only be stayed in exceptional circumstances.

Mr Segal drew the attention of the delegates to Working Document No 25. He stated that it was important to have a framework of time limits for appeals. He noted that the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* allowed years of litigation to impede its smooth functioning and this should be avoided by setting time limits in the preliminary draft Convention. He opined that, as a minimum, there should be a timeframe within which States had the obligation to report on progress, as proposed in Working Document No 25.

13. **M. Marani** (Argentine) remercie la Présidente et souhaite remercier le Délégué d'Israël pour son intervention. La délégation de l'Argentine considère que cette intervention est très intéressante et qu'elle permet d'avancer sur des questions identiques à celles évoquées la veille par les États d'Amérique latine. Une question essentielle est à mettre en lumière selon le Délégué de l'Argentine. Bien qu'il existe un certain nombre de points négociables, les délégations des États d'Amérique latine expriment une réticence à l'égard de la forme, de l'articulation des articles 20 et 20 *bis*, ainsi qu'à l'égard de la complexité de leur application. Les délégations de ces États souhaitent pouvoir négocier sur la rédaction du texte. En effet, la rédaction proposée créera sans aucun doute des difficultés lors de l'application de ces articles 20 et 20 *bis* proposés. En outre, comme l'a précédemment évoqué la délégation du Chili, la délégation de l'Argentine considère qu'il ne s'agissait pas la veille d'une « révolution ». Il était seulement question de pouvoir étudier les articles 14 et 20 présentés dans le Document de travail No 62. En effet, la proposition reproduite dans le Document de travail No 62 complique la future Convention et constitue une rédaction véritablement nouvelle des articles 14 et 20. Ainsi, le point de départ de ces discussions était l'article 20 de l'avant-projet de Convention qui consiste à améliorer la rapidité de la procédure. Il existait une position commune des États d'Amérique latine pour admettre par exemple une procédure variant en fonction des moyens de chaque État. Le champ du contrôle portant sur une demande de reconnaissance et d'exécution restait particulièrement large. Selon la délégation de l'Argentine, l'article 20, paragraphe 4, proposé au Document de travail No 62 ne reflète pas ces postulats de base, contrairement à ce qu'évoquait la délégation du Royaume-Uni précédemment. De plus, l'article 20 *bis*, paragraphe 4, du

Document de travail No 62 ne reflète pas non plus les postulats de base que l'on trouve dans les articles 14 et 20 de l'avant-projet de Convention.

Le Délégué de l'Argentine relève qu'une question nouvelle est apparue avec la présentation de la proposition du groupe informel. Il est possible de considérer que les positions des délégations sur les articles 14 et 20 relèvent de la politique interne des États qu'ils représentent. Or, un certain nombre de délégations avait précédemment ouvert ces discussions avec le Document de travail No 60, présenté par les délégations de l'Argentine, du Brésil, du Chili, de l'Équateur, du Pérou et de l'Uruguay. Ainsi, le Délégué de l'Argentine considère que le problème ne peut être résolu sans connaître parfaitement le but et le champ d'application de la future Convention. Par conséquent, la délégation de l'Argentine propose de revenir sur l'approbation de ces articles 14 et 20 seulement après avoir clairement établi les termes de l'article 2 de la future Convention.

Enfin, en ce qui concerne les personnes vulnérables, le Document de travail No 60 est le résultat d'efforts communs pour limiter le champ d'application de la future Convention. M. Marani précise que la délégation de l'Argentine n'a pas l'intention de commencer à discuter la proposition formulée au Document de travail No 60, car seule la Présidente a le pouvoir d'en décider. La délégation de l'Argentine conclut qu'il ne sera pas possible de continuer les discussions portant sur les articles 14 et 20 si le champ d'application de la future Convention n'a pas été déterminé clairement.

14. **The Chair** stated that the opportunity to discuss the scope would be given in the second reading, but added that she had taken note of the position expressed by the Delegate of Argentina.

15. **Ms Fisher** (International Association of Women Judges) stated that she shared some of the concerns of the Delegate of Israel regarding drafting.

On the matter of Article 20 *bis* she thanked the Delegate of the United Kingdom for his explanation. She added that she appreciated that in some respects Article 20 and Article 20 *bis* were parallel, but that they do not always use parallel language and might therefore be interpreted differently. Turning specifically to Article 20 *bis*, paragraph 3, she observed that that paragraph provided that both parties would be given the opportunity to be heard. She wondered if, in the absence of similar language in Article 20, this meant that in Article 20, paragraph 7, only the respondent could be heard. She was of the view that a tenable argument could be made that the differences between Article 20 *bis*, paragraph 3, and Article 20, paragraph 7, meant that the latter provision did not give the applicant the right to be heard. She observed that this would be unfortunate as it was not the intention of the drafters.

She was also of the view that Article 20 *bis*, paragraph 4, was confusing. She felt that a shorthand reference to a one-step or two-step procedure was misleading. She emphasised that the distinction was between what would be reviewed *ex officio*, that is without the argument of the parties, and what would be considered only with the argument of the parties. She added that the drafting of Article 20 was clear but that Article 20 *bis* was not. She outlined the procedure contemplated in Article 20 *bis*, paragraph 4, noting that the competent authority could, *ex officio*, review the grounds for refusing recognition under Article 17 and Article 19, paragraphs (a) and (d). The Article then listed the grounds that could not be reviewed *ex officio* but required the defendant to raise them. She continued and read the phrase "or if concerns relating to those grounds arise". She asked whose concerns the term "concerns" referred to. She explained that if this referred to *ex officio* review then the provision should make that clear, but that as it stood it was confusing. If the intended procedure was composed of *ex officio* review followed by the defendant submitting his arguments, then the provision should say just that. She added that, if her interpretation was correct, then this would mean that the only difference between Article 20 and Article 20 *bis* was the extent of *ex officio* control.

Ms Fisher noted that, as an Observer, her organisation rarely made its views on substantive matters known and reserved its comments for matters concerning the judiciary. However, on this occasion she felt that it was pertinent to note that her organisation had always supported the draft of Article 20 because it engendered mutual faith between States. She hoped that the treaty partners would have faith in each other and therefore always supported a system that would expedite the payment of support to children by limiting grounds for challenge. She therefore preferred Article 20 to Article 20 *bis*. She emphasised that she hoped that countries would employ systems of fast proceedings that were based on faith in their treaty partners and avoided adversarial recognition and enforcement litigation.

On the matter of staying of enforcement of decisions pending appeals, Ms Fisher noted that the procedure for appeals had always been left to national law before. She observed that she appreciated the philosophy of expediting payment to children. However, she opposed the stringency of Article 20, paragraph 10, when compared to Article 20 *bis*, paragraph 6, because such stringency might encourage States to declare that they would apply the procedure in Article 20 *bis*. She therefore proposed that the wording of Article 20 *bis*, paragraph 6, be reflected in Article 20, paragraph 10.

16. **The Chair** observed that it was 11.00 a.m. She announced that the coffee break would be held later since the meeting had begun late. She asked the delegates to be as brief as possible in their interventions because the time available was limited.

17. **Mr Beaumont** (United Kingdom) responded to the question raised by the Delegate of Israel concerning Article 14, paragraph 5, and its correlation with Article 14 *quater*. Mr Beaumont noted that it was correct to say that the question had been settled in favour of debtors. This was a policy decision made on the basis of a balance of views that had been expressed in the assembly of delegates. He was of the view that it was right to provide legal assistance to debtors on the basis of Article 14 *quater*.

He opined that Article 14, paragraph 4, was not the most important provision in the compromise that had been achieved, but that the view was that the new provision was clearer. He explained that Article 14, paragraph 4, as drafted in Working Document No 62 provided that in the rare event that the result of a means test was that legal assistance would not be provided, and if the most favourable system of legal assistance would dictate that legal assistance would be provided, then the most favourable rules would apply. He observed that this provision probably would not be employed in practice, but that it provided a backstop in order that an applicant would benefit from the best system.

Concerning the observations of the Delegate of Israel on Article 20 *bis* and whether the information route was pref-

erable to a declaration, Mr Beaumont stated that this was a part of the compromise that had been achieved and that it was necessary to achieve clarity. He added that both Article 20 and Article 20 *bis* contained safeguards because it was intended that not too much would be left to the vagaries of national law. Accordingly, there were safeguards, but some other matters were left to national law.

He added that there was some confusion regarding Article 20 *bis*, paragraph 4. He explained that a judge would have the right to decide matters of his own motion, but that the defendant could also raise such matters. However, it was the judge who would ultimately decide. He emphasised that this was a careful compromise. He added that it had been recognised that some States expected full *ex officio* review, and that the system that was proposed was a compromise between automatic *ex officio* review and automatic recognition and enforcement. The result of the compromise was that if there were no problems on the face of the documents, the review would stop. He emphasised that this was a compromise through which countries that had a civil law system were making concessions by limiting the scope of review.

The Delegate of the United Kingdom added that the system in Article 20 was different because the defendant could raise any matter in the second of the two stages. He explained that the differences between Article 20 and Article 20 *bis* were not major. He also observed that it was clear that Article 20 set the standard and that Article 20 *bis* applied by way of an acceptable derogation from that standard and therefore required States to make a declaration.

He also urged the Delegate of Israel to see that it was not achievable to have time limits as proposed in Working Document No 25.

On the question of improvements to the proposed draft, Mr Beaumont was of the view that there might be some need for added clarity. He observed that there was no intention to have differences between Article 20 and Article 20 *bis* on the right of parties to be heard, save to the extent that in the first phase of the two-step system the parties would not be heard.

The Delegate of the United Kingdom also urged observers to restrict their comments to matters of a technical nature and to leave policy to delegates since the latter had carefully considered and compromised upon matters of policy.

18. **M. Cieza** (Pérou) remercie la Présidente et souhaite exprimer le soutien de la délégation du Pérou à la position des délégations du Brésil, du Chili, et de l'Argentine. Les délégations des États d'Amérique latine sont actuellement en train d'analyser le Document de travail No 62 et le Document de travail No 64 qui vient d'être soumis. En acceptant ces propositions, les États contractants établiraient un système de déclaration similaire à celui prévu à l'article 14 *ter* du Document de travail No 51. Ce système pourrait effectivement être une alternative et la délégation du Pérou peut accepter ce système de façon préliminaire.

De plus, sa délégation considère que l'article 20 *bis*, paragraphe 4, dans le Document de travail No 62 pourrait être acceptable dans la perspective d'un consensus, comme l'a souligné la délégation du Royaume-Uni. Néanmoins, la rédaction du paragraphe 4 de l'article 20 *bis* est très complexe. Cette rédaction est susceptible de poser des problèmes d'interprétation et d'application de la part des tribunaux. La délégation du Pérou est cependant d'accord avec son contenu. Concernant l'article 20 *bis*, paragraphe 6, la délégation du Pérou n'est pas favorable à une référence purement procédurale portant sur l'effet d'un recours mais préférerait voir une référence au droit interne des États contractants afin qu'il régisse l'effet d'un recours.

19. **Mr McClean** (Commonwealth Secretariat) stated that he would restrict himself to the technical matters that had been raised on the previous day. In the text of Article 14 *ter*, paragraph 1, he felt that the word "only" caused confusion and that it could be removed without doing any harm to the intended scope of the provision.

Concerning Article 20 *bis*, paragraph 4, he stated that this provision could be reordered to bring together the first and second parts thereof. He noted that the draft was good but that it would be helpful to reorder it somewhat.

20. **Ms Cameron** (Australia) stated that she supported and endorsed the views expressed by the Observer from the International Association of Women Judges. She stated, however, that she preferred the text of Article 20, paragraph 10, to that of Article 20 *bis*, paragraph 6. She would not elaborate in the time provided, but stated that she would be happy to share her views with delegates during the coffee break. Since her delegation was not part of the informal working group that had proposed the compromise in Working Document No 62, she asked what the motivation for the distinction between the two provisions was and why it formed part of the compromise.

21. **Mr Segal** (Israel) thanked the Delegate of the United Kingdom for his explanation. He also thanked the Chair for giving him the floor again and stated that he needed to emphasise a few points. Firstly, he noted that he understood that some States had difficulty with recognising decisions with scrutiny of form, but he questioned whether it was necessary to deviate from a one-step process that provided a review without excessive scrutiny. Secondly, while he noted that there might be some difficulties with the imposition of formal procedural deadlines by way of the future Convention, he was of the view that one could impose reporting requirements every 180 days that would encourage judges to provide information and, perhaps, to expedite proceedings. The Delegate was of the view that in the procedure contemplated in Article 20 *bis*, paragraph 4, both the judge and the respondent should be empowered to raise all of the grounds for refusing recognition. He concluded that he did not have the time to reflect on Article 20 *bis*, paragraph 5, but had simply wished for some clarification.

22. **Ms Carlson** (United States of America) stated that her delegation had no qualms with the proposal of the Delegate of Israel and the Delegate of Australia to have the same language in Article 20, paragraph 10, and Article 20 *bis*, paragraph 6. However, she wished to have confirmed that this was acceptable to the delegation of Canada.

23. **Ms Ménard** (Canada) confirmed that this was acceptable to her delegation.

24. **Mme Fernandez Pereyro** (Uruguay) souhaite évoquer l'article 20 *bis*, paragraphe 6, de la proposition de compromis, le Document de travail No 62. En effet, cet article prévoit une exception avec l'utilisation des termes « sauf circonstances exceptionnelles ». La délégation d'Israël et la délégation du Royaume-Uni étaient favorables à l'insertion de cette expression à l'article 20, paragraphe 10, de la proposition. Néanmoins, la délégation de l'Uruguay considère qu'il est dangereux de prévoir cette exception sous cette forme car les termes « sauf circonstances exceptionnelles » ne sont pas définis. De plus, l'article 20 *bis* est certes une

option mieux adaptée à certains États mais elle présentera certainement des difficultés d'application. En ce qui concerne les termes « sauf circonstances exceptionnelles », le Délégué du Pérou considère qu'ils créent un certain flou. En effet, ils constituent une notion vague et très subjective. Dans de nombreux cas, cette exception pourrait servir de prétexte pour suspendre l'exécution d'une décision. Une disposition similaire existe à l'article 13 de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*, qui envisage une « situation intolérable ». Ces termes ne sont pas non plus définis, par conséquent tout dépend du juge, ou de l'Autorité qui les appliquera. Il y a un risque que cette disposition soit appliquée dans un esprit contraire à la future Convention. En effet, même si une explication est prévue dans le Rapport explicatif, cela n'est pas suffisant dans la mesure où les juges ne consultent pas en pratique les rapports explicatifs des conventions qu'ils appliquent.

Dans un esprit de consensus, la délégation du l'Uruguay peut accepter cette formulation de l'exception à l'article 20 *bis* mais pas à l'article 20, paragraphe 10, portant sur les recours, car l'appel ne devrait en aucun cas suspendre l'exécution de la décision de première instance.

25. **Ms Nind** (New Zealand) stated that her delegation supported the alignment of Article 20, paragraph 10, and Article 20 *bis*, paragraph 6. She supported a system of limited discretion and a high threshold for review. She emphasised that the delegates should avoid the possibility of opening up Pandora's box.

26. **Ms Lenzing** (European Community – Commission) supported the proposal of the Delegates of Israel and Australia to align Article 20, paragraph 10, and Article 20 *bis*, paragraph 6. She added that she was of the view that the reference to the term "exceptional circumstances" made it clear that staying of proceedings would not be systematic even without the need for reference to the Explanatory Report.

27. **Mr Markus** (Switzerland) recalled that, as he had stated on the previous day, he wished to make a small observation regarding Article 20 with reference to Working Document No 11.

28. **The Chair** suggested that he should do so during the second reading and leave the time available for consideration of the compromise proposed in Working Document No 62. She emphasised that she had not forgotten the matter raised by the Delegate of Switzerland.

29. **Mr Markus** (Switzerland) made known his acceptance of the Chair's ruling.

30. **Mme Mansilla y Mejía** (Mexique) remercie la Présidente et considère que la question de savoir si l'appel suspend ou non l'exécution de la décision de première instance à l'article 20 *bis*, paragraphe 6, doit être régie par la loi nationale de chaque État contractant.

31. **The Chair** concluded that the matters raised in Working Document No 62 should be left open as there was no general agreement. However, she noted that the working document constituted a good basis for further discussion and that the matters would be returned to in the second reading. She announced that the second reading would begin after the coffee break.

Deuxième lecture / Second reading

32. **The Chair** welcomed the delegates back to the meeting. She announced that the second reading would begin at that juncture. The second reading would be based on Working Document No 65, which contained a draft Convention submitted by the Drafting Committee. The procedure for discussion would be an article-by-article review of the draft Convention. She noted that there would be very intensive discussions. She added that it was certain that there would be an additional meeting that evening and that it was intended to complete the second reading by lunchtime on the following day. She urged the delegates to be focussed and brief in their interventions. She added that the purpose of the second reading was to take decisions, and that accordingly all brackets should be removed from the draft Convention, either by accepting or by rejecting the text contained therein.

Préambule / Preamble

33. **The Chair** asked if there were any observations regarding the Preamble.

34. **Mme Mansilla y Mejía** (Mexique) remercie la Présidente et relève qu'il avait été dit lors des précédentes réunions de la Commission I que le considérant portant sur les technologies serait supprimé du préambule du projet de Convention. La Déléguée du Mexique admet néanmoins qu'elle puisse faire erreur sur ce point.

35. **The Chair** observed that it had been decided to delete the two provisions concerning forms and sharing of information by way of Country Profiles because these provisions addressed techniques, and not the purpose of the draft Convention. She emphasised that the Preamble addressed the spirit of the Convention.

36. **Mr Segal** (Israel) agreed that the provisions on forms and sharing of information might not be a matter of the spirit of the Convention. He proposed to include references to these matters in Article 1 instead.

37. **The Chair** observed that, in order to have an efficient discussion, it was required that all proposals be made in writing.

She recalled that there was consensus that references to forms and sharing of information would be deleted from the Preamble and included in the Final Act. She added that there were no objections to this proposal.

In the absence of further interventions, the Chair announced that the Preamble had been adopted.

Article premier – Objet / Article 1 – Object

38. **The Chair** noted that there were no square brackets in Article 1. In the absence of any interventions, she concluded that Article 1 had also been adopted.

Article 2 – Champ d'application / Scope

39. **The Chair** noted that there were square brackets in Article 2, paragraph 1. She recalled that there were three working documents concerning this Article, namely Working Documents Nos 60, 63 and 66. She invited the relevant delegations to introduce the working documents.

40. **Ms Carlson** (United States of America) introduced Working Document No 66 regarding Article 2, paragraph 1.

Procès-verbal/Minutes No 18

She stated that delegates might recall that on the previous day there was a confusing discussion regarding the exact scope of application of the language that was contained in square brackets. She explained that Working Document No 66 clarified that the United States of America was able to handle applications for spousal support made in conjunction with a child support application. She noted that delegates may have been speaking at cross purposes during previous discussions and that there had not been a meeting of the minds regarding the relevant provision. The Delegate explained that Working Document No 66 proposed to delete the square brackets and to retain the text in Article 2, paragraph 1, but that it was also intended to clarify the extent to which Central Authorities could in fact handle applications for spousal support that were made in conjunction with an application for child support. She explained that the manner in which the child support agencies functioned in the United States of America generally was not such that they could handle applications beyond the extent of recognition and enforcement. She noted that this was the motivation for the addition of references to Chapter V, concerning recognition and enforcement, and Chapter VI, which the Delegate characterised as the real enforcement chapter.

Ms Carlson noted that the second proposed amendment in Working Document No 66 was a consequential amendment to Article 17, paragraph 4. To be precise, she added that the proposal contained two changes, one of which was consequential to Article 2, paragraph 1. Firstly, additional wording had been included at the end of Article 17, paragraph 4, and the second sentence would read as follows: "The preceding sentence does not apply to direct requests for recognition and enforcement under Article 16(5) or to claims under Chapter V for spousal support made in combination with claims for maintenance in respect of such a person." She explained that the text was drafted so that States, such as the United States of America, that took creditor-based jurisdiction would have an obligation to undertake proceedings to procure a new order. She emphasised that this only applied to applications through Central Authorities. She added that the obligation was also limited to situations where an application for spousal support was made in conjunction with an application for child support. Secondly, she observed that the phrase "unless a new application is made under Article 10(1)(d)" had been deleted in order to clarify that what was contemplated was not a new application, because in such a scenario an application would never have been made. She added that if a request to a competent authority were rejected, there was nothing to prevent an application to a Central Authority under Article 10.

41. **The Chair** asked if there was any support for the proposal contained in Working Document No 66.

42. **Ms Lenzing** (European Community – Commission) stated that she regretted that the delegation of the United States of America had only realised what the meaning of the text in Article 2 was at such a late phase. However, she understood the proposal of the delegation of the United States of America and supported the proposed amendment.

43. **Ms Kulikova** (Russian Federation) stated that her comments would not be based on Working Document No 66, but that she wished to pose some questions regarding Article 2.

She recalled that Preliminary Document No 29 contained a footnote that was not reflected in Article 2 as presented in Working Document No 65. Her delegation did not remember that it had been agreed to delete the footnote and suggested that it be restored because she had raised concerns regarding the scope of the preliminary draft Convention on several occasions.

Ms Kulikova continued by stating that the phrase that was contained in square brackets was not the only matter to be resolved in Article 2, and she drew the attention of the delegates to Working Document No 8. She asked the Chair if the delegation of Russia should reintroduce Working Document No 8, or if it would be assumed that a formal presentation of the working document had already been made. She recalled that the position of her delegation as expressed in Working Document No 8 was that the scope of the future Convention would be limited to parent-child obligations towards children below the age of 18, and that there would be flexibility in respect of other maintenance obligations by virtue of an opt-in / opt-out system.

She added that her delegation was open to discussion on the treatment of vulnerable adults in the scope of the draft Convention.

44. **The Chair** recalled that Working Document No 8 had not gained the support of other delegations.

45. **The Chair of the Drafting Committee** reminded delegates of the rules of a Diplomatic Session, as opposed to a Special Commission. She also noted that the mandate of the Drafting Committee was to produce a text that was clean in preparation for adoption. She added that the removal of footnotes did no violence to the possibility for States to express the views that had previously been reflected in the relevant footnotes.

46. **The Chair** proposed to return to a discussion of Working Document No 66. She noted that the delegation of the European Community had supported the working document. She asked if there were any further observations.

47. **Ms Ménard** (Canada) stated that her delegation completely supported the working document.

48. **Mme Mansilla y Mejía** (Mexique) informe les membres de la Commission I que la délégation du Mexique avait appuyé la proposition de la délégation de la Fédération de Russie présentée dans le Document de travail No 8. En effet, la Déléguée considère que cette proposition conviendrait parfaitement à la législation du Mexique.

49. **Mr McClean** (Commonwealth Secretariat) asked for some clarification concerning Working Document No 66. He understood that the intention of the proposal was to capture what the Central Authority in the United States of America could do. He added that he understood that the references to Chapters V and VI were intended to refer to the recognition and enforcement capacities of Central Authorities. However, he observed that this seemed to imply that Chapter III would not be applicable. He proposed that this should be clarified.

50. **Mr Ding** (China) stated that, given that there was not much time available for discussion, he would be brief. He observed that the proposal in Working Document No 66 seemed to make a substantive difference and that his delegation needed to consider it further. He also felt that he needed to examine the overall scope of the Article. His delegation also noted the proposal to include vulnerable adults in the scope of the draft Convention.

51. **The Chair** reminded the delegates that there was no more time for reflection and that decisions needed to be

made. She recalled that the following day was the last day of the second reading. She emphasised that discussions had been conducted over a long period of time and that the proposal in Working Document No 66 was clear – the meaning of the proposal was that applications for spousal support in conjunction with child support would only be addressed in the mandatory scope of the Convention in so far as it concerned recognition and enforcement.

52. **Ms Carlson** (United States of America) thanked the Representative of the Commonwealth Secretariat and observed that he was right that drafting changes should be made to show that, besides applications under Chapters V and VI, applications under Article 10, paragraph 1, subparagraph (b), would also be covered.

53. **M. de Leiris** (France) remercie la Présidente. La délégation de la France appuie l'analyse du Représentant du Secrétariat du Commonwealth portant sur la lecture de la proposition de la délégation des États-Unis d'Amérique dans le Document de travail No 66. En effet, le Comité de rédaction a déjà fait référence aux « demandes ». Ainsi, il serait plus approprié que l'article 2 se réfère aux « demandes » et non aux « chapitres » de la future Convention.

54. **Mr Moraes Soares** (Brazil) asked the Chair if she had concluded that there was broad consensus.

55. **The Chair** stated that she had not concluded anything yet.

56. **Mr Moraes Soares** (Brazil) asked if each article would be discussed separately.

57. **The Chair** confirmed that each article would indeed be discussed separately. She asked if there were any objections.

58. **Mme Mansilla y Mejía** (Mexique) informe la Présidente qu'elle souhaite présenter une objection. En effet, la délégation du Mexique est en faveur d'une autre proposition qui n'a pas encore été examinée.

59. **Mr Moraes Soares** (Brazil) stated that his delegation would discuss Working Document No 60 with the delegation of the European Community at lunchtime and asked if it would be possible to discuss all the relevant issues together for the sake of efficiency.

60. **The Chair** asked if the Delegate of Brazil was suggesting that the meeting should break for lunch at that juncture.

61. **Mr Moraes Soares** (Brazil) replied that this was not necessarily so and that his delegation would accept the Chair's decision.

62. **The Chair** suggested that the delegates should postpone the discussion concerning Article 2 and move on to Article 3 in order to allow for further discussion.

Article 3 – Définitions / Definitions

63. **The Chair** invited the Chair of the Drafting Committee to introduce Article 3.

64. **The Chair of the Drafting Committee** noted that two changes had been made. She asked the Chair if they should be introduced separately or jointly.

65. **The Chair** asked the Chair of the Drafting Committee to introduce both changes.

66. **The Chair of the Drafting Committee** explained that the first sentence of the definition of "legal assistance" provided an overarching obligation. The proposed additional text concerning the means of providing legal assistance was intended to underscore that it is the prerogative of States to decide how best to ensure that the overarching obligation was met.

The second change concerned the definition of "maintenance arrangement". She recalled that Working Document No 59 contained a proposed formulation of that definition and explained that the Drafting Committee had had difficulties in adopting the formulation as proposed, because it was felt that it was necessary to separate the character of a maintenance arrangement from the substantive rules that would govern such an arrangement. Accordingly, the formulation in Working Document No 65 differed from the proposal in Working Document No 59. She drew the attention of the delegates to the flexibility of form in the proposed definition. She observed that a maintenance arrangement could be formally drawn up or registered and that such an instrument could also be authenticated. She emphasised that both types of maintenance arrangements could be subject to review. In that context, she stressed the term "and". She concluded that the reference to a document that had been rendered or made in a Contracting State had been removed, and she noted that so long as the arrangement was enforceable in a Contracting State, it would satisfy that definition.

67. **The Chair** asked if there were any interventions concerning Article 3.

68. **Mme Mansilla y Mejía** (Mexique) souhaite le retrait des crochets à l'article 3, paragraphe (c).

69. **Ms Carlson** (United States of America) proposed that the remaining square brackets be removed.

However, she stated that she took the floor to ask that the language in the Explanatory Report regarding Article 3, paragraph (c), clarify one point. She stated that it was important to her delegation that whatever needed to be done to help an applicant to bring an application to a Central Authority would in fact be done. She requested that the Explanatory Report list some of those things that a Central Authority could do including location of assets, enforcement, exemption from costs, establishment of parentage where necessary, provisional measures and service of documents.

70. **Ms Lenzing** (European Community – Commission) stated that her delegation wished to delete the brackets and retain the text. She added that she was not sure that it was necessary to discuss the question of the text in the Explanatory Report at that juncture and observed that her delegation needed to consider the proposal of the delegation of the United States of America further.

71. **Mr Moraes Soares** (Brazil) supported the deletion of the brackets and the retention of the text. However, he recalled that in the first week of the Diplomatic Session it had been agreed to include the phrase "where necessary". He asked if the Drafting Committee had decided that this was not possible. He also called the delegates' attention to the addition of the phrase "may include" and observed that this was a new addition.

72. **The Chair** recalled that during the first reading there was a reference to include the term "as necessary" or "where necessary". However, she recalled that the mandate of the Drafting Committee was to decide how best to do this. She noted that the addition of the word "may" achieved the intended effect, namely that the core obligation was to assist applicants to know and assert their rights, while the means to do so would be more discretionary.

73. **Mr Ding** (China) stated that he supported the intervention of the Delegate of Brazil and he opined that it would be clearer to use the phrase "as necessary" or "where necessary". As a minimum he stated that the Explanatory Report should reflect this position.

Concerning the proposal of the delegation of the United States of America regarding the Explanatory Report, Mr Ding observed that the location of the debtor should not be included in the explanation of legal assistance as it did not relate thereto.

74. **Mr Sello** (South Africa) also supported the deletion of the brackets and the retention of the text.

75. **Mr Segal** (Israel) stated that he, too, supported the views expressed by the Delegate of Brazil concerning the inclusion of the phrase "where necessary". He added that this phrase had been included in Working Document No 25, which had been submitted by his delegation.

Regarding the proposal of the delegation of the United States of America for an amendment to the Explanatory Report, Mr Segal suggested that exemption from costs of proceedings should not be included within an explanation of the definition of legal assistance, as it would be out of place there.

76. **Mme González Cofré** (Chili) soutient la position de la délégation du Brésil et de la délégation d'Israël. En effet, durant le mois de mai, de longues négociations ont permis d'aboutir à un équilibre. De nouvelles discussions ont eu lieu cette semaine. Or, le texte actuel présenté dans le Document de travail No 65 ne reflète pas cet équilibre alors même que peu de jours auparavant, une proposition informelle de la délégation des États-Unis d'Amérique intégrait les termes « le cas échéant ». En outre, la délégation du Chili souhaite la suppression des crochets mais soutient la position de la délégation du Brésil en faveur d'un plus grand pouvoir discrétionnaire au profit de l'Autorité centrale requise par l'ajout des termes « le cas échéant » ou bien « lorsque cela est nécessaire », à la deuxième phrase de l'article 3, paragraphe (c), du Document de travail No 65.

77. **Ms Escutin** (Philippines) supported the deletion of the brackets and the retention of the text. She also supported the views expressed by the delegation of Brazil on the matter of the inclusion of the phrase "where necessary", as this would provide greater flexibility to the requested Central Authority concerning the extent of legal assistance to be provided.

78. **Ms Carlson** (United States of America) stated that she may have misspoken and that she did not intend to include the location of the debtor, but location of assets, in the list of actions that could be considered to be included in the meaning of legal assistance.

79. **Mme Mansilla y Mejía** (Mexique) soutient la position de la délégation du Brésil.

80. **Ms John** (Switzerland) stated that she had not understood the proposal of the delegation of the United States of America. She asked for clarification.

81. **The Chair**, noting that the proposal of the delegation of the United States of America concerned the Explanatory Report, stated that there was no time to discuss this further in the time that was intended for the second reading.

82. **Mme Subia Dávalos** (Équateur) soutient la position de la délégation du Brésil pour la suppression des crochets et souhaite l'ajout des termes « le cas échéant » ou « lorsque cela est nécessaire ».

83. **Mme Fernandez Pereyro** (Uruguay) soutient la position de la délégation du Brésil en faveur de la suppression des crochets et l'ajout des termes « le cas échéant » ou « lorsque cela est nécessaire ». De plus, la délégation de l'Uruguay admet que le moment n'est pas le plus opportun pour évoquer le contenu du futur Rapport explicatif. Cependant, la délégation de l'Uruguay souhaite des clarifications et considère que la proposition de la délégation des États-Unis d'Amérique répond à cette nécessité.

84. **M. Marani** (Argentine) souhaite intervenir à propos de l'article 3, paragraphe (c). La délégation de l'Argentine partage les préoccupations des délégations du Brésil et du Chili. Elle apprécie le travail effectué par le Comité de rédaction. Néanmoins, le texte proposé par ce dernier ne reflète pas l'accord équilibré obtenu antérieurement portant sur la deuxième partie de la phrase. En effet, les termes « le cas échéant » ou « lorsque cela est nécessaire » sont bien différents des termes « peut être fournie notamment ». Il existe sans aucun doute une différence dans la version anglaise du texte de la proposition. Il serait judicieux de revenir au texte original. Afin de faciliter l'exposé de sa position, le Délégué de l'Argentine poursuit son intervention en anglais.

Mr Marani stated that his intervention had probably been lost in translation. He noted that he had not said that there should be a return to the original wording, but that there should be a return to the original concept.

85. **Mme Dabresil** (Haïti) relève qu'au regard des discussions antérieures, la deuxième phrase de l'article 3, paragraphe (c), était effectivement controversée. Sur ce point, elle se prononce en faveur d'une proposition souple et, par conséquent, soutient la suppression des crochets et l'insertion de la proposition de la délégation du Brésil.

86. **The Chair** asked if there were any more interventions. Noting that there were none, she concluded that it had been agreed to delete the brackets and to retain the text in Article 3, paragraph (c). She also noted that there was agreement to add the phrase "as necessary" or "where necessary". She instructed the Drafting Committee to select which of the two formulations was more appropriate.

87. **Mr Moraes Soares** (Brazil) asked if the Chair had finished her conclusion.

88. **The Chair** responded that she had finished.

89. **Mr Moraes Soares** (Brazil) stated that his proposal was also to exclude the word "may" and to include instead the phrase "as necessary" or "where necessary".

90. **The Chair** stated that she understood that the first sentence of Article 3, paragraph (c), established the obligation itself, the goal of which was that applicants know and

assert their rights. The second sentence addressed the various means. If necessary and appropriate States shall provide legal advice or assistance in order that applicants could know and assert their rights. However, it was not necessarily mandatory for States to provide all of these means. She stated that this was why the term "may" was included, as States were not obliged to provide the specific services if applicants could know and assert their rights by other means.

91. **Mr Moraes Soares** (Brazil) thanked the Chair. He noted that he preferred the formulation that he had proposed, but that this was not a deal breaker.

92. **The Chair** recalled that the original text provided that "[t]his includes assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". She stated that she understood that this created the possibility without using the word "may". She asked if the delegates accepted the inclusion both of the term "may" and the phrase "as necessary" or "where necessary".

93. **Mme González Cofré** (Chili) relève que la délégation du Chili a compris dans les mêmes termes le compromis qu'a évoqué précédemment la délégation du Brésil. Il est important de rappeler qu'un grand nombre de délégations étaient favorables à l'insertion du terme « *may* ». En l'occurrence, le compromis dont il est question consistait en l'introduction des termes « le cas échéant » ou « lorsque cela est nécessaire ». Or, ce compromis n'est absolument pas reflété par le texte du Document de travail No 65. Les délégations de l'Argentine, de l'Équateur, du Brésil et du Chili sont en accord sur ce point.

94. **The Chair** repeated her question regarding whether delegates accepted a phrase to the effect of "may as necessary include".

95. **Mr Marani** (Argentina) apologised for intervening in English but noted that the Spanish simultaneous translation was difficult to follow. He recalled that the consensus in the previous week was to include the phrase "include as necessary" or "include where necessary". He was of the view that this was not the same as "may include as necessary". He observed that there might be some confusion but he emphasised that the Latin American delegates were saying, in Spanish, that they wanted to add the phrase "include as necessary".

96. **The Chair** recollected that during the first reading the problem that had been expressed was that States might have to always provide legal advice, legal assistance and exemption from costs even if this was not necessary in their legal or administrative system. In such an event, such States would have to add unnecessary assistance. She observed that this was why the term "may" had been included. This meant that States did not necessarily have to achieve the core obligation to allow applicants to know and assert their rights in a prescribed fashion. She added that she understood the proposal to include the phrase "as necessary" or "where necessary" and opined that both the proposed phrase and the term "may" were needed.

97. **Mr Marani** (Argentina) welcomed the Chair's suggestion to include the phrase "as necessary". He emphasised that the term "may" was subjective and that this was why the phrase "as necessary" should be included instead.

98. **Mme Subia Dávalos** (Équateur) relève que les délégués ont déjà discuté depuis un certain temps à propos de cet article. Ainsi, la Déléguée de l'Équateur demande à la Présidente dans quelle mesure cet ajout crée des difficultés en l'absence d'objections de la part des délégations présentes et ceci depuis le début des discussions portant sur l'article 3. La délégation de l'Équateur réitère sa demande : peut-on rédiger l'article 3, paragraphe (c), du Document de travail No 65 comme convenu antérieurement ?

99. **Mr Beaumont** (United Kingdom) recalled that the first sentence of the definition was the most important part of Article 3, paragraph (c). He emphasised that the term "necessary" already featured in the first sentence and that said term qualified the obligation therein. He stated that the second sentence made no substantive difference. He had no preference regarding what formulation would be adopted, but insisted that this was a trivial issue for the Diplomatic Session to dedicate so much time to at such a late stage.

100. **Mr Moraes Soares** (Brazil) asked if anyone, besides the Drafting Committee, supported the use of the term "may".

101. **Mr Markus** (Switzerland) supported the use of the term "may".

102. **Ms Nind** (New Zealand) supported the use of the term "may".

103. **Mr Hayakawa** (Japan) supported the use of the term "may".

104. **The Chair** asked if the phrase "may as necessary" was acceptable. Noting that there were no objections she concluded that this was agreed.

105. **Mr Segal** (Israel) asked why a definition of an "authentic instrument" was not included in Article 3. He observed that there was no definition in Article 26 either.

106. **The Chair of the Drafting Committee** referred the Delegate of Israel to Article 3, paragraph (e), sub-paragraph (i).

107. **The Chair** explained that an authentic instrument was included in the definition in Article 3, paragraph (e), sub-paragraph (i).

The Chair asked if she could conclude that Article 3 had been adopted.

108. **Mr Moraes Soares** (Brazil) stated that in a spirit of compromise his delegation would accept the inclusion of the term "may".

109. **The Chair** concluded that Article 3 had been adopted.

Hommage à Julio González Campos / Tribute to Julio González Campos

110. **The Secretary General** stated that experts and delegates attending the Hague Conference meetings over the years were like a family. He announced, with regret, that the Hague Conference had lost a beloved and distinguished member of its family through the passing away of Julio González Campos.

The Secretary General recalled that Julio González Campos first came to The Hague in the 1970s and had attended the Twelfth and Thirteenth Diplomatic Sessions. He had first met Julio González Campos at the Fourteenth Session. For some time Julio González Campos could not attend the

Hague Conference because he was a member of the Constitutional Court in Spain. However, as soon as his term was completed he came back to The Hague and, among other major contributions, was instrumental in bringing the accession of the European Community to the Hague Conference to a successful conclusion.

Julio González Campos also worked closely with Alegría Borrás and together they had published a "Green Book" with the Spanish text of Hague Conventions and commentaries. Julio González Campos had also been instrumental in forging an enduring relationship with the Government of Spain, enabling the use of Spanish in the Conference and helping to provide translations of documents into Spanish.

The Secretary General paid tribute to a bright, brilliant and principled man. He recalled that Julio González Campos also had a wonderful sense of humour. The Secretary General made known that he was still digesting the news of the loss of a personal friend and a friend of the Hague Conference. He added that this was a great loss for all present, but particularly for Mrs Borrás.

The Secretary General noted that Julio González Campos would be remembered with fondness.

The meeting was closed at 1.15 p.m.

Procès-verbal No 19

Minutes No 19

Séance du mardi 20 novembre 2007 (après-midi)

Meeting of Tuesday 20 November 2007 (afternoon)

La séance est ouverte à 15 h 09 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

1. **The Chair** welcomed the participants and gave the floor to the Secretary General.

2. **Le Secrétaire général** rappelle à l'assemblée que vendredi dernier, un accord sur la création d'un groupe de travail informel qui aurait pour mission de discuter des articles 4 et 8 du Protocole s'est dégagé. Il note que la rencontre qui devait se tenir dimanche dernier n'a pas eu lieu et indique qu'il serait important que cette rencontre ait lieu cet après-midi. Il énumère les délégations participant à ce groupe de travail informel, soit les délégations du Brésil, de la Chine, de la Communauté européenne, d'Israël, du Japon, du Mexique, de la Fédération de Russie et de la Suisse. Il indique également qu'il s'agit d'un groupe de travail ouvert à tous et invite les délégations à soumettre des documents de travail sur l'article 8.

Article 4

3. **The Chair** stated that they would continue the second reading of the draft Convention text, and would start with Article 4 on the designation of Central Authorities. The Chair gave the floor to the delegation of Argentina.

4. **M. Marani** (Argentine) demande à la Présidente si l'examen de l'article 4 en deuxième lecture pourrait être ajourné et remis au lendemain matin.

5. **Mr Beaumont** (United Kingdom) stated that his delegation supported the suggestion by the delegation of Argentina to postpone a second reading of Article 4 until tomorrow morning.

6. **The Chair** indicated that a second reading of Article 4 would be postponed until the following morning.

Article 5

7. **The Chair** stated that they would turn to a second reading of Article 5, and noted that there were no square brackets in the text nor related working documents. She asked if there were any interventions on this Article. She observed that there were no requests for the floor and concluded that Article 5 was accepted.

Article 6

8. **The Chair** stated that they would turn to Article 6. She observed that there were square brackets around paragraph 2, sub-paragraph (i), which stated: "to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application". She confirmed that the delegates were aware that Article 6 applied to cases where there was an application in accordance with Article 10, and that as proposed under Article 6, paragraph 2, sub-paragraph (i), Central Authorities would be required to take all appropriate measures to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application. She observed that there were no working documents related to this Article, and asked if any delegations wished to make an intervention. She then asked if any delegations had objections to the removal of the square brackets. The Chair gave the floor to the delegation of China.

9. **Mr Lixiao** (China) stated that his delegation did not believe it was a function of Central Authorities to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures, as proposed under Article 6, paragraph 2, sub-paragraph (i), and that they supported removal of the text within square brackets.

10. **M. Markus** (Suisse) s'associe aux commentaires émis par la délégation de la Chine. Il indique que sa délégation trouve l'article 6, paragraphe 2, alinéa (i), vague et imprécis. Il souligne que les tâches qui y sont mentionnées relèvent des tribunaux et non des Autorités centrales. Il propose donc la suppression du texte de l'article 6, paragraphe 2, alinéa (i).

11. **The Chair** gave the floor to the delegation of Uruguay.

12. **Mme Fernandez** (Uruguay) indique que l'article 6, paragraphe 4, dissipe les doutes quant à l'interprétation de l'article 6, paragraphe 2, alinéa (i). Elle souligne que l'article 6, paragraphe 4, est clair. Elle propose de conserver le texte figurant entre crochets à l'article 6, paragraphe 2, alinéa (i), et de supprimer les crochets.

13. **Mme González Cofré** (Chili) appuie la délégation de l'Uruguay. Elle souligne que le libellé de l'article 6, paragraphe 2, alinéa (i), est satisfaisant et que le paragraphe 4 de l'article 6 dissipe toutes les craintes quant à l'interprétation de l'article 6, paragraphe 2, alinéa (i).

14. **Mme Ménard** (Canada) rappelle que sa délégation a, par le passé, proposé la suppression de l'article 6, paragraphe 2, alinéa (i). Elle s'associe aux délégations de la Chine et de la Suisse et suggère la suppression de l'article 6, paragraphe 2, alinéa (i).

15. **Ms Bean** (United States of America) stated that her delegation supported the positions of the delegations of Uruguay and Chile. She added that paragraph 2, sub-paragraph (i), should be read in conjunction with paragraph 4, and that the language in paragraph 2, sub-paragraph (i), would be useful and provide flexibility for many States.

16. **Ms Lenzing** (European Community – Commission) stated the European Community's position that the text in square brackets in paragraph 2, sub-paragraph (i), should remain and the square brackets be deleted. She observed that paragraph 4 would apply to any necessary provisional measures considered under paragraph 2, sub-paragraph (i).

17. **The Chair** clarified that Article 6 did not require Central Authorities to take necessary provisional measures, but rather enabled them to initiate or facilitate the institution of proceedings in order to do so. She further clarified that this would not interfere with the exercise of powers by judicial authorities under paragraph 4. She queried whether there were still any objections to the text in square brackets based on this explanation, and if not, would conclude that paragraph 2, sub-paragraph (i), remained in Article 6. She observed that there were no objections and concluded that Article 6 was accepted and that paragraph 2, sub-paragraph (i), would remain without the square brackets.

Article 7

18. **The Chair** stated that they would turn to Article 7, and observed that there were square brackets in paragraph 1 around sub-paragraphs (g), (h), (i) and (j), and around paragraph 2. She noted that there were no working documents associated with this Article and opened the floor to interventions. She gave the floor to the delegation of the United States of America.

19. **Ms Bean** (United States of America) observed that many countries had explained their positions on Article 7, and that her delegation supported removing the square brackets. She noted that paragraph 1 is mandatory to a limited extent but that there is still some flexibility in the text, and that this paragraph must be read in conjunction with Article 6, paragraph 2, under which Central Authorities have some discretion and flexibility. She stated that Article 7, paragraph 2, is entirely discretionary, and that its inclusion in Article 7 would be useful without unduly burdening Central Authorities.

20. **Ms Ménard** (Canada) stated that her delegation supported the intervention by the delegation of the United States of America for keeping the text and removing the square brackets.

21. **Mme Mansilla y Mejía** (Mexique) propose l'adoption de l'article 7, paragraphes premier et 2, à l'instar de l'article 6, paragraphes premier et 2.

22. **Mr Markus** (Switzerland) stated that the items in square brackets concerned matters mainly involving international judicial assistance. He added that his delegation was of the opinion that these matters should be left to this area. He observed that it could be problematic for some States to take these measures if no request had been made under Article 10, that is, that it could be difficult for the requested State if there is no formal request under Article 10. He concluded on this point by noting that his delegation would be hesitant to keep the references in the square brackets. He stated that Article 7, paragraph 1, is mandatory, observing that "may" in the first half of the sentence refers to the requesting Central Authority, not the requested one. He added that the requesting Central Authority is free to make a request under this paragraph but that if a request is made, the requested Central Authority must act, and therefore the paragraph is mandatory. He concluded by confirming that his delegation was in favour of deleting the text in square brackets in paragraph 1. He noted that his delegation was in favour of also deleting the text in paragraph 2 but that their opinion was not strong on this matter.

23. **Mr Lixiao** (China) stated that his delegation supported the intervention by the Delegate of Switzerland. He noted that his delegation favoured deleting the references in square brackets in paragraph 1 for reasons that his delegation had given on previous occasions, in addition to the ones noted by the delegation of Switzerland. He added that the actions under Article 6, paragraph 2, were positive obligations, which would not be appropriate if an Article 10 application was not pending. On paragraph 2 of Article 7, he noted that the phrase "international element" would affect domestic cases, which they could not support, and that paragraph 2 should therefore also be deleted.

24. **Ms Lenzing** (European Community – Commission) confirmed the European Community's support for the text in Article 7, paragraphs 1 and 2, and their support for the removal of the square brackets. In response to the comments by the delegations of Switzerland and China, she observed that paragraph 2 was entirely discretionary. She added that, under paragraph 1, the requested Central Authority had more discretion under the text because they were enabled to only take "appropriate specific measures" or "measures as are appropriate" where an application under Article 10 was not pending.

25. **Mr Hellner** (Sweden) addressed some delegations' concerns about the text in square brackets in Article 7, paragraph 1, pointing out that an obligation under this paragraph, if there is one, was in the second sentence under which a requested Central Authority "shall take such measures as are appropriate". He noted that this language suggested that a decision to take measures still remained with the requested Central Authority on what would be appropriate. He added that the text in Article 6, paragraph 2, sub-paragraphs (g) to (j), was flexible, for example: "facilitate the obtaining of documentary or other evidence", "provide assistance", "initiate or facilitate the institution of proceedings", and "facilitate service of documents". He observed that the only obligation that could be inferred from Article 7, paragraph 1, was to be of some

help and not just to decline requests for information. He concluded by noting that it was an "undangerous" provision, but that if the text were kept it could be very useful in providing these types of assistance. If it were removed, on the other hand, this would signal that assistance on these matters was not necessary.

26. **Ms Albuquerque Ferreira** (China) stated that her delegation understood the provisions in Articles 6 and 7, but maintained that some functions in Article 6 should not be exercised by Central Authorities. She clarified that her delegation nevertheless accepted Article 6 as a compromise. She added that with Article 7, however, its paragraphs were obligations because something in a treaty is an obligation. She confirmed that it was of course up to a Central Authority to determine if certain measures were necessary or appropriate but that the word "may" suggested that Article 7, paragraph 1, might not be necessary at all. She discussed Article 6, paragraph 2, sub-paragraphs (g), (h), (i) and (j), in particular noting that other Hague Conventions covering the same areas of assistance, such as evidence and service of process, were exclusive. She added that the term "facilitate" meant nothing in their legal tradition and that her delegation was not certain these actions were not obligations. She added that the term "appropriate" also remained unclear and that the Explanatory Report needed to explain how paragraph 1 would work with the other Hague Conventions. On paragraph 2, she noted that the term "international element" would pose problems for her delegation and that they had other internal mechanisms to deal with these issues.

27. **Mme Fernandez** (Uruguay) indique que l'interprétation de l'article 7, proposée par la délégation de la Suisse, est exacte. Elle exprime son accord avec les commentaires de la délégation de la Chine et souligne que d'autres Conventions de La Haye régissent les questions de coopération judiciaire et administrative.

28. **Mr Beaumont** (United Kingdom) responded to the point raised by the delegation of China on the relationship between this Convention and the other Hague Conventions on assistance. He noted that their concerns may be alleviated by Article 44 *ter*. He added that this provision was designed to make it clear that States can continue to rely on these Conventions. He noted that another important change arising from Preliminary Document No 29 was the amendment to Article 7, paragraph 1, on making applications under Article 10, in which the duty is on the requested Central Authority to take such specific measures as are appropriate, that is, they can make a decision as to what measures are appropriate. He added that the positive advantage of this provision was that States that wanted to assist with specific measures could do so. He observed that this may save costs because a Central Authority would not necessarily need to receive an Article 10 application in order to provide the assistance. He encouraged delegations to be flexible for these reasons, confirming that Central Authority obligations were limited but that if they chose to exercise them it could be beneficial and reduce taxpayer burden.

29. **Mr Lixiao** (China) confirmed that his delegation had problems with the Article, particularly on the issue of pending applications and the other Hague Conventions. He observed that the other Hague Conventions were exclusive and that a Central Authority could not act contrary to them under this Convention. He confirmed that they would have problems with this Convention in practice because their obligations under the other Conventions were exclusive in nature.

30. **M. Heger** (Allemagne), afin de convaincre la délégation de la Chine, rappelle qu'à l'origine, la délégation de l'Allemagne s'opposait à l'article 7, paragraphe 2. Il souligne que sa délégation a changé d'avis avec l'adoption de l'article 44 *ter*. Il note que l'article 44 *ter* explique bien que les Conventions qui sont mentionnées dans cet article restent applicables et que la présente Convention ne déroge pas aux obligations prises en vertu de ces autres Conventions.

31. **Mr Moraes Soares** (Brazil) stated that his delegation supported the removal of the square brackets for the reasons stated by the delegation of Uruguay and others.

32. **Mr Markus** (Switzerland) responded to the comments of the delegation of Germany by noting that Article 44 *ter* is in the Convention, and that his delegation is happy with this, but he queried why obligations would be created under Article 7 that contradict this Article. He explained that, on the one hand, there are the Hague Conventions on judicial assistance but, on the other hand, measures can be taken under Article 7 which are contradictory to the other Conventions listed in Article 44 *ter*. He noted in particular that the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* have as their basis pending judicial proceedings, whereas under Article 7, paragraph 1, judicial proceedings are not under way. He noted that though his delegation supported Article 44 *ter*, rules should not be made that confuse and do not make sense. He observed moreover that the duties under Article 6 which are mentioned in Article 7 do not just cover international but also domestic procedures and, though some of these measures would not contradict Article 44 *ter*, some would.

33. **The Chair** clarified her understanding of Article 7, noting that it did assume that there was a judicial proceeding in another State and that assistance could be asked for on service and evidence, and that if there was no assistance there would be an establishment application. She added that an establishment case could be more burdensome for the requested State. She gave the floor to the delegation of the United Kingdom.

34. **Mr Beaumont** (United Kingdom) responded to the intervention by the delegation of Switzerland, noting that even if one accepted their hypothesis that the cases in Article 7, paragraph 1, were covered by other Hague Conventions, some States could say in response to a request under Article 7, paragraph 1, that they could not act because of these Conventions. He observed, however, that some States might want to act outside these other Conventions, as allowed, for example, by Article 11 of the 1965 Service Convention. He explained that it would still be possible to go through a judicial authority under Article 7 but that there was no obligation to do this. He added that the other Conventions under Article 44 *ter* or a parallel system of assistance could be used if countries wished, and that there was therefore no harm in countries taking a strict position on this because of Article 44 *ter* and the redrafting of Article 7, paragraph 1.

35. **The Chair** clarified that there may be cases where the Central Authority will facilitate service. If it can locate the addressee, then recognition and enforcement could take place under this Convention. The Chair gave the floor to the delegation of the Republic of Korea.

36. **Ms Lee** (Republic of Korea) noted that her delegation still had lingering questions about how a Central Authority could exercise powers that only judicial authorities could exercise, such as service of documents and provisional measures. She noted that a Central Authority has some powers to facilitate or can take other safeguard measures, and that they have a certain level of obligations prior to a real application being made. She therefore added that it could be useful to specify what measures they could carry out to delimit the scope of Article 7 and to avoid unnecessary litigation.

37. **The Chair** noted that there were explanations of necessary measures in the Explanatory Report but these could be extended. The Chair gave the floor to the delegation of China.

38. **Ms Albuquerque Ferreira** (China) stated that her delegation had to reserve their position because they were not satisfied with the explanation given by the delegation of the United Kingdom. She added that, on paragraph 2, no one could explain "international element" and that they did not want the Convention to apply to internal situations, but that the text as it was would give rise to this.

39. **The Chair** responded that, if talking about paragraph 2 and internal cases with an international element, nothing would oblige courts to take measures under this paragraph. She added that it was time to make a decision on this Article as it had been under discussion for several years. The Chair gave the floor to the delegation of China.

40. **Ms Albuquerque Ferreira** (China) stated that her delegation could not accept Article 7, paragraph 2, at this moment.

41. **The Chair** responded that the vast majority of delegations were in favour of keeping Article 7 without the square brackets. She asked if there were any strong objections left to the text in square brackets. She concluded that the vast majority of delegations were in favour of keeping Article 7, and concluded that it was adopted.

Article 8

42. **The Chair** then turned to Article 8, noting that there were neither related working documents nor square brackets, and asked if any delegations wished to make an intervention. The Chair gave the floor to the Representative of the Commonwealth Secretariat.

43. **Mr McClean** (Commonwealth Secretariat) noted that he had a non-controversial point to make on paragraph 3 in the English text. He observed that it was unclear what "at such cost" referred to, and queried whether the drafters were trying to get to the specified costs mentioned in paragraph 2.

44. **The Chair** noted that this was a drafting matter for the Drafting Committee. She concluded that Article 8 was adopted subject to drafting changes to paragraph 3. She adjourned the session for a coffee break and asked the delegates to return at 4 p.m.

45. **The Chair** noted that the participants had reached Chapter III on applications through Central Authorities.

Article 9

46. **The Chair** turned first to Article 9 (Application through Central Authorities), and asked if delegations had any interventions to make on this Article. She observed that there were no square brackets in the text, nor any related working documents. She observed that there were no interventions and concluded that Article 9 was accepted.

Article 10

47. **The Chair** turned to Article 10 (Available applications). She observed that there were square brackets around the text in paragraph 2, sub-paragraph (a), on debtors getting recognition of a decision. She opened the floor to interventions. She gave the floor to the delegation of Japan.

48. **Mr Hayakawa** (Japan) stated that his delegation still had concerns about the text in square brackets in Article 10, paragraph 2, sub-paragraph (a). He stated that his delegation had earlier indicated that this type of application could not be adopted properly in the Japanese legal system, and that he suspected that it would not be indispensable to include it as mandatory in Article 10. He noted that there may be cases where the debtor wants to be assured by a mandatory order. He therefore added that he was in favour of deleting paragraph 2, sub-paragraph (a), but that if delegations wanted to have mandatory applications on the recognition of a decision, then some States should be able to exclude this type of application.

49. **The Chair** referred to Article 10, paragraph 3, and noted that the text in square brackets concerned modification applications by debtors which would be subject to the jurisdictional rules applicable in the requested State.

50. **Mr Segal** (Israel) confirmed his delegation's support for the comments by the delegation of Japan on Article 10, paragraph 2, sub-paragraph (a). He added that he was unsure of the possibilities raised by Article 26 for Article 10, paragraph 2, sub-paragraph (a), including the scope of a "decision". He noted that "decision" under paragraph 2, sub-paragraph (a), could be wider than the recognition and enforcement of a maintenance agreement under Article 26. He concluded that for the reasons stated by the delegation of Japan, his delegation also supported the deletion of paragraph 2, sub-paragraph (a), of Article 10.

51. **Ms John** (Switzerland) stated that her delegation was against imposing obligations onto Central Authorities to assist debtors, and that they were therefore against the text in square brackets in Article 10, paragraph 2, sub-paragraph (a), and in favour of deleting the text. She added that her delegation did not see the practical need for the text. She stated that her delegation supported the deletion of the square brackets in paragraph 3, to amend that paragraph to include paragraph 2, sub-paragraphs (b) and (c).

52. **Mr Lixiao** (China) stated that his delegation agreed with the comments made by the previous delegations on Article 10, paragraph 2, sub-paragraph (a). He added that his delegation opposed this sub-paragraph, that they saw little practical value in it, and that it should be deleted because some States had a problem with it.

53. **Ms Lenzing** (European Community – Commission) stated that the European Community supported the addition of Article 10, paragraph 2, sub-paragraph (a), and believed that it was necessary because it was an important, additional element to balance the possibility of a debtor seeking modification of a decision. She explained that a situation giving rise to the need to recognise a decision under paragraph 2, sub-paragraph (a), would be one where a maintenance decision is given in one State but a modification decision was given in another State either through a choice

of court agreement or because the defendant had accepted jurisdiction. She added that the recognition of the new decision would be necessary since the amount in the decision might be lower than the original one. She observed that debtors would remain unprotected if they could not get this type of application. She responded to the concerns of the delegation of Israel, and was aware that the discussions on maintenance arrangements did not get rid of all concerns. She added, however, that if a Contracting State did not feel comfortable with the recognition of maintenance arrangements, they should make a reservation. She confirmed that paragraph 2, sub-paragraph (a), may not apply to all States but that the European Community would nevertheless like to see this sub-paragraph included.

54. **Mme Mansilla y Mejía** (Mexique) propose de supprimer le texte de l'article 10, paragraphe premier, alinéa (f), du paragraphe 2, alinéa (c), et du paragraphe 3.

55. **The Chair** responded to the intervention of the delegation of Mexico by noting that they were discussing the text in square brackets, not points concerning text outside of the square brackets. The Chair gave the floor to the delegation of the Russian Federation.

56. **Ms Kulikova** (Russian Federation) stated that her delegation could support the removal of the square brackets around the text in paragraph 3.

57. **The Chair** explained that the two sets of square brackets in Article 10 were related. She observed that it was necessary to put the text in paragraph 3 in square brackets because paragraph 2, sub-paragraphs (b) and (c), would be subject to the jurisdictional rules applicable in the requested State whereas recognition of a decision in paragraph 2, sub-paragraph (a), would not be subject to those rules. She noted that because there were square brackets around paragraph 2, sub-paragraph (a), the Drafting Committee had to put square brackets around the text in paragraph 3 to distinguish between the recognition and modification of decisions in respect of the jurisdictional rules applicable in the requested State. She concluded that if paragraph 2, sub-paragraph (a), were accepted, and the recognition of a decision were not subject to the jurisdictional rules of the requested State, then they must accept that the modification of decisions in paragraph 2, sub-paragraphs (b) and (c), would be subject to those jurisdictional rules. In other words, the two sets of brackets were connected. The Chair gave the floor to the delegation of Australia.

58. **Ms Cameron** (Australia) thanked the Chair for her clarification of the square bracketed text in Article 10. She added that her delegation supported the addition of paragraph 2, sub-paragraph (a), and the text in square brackets in paragraph 3.

59. **Mme Ménard** (Canada) propose de conserver le texte de l'article 10, paragraphe 2, alinéa (a), et de l'article 10, paragraphe 3. Elle suggère de supprimer les crochets entourant le texte.

60. **Mme Fernandez** (Uruguay) soutient l'idée de supprimer le texte de l'article 10, paragraphe 3, car selon elle, l'article 20, paragraphe premier, établit les règles de compétence de l'État requis.

61. **Mr Sello** (South Africa) stated that his delegation supported the removal of the square brackets around the text in Article 10, paragraph 2, sub-paragraph (a), and in paragraph 3 concerning paragraph 2, sub-paragraphs (b) and (c).

62. **The Chair** observed that there were no more interventions. She noted that following the comments by the European Community, the addition of paragraph 2, sub-paragraph (a), was intended to allow for an application by a debtor for the recognition of a decision to stop enforcement against him if the maintenance decision was about the fact that the debtor no longer had the obligation to pay. She added that there would be jurisdiction for the decision under the rules of this Convention if this addition is recognised. The Chair gave the floor to the delegation of the United Kingdom.

63. **Mr Beaumont** (United Kingdom), adding to what the Chair had said, stated that Article 10, paragraph 2, sub-paragraph (a), balances Article 15 of the Convention which places limits on what the debtor can do with regard to modification. He added that Article 15 limits the debtor to getting modification orders only under strict circumstances. He noted that recognition of a decision is a reasonable *quid pro quo* for these restrictions, and that a judgment should be recognised. He recalled that the delegation of Japan suggested that the debtor could wait for the creditor to act and that the debtor could use this as a defence. He countered that a debtor cannot regulate his or her affairs this way and needs to be able to act before. He added that there are no clear rules for this type of situation under Article 19, paragraphs (c) and (d), that they are discretionary, and that therefore the debtor would be left wondering how the court would deal with his application. He concluded that it only seemed fair to let debtors have recognition of decisions concerning them.

64. **Mme Fernandez** (Uruguay) désire corriger sa dernière intervention. Elle indique que la version espagnole de l'article 10, paragraphe 3, est différente de la version anglaise du même article. Elle propose donc soit de conserver le texte entre crochets de l'article 10, paragraphe 2, alinéa (a), et du paragraphe 3, soit de supprimer le texte de l'article 10, paragraphe 2, alinéa (a), et du paragraphe 3.

65. **Mr Lixiao** (China) stated that he understood the rationale behind paragraph 2, sub-paragraph (a), as explained by the Delegates of the European Community and the United Kingdom, but that it was nevertheless important to use the modification decision as a defence. He added that, because Central Authorities had an obligation to provide legal assistance, it would be a waste of resources to give debtors such assistance even if there would not be an action to enforce a decision. He proposed deleting paragraph 2, sub-paragraph (a).

66. **The Chair** noted that under Article 10, paragraph 2, sub-paragraph (a), there would already be ongoing enforcement against the debtor, and that this would not be an *exequatur* procedure, rather purely an enforcement procedure. She added that if there was no recognition of the modification decision, there would be no defence. The Chair gave the floor to the delegation of the United States of America.

67. **Ms Bean** (United States of America) stated that her delegation supported deleting the square brackets in Article 10 and keeping the text.

68. **Mr Segal** (Israel) observed a difference between Working Documents Nos 64 and 65 in relation to Article 14 *bis*. He observed that in Working Document No 65 free legal assistance would be available to creditors and debtors without the square bracketed text, whereas under Working Document No 64 free legal assistance would only be available to the creditor. He observed that under Working Docu-

ment No 65 modification would be a defence and the debtor could get free legal assistance. He added, however, that it would be difficult for States to give this assistance before the debtor asked for the opportunity to defend his case. He concluded that the debtor could use free legal assistance to make his situation secure for himself, and queried whether it would be justified to use resources in this way.

69. **Mr Beaumont** (United Kingdom) responded to the intervention by the Delegate of Israel noting that, under Working Document No 64, the debtor falls under Article 14 *quater*, by which free legal assistance is subject to a means or merits test. He added that if the debtor is of reasonable means, then he could not get aid, nor could he get aid if there was no merit to his case. He concluded that a debtor could only get aid if he had a strong case and passed a means test as determined by his own country.

70. **M. Marani** (Argentine) indique que l'insertion de l'article 10 n'aura pas d'effets sur la reconnaissance d'une décision dans un autre État, mais risque d'avoir des répercussions sur les Autorités centrales. Il s'associe donc aux commentaires émis par la délégation de la Suisse. Il explique que sa délégation est contre l'idée d'avoir recours à l'Autorité centrale pour faire reconnaître une décision. Il suggère de supprimer le texte entre crochets de l'article 10, paragraphe 2.

71. **The Chair** noted that the discussion showed that the majority of the delegations were in favour of keeping recognition of applications by the debtor, but that a number of States were not in favour of allowing the debtor to apply for recognition through Central Authorities. She queried whether there were any strong objections by these States after this discussion. The Chair gave the floor to the delegation of Japan.

72. **Mr Hayakawa** (Japan) stated that his delegation still had problems with the inclusion of paragraph 2, sub-paragraph (a). He clarified that in the Japanese legal system, the debtor could stop enforcement by objecting in a separate procedure, but that this was not recognition of enforcement; rather, it was a special type of lawsuit. He concluded that it would not be inappropriate to not have recognition applications in Article 10.

73. **Mr Lixiao** (China) stated that his delegation still had hesitations about adding paragraph 2, sub-paragraph (a), to Article 10. He added that he doubted it was justified to allow a Central Authority to give assistance to a debtor when others could use the resources. He concluded by noting that if modification was a defence, the proposal by the European Community could be accepted in practice, but it would not be justified for a Central Authority to deal with such applications.

74. **Ms Cameron** (Australia) added that her delegation did not have much to add about the need for a justification for the text in paragraph 2, sub-paragraph (a), but that she disagreed with the suggestion that it was not justified to use Central Authority resources on a debtor. She added that the debtor is in all cases a person and that strong enforcement measures could have an impact on him or her and his or her family relationships. She confirmed that her delegation felt strongly about this matter.

75. **Mr Markus** (Switzerland) stated that his delegation did not have such a strong view on this matter, but that they supported the delegations of Japan and China. He added that in most countries this provision would have no applicability in practice because the applications would be rejected by the court. He noted that a debtor usually had no need to apply for recognition because he could wait for the creditor to try to get a decision enforced against him. He observed that normally a debtor would wait and see what happened to him and then object to a decision taken at the request of the creditor. He concluded that in practice this issue would not be an important matter and that the text could therefore be deleted.

76. **Mr Helin** (Finland) noted, in response to those delegations who believed paragraph 2, sub-paragraph (a), would overburden Central Authorities, that the provision would rarely be needed because normally enforcement would take place in a debtor's State along with the taking of the modification decision. He cautioned, however, that there were situations where enforcement takes place in States other than the debtor's and that in these cases the debtor had the possibility to use this channel. He added that the debtor did not need a formal order to stop enforcement but that in some States such an order would be necessary. He concluded that there was a real need for this provision but that it would be limited to a few cases.

77. **Mr Segal** (Israel) noted that there was a question of balance here. He queried how many applications by debtors like those suggested by Australia there would be, how many debtors would be in need versus continuing to seek modification of their obligations. He added that the experience in Israel confirmed that the people in question were not people in need but rather persons trying to look for any method to reduce their obligations. He concluded by calling for balance and for deleting paragraph 2, sub-paragraph (a).

78. **Mr Beaumont** (United Kingdom) suggested that perhaps the delegations should be thinking towards compromise on the matter. He observed that the concern here was ongoing enforcement of an order and getting enforcement of a modification order. He queried whether it would be acceptable to delegations to have enforcement of a decision to render void an earlier decision, because there were cases where constraints were put on the jurisdiction the debtor can use but there must be some balance for him. He noted that this might address the problem the delegation of Switzerland had with this provision, that the debtor would use paragraph 2, sub-paragraph (a), for the sake of recognising a decision, not to stop enforcement of an order against him.

79. **The Chair** asked if there were any interventions on this proposal. She observed that they had not reached consensus on the addition of paragraph 2, sub-paragraph (a), and queried whether there were strong objections to deleting paragraph 2, sub-paragraph (a), and the bracketed language in paragraph 3. She gave the floor to the delegation of the United Kingdom.

80. **Mr Beaumont** (United Kingdom) noted that he had proposed an informal amendment but that he remained interested in seeing whether a compromise was possible, adding that deletion of the bracketed text would be drastic. He observed that there were heads nodding in agreement around the room.

81. **Mr Segal** (Israel) stated that the proposal by the delegation of the United Kingdom was worth considering.

82. **Ms Cameron** (Australia) thanked the delegation of the United Kingdom for the compromise, adding that her delegation would welcome the proposal. She added that it was also worth considering the suggestion from States with objections that they be able to opt out of paragraph 2, sub-paragraph (a).

83. **Mr Lixiao** (China) stated that his delegation would need to think carefully about the proposal by the delegation of the United Kingdom, and to think about the wording so that their domestic procedures would not be affected. He added that they could not call the procedure recognition of an enforcement decision.

84. **Mr Markus** (Switzerland) stated that his delegation could go along with the compromise proposed by the delegation of the United Kingdom, but that they would like to see the exact wording.

85. **Ms Nind** (New Zealand) stated that, to accommodate the concerns of the delegations of Japan and China, redrafting could cover procedures for the stopping of enforcement while taking into account different legal systems.

86. **Mr Hayakawa** (Japan) stated that his delegation could accept the compromise proposed by the delegations of the United Kingdom and New Zealand.

87. **The Chair** suggested that the Article 10 discussion be kept open and that they come back to this Article on the basis of a working document.

Article 11

88. **The Chair** turned to Article 11 and observed that the only square brackets were in paragraph 1, sub-paragraph (g), which was connected to a debtor's application for recognition of a decision. She noted that this remained a pending matter until the proposed compromise for Article 10 was fully considered. The Chair opened the floor to any other interventions on Article 11. She gave the floor to the delegation of Sweden.

89. **Mr Hellner** (Sweden) noted that his intervention referred to the proposal of the delegations of Sweden and Canada regarding Article 11, in view of Article 37, and for explanations to appear in the Explanatory Report. He recalled that during discussions of Article 37, paragraph 2, several delegations had problems with their Central Authorities being bound in certain cases to non-disclosure of information gathered or transmitted in application of the Convention. The delegations of the European Community and Canada accordingly proposed changing "binding on" to "taken into account by" in Article 37, paragraph 2 (Work. Docs Nos 36 and 68). He explained that their concern was for women in particular, that if an application under Article 11 included the applicant's address, she would put herself in danger. He noted that Article 11, paragraph 1, sub-paragraph (b), stated that an application should include at a minimum the applicant's name and contact details, including an address, and date of birth. He observed that the address could be an "in the care of" address so that the applicant could be reached with progress reports and other documents. He added that his delegation and the delegation of Canada felt it was necessary to make it clear in the Explanatory Report that in many Member States, the applicant's "in the care of" address was the address of the Central Authority, that this worked well, and that it would not be wise to exclude this practice. He confirmed that in some countries such an application would not be accepted by a court, and that the address of the applicant would have to be included, but he cautioned that, in such case, the applicant should be warned of the risk of having her address in the application. He concluded by asking for the delegates' understanding of a practice that currently exists, as clarified in the Explanatory Report.

90. **The Chair** responded that this proposal would be discussed during the second reading of Article 37. The Chair gave the floor to the Representative of the Commonwealth Secretariat.

91. **Mr McClean** (Commonwealth Secretariat) stated that, though the text of Article 11, paragraph 3, had been settled for years, the reference to "legal assistance" should nevertheless be changed to "free legal assistance" to reflect recent developments on the Convention.

92. **Mme Mansilla y Mejía** (Mexique) appuie la proposition du Représentant du Commonwealth.

93. **The Chair** queried whether there were any objections to changing "legal assistance" in Article 11, paragraph 3, to "free legal assistance". She noted that there were no objections and that this change was accepted. She added that if there were no further interventions on Article 11, it would remain open because paragraph 1, sub-paragraph (g), was under consideration while Article 10, paragraph 2, sub-paragraph (a), was still under discussion. The Chair gave the floor to the delegation of South Africa.

94. **Mr Sello** (South Africa) stated that the proposal submitted by the delegations of Ecuador and South Africa in Working Document No 31 was not included in square brackets. He stated that it was unclear whether this could be reopened or not.

95. **The Chair** asked if the Delegate of South Africa could clarify which working document he was referring to.

96. **Mr Sello** (South Africa) stated that he was referring to Working Document No 31, dated 13 November.

97. **The Chair** queried whether there was any support for an addition to Article 11, paragraph 1, sub-paragraph (c), as follows: "latest photograph where this is available and short description". The Chair gave the floor to the delegation of China.

98. **Mr Lixiao** (China) queried whether this would not already fall under paragraph 2, sub-paragraph (c).

99. **Mme Mansilla y Mejía** (Mexique) appuie la proposition des délégations de l'Afrique du Sud et de l'Équateur et souligne que l'insertion d'une photo facilitera la localisation du débiteur dans certains cas.

100. **M. Manly** (Burkina Faso) indique que l'insertion d'une photo devrait être prévue à l'article 11, paragraphe 2, alinéa (c), et non au paragraphe premier, alinéa (c).

101. **Ms Lenzing** (European Community – Commission) stated that the European Community opposed the proposal requiring a photograph and short description of the applicant in Article 11, paragraph 1, sub-paragraph (c), because it would be too heavy an obligation for applicants. She noted, on the other hand, that problems with names and contact details, such as phone numbers, would be rare. She added that if a requesting Central Authority believed there was some confusion in an applicant's information, they could obtain further information under paragraph 2, sub-paragraph (c). She explained that if a common name was used or an address was difficult to identify, the Central Authority could request additional information under paragraph 2, sub-paragraph (c), but that the information in the proposal should not be a minimum requirement. She concluded by noting that if Article 10, paragraph 2, sub-

paragraph (a), were to be retained, a reference to this sub-paragraph should be added to Article 11, paragraph 3.

102. **Mr Hellner** (Sweden) stated that the proposal by the delegations of Ecuador and South Africa to make a photo and short description of the applicant mandatory would be unnecessary, even useless in a country like Sweden where population registries are accurate. He cautioned that making a photo a requirement, however, could prolong proceedings because of the need to find an accurate picture. He noted that if a photo and short description of the applicant could facilitate finding the creditor, this could be useful, but that to impose it in all situations would be like using a sledgehammer to crack a nut.

103. **The Chair** gave the floor to the delegation of Ecuador.

104. **Mme Subía Dávalos** (Équateur) précise que l'article 11, paragraphe premier, alinéa (c), ne précise pas que l'insertion d'une photo soit obligatoire. Elle explique que la proposition du Document de travail No 31 indique bien qu'une photo sera incluse dans la mesure du possible en vue de localiser un débiteur.

105. **The Chair** noted that there were no more interventions on this proposal, and concluded that there did not appear to be much support for Working Document No 31. She added that the latest photo or a short description of the applicant could be part of an application under paragraph 2, sub-paragraph (c), if the location of the respondent was necessary. She stated that Article 11 was still open in view of the pending discussion on Article 10, paragraph 2, sub-paragraph (a). She stated that she wanted to adjourn the meeting and asked all delegations interested in reaching a compromise on Article 2, on the scope of the Convention, to meet. She added that the Working Group on Applicable Law would meet at 6 p.m. She noted that the delegates were to reconvene at 7.30 p.m. She clarified that any delegations interested in discussing the scope of the Convention should approach the delegation of Brazil.

The meeting was closed at 5.45 p.m.

Procès-verbal No 20

Minutes No 20

Séance du mardi 20 novembre 2007 (soir)

Meeting of Tuesday 20 November 2007 (evening)

La séance est ouverte à 20 h 05 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

1. **The Chair** welcomed the delegates to the late night session for Tuesday 20 November 2007. She noted that the advantage of a late night session was the cosy atmosphere. She stated that the proposals for Articles 2, 14 and 20 had not yet been finalised and so discussion on those articles could not yet be concluded. She said that those Articles would be discussed tomorrow along with Articles 4 and 10. She said that she hoped that all discussion on those matters would be concluded by lunchtime on Wednesday 21 November 2007. She noted however that as many of the other articles as possible would be discussed during that evening.

Article 12 (Doc. trav. / Work. Doc. *No 65)*

2. **The Chair** turned to discussion of Article 12. She stated that in Working Document No 65, the most recent version of the draft Convention produced by the Drafting Committee, the only square brackets remaining in Article 12 were in paragraph 2, where it contained a reference to Article 26, paragraph 2. The latter part of Article 12, paragraph 2, stated that "[t]he Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 21(1)(a), (b) and (d) and 21(3)(b) [and 26(2)]". The Chair noted that Article 26 related to maintenance arrangements and that it had not yet been decided whether that Article would be an "opt-in" or an "opt-out" provision. She asked the delegations whether there were any objections to the removal of the square brackets in Article 12, paragraph 2, and the retention of the reference to Article 26, paragraph 2. The Chair handed the floor to the Delegate of Mexico.

3. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique ne s'oppose pas à la proposition de supprimer, dans l'article 12, paragraphe 2, les crochets autour de la référence à l'article 26, paragraphe 2.

4. **The Chair** thanked the Delegate of Mexico and asked if there were any further reactions. That was not the case and so the Chair removed the square brackets in Article 12, paragraph 2, and noted that the text would be accepted.

Article 13 (Doc. trav. / Work. Docs *Nos 61 et /* and *65)*

5. **The Chair** then turned discussion to Article 13 and noted that the whole of Article 13 was in square brackets. She noted that Working Document No 61, produced by the

delegation of Canada, related to Article 13 and so asked for it to be introduced by their delegation.

6. **Ms Morrow** (Canada) thanked the Chair and stated that the delegation of Canada had proposed a reformulation of Article 13 in Working Document No 61, and that the new formula was closely based on Article 30 of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* as it provided for the more general admissibility of documentation transmitted through Central Authorities.

She noted that the inclusion of a provision that corresponded to Article 30 of the 1980 Child Abduction Convention was important for States that had found Article 30 necessary to facilitate acceptance, by their competent authorities, of documents from other States that were not in the same form and used different terminology than that used by those competent authorities.

In States whose competent authorities had attached significance to Article 30 of the 1980 Child Abduction Convention in proceedings under that Convention, Ms Morrow believed that the absence of a comparable provision in the Maintenance Convention would lead to an interpretation that the principles contained in Article 30 were not considered applicable to applications pursuant to the Maintenance Convention.

She stated that the proposal contained in Working Document No 61 would also restrict the admissibility rule of the provision in the Maintenance Convention to applications transmitted through Central Authorities and that it maintained the prohibition against challenge by reason only of the medium or means of communication utilised.

Ms Morrow further stated that the delegation of Canada had found Article 30 useful and gave an example of where a document transmitted from the United Kingdom was found to be admissible by a judge in Canada under that Article of the 1980 Child Abduction Convention. She referred to the Explanatory Report to the draft Convention, Preliminary Document No 32, and emphasised that the proposal made by the delegation of Canada to amend Article 13 in accordance with Working Document No 61 did not affect the operation of domestic rules of evidence and that they would still be applicable with regard to the substance of the document and information.

7. **Ms Burgess** (United Kingdom) thanked the Chair and stated that the delegation of the United Kingdom supported the proposal of the delegation of Canada as contained in Working Document No 61.

8. **Mr Ding** (China) thanked the Chair and stated that the delegation of China had difficulty in accepting the proposal made in Working Document No 61 because the admissibility of a document should be determined by the internal law of a country, and Working Document No 61 went beyond the existing scope of Article 13 as it was currently drafted.

9. **Ms Lenzing** (European Community – Commission) thanked the Chair and the delegation of Canada for redrafting their proposal to amend Article 13. She believed that it had certainly become more readable but that the European Community was still not convinced that their concerns had been fully taken into account. She stated her belief that further drafting may be necessary with respect to the proposal that had been made by the delegation of Canada. She expressed the view that the wording of the proposal should not give rise to any interpretation that a court was obliged to accept documents that had been transmitted electronically in accordance with the proposed Article 13 when the national law of their State did not allow for documents to be accepted via that means of communication. She therefore proposed a slight drafting amendment in that context. Ms Lenzing believed that the court should be able to challenge documents and request more documents if necessary and if that requirement arose from the national law of that State. Ms Lenzing stated that the delegation of the European Community could support a proposal that made those factors clear.

10. **Ms Carlson** (United States of America) stated that the delegation of the United States of America supported the proposal of the delegation of Canada and that her delegation had no objection to any amendments that would be made to the proposal in accordance with the comments that had been made by the Delegate of the European Community.

11. **Mr Hayakawa** (Japan) shared the concerns expressed by the Delegate of the European Community.

12. **Mr Moraes Soares** (Brazil) stated that the delegation of Brazil supported the proposal made by the delegation of Canada in relation to Article 13.

13. **Mr Segal** (Israel) stated that the delegation of Israel supported the proposal made by the delegation of Canada.

14. **Ms Morrow** (Canada) indicated that the delegation of Canada was agreeable to the suggestions for a drafting change to their proposal in accordance with the comments made by the Delegate of the European Community.

15. **The Chair** stated that there had been support for the proposal contained in Working Document No 61 but that there had not been total agreement. She noted that it would be supported if it was amended so as to be restricted to challenges made by a defendant only, and not to those challenges made by a court in accordance with the national law of their State. The Chair queried whether an amendment would relate to the first part of the proposed Article 13 or to the second part.

16. **Ms Lenzing** (European Community – Commission) thanked the Chair and suggested that an addition be made to the second part of the proposed Article 13 as contained in Working Document No 61, such that it would read "and may not be challenged by the respondent by reason only of the medium or means of communications employed […]".

17. **The Chair** thanked Ms Lenzing and asked the delegates whether the suggested change was acceptable.

18. **Mr Ding** (China) queried why the challenge was limited to the defendant only. The delegation of China sought clarification on that point.

19. **M. de Leiris** (France) souhaite faire une remarque d'ordre rédactionnel dans la lignée de ce qui a été évoqué précédemment par la Déléguée de la Communauté européenne. En effet, il constate que dans la version précédente de l'article 13 (Doc. trav. No 65), la recevabilité de la demande et des documents ne pouvait être contestée en raison du mode de transmission utilisé. Or, dans la version de l'article 13 tel que proposé par la délégation du Canada dans le Document de travail No 61, il s'avère que la demande est recevable et ne peut être refusée en raison du mode de transmission. Ainsi, cette proposition prévoit-elle une recevabilité de principe de la demande. Or, il serait préférable que ce soit la recevabilité qui ne puisse être con-

testée au seul prétexte que le support ou les moyens technologiques utilisés diffèrent de ceux des Autorités centrales. M. de Leiris observe cependant que cette remarque d'ordre rédactionnel pourrait simplement être confiée au Comité de rédaction afin qu'il la prenne en considération.

20. **The Chair** asked whether there were any responses to the question that had been asked by the Delegate of China or to the addition that had been verbally proposed by the Delegate of the European Community that only a challenge by a defendant with regard to the medium or means of communication employed to transmit a document would not be allowed in accordance with Article 13. She noted that a defendant could be both a debtor or a creditor and that the proposed amendments to Article 13 did not interfere with the evidential rules of the State concerned, simply that a defendant could not challenge a document just on the basis of the technological means of communication utilised.

21. **Mr Ding** (China) agreed that it could be left to the Drafting Committee to ensure that it was clear that the rules of evidence of the States concerned would not be interfered with in this process.

22. **Ms Cameron** (Australia) stated that it was not clear that there was a meeting of the minds in regards to what was being agreed to. She noted that if the proposal from the delegation of Canada had been understood correctly by the delegation of Australia, it had two elements: firstly, that "any document […] shall be admissible in the competent authorities of the Contracting States" and, secondly, that documents should "not be challenged [by the defendant] by reason only of the medium or means of communications employed" to transmit such documents.

Ms Cameron stated that the delegation of Australia had understood that the wording suggested by the Delegate of the European Community applied only to the second element and not to the first. However, she believed that it was not clear that the first element, which had not been changed, did not interfere with the domestic laws of evidence of the relevant State.

23. **Mr Hayakawa** (Japan) stated that he was about to say exactly what had been said by the Delegate of Australia. He noted that if the phrase referred to by the Delegate of Australia as the first element of the proposal of the delegation of Canada remained, then it would imply that courts had to accept any documents that fell within the scope of Article 13 regardless of their internal rules of evidence.

24. **Mr Beaumont** (United Kingdom) thanked the Chair and stated that to be fair to the delegation of Canada, their proposal contained in Working Document No 61 reflected the language that had been used in the 1980 Child Abduction Convention. He noted that that Convention used exactly the same language in Article 30 and that it did not implicitly mean that documents cannot be challenged at all. He noted that national laws of evidence still applied and the effect of what had been referred to as the first element of the proposal from the delegation of Canada simply meant that the court had an obligation to receive the document. He noted that this was not a novel provision; it had been utilised and understood in other instruments.

25. **Mr Lortie** (First Secretary) thanked the Chair and suggested that as had been mentioned by the Delegate of the United Kingdom, the wording of Article 30 in the 1980 Child Abduction Convention could just be followed. He noted that that Article was medium-neutral and well understood to mean that if a competent authority was not equipped to receive documents electronically then they just would not receive them. He observed that a court or authority cannot be forced into buying technology that would enable them to receive documents electronically. The First Secretary stated that Article 30 of the 1980 Convention could simply be used in the Maintenance Convention in order to meet its needs as required.

26. **M. Heger** (Allemagne) remarque qu'il n'est pas un expert de *common law* et est donc reconnaissant à la délégation de l'Australie d'avoir porté cette question à l'attention des délégués. Il précise que ce qui importe, à son avis, c'est la recevabilité par le tribunal. Il ne souhaite pas que le tribunal soit contraint de recevoir des documents sous une forme qui ne lui convient pas. Le tribunal ou la cour devrait avoir la possibilité d'exprimer sa volonté de recevoir les documents et demandes par d'autres moyens. Il conclut qu'il s'en remet entièrement aux experts pour rédiger la disposition à la lumière des attentes de sa délégation telles qu'il vient de les exprimer.

27. **The Chair** asked whether there were any further interventions. She stated that she did not believe that Article 13 could be sent to the Drafting Committee at that stage because there remained policy issues to be resolved. She noted that there appeared to be agreement on the second part of the proposal made by the delegation of Canada and to include the addition verbally suggested by the Delegate of the European Community so that the reference to a challenge under Article 13 was to challenges by defendants only. She queried whether the delegates could find agreement on the first part of the proposed Article 13 as contained in Working Document No 61.

28. **Ms Morrow** (Canada) stated that in relation to the comments of the First Secretary, the delegation of Canada was happy to include an identical provision in their proposal for Article 13 and along the same lines as Article 30 of the 1980 Child Abduction Convention. She believed the utilisation of a replicate provision would achieve what the delegation of Canada had been seeking in proposing Working Document No 61.

29. **Mr Ding** (China) stated that the content of the 1980 Child Abduction Convention was different to the content and scope of the Maintenance Convention and that he had thought that the proposed Article 13 would not interfere with the national rules of evidence of the receiving State. He noted that this was still not clear from the proposals and suggestions that were being discussed and that the delegation of China therefore had hesitation in accepting any proposed changes.

30. **Ms Carlson** (United States of America) stated that the delegation of the United States of America could accept the language of Article 30 of the 1980 Child Abduction Convention being utilised in the Maintenance Convention but that Article 13 was not a key Article for their delegation, and so they were flexible.

31. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that Article 13 was not a core Article for the delegation of the European Community either and so they did not want to prolong discussions on it. Ms Lenzing queried whether it would be acceptable to the common law States to delete the part of Article 13 that referred to the admissibility of documents in the competent authorities of the Contracting States in the proposal made by the delegation of Canada in Working Document No 61. She believed that the deletion of that reference would remove any potential conflict that the proposed Article 13

caused with the national rules of evidence of the relevant State and addressed the concerns that had been expressed by some delegations. If this were not acceptable, Ms Lenzing stated that discussion on Article 13 would need to be returned to at another stage.

32. **The Chair** summarised that, taking into account the verbal proposals made by the Delegate of the European Community, Article 13 would read: "Any application made through Central Authorities of the Contracting States in accordance with Chapter III, and any document or information appended thereto or provided by a Central Authority, may not be challenged by the respondent by reason only of the medium or means of communications employed between Central Authorities concerned."

33. **Mme Mansilla y Mejía** (Mexique) estime, malgré tout le respect qu'elle a pour la délégation du Canada, que l'article 13 tel qu'il est actuellement rédigé dans le Document de travail No 65 est parfaitement clair lorsqu'il utilise l'expression « uniquement en raison du support ou des moyens technologiques utilisés ». Elle constate en outre que l'article 30 de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants* n'aborde pas la question du support employé et ne contient aucune référence technologique. Aussi pense-t-elle que se référer à l'article 30 n'est pas d'une grande utilité pour leur discussion. Elle propose de conserver le libellé de l'article 13 du Document de travail No 65.

34. **Mr Hayakawa** (Japan) stated that the delegation of Japan supported the latest proposal that had been made by the Delegate of the European Community and summarised by the Chair.

35. **Ms Carlson** (United States of America) stated that the delegation of the United States of America could support the verbal proposals that had been made by the Delegate of the European Community and that had been summarised by the Chair.

36. **Mr Ding** (China) stated that the delegation of China could support the proposals that had been made by the Delegate of the European Community in preference to the original proposal that had been made by the delegation of Canada.

37. **Ms Escutin** (Philippines) thanked the Chair and stated that the delegation of the Philippines supported the verbal proposals that had been made by the Delegate of the European Community in order to avoid an interpretation of Article 13 that would imply any impact on the internal rules of evidence of the requested State. Ms Escutin believed that the medium or means of communications employed to transmit a document to a Central Authority in a requested State should, however, be irrelevant as the admissibility of that method of transmission would be determined by the internal law of the requested State.

38. **Mr Marani** (Argentina) stated that the delegation of Argentina supported the verbal proposals made by the Delegate of the European Community and as had been summarised by the Chair.

39. **The Chair** queried whether she could therefore conclude that the proposal made by the delegation of Canada in Working Document No 61 in relation to Article 13, as amended by the verbal proposals that had been suggested by the Delegate of the European Community, was acceptable to the delegates. She noted that the section of the proposed Article 13 that would be deleted was the part that stated "shall be admissible in the competent authorities of the Contracting States and" and that the phrase "by the defendant" would be inserted after the word "challenged" in the second part of the proposal contained in Working Document No 61. The Chair therefore asked the Drafting Committee to amend Article 13 in those terms and stated that it would therefore be adopted.

Article 15 (Doc. trav. / Work. Doc. *No 58)*

40. **The Chair** reiterated, in relation to Article 14, that discussion on that Article would be left until Wednesday 22 November 2007 and that discussions would now relate to Article 15 (Limit on proceedings). The Chair stated that no square brackets were to be found in this Article but that Working Document No 58 in relation to Article 15 had been proposed by the delegation of Australia. The Chair handed the floor to the delegation of Australia.

41. **Ms Cameron** (Australia) thanked the Chair and stated that she would like to introduce Working Document No 58 in relation to Article 15. She noted that this proposal followed an earlier working document and that, as had been previously explained, for the delegation of Australia there was a connection between Articles 14 and 15 of the Convention. She noted that the delegation of Australia had also made a proposal in relation to Article 14 in Working Document No 52 and that both working documents had been designed to protect debtors in cases where they had instituted proceedings in a foreign jurisdiction to modify a decision.

Ms Cameron stated that, as had been proposed in Working Document No 58, a new Article 15, paragraph 2, sub-paragraph (e), should be inserted in order to avoid a debtor being limited by Article 15. She noted that this additional exception would enable a debtor to institute proceedings in a foreign jurisdiction to modify a decision in circumstances where they had "made all proper attempts to bring such proceedings in the State of origin [but] faced exceptional difficulties in asserting his or her rights" in that jurisdiction due to the non-availability to them of free legal assistance.

Ms Cameron noted that Working Document No 58 was an important proposal for the delegation of Australia but because of issues in relation to Article 14 that remained outstanding, the delegation of Australia realised that any proposals in relation to Article 15 could not yet be decided. Ms Cameron further stated that the proposals that had been made by her delegation in relation to Articles 14 and 15 were intended to be made in the alternative and so that if their proposal in relation to Article 15 was accepted, the delegation of Australia would withdraw their proposed working document in relation to Article 14.

42. **The Chair** agreed with the Delegate of Australia in relation to the fact that discussion on Article 14 was so closely connected to the discussion on Article 15. She therefore suggested that discussion on both Articles would be left until Wednesday 21 November 2007 and that discussion at that moment would move to Article 16 regarding the scope of Chapter V on recognition and enforcement.

Article 16

43. **The Chair** observed that one provision in Article 16 contained square brackets, namely paragraph 4. She noted that that paragraph stated: "This Chapter also applies to maintenance arrangements in accordance with Article 26." The Chair clarified that it had been concluded that the scope of Chapter V would extend to maintenance arrange-

ments but that it had not yet been decided whether Article 16, paragraph 4, would be an "opt-in" or an "opt-out" provision. The Chair asked whether there were any objections to removing the square brackets in Article 16, paragraph 4, and, observing that there were none, stated that the square brackets would be removed from Article 16 and the text retained.

Article 17 (Doc. trav. / Work. Doc. *No 66)*

44. **The Chair** moved on to discuss Article 17 (Bases for recognition and enforcement). She stated that there were no square brackets contained in the text although Working Document No 66, proposed by the United States of America, was in relation to Article 17, paragraph 4. She noted that an introduction of Working Document No 66 had already been made on the morning of Tuesday 20 November 2007 and so she asked the delegation of the United States of America to simply give a brief repetition of their proposal.

45. **Ms Carlson** (United States of America) firstly stated that in relation to Article 2, for which a proposal was also made in Working Document No 66, the United States of America could accept claims for the recognition and enforcement of a spousal support decision that were made in combination with a claim for recognition and enforcement of a maintenance decision in respect of a child. She noted, however, that Central Authorities in the United States of America had no processes for the establishment of such claims. Ms Carlson noted that this was relevant to the discussion of Article 17, paragraph 4, on which the delegation of the United States of America had also made a proposal in Working Document No 66.

Ms Carlson noted that Article 17, paragraph 4, stated that: "A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 16(5) […]." Ms Carlson explained that the proposal of the delegation of the United States of America sought to also exclude the applicability of the first sentence of Article 17, paragraph 4, to applications made under Chapter V "for spousal support made in combination with claims for maintenance in respect of such a person". Ms Carlson explained that the Central Authorities in the United States of America had no authority to establish an order for spousal support made in combination with an order for the establishment of a maintenance decision in respect of a child. She explained that only the recognition and enforcement of such combined claims could occur through the Central Authority system.

Ms Carlson suggested that the impact of the amendment proposed in Working Document No 66 was limited since there was already an obligation under the Convention to recognise an order for spousal support if there were any bases of jurisdiction that would allow for such recognition, other than the habitual residence of a creditor. Ms Carlson also noted that the bases of jurisdiction in the United States of America for the establishment of a decision in relation to spousal support or the establishment of an order for spousal support made in combination with an order for the establishment of a maintenance decision in respect of a child were, in any event, similar to those found in other countries.

Ms Carlson also noted that the proposal made by the delegation of the United States of America in Working Document No 66 deleted the phrase "unless a new application is made under Article 10(1)(d)" at the end of Article 17, paragraph 4. She explained that this deletion was proposed because it did not make practical sense to include a reference to the making of a new application under Article 10, paragraph 1, sub-paragraph (d), since there would never be an old application in existence as a result of the fact that the appearance of that sentence was in the context of direct requests for recognition and enforcement made under Article 16, paragraph 5.

46. **The Chair** thanked the Delegate of the United States of America and stated that the floor was open for discussion.

47. **Mr Fucik** (Austria) thanked the Chair and stated in relation to Working Document No 66 that the only issue with the proposal in relation to Article 17, paragraph 4, was the reference to "Chapter V". He suggested that it might simply be a drafting matter but it was probably not necessary to refer to Chapter V since the provision was already contained in that Chapter.

48. **Mme Ménard** (Canada) souhaite indiquer que la délégation du Canada appuie la proposition de la délégation des États-Unis d'Amérique.

49. **Mr McClean** (Commonwealth Secretariat) explained that he was somewhat confused by the discussion that was occurring. He pointed to the rule in Article 10, paragraph 3, to the effect that applications for recognition, recognition and enforcement or enforcement of a decision "shall be determined under the law of the requested State", and that an application under another category listed in Article 10 "shall be subject to the jurisdictional rules applicable in the requested State". He therefore asked whether that provision itself dealt with the concerns of the delegation of the United States of America.

50. **Ms Carlson** (United States of America) responded to the Representative of the Commonwealth Secretariat and stated that Article 10, paragraph 3, did not deal with the problems experienced by the delegation of the United States of America because of the limitation on the services of the Central Authorities of the United States of America. She repeated what the proposed Article 17, paragraph 4, stated and explained that the Central Authorities in the United States of America could not establish a decision in relation to spousal support when made in combination with a claim for the establishment of a maintenance decision in respect of a child.

51. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that while the delegation of the European Community was not necessarily happy with the proposal that had been made by the delegation of the United States of America in Working Document No 66, their delegation could see the policy that was underlying the proposal in relation to Article 17, paragraph 4, and so would be ready to accept it. She mentioned, however, that the delegation of the European Community hoped that what the Delegate of the United States of America had said in relation to the fact that there would not be many situations where a claim for spousal support made in combination with a claim for maintenance in respect of a child was unable to be established because of the proposed amendment to Article 17, paragraph 4, was accurate.

In relation to the comments made by the Delegate of Austria, Ms Lenzing suggested that that matter could be dealt with by the Drafting Committee.

52. **The Chair** therefore queried whether the proposal of the delegation of the United States of America was acceptable bearing in mind that Central Authorities in the United States of America could not establish claims in respect of spousal support. The Chair confirmed the support for Working Document No 66 and therefore, subject to the drafting change in relation to the reference to Chapter V, she asked the Drafting Committee to make that amendment. The Chair then stated that discussions would move to Article 18.

53. **Ms Carlson** (United States of America) thanked the Chair and reiterated that as the delegation of the United States of America had stated previously, they wished to discuss the language to be used in the Explanatory Report to the Convention in relation to Article 17. Ms Carlson asked the Chair whether she would like her delegation to discuss that issue now.

54. **The Chair** stated that that discussion would not occur at that moment and that an opportunity for such discussion would occur over the next couple of days.

Article 18

55. **The Chair** noted that in relation to Article 18, the provision contained no square brackets and there were no working documents. The Chair asked whether there were any interventions; none were forthcoming and she concluded that Article 18 was accepted.

Article 19 (Doc. trav. / Work. Doc. *No 70)*

56. **The Chair** noted that in relation to Article 19, there were no square brackets contained in the provision but there was Working Document No 70 in relation thereto, particularly in relation to Article 19, paragraph (e). She asked the delegation of Switzerland, one of the proposing States, to present Working Document No 70.

57. **Mr Markus** (Switzerland) thanked the Chair and stated that he would like to present Working Document No 70 subject to additional comments to be made by delegates from the other States who had contributed to that proposal. He noted that the proposal had been changed slightly since Working Document No 53 and that the concerns expressed in relation to that working document had been taken into account in the redrafting process. He noted that a change had been made in response to the criticisms expressed by the delegation of the European Community in relation to Working Document No 53.

Mr Markus explained that the new element in their proposal in relation to Article 19 was that an introductory paragraph (e) was inserted to introduce sub-paragraphs (i) and (ii). He noted that any other amendments that had been made to the proposal and were now contained in Working Document No 70 were drafting matters that had been carried out in order to clarify the concept of the provision.

In relation to the substantive amendment, Mr Markus explained that the criticism of Working Document No 53 had been that the provision should be structured so that a debtor should not be able to invoke the fact that he had not been given proper notice of proceedings as a ground to challenge the recognition and enforcement of a decision, in circumstances where he ultimately learnt about the existence of proceedings and participated in the same. He noted that in such a case, although there had been no proper notice and a violation of the procedural rights of the debtor, it would be unfair to the creditor to refuse recognition and enforcement of a decision where the debtor did in fact appear and participate in proceedings. He noted that it should remain possible for a defendant to raise issues of procedure in order to challenge the recognition and enforcement of a decision, where, for example, there was a lack of jurisdiction or where proper notice was not given. However, if a debtor participated in proceedings, it would simply be unfair to refuse the recognition and enforcement of a decision where the debtor had in fact participated in proceedings.

In relation to the other formatting amendments, Mr Markus noted that the delegation of Switzerland wished to make it clear that Article 19, paragraph (e), sub-paragraphs (i) and (ii), covered two separate situations. He noted that sub-paragraph (i) related to judicial systems where the law of the forum allowed for notice of a proceeding to be given. He also observed that sub-paragraph (ii) was relevant to administrative systems that did not allow for notice of proceedings to be given but allocated increased rights to a debtor by giving notice of a decision in order for there to be an opportunity to challenge or appeal it on fact and law.

58. **Mr Hellner** (Sweden) stated that as a matter of drafting, it would be desirable to amend the wording of Article 19, paragraph (e), which stated: "[…] where the merits of the case were considered in the absence of the respondent […]", because the text was not factually correct. He noted that merits of a case were never reviewed in the absence of a respondent and that further, the text did not take into account the fact that a respondent could be represented. Mr Hellner suggested that other international instruments could be considered to assist in finding a possible alternative to the wording of that sentence, including, possibly, the European Community regulations. He proposed that the wording for Article 19, paragraph (e), could be along the lines of: "[…] the debtor has not appeared or been represented […]", since that wording would apply to both a court hearing as well as a hearing in an administrative system.

59. **Ms Cameron** (Australia) regretted that despite the best efforts of the delegation of Switzerland in drafting Working Document No 70, the delegation of Australia could not support the proposal.

Firstly, she stated that the delegation of Australia agreed with what had been said by the Delegate of Switzerland in relation to the fact that Article 19, paragraph (e), sub-paragraph (i), applied to judicial proceedings while sub-paragraph (ii) applied to administrative proceedings. She noted also that her delegation appreciated the amendment that had been made to the proposal as contained in Working Document No 70 to address concerns that had previously been expressed in respect of a situation where, despite there being improper notice of proceedings, a defendant may nevertheless appear and be heard. She agreed that in those circumstances, and as had now been taken account of by the delegation of Switzerland in their proposal, a decision should not be refused for recognition and enforcement.

Ms Cameron then proceeded to explain the difficulties that the delegation of Australia had with the proposal contained in Working Document No 70. She said that the introductory paragraph of Article 19, paragraph (e), which stated: "[…] where the merits of the case were considered in the absence of the respondent […]" and which would apply to sub-paragraphs (i) and (ii), was inaccurate in the context of an

administrative system. She stated that in administrative proceedings, the merits of a matter were never considered in the absence of a defendant.

Ms Cameron suggested that Working Document No 70 could be amended to more accurately reflect administrative systems by merging Article 19, paragraph (e), and sub-paragraph (i) and adding a separate reference to the merits of a case in sub-paragraph (ii). She noted that although it may require further drafting, sub-paragraph (ii) could therefore be amended to state "when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on the merits of the case on fact and law".

60. **Ms Lenzing** (European Community – Commission) stated that although the delegation of the European Community was not enthusiastic about the proposal contained in Working Document No 70, it was appreciated that their concerns had been taken into account in order to improve the proposal from its original format as was contained in Working Document No 53. She noted that the concerns raised by the delegations of Australia and Sweden could be resolved via further efforts to redraft the document. She stated that she lost the Delegate of Australia part way through her verbal proposal to make an amendment to Working Document No 70. Ms Lenzing stated that subject to drafting issues, the delegation of the European Community could support Working Document No 70.

61. **The Chair** asked the Delegate of Australia to repeat her verbal proposal for an amendment to Working Document No 70.

62. **Ms Cameron** (Australia) repeated that it was not accurate to suggest that in administrative systems the merits of the case would be considered in the absence of the respondent. She said that the *chapeau* in the proposed Article 19, paragraph (e), therefore needed to be merged with sub-paragraph (i) so that the text would be applicable to jurisdictions where the law of the State of origin provided for notice of proceedings to be given to a respondent. She observed that sub-paragraph (ii) would therefore also require amendment so that it would read: "when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on the merits of the case on fact and law". Ms Cameron noted that the intention of this proposed further amendment to Working Document No 70 was to introduce a consideration of the merits of the case at the challenge or appeal stage but in an accurate context.

63. **Mr Beaumont** (United Kingdom) noted that the delegation of the United Kingdom wished to retain the wording of the *chapeau* because it made the operation of Article 19, paragraph (e), clearer with respect to the fact that recognition and enforcement of decisions should only be refused in circumstances where the defendant had not appeared in proceedings in the State of origin.

64. **The Chair** queried whether there were any objections to retaining the *chapeau* in Article 19, paragraph (e).

65. **Ms Cameron** (Australia) re-emphasised the objection of the delegation of Australia to the wording of the proposal contained in Working Document No 70 and the retention of the *chapeau* in Article 19, paragraph (e). She noted that it suggested that the merits of a case were considered in the absence of the respondent in proceedings in administrative systems. She explained again that this was not an accurate reflection of an administrative system, and that the full wording of Article 19, paragraph (e), was so much of a problem that the delegation of Australia in fact preferred the wording of the Article as it existed in Working Document No 65.

66. **The Deputy Secretary General** asked the delegation of Australia whether the reference to the word "proceedings" in Article 19, paragraph (e), sub-paragraph (ii), and which provision was drafted to address the Australian administrative system, was correct or whether that reference may also need to be redrafted.

67. **Ms Cameron** (Australia) said, in response to the query from the Deputy Secretary General, that the delegation of Australia had taken a liberal interpretation of the word "proceedings" as it appeared in Article 19, paragraph (e), in the proposal contained in Working Document No 70, but that even in that regard, the wording of Article 19, paragraph (e), as contained in Working Document No 65 was preferred since in the latter working document, the reference to consideration of the merits of the case did not even appear.

68. **Mr Segal** (Israel) stated that, with regard to the verbal proposal made by the delegation of Australia to amend Working Document No 70, the wording of Article 19, paragraph (e), sub-paragraph (ii), could be amended to address all such concerns while retaining the reference to the important idea reflected in the *chapeau* by rewording sub-paragraph (ii) to include the reference to the phrase "if the merits were considered in the absence". In this way, Mr Segal suggested that for States that had administrative systems and where notice of proceedings was not given to a respondent, the important idea reflected in the *chapeau* would still be relevant to challenges or appeals of any decision made. He noted that the wording of the *chapeau* could then be adjusted to fit into Article 19, paragraph (e), sub-paragraph (ii), and to, of course, still be relevant to States that used judicial proceedings to make maintenance decisions where notice of proceedings was given to a respondent.

69. **Ms Nind** (New Zealand) stated that the delegation of New Zealand supported the wording of Article 19, paragraph (e), as it was contained in Working Document No 65. She noted that it was important not to change the provision via the further Working Document No 70 since it might upset the delicate balance of the applicability of the provision to both administrative and judicial systems. She noted that the outcome of doing so could be that the Convention would ultimately end up with an Article 19, paragraph (e), that was not in fact wanted.

70. **Mr Markus** (Switzerland) noted that he did not consider it impossible to amend the wording in Working Document No 70 so as to take into account the concern expressed by the delegation of Australia. He believed that redrafting consideration should not return to the wording of Article 19, paragraph (e), as it appeared in Working Document No 65 because it would ultimately mean a difference in substance to that which was contained in Working Document No 70.

He explained that the opinion of the delegation of Switzerland was that Working Document No 65 was not suitable for a worldwide context. Mr Markus said that if it were the case that the text of Article 19, paragraph (e), as contained in Working Document No 65 were supported, then real reliance would be placed upon the availability of effective

procedures and opportunities for a defendant at the second stage of the process, *i.e.*, at the stage of a challenge or an appeal of a decision, in jurisdictions where proper notice of proceedings and the opportunity to be heard were not given to the defendant at the first stage of proceedings. Mr Markus believed that in a worldwide context, where the availability and adequacy of such opportunities were more difficult to understand and come to know by a judge who was asked to recognise and enforce a decision, there was a risk that a defendant's right to properly challenge or appeal a decision on fact and law may be compromised. He suggested that it was more difficult for defendants to bring forward their defences at the second stage of a process, where they had to appeal a decision already made, when the opportunity for notice to be given and an opportunity to be heard at the first stage were not allowed. He did not believe that the delegates should support Working Document No 65.

71. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique, comme d'autres délégations, pense qu'il est préférable de s'en tenir à la version de l'article 19 tel que rédigé dans le Document de travail No 65.

72. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that the delegation of the European Community did not support Working Document No 65. She considered that Working Document No 70 was an improvement from the earlier working document that took into account the concerns of the European Community. She stated that she believed the delegates were close to reaching an agreement and that she was attempting to fully comprehend the concerns of the delegation of Australia. She referred to the suggestion that had been made by the Delegate of Sweden that the wording of Working Document No 70 be modified, to read along the lines of: "if the debtor has not appeared or been represented in proceedings […]". She then asked the delegation of Australia whether this wording would still be a problem for the Australian administrative system or whether the problem only related to the drafting of the reference to the merits. Ms Lenzing stated that if she had understood correctly the concerns of the delegation of Australia, then solutions in the way she had suggested could be arranged.

73. **Ms Cameron** (Australia) stated that the Delegate of the European Community had hit the nail on the head in relation to the concerns of the delegation of Australia with respect to the drafting of Working Document No 70. Ms Cameron noted that the wording as suggested by the Delegate of Sweden would be acceptable.

74. **The Chair** queried whether, if the reference in the *chapeau* in Article 19, paragraph (e), as contained in Working Document No 70 was to "cases where the respondent or the representative of the respondent did not appear in proceedings", this would be an acceptable change for delegates for application to both sub-paragraphs (i) and (ii). She noted that the reference to the appearance by the respondent or the respondent's representative would be to take account of the situation in Australia and that a suitable explanation would be added to the Explanatory Report to the Convention in order to make that clear.

75. **Mr McClean** (Commonwealth Secretariat) began to suggest that Article 16 already drew a clear distinction between a decision rendered by an administrative authority and a decision rendered by a judicial authority, but retracted what he had commenced to say and suggested that discussions be continued.

76. **The Chair** summarised that a compromise had been made with respect to the *chapeau* located in Article 19, paragraph (e), and that its wording would be amended so that it would remain in its current position but would instead state: "if, where the respondent or the respondent's representative did not appear in proceedings […]". The Chair noted that this would be subject to any improvements by the Drafting Committee and that the substance of the remainder of Article 19, paragraph (e), would remain the same.

Article 21

77. **The Chair** stated that the discussion would move to Article 21 in relation to the documents that were required to accompany an application for recognition and enforcement. She explained that there were no square brackets or working documents in relation to the provision and asked the delegates whether there were any interventions. She noted that Article 21 was accepted.

Article 22

78. **The Chair** moved the discussion to Article 22 that did not contain any square brackets. She noted that there were no working documents in relation to the provision and asked the delegates whether there were any interventions. The Chair noted that Article 22 was adopted.

Article 23

79. **The Chair** moved the discussion to Article 23 (Findings of fact), and stated that it did not contain any square brackets. She noted that there were no working documents in relation to the provision and asked the delegates whether there were any interventions. The Chair noted that Article 23 was adopted.

Article 24

80. **The Chair** moved the discussion to Article 24 (No review of the merits). She asked the delegates whether there were any interventions. The Chair noted that Article 24 was adopted.

Article 25

81. **The Chair** moved the discussion to Article 25 (Physical presence of the child or the applicant not required). She asked the delegates whether there were any interventions. The Chair noted that Article 25 was adopted.

Article 26

82. **The Chair** then moved the discussion to Article 26 and noted that square brackets were found in that provision. She asked the Chair of the Drafting Committee to explain the outstanding issues and amendments in relation to Article 26.

83. **The Chair of the Drafting Committee** thanked the Chair and noted that, firstly, the addition of square brackets around Article 26, paragraph 0, as contained in Working Document No 65, reflected a policy decision that had to be made regarding whether to make Article 26 an "opt-in" provision. She noted that this was to be compared to Article 26, paragraph 7, which was also in square brackets and which was framed as an "opt-out" provision in relation to Article 26.

Secondly, the Chair of the Drafting Committee wished to point out Article 26, paragraph 1 *bis*, which contained square brackets and which stated that an application for the recognition and enforcement of a maintenance decision could be made directly to a competent authority in the requested State. She also pointed out Article 26, paragraph 4, sub-paragraph (a), a further provision that contained square brackets and for which a decision by the delegates was required.

The Chair of the Drafting Committee noted that in relation to Article 26, paragraph 4, sub-paragraph (b)(ii), there had already been a resolution made by the delegates to remove the word "veracity" as it appeared in that provision and that it would be deleted in the next draft of the Convention. She also observed that in relation to Article 26, paragraph 5, the Drafting Committee had resolved that the reference to "State of origin" should in fact be to "competent authority". She stated that this change was necessary because it was not always in the "State of origin" that a challenge concerning a maintenance arrangement was pending. She noted that this change had not yet been made to Working Document No 65 but that it would appear in the next draft of the Convention.

84. **The Chair** noted that the floor was open for discussion in relation to the matters pointed out by the Chair of the Drafting Committee.

85. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that the preference of the European Community was to see Article 26 maintained in the form as it appeared in the draft Convention and for most of the square brackets contained therein to be deleted. In relation to the question of whether Contracting States should choose the possibility of an "opt-in" to Article 26 as was contained in paragraph 0 or a right to make a reservation with respect to Article 26, as contained in paragraph 7, she said that the European Community was in favour of the latter. Ms Lenzing believed that this more accurately reflected the views of delegates in relation to maintenance arrangements as being an effective instrument within the context of this Convention. Ms Lenzing also stated that the delegation of the European Community was in favour of the deletion of the square brackets around Article 26, paragraph 1 *bis*, and the retention of the text contained therein.

86. **The Chair** asked the Delegate of the European Community to comment on the issue of *ex officio* review as proposed within Article 26, paragraph 4, sub-paragraph (a).

87. **Ms Lenzing** (European Community – Commission) stated that, in relation to Article 26, paragraph 4, sub-paragraph (a), the delegation of the European Community preferred to retain the wording contained in square brackets that referred to "paragraph 3(a)" but that they could also be happy if the majority of delegates wished to retain the wording contained in square brackets that referred to "paragraph 3" only.

88. **The Chair** asked the delegates if there were any further interventions, suggesting that if not, a coffee and tea break would be held and the meeting would be resumed at 9.45 p.m. in order to continue discussion in relation to Article 26 and maintenance arrangements.

Article 26 (suite / cont.*)*

89. **The Chair** welcomed back the delegates and stated that discussions would continue in relation to Article 26. She suggested that as much as possible would be covered before 11 p.m. because the interpreters could not be expected to continue working after that time. She therefore asked the delegates to remain focussed.

90. **Ms Morrow** (Canada) supported the comments made by the Delegate of the European Community and suggested that most of the text contained within square brackets in Article 26 should be retained and the square brackets deleted. She stated, however, that the preference of the delegation of Canada was for Article 26, paragraph 7, over Article 26, paragraph 0. She also stated that her delegation supported the text of Article 26, paragraph 1 *bis*, and the deletion of the square brackets around that paragraph.

91. **Mr Moraes Soares** (Brazil) did not believe that Article 26, as it appeared in Working Document No 65, was drafted in a way that enabled its general application to the working processes of Article 26, paragraph 1 *bis*, in the event that the delegates supported the inclusion of the text contained within the square brackets in paragraph 1 *bis*. Further, and in relation to Article 26, paragraph 4, Mr Moraes Soares stated that the contents of that paragraph were currently then similar to the provisions contained in Article 20. He noted that if States supported Article 20 *bis*, the wording of Article 26, paragraph 4, should therefore be improved and amended so that the provisions outlined in paragraph 4 for the recognition and enforcement of a maintenance arrangement could be equally applicable and relevant to Articles 20 and 20 *bis*.

92. **Mr Tian** (China) stated in relation to the debate between Article 26, paragraph 0, and Article 26, paragraph 7, that although the delegation of China did not mind, they supported the deletion of the square brackets in paragraph 7 and the retention of the text contained therein. In relation to Article 26, paragraph 4, Mr Tian noted that his delegation supported the deletion of the wording in square brackets that referred to "paragraph 3(a)" and the retention of the wording in square brackets that referred to "paragraph 3".

93. **Mr Segal** (Israel) thanked the Chair and noted that in preliminary deliberations in relation to Article 26, he had expressed hesitations because he did not believe that the Article gave sufficient protection to a child or spouse creditor. With respect to the definition of "maintenance arrangement" as contained in Article 3, he said that it only spoke of formal requirements in relation to maintenance arrangements and that a system was needed that enabled a competent authority in the requested State to substantially review and not just formally review any maintenance arrangement. Mr Segal gave the example that in the process of obtaining a divorce, if a couple had made a maintenance arrangement in a foreign Contracting State and if that maintenance arrangement complied with the formal requirements under the definition of a "maintenance arrangement" in Article 3, he noted that it would be enforceable in a court and could be appealed by consent of both parties. He continued his example by stating that if a couple returned to France with that maintenance arrangement, according to Article 26, paragraph 1, it would "be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin".

Mr Segal noted that Article 26, paragraph 1, therefore meant that such a maintenance arrangement in accordance with the example given above could be recognised and enforced in other Contracting States. Mr Segal believed that an extra element should be added to Article 26, paragraph 1, to the effect that such a maintenance arrangement could be reviewed by the competent authority in the requested State on both the merits and formalities of the maintenance arrange-

ment. He suggested that such a safeguard was required in Article 26, paragraph 1, and that that paragraph required further clarification.

In relation to the debate between whether an "opt-in" provision in accordance with Article 26, paragraph 0, or a "reservation" process in accordance with Article 26, paragraph 7, was preferred, Mr Segal stated that the delegation of Israel supported the former and that Article 26 should operate via a process of declaration. Mr Segal also stated that his delegation supported the deletion of the wording in square brackets that referred to "paragraph 3(a)" in Article 26, paragraph 4, and the retention of the wording in square brackets that referred to "paragraph 3" so that Contracting States had the maximum ability to refuse the recognition and enforcement of a maintenance arrangement.

94. **Ms Lenzing** (European Community – Commission) stated that she would like to confirm her analysis of the operation of Article 26, paragraph 4. She noted that if Article 20 *bis* as proposed in Working Document No 62 were accepted by delegates, then changes would have to be made to Article 26, paragraph 4, since that paragraph only referred to Article 20.

In relation to the comments of the Delegate of Israel, Ms Lenzing clarified for him that it was not suggested that Article 26 would be relevant and applicable to all Contracting States under the Convention. She stated that some countries may simply not recognise the ability of parties to enter into a maintenance arrangement, and that was why there was included in Article 26 the possibility for Contracting States to make either a reservation or a declaration with respect to that provision if they did not wish for maintenance arrangements to be able to be recognised and enforced within their jurisdiction. Ms Lenzing stated her belief that the current text of Article 26 reflected differing legal traditions and that no further restrictions or additions to the text, including to Article 26, paragraph 1, as had been suggested by the Delegate of Israel, should be made.

95. **Ms Kulikova** (Russian Federation) stated that after having heard the intervention of the Delegate of the European Community, she agreed with the delegations of both Brazil and the European Community with respect to amendments that would need to be made to Article 26, paragraph 4, if Article 20 *bis* were supported. In this sense, she considered it necessary that if Article 20 were accepted by States, other Articles that referred to Article 20 would also potentially need to be redrafted.

96. **Mr Beaumont** (United Kingdom) referred to the definition of "maintenance arrangement" in Article 3 and stated that the term "authentic instrument" as contained therein could be further explained in the Explanatory Report to the Convention. He noted that while it was difficult to add such an explanation into the text of the Convention itself, he hoped that such an explanation in the text of the Explanatory Report would assist in addressing the concerns of the Delegate of Israel.

97. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique souhaite que les crochets soient supprimés autour du texte de l'article 26, paragraphe premier *bis*. Concernant le paragraphe 4, alinéa (a), de l'article 26, Mme Mansilla y Mejía souhaite que la référence à l'article 3, paragraphe (a), soit supprimée et que l'on enlève les crochets autour de la référence au paragraphe 3.

98. **Mr Moraes Soares** (Brazil) thanked the Chair and stated that he wished to properly understand the discussion in relation to maintenance arrangements and the articles that related to such arrangements. He therefore sought to clarify, if delegates supported Article 20 *bis*, whether a reference to that Article would also need to be included in Article 16, paragraph 4.

99. **The Chair** stated, in response to the Delegate of Brazil, that Article 16, paragraph 4, had been supported by the delegates and that since it stated that Chapter V would apply to maintenance arrangements in accordance with Article 26, this meant that Article 20 and, potentially, Article 20 *bis*, would also apply to maintenance arrangements since they were contained in Chapter V.

100. **Mr Moraes Soares** (Brazil) thanked the Chair and queried, in order to balance Article 26, Article 20 and Article 20 *bis*, whether Article 26, paragraph 4, sub-paragraphs (a) and (b), would need to be deleted since the presence of the latter provisions meant that the procedures for the recognition and enforcement of maintenance arrangements were confused. He suggested that if a Contracting State declared to apply the procedures for recognition and enforcement as set out in Article 20 *bis*, then according to Article 26, paragraph 4, sub-paragraphs (a) and (b), that State would still be required to apply the procedures for recognition and enforcement as set out under Article 20. He therefore stated that references to the alternatives of Articles 20 and 20 *bis* needed to be made clear in Article 26, paragraph 4, sub-paragraphs (a) and (b), and if not, then Article 26, paragraph 4, should be deleted altogether. He also believed that since Articles 20 and 20 *bis* were located in Chapter V, for those Articles to be relevant to the recognition and enforcement of maintenance arrangements, they also needed to be referred to in Article 16, paragraph 4.

101. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated in relation to the comments made by the Delegate of Brazil that it was necessary to amend Article 26, paragraph 4, sub-paragraphs (a) and (b), but that it was not necessary to completely delete that provision. She noted that this was because Articles 20 and 20 *bis* had been modelled for the recognition and enforcement of judicial decisions and that meant that, occasionally, some matters did not make sense in the context of the recognition and enforcement of maintenance arrangements. She noted that Article 26, paragraph 4, therefore needed to be retained but suggested that it could certainly be redrafted to take into account those concerns that had been raised. She suggested that the Drafting Committee could be asked to consider this issue and that Article 26, paragraph 4, could be looked at again in the third reading of the draft Convention.

102. **The Chair** stated that, as she understood it, Article 26, paragraph 4, had been drafted to take into account the two-step approach that could be found in Article 20, and this included the first stage of declaring enforceable or registering a maintenance arrangement in the requested State and the second stage of challenging or appealing such a decision. Thus, in Article 26, paragraph 4, sub-paragraph (a), there was discussion of the grounds for the refusal to declare enforceable or register a maintenance arrangement and, in sub-paragraph (b), the bases for a challenge or appeal of a maintenance arrangement declared enforceable or registered were discussed. The Chair noted that, to the contrary, Article 20 *bis* was a one-step process for recognition and enforcement and so, if it was agreed by delegates, Article 26, paragraph 4, would need to be changed to reflect its applicability to maintenance arrangements if a Contracting State declared that it would apply the procedures for recognition and enforcement to be found in Article 20 *bis*.

103. **Ms Escutin** (Philippines) stated, in relation to Article 26, paragraph 4, that since Article 20 had not yet been formally decided, the wording contained in the square brackets that referred to "paragraph 3(a)" should be deleted and the wording contained in the square brackets that referred to "paragraph 3" should be retained. Ms Escutin also stated in relation to Article 26, paragraph 1 *bis*, that the whole of the text contained within the square brackets should be deleted because it was a redundant provision on account of Article 16, paragraph 4, already regulating those same matters. With regard to the discussion relating to maintenance arrangements, Ms Escutin wished to remind the Delegate of the European Community that not all States were ready to embrace the idea of maintenance arrangements.

104. **The Chair** concluded that the majority of States were in favour of Article 26 being run as an "opt-out" provision and that paragraph 7 would therefore be retained while Article 26, paragraph 0, would be deleted. The Chair noted that there was also general agreement to retain Article 26, paragraph 1 *bis*, subject to drafting changes if some aspects of it were made redundant as a result of Article 16, paragraph 4, being redrafted. The Chair noted in relation to Article 26, paragraph 4, that if Article 20 *bis* were accepted by States as an option to govern procedures for recognition and enforcement, then changes had to be made in paragraph 4 to reflect this fact while still indicating that other States in which the procedures for recognition and enforcement would be governed by the two-step process, as outlined in Article 20, would proceed as it then appeared in Article 26, paragraph 4, in Working Document No 65.

105. **Mme Mansilla y Mejía** (Mexique) attire l'attention de la Présidente sur le fait que, selon elle, plusieurs délégations ont exprimé le souhait que soient supprimés, d'une part, les crochets autour du paragraphe 3, et, d'autre part, le paragraphe 4, alinéa (a), de l'article 26 dans son intégralité. Elle note qu'au moins trois délégations se sont exprimées en ce sens.

106. **The Chair** noted that Article 26, paragraph 3, was not contained in square brackets and that that provision had already been agreed. She noted that the square brackets that were being discussed were those located in Article 26, paragraph 4, sub-paragraph (a). She noted that a maintenance arrangement could be reviewed by a competent authority in accordance with Article 3, paragraph (e), and that that would be a review on substance and not just a formal review. The Chair referred to the example of a couple who obtained a divorce and made a maintenance arrangement that complied with the definition of "maintenance arrangement" in Article 3, *i.e.*, it was in writing and related to the payment of maintenance and complied with either Article 3, paragraph (e), sub-paragraph (i) or (ii). She continued the example by stating that if that couple returned to France with such a maintenance arrangement, it would be entitled to recognition and enforcement as a decision under Chapter V in accordance with Article 26, paragraph 1, but it could also be substantially – and not just formally – reviewed by a competent authority in accordance with Article 3, paragraph (e).

The Chair noted that the outcome of discussions on Article 20 would affect Article 26, especially for States determined to accept Article 20 *bis*. The Chair observed that those States that supported Article 20 *bis* and the one-step procedure contained therein, where a competent authority could review the grounds for a refusal of the recognition and enforcement of a decision, were also generally those States that supported the retention of all three grounds for the refusal to recognise and enforce a maintenance arrangement under Article 26, paragraph 3.

107. **Mme Mansilla y Mejía** (Mexique) indique que les explications données par la Présidente sont parfaitement claires.

Articles 27, 28, 29, 30 et / and *31*

108. **The Chair** suggested that discussion move to Article 27. She noted that no square brackets were found in the provision and there were no working documents that related to it. She asked whether there were any interventions and then stated that Article 27 was accepted.

The Chair queried whether the whole of Chapter VI could be accepted since there were no square brackets or working documents in relation to that Chapter. Although it related to Chapter VI, she noted that Article 32 had been deleted and that such a provision was now contained within Article 51. Also, with regard to Article 30, she stated that a list of possible internal law effective measures to enforce decisions under the Convention had been decided and included therein. She observed that Article 30, paragraph 2, sub-paragraph (i), now referred to the use of alternative dispute resolution processes "to bring about voluntary compliance". The Chair asked whether there were any interventions in relation to Articles 28 to 31 inclusive. She concluded that Chapter VI was accepted.

Article 33 (Doc. trav. / Work. Docs *Nos 72 et /* and *2)*

109. **The Chair** then turned to discuss Article 33 in relation to public bodies as applicants. She handed the floor to the delegation of the United States of America.

110. **Mr Keith** (United States of America) noted that it was late but that there remained an important issue to discuss and one that was open for comment, namely in relation to public bodies as applicants. He stated that this issue had been referred to the Working Group on Article 14 but they had not had time to consider it. He referred delegates to Minutes No 4 of Commission I (paras 45-48).

Mr Keith noted that there were two questions in relation to this open issue. He suggested that the first question was whether pubic bodies were entitled to free legal assistance in order to establish a maintenance decision. He noted that this raised two further issues but those issues could be discussed on Wednesday 21 November 2007. The second question for consideration was whether an order could be made to establish a public body as an applicant "acting in place of an individual to whom maintenance [was] owed or one to which reimbursement [was] owed for benefits provided in lieu of maintenance".

Mr Keith referred delegates to Working Document No 72 and the proposal therein relating to Article 33. He noted that it sought to acknowledge two situations where a public body may be a creditor: firstly, for the purposes of applications for recognition and enforcement under Article 10, paragraph 1, sub-paragraphs (a) and (b), where a decision was made in favour of a public body and provided for the repayment of maintenance to the public body that had already been provided as benefits to the creditor; secondly, for establishment of situations under Article 17, paragraph 4, and Article 10, paragraph 1, sub-paragraph (c), where an original order for the reimbursement of maintenance already provided by the public body as benefits to the creditor cannot be recognised and enforced if the jurisdictional basis of the decision was not accepted by the requested

State as a result of a reservation made under Article 17, paragraph 2.

Mr Keith did not believe that the proposal contained in Working Document No 72 was radical but that it simply provided parity for public bodies as applicants so that decisions in favour of those public bodies, and that were essentially for the reimbursement of maintenance already paid to a creditor, could either be recognised and enforced or, if that were not possible, could be established. He therefore noted that the proposal in relation to Article 33 in Working Document No 72 simply sought parity for a public body as an applicant where that body had already provided for the maintenance of a child and should be reimbursed. Mr Keith asked the Chair whether she wished for him to discuss the proposals also contained within Working Document No 72 in relation to Articles 14 *bis* and 14 *ter*.

111. **The Chair** noted that that discussion would not be necessary at this stage.

112. **Ms Lenzing** (European Community – Commission) noted that on the issue of public bodies as applicants, the European Community had also proposed Working Document No 2. Ms Lenzing noted that the proposal contained within Working Document No 2 did not go quite as far as the proposal contained within Working Document No 72 and that the key difference related to the treatment of cases for establishment. She stated that the idea behind Working Document No 2 was to ensure that where a public body was an applicant and applied for the recognition and enforcement of a decision that was in its favour, including for the reimbursement of maintenance already paid to the creditor, then such an application would be granted.

Ms Lenzing stated that Working Document No 2 also proposed that free legal assistance, in accordance with Articles 14, 14 *bis* and 14 *ter*, be equally given to public bodies as other applicants. She observed that public bodies sometimes automatically intervened in maintenance cases and it would not be adequate to deny those bodies benefits under the Convention simply because they intervened at an early stage. While Ms Lenzing agreed that public bodies should benefit from free legal assistance when making applications for the recognition and enforcement of maintenance decisions with respect to a child, she considered that it probably went too far to also provide free legal assistance to public bodies who sought to establish a maintenance decision when that decision could not be recognised and enforced. Ms Lenzing stated that the delegation of the European Community felt that in those situations, a public body should establish a decision in its own State rather than abroad. Further, Ms Lenzing felt that the provision of free legal assistance in those cases may over-extend the already generous support provided by many States under this Convention.

Ms Lenzing appreciated, however, that a public body should be able to establish a maintenance decision in its favour in a foreign jurisdiction where the recognition and enforcement of a decision rendered in the requesting State had been refused. Ms Lenzing did not consider that the delegation of the United States of America should be concerned about maintenance decisions originating from the United States of America, in favour of a public body, being refused recognition and enforcement in the requested State because of that State having made a reservation under Article 17, paragraph 2, with respect to the bases for recognition and enforcement that it would recognise. She noted that this was because the possibility to make a reservation in accordance with Article 17, paragraph 2, was essentially designed for the benefit of the delegation of the United States of America themselves. Regardless of this, a maintenance decision in favour of a public body could never be refused recognition in the requesting State on the basis of a lack of jurisdiction because the jurisdiction of the creditor's habitual residence would always provide that basis of jurisdiction.

Ms Lenzing summarised by stating that she believed the proposal made by the delegation of the United States of America went too far in proposing that free legal assistance also be provided to public bodies in cases where the establishment of a maintenance decision in favour of a public body was sought.

113. **Mr Ding** (China) stated that the delegation of China had serious concerns in relation to the provision of free legal assistance to public bodies under Article 14. He considered that it would upset the compromise the delegates were currently attempting to reach in relation to Article 14. He noted that if States supported the proposal of the delegation of the United States of America for the provision of free legal assistance to public bodies as applicants, it should only be discussed after Article 14 with respect to all of the other issues that had been provisionally settled.

114. **Mme Gervais** (Canada) indique que la délégation du Canada est favorable à la proposition de la Communauté européenne. Elle observe en outre que sa délégation, lors d'une précédente intervention concernant les organismes publics, avait indiqué qu'elle estimait que les organismes publics devraient pouvoir bénéficier des mêmes conditions d'accès effectif aux procédures que les créanciers, ainsi que de l'assistance juridique pour les demandes relatives aux enfants. De l'avis de la délégation du Canada, l'organisme public qui verse des prestations à un créancier privé d'aliments, en raison du défaut de payer du débiteur, ne devrait pas avoir à supporter un fardeau financier pour le recouvrement, auprès de ce débiteur, de telles prestations. La délégation du Canada estime donc que l'organisme public devrait bénéficier de l'accès effectif aux procédures au même titre que tout autre créancier ainsi que de l'assistance juridique gratuite pour les demandes relatives aux enfants. Mme Gervais ajoute que cette proposition ne constituerait pas un fardeau additionnel pour les Autorités centrales et compétentes de l'État requis qui seraient de toute façon tenues d'offrir ces mêmes services aux créanciers.

À cet égard, la délégation du Canada souhaite appuyer la proposition soumise par la délégation de la Communauté européenne dans le Document de travail No 2 visant à ajouter à l'article 33 du projet de Convention un paragraphe concernant le droit des organismes publics à bénéficier des services et de l'assistance juridique gratuite prévue à l'article 14 *bis* du projet de Convention.

115. **Mr Keith** (United States of America) thanked the Chair and stated that he wished to address the comments made by the Delegates of China and the European Community.

In relation to the comments of the Delegate of China, Mr Keith noted that the vast majority of countries could establish their own orders for reimbursement to public bodies for support already provided by them because of the creditor-based jurisdiction. He noted that the United States of America could not do that and so an imbalance existed.

In relation to the comments made by the Delegate of the European Community, Mr Keith stated that the delegation of the United States of America endorsed reaching a compromise and that he wished to point out that there was a

concomitant obligation on the United States of America to establish a decision under Article 17, paragraph 4, and so any purported advantage to the United States of America in relation to the making of reservations under that Article was not necessarily an accurate reflection of the actual situation. In relation to the comments that the Delegate of the European Community had made regarding their reluctance to agree to extend the provision of free legal assistance to public bodies seeking to establish decisions that were in favour of that public body, he noted that free legal assistance was already provided under Article 10, paragraph 1, sub-paragraph (d). He therefore suggested that the extension of such assistance in accordance with the proposal made by the delegation of the United States of America was not necessarily going too far.

116. **Mr Markus** (Switzerland) thanked the Chair and stated that the delegation of Switzerland supported what had been said by the Delegate of the European Community and that his delegation was of the opinion that it was sufficient to grant free legal assistance to public bodies for the recognition and enforcement of decisions in their favour only. He noted that that position was already a compromise, *i.e.*, for the provision of free legal assistance to support public bodies in making an application for the recognition and enforcement of maintenance decisions in their favour and which were in respect of children. Mr Markus noted further that the delegation of Switzerland also agreed with the comments made by the Delegate of the European Community with respect to Article 17 and stated that while he understood the position of the delegation of the United States of America, he believed that Article 17, paragraph 4, avoided most situations where a maintenance decision in favour of a public body that could not be recognised and enforced, as a result of a reservation made under Article 17, would then not be able to be established.

117. **Ms Lenzing** (European Community – Commission) thanked the Chair and, in relation to the last intervention by the Delegate of the United States of America, apologised for having previously made a nonsensical intervention. In relation to the concerns expressed by the delegation of the United States of America that the United States does not recognise some grounds for jurisdiction, including a base of jurisdiction in relation to the habitual residence of the creditor, which would put their public bodies at a disadvantage vis-à-vis others, Ms Lenzing referred to previous discussions and the amendment to Article 17, paragraph 4, that had been made in favour of the United States of America where the European Community had accepted that that provision would not be applied to orders for spousal support made in combination with an order for the establishment of a maintenance decision in respect of a child. Ms Lenzing therefore asked the delegation of the United States of America to accept this slight setback that their public bodies, when acting as applicants, would encounter.

118. **The Chair** asked whether there were any further interventions and concluded that there was not enough support for the proposal of the delegation of the United States of America in Working Document No 72 relating to the provision of free legal assistance to public bodies who sought to establish a maintenance decision in their favour and that could not be recognised and enforced. Therefore, she noted that the text of Article 33, paragraph 1, would remain as it then existed. The Chair handed the floor to the delegation of the European Community.

119. **Ms Lenzing** (European Community – Commission) noted that she believed the proposal made by the European Community in Working Document No 2 had received some support and particularly the addition of Article 33, paragraph 5.

120. **The Chair** queried which part of Working Document No 2 the Delegate of the European Community was referring to.

121. **Ms Lenzing** (European Community – Commission) stated that she was particularly referring to the addition of paragraph 5 to Article 33 as was contained in Working Document No 2, which read: "Public bodies as applicants shall benefit from the same services or legal assistance as those set out in Article 14."

122. **The Chair** stated that discussion on Working Document No 2 would not occur until discussions in relation to Article 14 had been settled.

Article 34

123. **The Chair** moved discussion to Article 34 in relation to the making of direct requests to competent authorities. She noted that there had previously been extended discussions on Article 34 and that the provision contained no square brackets.

124. **Ms Morrow** (Canada) thanked the Chair and wished to confirm the recollection of the delegation of Canada with respect to the previous discussions that had occurred on Article 34. She noted that the delegation of the European Community had wished to include Article 14 *quater*, paragraph (b), within Article 34, paragraph 2, for the time being but that the delegation of Canada had hoped that the delegation of the European Community had taken the concerns expressed by the delegation of Canada into account, and that the reference to that provision could perhaps be included in the Explanatory Report to the Convention instead. Ms Morrow noted that this issue had been left open.

125. **The Chair** queried whether the question from the delegation of Canada related to that part of Article 14 by which the reference in Article 34, paragraph 2, would mean that free legal assistance would be available for requests for recognition and enforcement made directly to competent authorities.

126. **Ms Morrow** (Canada) confirmed that the Chair was correct in her understanding.

127. **The Chair** stated that according to her recollection it had not been included in square brackets. She gave the floor to the delegation of the United States of America.

128. **Ms Carlson** (United States of America) thanked the Chair and stated that her delegation had referred to their written notes and their recollection of the discussion on Article 34, paragraph 2, was in accordance with what had been noted by the delegation of Canada, *i.e.*, that legal aid dollars could be funnelled to assist requests for recognition and enforcement made directly to competent authorities as a result of the reference to "14 *quater* (b)" in Article 34, paragraph 2. Ms Carlson recalled that the Delegate of the European Community had stated previously that they had not considered the concern expressed by the delegation of Canada in discussion but that they would do so. She noted that the provision was left open in order for that consideration to occur and further discussion to take place if necessary.

129. **The Chair** stated that discussion on that issue could probably not occur at this stage of the evening meeting but

that it should be kept in mind and raised within the context of discussions relating to Article 14 on Wednesday 21 November 2007. The Chair therefore left that question open.

Article 35

130. **The Chair** noted, in relation to Article 35 (Protection of personal data), that there were no square brackets or working documents related thereto. She asked if there were any interventions and since there were not, the Chair noted that Article 35 was accepted.

Article 36

131. **The Chair** moved the discussion to Article 36 in relation to confidentiality and stated that there were no square brackets or working documents in relation to that provision. She asked if there were any interventions and since there were not, the Chair noted that Article 36 was accepted.

Article 37 (Doc. trav. / Work. Doc. *No 68)*

132. **The Chair** turned to discuss Article 37 (Non-disclosure of information), and noted that Working Document No 68 had been submitted by the delegation of Canada in relation to that Article. The Chair therefore gave the floor to the delegation of Canada.

133. **Mme Ménard** (Canada) présente le Document de travail No 68 contenant la proposition de la délégation du Canada relative à l'article 37 sur la non-divulgation de renseignements. Elle indique que cette proposition fait suite à l'intervention du Délégué de la Suède sur la protection des renseignements personnels lors de la séance précédente. Alors que le paragraphe premier de l'article 37 prévoit la possibilité pour une autorité de décider de ne pas divulguer des renseignements personnels, la délégation du Canada suggère de modifier le paragraphe suivant (art. 37(2)) comme suit : « Lorsqu'une telle décision est prise par une Autorité centrale, elle doit être prise en compte par toute autre Autorité centrale, en particulier dans les cas de violence conjugale. »

Mme Gervais ajoute que cette modification de l'article 37, paragraphe 2, devrait être accompagnée d'une explication dans le Rapport explicatif afin de préciser qu'il n'est pas nécessaire que l'adresse du demandeur soit fournie. Elle pense ainsi que l'adresse confidentielle du demandeur serait protégée de façon satisfaisante.

134. **Mme González Cofré** (Chili) souhaite réitérer que la délégation du Chili est favorable à la proposition de la délégation du Canada en vue de la non-divulgation de renseignements personnels.

135. **Mr Tian** (China) stated that the delegation of China could support the proposal made by the delegation of Canada, but that he wished to be provided with some clarification in relation to the necessity of the addition of "in particular in cases of family violence" to Article 37, paragraph 2, in accordance with Working Document No 68.

136. **Ms Carlson** (United States of America) stated that the delegation of the United States of America supported the proposal of the delegation of Canada as contained in Working Document No 68.

137. **Mr Hellner** (Sweden) stated that at that moment he had the honour to speak on behalf of the entire European Community in stating that the proposal made by the delegation of Canada in Working Document No 68 was supported. He noted that while the reference in the proposed Article 37, paragraph 2, to "cases of family violence" did not add any beauty to the text, it did point out one example of circumstances in which information should be protected.

138. **The Chair** asked whether there were any objections to the proposal made by the delegation of Canada in Working Document No 68, bearing in mind also the proposed changes to the Explanatory Report to the Convention. There were no objections and so the Chair concluded that Working Document No 68 was supported. She asked the Drafting Committee to make the appropriate changes to Article 37, paragraph 2.

Article 38

139. **The Chair** then asked whether there were any interventions in relation to Article 38; there being none, the Chair declared the Article adopted.

Article 39

140. **The Chair** asked, in relation to Article 39 concerning powers of attorney, whether there were any interventions. Since there were none, she noted that Article 39 would be accepted.

Article 40

141. **The Chair** noted that Article 40 would be discussed on Wednesday 21 November 2007 and that current discussion would move to Article 41 in relation to language requirements.

Article 41

142. **The Chair** noted that Article 41 contained no square brackets and queried whether there were any interventions. Since there were none, she noted that Article 41 would be accepted.

Article 42

143. **The Chair** noted in relation to Article 42 (Means and costs of translation), that there were no square brackets and she asked whether there were any interventions. She noted that Article 42 was accepted.

Article 43 (Doc. trav. / Work. Doc. *No 69)*

144. **The Chair** then moved the discussion to Article 43 and observed that Working Document No 69, proposed by the delegation of the United States of America, related to that Article. She therefore handed the floor to the delegation of the United States of America.

145. **Ms Carlson** (United States of America) thanked the Chair and stated that she could not really explain the proposal contained in Working Document No 69 in relation to Article 43 without discussing Article 46. She noted that the proposal was also indirectly related to the discussion that took place regarding Articles 14 and 20. Ms Carlson noted that prior to the addition of Article 20 *bis*, which referred to a competent authority acting expeditiously, there was an Article 20, paragraph 11, providing that "[n]othing in this Article shall prevent the use of simpler or more expeditious procedures". Ms Carlson stated that there was therefore some overlap with respect to the idea of using simplified or expeditious procedures, because such ideas had always been present in Article 46.

Ms Carlson noted, however, that there was no reference to the protection of the rights of a defendant within the operation of Article 46 relating to the use of more simplified or expeditious procedures. She stated that the proposal contained in Working Document No 69 was therefore engineered so that within the *chapeau* of Article 46, the rights referred to were reciprocal and not unilateral. She observed that some language was also removed from the *chapeau* in the proposed Article 46, including the deletion of the reference to "other law in force in the requested State", such that Article 46 would then state: "This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or reciprocity arrangements in force in the requested State that provide for […]." In this sense, Ms Carlson referred to arrangements between the United States of America and Canada which had a reciprocal effect.

Ms Carlson also stated that there was a proposed change in relation to Article 46, paragraph (b), to remove the word "or" between "simplified" and "more expeditious" so that paragraph (b) would state: "simplified, more expeditious procedures on an application for recognition or enforcement of maintenance decisions". The impact of the changes made to the *chapeau* of Article 46 in the proposal of the delegation of the United States of America meant that Article 43 also required an addition so that any reciprocity arrangements would also apply to territorial units. She noted that Article 43, paragraph 1, sub-paragraph (g), was therefore proposed in Working Document No 69.

146. **Ms Lenzing** (European Community – Commission) thanked the Chair and stated that the delegation of the European Community supported the proposal of the delegation of the United States of America as contained in Working Document No 69 in relation to changes to Article 46 and consequential changes to Article 43.

147. **Mr McClean** (Commonwealth Secretariat) queried what policy reason had made the delegation of the United States of America desirous to exclude unilateral actions made by a requested State under the law of that State from the operation of Article 46, and what was the effect of the amendments made to the *chapeau* of that Article. He believed that if the objective under the Convention was to allow for the wide recognition and enforcement of maintenance decisions, if a State added a further basis of jurisdiction for recognition and enforcement under Article 46, paragraph (a), for example, the only way that could be done would be on a reciprocal basis according to the proposed Article 46.

148. **Mme Riendeau** (Canada) observe que la délégation du Canada partage les préoccupations soulevées par la délégation des États-Unis d'Amérique et est donc favorable à la proposition de cette délégation concernant l'article 46 relatif à la règle de l'efficacité maximale, telle que contenue dans le Document de travail No 69. En effet, Mme Riendeau note que la délégation du Canada est intervenue la semaine précédente lorsque cette disposition fut débattue dans le souci de protéger, clairement, par le biais de cette disposition, les ententes de réciprocité impliquant des provinces canadiennes et d'autres juridictions. Or, elle remarque que la nouvelle formulation de l'article 46 proposée par la délégation des États-Unis d'Amérique dans le Document de travail No 69 permettrait de tenir compte des accords de réciprocité.

Elle ajoute qu'il est important que le Rapport explicatif fournisse une description des types d'ententes visées par cette disposition.

Concernant la proposition d'amendement de l'article 43, Mme Riendeau souligne que si l'amendement proposé par la délégation des États-Unis d'Amérique est accepté pour l'article 46, il convient de modifier en conséquence l'article 43. Elle indique qu'à cet égard la rédaction proposée par la délégation des États-Unis d'Amérique est acceptable pour la délégation du Canada.

149. **Mr Tian** (China) thanked the Chair and stated that the delegation of China supported the comments made by the Representative of the Commonwealth Secretariat. Mr Tian noted that the delegation of China did not see any reason to restrict a State from making a unilateral addition to the bases for the recognition and enforcement of maintenance decisions. He noted that more discussion would be required on this topic for clarification purposes, as well as the fact that discussion with regard to Article 14, and which may affect the current discussion, was not yet finalised. In relation to the addition of Article 43, paragraph 1, sub-paragraph (g), the delegation of China had no objection to that amendment.

150. **Ms Carlson** (United States of America) noted that she observed that the Delegate of the United Kingdom had raised his placard, and so if he proposed to address the policy issue raised by the Representative of the Commonwealth Secretariat then she would defer to his comments.

151. **Mr Beaumont** (United Kingdom) stated that there could be a long and detailed discussion in response to the comments of the Representative of the Commonwealth Secretariat. He noted, however, that if a unilateral power were given to a requested State to simplify and expedite its procedures, for example, without any reference to any minimum requirements, then that State may only be interested in protecting its own nationals rather than the interests of a creditor from another State. A creditor did not always win at the first stage of proceedings and so it was important that there were minimum procedural delays available for a creditor to appeal a decision in a requested State, for example. He noted that the idea of minimum core requirements to balance the interests of creditors and debtors was what had led the delegation of the United States of America to make the proposal in relation to Article 46, so that a requested State could not unilaterally adjust its procedures under the law of its State in relation to the operation of this Convention.

152. **The Chair** noted that it was past 11 p.m. and asked the Delegate of Australia to keep her intervention short.

153. **Ms Cameron** (Australia) noted that if she had understood the Representative of the Commonwealth Secretariat correctly, his concern was not with a State not being able to unilaterally simplify or expedite its procedures on an application for recognition and enforcement under the proposed Article 46, paragraph (b), but with paragraphs (a), (c) and (d) of that Article. She noted that the delegation of Australia shared those concerns because if the effect of the proposal made by the delegation of the United States of America meant that States would be prevented from unilaterally adopting changes under Article 46, paragraphs (a), (c) and (d), then that was not a good step forward. She noted, however, that this was not how she believed the rule should be interpreted, but wanted to nevertheless highlight that issue in the event that such an interpretation was actually intended.

154. **The Chair** noted that there seemed to be complete agreement on the proposal of the delegation of the United States of America in Working Document No 69 concerning Article 43. Regarding the proposed Article 46 in Working Document No 69, the Chair noted that discussions in relation thereto would be raised again, specifically as concerns the unilateral provision by States of further bases for the recognition and enforcement of maintenance decisions. The Chair noted that the meeting would be adjourned and that discussion on the remaining Articles would be continued, and must be finished, on Wednesday 21 November 2007, starting at 9.30 a.m.

La séance est levée à 23 h 05.

Procès-verbal No 21

Minutes No 21

Séance du mercredi 21 novembre 2007 (matin)

Meeting of Wednesday 21 November 2007 (morning)

La séance est ouverte à 10 heures sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

Article 4

1. **The Chair** welcomed everyone to the final day of Commission I discussions. She suggested moving back to Article 4 as discussions on that Article for the second reading had been postponed. She gave the floor to the Delegate of Argentina.

2. **Mr Goñi Marenco** (Argentina) stated that the Argentine Republic considered that it would have been preferable to have a different drafting for Article 4, paragraph 2, of the Convention since it seemed to introduce differences in the application of the Convention in certain matters, based on the internal organisation of States. He stated that nevertheless the delegation of Argentina would follow the consensus because they considered that Article 4, paragraph 2, of the Convention could not be applied to Islas Malvinas, Georgias del Sur and Sandwich del Sur by a State other than the Argentine Republic, since the abovementioned archipelagos are an integral part of the Argentine national territory. He stated that these archipelagos, illegally occupied by the United Kingdom, were the object of a sovereignty dispute between the two countries that had been recognised by the United Nations and that this body has repeatedly asked the Argentine Republic and the United Kingdom to resume the negotiations tending towards resolving the dispute and, until then, to abstain from adopting unilateral measures. He stated that the delegation of Argentina would submit to the Chair a note which would reserve the position of his delegation (see attached Note in Annex I).

3. **Mr Parker** (United Kingdom) thanked the Delegate of Argentina. He stated that while they had some useful discussions they had been unable to reach an agreement which could be reflected in the text. He stated that he understood the position of the delegation of Argentina and that his delegation would review the text as produced and would respond if necessary (see attached Note in Annex II).

4. **Mme Parra Rodriguez** (Espagne) remercie la délégation de l'Argentine pour le document de travail qu'elle vient de présenter et indique que sa délégation partage l'opinion qui y est exprimée. Elle mentionne que la délégation de l'Espagne est également en pourparlers avec le Royaume-Uni pour essayer de résoudre le problème des Autorités. Elle indique que ces négociations ne se déroulent pas seulement dans le cadre de cette Convention mais aussi pour d'autres Conventions que son pays est appelé à ratifier. Elle espère que sa délégation puisse aboutir à un accord mais précise que dans l'intervalle, sa délégation peut accepter l'article 4, paragraphe 2, tel qu'il figure dans le Document de travail No 65.

5. **The Chair** asked if there were any more interventions on this Article.

There were no remarks and she concluded that the present wording of Article 4 was accepted and that note would be taken of the statements made by these States.

Article 43 bis

6. **The Chair** recalled that the discussion the previous night had finished with Article 43, which had been accepted but left open for the possibility of further discussions as it could be necessary to add further references for non-unified legal systems. She suggested moving on to Article 43 *bis* and she noted that there were no square brackets in the present text and that no working documents had been presented.

There were no remarks and she concluded that this Article had been accepted.

Articles 44, 44 bis *et /* and *44* ter

7. **The Chair** stated that the discussion would move on to Article 44 concerning co-ordination with prior Hague Maintenance Conventions. She asked if there were any interventions on this Article.

There were no remarks and she concluded that it was accepted.

The Chair stated that the discussion would move on to Article 44 *bis* concerning co-ordination with the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. She asked if there were any interventions on this Article.

There were no remarks and she concluded that it was accepted.

The Chair referred to Article 44 *ter* concerning the relationship with prior Hague Conventions on the service of documents and the taking of evidence and asked if there were any interventions on this Article.

8. **Mr Ding** (China) stated that there was no objection to this Article as long as there was a clear explanation in the Explanatory Report to explain the relationship between these Conventions and the present Convention.

9. **Mr Markus** (Switzerland) supported what was said by the Delegate of China. He stated that he would like to have a clear explanation in the Explanatory Report as to this Article.

10. **The Chair** noted that there were no more interventions and she stated that, bearing in mind that there needed to be a clear explanation of the relationship between the previous Conventions and this one, this Article was accepted.

Article 45

11. **The Chair** referred to Article 45 and noted that paragraph 4 was in square brackets.

12. **Ms Lenzing** (European Community – Commission) stated that her delegation wanted to see the text maintained and the square brackets removed. She stated that she believed that there was acceptance from the delegation of the United States of America on this but she would leave it to the Delegate of the United States of America to confirm this.

13. **Ms Carlson** (United States of America) stated that her delegation had no problems in relation to this Article.

14. **Mr Ding** (China) stated that he would like clarification on paragraph 1 where it stated "concluded before this Convention", querying whether this meant before this Convention comes into force or before the Convention was adopted.

15. **Mr Markus** (Switzerland) responded to the Delegate of China by stating that he understood it to mean before the adoption of this Convention. He remarked that this meant that it would not affect any other international instrument adopted before the adoption of this text, and that would mean instruments adopted earlier than noon on Friday. He questioned whether the word "adopted" would be preferable to the word "concluded". He stated that other than this the provision was in order.

16. **The Chair** stated that she assumed that the common understanding of the phrase was as explained by the Delegate of Switzerland and that this paragraph was referring to international instruments adopted before this Convention's adoption. She asked whether there were any more interventions on this Article.

There were no remarks and she concluded that paragraph 4 had been adopted so that the square brackets could be removed and the whole Article was accepted.

Article 46

17. **The Chair** referred to Article 46 on the most effective rule and recalled that discussions had been started on this the previous night on the basis of Working Document No 69, which had been submitted by the delegation of the United States of America and suggested the deletion of the words "other law in force in the requested State" from the *chapeau* of the Article. She commented that the concern of the delegation of the United States of America was about procedural protection provided by the expeditious procedures that might be set up under national law under paragraph (b). She noted that the Observer from the Commonwealth Secretariat had raised the point that the deletion of this wording would have an unnecessary negative effect on the other paragraphs of the Article.

18. **Ms Lenzing** (European Community – Commission) stated that while her delegation had supported the redrafting of Article 46 as found in Working Document No 69 the previous evening, they had discussed it this morning and realised that it might "throw the baby out with the bathwater". She stated that her delegation was working on another way to formulate this Article and asked that discussion on it be postponed for the time being to see if there was another way to express the policy behind the proposal of the delegation of the United States of America, which her delegation still supported.

19. **Ms Albuquerque Ferreira** (China) asked whether the discussion would be postponed.

20. **The Chair** stated that discussion would continue and that the policy should be decided.

21. **Ms Albuquerque Ferreira** (China) stated that there were no policy reasons to exclude unilateral actions by a State which was being more generous. She noted that from the explanations last night, the drafting as proposed was supported because it rested on the basis of reciprocity. She stated, however, that this Article was not about reciprocity; it was about having the most effective rule and there was nothing to prevent a State from adopting more expeditious procedures providing guarantees of procedures are kept. She remarked that this was not a question of trust and she stated that her delegation was in favour of keeping the original wording.

22. **Ms Lenzing** (European Community – Commission) apologised for not having been entirely clear. She stated that her delegation was working on a proposal that would take into account the concerns that had just been raised and also the policy concerns behind the proposal of the delegation of the United States of America. She noted that this latter concern was that the expeditious procedures would still ensure that procedural safeguards are provided. She stated that there might be room for procedures that did not follow Article 20 but which still provided sufficient procedural safeguards and which should not be prevented. She stated that it also had to be considered whether there was a need to prevent a State from providing broader bases of recognition or more beneficial legal assistance and that the wording in the *chapeau* may be necessary for these aspects. She remarked that it was not a mere drafting issue that her delegation was working on but that they were hoping to accommodate the concerns of the delegation of China, which had also been raised by some of the delegations of the Member States.

23. **Ms Carlson** (United States of America) asked whether this discussion would be postponed or whether she should make her comments.

24. **The Chair** stated that the discussion would be postponed until the working document from the delegation of the European Community could be examined.

Article 47

25. **The Chair** referred to Article 47 on uniform interpretation and asked if there were any interventions on this Article.

Procès-verbal/Minutes No 21

There were no remarks and she concluded that it was accepted.

Article 48

26. **The Chair** referred to Article 48 on review of practical operation and asked if there were any interventions on this Article.

There were no remarks and she concluded that it was accepted.

Article 49

27. **The Chair** stated that Article 49 on the amendment of forms would be examined next and asked if there were any interventions on this Article.

There were no remarks and she concluded that it was accepted.

28. **Mr Segal** (Israel) stated that Working Document No 32 contained a proposal to amend Article 49. He remarked that it contained two options and in both options there was a proposal to add an additional paragraph to Article 49 that would allow future amended forms to be annexed to the Convention. He stated that this would mean that a new amended form would have the same status as those which were now annexed to the Convention. He noted that in Option 2, paragraph 1 of the proposed Article 49 *bis* left open the possibility that since most of the forms suggested had not been dealt with in this meeting, and these forms would have an important task afterwards, they should be mandatory in those States who wish to see them as mandatory. He stated that Option 2 provided that these mandatory forms, if accepted, would be annexed to the Convention. He observed that in Article 11 there was provision for forms to be recommended but it was not articulated how these recommended forms would be made, and this was provided for here. He noted that the proposed Article 49 *bis*, paragraph 3, contained two options: the first did not limit the recommended forms to any particular part of the Convention, while the second refers specifically to Article 11. He stated that Option 1 demonstrated the same proposal using Article 11 by adding text to paragraph 4 and a new paragraph 5, but limited it to having both mandatory and recommended forms with the further mandatory forms being annexed to the Convention.

29. **The Chair** asked if there was any support for this proposal or any of the options it contained.

There were no remarks and she asked if there were any interventions on Article 49. There were no remarks and she concluded that the present wording of Article 49 was accepted.

Article 50

30. **The Chair** referred to Article 50 on transitional provisions and noted that the square-bracketed paragraph 3 had been discussed before and related to arrears falling due prior to the entry into force of this Convention.

31. **Ms Carlson** (United States of America) supported deleting the brackets and retaining the bracketed language. She noted that there were some internal brackets as well and she stated that they should be deleted. She stated that there was no policy reason to penalise a child for the fact that the payments fell due before the entry into force of the Convention.

32. **Mme Mansilla y Mejía** (Mexique) indique qu'après avoir lu attentivement le texte de l'article 50 de l'avant-projet révisé de Convention et l'avoir comparé avec le Document de travail No 65, sa délégation est arrivée à la conclusion suivant laquelle il serait préférable de maintenir le texte du Document préliminaire No 29. Elle estime que l'article 50 y est présenté de manière plus concrète et précise. Elle indique enfin que sa délégation souhaite revenir à cette version tout en éliminant les crochets.

33. **Mr Segal** (Israel) expressed support for the position of the Delegate of the United States of America as there was no reason to penalise those who would have arrears or maintenance obligations due before the entry into force of this Convention.

34. **Mr Tian** (China) stated that his delegation could agree to deleting the square brackets in paragraph 3 and keeping the text in the paragraph.

35. **Mr Moraes Soares** (Brazil) supported the text in Working Document No 65 and deleting the square brackets.

36. **Ms Lenzing** (European Community – Commission) expressed support for the present text of the Article and for removing the square brackets. She responded to the Delegate of Mexico by stating that the text was an improvement with respect to Preliminary Document No 29 because in terms of policy for maintenance obligations towards children, arrears should be enforceable if they fall due prior to the entry into force of this Convention. She stated that this was an appropriate policy to support the child creditor, and that was why this proposal was made in Working Document No 49.

37. **Ms Riendeau** (Canada) supported retaining the text and deleting the square brackets in Article 50 as set out in Working Document No 65.

38. **M. Markus** (Suisse) relève qu'il y a déjà eu beaucoup de discussions sur la question de la rétroactivité. Il mentionne que sa délégation estime que le paragraphe 3 de l'article 50 est un compromis. Il conclut en indiquant que la délégation de la Suisse est en faveur du maintien équilibré du texte à l'alinéa 3.

39. **Mr Sello** (South Africa) stated that his delegation would also like to support the removal of the square brackets in Article 50.

40. **Mr Voulgaris** (Greece) stated that he was in agreement with the general opinion which was in favour of deleting the brackets and retaining the paragraph. He stated that it was a general admission that the crucial moment was when the obligation was realised, and legally speaking it was realised when there was a decision or an instrument between the parties accepting the obligations. He observed that this was the crucial event that gave rise to obligations and not the coming into force of the Convention.

41. **The Chair** stated that she understood that the Delegate of Greece was in favour of keeping the text in paragraph 3.

42. **Mme Mansilla y Mejía** (Mexique) indique que la délégation du Mexique est consciente des bienfaits que le paragraphe 3 et le nouveau paragraphe 2 apporteront aux enfants. Néanmoins, elle ne peut les accepter pour des raisons législatives. Elle explique que le Mexique ne permet cette règle que dans les domaines du droit pénal et du droit du travail, mais non en matière civile. Dans la mesure où cette

question relève du domaine civil, sa délégation s'oppose à l'élimination des crochets.

43. **Mr Segal** (Israel) stated that since the question of the scope of the Convention was being discussed, this Article may have to be reconsidered.

44. **Mme Gonzalez Cofré** (Chili) indique que la délégation du Chili a beaucoup évoqué ce thème avec la délégation du Mexique. Elle estime que les appréhensions exprimées par la délégation du Mexique sont compréhensibles et qu'il est important que le Comité de rédaction les prenne en considération. Elle indique que pour sa délégation, ce paragraphe 3 ne pose aucun problème.

45. **The Chair** stated that she did not understand the issue to be a drafting matter.

46. **M. Gonzalo Cieza** (Pérou) informe l'assemblée que sa délégation partage la préoccupation de la délégation d'Israël au sujet de l'article 2 en cours de négociation. Il estime qu'un consensus va probablement se dégager au cours de cette séance. Il ajoute que sa délégation ne voit aucun inconvénient à l'élimination des crochets au paragraphe 3, mais propose de prendre ce fait en considération lorsqu'il sera question d'aborder l'article 2 de la Convention.

47. **The Chair** stated, with regard to the interventions of the Delegates of Israel and Peru, that if there was a change to the scope provision this would mean that consequential changes would need to be made to the text and the Drafting Committee would need to revisit the whole Convention, so that was a problem. She stated that leaving this issue aside for the moment, she understood that the vast majority of States were in favour of keeping paragraph 3 as it was in Working Document No 65.

48. **Mme Mansilla y Mejía** (Mexique) indique que sa délégation s'oppose fortement au maintien de ce paragraphe.

49. **The Chair** asked if there were any more strong objections. She stated that if there were no more objections she would conclude that the vast majority of States were in favour of paragraph 3 as it was set out in Working Document No 65 and that Article 50 was accepted.

Article 51

50. **The Chair** referred to Article 51 on the provision of information concerning laws, procedures and services, and noted that the delegation of Canada had submitted Working Document No 56 on this Article. She gave the floor to the delegation of Canada to explain the proposal.

51. **Ms Riendeau** (Canada) noted that Article 51 provided that information would be transmitted to the Permanent Bureau regarding the laws and information on various issues and that it should be transmitted at the time of ratification or accession. She stated that this did not take into account multi-unit systems where the Convention would be extended to territories in stages only. She stated that the proposal was that States would provide this information for territories to which the Convention will not immediately apply when they submit declarations under Article 56 that application is to be extended to those territories.

52. **The Chair** asked if there were any objections. There were no remarks and she stated that it was taken that Working Document No 56 was accepted. She asked the Drafting Committee to make the necessary amendment.

53. **The Deputy Secretary General** stated that there was a small matter in relation to the wording of paragraph 2 of this Article. He noted that the text stated that the Contracting States may utilise the Country Profile form recommended and published by the Hague Conference on Private International Law. He suggested that as the form had not been approved, a better wording would be that Contracting States may utilise a "Country Profile form as may be recommended and published by the Hague Conference on Private International Law".

54. **Mrs Borrás** (co-*Rapporteur*) stated that she did not have an objection to the proposal of the delegation of Canada but she had a question for them. She asked if it was necessary to add "or a declaration is submitted in accordance with Article 56(1) of the Convention" to Article 51, paragraph 1, since in Article 56 it was provided that this declaration will take place at the time of ratification or accession. She stated that it appeared that the making of a declaration was included in all these Articles and it was not necessary to add this text to the paragraph.

55. **Ms Riendeau** (Canada) stated that it was a question of transparency and at the time of ratification the application of the Convention might extend to some territories and provinces in Canada at the beginning, with a view to extending it to the others when they are ready. She observed that to provide the Permanent Bureau with information on territories or provinces to which the Convention would not be applicable at the time of ratification would be confusing and unnecessary. She stated that it was an issue of clarification and transparency for when the information indicated in Article 51 would be provided for the individual provinces and territories.

56. **Ms Albuquerque Ferreira** (China) stated that she agreed with the proposal of the Deputy Secretary General with regard to paragraph 2. She asked if it would be possible to have better wording for paragraph 1, sub-paragraph (b). She stated that Article 6, paragraph 2, was an illustrative list and that the purpose of the list had been debated and that it did not contain obligations, as the obligations were found in paragraph 1. She noted that Article 51, paragraph 1, sub-paragraph (b) should not refer to the obligations. She requested that the Drafting Committee be asked to change the drafting of this sub-paragraph.

57. **The Chair** stated that Article 6, paragraph 2, was not an illustrative list and that in the absence of a working document, no part of Article 51 could be reopened.

58. **Ms Albuquerque Ferreira** (China) stated that she had been assured that Article 6, paragraph 2, was an illustrative list and did not contain obligations.

59. **The Chair** stated that Article 6 had been accepted and that it was agreed that it was not an illustrative list, and that was an important conclusion of the Commission.

60. **Ms Carlson** (United States of America) stated that part of the compromise for her delegation in agreeing to Article 6 was that there would be a requirement in Article 51 that countries indicate to other countries what they were going to do to fulfil their soft and flexible obligations under Article 6. She stated that her delegation had never said that there were no obligations. She remarked that it was critical information for a State to know what was available from

another Central Authority to assist applicants. She stated that Article 51 did not change anything in Article 6, but provided that a State has to set out what the Central Authority would do to carry out these soft and flexible obligations and provide this information for the requesting State. She emphasised that this was a very important provision for the delegation of the United States of America.

61. **The Chair** stated that there were no square brackets and no working documents, so the only question was whether there was agreement to the proposal of the delegation of Canada, and the change in drafting as proposed by the Deputy Secretary General.

62. **Ms Albuquerque Ferreira** (China) stated that they did not object to the policy but just wanted a change in the drafting. She asked that the reference to Article 6, paragraph 2, be replaced by a reference to Article 6, and she stated that then it would be correct.

63. **Mr Beaumont** (United Kingdom) stated that his delegation would welcome the amendment proposed by the delegation of China and that it would be wise to have information on Article 6 as a whole.

64. **The Chair** asked if there were any objections to extending the reference in Article 51, paragraph 1, sub-paragraph (b), to the whole of Article 6.

65. **Mme Subía Dávalos** (Équateur) indique que la délégation de l'Équateur estime qu'il est préférable de maintenir le texte actuel. Elle observe qu'il s'agit de mesures en rapport avec l'article 6, que l'on ne devrait pas s'écarter de cet article qui se limite à une description de ces mesures.

66. **Ms Carlson** (United States of America) stated that this should not be a huge issue but she would agree with the Delegate of Ecuador. She noted that Article 51 talks of measures, which relates back to Article 6, paragraph 2. She remarked that what was required under Article 6, paragraph 1, was fairly obvious. She stated that she would prefer to keep the text as it was, but she had no strong objections.

67. **The Chair** asked if there were any problems with changing the reference to Article 6 with possible drafting changes.

There were no remarks and she concluded that it was accepted that it should be changed. She asked if Article 51 was acceptable with this change, the proposal of the delegation of Canada and the proposal made by the Deputy Secretary General.

68. **M. Manly** (Burkina Faso) indique qu'il intervient, non pas sur les modifications, mais pour indiquer qu'il n'y a plus d'interprétation en français.

69. **The Chair** repeated that the question was whether Article 51 was acceptable to everyone with the change in paragraph 1, sub-paragraph (b), where the reference would be to Article 6, and with the change proposed by the Deputy Secretary General so that paragraph 2 referred to a Country Profile form that may be recommended and published by the Hague Conference, and with the change proposed by the delegation of Canada set out in Working Document No 56.

There were no remarks and the Chair concluded that Article 51 was accepted.

The Chair proposed that Article 52 not be considered until the end of the discussions and that the annexes and mandatory forms would be discussed next instead.

Document de travail / Working Document *No 75 (Formulaires /* Forms*)*

70. **The Chair** noted that there was a working document from the delegation of the European Community proposing amendments to the forms.

71. **Mr Hať apka** (European Community – Commission) remarked that the proposal did not contain substantive changes but just drafting changes. He stated that this issue came up first in internal discussions and he thought it had also been discussed with members of the Forms Working Group. He referred to the transmittal form in Working Document No 75 and stated that the first change occurred in points 5 and 6 where the word "above" was replaced with "in point 4", as use of the word "above" could be confusing. He noted that the second change was in point 7 where the text of the Article was deleted. He stated that the texts of the provisions were taken directly from the Convention but did not work here, and he gave the example of Article 10, paragraph 1, sub-paragraph (d), which would have to be described differently. His delegation felt it was easiest just to delete the texts and refer solely to the denomination of the section, as was found in point 8. He stated that in point 8 there was a change proposed to the introductory sentence because the original was a bit misleading as it suggested that the document had to be enclosed with the form. His delegation felt it was more important that it be appended to the application and not the form. He stated that there was one change to the acknowledgment form and that was in point 4, and was the same as in point 7 of the transmittal form, to delete the reference to the text of the provision and just keep the numbering.

72. **The Chair** asked if there were any interventions on this proposal.

73. **Ms Carlson** (United States of America) asked what the impetus for these changes was.

74. **Mr Hať apka** (European Community – Commission) stated that the impetus was that during discussions between Member States of the European Community certain misunderstandings had arisen. He commented that he thought that there had also been some contact with the Forms Working Group, but he asked if his colleague could further clarify this.

75. **Ms Kasanová** (Slovakia) stated that these were only drafting proposals to make it clearer and easier for the Central Authorities. She noted that in point 5 the formulation of "the applicant named above" was reasonably clear but this was more confusing in point 6, and the insertion of "in point 4" was to make it clearer. She stated that perhaps this formulation was not the most clear, but it was clearer. She referred to the change proposed for point 7 and stated that, for example, in Article 10, paragraph 1, sub-paragraph (a), there were two possible applications and this could be confusing, so it was clearer to delete these references. She stated that the word "appended" was to be preferred in point 8 as this made it clear that the documents in question had to be attached to the application and not the form. She stated that these changes should be more helpful to Central Authorities that may not have lawyers.

76. **Mr Markus** (Switzerland) stated that in general the changes were useful and that his delegation would support

them. He asked why the full texts of the provisions were deleted in point 7, as they might be needed and might be helpful for people working in Central Authorities. He stated with respect to the acknowledgment form that his delegation had already said that point 4 was not necessary and could be deleted. He remarked that if this was not acceptable, his delegation would be in favour of maintaining the full written reference to the Articles and not just the numbers. He noted, however, that this was not an important point for his delegation.

Mr Markus observed that in respect of applications for recognition and enforcement of an administrative decision under Article 16, paragraph 3, it had been agreed to change Article 21, paragraph 1, sub-paragraph (b), to the extent that it was not always necessary to add the documents stating that the decision was a decision by an administrative authority and that the requirements of Article 16, paragraph 3, were met. He noted that this meant that the inclusion of these documents was not necessary in every case as there might be a declaration in existence, so the text of point 8, paragraph (a), of the transmittal form should be changed to say that this information must be added only if necessary, or something to that effect.

77. **The Chair** thanked the Delegate of Switzerland for the reminder that there had been a decision on the documentary requirements for the decisions of administrative authorities and that this was a drafting matter and would be corrected in accordance with the previous decision. She asked if there were any more interventions.

There were no remarks and she stated that there seemed to be an agreement to the changes proposed by the delegation of the European Community.

The Chair asked if there were any objections to the deletion of the wording of the possible types of applications in point 7 of the transmittal form and point 4 of the acknowledgment form.

There were no remarks and the Chair concluded that the changes suggested by Working Document No 75 were accepted. She asked the Drafting Committee to make the necessary changes along with the change in point 8, paragraph (a), with regard to the decision of the administrative authorities.

The Chair stated that this completed the question of forms. She noted that it would be more logical to leave Article 52 open and discuss it towards the end of the meeting.

Article 53

78. **The Chair** suggested moving on to Article 53 concerning regional economic integration organisations and noted that there were two working documents on this Article from the delegation of the European Community: Working Document No 67 and Working Document No 71.

79. **Ms Lenzing** (European Community – Commission) stated that Working Document No 71 replaced Working Document No 67 so delegates should only look at Working Document No 71. She stated that this proposal was essentially a drafting change and it combined Articles 53 and 54 of the current draft into a single Article which dealt with Regional Economic Integration Organisations. She stated that this was a clearer and less confusing way to deal with the requirements and conditions under which a Regional Economic Integration Organisation, such as the European Community, would accede to this Convention. She commented that as well as merging the two Articles together, there were two changes in the text.

The Delegate of the European Community stated that the wording in what was previously Article 54 was changed so that the reference was not simply to Member States of the Regional Economic Integration Organisation but to the Member States which have transferred competence to the Organisation in the area in question. She noted that this was necessary because not all Member States were bound by the internal rules in the area of maintenance and would consequently not be bound by the accession of the European Community to the Convention. She stated that another amendment was that the Article no longer said explicitly that a Member State would not be a Party to the Convention, but would just say that Member States would be bound by the Convention by virtue of its ratification by the Organisation. She invited the other delegates to accept this proposal, which essentially just merged Articles 53 and 54 into a single Article.

80. **The Chair** asked if there were any objections to this proposal. She noted that there appeared to be no objections so she concluded that the proposal of the delegation of the European Community was accepted, and Article 53 in this new version was adopted and Article 54 would be deleted.

Article 55

81. **The Chair** referred to Article 55 which concerned the entry into force of the Convention and she noted that there were no square brackets. She asked if there were any interventions on this Article.

82. **Mr Segal** (Israel) stated that in the previous draft, the ratification or accession of three States was needed in order for the Convention to come into force. He asked whether this was an intentional change from three States to two States.

83. **The Chair** stated that during the first reading a decision was made that this Convention would enter into force after the deposit of a second instrument.

84. **Mr Segal** (Israel) noted that the requirement was usually for three States and he questioned why the change had been made to two.

85. **The Deputy Secretary General** stated that a Convention needed at least two parties but it did not need more and it was desirable that this Convention come into force as soon as possible.

86. **The Secretary General** noted that the same decision had been taken as regards the *Hague Convention of 30 June 2005 on Choice of Court Agreements*.

87. **Mr Tian** (China) stated that he had the same understanding as the Delegate of Israel, but he was open on this point. He stated that if the number of instruments required to be deposited was limited to just two, that would make this multilateral Convention a bilateral Convention when only two States had ratified. He noted that for other Conventions there are often higher requirements. He stated that perhaps the number could be increased to three or higher but that his delegation was flexible on this point.

88. **The Chair** stated that it was to be remembered that this Convention was for the recovery of maintenance for children, and children would benefit if two States that were willing to be bound would be bound. She asked if there

were any strong opinions on changing the number of States. There were no remarks and she concluded that the wording of Article 55 was accepted.

Article 56

89. **The Chair** referred next to Article 56 on declarations with respect to non-unified legal systems and noted that there were no square brackets and no working documents. She asked if there were any interventions.

There were no remarks and she concluded that the Article was accepted.

Articles 57 et / and *58*

90. **The Chair** noted that Articles 57 and 58 may well change as a result of the discussion on the remaining Articles so it was wise not to go into the details of these Articles for the time being.

Article 59

91. **The Chair** suggested moving on to Article 59 on denunciation and asked if there were any interventions.

There were no remarks and she concluded that the Article was accepted.

Article 60

92. **The Chair** observed that Article 60 was connected to Article 52, which had not yet been discussed in the second reading, so discussion on Article 60 would be left for a later stage.

Document de travail / Working Document *No 74 (art. 43)*

93. **The Chair** noted this meant that the discussion could return to some open issues. She asked the delegation of Canada to introduce Working Document No 74 which contained a proposal for Article 43.

94. **Mme Riendeau** (Canada) indique que le document de travail présenté par sa délégation a pour but d'ajouter une règle d'interprétation à l'article 43, paragraphe premier. Elle ajoute qu'après avoir parcouru le texte de cet article, elle a noté que l'article 21, paragraphe premier, fait référence à des documents concernant l'assistance juridique gratuite devant être annexés à la demande de reconnaissance et d'exécution. Elle indique également que sa délégation estime que dans un État comme le Canada, cela signifierait que l'assistance juridique devrait être gratuite dans l'unité territoriale considérée.

95. **Mr Ding** (China) stated that as China also has more than one legal system, his delegation supported the proposal of the delegation of Canada. He noted that his delegation also wanted to propose changes to Article 43 and they would be circulating a working document shortly.

96. **The Chair** concluded that as there were no objections, Working Document No 74 was accepted and the necessary changes would be made. She noted that since a working document was being prepared by the delegation of China, the discussions on Article 43 would not be closed.

Document de travail / Working Document *No 77 (art. 46)*

97. **The Chair** noted that discussions on Article 46 had not been concluded because at the time there was a proposal being prepared by the delegation of the European Community, and that this proposal was now contained in Working Document No 77 which had since been distributed.

98. **Ms Lenzing** (European Community – Commission) recalled that her delegation had supported the policy behind Working Document No 69 proposed by the delegation of the United States of America on the same Article the previous day. She noted that what was important was that if in paragraph (b) more simplified and expeditious procedures were used in a State, this should be without prejudice to safeguards for applicants. She stated that her delegation thought there might be another way to deal with this issue. She observed that the proposal of the delegation of the United States of America was that States could not unilaterally provide their own procedures, and she stated that this could be allowed if safeguards were provided for the procedures and this was intended to be achieved by the proposal. Ms Lenzing stated that it was clear that if national rules on recognition and enforcement are simpler and more expeditious then they could be used, but they would have to be consistent with the objective of Articles 20 and 20 *bis* and have to provide the same rights of defence, such as the opportunity to be heard and due notification, as well as the same effects with regard to any challenge or appeal. She commented that this was a delicate issue because it touched on the compromise reached on Articles 20 and 20 *bis* and she did not want to reopen that question. She remarked that the proposal of the delegation of the United States of America dealt with the danger that a State could adopt procedures for recognition and enforcement which could do away with all rights for the defence. She stated that with these safeguards added, the reference to the law in force in the State could be retained and all other parts of Article 46 could be done unilaterally. She stated that the new phrase added safeguards which should be maintained in any simpler and more expeditious proceedings, and noted that a State that provided for automatic recognition and where the review would take place at the enforcement stage could apply this without a problem.

99. **Mr McClean** (Commonwealth Secretariat) stated that he was grateful for the proposal but was puzzled by the effect on paragraph (b). He remarked that a natural reading of the provision was that you could improve on what was found in Articles 20 and 20 *bis* provided you observed Articles 20 and 20 *bis*, and that this did not appear to leave much in terms of room for manoeuvre as the Articles mentioned seemed to take up all the scope for action.

100. **Ms Lenzing** (European Community – Commission) responded that the proposed amendment to paragraph (b) did not say that Articles 20 and 20 *bis* had to be applied, but that the new procedures had to be consistent with the objective and purpose of those Articles, and this was not the same thing. She accepted that there was not much room for manoeuvre but noted that there was scope for the application of the provision. She gave the example of a State where recognition was automatic but the procedures set out in Articles 20 or 20 *bis* were used at the enforcement stage. She remarked that if there were nothing provided for in Article 46 then it would be unclear if this was acceptable as Articles 20 and 20 *bis* provide for their application at the recognition stage. She stated that while there was not much room for manoeuvre, there was some room and States may be able to use this.

101. **Ms Carlson** (United States of America) thanked the delegation of the European Community for improving the proposal that her delegation had made the previous night. She stated that she understood and agreed that the room for

manoeuvring was limited but noted that if some States indicated that they have some procedures that are not set out in Articles 20 or 20 *bis*, but which are consistent with the objects of those Articles, there was no harm and no reason not to draft this provision so that they would be able to make use of those provisions. She expressed support for Working Document No 77.

102. **Ms Riendeau** (Canada) stated that her delegation supported the proposal and that it was an improvement on the proposal put forward the previous day.

103. **Mr Segal** (Israel) asked whether these supplementary sentences complicated the matter. He commented that the words "consistent with the objects and purpose" may be understood as interfering with internal law and he wondered how States would interpret this. He stated that it was possible that a procedure operating in one State under this provision could be objected to by another State that could claim that it was not consistent with the objects and purpose of Articles 20 and 20 *bis*. He noted that in Articles 20 and 20 *bis* there was a clear delimitation between internal law and conventional law, but this provision blurred the issue.

104. **The Chair** asked if there were any further interventions on this point.

105. **Mr Hellin** (Finland) stated that he wished to respond to the Delegate of Israel on whether the provision was clear enough. He stated that the real message was at the end of the proposed paragraph (b) which read "in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal". He remarked that this was the message, but it was complemented by a general statement that what was done had to be consistent with the objects and purpose of Articles 20 and 20 *bis*. He stated that there were two objectives, the effectiveness of the procedures and the procedural safeguards, and this was a way of providing for both.

106. **Ms Fisher** (International Association of Women Judges) stated that she agreed with the expressions of concern from the Delegate of Israel and the Observer from the Commonwealth Secretariat about the language, particularly "objects and purpose". She noted that when the phrase "objects and purpose" was used as a guide in relation to international instruments it generally referred to the Convention as a whole and not just particular Articles thereof. She stated that if it focussed on particular Articles then it would leave a broad scope for interpretative debate. She noted that her perspective of the objects and purpose of Articles 20 and 20 *bis* was to create a procedure where recognition and enforcement could be carried out. She suggested removing the reference to "objects and purpose of Articles 20 and 20 *bis*" and instead detailing the points that were considered important in relation to those Articles.

107. **The Deputy Secretary General** asked whether it was intended that it would not be possible for two or more States to abolish *exequatur* among themselves.

108. **M. Voulgaris** (Grèce) indique que la proposition de la Communauté européenne présentée dans le Document de travail No 77 instaure un clivage. Il explique que l'article 46 tel que présenté n'est pas exclusif mais simplement indicatif, même dans le cas des procédures simplifiées. Il ajoute que le caractère indicatif de cet article a pour but d'attirer l'attention de tous, puisqu'informer le défendeur afin qu'il puisse assurer sa défense constitue un principe général du droit. Il indique qu'il s'agit d'un principe relatif au respect des droits de l'Homme. Il mentionne également que le deuxième degré de juridiction est accepté par tous les systèmes de droit. Il estime que cet article est énoncé à titre indicatif et non pas pour exclure le reste et qu'il permet de mieux comprendre la base du document.

109. **Ms Lenzing** (European Community – Commission) stated that the point raised by the Deputy Secretary General was correct in that it would be entirely sufficient to limit the conditions that were contained in the proposal to unilateral measures. She commented that in terms of policy, there was no reason to prevent two States among themselves agreeing to do away with additional safeguards. She stated that her delegation would need some time to come up with an alternative draft to limit the underlying rules to situations where different procedures were adopted by States unilaterally.

110. **The Chair** stated that this Article would be revisited after lunch which should give time for the redrafting. She gave the floor to the Delegate of South Africa to make the statement found in Working Document No 73.

The Delegate of South Africa read the statement in Working Document No 73.

111. **The Deputy Secretary General** thanked the delegation of South Africa for this important historic statement and, in terms of the development of the Hague Conference and the intent to involve more African States, he stated that in the last few years the Permanent Bureau had been working to involve African States and bring the importance of the Hague Conventions to their attention. He noted that in the last year two seminars had been organised, one for southern and eastern Africa and one for the French-speaking African States, and in both these seminars enormous interest was expressed in this Convention. He stated that he was looking forward to the conference in June which was being hosted by the South African Government and organised in co-operation with the Permanent Bureau. He commented that this would provide an important showcase for the Hague Conventions generally and for examination of how they could fit in with the special features of African legal systems, as well as a means of obtaining the input of African States. He remarked that the conference in Johannesburg would also involve national regional unions. He stated that the statement just presented was inspiring and was a call for action which the Permanent Bureau would certainly follow up, and he was quite sure that in doing so it would have the support of Hague Conference Members from all around the world.

112. **The Chair** thanked the delegation of South Africa. She stated that it was now lunchtime and the next session would begin at 2.45 p.m. She noted that the most difficult Articles remained for discussion and that there was not a great deal of time as there was an invitation to dinner in the evening. She stated that delegations interested in finding a solution to the question on scope could meet upstairs and lunch would be provided.

113. **The Secretary General** asked the participants in the Working Group on Applicable Law to remain in the room to discuss how to organise the next step.

114. **Mr Lortie** (First Secretary) asked those delegates who had not yet returned the information sheet with their contact details to do so this afternoon, as a final list of participants would be published the following day.

Procès-verbal/Minutes No 21

115. **The Chair** stated that the meeting was adjourned until 2.45 p.m.

La séance est levée à 13 h 20.

ANNEXE/ANNEX I

[Unofficial translation]

The Argentine Republic declares that Article 4(2) of the Convention on the International Recovery of Child Support and other Forms of Family Maintenance is not applicable to the territories subject to the dispute of sovereignty recognised by the General Assembly of the United Nations.

The Argentine Republic reminds that the Malvinas, South Georgia and South Sandwich Islands and the surrounding maritime areas are an integral part of the Argentine national territory and, being illegitimately occupied by the United Kingdom of Great Britain and Northern Ireland, are the object of a sovereignty dispute between both countries, recognised by the United Nations and other international organisations.

In this regard, the United Nations General Assembly has adopted resolutions 2065 (XX), 3160 (XXVIII), 31/49, 37/9, 39/6, 40/21, 42/19, and 43/25, through which the General Assembly recognised the existence of the dispute referred to as the "Question of the Malvinas Islands", urges the Governments of the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland to resume negotiations with a view to finding without delay a lasting, just and peaceful solution of the controversy. For its part, the United Nations Special Committee on Decolonization has pronounced itself repeatedly in equal sense, more recently through the resolution adopted on 21 June 2007. Likewise, the Organization of the American States General Assembly adopted on 5 June 2007 a new pronouncement on the question in similar terms.

ANNEXE/ANNEX II

With reference to the Declaration made by the Republic of Argentina rejecting the sovereignty of the United Kingdom over the Falkland Islands, South Georgia and South Sandwich Islands, the position of the United Kingdom is well known and remains unchanged. The United Kingdom has no doubt about its sovereignty over the Falkland Islands (which is the correct title for the territory recognised by the Administering Power), and over South Georgia and the South Sandwich Islands and its consequent right to extend treaties to them.

Procès-verbal No 22

Minutes No 22

Séance du mercredi 21 novembre 2007 (après-midi)

Meeting of Wednesday 21 November 2007 (afternoon)

La séance est ouverte à 15 h 20 sous la présidence de Mme Kurucz (Hongrie), Mmes Degeling (Bureau Permanent) et Borrás (Espagne) étant co-Rapporteurs.

1. **The Chair** stated that this meeting constituted the final stage of Commission I. She announced that a working document concerning Article 2 would be circulated during the meeting.

The Chair gave the floor to the delegation of Canada.

2. **Ms Ménard** (Canada) apologised that due to some miscommunication a version of Working Document No 79 that was not ready for distribution had been circulated. The document had been collected from the delegates' desks, but she advised delegates to disregard the document if some copies had accidentally been left in circulation.

Articles 14, 14 bis*, 14* ter*, 14* quater *et /* and *40*

3. **The Chair** announced that the discussion would focus on Article 14 as formulated in Working Document No 64, which was an amended version of that Article as formulated in Working Document No 62. The latter working document had been prepared by an informal working group. The first part of the discussion would simultaneously address Articles 14, 14 *bis*, 14 *ter*, 14 *quater* and 40. This would be followed by a discussion of Articles 20 and 20 *bis*. The latter discussion would also be conducted on the basis of Working Documents Nos 62 and 64.

The Chair recalled that the chair of the informal working group that formulated Working Document No 62 had already introduced Articles 14, 14 *bis*, 14 *ter*, 14 *quater* and 40. She therefore opened the floor for discussion.

4. **Ms Cameron** (Australia) expressed her general support and endorsement of Working Document No 64 in respect of Articles 14, 14 *bis*, 14 *ter*, 14 *quater* and 40. However, she wished to introduce Working Document No 52. The latter working document had been submitted prior to Working Document No 62 and the Delegate of Australia wished to explain how the two documents related one to the other.

She recalled that her delegation had expressed its principled support for the granting of legal assistance to both the creditor and the debtor, whereas several other delegations supported a means test for debtors. The Delegate of Australia asserted that Article 14 *bis* should include an explicit reference to the obligation of States to provide free legal assistance to debtors, subject to a means test. She recalled that other delegates had suggested to her that Article 14 *quater*

already provided for this, but Ms Cameron respectfully disagreed.

She recalled that legal assistance in all child support applications was the key principle of the future Convention. The Delegate explained that her delegation felt that it was important to distinguish child support cases from other situations where a debtor might request legal assistance. In child support cases the creditor and the debtor would be the child's parents, both of whom should be protected for the sake of the child. Besides the practicalities, the Delegate emphasised that there was a symbolic meaning attached to the special status of the maintenance debtor.

Ms Cameron called upon delegates to accept the proposal of her delegation because it would do no harm to the compromise that had been achieved and the creditor and debtor would thereby be better off through the Convention as a whole.

5. **The Chair** asked if any delegations supported the proposal of the delegation of Australia.

6. **Ms Ménard** (Canada) stated that her delegation wished to support the views expressed by the Delegate of Australia.

7. **Ms Lenzing** (European Community – Commission) observed that the Delegate of Australia was probably referring to the delegation of the European Community and delegates of Member States of the European Community when she said that somebody had tried to convince her that Article 14 *quater* provided that a debtor was entitled to legal assistance subject to a means test. Ms Lenzing reiterated her view that, following amendments that were proposed by the delegation of the European Community, the same effect as that proposed by the delegation of Australia was achieved through slightly different wording. She explained that Article 14 *quater*, paragraph (b), read in conjunction with Article 14, paragraphs 2 and 3, would lead to the conclusion that Contracting States would be obliged to provide free legal assistance to debtors, subject to a means test.

Ms Lenzing cautioned that if the proposal of the delegation of Australia were adopted at this late stage, there might be problems with cross-references that might not be immediately apparent. She added that a difficult compromise had been achieved among several States in respect of the articles of the draft Convention that regulated effective access to procedures. She thought it unwise to tamper with that compromise, but added that the draft could perhaps be slightly amended to make it absolutely clear that the concerns of the delegation of Australia were catered for.

8. **Mr Markus** (Switzerland) stated that his delegation fully supported the views expressed by the delegation of the European Community.

9. **Mr Ryng** (Poland) stated that his delegation also supported the views expressed by the Delegate of the European Community. Having heard both sides of the argument, he wished to add one more point. He observed that Article 14 *ter* provided a parallel mechanism to that contemplated in Article 14 *bis*. The new approach in Article 14 *ter* focussed exclusively on the child creditor. He was of the view that, if Article 14 *bis* were broadened to include the debtor, this would create a completely different model. He was also of the view that the broadening of Article 14 *bis* would have side effects on Article 14 *ter* because of the cross-reference from the latter to the former.

10. **Mme Ménard** (Canada) remercie la Présidente et appuie la position de la délégation de la Communauté européenne.

11. **The Chair** asked if there were any further interventions concerning Article 14 or Working Document No 52. Noting that there were none, she concluded that there was no support for the proposal of the delegation of Australia in Working Document No 52.

She asked Mr Lortie (First Secretary) to introduce Working Document No 76, which addressed a technical matter concerning Article 14.

12. **Mr Lortie** (First Secretary) reiterated the Chair's observation that Working Document No 76 contained a proposal of a technical nature. He noted that, particularly at this phase of the proceedings of the Session, the Permanent Bureau would not propose any amendments without consulting States that had an interest in the proposal. In fact the Permanent Bureau had consulted the delegations of Australia, Brazil, Canada, Chile, China, the European Community, France, Germany, Israel, Japan, the Russian Federation, Switzerland, the United Kingdom and the United States of America.

In the light of the mandate to produce a medium-neutral text, the Permanent Bureau wished to propose a functional equivalent to the signed declaration provided for under Article 14 *ter*, paragraph 3. The proposal was to replace the signed declaration with a formal attestation by the applicant. It was understood that this attestation, where required, would be part of the documentation and information transmitted by the Central Authority under Article 12. He explained that this meant that it would be transmitted by the Central Authority on behalf of and with the consent of the applicant.

In addition, a consequential amendment to Article 12, paragraph 2, would allow the provision of a certified copy of the attestation when asked for by the Central Authority of the requested State.

Mr Lortie concluded that the purpose of the proposal was to avoid the need for signatures and thereby simplify transmission of information in an electronic world.

13. **The Chair** recalled that the Permanent Bureau had consulted several States when formulating Working Document No 76. She asked if there were any objections to the proposed amendments in said working document. She noted that there were none.

14. **Ms Lenzing** (European Community – Commission) stated that she agreed with the proposal of the Permanent Bureau in Working Document No 76.

She stated that she wished to intervene regarding the matter raised by the Delegate of Australia. She was of the view that with some changes to the language in Article 14 *quater*, paragraph (a), it would be possible to make it clear that States would provide free legal assistance but still allow a debtor's means test. Ms Lenzing asked if it would be acceptable to allow the Drafting Committee to analyse the language of Article 14 *quater*, paragraph (a), in order to provide for this.

15. **Ms Cameron** (Australia) asserted that she still believed that the effect would not be exactly the same as that intended by her delegation. She emphasised that the inclusion of free legal assistance for debtors in Article 14 *bis*

Procès-verbal/Minutes No 22

would also have an important symbolic value. However, she noted the lack of support for her delegation's proposal and stated that she would be happy to allow the Drafting Committee to address this important concern. She added that the Explanatory Report should reflect the understanding that States would provide free legal assistance, subject to a merits test.

16. **Mr Segal** (Israel) commented on the obligation in Article 14, paragraph 5, that States should not require any security, bond or deposit for the payment of costs under the draft Convention. He was of the view that this should not be so for any applicant but only in respect of a creditor. He added that, since Article 40 allowed for the recovery of costs, it would be preferable to require a bond or deposit from a debtor as this would expedite the procedure to recover costs from debtors.

17. **The Chair** recalled that the relevant text of Article 14 originally referred only to a creditor. The phrase "brought by the creditor" was contained in square brackets and it was later agreed that it should be excluded and that Article 14, paragraph 5, would apply to any applicant. She noted that the wide rule concerning recovery of costs in Article 40 implied that there should be sufficient guarantee for both parties.

18. **Mr Segal** (Israel) explained that he felt that it would be more effective to require a deposit from debtors for two reasons. Primarily, he was of the view that this would deter unreasonable applications. Secondly, he felt that it would make the recovery of costs more expeditious and cost-effective.

19. **The Chair** asked the delegates if there was any support for the restriction of the benefit of Article 14, paragraph 5, to a creditor.

20. **Mr Ding** (China) stated that his delegation was hesitant to allow the Drafting Committee to amend the wording that had been agreed upon in Working Document No 62, unless the working group that had submitted said working document was reconvened for that purpose.

21. **The Deputy Secretary General** made known that his understanding was that the provision in Article 40 regarding the recovery of costs was restricted to extraordinarily wealthy debtors. He noted that, in order for a wealthy debtor to be designated as such, he or she would have to submit to a means test. If the debtor passed the means test then he or she would not be wealthy. He therefore could not see the connection with Article 40.

22. **The Chair** asked if there were any further submissions regarding Article 14. Regarding the concern raised by the Delegate of Australia, the Chair noted that Article 14, paragraph 1, contained a clear rule that bound States to provide effective access to procedures for all applicants. She emphasised that this was the principal rule. She asked if it would suffice for the delegation of Australia that the Explanatory Report would make it clear that this also applied to debtors, subject to a means or merits test. Noting that the delegation of Australia had indicated that this would suffice, the Chair concluded that the Explanatory Report would clarify this matter.

Since there were no more interventions on Articles 14, 14 *bis*, 14 *ter*, 14 *quater* or 40, the Chair concluded that these Articles had been accepted as drafted in Working Document No 64, with the addition of the proposal of the Permanent Bureau contained in Working Document No 76.

23. **Ms Morrow** (Canada) sought the Chair's instruction as to whether this was the right moment to intervene regarding the relationship of Article 14 *quater* and Article 34.

24. **The Chair** stated that at that juncture the meeting would address Articles 20 and 20 *bis*, as drafted in Working Document No 64.

She added that it was planned not to have any breaks during this meeting in order to ensure that the agenda would be completed in time for the delegates to attend a dinner that was to be hosted by the Minister of Justice of the Netherlands. The Chair asked the delegates to keep their interventions as brief as possible.

Articles 20 et / and *20* bis

25. **The Chair** recalled that there had been a discussion during the first reading in which it had been proposed to align Article 20, paragraph 10, with Article 20 *bis*, paragraph 6, by replicating the wording of the latter provision in the former.

She opened the floor to discussion regarding Articles 20 and 20 *bis.*

26. **Mr Markus** (Switzerland) referred the delegates to Working Document No 11. He stated that it made reference to a somewhat minor matter that was nevertheless important to Swiss practice. Working Document No 11 proposed to add language to Article 6, paragraph 2, sub-paragraph (d), and Article 20, paragraph 2. Following the supervening addition of Article 20 *bis*, the Delegate stated that the proposed change should also be effected in Article 20 *bis*, paragraph 2. The proposed change concerned the procedure that was effectively adopted in Switzerland whereby, prior to proceeding to enforce a decision against a debtor, the Central Authority would seek an amicable solution. He stated that this procedure had proved very successful. The proposed changes therefore sought to allow Central Authorities to seek amicable solutions without thereby breaching their obligation to promptly enforce a decision.

27. **Mme Fernandez Pereyro** (Uruguay) remercie la Présidente. Concernant les articles 20 et 20 *bis*, la délégation de l'Uruguay appuie le texte du Document de travail No 64. Cependant, lors des précédentes discussions concernant les ajouts à l'article 20 *bis*, paragraphe 6, et à l'article 20, paragraphe 10, la délégation de l'Uruguay avait exprimé son désaccord. La délégation de l'Uruguay fait preuve de souplesse concernant le Document de travail No 64. En effet, selon la Déléguée, ce qui ressort de l'article 20 est l'établissement d'une procédure spécifique à l'appel et de délais pour interjeter appel. De plus, l'article 20 *bis*, paragraphe 6, renvoie à la loi de l'État sur le territoire duquel la décision est exécutée.

Ainsi, souhaitant éviter toute suspension de l'exécution d'une décision permettant de recouvrer des obligations alimentaires, la délégation de l'Uruguay soutient modérément la proposition du Comité de rédaction formulée au Document de travail No 64.

28. **Mr Segal** (Israel) observed that Article 20 *bis*, paragraph 4, provided that a competent authority may review an order of its own motion in respect of Article 19, paragraphs (a), (b) and (c), while other grounds could be reviewed upon a plea to that effect by the defendant. He was of the view that the defendant should be empowered to raise all grounds of review, including those grounds that the competent authority could raise of its own motion. He

suggested that the drafting should be amended to make it clear that the defendant could do so.

29. **Mr Fucik** (Austria) referred to the proposal of the delegation of Switzerland to introduce wording that would allow States to seek amicable solutions prior to enforcing decisions. He expressed the view that, in substance, this was a very useful proposal. However, he added that this was provided for by virtue of Article 30, paragraph 2, subparagraph (i). Accordingly, he felt that it could not be argued that a State was in violation of its duty to promptly enforce a decision if it first sought an amicable solution.

30. **Ms Cameron** (Australia) repeated her view expressed on the previous day that the wording of Article 20 *bis*, paragraph 6, was preferable to that of Article 20, paragraph 10, and that, at the very least, the latter provision should be amended accordingly. In fact, she felt that Article 20, paragraph 10, itself was close to unacceptable to her delegation. She observed that if the proposal of the delegation of Australia were not accepted, her delegation might regretfully have to opt for Article 20 *bis*, notwithstanding that her delegation otherwise preferred the procedure in Article 20.

31. **Mr Beaumont** (United Kingdom) stated that the suggestion of the Delegate of Israel concerning Article 20 *bis*, paragraph 4, was perfectly reasonable and that the defendant should be empowered to raise all grounds for refusal of enforcement. He therefore asked the Drafting Committee to consider that proposal.

On the policy matter raised by the Delegate of Australia, he stated that he would leave this to be addressed by the delegation of the European Community.

32. **The Chair** asked if there were any further interventions regarding the matter raised by the delegation of Australia.

33. **Mr Segal** (Israel) stated that his delegation supported the view of the Delegate of Australia.

34. **Ms Lenzing** (European Community – Commission) stated that, following quick consultation, her delegation supported the view of the Delegate of Australia.

35. **Ms Carlson** (United States of America) stated that her delegation supported the view of the Delegate of Australia.

36. **Ms Nind** (New Zealand) stated that her delegation supported the view of the Delegate of Australia.

37. **Mr Ding** (China) stated that his delegation supported the view of the Delegate of Australia.

38. **Ms Morrow** (Canada) stated that her delegation supported the view of the Delegate of Australia.

39. **The Chair** asked if there were any objections to the proposal of the Delegate of Australia. Noting that there were none she instructed the Drafting Committee to replace the text in Article 20, paragraph 10, with the text in Article 20 *bis*, paragraph 6.

The Chair asked if there were any further interventions regarding Articles 20 and 20 *bis*.

40. **Ms Lenzing** (European Community – Commission) asked if the suggestion of the Delegate of the United Kingdom to accommodate the request of the Delegate of Israel had been accepted.

41. **The Chair** noted that she had not yet articulated her conclusions. She added that the proposal was perfectly reasonable and that the Drafting Committee should make the necessary changes in Article 20 *bis*, paragraph 4.

42. **Ms Albuquerque Ferreira** (China) asserted that the request of the Delegate of Israel, which she supported, could be accommodated by suppressing the reference to Article 19, paragraphs (b), (e) and (f), in Article 20 *bis*, paragraph 4.

43. **Mr Beaumont** (United Kingdom) stated that the problem could not be solved in as simple a manner as proposed by the Delegate of China since the latter part of the clause was linked to the first part. However, he was confident that the Drafting Committee would be able to resolve the problem.

44. **The Chair** concluded that the delegates had accepted the proposal of the Delegate of Israel that the drafting of Article 20 *bis*, paragraph 4, should be clarified to show that the defendant could also raise the grounds for the refusal of recognition that the competent authority could review of its own motion. She explained that the purpose of the proposal was to allow the defendant to raise the grounds for refusal of recognition set out in Article 19, paragraphs (a), (c) and (d).

The Chair asked the delegates if they could accept Articles 20 and 20 *bis* with the changes that had been agreed upon. She added that there had been no support for the proposal of the delegation of Switzerland in Working Document No 11, bearing in mind the observation of the Delegate of Austria that the principle contained in that proposal was catered for elsewhere in the draft Convention.

45. **Mr Markus** (Switzerland) stated that the observation of the Delegate of Austria was pertinent but that it did not address the concerns of the delegation of Switzerland fully since Article 30 referred to enforcement measures, whereas the proposal in Working Document No 11 concerned recognition and enforcement procedures. He added that he would not insist upon this point but that the Explanatory Report should make it clear that a Central Authority could seek an amicable solution after recognition and a declaration of enforceability, but before actual enforcement.

46. **The Chair** asked if there were any reactions to the suggestion of the Delegate of Switzerland.

47. **Mr Segal** (Israel) proposed that it would be appropriate to impose time limits on the period of mediation.

He added that Working Document No 25 proposed a procedure whereby the requesting Central Authority would be notified of the recognition or refusal of an application. The Delegate suggested that that working document should be addressed.

48. **The Chair** asked if there was any support for the proposal.

She stated that she understood that if an application were processed through a Central Authority, the Central Authority would not lose track of the development of the procedure.

The Chair asked if there were any further reactions. Noting that there were none, she stated that the text of the draft Convention would not be changed to the effect proposed by the delegation of Israel concerning time limits or in the manner proposed by the delegation of Switzerland concern-

ing an explicit reference to mediation and conciliation. She therefore concluded that Articles 20 and 20 *bis* were accepted, subject to the changes proposed by the delegation of Australia in Article 20, paragraph 10.

49. **The Chair of the Drafting Committee** asked if the Chair had said that the Drafting Committee should amend Article 20, paragraph 10.

50. **The Chair** confirmed that this was indeed her conclusion.

Document de travail / Working Document *No 81 : articles 2, 3 et /* and *34*

51. **The Chair** noted that the discussion of Working Document No 64 was concluded and proposed to proceed to Working Document No 81. This was a proposal of an informal working group, the participants in which were cited in a footnote to the working document. She invited the Chair of the working group to introduce the working document.

52. **Mr Beaumont** (United Kingdom) stated that significant changes had been made to Article 2, paragraph 2. The changes clarified that a reservation could be made in respect of a parent-child relationship where the child was aged between 18 and 21 years. If a State were to make such a reservation, this would have reciprocal effects and other States would not be obliged to provide services to children aged between 18 and 21 years that originated from the State that made the reservation.

He also noted that a specific reference to vulnerable persons had been added in Article 2, paragraph 3. The specific reference made it easier for States making a declaration to include vulnerable persons within the scope of the draft Convention. A definition of vulnerable persons was thus added in Article 3, paragraph (f). That definition was drawn from the *Hague Convention of 13 January 2000 on the International Protection of Adults*.

A new paragraph had also been added to Article 34, namely Article 34, paragraph 3. This was introduced to allow the extension of direct requests for recognition and enforcement under Article 2, paragraph 1, sub-paragraph (a), to persons over the age of 21 in very limited circumstances. The conditions were that the person must have been (i) (a) a vulnerable adult, (b) above the age of 18 or 21, as the case may be for the relevant State, and (ii) that the impairment had arisen before the person attained the age of 18 or 21, as the case may be. The person to whom the maintenance obligation was owed would therefore fall within the scope of Article 2, paragraph 1, sub-paragraph (a), at the time that the decision was taken but would be older than 18 or 21 at the time when recognition and enforcement were sought. Accordingly, this proposed amendment constituted an extension of the scope of the draft Convention in very limited circumstances where the decision was within the scope. In these situations the order would be preserved even if it did not remain within the scope thereafter.

Mr Beaumont added that the working document also proposed to amend the Final Act by virtue of which the Diplomatic Session would make a recommendation to the Council on General Affairs and Policy, which decides the priorities of the Hague Conference. The recommendation would suggest that the Council on General Affairs and Policy "should consider as a matter of priority the feasibility of developing a Protocol to the Convention on the International Recovery of Child Support and other Forms of Family Maintenance to deal with the international recovery of maintenance in respect of vulnerable persons".

The Delegate explained that many States were involved in the informal working group that drew up Working Document No 81. He added that it was not an easy task, but he was very satisfied with the results and commended the excellent spirit of co-operation of the participants in the working group. He noted that difficult decisions were taken under pressure and thanked all States involved for their willingness to achieve a result that would facilitate the success of the work on the future Convention.

53. **The Chair** thanked the Delegate of the United Kingdom for his introduction of Working Document No 81. She also thanked him for accepting to chair the working group at such a late stage in the Diplomatic Session. Finally, she thanked those who had participated in the working group and invited the delegates to express their views on the working document.

54. **Ms Carlson** (United States of America) stated that her delegation supported the proposal in Working Document No 81. She noted that her delegation had participated in the working group and wished to thank the Delegate of the United Kingdom and the Deputy Secretary General for their work and patience. She also thanked the other delegates for making very difficult compromises. She added that her delegation had also made some difficult compromises, but she thought that the result that the working group had managed to reach met concerns of delegations regarding vulnerable adults and thereby encouraged wider ratification of the future Convention.

Ms Carlson recalled that it had been agreed in the working group that her delegation would raise a concern that it had in respect of the drafting of Article 34, paragraph 3, and that it would also be proposed to refer this concern to the Drafting Committee. She asserted that it must be clarified in Article 34, paragraph 3, that the decision was taken before the person attained majority and that his or her impairment was taken into account in the delivery of the decision in question. She noted that the decision would have effects after the child attained majority because his or her impairment had been taken into account in the maintenance decision.

55. **M. Marani** (Argentine) remercie la Présidente et s'associe à la délégation des États-Unis d'Amérique pour remercier chaleureusement le Délégué du Royaume-Uni qui a permis d'établir un très délicat compromis relatif au champ d'application de la future Convention. De plus, la délégation de l'Argentine remercie l'ensemble des délégations et souligne les efforts fournis par chacune d'elle, qui ont permis d'aboutir à cette solution.

En outre, la délégation de l'Argentine soutient la proposition verbale de la délégation des États-Unis d'Amérique portant sur une adjonction à l'article 34, paragraphe 3, du Document de travail No 81.

56. **M. Cieza** (Pérou) remercie spécialement le Délégué du Royaume-Uni pour le compromis établi au Document de travail No 81 et remercie l'ensemble des délégations participantes ainsi que les délégations des États d'Amérique latine.

Toutefois, le Délégué du Pérou revient sur la recommandation de la Vingt et unième session présentée au Document de travail No 81. Il précise qu'il ne faut pas nécessairement retenir la formule « *as a matter of priority* ». En effet, le

Conseil sur les affaires générales et la politique de la Conférence devrait considérer lui-même l'ordre de priorité qui doit être conféré à l'établissement d'un nouveau Protocole à la future Convention.

57. **Ms Lenzing** (European Community – Commission) stated that her delegation supported the compromise that had been achieved in respect of Articles 2, 3 and 34. She thanked the Permanent Bureau and the Delegate of the United Kingdom for brokering the compromise. She also thanked the delegations of the Latin American States and the delegation of the United States of America for their flexibility since those delegations had initially come to discussions from diametrically opposed sides.

58. **Ms Ménard** (Canada) thanked the Delegate of the United Kingdom and the Deputy Secretary General. She extended her thanks to the delegations that had participated in the working group, particularly the delegations of the Latin American States and the delegation of the United States of America for the considerable compromise that they had achieved. She noted that it was important that this compromise had been achieved as it would encourage wide ratification and thereby help more children. Her delegation therefore supported Working Document No 81.

59. **Mr de Oliveira Moll** (Brazil) thanked all those who were involved in the formulation of Working Document No 81. In particular, he thanked the Delegate of the United Kingdom for chairing the working group and the Deputy Secretary General for his suggestions. Mr de Oliveira Moll observed that Working Document No 81 was an important step towards the attainment of a universally acceptable Convention. He recalled that all concerned had made a significant effort to compromise.

On the matter of the proposal of the delegation of the United States of America to recommend that the Drafting Committee clarify the language of Article 34, paragraph 3, he stated that his delegation had no objection.

Regarding the recommendation to the Council on General Affairs and Policy, the Delegate stated that he was of the view that it should be recommended that the feasibility of a protocol to deal with vulnerable adults should be addressed with "priority".

60. **M. Markus** (Suisse) remercie la Présidente. La délégation de la Suisse est très reconnaissante envers les délégations qui ont participé au groupe de travail sur les articles 2, 3 et 34 car elles ont permis un résultat considérable. Par conséquent, la délégation de la Suisse appuie le compromis formulé au Document de travail No 81.

Cependant, le Délégué indique qu'il a eu certaines réticences sur la recommandation qui devrait être faite au Conseil sur les affaires générales et la politique de la Conférence, telle qu'elle est formulée dans le Document de travail No 81. En effet, il existe déjà un certain nombre de points sur lesquels le Conseil aura à se pencher et qui ont été annoncés il y a déjà plus d'un an. Le Délégué de la Suisse est très reconnaissant à l'égard de la délégation du Pérou pour son intervention portant sur la possibilité pour le Conseil de déterminer par lui-même le niveau de priorité à consacrer à l'établissement d'un nouveau Protocole.

Ainsi, la délégation de la Suisse soutient la proposition de la délégation du Pérou de biffer la mention « *as a matter of priority* » sans pour autant s'opposer à l'ensemble du Document de travail No 81. En l'occurrence, la délégation de la Suisse soutient la proposition verbale de la délégation des États-Unis d'Amérique portant sur l'article 34 du Document de travail No 81 car elle la considère comme tout à fait utile.

61. **The Chair** asked if there were any further interventions. Noting that there were none, she stated that she was glad to conclude that there was general agreement on the proposed text in Working Document No 81. There was also support for the additional proposal of the delegation of the United States of America regarding Article 34, paragraph 3. The Chair recalled that said proposal recommended that wording be added to Article 34, paragraph 3, to the effect that cases where the decision took the impairment into account would extend beyond the attainment of majority. The precise wording would be left to be determined by the Drafting Committee.

The Chair understood that the recommendation was also part of the proposal and that a majority of delegates were in favour of the retention of the term "priority". She asked those delegations that had objections to its inclusion if their objections were strong.

62. **M. Cieza** (Pérou) considère qu'une décision doit être prise au sujet de la recommandation faite aux Conseil sur les affaires générales et la politique de la Conférence. Il en résulte que la délégation du Pérou n'a plus d'objections à l'encontre du Document de travail No 81.

63. **The Chair** therefore concluded that the recommendation had been accepted, including the phrase "as a matter of priority". She also concluded that Articles 2, 3 and 34 as amended had been accepted.

Document de travail / Working Document *No 78*

64. **The Chair** stated that the discussion would return to open questions. She recalled that the discussion of Article 46, based on Working Document No 77, had not been completed. Noting that the delegation of the European Community was to submit a working document on Article 46, the Chair stated that that Article would be addressed at a later stage.

The Chair also recalled that on the previous night the discussion of Working Document No 78 on the matter of Article 10 concerning recognition of decisions at the application of a debtor had not been completed. She invited the delegation of the European Community to submit its proposal regarding Article 10.

65. **Ms Lenzing** (European Community – Commission) stated that her delegation proposed to redraft Article 10, paragraph 2, sub-paragraph (a), in order to take into account the concerns of the delegations of Japan and China, specifically concerning the provision, which only the debtor in the requesting State would be able to avail himself of, regarding a request for recognition of a decision.

The proposal of the delegation of the European Community suggested to qualify the previous draft in two respects. Firstly, it was proposed that the debtor would only be able to make a request for recognition of a decision leading to the suspension, or limitation of the enforcement of a decision. This would ensure that the debtor had a genuine interest. Secondly, the proposed amendment introduced wording to allow those States that did not have a procedure for recognition of a decision on the application of a debtor to use an equivalent procedure available in their national laws. Such States would inform the Permanent Bureau of the nature of such procedure per Article 51 of the draft Convention.

She asserted that the revised draft would take into account the different systems used in States regarding modification of decisions at the application of a debtor. She added that recognition and enforcement would be sought only if the previous decision was, or was to be, enforced in the requested State.

66. **The Chair** asked if there were any further interventions.

67. **Mr Markus** (Switzerland) stated that his delegation was prepared to accept some compromise, although in principle it was in favour of the deletion of Article 10, paragraph 2, sub-paragraph (a). He reiterated that his delegation remained in favour of a compromise, but that it could not understand the drafting proposed in Working Document No 78. He asked to which decision reference was being made. He explained that the previous decision in the requested State would have been rendered earlier in the requested State, or rendered in another State and recognised in the requested State. He stated that a decision generally could not be rendered non-functional simply by virtue of a later decision. He suggested that the draft of Article 10, paragraph 2, sub-paragraph (a), contradicted Article 19, paragraph (d), concerning grounds for refusal of recognition of a decision. He observed that, if he had understood correctly, it was intended that a decision that had been recognised or rendered in the requested State could be modified; he was of the view that this would be reasonable, but that the text should be amended to include a reference to a decision modifying a previous maintenance obligation.

Mr Markus added that he had a further concern that the reference to enabling the suspension or alteration of a previous decision entered into the merits of enforcement laws unnecessarily, and that this was not the object of the future Convention.

68. **Ms Cameron** (Australia) stated that, although the name of her delegation did not appear on the working document, her delegation supported it completely.

Regarding the matters raised by the Delegate of Switzerland, Ms Cameron stated that it was not intended to guarantee a particular outcome for the debtor. She added that the draft Convention did not go so far as to resolve all inconsistent decisions, and that Article 19 employed the term "may" in respect of the faculty to refuse enforcement. She concluded that she understood that it was intended that such an application could be brought and that certain matters would not be governed by the future Convention.

69. **The Chair** asked the delegation of the European Community to clarify the second part of the proposal.

70. **Ms Lenzing** (European Community – Commission) asked the Chair if she wished her to repeat her introduction.

71. **The Chair** stated that, following the intervention of the Delegate of Switzerland and the discussion of the previous evening regarding a possible compromise based on the possibility of allowing a debtor to apply for recognition, the first part of the proposed Article 10, paragraph 2, sub-paragraph (a), was clear. However, she noted that the second part was not clear and she asked Ms Lenzing to explain the import of the provision.

72. **Ms Lenzing** (European Community – Commission) explained that the underlying situation was that the debtor would seek modification of a previous decision. She observed that it was implied that the application was in respect of a previous decision. As an aside, she explained that it could be argued that one could have a declaratory judgment, although she thought this unlikely since recognition of such a judgment would be refused under Article 19. She suggested that the Explanatory Report should clarify this matter.

Concerning the second part of the proposal, she recalled that in States such as Japan and China, there was no procedure for simple recognition. However, there were other procedures that could be used to achieve that the same effect. If there was no procedure for the recognition of a decision, a debtor could apply under such equivalent procedures as available in that State. States would inform the Permanent Bureau of what procedures existed within their territories, and the Permanent Bureau would make that information public.

73. **The Chair** asked if this proposal was acceptable.

74. **Mr Markus** (Switzerland) thanked Ms Lenzing for her explanation. He stated that he was fully satisfied by the second part of the proposal. In respect of the first part, he opined that, if it was intended that there should be a reference to applications for modification, then this should be explicit. This would clarify that there was no contradiction in respect of Article 19, paragraph (d).

75. **The Chair** stated that, if there was agreement from a policy perspective, the Drafting Committee could improve the formulation and consider the inclusion of a mention of the term "modification".

76. **Mr Beaumont** (United Kingdom) urged the delegates to be aware of the workload of the Drafting Committee. He added that the Drafting Committee had dedicated much time to the matter at hand, and that he was not sure what was being asked in terms of policy. He opined that there were only a few working hours left and that it might be too much to ask of the Drafting Committee if only one delegation objected to the drafting.

77. **The Chair** stated that the policy was clear as explained by the Delegate of the European Community. She asked if this was acceptable, with the appropriate clarifications in the Explanatory Report.

78. **Ms Cameron** (Australia) was of the view that this might not necessarily be the case. She stated that there could be a situation where the application was inconsistent with a previously recognised or enforced decision. She feared that to only refer to "modification" might go too far.

79. **Mr Markus** (Switzerland) stated that he did not wish to insist on further amendments given that the policy was clear following the explanation of the Delegate of the European Community. He stated that it was therefore clear that the reference was not to a decision that was explicitly rendered to modify a previous decision. He added that the principle of *res judicata* made it clear that a decision could not be blocked in such a manner. He was therefore of the view that the sensible conclusion was that this must be a reference to "modification" and that its insertion would resolve the matter. Otherwise, he was of the view that there would be a conflict with the provisions of Article 19, paragraph (d). He added that he hoped that this would not be too much to ask of the Drafting Committee.

80. **Mr Segal** (Israel) stated that he supported the views of the delegation of Switzerland and that he felt that it would not be difficult to make the necessary linguistic changes.

81. **Ms Lenzing** (European Community – Commission) recalled a previous discussion concerning Article 15 of the draft Convention. She stated that there was some controversy about a reference to the modification of a decision, and that this was why Article 15 had been amended to refer to a new decision. She stated that she did not wish to import the same problem into Article 10, paragraph 2. She added that it could be left to the common sense of an applicant not to apply for recognition of a declaratory judgment, as this would obviously be refused. She stated that, as a member of the Drafting Committee, she recognised that it would be too burdensome to ask the Drafting Committee to deal with complex matters of definition at such a late stage. She suggested that the Explanatory Report should clarify any difficulties.

82. **Mme Mansilla y Mejía** (Mexique) relève que la délégation du Mexique a les mêmes préoccupations que celles exprimées par la délégation de la Suisse.

83. **Mr McClean** (Commonwealth Secretariat) stated that he was puzzled and worried by the draft. He was of the view that if the debtor were to be given the possibility of availing himself of two types of applications, there should at least be some sort of introductory language to show that the debtor could only invoke the equivalent procedure where the principal procedure was not available. He stressed that, notwithstanding the limited time available, the Drafting Committee should deal with this matter.

84. **Mr Fucik** (Austria) drew the attention of the delegates to Article 12, paragraph 8, of the preliminary draft Convention. He explained that it provided that no Central Authority would be bound to transmit or process an application that did not meet the requirements of Articles 15 and 19. He suggested that the Explanatory Report should make it clear that Article 10, paragraph 2, did not affect the limits established in Articles 15 and 19.

85. **The Chair** observed that there was agreement in terms of policy. She stated that the specifics of drafting should be left to the Drafting Committee. She concluded that it had been accepted to include applications for mere recognition in Article 10, paragraph 2. She added that this consequentially meant that the delegates had also accepted the retention of the language contained in brackets in Article 11, paragraph 1, sub-paragraph (g). She noted that this decision meant that the discussion on both Article 10 and Article 11 had been concluded.

Article 15

86. **The Chair** recalled that discussion regarding Article 15 had not been concluded. She invited the delegation of Australia to briefly introduce Working Document No 58.

87. **Ms Cameron** (Australia) announced that her delegation did not wish to proceed with its proposal at this stage.

88. **The Chair** asked if there were any further interventions regarding Article 15. Noting that there were none she concluded that Article 15 was accepted.

Article 46

89. **The Chair** invited the delegation of the European Community to introduce Working Document No 82. She informed the delegates that this working document contained a new proposal to amend Article 46.

90. **Mr Hať apka** (European Community – Commission) stated that Working Document No 82 was intended to take into account the objections and concerns regarding the original proposal for Article 46. There was also an additional element, namely the inclusion of a new paragraph 2 to Article 46, which had been introduced in view of the suggestion of the Representative of the International Bar Association. He recalled that the delegation of the European Community had felt that it would be better to include the said proposal in Article 46, rather than Article 49 as had been suggested by the Representative of the IBA.

The Delegate of the European Community drew the meeting's attention to the *chapeau* of Article 46, paragraph 1. He stated that paragraph 1 was not intended to operate unilaterally. He explained that, in order to take into account all relevant elements, the new draft had been approached from a slightly different angle. He observed that Article 46, paragraph 1, addressed bilateral and multilateral agreements, while Article 46, paragraph 2, addressed unilateral instruments. In other words Article 46, paragraph 2, addressed the law of the requested State and cross-referred only to Article 46, paragraph 1, sub-paragraphs (a), (b) and (c).

He also explained that the original idea concerning expedited procedures was dealt with in the second sentence of Article 46, paragraph 2. He noted that, in response to previous criticism, the proposal in Working Document No 82 referred to compatibility with the protection offered under Articles 20 and 20 *bis*.

Mr Hať apka concluded that Article 46 otherwise remained the same, save for some inconsequential changes.

91. **The Chair** asked if there were any reactions to the proposal of the delegation of the European Community.

92. **Ms Riendeau** (Canada) stated that her delegation supported the proposal in Working Document No 82.

93. **The Chair** noted that there were no objections and concluded that the proposal of the delegation of the European Community had been accepted.

Document de travail / Working Document *No 80*

94. **The Chair** invited the delegation of China to introduce Working Document No 80, which proposed an amendment to Article 43 regarding non-unified legal systems.

95. **Mr Ding** (China) stated that Working Document No 80 contained technical changes that were proposed in view of the additional provisions of Articles 26 and 40. He observed that the proposed changes were self-explanatory. He added that the Drafting Committee should consider whether or not it was necessary to improve the drafting of the proposed text.

96. **Ms Riendeau** (Canada) stated that her delegation supported the proposal in Working Document No 80 to add two new paragraphs to Article 43 as the proposed changes were appropriate.

97. **The Chair** noted that there were no objections and concluded that the proposal of the delegation of China had been accepted.

Procès-verbal/Minutes No 22

Article 34, paragraphe / paragraph *2*

98. **The Chair** invited the delegation of Canada to present its views on Article 34, paragraph 2, concerning direct requests.

99. **Ms Morrow** (Canada) stated that her comment concerned the interpretation of Article 14 *quater*, paragraph (b), in the context of Article 34, paragraph 2.

Ms Morrow explained that her delegation had stated that it had a difficulty with a provision in the draft Convention that could be interpreted as obliging a State to provide free legal assistance to a direct applicant who would otherwise receive all necessary services for free by applying through Central Authorities but who chooses instead to apply directly to a competent authority. She stated that this was a concern to Canadian provinces and territories because they had established efficient, effective systems and procedures for registration and enforcement of foreign orders on a Central Authority system.

Her delegation's concern with the inclusion of Article 14 *quater*, paragraph (b), was that for States such as Canada, there was the possibility of a purely judicial process for an application for recognition and enforcement completely outside the Central Authority system but, because of the much more efficient process through Central Authorities, this purely judicial process was rarely used.

Her delegation had no objection to the future Convention creating a legal basis for such a direct application. However, when an applicant would choose to use another route than what the State was offering cost-free, without a means test, the delegation of Canada was of the view that that State should not be obliged to incur the cost of a choice by the applicant. However, she emphasised that her delegation understood the importance of including Article 14 *quater*, paragraph (b), in Article 34, paragraph 2, for some States and did not wish to undermine the well-established principles among those States that Article 14 *quater*, paragraph (b), in Article 34, paragraph 2, represented.

In the light of informal discussions that her delegation had had with other delegations, the delegation of Canada was confident that a clear statement should be made in the Explanatory Report confirming that the inclusion of Article 14 *quater*, paragraph (b), in Article 34, paragraph 2, would not oblige a State to provide free legal assistance for a direct application where all necessary assistance and services were available cost-free through Central Authority applications. The Delegate concluded that if it was acceptable to include such a statement in the Explanatory Report, her delegation would be satisfied that this would adequately address its concerns while preserving the significance of Article 14 *quater*, paragraph (b), in Article 34, paragraph 2, for other States.

100. **Ms Lenzing** (European Community – Commission) stated that her delegation supported the statement of the delegation of Canada and had no objection to including the proposed clarification in the Explanatory Report.

101. **Ms Carlson** (United States of America) stated that her delegation also supported the statement of the delegation of Canada and had no objection to the proposed clarification appearing in the Explanatory Report.

102. **Mr Moraes Soares** (Brazil) added his delegation's support for the statement of the delegation of Canada.

103. **The Chair** concluded that the proposed interpretation had been accepted and would be included in the Explanatory Report. She added that Article 34 had therefore also been accepted.

Article 52

104. **The Chair** noted that there remained few open Articles to be finalised. She invited the delegates to discuss Article 52 concerning signature, ratification and accession. She noted that this had already been discussed during the first reading but that the discussion had not been concluded because the final contents of the future Convention were not yet known. Since most Articles had been agreed upon, the Chair opened the floor to discussion on Article 52.

105. **Ms Riendeau** (Canada) stated that her delegation had expressed its position during the first reading. The delegation of Canada supported Option 1 of Article 52 in Working Document No 65 and the second version of Article 52, paragraph 5, in Option 1. She explained that the future Convention would establish a medium for co-operation and that it was important for States to verify their ability to fulfil obligations. It was for this reason that her delegation supported the stated options as those options allowed consultation on whether or not new accessions should be accepted.

106. **Ms Lenzing** (European Community – Commission) stated that her delegation had previously supported Option 2, but that it now was of the view that Option 1 was more appropriate, given the considerable obligations that Central Authorities were burdened with under the draft Convention.

Within Option 1, her delegation supported the first version of Article 52, paragraph 5. She asserted that it was preferable to have a deadline by which States should oppose accessions. The alternative would mean that the process of accession could go on for years for no good reason. However, she suggested that the six-month period provided in the draft Convention was insufficient and should be extended to one year, as in other Hague Conventions. She added that the additional six months would make it easier for the Member States of the European Community to coordinate their views.

107. **Mme Mansilla y Mejía** (Mexique) remercie la Présidente et confirme que la délégation du Mexique est favorable à la seconde option de l'article 52 du Document de travail No 65.

108. **Mr Tian** (China) stated that, as had been stated during the first reading, his delegation preferred Option 2. He emphasised that Option 2 was preferable if the delegates wished to have a truly universal instrument. He added that he understood the rationale for some States to prefer Option 1, but he encouraged careful consideration so that new States could be welcomed.

109. **Ms Carlson** (United States of America) stated that, as indicated before, her delegation strongly preferred Option 1. She recalled that the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, the *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, and the *Hague Convention of 13 January 2000 on the International Protection of Adults* all contained provisions of the type contemplated in Option 1, and one or the other of the versions of Article 52, paragraph 5. She opined that the draft Convention imposed far more obligations on Central Authorities than did previous family law Conven-

tions and that there was no reason to depart from the policy of previous Conventions.

The Delegate stated that, like the delegation of Canada, her delegation supported the second version of Article 52, paragraph 5. However, she stated that she understood the alternative approach proposed by the European Community and was sympathetic to the reasoning for a twelve-month period for consideration of accessions. She stated that, if a majority supported the first version, her delegation could accept this in a spirit of compromise.

110. **Mme González Cofré** (Chili) confirme que, conformément à l'accord établi entre les délégations des États membres du Mercosur et des délégations des États associés, la délégation du Chili est favorable à la première option figurant à l'article 52 et à la première version du paragraphe 5.

De plus, la délégation du Chili appuie la proposition verbale de la délégation de la Communauté européenne concernant l'allongement du délai de six à douze mois pour élever des objections conformément à l'article 52 (première option), paragraphe 5 (première version).

111. **Mr Segal** (Israel) supported Option 1 and the second version of Article 52, paragraph 5, in Option 1, as he had during the first reading. He explained that it was not only universality of the future Convention that was necessary, but also its responsible implementation and development. States that would sign up later therefore needed guidance and time. He asserted that, in order to universalise the future Convention responsibly, Option 1 was preferable. In respect of the second version of Article 52, paragraph 5, in Option 1, the Delegate noted that the decisions of States under that provision would not be political, although it might appear that this might be the case.

112. **Mme Dabresil** (Haïti) remercie la Présidente et relève que le Délégué d'Israël a bien soutenu le point de vue de la délégation d'Haïti. Ainsi, la délégation d'Haïti est favorable à la première option de l'article 52 et à la deuxième version du paragraphe 5.

113. **Ms Escutin** (Philippines) stated that, since the purpose of the future Convention would be to ensure the international recovery of child support, she supported Option 2. She encouraged the delegates to do the same.

114. **Mme Fernandez Pereyro** (Uruguay) relève que la délégation de l'Uruguay, comme la délégation du Chili, soutient la première option de l'article 52 et la première version de son paragraphe 5.

115. **Mr Ribeiro Zerbinatti** (Brazil) stated that Brazil and the other members of Mercosur supported Option 1 and the first version of Article 52, paragraph 5.

116. **Mr Sello** (South Africa) supported Option 1 and the second version of Article 52, paragraph 5, therein.

117. **M. Markus** (Suisse) relève que la délégation de la Suisse est favorable, comme en première lecture, à la première option de l'article 52 et à la première version de son paragraphe 5. De plus, la délégation de la Suisse soutient la proposition verbale de la délégation de la Communauté européenne visant à l'allongement du délai de six à douze mois au paragraphe 5 (première version) de l'article 52 (première option).

118. **The Chair** concluded that the vast majority of delegates supported Option 1, and that, within Option 1, the delegates were divided between the first and second versions of Article 52, paragraph 5. Within the first version, namely that where accession would take effect in relation to States that had not raised an objection, the Chair observed that the proposal to extend the period to twelve months had gained support. On further consideration, the Chair asked if there were any strong objections to amending the second version of Article 52, paragraph 5, in Option 1, from a six-month to a twelve-month period. Noting that there were none she concluded that this was accepted and that the Drafting Committee should delete all other options and effect the extension of the time period to twelve months.

Article 60

119. **The Chair** observed that the decision in respect of Article 52 had consequential effects on Article 60 regarding notification. There were two options in Article 60 concerning paragraph (a) and paragraph (b) thereof. She explained that paragraphs (c) to (g) were common to both options. Now that it had been decided that the future Convention would be open only to States that were Members of the Hague Conference at the time of the Twenty-First Session, or that had participated in the Diplomatic Session, Option 1 of Article 60 was also accepted by implication. She asked if there were any further observations regarding Article 60.

Article 55

120. **The Deputy Secretary General** wished to intervene on the matter of the depositary's obligation to notify each other State that was a Party to the Convention in line with Article 52.

121. **The Chair** observed that Article 60 had been accepted with Option 1 thereof.

122. **The Deputy Secretary General** explained that there was a potential problem that could arise as the twelve-month period for objections in Article 52 created an inconsistency in respect of Article 55 because the latter Article provided that the Convention would enter into force three months after ratification. Accordingly, there was a nine-month period after the Convention would theoretically come into force during which States could still object to accession. He therefore suggested that the period for entry into force for States that were not Members of the Hague Conference and had not participated in the Twenty-First Session should be twelve months in order to avoid disjunction. He reiterated that the purpose of his suggestion was that the time period for entry into force would coincide with the period in which Contracting States could raise objections in respect of acceding States.

123. **The Chair** asked if there were any objections.

124. **Ms Carlson** (United States of America) thanked the Deputy Secretary General. She asked if the time period for entry into force would remain three months in respect of States that had participated in the Diplomatic Session. Noting that the Deputy Secretary General had gestured his agreement, she indicated that she accepted the proposal.

125. **The Chair** concluded that it had been accepted to extend the period for entry into force from three months to twelve months for acceding States.

Procès-verbal/Minutes No 22

126. **The Chair** invited the Deputy Secretary General to introduce Working Document No 83, concerning a proposal to include additional text in the Final Act.

127. **The Deputy Secretary General** explained that Working Document No 83 was technically a proposal of the Permanent Bureau, but that in fact it reflected the will of the Diplomatic Session as expressed in discussion regarding forms.

He explained that the first three paragraphs related to the Working Group on Forms. The first paragraph commended the Working Group's work, the second endorsed the forms, and the third recommended that the Working Group should continue its work.

The fourth paragraph commended the Administrative Co-operation Working Group and its sub-committees and the fifth paragraph recommended that their work should be continued on an interim basis. It was also suggested that a future Special Commission would consider establishing a standing Central Authority Co-operation Committee.

The sixth and seventh paragraphs endorsed the Country Profile form and recommended that the work of the Administrative Co-operation Working Group continue with a view to the presentation and adoption at a future Special Commission of a Country Profile form to be published by the Permanent Bureau in accordance with Article 51, paragraph 2.

He added that in any case the Permanent Bureau could publish a draft Country Profile form on its website, as in fact would be done after the Diplomatic Session. However, the formal adoption of the Country Profile form would be left to a future Special Commission.

128. **The Chair** asked if there were any interventions.

129. **Mr Tian** (China) stated that he had some concern regarding the Working Group on Forms and the Country Profile Sub-committee and that he wished to suggest some amendments to the text of the Final Act.

He suggested that the words "where appropriate" be added in the fifth paragraph, following the words "future Special Commission". He stated that it could be recommended that a future Special Commission should think about the matter, but that the manner in which the committees would function could not be decided yet. He emphasised that the standing Central Authority Co-operation Committee and the sub-committees should be supervised by the Special Commission.

On the matter of paragraph 7, the Delegate stated that he could agree that the work of the Country Profile Sub-committee would be continued, but he also felt that this should be supervised by the Special Commission. He therefore proposed that the words "under the guidance of a future Special Commission" be added. He emphasised that it should be clear that the two committees could continue to work, but under the guidance of the Special Commission.

130. **The Deputy Secretary General** thanked the Delegate of China for his helpful comments. He stated that it was understood that any possible future body, if agreed, would work under the supervision of the Special Commission. He noted that the proposed recommendations suggested that consideration be given to the suggestions set out in the Final Act.

Regarding the proposal to add words to the effect of "subject to the supervision of the Special Commission" in paragraph 5, the Deputy Secretary General observed that the problem was that there was no Special Commission as yet. However, he noted that it was correct that in future the established organs would function under the guidance of the Special Commission, if it were decided to keep those organs in future. He also observed that there was no danger in allowing the very important work of the committees to continue as the work would be continued on the basis of the agreements reached at the Diplomatic Session and with a view to updating previous work. The Deputy Secretary General asserted that it was very important to endorse the work of the relevant organs, but he added that nothing formal would be concluded until a future Special Commission.

131. **M. Heger** (Allemagne) précise qu'il a fait partie du Groupe de travail sur la coopération administrative. Le Délégué indique qu'il se réfère au paragraphe 5 du texte à insérer dans l'Acte final proposé par le Bureau Permanent au Document de travail No 83. Ce paragraphe 5 propose l'idée que le Groupe de travail sur la coopération administrative poursuive ses travaux. Le travail précédemment effectué au sein de ce groupe, l'a été en collaboration avec le Bureau Permanent plutôt qu'au sein d'une Commission spéciale. Cependant, ce point n'est que d'ordre matériel et il importe de se concentrer sur le fond.

132. **Ms Ménard** (Canada) strongly supported Working Document No 83. She observed that all the work that was mentioned therein was essential for an effective Convention. She added that it was important to keep the work going so as not to lose momentum.

133. **Mr Segal** (Israel) supported the working document, but he wished to ask what the status of the relevant organs would be in respect of States that would become Party to the future Convention in future. He asked if anything specific should be done to allow States that had not participated to date to be afforded the opportunity to do so.

134. **The Chair** noted that one of the aims of the Administrative Co-operation Working Group was to allow the sharing of experiences in order to help improve efficiency globally. She observed that membership of the Working Group was therefore open to all.

135. **M. Markus** (Suisse) appuie en principe la proposition formulée au Document de travail No 83. En ce qui concerne la proposition d'amendement du paragraphe 5 du texte qui devrait être inséré dans l'Acte final, la délégation de la Suisse exprime des hésitations car il s'agirait d'établir un Comité permanent de coopération des Autorités centrales qui serait pourtant supervisé par un organe non permanent, en l'occurrence une Commission spéciale.

De plus, une fois créé, ce Comité permanent devra travailler avec des moyens légers et peu coûteux comme l'a fait le Groupe de travail sur la coopération administrative. La délégation de la Suisse a d'ailleurs admiré l'efficacité de ce Groupe de travail.

136. **Ms Carlson** (United States of America) strongly endorsed Working Document No 83. She noted that there were enough caveats and safeguards to make it clear that the text only made recommendations to future Special Commissions and was in fact not binding upon them. She added that she agreed that the work of the working groups was particularly valuable and that momentum should therefore not be lost. The Delegate also noted that participation in the working groups would remain open in future because

this gave States the opportunity to learn a lot from one another.

137. **The Chair** asked if the delegates agreed with the proposal of the Permanent Bureau in Working Document No 83.

138. **Ms Lenzing** (European Community – Commission) asked the Chair to bear with her delegation since it could not express any view as yet because the Member States of the European Community had yet to co-ordinate their position, as had been noted by the Delegate of Germany.

139. **The Secretary General** recalled that the proposed text would be a proposal in the Final Act. He stated that three months after the Diplomatic Session there would be a meeting of the Council on General Affairs and Policy and that the latter body was competent to decide on all policy matters. Accordingly, the proposal in the working document was just an impetus, but the Council on General Affairs and Policy and the Special Commission would steer the work over the years. The proposal in Working Document No 83 was therefore not binding indefinitely.

140. **The Deputy Secretary General** added that all of the organs mentioned worked in close consultation with the Permanent Bureau and that the Permanent Bureau enjoyed close collaboration with the said organs.

Articles 57 et / and *58*

141. **The Chair** announced that, if her recollection was correct, Articles 57 and 58 were the only remaining Articles that had not been discussed fully. She noted that in the course of the discussions of that day, some more declarations and reservations had been added. It was therefore necessary to outline what would be needed to be added to Articles 57 and 58. She instructed the Drafting Committee to look into this matter and collect the references that needed to be added. She asked if there were any further interventions regarding Articles 57 and 58.

142. **Mrs Borrás** (co-*Rapporteur*) observed that Article 57, paragraph 4, provided that reservations would not have a reciprocal effect. She explained that, following the amendments that had been adopted on the basis of Working Document No 81, there would be a reciprocal effect in respect of a declaration whereby the future Convention would be restricted to children below the age of 18. She suggested that Article 57, paragraph 4, should therefore be modified to reflect the reciprocal effect of a declaration under Article 2, paragraph 2.

143. **The Chair** thanked the co-*Rapporteur*. Noting that there were no further interventions, the Chair concluded that Articles 57 and 58 had been adopted, subject to the Drafting Committee making the necessary changes in Article 57, paragraph 4.

Article 33

144. **Ms Lenzing** (European Community – Commission) called the attention of the Chair to the fact that discussion of Article 33 had not been concluded.

145. **The Chair** noted that since discussion of Article 14 had been concluded, it was possible to also conclude discussion of costs in Article 33. She opened the floor to interventions.

146. **Ms Lenzing** (European Community – Commission) drew the delegates' attention to Working Document No 2, where it was proposed that Article 33, paragraph 5, should be added to allow public bodies to benefit from the same legal assistance set out in Article 14. She observed that in view of supervening developments, the proposal should be read to also include cross-references to Articles 14 *bis*, 14 *ter* and 14 *quater*.

147. **Ms Carlson** (United States of America) stated that she agreed with the proposal of the delegation of the European Community to clarify that public bodies should benefit from the same degree of legal assistance. Premising that she was not completely certain of the view she was about to express, she observed that it might be possible that this was already addressed without need for clarification since the draft Convention provided that public bodies were included in the meaning of creditors and that creditors in child support applications were entitled to free legal assistance. However, she concluded that it would be useful to have a general provision.

148. **Mr Ding** (China) stated that it would be difficult to extend the proposal in Working Document No 2 to Article 14 *ter* because in that case a means test would be irrelevant as the child would have already benefited from child support.

149. **Mme Ménard** (Canada) appuie la proposition de la délégation de la Communauté européenne telle qu'elle est formulée au Document de travail No 2.

150. **Ms Carlson** (United States of America) recalled that public bodies could only seek recognition and enforcement of a decision. It had already been agreed in the compromise concerning Articles 14, 14 *bis* and 14 *ter* that applications for recognition and enforcement would always be free. She therefore observed that the child-centred means test would not be relevant in the context of recognition and enforcement.

151. **Ms John** (Switzerland) asked the Delegate of the European Community to clarify why she referred to an amendment concerning Article 14 since this did not only concern child support.

152. **Ms Lenzing** (European Community – Commission) explained that it had not been proposed to amend Article 14, but to add Article 33, paragraph 5. The intention was to ensure that public bodies would benefit from free legal assistance under Articles 14 *bis* and 14 *ter* in recognition and enforcement proceedings for child support. Regarding the observation of the delegation of the United States of America, the Ms Lenzing stated that she understood the argument but wished to ensure that public bodies would certainly benefit from free legal assistance.

153. **Mr Tian** (China) observed that the proposal of the delegation of the European Community related to the compromise that had been achieved in Working Document No 64. He stated that his delegation could not agree that public bodies should be provided free legal assistance. He emphasised that the issue of free legal assistance for public bodies had not been discussed in the informal working group that had formulated Working Document No 64 and that there should therefore not be any entitlement to free aid. He stated that if a public body needed to recover costs, it should do so through Article 40 of the draft Convention.

154. **Ms Lenzing** (European Community – Commission) stated that, having further considered the submission of the

Procès-verbal/Minutes No 22

Delegate of the United States of America, she now believed that it was not necessary to amend the text and therefore withdrew her suggestion.

155. **The Chair** asked if there were any further observations regarding Article 33. Noting that there were none, she concluded that Article 33 had been accepted.

Remarques finales / Final remarks

156. **The Chair** announced that there were no more open Articles and that all Articles had been adopted by consensus. She emphasised that on the second reading the draft Convention had been adopted on a consensus basis.

The Chair announced that Commission I had therefore finished its work and that the following day would be dedicated to Commission II and the Plenary reading (third reading). She noted that the Drafting Committee would finalise the text of the draft Convention and would be working hard while others celebrated the success of Commission I.

The Chair announced that with this her work had come to its conclusion. She stated that it was not only an honour, but also a pleasure to work with such a committed and hard-working group of experts. She thanked the working groups and working parties, the Permanent Bureau, the interpreters, the recording secretaries, the co-*Rapporteurs* and the Drafting Committee for their work.

Finally, the Chair asked if there were any organisational announcements concerning the dinner that was to be held that evening.

157. **The Secretary General** stated that more time than was available was necessary to appropriately thank the Chair for her guidance of Commission I. He also wished the Drafting Committee good luck for their task ahead.

158. **Mr Pereira Guerra** (European Community – Presidency) announced that there would be a co-ordination meeting to discuss the Protocol on the following morning at 8.45 a.m.

159. **The Chair of the Drafting Committee** advised the members of the Drafting Committee that their meeting would commence immediately at the Permanent Bureau.

The meeting was closed at 6.25 p.m.

Séances plénières
Plenary Sessions

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No 1 – Proposition de la Commission I

PROJET DE CONVENTION SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX ENFANTS ET À D'AUTRES MEMBRES DE LA FAMILLE

PRÉAMBULE

Les États signataires de la présente Convention,

Désireux d'améliorer la coopération entre les États en matière de recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille,

Conscients de la nécessité de disposer de procédures produisant des résultats et qui soient accessibles, rapides, efficaces, économiques, équitables et adaptées à diverses situations,

Souhaitant s'inspirer des meilleures solutions des Conventions de La Haye existantes, ainsi que d'autres instruments internationaux, notamment la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies,

Cherchant à tirer parti des avancées technologiques et à créer un système souple et susceptible de s'adapter aux nouveaux besoins et aux opportunités offertes par les technologies et leurs évolutions,

Rappelant que, en application des articles 3 et 27 de la *Convention relative aux droits de l'enfant* du 20 novembre 1989, établie par les Nations Unies,

– l'intérêt supérieur de l'enfant doit être une considération primordiale dans toutes les décisions concernant les enfants,

– tout enfant a droit à un niveau de vie suffisant pour permettre son développement physique, mental, spirituel, moral et social,

– il incombe au premier chef aux parents ou autres personnes ayant la charge de l'enfant d'assurer, dans la limite de leurs possibilités et de leurs moyens financiers, les conditions de vie nécessaires au développement de l'enfant,

– les États parties devraient prendre toutes les mesures appropriées, notamment la conclusion d'accords internationaux, en vue d'assurer le recouvrement des aliments destinés aux enfants auprès de leurs parents ou d'autres personnes ayant une responsabilité à leur égard, en particulier lorsque ces personnes vivent dans un territoire autre que celui de l'enfant,

No 1 – Proposal of Commission I

DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

PREAMBLE

The States signatory to the present Convention,

Desiring to improve co-operation among States for the international recovery of child support and other forms of family maintenance,

Aware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive, and fair,

Wishing to build upon the best features of existing Hague Conventions and other international instruments, in particular the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956,

Seeking to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities,

Recalling that, in accordance with Articles 3 and 27 of the United Nations *Convention on the Rights of the Child* of 20 November 1989,

– in all actions concerning children the best interests of the child shall be a primary consideration,

– every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,

– the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development, and

– States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child,

Ont résolu de conclure la présente Convention, et sont convenus des dispositions suivantes :

Have resolved to conclude this Convention and have agreed upon the following provisions –

CHAPITRE PREMIER – OBJET, CHAMP D'APPLICATION ET DÉFINITIONS

Article premier Objet

La présente Convention a pour objet d'assurer l'efficacité du recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille, en particulier en :

(a) établissant un système complet de coopération entre les autorités des États contractants ;

(b) permettant de présenter des demandes en vue d'obtenir des décisions en matière d'aliments ;

(c) assurant la reconnaissance et l'exécution des décisions en matière d'aliments ; et

(d) requérant des mesures efficaces en vue de l'exécution rapide des décisions en matière d'aliments.

Article 2 Champ d'application

1 La présente Convention s'applique :

(a) aux obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne de moins de 21 ans.

(b) à la reconnaissance et à l'exécution ou à l'exécution d'une décision relative aux obligations alimentaires entre époux et ex-époux lorsque la demande est présentée conjointement à une action comprise dans le champ d'application de l'alinéa (a) ; et

(c) à l'exception des chapitres II et III, aux obligations alimentaires entre époux et ex-époux.

2 Tout État contractant peut, conformément à l'article 62, se réserver le droit de limiter l'application de l'alinéa (a) du paragraphe premier de la Convention aux personnes n'ayant pas atteint l'âge de 18 ans. Tout État contractant faisant une telle déclaration ne sera pas fondé à demander l'application de la Convention aux personnes exclues par sa réserve du fait de leur âge.

3 Tout État contractant peut, conformément à l'article 63, déclarer qu'il étendra l'application de tout ou partie de la Convention à telle ou telle obligation alimentaire découlant de relations de famille, de filiation, de mariage ou d'alliance, incluant notamment les obligations envers les personnes vulnérables. Une telle déclaration ne crée d'obligation entre deux États contractants que dans la mesure où leurs déclarations recouvrent les mêmes obligations alimentaires et les mêmes parties de la Convention.

4 Les dispositions de la présente Convention s'appliquent aux enfants indépendamment de la situation matrimoniale de leurs parents.

Article 3 Définitions

Aux fins de la présente Convention :

(a) « créancier » désigne une personne à qui des aliments sont dus ou allégués être dus ;

CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

Article 1 Object

The object of the present Convention is to ensure the effective international recovery of child support and other forms of family maintenance in particular by –

(a) establishing a comprehensive system of co-operation between the authorities of the Contracting States;

(b) making available applications for the establishment of maintenance decisions;

(c) providing for the recognition and enforcement of maintenance decisions; and

(d) requiring effective measures for the prompt enforcement of maintenance decisions.

Article 2 Scope

1 This Convention shall apply –

(a) to maintenance obligations arising from a parent-child relationship towards a person under the age of 21;

(b) to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of sub-paragraph (a); and

(c) with the exception of Chapters II and III, to spousal support.

2 A Contracting State may reserve, in accordance with Article 62, the right to limit the application of the Convention under sub-paragraph 1(a), to persons who have not attained the age of 18. A Contracting State which makes this reservation shall not be entitled to claim the application of this Convention to persons of the age excluded by its reservation.

3 Any Contracting State may declare in accordance with Article 63 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.

4 The provisions of this Convention shall apply to children regardless of the marital status of the parents.

Article 3 Definitions

For the purposes of this Convention –

(a) "creditor" means an individual to whom maintenance is owed or is alleged to be owed;

(b) « débiteur » désigne une personne qui doit ou de qui on réclame des aliments ;

(c) « assistance juridique » désigne l'assistance nécessaire pour mettre les demandeurs en mesure de connaître et de faire valoir leurs droits et pour garantir que leurs demandes seront traitées de façon complète et efficace dans l'État requis. Une telle assistance peut être fournie, le cas échéant, au moyen de conseils juridiques, d'une assistance lorsqu'une affaire est portée devant une autorité, d'une représentation en justice et de l'exonération des frais de procédure ;

(d) « accord par écrit » désigne un accord consigné sur tout support dont le contenu est accessible pour être consulté ultérieurement ;

(e) « convention en matière d'aliments » désigne un accord par écrit relatif au paiement d'aliments qui :

(i) a été dressé ou enregistré formellement en tant que acte authentique par une autorité compétente ; ou

(ii) a été authentifié ou enregistré par une autorité compétente, conclu avec elle ou déposé auprès d'elle,

et peut faire l'objet d'un contrôle et d'une modification par une autorité compétente ;

(f) une « personne vulnérable » désigne une personne qui, en raison d'une altération ou d'une insuffisance de ses capacités physiques ou mentales, n'est pas en état de pourvoir à ses besoins.

(b) "debtor" means an individual who owes or who is alleged to owe maintenance;

(c) "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The means of providing such assistance may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings;

(d) "agreement in writing" means an agreement recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference;

(e) "maintenance arrangement" means an agreement in writing relating to the payment of maintenance which –

(i) has been formally drawn up or registered as an authentic instrument by a competent authority; or

(ii) has been authenticated by, or concluded, registered or filed with a competent authority,

and may be the subject of review and modification by a competent authority;

(f) "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her physical or mental faculties, is not able to support him or herself.

CHAPITRE II – COOPÉRATION ADMINISTRATIVE

Article 4 Désignation des Autorités centrales

1 Chaque État contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.

2 Un État fédéral, un État dans lequel plusieurs systèmes de droit sont en vigueur ou un État ayant des unités territoriales autonomes, est libre de désigner plus d'une Autorité centrale et doit spécifier l'étendue territoriale ou personnelle de leurs fonctions. L'État qui fait usage de cette faculté désigne l'Autorité centrale à laquelle toute communication peut être adressée en vue de sa transmission à l'Autorité centrale compétente au sein de cet État.

3 Au moment du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration faite conformément à l'article 61, chaque État contractant informe le Bureau Permanent de la Conférence de La Haye de droit international privé de la désignation de l'Autorité centrale ou des Autorités centrales ainsi que de leurs coordonnées et, le cas échéant, de l'étendue de leurs fonctions visées au paragraphe 2. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

Article 5 Fonctions générales des Autorités centrales

Les Autorités centrales doivent :

(a) coopérer entre elles et promouvoir la coopération entre les autorités compétentes de leur État pour réaliser les objectifs de la Convention ;

CHAPTER II – ADMINISTRATIVE CO-OPERATION

Article 4 Designation of Central Authorities

1 A Contracting State shall designate a Central Authority to discharge the duties that are imposed by the Convention on such an authority.

2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

3 The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited or when a declaration is submitted in accordance with Article 61. Contracting States shall promptly inform the Permanent Bureau of any changes.

Article 5 General functions of Central Authorities

Central Authorities shall –

(a) co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention;

(b) rechercher, dans la mesure du possible, des solutions aux difficultés pouvant survenir dans le cadre de l'application de la Convention.

Article 6 Fonctions spécifiques des Autorités centrales

1 Les Autorités centrales fournissent une assistance relative aux demandes prévues au chapitre III, notamment en :

(a) transmettant et recevant ces demandes ;

(b) introduisant ou facilitant l'introduction de procédures relatives à ces demandes.

2 Relativement à ces demandes, elles prennent toutes les mesures appropriées pour :

(a) accorder ou faciliter l'octroi d'une assistance juridique, lorsque les circonstances l'exigent ;

(b) aider à localiser le débiteur ou le créancier ;

(c) faciliter la recherche des informations pertinentes relatives aux revenus et, si nécessaire, au patrimoine du débiteur ou du créancier, y compris la localisation des biens ;

(d) encourager le règlement amiable des différends afin d'obtenir un paiement volontaire des aliments, lorsque cela s'avère approprié par le recours à la médiation, à la conciliation ou à d'autres modes analogues ;

(e) faciliter l'exécution continue des décisions en matière d'aliments, y compris les arrérages ;

(f) faciliter le recouvrement et le virement rapide des paiements d'aliments ;

(g) faciliter l'obtention d'éléments de preuve documentaire ou autre ;

(h) fournir une assistance pour établir la filiation lorsque cela est nécessaire pour le recouvrement d'aliments ;

(i) introduire ou faciliter l'introduction de procédures afin d'obtenir toute mesure nécessaire et provisoire à caractère territorial et ayant pour but de garantir l'aboutissement d'une demande pendante d'aliments ;

(j) faciliter la signification et la notification des actes.

3 Les fonctions conférées à l'Autorité centrale en vertu du présent article peuvent être exercées, dans la mesure prévue par la loi de l'État concerné, par des organismes publics, ou d'autres organismes soumis au contrôle des autorités compétentes de cet État. La désignation de tout organisme public ou autre organisme, ainsi que ses coordonnées et l'étendue de ses fonctions sont communiquées par l'État contractant au Bureau Permanent de la Conférence de La Haye de droit international privé. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

4 Le présent article et l'article 7 ne peuvent en aucun cas être interprétés comme imposant à une Autorité centrale l'obligation d'exercer des attributions qui relèvent exclusivement des autorités judiciaires selon la loi de l'État requis.

(b) seek as far as possible solutions to difficulties which arise in the application of the Convention.

Article 6 Specific functions of Central Authorities

1 Central Authorities shall provide assistance in relation to applications under Chapter III. In particular they shall –

(a) transmit and receive such applications;

(b) initiate, or facilitate the institution of, proceedings in respect of such applications.

2 In relation to such applications they shall take all appropriate measures –

(a) where the circumstances require, to provide or facilitate the provision of legal assistance;

(b) to help locate the debtor or the creditor;

(c) to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;

(d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;

(e) to facilitate the ongoing enforcement of maintenance decisions including any arrears;

(f) to facilitate the collection and expeditious transfer of maintenance payments;

(g) to facilitate the obtaining of documentary or other evidence;

(h) to provide assistance in establishing parentage where necessary for the recovery of maintenance;

(i) to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;

(j) to facilitate service of documents.

3 The functions of the Central Authority under this Article may, to the extent permitted under the law of that State, be performed by public bodies, or other bodies subject to the supervision of the competent authorities of that State. The designation of any such public bodies or other bodies as well as their contact details and the extent of their functions shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. Contracting States shall promptly inform the Permanent Bureau of any changes.

4 Nothing in this Article or Article 7 shall be interpreted as imposing an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested State.

Article 7 Requêtes de mesures spécifiques

1 Une Autorité centrale peut, sur requête motivée, demander à une autre Autorité centrale de prendre les mesures spécifiques appropriées prévues à l'article 6(2)(b), (c), (g), (h), (i) et (j) lorsque aucune demande prévue à l'article 10 n'est pendante. L'Autorité centrale requise prend les mesures s'avérant appropriées si elle considère qu'elles sont nécessaires pour aider un demandeur potentiel à présenter une demande prévue à l'article 10 ou à déterminer si une telle demande doit être introduite.

2 Une Autorité centrale peut également prendre des mesures spécifiques, à la requête d'une autre Autorité centrale, dans une affaire de recouvrement d'aliments pendante dans l'État requérant et comportant un élément d'extranéité.

Article 8 Frais de l'Autorité centrale

1 Chaque Autorité centrale prend en charge ses propres frais découlant de l'application de la Convention.

2 Les Autorités centrales ne peuvent mettre aucuns frais à la charge du demandeur pour les services qu'elles fournissent en vertu de la Convention sauf s'il s'agit de frais exceptionnels découlant d'une requête de mesures spécifiques prévue à l'article 7.

3 L'Autorité centrale requise ne peut pas recouvrer les frais exceptionnels mentionnés au paragraphe 2 sans avoir obtenu l'accord préalable du demandeur sur la fourniture de ces services à un tel coût.

CHAPITRE III – DEMANDES PAR L'INTERMÉDIAIRE DES AUTORITÉS CENTRALES

Article 9 Demande par l'intermédiaire des Autorités centrales

Toute demande prévue au présent chapitre est transmise à l'Autorité centrale de l'État requis par l'intermédiaire de l'Autorité centrale de l'État contractant dans lequel réside le demandeur. Aux fins de la présente disposition, la résidence exclut la simple présence.

Article 10 Demandes disponibles

1 Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un créancier qui poursuit le recouvrement d'aliments en vertu de la présente Convention :

(a) la reconnaissance ou reconnaissance et exécution d'une décision ;

(b) l'exécution d'une décision rendue ou reconnue dans l'État requis ;

(c) l'obtention d'une décision dans l'État requis lorsqu'il n'existe aucune décision, y compris l'établissement de la filiation si nécessaire ;

(d) l'obtention d'une décision dans l'État requis lorsque la reconnaissance et l'exécution d'une décision n'est pas possible ou est refusée en raison de l'absence d'une base de reconnaissance et d'exécution prévue à l'article 20 ou sur le fondement de l'article 22(b) ou (e) ;

Article 7 Requests for specific measures

1 A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2)(b), (c), (g), (h), (i) and (j) when no application under Article 10 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 10 or in determining whether such an application should be initiated.

2 A Central Authority may also take specific measures on the request of another Central Authority in relation to a case having an international element concerning the recovery of maintenance pending in the requesting State.

Article 8 Central Authority costs

1 Each Central Authority shall bear its own costs in applying this Convention.

2 Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention save for exceptional costs arising from a request for a specific measure under Article 7.

3 The requested Central Authority may not recover the costs of the services referred to in paragraph 2, without the prior consent of the applicant to the provision of those services at such cost.

CHAPTER III – APPLICATIONS THROUGH CENTRAL AUTHORITIES

Article 9 Application through Central Authorities

An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State. For the purpose of this provision, residence excludes mere presence.

Article 10 Available applications

1 The following categories of application shall be available to a creditor in a requesting State seeking to recover maintenance under this Convention –

(a) recognition or recognition and enforcement of a decision;

(b) enforcement of a decision made or recognised in the requested State;

(c) establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage;

(d) establishment of a decision in the requested State where recognition and enforcement of a decision is not possible or is refused because of the lack of a basis for recognition and enforcement under Article 20 or on the grounds specified in Article 22(b) or (e);

(e) la modification d'une décision rendue dans l'État requis ;

(f) la modification d'une décision rendue dans un État autre que l'État requis.

2 Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un débiteur à l'encontre duquel existe une décision en matière d'aliments :

(a) la reconnaissance d'une décision ou une procédure équivalente ayant pour effet de suspendre ou de restreindre l'exécution d'une décision antérieure dans l'État requis ;

(b) la modification d'une décision rendue dans l'État requis ;

(c) la modification d'une décision rendue dans un État autre que l'État requis.

3 Sauf disposition contraire de la Convention, les demandes prévues aux paragraphes premier et 2 sont traitées conformément au droit de l'État requis et, dans le cas des demandes prévues aux paragraphes premier (c) à (f) et 2(b) et (c), sont soumises aux règles de compétence applicables dans cet État.

Article 11 Contenu de la demande

1 Toute demande prévue à l'article 10 comporte au moins :

(a) une déclaration relative à la nature de la demande ou des demandes ;

(b) le nom et les coordonnées du demandeur, y compris son adresse et sa date de naissance ;

(c) le nom du défendeur et, lorsqu'elles sont connues, son adresse et sa date de naissance ;

(d) le nom et la date de naissance des personnes pour lesquelles des aliments sont demandés ;

(e) les motifs sur lesquels la demande est fondée ;

(f) lorsque la demande est formée par le créancier, les informations relatives au lieu où les paiements doivent être effectués ou transmis électroniquement ;

(g) à l'exception de la demande prévue à l'article 10(1)(a) et (2)(a), toute information ou tout document exigé par une déclaration de l'État requis faite conformément à l'article 63 ;

(h) les noms et coordonnées de la personne ou du service de l'Autorité centrale de l'État requérant responsable du traitement de la demande.

2 Lorsque cela s'avère approprié, la demande comporte également les informations suivantes lorsqu'elles sont connues :

(a) la situation financière du créancier ;

(b) la situation financière du débiteur, y compris le nom et l'adresse de l'employeur du débiteur, ainsi que la localisation et la nature des biens du débiteur ;

(c) toute autre information permettant de localiser le défendeur.

(e) modification of a decision made in the requested State;

(f) modification of a decision made in a State other than the requested State.

2 The following categories of application shall be available to a debtor in a requesting State against whom there is an existing maintenance decision –

(a) recognition of a decision, or an equivalent procedure leading to the suspension, or limiting the enforcement, of a previous decision in the requested State;

(b) modification of a decision made in the requested State;

(c) modification of a decision made in a State other than the requested State.

3 Save as otherwise provided in this Convention, the applications in paragraphs 1 and 2 shall be determined under the law of the requested State, and applications in paragraphs 1(c) to (f) and 2(b) and (c), shall be subject to the jurisdictional rules applicable in the requested State.

Article 11 Application contents

1 All applications under Article 10 shall as a minimum include –

(a) a statement of the nature of the application or applications;

(b) the name and contact details, including the address, and date of birth of the applicant;

(c) the name and, if known, address and date of birth of the respondent;

(d) the name and the date of birth of any person for whom maintenance is sought;

(e) the grounds upon which the application is based;

(f) in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;

(g) save in an application made under Article 10(1)(a) and (2)(a), any information or document specified by declaration in accordance with Article 63 by the requested State;

(h) the name and contact details of the person or unit from the Central Authority of the requesting State responsible for processing the application.

2 As appropriate, and to the extent known, the application shall in addition in particular include –

(a) the financial circumstances of the creditor;

(b) the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor;

(c) any other information that may assist with the location of the respondent.

3 La demande est accompagnée de toute information ou tout document justificatif nécessaire y compris pour établir le droit du demandeur à l'assistance juridique gratuite. La demande prévue à l'article 10(1)(a) et (2)(a), n'est accompagnée que des documents énumérés à l'article 25.

4 Toute demande prévue à l'article 10 peut être présentée au moyen d'un formulaire pouvant être recommandé et publié par la Conférence de La Haye de droit international privé.

Article 12 Transmission, réception et traitement des demandes et des affaires par l'intermédiaire des Autorités centrales

1 L'Autorité centrale de l'État requérant assiste le demandeur afin que soient joints tous les documents et informations qui, à la connaissance de cette autorité, sont nécessaires à l'examen de la demande.

2 Après s'être assurée que la demande satisfait aux exigences de la Convention, l'Autorité centrale de l'État requérant la transmet, au nom du demandeur et avec son consentement, à l'Autorité centrale de l'État requis. La demande est accompagnée du formulaire de transmission prévu à l'annexe 1. Lorsque l'Autorité centrale de l'État requis le demande, l'Autorité centrale de l'État requérant fournit une copie complète certifiée conforme par l'autorité compétente de l'État d'origine des documents énumérés aux articles 16(3), 25(1)(a), (b) et (d), 25(3)(b) et 30(2).

3 Dans un délai de six semaines à compter de la date de réception de la demande, l'Autorité centrale requise en accuse réception au moyen du formulaire prévu à l'annexe 2, avise l'Autorité centrale de l'État requérant des premières démarches qui ont été ou qui seront entreprises pour traiter la demande et sollicite tout document ou toute information supplémentaire qu'elle estime nécessaire. Dans ce même délai de six semaines, l'Autorité centrale requise informe l'Autorité centrale requérante des nom et coordonnées de la personne ou du service chargé de répondre aux questions relatives à l'état d'avancement de la demande.

4 Dans un délai de trois mois suivant l'accusé de réception, l'Autorité centrale requise informe l'Autorité centrale requérante de l'état de la demande.

5 Les Autorités centrales requérante et requise s'informent mutuellement :

(a) de l'identité de la personne ou du service responsable d'une affaire particulière ;

(b) de l'état d'avancement de l'affaire et répondent en temps utile aux demandes de renseignements.

6 Les Autorités centrales traitent une affaire aussi rapidement qu'un examen adéquat de son contenu le permet.

7 Les Autorités centrales utilisent entre elles les moyens de communication les plus rapides et efficaces dont elles disposent.

8 Une Autorité centrale requise ne peut refuser de traiter une demande que s'il est manifeste que les conditions requises par la Convention ne sont pas remplies. Dans ce cas, cette Autorité centrale informe aussitôt l'Autorité centrale requérante des motifs de son refus.

3 The application shall be accompanied by any necessary supporting information or documentation including documentation concerning the entitlement of the applicant to free legal assistance. In the case of applications under Article 10(1)(a) and (2)(a), the application shall be accompanied only by the documents listed under Article 25.

4 An application under Article 10 may be made in the form as may be recommended and published by the Hague Conference on Private International Law.

Article 12 Transmission, receipt and processing of applications and cases through Central Authorities

1 The Central Authority of the requesting State shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application.

2 The Central Authority of the requesting State shall, when satisfied that the application complies with the requirements of the Convention, transmit the application on behalf of and with the consent of the applicant to the Central Authority of the requested State. The application shall be accompanied by the Transmittal Form set out in Annex 1. The Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 16(3), 25(1)(a), (b) and (d), 25(3) (b) and 30(2).

3 The requested Central Authority shall within six weeks from the date of receipt of the application, acknowledge receipt in the form set out in Annex 2, and inform the Central Authority of the requesting State what initial steps have been or will be taken to deal with the application and may request any further necessary documents and information. Within the same six-week period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.

4 Within three months after the acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.

5 Requesting and requested Central Authorities shall keep each other informed of –

(a) the person or unit responsible for a particular case;

(b) the progress of the case and provide timely responses to enquiries.

6 Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.

7 Central Authorities shall employ the most rapid and efficient means of communication at their disposal.

8 A requested Central Authority may refuse to process an application only if it is manifest that the requirements of the Convention are not fulfilled. In such case, that Central Authority shall promptly inform the requesting Central Authority of its reasons for refusal.

9 L'Autorité centrale requise ne peut rejeter une demande au seul motif que des documents ou des informations supplémentaires sont nécessaires. Toutefois, l'Autorité centrale requise peut demander à l'Autorité centrale requérante de fournir ces documents ou ces informations supplémentaires. À défaut de les fournir dans un délai de trois mois ou dans un délai plus long spécifié par l'Autorité centrale requise, cette dernière peut décider de cesser de traiter la demande. Dans ce cas, elle en informe l'Autorité centrale requérante.

Article 13 Moyens de communication

Toute demande présentée par l'intermédiaire des Autorités centrales des États contractants, conformément à ce chapitre, et tout document ou information qui y est annexé ou fourni par une Autorité centrale ne peuvent être contestés par le défendeur uniquement en raison du support ou des moyens de communication utilisés entre les Autorités centrales concernées.

Article 14 Accès effectif aux procédures

1 L'État requis assure aux demandeurs un accès effectif aux procédures, y compris dans le cadre des procédures d'exécution et d'appel, qui découlent des demandes prévues à ce chapitre.

2 Pour assurer un tel accès effectif, l'État requis fournit une assistance juridique gratuite conformément aux articles 14 à 17 à moins que le paragraphe 3 s'applique.

3 L'État requis n'est pas tenu de fournir une telle assistance juridique gratuite si et dans la mesure où les procédures de cet État permettent au demandeur d'agir sans avoir besoin d'une telle assistance et que l'Autorité centrale fournit gratuitement les services nécessaires.

4 Les conditions d'accès à l'assistance juridique gratuite ne doivent pas être plus restrictives que celles fixées dans les affaires internes équivalentes.

5 Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans les procédures introduites en vertu de la Convention.

Article 15 Assistance juridique gratuite pour les demandes d'aliments destinés aux enfants

1 L'État requis fournit une assistance juridique gratuite pour toutes les demandes relatives aux obligations alimentaires découlant d'une relation parent-enfant envers une personne âgée de moins de 21 ans présentées par un créancier en vertu de ce chapitre.

2 Nonobstant le paragraphe premier, l'État requis peut, en ce qui a trait aux demandes autres que celles prévues à l'article 10(1)(a) et (b) et aux affaires couvertes par l'article 20(4) refuser l'octroi d'une assistance juridique gratuite s'il considère que la demande, ou quelqu'appel que ce soit, est manifestement mal fondée.

9 The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to provide these additional documents or information. If the requesting Central Authority does not do so within three months or a longer period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application. In this case, it shall inform the requesting Central Authority of this decision.

Article 13 Means of communication

Any application made through Central Authorities of the Contracting States in accordance with this Chapter, and any document or information appended thereto or provided by a Central Authority may not be challenged by the respondent by reason only of the medium or means of communications employed between Central Authorities concerned.

Article 14 Effective access to procedures

1 The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under this Chapter.

2 To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14 to 17 unless paragraph 3 applies.

3 The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

4 Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

Article 15 Free legal assistance for child support applications

1 The requested State shall provide free legal assistance in respect of all applications by a creditor under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21.

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than under Article 10(1)(a) and (b) and the cases covered by Article 20(4) refuse free legal assistance, if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Article 16 Déclaration permettant un examen limité aux ressources de l'enfant

1 Nonobstant les dispositions du paragraphe premier de l'article 15, un État peut déclarer, conformément à l'article 63, qu'en ce qui a trait aux demandes autres que celles prévues à l'article 10(1)(a) et (b) et aux affaires couvertes par l'article 20(4), il fournira une assistance juridique gratuite sur le fondement d'un examen des ressources de l'enfant.

2 Un État, au moment où il fait une telle déclaration, fournit au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont l'examen des ressources de l'enfant sera effectué ainsi que les conditions financières qui doivent être remplies.

3 Une demande mentionnée au paragraphe premier, adressée à un État qui a fait une déclaration mentionnée à ce paragraphe, devra inclure une attestation formelle du demandeur indiquant que les ressources de l'enfant satisfont aux conditions mentionnées au paragraphe 2. L'État requis ne peut demander de preuves additionnelles des ressources de l'enfant que s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

4 Si l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne les demandes présentées en vertu de ce chapitre relatives aux obligations alimentaires découlant d'une relation parent-enfant envers un enfant est plus favorable que celle fournie conformément aux paragraphes premier à 3, l'assistance juridique la plus favorable doit être fournie.

Article 17 Demandes ne permettant pas de bénéficier de l'article 15 ou de l'article 16

Pour les demandes présentées en application de la qui ne relèvent pas de l'article 15 ou de l'article 16 :

(a) l'octroi d'une assistance juridique gratuite peut être subordonné à l'examen des ressources du demandeur ou à l'analyse de son bien-fondé ;

(b) un demandeur qui, dans l'État d'origine, a bénéficié d'une assistance juridique gratuite, bénéficie, dans toute procédure de reconnaissance ou d'exécution, d'une assistance juridique gratuite au moins équivalente à celle prévue par la loi de l'État requis dans les mêmes circonstances.

CHAPITRE IV – RESTRICTIONS À L'INTRODUCTION DE PROCÉDURES

Article 18 Limite aux procédures

1 Lorsqu'une décision a été rendue dans un État contractant où le créancier a sa résidence habituelle, des procédures pour modifier la décision ou obtenir une nouvelle décision ne peuvent être introduites par le débiteur dans un autre État contractant, tant que le créancier continue à résider habituellement dans l'État où la décision a été rendue.

2 Le paragraphe premier ne s'applique pas :

(a) lorsque, dans un litige portant sur une obligation alimentaire envers une personne autre qu'un enfant, la compétence de cet autre État contractant a fait l'objet d'un accord par écrit entre les parties ;

Article 16 Declaration to permit use of child-centred means test

1 Notwithstanding paragraph 1 of Article 15, a State may declare, in accordance with Article 63, that it will provide free legal assistance in respect of applications other than under Article 10(1)(a) and (b) and the cases covered by Article 20(4), subject to a test based on an assessment of the means of the child.

2 A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's means will be carried out, including the financial criteria which would need to be met to satisfy the test.

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a formal attestation by the applicant stating that the child's means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child's means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

4 If the most favourable legal assistance provided for by the law of the requested State in respect of applications under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a child is more favourable than that provided for under paragraphs 1 to 3, the most favourable legal assistance shall be provided.

Article 17 Applications not qualifying under Article 15 or Article 16

In the case of all applications under this Convention other than those under Article 15 or Article 16 –

(a) the provision of free legal assistance may be made subject to a means or a merits test;

(b) an applicant, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

CHAPTER IV – RESTRICTIONS ON BRINGING PROCEEDINGS

Article 18 Limit on proceedings

1 Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made.

2 Paragraph 1 shall not apply –

(a) where, except in disputes relating to maintenance obligations in respect of children, there is agreement in writing between the parties to the jurisdiction of that other Contracting State;

(b) lorsque le créancier se soumet à la compétence de cet autre État contractant, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en est offerte pour la première fois ;

(c) lorsque l'autorité compétente de l'État d'origine ne peut ou refuse d'exercer sa compétence pour modifier la décision ou rendre une nouvelle décision ; ou,

(d) lorsque la décision rendue dans l'État d'origine ne peut être reconnue ou déclarée exécutoire dans l'État contractant dans lequel des procédures tendant à la modification de la décision ou à l'obtention d'une nouvelle décision sont envisagées.

(b) where the creditor submits to the jurisdiction of that other Contracting State either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

(c) where the competent authority in the State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or make a new decision; or,

(d) where the decision made in the State of origin cannot be recognised or declared enforceable in the Contracting State where proceedings to modify the decision or make a new decision are contemplated.

CHAPITRE V – RECONNAISSANCE ET EXÉCUTION

Article 19 Champ d'application du chapitre

1 Ce chapitre s'applique aux décisions rendues par une autorité judiciaire ou administrative en matière d'obligations alimentaires. Par le mot « décision » on entend également les transactions ou accords passés devant de telles autorités ou homologués par elles. Une décision peut comprendre une indexation automatique et une obligation de payer des arrérages, des aliments rétroactivement ou des intérêts, de même que la fixation des frais ou dépenses.

2 Si la décision ne concerne pas seulement l'obligation alimentaire, l'effet de ce chapitre reste limité à cette dernière.

3 Aux fins du paragraphe premier, « autorité administrative » signifie un organisme public dont les décisions, en vertu de la loi de l'État où il est établi :

(a) peuvent faire l'objet d'un appel devant une autorité judiciaire ou d'un contrôle par une telle autorité ; et

(b) ont une force et un effet équivalant à une décision d'une autorité judiciaire dans la même matière.

4 Ce chapitre s'applique aussi aux conventions en matière d'aliments, conformément à l'article 30.

5 Les dispositions de ce chapitre s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à l'autorité compétente de l'État requis, conformément à l'article 37.

Article 20 Bases de reconnaissance et d'exécution

1 Une décision rendue dans un État contractant (« l'État d'origine ») est reconnue et exécutée dans les autres États contractants si :

(a) le défendeur résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

(b) le défendeur s'est soumis à la compétence de l'autorité, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en a été offerte pour la première fois ;

(c) le créancier résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

CHAPTER V – RECOGNITION AND ENFORCEMENT

Article 19 Scope of the Chapter

1 This Chapter shall apply to a decision rendered by a judicial or administrative authority in respect of a maintenance obligation. The term "decision" also includes a settlement or agreement concluded before or approved by such an authority. A decision may include automatic adjustment by indexation and a requirement to pay arrears, retroactive maintenance or interest and a determination of costs or expenses.

2 If a decision does not relate solely to a maintenance obligation, the effect of this Chapter is limited to the parts of the decision which concern maintenance obligations.

3 For the purpose of paragraph 1, "administrative authority" means a public body whose decisions, under the law of the State where it is established –

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect to a decision of a judicial authority on the same matter.

4 This Chapter also applies to maintenance arrangements in accordance with Article 30.

5 The provisions of this Chapter shall apply to a request for recognition and enforcement made directly to a competent authority of the State addressed in accordance with Article 37.

Article 20 Bases for recognition and enforcement

1 A decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if –

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

(b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

(c) the creditor was habitually resident in the State of origin at the time proceedings were instituted;

(d) l'enfant pour lequel des aliments ont été accordés résidait habituellement dans l'État d'origine lors de l'introduction de l'instance, à condition que le défendeur ait vécu avec l'enfant dans cet État ou qu'il ait résidé dans cet État et y ait fourni des aliments à l'enfant ;

(e) la compétence a fait l'objet d'un accord par écrit entre les parties sauf dans un litige portant sur une obligation alimentaire à l'égard d'un enfant ; ou

(f) la décision a été rendue par une autorité exerçant sa compétence sur une question relative à l'état des personnes ou à la responsabilité parentale, sauf si cette compétence est uniquement fondée sur la nationalité de l'une des parties.

2 Un État contractant peut faire une réserve portant sur le paragraphe premier (c), (e) ou (f), conformément à l'article 62.

3 Un État contractant ayant fait une réserve en application du paragraphe 2 doit reconnaître et exécuter une décision si sa législation, dans des circonstances de fait similaires, confère ou aurait conféré compétence à ses autorités pour rendre une telle décision.

4 Lorsque la reconnaissance d'une décision n'est pas possible dans un État contractant en raison d'une réserve faite en application du paragraphe 2, cet État prend toutes les mesures appropriées pour qu'une décision soit rendue en faveur du créancier si le débiteur réside habituellement dans cet État. La phrase précédente ne s'applique pas aux demandes directes de reconnaissance et d'exécution prévues à l'article 19(5) ni aux actions alimentaires mentionnées à l'article 2(1)(b).

5 Une décision en faveur d'un enfant de moins de 18 ans, qui ne peut être reconnue uniquement en raison d'une réserve faite portant sur l'article 20(1)(c), (e) ou (f), est acceptée comme établissant l'éligibilité de cet enfant à des aliments dans l'État requis.

6 Une décision n'est reconnue que si elle produit des effets dans l'État d'origine et n'est exécutée que si elle est exécutoire dans l'État d'origine.

Article 21 Divisibilité et reconnaissance ou exécution partielle

1 Si l'État requis ne peut reconnaître ou exécuter la décision pour le tout, il reconnaît ou exécute chaque partie divisible de la décision qui peut être reconnue ou déclarée exécutoire.

2 La reconnaissance ou l'exécution partielle d'une décision peut toujours être demandée.

Article 22 Motifs de refus de reconnaissance et d'exécution

La reconnaissance et l'exécution de la décision peuvent être refusées si :

(a) la reconnaissance et l'exécution de la décision sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) la décision résulte d'une fraude commise dans la procédure ;

(d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;

(e) except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or

(f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

2 A Contracting State may make a reservation, in accordance with Article 62, in respect of paragraph 1(c), (e) or (f).

3 A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

4 A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 19(5) or to claims for support referred to in Article 2(1)(b).

5 A decision in favour of a child under the age of 18 which cannot be recognised by virtue only of a reservation under Article 20(1)(c), (e) or (f) shall be accepted as establishing the eligibility of that child for maintenance in the State addressed.

6 A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

Article 21 Severability and partial recognition and enforcement

1 If the State addressed is unable to recognise or enforce the whole of the decision it shall recognise or enforce any severable part of the decision which can be so recognised or enforced.

2 Partial recognition or enforcement of a decision can always be applied for.

Article 22 Grounds for refusing recognition and enforcement

Recognition and enforcement of a decision may be refused if –

(a) recognition and enforcement of the decision is manifestly incompatible with the public policy ("*ordre public*") of the State addressed;

(b) the decision was obtained by fraud in connection with a matter of procedure;

(c) un litige entre les mêmes parties et ayant le même objet est pendant devant une autorité de l'État requis, première saisie ;

(d) la décision est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque, dans ce dernier cas, la dernière décision remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis ;

(e) dans les cas où le défendeur n'a ni comparu ni été représenté dans les procédures dans l'État d'origine :

(i) lorsque la loi de l'État d'origine prévoit un avis de la procédure, le défendeur n'a pas été dûment avisé de la procédure et n'a pas eu l'opportunité de se faire entendre ; ou

(ii) lorsque la loi de l'État d'origine ne prévoit pas un avis de la procédure, le défendeur n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester, ou de former un appel en fait et en droit ; ou

(f) la décision a été rendue en violation de l'article 18.

Article 23 Procédure pour une demande de reconnaissance et d'exécution

1 Sous réserve des dispositions de la Convention, les procédures de reconnaissance et d'exécution sont régies par la loi de l'État requis.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre la décision à l'autorité compétente qui doit sans retard déclarer la décision exécutoire ou procéder à son enregistrement aux fins d'exécution ; ou

(b) si elle est l'autorité compétente, prendre elle-même ces mesures.

3 Lorsque la demande est présentée directement à l'autorité compétente dans l'État requis en vertu de l'article 19(5), cette autorité déclare sans retard la décision exécutoire ou procède à son enregistrement aux fins d'exécution.

4 Une déclaration ou un enregistrement ne peut être refusé que pour les raisons énoncées à l'article 22(a). À ce stade, ni le demandeur ni le défendeur ne sont autorisés à présenter d'objection.

5 La déclaration ou l'enregistrement fait en application des paragraphes 2 et 3, ou leur refus, est notifié promptement au demandeur et au défendeur qui peuvent le contester ou faire appel en fait et en droit.

6 La contestation ou l'appel est formé dans les 30 jours qui suivent la notification en vertu du paragraphe 5. Si l'auteur de la contestation ou de l'appel ne réside pas dans l'État contractant où la déclaration ou l'enregistrement a été fait ou refusé, la contestation ou l'appel est formé dans les 60 jours qui suivent la notification.

(c) proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;

(d) the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;

(e) in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin –

(i) when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard, or

(ii) when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or

(f) the decision was made in violation of Article 18.

Article 23 Procedure on an application for recognition and enforcement

1 Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or

(b) if it is the competent authority take such steps itself.

3 Where the request is made directly to a competent authority in the State addressed in accordance with Article 19(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

4 A declaration or registration may be refused only for the reasons specified in Article 22(a). At this stage neither the applicant nor the respondent is entitled to make any submissions.

5 The applicant and the respondent shall be promptly notified of the declaration or registration, or the refusal thereof, made under paragraphs 2 and 3 and may bring a challenge or appeal on fact and on a point of law.

6 A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

7 La contestation ou l'appel ne peut être fondé que sur :

(a) les motifs de refus de reconnaissance et d'exécution prévus à l'article 22 ;

(b) les bases de reconnaissance et d'exécution prévues à l'article 20 ;

(c) l'authenticité, la véracité ou l'intégrité d'un document transmis conformément à l'article 25(1)(a), (b) ou (d) ou 25(3)(b).

8 La contestation ou l'appel formé par le défendeur peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution concernent les paiements échus.

9 La décision sur la contestation ou l'appel est promptement notifiée au demandeur et au défendeur.

10 Tout appel, s'il est permis par la loi de l'État requis, ne doit pas avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

11 L'autorité compétente doit agir de façon expéditive pour rendre une décision en matière de reconnaissance et d'exécution.

Article 24 Procédure alternative pour une demande de reconnaissance et d'exécution

1 Nonobstant l'article 23(2) à (11), un État peut déclarer, conformément à l'article 63, qu'il appliquera la procédure de reconnaissance et d'exécution prévue par cet article.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre la décision à l'autorité compétente qui se prononce sur la demande de reconnaissance et d'exécution ; ou

(b) si elle est l'autorité compétente, prendre elle-même ces mesures.

3 Une décision de reconnaissance et d'exécution est rendue par l'autorité compétente après que le défendeur ait été dûment et promptement notifié de la procédure et que chacune des parties ait eu une opportunité adéquate d'être entendue.

4 L'autorité compétente peut contrôler d'office les bases de reconnaissance et d'exécution spécifiées à l'article 22(a), (c) et (d). Elle peut contrôler tous les motifs prévus aux articles 20, 22 et 23(7)(c) s'ils sont soulevés par le défendeur ou si un doute relatif à ces motifs existe au vu des documents soumis conformément à l'article 25.

5 Un refus de reconnaissance et d'exécution peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution ne concernent que les paiements échus.

7 A challenge or appeal may be founded only on the following –

(a) the grounds for refusing recognition and enforcement set out in Article 22;

(b) the bases for recognition and enforcement under Article 20;

(c) the authenticity or integrity of any document transmitted in accordance with Article 25(1)(a), (b) or (d) or 25(3)(b).

8 A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

9 The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

10 A further appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

11 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 24 Alternative procedure on an application for recognition and enforcement

1 Notwithstanding Article 23(2) to (11), a State may declare in accordance with Article 63 that it will apply the procedure for recognition and enforcement set out in this Article.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall decide on the request for recognition and enforcement; or

(b) if it is the competent authority take such a decision itself.

3 A decision on recognition and enforcement shall be given by the competent authority after the respondent has been duly and promptly notified of the proceedings and both parties have been given an adequate opportunity to be heard.

4 The competent authority may review the grounds for refusing recognition and enforcement set out in Article 22(a), (c) and (d) of its own motion. It may review any grounds listed in Articles 20, 22 and 23(7)(c) if raised by the respondent or if concerns relating to those grounds arise from the face of the documents submitted in accordance with Article 25.

5 A refusal of recognition and enforcement may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

6 Tout appel, s'il est permis par la loi de l'État requis, ne doit pas avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

7 L'autorité compétente doit agir de façon expéditive pour rendre une décision en matière de reconnaissance et d'exécution.

Article 25 Documents

1 La demande de reconnaissance et d'exécution en application de l'article 23 est accompagnée des documents suivants :

(a) le texte complet de la décision ;

(b) un document établissant que la décision est exécutoire dans l'État d'origine et, si la décision émane d'une autorité administrative, un document établissant que les conditions prévues à l'article 19(3) sont remplies à moins que cet État ait précisé conformément à l'article 57 que les décisions de ses autorités administratives remplissent dans tous les cas ces conditions ;

(c) si le défendeur n'a ni comparu ni été représenté dans les procédures dans l'État d'origine, un document ou des documents attestant, selon le cas, que le défendeur a été dûment avisé de la procédure et a eu la possibilité de se faire entendre ou qu'il a été dûment avisé de la décision et a eu la possibilité de la contester ou d'en appeler en fait et en droit ;

(d) si nécessaire, un document établissant le montant des arrérages et indiquant la date à laquelle le calcul a été effectué ;

(e) si nécessaire, dans le cas d'une décision prévoyant une indexation automatique, un document contenant les informations qui sont utiles à la réalisation des calculs appropriés ;

(f) si nécessaire, un document établissant dans quelle mesure le demandeur a bénéficié de l'assistance juridique gratuite dans l'État d'origine.

2 Dans le cas d'une contestation ou d'un appel fondé sur un motif visé à l'article 23(7)(c) ou à la requête de l'autorité compétente dans l'État requis, une copie complète du document en question, certifiée conforme par l'autorité compétente de l'État d'origine, est promptement fournie :

(a) par l'Autorité centrale de l'État requérant, lorsque la demande a été présentée conformément au chapitre III ;

(b) par le demandeur, lorsque la demande a été présentée directement à l'autorité compétente de l'État requis.

3 Un État contractant peut préciser conformément à l'article 57 :

(a) qu'un texte complet de la décision certifié conforme par l'autorité compétente de l'État d'origine doit accompagner la demande ;

(b) les circonstances dans lesquelles il accepte, au lieu du texte complet de la décision, un résumé ou un extrait de la décision établi par l'autorité compétente de l'État d'origine qui peut être présenté au moyen du formulaire recommandé

6 Any appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

7 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 25 Documents

1 An application for recognition and enforcement under Article 23 shall be accompanied by the following –

(a) a complete text of the decision;

(b) a document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements;

(c) if the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law;

(d) where necessary, a document showing the amount of any arrears and the date such amount was calculated;

(e) where necessary, in the case of a decision providing for automatic adjustment by indexation, a document providing the information necessary to make the appropriate calculations;

(f) where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin.

2 Upon a challenge or appeal under Article 23(7)(c) or upon request by the competent authority in the State addressed, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly –

(a) by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;

(b) by the applicant, where the request has been made directly to a competent authority of the State addressed.

3 A Contracting State may specify in accordance with Article 57 –

(a) that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application;

(b) circumstances in which it will accept, in lieu of a complete text of the decision, an abstract or extract of the decision drawn up by the competent authority of the State of origin, which may be made in the form recommended

et publié par la Conférence de La Haye de droit international privé ; ou

(c) qu'il n'exige pas de document établissant que les conditions prévues à l'article 19(3) sont remplies.

Article 26 Procédure relative à une demande de reconnaissance

Ce chapitre s'applique *mutatis mutandis* à une demande de reconnaissance d'une décision, à l'exception de l'exigence du caractère exécutoire qui est remplacée par l'exigence selon laquelle la décision produit ses effets dans l'État d'origine.

Article 27 Constatations de fait

L'autorité compétente de l'État requis est liée par les constatations de fait sur lesquelles l'autorité de l'État d'origine a fondé sa compétence.

Article 28 Interdiction de la révision au fond

L'autorité compétente de l'État requis ne procède à aucune révision au fond de la décision.

Article 29 Présence physique de l'enfant ou du demandeur non requise

La présence physique de l'enfant ou du demandeur n'est pas exigée lors de procédures introduites en vertu du présent chapitre dans l'État requis.

Article 30 Conventions en matière d'aliments

1 Une convention en matière d'aliments conclue dans un État contractant doit pouvoir être reconnue et exécutée comme une décision en application de ce chapitre si elle est exécutoire comme une décision dans l'État d'origine.

2 Aux fins de l'article 10(1)(a) et (b) et (2)(a), le terme « décision » inclut une convention en matière d'aliments.

3 La demande de reconnaissance et d'exécution d'une convention en matière d'aliments est accompagnée des documents suivants :

(a) le texte complet de la convention en matière d'aliments ;

(b) un document établissant que la convention en matière d'aliments est exécutoire comme une décision dans l'État d'origine.

4 La reconnaissance et l'exécution d'une convention en matière d'aliments peuvent être refusées si :

(a) la reconnaissance et l'exécution sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) la convention en matière d'aliments a été obtenue par fraude ou a fait l'objet de falsification ;

(c) la convention en matière d'aliments est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque, dans ce dernier cas, elle remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis.

and published by the Hague Conference on Private International Law; or

(c) that it does not require a document stating that the requirements of Article 19(3) are met.

Article 26 Procedure on an application for recognition

This Chapter shall apply *mutatis mutandis* to an application for recognition of a decision, save that the requirement of enforceability is replaced by the requirement that the decision has effect in the State of origin.

Article 27 Findings of fact

Any competent authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.

Article 28 No review of the merits

There shall be no review by any competent authority of the State addressed of the merits of a decision.

Article 29 Physical presence of the child or the applicant not required

The physical presence of the child or the applicant shall not be required in any proceedings in the State addressed under this Chapter.

Article 30 Maintenance arrangements

1 A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.

2 For the purpose of Article 10(1)(a) and (b) and (2)(a) the term "decision" includes a maintenance arrangement.

3 An application for recognition and enforcement of a maintenance arrangement shall be accompanied by the following –

(a) a complete text of the maintenance arrangement;

(b) a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin.

4 Recognition and enforcement of a maintenance arrangement may be refused if –

(a) the recognition and enforcement is manifestly incompatible with the public policy of the State addressed;

(b) the maintenance arrangement was obtained by fraud or falsification;

(c) the maintenance arrangement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

5 Les dispositions de ce chapitre, à l'exception des articles 20, 22, 23(7) et 25(1) et (3), s'appliquent *mutatis mutandis* à la reconnaissance et à l'exécution d'une convention en matière d'aliments, toutefois :

(a) une déclaration ou un enregistrement fait conformément à l'article 23(4) ne peut être refusé que pour les raisons énoncées au paragraphe 3(a) ; et

(b) une contestation ou un appel en vertu de l'article 23(6) ne peut être fondé que sur :

(i) les motifs de refus de reconnaissance et d'exécution prévus au paragraphe 3 ;

(ii) l'authenticité ou l'intégrité d'un document transmis conformément au paragraphe 2 ;

(c) en ce qui concerne la procédure prévue à l'article 24(4), l'autorité compétente peut contrôler d'office les motifs de refus de reconnaissance et d'exécution spécifiés au paragraphe 4(a) de cet article. Elle peut contrôler l'ensemble des bases de reconnaissance et d'exécution prévues au paragraphe 4, ainsi que l'authenticité ou l'intégrité de tout document transmis conformément au paragraphe 3 si cela est soulevé par le défendeur ou si un doute relatif à ces motifs existe au vu de ces documents.

6 La procédure de reconnaissance et d'exécution d'une convention en matière d'aliments est suspendue si une contestation portant sur la convention est pendante devant une autorité compétente d'un État contractant.

7 Un État peut déclarer que les demandes de reconnaissance et d'exécution des conventions en matière d'aliments ne peuvent être présentées que par l'intermédiaire d'une Autorité centrale.

8 Un État contractant pourra, conformément à l'article 62, se réserver le droit de ne pas reconnaître et exécuter les conventions en matière d'aliments.

Article 31 Décisions résultant de l'effet combiné d'ordonnances provisoires et de confirmation

Lorsqu'une décision résulte de l'effet combiné d'une ordonnance provisoire rendue dans un État et d'une ordonnance rendue par l'autorité d'un autre État qui confirme cette ordonnance provisoire (« État de confirmation ») :

(a) chacun de ces États est considéré, aux fins du présent chapitre, comme étant un État d'origine ;

(b) les conditions prévues à l'article 22(e) sont remplies si le défendeur a été dûment avisé de la procédure dans l'État de confirmation et a eu la possibilité de contester la confirmation de l'ordonnance provisoire ; et

(c) la condition prévue à l'article 20(6) relative au caractère exécutoire de la décision dans l'État d'origine est remplie si la décision est exécutoire dans l'État de confirmation ;

(d) l'article 18 ne fait pas obstacle à ce qu'une procédure en vue de la modification d'une décision soit initiée dans l'un ou l'autre des États.

5 The provisions of this Chapter, with the exception of Articles 20, 22, 23(7) and 25(1) and (3), shall apply *mutatis mutandis* to the recognition and enforcement of a maintenance arrangement save that –

(a) a declaration or registration in accordance with Article 23(4) may be refused only for the reasons specified in paragraph 3(a); and

(b) a challenge or appeal as referred to in Article 23(6) may be founded only on the following –

(i) the grounds for refusing recognition and enforcement set out in paragraph 3;

(ii) the authenticity or integrity of any document transmitted in accordance with paragraph 2;

(c) as regards the procedure under Article 24(4), the competent authority may review of its own motion the grounds for refusing recognition and enforcement set out in paragraph 4(a) of this Article. It may review all grounds listed in paragraph 4 of this Article and the authenticity or integrity of any document transmitted in accordance with paragraph 3 if raised by the respondent or if concerns relating to those grounds arise from the face of those documents.

6 Proceedings for recognition and enforcement of a maintenance arrangement shall be suspended if a challenge concerning the arrangement is pending before a competent authority of a Contracting State.

7 A State may declare that applications for recognition and enforcement of a maintenance arrangement shall only be made through Central Authorities.

8 A Contracting State may, in accordance with Article 62, reserve the right not to recognise and enforce a maintenance arrangement.

Article 31 Decisions produced by the combined effect of provisional and confirmation orders

Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order –

(a) each of those States shall be deemed for the purposes of this Chapter to be a State of origin;

(b) the requirements of Article 22(e) shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order; and

(c) the requirement of Article 20(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State;

(d) Article 18 shall not prevent proceedings for the modification of the decision being commenced in either State.

Article 32 Exécution en vertu du droit interne

1 Sous réserve des dispositions du présent chapitre, les mesures d'exécution ont lieu conformément à la loi de l'État requis.

2 L'exécution est rapide.

3 En ce qui concerne les demandes présentées par l'intermédiaire des Autorités centrales, lorsqu'une décision a été déclarée exécutoire ou enregistrée pour exécution en application du chapitre V, il est procédé à l'exécution sans qu'il soit besoin d'aucune autre action du demandeur.

4 Il est donné effet à toute règle relative à la durée de l'obligation alimentaire applicable dans l'État d'origine de la décision.

5 Le délai de prescription relatif à l'exécution des arrérages est déterminé par celle des lois de l'État d'origine de la décision ou de l'État requis qui prévoit le délai plus long.

Article 33 Non-discrimination

Dans les affaires relevant de la Convention, l'État requis prévoit des mesures d'exécution au moins équivalentes à celles qui sont applicables aux affaires internes.

Article 34 Mesures d'exécution

1 Les États contractants doivent rendre disponibles dans leur droit interne des mesures efficaces afin d'exécuter les décisions en application de la Convention.

2 De telles mesures peuvent comporter :

(a) la saisie des salaires ;

(b) les saisies-arrêts sur comptes bancaires et autres sources ;

(c) les déductions sur les prestations de sécurité sociale ;

(d) le gage sur les biens ou leur vente forcée ;

(e) la saisie des remboursements d'impôt ;

(f) la retenue ou saisie des pensions de retraite ;

(g) le signalement aux organismes de crédit ;

(h) le refus de délivrance, la suspension ou le retrait de divers permis (le permis de conduire par exemple) ;

(i) le recours à la médiation, à la conciliation et à d'autres modes alternatifs de résolution des différends afin de favoriser une exécution volontaire.

Article 35 Transferts de fonds

1 Les États contractants sont encouragés à promouvoir, y compris au moyen d'accords internationaux, l'utilisation des moyens disponibles les moins coûteux et les plus efficaces pour effectuer les transferts de fonds destinés à être versés à titre d'aliments.

2 Un État contractant dont la loi impose des restrictions aux transferts de fonds accorde la priorité la plus élevée aux transferts de fonds destinés à être versés en vertu de la présente Convention.

Article 32 Enforcement under internal law

1 Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed.

2 Enforcement shall be prompt.

3 In the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement under Chapter V, enforcement shall proceed without the need for further action by the applicant.

4 Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation.

5 Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.

Article 33 Non-discrimination

The State addressed shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases.

Article 34 Enforcement measures

1 Contracting States shall make available in internal law effective measures to enforce decisions under this Convention.

2 Such measures may include –

(a) wage withholding;

(b) garnishment from bank accounts and other sources;

(c) deductions from social security payments;

(d) lien on or forced sale of property;

(e) tax refund withholding;

(f) withholding or attachment of pension benefits;

(g) credit bureau reporting;

(h) denial, suspension or revocation of various licenses (for example, driving licenses);

(i) the use of mediation, conciliation or similar processes to bring about voluntary compliance.

Article 35 Transfer of funds

1 Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance.

2 A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable under this Convention.

CHAPITRE VII – ORGANISMES PUBLICS

Article 36 Organismes publics en qualité de demandeur

1 Aux fins d'une demande de reconnaissance et d'exécution en application de l'article 10(1)(a) et (b) et des affaires couvertes par l'article 20(4), le terme « créancier » inclut un organisme public agissant à la place d'une personne à laquelle des aliments sont dus ou auquel est dû le remboursement de prestations fournies à titre d'aliments.

2 Le droit d'un organisme public d'agir à la place d'une personne à laquelle des aliments sont dus ou de demander le remboursement de la prestation fournie au créancier à titre d'aliments est soumis à la loi qui régit l'organisme.

3 Un organisme public peut demander la reconnaissance ou l'exécution :

(a) d'une décision rendue contre un débiteur à la demande d'un organisme public qui poursuit le paiement de prestations fournies à titre d'aliments ;

(b) d'une décision rendue entre un créancier et un débiteur, à concurrence des prestations fournies au créancier à titre d'aliments.

4 L'organisme public qui invoque la reconnaissance ou qui sollicite l'exécution d'une décision produit, sur demande, tout document de nature à établir son droit en application du paragraphe 2 et le paiement des prestations au créancier.

CHAPTER VII – PUBLIC BODIES

Article 36 Public bodies as applicants

1 For the purposes of applications for recognition and enforcement under Article 10(1)(a) and (b) and cases covered by Article 20(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in lieu of maintenance.

2 The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

3 A public body may seek recognition or claim enforcement of –

(a) a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;

(b) a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.

4 The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.

CHAPITRE VIII – DISPOSITIONS GÉNÉRALES

Article 37 Demandes présentées directement aux autorités compétentes

1 La Convention n'exclut pas la possibilité de recourir aux procédures disponibles en vertu du droit interne d'un État contractant autorisant une personne (le demandeur) à saisir directement une autorité compétente de cet État dans une matière régie par la Convention, y compris, sous réserve de l'article 18, en vue de l'obtention ou de la modification d'une décision en matière d'aliments.

2 Les articles 14(5) et 17(b) et les dispositions des chapitres V, VI, VII et de ce chapitre, à l'exception des articles 40(2), 42, 43(3), 44(3), 45 et 55 s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à une autorité compétente d'un État contractant.

3 Aux fins du paragraphe 2, l'article 2(1)(a) s'applique à une décision octroyant des aliments à une personne vulnérable dont l'âge est supérieur à l'âge précisé dans cet alinéa lorsqu'une telle décision a été rendue avant que la personne n'ait atteint cet âge et a accordé des aliments au-delà de cet âge en raison de l'altération de ses capacités.

Article 38 Protection des données à caractère personnel

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises.

CHAPTER VIII – GENERAL PROVISIONS

Article 37 Direct requests to competent authorities

1 The Convention shall not exclude the possibility of recourse to such procedures as may be available under the internal law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by the Convention including, subject to Article 18, for the purpose of having a maintenance decision established or modified.

2 Articles 14(5) and 17(b) and the provisions of Chapters V, VI, VII and this Chapter with the exception of Articles 40(2), 42, 43(3), 44(3), 45 and 55 shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.

3 For the purpose of paragraph 2, Article 2(1)(a) shall apply to a decision granting maintenance to a vulnerable person over the age specified in that sub-paragraph where such decision was rendered before the person reached that age and provided for maintenance beyond that age by reason of the impairment.

Article 38 Protection of personal data

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted.

Article 39 Confidentialité

Toute autorité traitant de renseignements en assure la confidentialité conformément à la loi de son État.

Article 40 Non-divulgation de renseignements

1 Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle estime que la santé, la sécurité ou la liberté d'une personne pourrait en être compromise.

2 Une décision en ce sens prise par une Autorité centrale doit être prise en compte par une autre Autorité centrale, en particulier dans les cas de violence familiale.

3 Le présent article ne fait pas obstacle au recueil et à la transmission de renseignements entre autorités, dans la mesure nécessaire à l'accomplissement des obligations découlant de la Convention.

Article 41 Dispense de légalisation

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention.

Article 42 Procuration

L'Autorité centrale de l'État requis ne peut exiger une procuration du demandeur que si elle agit en son nom dans des procédures judiciaires ou dans des procédures engagées devant d'autres autorités ou afin de désigner un représentant à ces fins.

Article 43 Recouvrement des frais

1 Le recouvrement de tous frais encourus pour l'application de cette Convention n'a pas de priorité sur le recouvrement des aliments.

2 Un État peut recouvrer les frais à l'encontre d'une partie perdante.

3 Pour les besoins d'une demande en vertu de l'article 10(1)(b) afin de recouvrer les frais d'une partie qui succombe en vertu du paragraphe 2, le terme « créancier » dans l'article 10(1) inclut un État.

4 Cet article ne déroge pas à l'article 8.

Article 44 Exigences linguistiques

1 Toute demande et tout document s'y rattachant sont rédigés dans la langue originale et accompagnés d'une traduction dans une langue officielle de l'État requis ou dans toute autre langue que l'État requis aura indiqué pouvoir accepter, par une déclaration faite conformément à l'article 63, sauf dispense de traduction de l'autorité compétente de cet État.

2 Tout État contractant qui a plusieurs langues officielles et qui ne peut, pour des raisons de droit interne, accepter pour l'ensemble de son territoire les documents dans l'une de ces langues, doit faire connaître, par une déclaration faite conformément à l'article 63, la langue dans laquelle ceux-ci doivent être rédigés ou traduits en vue de leur présentation dans les parties de son territoire qu'il a déterminées.

Article 39 Confidentiality

Any authority processing information shall ensure its confidentiality in accordance with the law of its State.

Article 40 Non-disclosure of information

1 An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.

2 A determination to this effect made by one Central Authority shall be taken into account by another Central Authority, in particular in cases of family violence.

3 Nothing in this Article shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under the Convention.

Article 41 No legalisation

No legalisation or similar formality may be required in the context of this Convention.

Article 42 Power of attorney

The Central Authority of the requested State may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.

Article 43 Recovery of costs

1 Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

2 A State may recover costs from an unsuccessful party.

3 For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with paragraph 2, the term "creditor" in Article 10(1) shall include a State.

4 This Article shall be without prejudice to Article 8.

Article 44 Language requirements

1 Any application and related documents shall be in the original language, and shall be accompanied by a translation into an official language of the requested State or in another language which the requested State has indicated, by way of declaration in accordance with Article 63, it will accept, unless the competent authority of that State dispenses with translation.

2 A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents in one of those languages shall by declaration in accordance with Article 63 specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.

3 Sauf si les Autorités centrales en ont convenu autrement, toute autre communication entre elles est adressée dans une langue officielle de l'État requis ou en français ou en anglais. Toutefois, un État contractant peut, en faisant la réserve prévue à l'article 62, s'opposer à l'utilisation soit du français, soit de l'anglais.

Article 45 Moyens et coûts de traduction

1 Dans le cas de demandes prévues au chapitre III, les Autorités centrales peuvent convenir, dans une affaire particulière ou de façon générale, que la traduction dans la langue officielle de l'État requis sera faite dans l'État requis à partir de la langue originale ou de toute autre langue convenue. S'il n'y a pas d'accord et si l'Autorité centrale requérante ne peut remplir les exigences de l'article 44(1) et (2), la demande et les documents s'y rattachant peuvent être transmis accompagnés d'une traduction en français ou anglais pour traduction ultérieure dans une langue officielle de l'État requis.

2 Les frais de traduction découlant de l'application du paragraphe premier sont à la charge de l'État requérant, sauf accord contraire des Autorités centrales des États concernés.

3 Nonobstant l'article 8, l'Autorité centrale requérante peut mettre à la charge du demandeur les frais de traduction d'une demande et des documents s'y rattachant, sauf si ces coûts peuvent être couverts par son système d'assistance juridique.

Article 46 Systèmes juridiques non unifiés – interprétation

1 Au regard d'un État dans lequel deux ou plusieurs systèmes de droit ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi ou à la procédure d'un État vise, le cas échéant, la loi ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence à une décision obtenue, reconnue et / ou exécutée, et modifiée dans cet État vise, le cas échéant, une décision obtenue, reconnue et / ou exécutée, et modifiée dans l'unité territoriale considérée ;

(c) toute référence à une autorité judiciaire ou administrative de cet État vise, le cas échéant, une autorité judiciaire ou administrative de l'unité territoriale considérée ;

(d) toute référence aux autorités compétentes, organismes publics ou autres organismes de cet État à l'exception des Autorités centrales vise, le cas échéant, les autorités compétentes, organismes publics ou autres organismes habilités à agir dans l'unité territoriale considérée ;

(e) toute référence à la résidence ou la résidence habituelle dans cet État vise, le cas échéant, la résidence ou la résidence habituelle dans l'unité territoriale considérée ;

(f) toute référence à la localisation des biens dans cet État vise, le cas échéant, la localisation des biens dans l'unité territoriale considérée ;

3 Unless otherwise agreed by the Central Authorities, any other communications between such Authorities shall be in an official language of the requested State or in either English or French. However, a Contracting State may, by making a reservation in accordance with Article 62, object to the use of either French or English.

Article 45 Means and costs of translation

1 In the case of applications under Chapter III, the Central Authorities may agree in an individual case or generally that the translation into an official language of the requested State may be made in the requested State from the original language or from any other agreed language. If no agreement can be reached and it is not possible for the requesting Central Authority to comply with the requirements of Article 44(1) and (2), then the application and related documents may be transmitted with translation into French or English for further translation into an official language of the requested State.

2 The cost of translation arising from the application of paragraph 1 shall be borne by the requesting State unless otherwise agreed by Central Authorities of the States concerned.

3 Notwithstanding Article 8, the requesting Central Authority may charge an applicant for the costs of translation of an application and related documents, except in so far as those costs may be covered by its system of legal assistance.

Article 46 Non-unified legal systems – interpretation

1 In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

(a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to a decision established, recognised and / or enforced, and modified in that State shall be construed as referring, where appropriate, to a decision established, recognised and / or enforced, and modified in a territorial unit;

(c) any reference to a judicial or administrative authority in that State shall be construed as referring, where appropriate, to a judicial or administrative authority in the relevant territorial unit;

(d) any reference to competent authorities, public bodies, and other bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;

(e) any reference to residence or habitual residence in that State shall be construed as referring, where appropriate, to residence or habitual residence in a territorial unit;

(f) any reference to location of assets in that State shall be construed as referring, where appropriate, to the location of assets in the relevant territorial unit;

(g) toute référence à une entente de réciprocité en vigueur dans un État vise, le cas échéant, une entente de réciprocité en vigueur dans l'unité territoriale considérée ;

(h) toute référence à l'assistance juridique gratuite dans cet État vise, le cas échéant, l'assistance juridique gratuite dans l'unité territoriale considérée ;

(i) toute référence à une convention en matière d'aliments conclue dans un État vise, le cas échéant, une convention en matière d'aliments conclue dans l'unité territoriale considérée ;

(j) toute référence au recouvrement des frais par un État vise, le cas échéant, le recouvrement des frais par l'unité territoriale considérée.

2 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 47 Systèmes juridiques non unifiés – règles matérielles

1 Nonobstant l'article 46, un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

2 Une autorité compétente dans une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu de reconnaître ou d'exécuter une décision d'un autre État contractant au seul motif que la décision a été reconnue ou exécutée dans une autre unité territoriale du même État contractant selon la présente Convention.

3 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 48 Coordination avec les Conventions de La Haye antérieures en matière d'obligations alimentaires

Dans les rapports entre les États contractants, et sous réserve de l'application de l'article 56(2), la présente Convention remplace la *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires* et la *Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants* dans la mesure où leur champ d'application entre lesdits États coïncide avec celui de la présente Convention.

Article 49 Coordination avec la Convention de New York de 1956

Dans les rapports entre les États contractants, la présente Convention remplace la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies, dans la mesure où son champ d'application entre lesdits États correspond au champ d'application de la présente Convention.

(g) any reference to a reciprocity arrangement in force in a State shall be construed as referring, where appropriate, to a reciprocity arrangement in force in the relevant territorial unit;

(h) any reference to free legal assistance in that State shall be construed as referring, where appropriate, to free legal assistance in the relevant territorial unit;

(i) any reference to a maintenance arrangement made in a State shall be construed as referring, where appropriate, to a maintenance arrangement made in the relevant territorial unit;

(j) any reference to recovery of costs by a State shall be construed as referring, where appropriate, to the recovery of costs by the relevant territorial unit.

2 This Article shall not apply to a Regional Economic Integration Organisation.

Article 47 Non-unified legal systems – substantive rules

1 Notwithstanding Article 46, a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

2 A competent authority in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

3 This Article shall not apply to a Regional Economic Integration Organisation.

Article 48 Co-ordination with prior Hague Maintenance Conventions

In relations between the Contracting States, this Convention replaces, subject to Article 56(2), the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.

Article 49 Co-ordination with the 1956 New York Convention

In relations between the Contracting States, this Convention replaces the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention.

Article 50 Relations avec les Conventions de La Haye antérieures relatives à la notification d'actes et à l'obtention de preuves

La présente Convention ne déroge pas à la *Convention de La Haye du premier mars 1954 relative à la procédure civile*, ni à la *Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale*, ni à la *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale*.

Article 50 Relationship with prior Hague Conventions on service of documents and taking of evidence

This Convention does not affect the Hague Convention of 1 March 1954 on civil procedure, the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

Article 51 Coordination avec les instruments et accords complémentaires

1 La présente Convention ne déroge pas aux instruments internationaux conclus avant la présente Convention auxquels des États contractants sont Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention.

2 Tout État contractant peut conclure avec un ou plusieurs États contractants des accords qui contiennent des dispositions sur les matières réglées par la Convention afin d'améliorer l'application de la Convention entre eux à condition que de tels accords soient conformes à l'objet et au but de la Convention et n'affectent pas, dans les rapports de ces États avec d'autres États contractants, l'application des dispositions de la Convention. Les États qui auront conclu de tels accords en transmettront une copie au dépositaire de la Convention.

3 Les paragraphes premier et 2 s'appliquent également aux ententes de réciprocité et aux lois uniformes reposant sur l'existence entre les États concernés de liens spéciaux.

4 La présente Convention n'affecte pas l'application d'instruments d'une Organisation régionale d'intégration économique partie à la présente Convention, ayant été adoptés après la conclusion de la Convention, en ce qui a trait aux matières régies par la Convention, à condition que de tels instruments n'affectent pas, dans les rapports de ces États avec d'autres États contractants, l'application des dispositions de la Convention. En ce qui a trait à la reconnaissance ou l'exécution de décisions entre les États membres de l'Organisation régionale d'intégration économique, la Convention n'affecte pas les règles de l'Organisation régionale d'intégration économique, que ces règles aient été adoptées avant ou après la conclusion de la Convention.

Article 51 Co-ordination of instruments and supplementary agreements

1 This Convention does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention.

2 Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, with a view to improving the application of the Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

3 Paragraphs 1 and 2 shall also apply to reciprocity arrangements and to uniform laws based on special ties between the States concerned.

4 This Convention shall not affect the application of instruments of a Regional Economic Integration Organisation that is a Party to this Convention, adopted after the conclusion of the Convention, on matters governed by the Convention provided that such instruments do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. As concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation, this Convention shall not affect the rules of the Regional Economic Integration Organisation, whether adopted before or after the conclusion of the Convention.

Article 52 Règle de l'efficacité maximale

1 La présente Convention ne fait pas obstacle à l'application d'un accord, d'une entente ou d'un instrument international en vigueur entre l'État requérant et l'État requis ou d'une entente de réciprocité en vigueur dans l'État requis et qui prévoit :

(a) des bases plus larges pour la reconnaissance des décisions en matière d'aliments, sans préjudice de l'article 22(f) de la Convention ;

(b) des procédures simplifiées ou accélérées relatives à une demande de reconnaissance et d'exécution de décisions en matière d'aliments ;

(c) une assistance juridique plus favorable que celle prévue aux articles 14 à 17 ; ou

Article 52 Most effective rule

1 This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or a reciprocity arrangement in force in the requested State that provides for –

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 22(f) of the Convention;

(b) simplified, more expeditious procedures on an application for recognition or enforcement of maintenance decisions;

(c) more beneficial legal assistance than that provided for under Articles 14 to 17; or

(d) des procédures permettant à un demandeur dans un État requérant de présenter une demande directement à l'Autorité centrale de l'État requis.

2 La présente Convention ne fait pas obstacle à l'application d'une loi en vigueur dans l'État requis prévoyant des règles plus efficaces pour ce qui est mentionné au paragraphe premier (a) à (c). Cependant, en ce qui concerne les procédures simplifiées et plus expéditives mentionnées au paragraphe premier (b), elles doivent être compatibles avec la protection offerte aux parties en vertu des articles 23 et 24, en particulier en ce qui a trait aux droits des parties de se voir dûment notifier les procédures et de disposer d'une opportunité adéquate d'être entendues et aux effets d'une contestation ou d'un appel.

Article 53 Interprétation uniforme

Pour l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 54 Examen du fonctionnement pratique de la Convention

1 Le Secrétaire général de la Conférence de La Haye de droit international privé convoque périodiquement une Commission spéciale afin d'examiner le fonctionnement pratique de la Convention et d'encourager le développement de bonnes pratiques en vertu de la Convention.

2 À cette fin, les États contractants collaborent avec le Bureau Permanent afin de recueillir les informations relatives au fonctionnement pratique de la Convention, y compris des statistiques et de la jurisprudence.

Article 55 Amendement des formulaires

1 Les formulaires modèles annexés à la présente Convention pourront être amendés par décision d'une Commission spéciale qui sera convoquée par le Secrétaire général de la Conférence de La Haye de droit international privé et à laquelle seront invités tous les États contractants et tous les États membres. La proposition d'amender les formulaires devra être portée à l'ordre du jour qui sera joint à la convocation.

2 Les amendements seront adoptés par des États contractants présents à la Commission spéciale et prenant part au vote. Ils entreront en vigueur pour tous les États contractants le premier jour du septième mois après la date à laquelle le dépositaire les aura communiqués à tous les États contractants.

3 Au cours du délai prévu au paragraphe 2, tout État contractant pourra notifier par écrit au dépositaire qu'il entend faire une réserve à cet amendement, conformément à l'article 62. L'État qui aura fait une telle réserve sera traité, en ce qui concerne cet amendement, comme s'il n'était pas Partie à la présente Convention jusqu'à ce que la réserve ait été retirée.

Article 56 Dispositions transitoires

1 La Convention s'applique dans tous les cas où :

(a) une requête visée à l'article 7 ou une demande prévue au chapitre III a été reçue par l'Autorité centrale de l'État requis après l'entrée en vigueur de la Convention entre l'État requérant et l'État requis ;

(d) procedures permitting an applicant from a requesting State to make an application directly to the Central Authority of the requested State.

2 This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1(a) to (c). However, as regards simplified and more expeditious procedures referred to in paragraph 1(b), they must be compatible with the protection offered to the parties under Articles 23 and 24, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal.

Article 53 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 54 Review of practical operation of the Convention

1 The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices under the Convention.

2 For the purpose of such review Contracting States shall co-operate with the Permanent Bureau in the gathering of information, including statistics and case law, concerning the practical operation of the Convention.

Article 55 Amendment of forms

1 The forms annexed to this Convention may be amended by a decision of a Special Commission convened by the Secretary General of the Hague Conference on Private International Law to which all Contracting States and all Member States shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.

2 Amendments adopted by the Contracting States present at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the depositary to all Contracting States.

3 During the period provided for by paragraph 2 any Contracting State may by notification in writing to the depositary make a reservation, in accordance with Article 62, with respect to the amendment. The State making such reservation shall until the reservation is withdrawn be treated as a State not a Party to the present Convention with respect to that amendment.

Article 56 Transitional provisions

1 The Convention shall apply in every case where –

(a) a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;

(b) une demande de reconnaissance et d'exécution a été présentée directement à une autorité compétente de l'État requis après l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis.

2 En ce qui concerne la reconnaissance et l'exécution des décisions entre les États contractants à la présente Convention qui sont également parties aux Conventions de La Haye mentionnées à l'article 48, si les conditions pour la reconnaissance et l'exécution prévues par la présente Convention font obstacle à la reconnaissance et à l'exécution d'une décision rendue dans l'État d'origine avant l'entrée en vigueur de la présente Convention dans cet État et qui à défaut aurait été reconnue et exécutée en vertu de la Convention qui était en vigueur lorsque la décision a été rendue, les conditions de cette dernière Convention s'appliquent.

3 L'État requis n'est pas tenu, en vertu de la Convention, d'exécuter une décision ou une convention en matière d'aliments pour ce qui concerne les paiements échus avant l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis sauf en ce qui concerne les obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne de moins de 21 ans.

Article 57 Informations relatives aux lois, procédures et services

1 Un État contractant, au moment où il dépose son instrument de ratification ou d'adhésion ou une déclaration faite en vertu de l'article 61 de la Convention, fournit au Bureau Permanent de la Conférence de La Haye de droit international privé :

(a) une description de sa législation et de ses procédures applicables en matière d'obligations alimentaires ;

(b) une description des mesures qu'il prendra pour satisfaire à ses obligations en vertu de l'article 6 ;

(c) une description de la manière dont il procurera aux demandeurs un accès effectif aux procédures conformément à l'article 14 ;

(d) une description de ses règles et procédures d'exécution, y compris les limites apportées à l'exécution, en particulier les règles de protection du débiteur et les délais de prescription ;

(e) toute précision à laquelle l'article 25(1)(b) et (3) fait référence.

2 Les États contractants peuvent, pour satisfaire à leurs obligations découlant du paragraphe premier, utiliser un formulaire de Profil des États pouvant être recommandé et publié par la Conférence de La Haye de droit international privé.

3 Les informations sont tenues à jour par les États contractants.

CHAPITRE IX – DISPOSITIONS FINALES

Article 58 Signature, ratification et adhésion

1 La Convention est ouverte à la signature des États qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session et des autres États qui ont participé à cette Session.

(b) a direct request for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.

2 With regard to the recognition and enforcement of decisions between Contracting States to this Convention that are also Party to either of the Hague Maintenance Conventions mentioned in Article 48, if the conditions for the recognition and enforcement under this Convention prevent the recognition and enforcement of a decision, given in the State of origin before the entry into force of this Convention for that State, that would otherwise have been recognised and enforced under the terms of the Convention that was in effect at the time the decision was rendered, the conditions of that Convention shall apply.

3 The State addressed shall not be bound under this Convention to enforce a decision, or a maintenance arrangement in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21.

Article 57 Provision of information concerning laws, procedures and services

1 A Contracting State, by the time its instrument of ratification or accession is deposited or a declaration is submitted in accordance with Article 61 of the Convention, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –

(a) a description of its laws and procedures concerning maintenance obligations;

(b) a description of the measures it will take to meet the obligations under Article 6;

(c) a description of how it will provide applicants with effective access to procedures, as required under Article 14;

(d) a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods;

(e) any specification referred to in Article 25(1)(b) and (3).

2 Contracting States may, in fulfilling their obligations under paragraph 1, utilise a Country Profile form as may be recommended and published by the Hague Conference on Private International Law.

3 Information shall be kept up to date by the Contracting States.

CHAPTER IX – FINAL PROVISIONS

Article 58 Signature, ratification and accession

1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twenty-First Session and by the other States which participated in that Session.

2 Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

3 Tout autre État pourra adhérer à la Convention après son entrée en vigueur en vertu de l'article 60.

4 L'instrument d'adhésion sera déposé auprès du dépositaire.

5 L'adhésion n'aura d'effet que dans les rapports entre l'État adhérant et les États contractants qui n'auront pas élevé d'objection à son encontre dans les 12 mois suivant la date de la notification prévue à l'article 65. Une telle objection pourra également être élevée par tout État au moment d'une ratification, acceptation ou approbation de la Convention, postérieure à l'adhésion. Ces objections seront notifiées au dépositaire.

Article 59 Organisations régionales d'intégration économique

1 Une Organisation régionale d'intégration économique constituée seulement par des États souverains et ayant compétence sur certaines ou toutes les matières régies par la présente Convention peut également signer, accepter ou approuver la présente Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres ont délégué leur compétence à cette Organisation. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer, conformément à l'article 63, qu'elle a compétence pour toutes les matières régies par la présente Convention et que les États membres qui ont transféré leur compétence à l'Organisation régionale d'intégration économique dans ce domaine seront liés par la présente Convention par l'effet de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

4 Pour les fins de l'entrée en vigueur de la Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique ne fasse une déclaration conformément paragraphe 3.

5 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique qui y est Partie. Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique conformément au paragraphe 3, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres de l'Organisation.

2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

3 Any other State may accede to the Convention after it has entered into force in accordance with Article 60.

4 The instrument of accession shall be deposited with the depositary.

5 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the 12 months after the date of the notification referred to in Article 65. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59 Regional Economic Integration Organisations

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 63 that it exercises competence over all the matters governed by this Convention and that the Member States which have transferred competence to the Regional Economic Integration Organisation in respect of the matter in question shall be bound by this Convention by virtue of the signature, acceptance, approval or accession of the Organisation.

4 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation makes a declaration in accordance with paragraph 3.

5 Any reference to a "Contracting State" or "State" in this Convention applies equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a "Contracting State" or "State" in this Convention applies equally to the relevant Member States of the Organisation, where appropriate.

Article 60 Entrée en vigueur

1 La Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du deuxième instrument de ratification, d'acceptation, d'approbation ou d'adhésion visé par l'article 58.

2 Par la suite, la présente Convention entrera en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique au sens de l'article 59(1) ratifiant, acceptant, approuvant postérieurement, le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt de son instrument de ratification, d'acceptation ou d'approbation ;

(b) pour chaque État ou Organisation régionale d'intégration économique mentionné à l'article 58(3) lendemain de l'expiration de la période durant laquelle des objections peuvent être élevées en vertu de l'article 58(5) ;

(c) pour les unités territoriales auxquelles la présente Convention a été étendue conformément à l'article 61, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification de la déclaration visée dans ledit article.

Article 61 Déclarations relatives aux systèmes juridiques non unifiés

1 Un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par cette Convention peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer, en vertu de l'article 63, que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

2 Toute déclaration est notifiée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 62 Réserves

1 Tout État pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu de l'article 61, faire une ou plusieurs des réserves prévues aux articles 2(2), 20(2), 30(8), 44(3) et 55(3). Aucune autre réserve ne sera admise.

2 Tout État pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au dépositaire.

3 L'effet de la réserve cessera le premier jour du troisième mois du calendrier après la notification mentionnée au paragraphe 2.

4 Les réserves faites en application de cet article ne sont pas réciproques à l'exception de la réserve prévue à l'article 2(2).

Article 60 Entry into force

1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 58.

2 Thereafter the Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation referred to in Article 59(1) subsequently ratifying, accepting, approving it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance or approval ;

(b) for each State or Regional Economic Integration Organisation referred to in Article 58(3) on the day after the end of the period during which objections may be raised in accordance with Article 58(5);

(c) for a territorial unit to which the Convention has been extended in accordance with Article 61, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 61 Declarations with respect to non-unified legal systems

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 63 that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3 If a State makes no declaration under this Article, the Convention is to extend to all territorial units of that State.

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 62 Reservations

1 Any Contracting State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 61, make one or more of the reservations provided for in Articles 2(2), 20(2), 30(8), 44(3) and 55(3). No other reservation shall be permitted.

2 Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.

3 The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in paragraph 2.

4 Reservations under this Article shall have no reciprocal effect with the exception of the reservation provided for in Article 2(2).

Article 63 Déclarations

1 Les déclarations visées aux articles 2(3), 11(1)(g), 16(1), 24(1), 44(1) et (2), 59(3) et 61(1) peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et pourront être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion prendra effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

Article 64 Dénonciation

1 Tout État contractant pourra dénoncer la Convention par une notification écrite au dépositaire. La dénonciation pourra se limiter à certaines unités territoriales d'un État à plusieurs unités auxquelles s'applique la Convention.

2 La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est spécifiée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 65 Notification

Le dépositaire notifiera aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé ou adhéré conformément aux articles 58 et 59, les renseignements suivants :

(a) les signatures, ratifications, acceptations et approbations visées aux articles 58 et 59;

(b) les adhésions et les objections aux adhésions visées à l'article 58(5) ;

(c) la date d'entrée en vigueur de la Convention conformément aux dispositions à l'article 60 ;

(d) les déclarations prévues aux articles 2(3), 11(1)(g), 16(1), 24(1), 44(1) et (2), 58(5), 59(3) et 61(1) ;

(e) les accords prévus à l'article 51(2) ;

(f) les réserves prévues aux articles 2(2), 20(2), 30(8), 44(3), 55(3) et le retrait des réserves prévu à l'article 62(2) ;

(g) les dénonciations prévues à l'article 64.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Article 63 Declarations

1 Declarations referred to in Articles 2(3), 11(1)(g), 16(1), 24(1), 44(1) and (2), 59(3) and 61(1), may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

Article 64 Denunciation

1 A Contracting State to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a multi-unit State to which the Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 65 Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 58 and 59 of the following –

(a) the signatures, ratifications, acceptances and approvals referred to in Articles 58 and 59;

(b) the accessions and objections raised to accessions referred to in Article 58(5);

(c) the date on which the Convention enters into force in accordance with Article 60;

(d) the declarations referred to in Articles 2(3), 11(1)(g), 16(1), 24(1), 44(1) and (2), 58(5), 59(3) and 61(1);

(e) the agreements referred to in Article 51(2);

(f) the reservations referred to in Articles 2(2), 20(2), 30(8), 44(3) and 55(3), and the withdrawals referred to in Article 62(2);

(g) the denunciations referred to in Article 64.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Fait à La Haye, le [...] [...] 2007, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session.

Done at The Hague, on the [...] day of [...], 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session.

Formulaire de transmission en vertu de l'article 12(2)

AVIS DE CONFIDENTIALITÉ ET DE PROTECTION DES DONNÉES À CARACTÈRE PERSONNEL

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises. Toute autorité traitant de telles données en assure la confidentialité conformément à la loi de son État.

Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle juge que ce faisant la santé, la sécurité ou la liberté d'une personne pourrait être compromise, conformément à l'article 40.

☐ Une décision de non-divulgation a été prise par une Autorité centrale conformément à l'article 40.

1 Autorité centrale requérante	2 Personne à contacter dans l'État requérant
a Adresse	a Adresse (si différente)
b Numéro de téléphone	b Numéro de téléphone (si différent)
c Numéro de télécopie	c Numéro de télécopie (si différent)
d Courriel	d Courriel (si différent)
e Numéro de référence	e Langue(s)

3 Autorité centrale requise .....

Adresse .....

.....

4 Renseignements à caractère personnel concernant le demandeur

a Nom(s) de famille : .....

b Prénom(s) : .....

c Date de naissance : ..... (jj/mm/aaaa)

ou

a Nom de l'organisme public : .....

.....

ANNEX 1

Transmittal Form under Article 12(2)

CONFIDENTIALITY AND PERSONAL DATA
PROTECTION NOTICE

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such data shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 40.

☐ A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.

1 Requesting Central Authority a Address b Telephone number c Fax number d E-mail e Reference number	2 Contact person in requesting State a Address (if different) b Telephone number (if different) c Fax number (if different) d E-mail (if different) e Language(s)

3 Requested Central Authority .....

Address .....

.....

4 Particulars of the applicant

a Family name(s): .....

b Given name(s): .....

c Date of birth: ..... (dd/mm/yyyy)

or

a Name of the public body: .....

.....

5 Renseignements à caractère personnel concernant la (les) personne(s) pour qui des aliments sont demandés ou dus

a ☐ La personne est la même que le demandeur identifié au point 4

b i Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

ii Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

iii Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

6 Renseignements à caractère personnel concernant le débiteur[1]

a ☐ La personne est la même que le demandeur identifié au point 4

b Nom(s) de famille : .....

c Prénom(s) : .....

d Date de naissance : ..... (jj/mm/aaaa)

7 Ce formulaire de transmission concerne et est accompagné d'une demande visée à :

☐ l'article 10(1)(a)

☐ l'article 10(1)(b)

☐ l'article 10(1)(c)

☐ l'article 10(1)(d)

☐ l'article 10(1)(e)

☐ l'article 10(1)(f)

☐ l'article 10(2)(a)

☐ l'article 10(2)(b)

☐ l'article 10(2)(c)

8 Les documents suivants sont annexés à la demande :

a Pour les fins d'une demande en vertu de l'article 10(1)(a) et :

Conformément à l'article 25 :

☐ Texte complet de la décision (art. 25(1)(a))

☐ Résumé ou extrait de la décision établi par l'autorité compétente de l'État d'origine (art. 25(3)(b)) (le cas échéant)

[1] En vertu de l'art. 3 de la Convention, « 'débiteur' désigne une personne qui doit ou de qui on réclame des aliments ».

5 Particulars of the person(s) for whom maintenance is sought or payable

a ☐ The person is the same as the applicant named in point 4

b i Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

ii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

iii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

6 Particulars of the debtor[1]

a ☐ The person is the same as the applicant named in point 4

b Family name(s): .....

c Given name(s): .....

d Date of birth: ..... (dd/mm/yyyy)

7 This Transmittal Form concerns and is accompanied by an application under:

☐ Article 10(1)(a)

☐ Article 10(1)(b)

☐ Article 10(1)(c)

☐ Article 10(1)(d)

☐ Article 10(1)(e)

☐ Article 10(1)(f)

☐ Article 10(2)(a)

☐ Article 10(2)(b)

☐ Article 10(2)(c)

8 The following documents are appended to the application:

a For the purpose of an application under Article 10(1)(a), and:

In accordance with Article 25:

☐ Complete text of the decision (Art. 25(1)(a))

☐ Abstract or extract of the decision drawn up by the competent authority of the State of origin (Art. 25(3)(b)) (if applicable)

[1] According to Art. 3 of the Convention "'debtor' means an individual who owes or who is alleged to owe maintenance".

☐ Document établissant que la décision est exécutoire dans l'État d'origine et, dans le cas d'une décision d'une autorité administrative, un document établissant que les exigences prévues à l'article 19(3) sont remplies à moins que cet État ait précisé conformément à l'article 57 que les décisions de ses autorités administratives remplissent dans tous les cas ces conditions (art. 25(1)(b))

☐ Si le défendeur n'a ni comparu ni été représenté dans les procédures dans l'État d'origine, un document ou des documents attestant, selon le cas, que le défendeur a été dûment avisé de la procédure et a eu la possibilité de se faire entendre ou qu'il a été dûment avisé de la décision et a eu la possibilité de la contester ou d'en appeler en fait et en droit (art. 25(1)(c))

☐ Si nécessaire, le document établissant l'état des arrérages et indiquant la date à laquelle le calcul a été effectué (art. 25(1)(d))

☐ Si nécessaire, le document contenant les informations qui sont utiles à la réalisation des calculs appropriés dans le cadre d'une décision prévoyant un ajustement automatique par indexation (art. 25(1)(e))

☐ Si nécessaire, le document établissant dans quelle mesure le demandeur a bénéficié de l'assistance juridique gratuite dans l'État d'origine (art. 25(1)(f))

Conformément à l'article 30(3) :

☐ Texte complet de la convention en matière d'aliments (art. 30(3)(a))

☐ Document établissant que la convention en matière d'aliments visée est exécutoire comme une décision de l'État d'origine (art. 30(3)(b))

☐ Tout autre document accompagnant la demande (par ex. : si requis, un document pour les besoins de l'art. 36(4)) :

.....

.....

b Pour les fins d'une demande en vertu de l'article 10(1)(b), (c), (d), (e), (f) et (2)(a), (b) ou (c) le nombre de documents justificatifs (à l'exclusion du formulaire de transmission et de la demande elle-même) conformément à l'article 11(3) :

☐ article 10(1)(b) .....

☐ article 10(1)(c) .....

☐ article 10(1)(d) .....

☐ article 10(1)(e) .....

☐ article 10(1)(f) .....

☐ article 10(2)(a) .....

☐ article 10(2)(b) .....

☐ article 10(2)(c) .....

Nom : ..... (en majuscules) Date : .....

Nom du fonctionnaire autorisé de l'Autorité centrale (jj/mm/aaaa)

☐ Document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements (Art. 25(1)(b))

☐ If the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law (Art. 25(1)(c))

☐ Where necessary, a document showing the amount of any arrears and the date such amount was calculated (Art. 25(1)(d))

☐ Where necessary, a document providing the information necessary to make appropriate calculations in case of a decision providing for automatic adjustment by indexation (Art. 25(1)(e))

☐ Where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin (Art. 25(1)(f))

In accordance with Article 30(3):

☐ Complete text of the maintenance arrangement (Art. 30(3)(a))

☐ A document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin (Art. 30(3)(b))

☐ Any other documents accompanying the application (*e.g.*, if required, a document for the purpose of Art. 36(4)):

.....

.....

b For the purpose of an application under Article 10(1)(b), (c), (d), (e), (f) and (2)(a), (b) or (c) the following number of supporting documents (excluding the Transmittal Form and the application itself) in accordance with Article 11(3):

☐ Article 10(1)(b) .....

☐ Article 10(1)(c) .....

☐ Article 10(1)(d) .....

☐ Article 10(1)(e) .....

☐ Article 10(1)(f) .....

☐ Article 10(2)(a) .....

☐ Article 10(2)(b) .....

☐ Article 10(2)(c) .....

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

Accusé de réception en vertu de l'article 12(3)

AVIS DE CONFIDENTIALITÉ ET DE PROTECTION DES DONNÉES À CARACTÈRE PERSONNEL

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises. Toute autorité traitant de telles données en assure la confidentialité conformément à la loi de son État.

Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle juge que ce faisant la santé, la sécurité ou la liberté d'une personne pourrait être compromise, conformément à l'article 40.

☐ *Une décision de non-divulgation a été prise par une Autorité centrale conformément à l'article 40.*

1 Autorité centrale requise	2 Personne à contacter dans l'État requis
a Adresse	a Adresse (si différente)
b Numéro de téléphone	b Numéro de téléphone (si différent)
c Numéro de télécopie	c Numéro de télécopie (si différent)
d Courriel	d Courriel (si différent)
e Numéro de référence	e Langue(s)

3 Autorité centrale requérante .....

Nom du contact .....

Adresse .....

.....

4 L'Autorité centrale requise confirme la réception le ..... (jj/mm/aaaa) du formulaire de transmission de l'Autorité centrale requérante (numéro de référence ..... ; en date du ..... (jj/mm/aaaa)) concernant la demande visée à :

- ☐ l'article 10(1)(a)
- ☐ l'article 10(1)(b)
- ☐ l'article 10(1)(c)
- ☐ l'article 10(1)(d)
- ☐ l'article 10(1)(e)
- ☐ l'article 10(1)(f)
- ☐ l'article 10(2)(a)
- ☐ l'article 10(2)(b)
- ☐ l'article 10(2)(c)

ANNEX 2

Acknowledgement form under Article 12(3)

CONFIDENTIALITY AND PERSONAL DATA PROTECTION NOTICE

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such data shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 40.

☐ *A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.*

1 Requested Central Authority	2 Contact person in requested State
a Address	a Address (if different)
b Telephone number	b Telephone number (if different)
c Fax number	c Fax number (if different)
d E-mail	d E-mail (if different)
e Reference number	e Language(s)

3 Requesting Central Authority .....

Contact person .....

Address .....

.....

4 The requested Central Authority acknowledges receipt on ..... (dd/mm/yyyy) of the Transmittal Form from the requesting Central Authority (reference number .....; dated ..... (dd/mm/yyyy)) concerning the following application under:

- ☐ Article 10(1)(a)
- ☐ Article 10(1)(b)
- ☐ Article 10(1)(c)
- ☐ Article 10(1)(d)
- ☐ Article 10(1)(e)
- ☐ Article 10(1)(f)
- ☐ Article 10(2)(a)
- ☐ Article 10(2)(b)
- ☐ Article 10(2)(c)

Nom de famille du demandeur : .....

Nom de famille de la (des) personne(s) pour qui des aliments sont demandés ou dus : .....

.....

.....

Nom de famille du débiteur : .....

5 Premières démarches entreprises par l'Autorité centrale requise :

☐ Le dossier est complet et pris en considération

☐ Voir le rapport sur l'état d'avancement ci-joint

☐ Un rapport sur l'état d'avancement suivra

☐ Veuillez fournir ces informations et / ou ces documents supplémentaires :

.....

.....

☐ L'Autorité centrale requise refuse de traiter la demande puisqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies (art. 12(8)). Les raisons :

☐ sont énumérées dans un document en annexe

☐ seront énumérées dans un prochain document

L'Autorité centrale requise demande à l'Autorité centrale requérante de l'informer de tout changement dans l'état d'avancement de la demande.

Nom : ..... (en majuscules) Date : .....

Nom du fonctionnaire autorisé de l'Autorité centrale (jj/mm/aaaa)

Family name(s) of applicant: .....

Family name(s) of the person(s) for whom maintenance is sought or payable: .....

.....

.....

Family name(s) of debtor: .....

5 Initial steps taken by the requested Central Authority:

☐ The file is complete and is under consideration

☐ See attached Status of Application Report

☐ Status of Application Report will follow

☐ Please provide the following additional information and / or documentation:

.....

.....

☐ The requested Central Authority refuses to process this application as it is manifest that the requirements of the Convention are not fulfilled (Art. 12(8)). The reasons:

☐ are set out in an attached document

☐ will be set out in a document to follow

The requested Central Authority requests that the requesting Central Authority inform it of any change in the status of the application.

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

Document de travail No 3*

Distribué le jeudi 22 novembre 2007

No 3 – Proposition du Comité de rédaction

PROJET DE CONVENTION SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX ENFANTS ET À D'AUTRES MEMBRES DE LA FAMILLE

Dernier paragraphe du projet de Convention :

Fait à La Haye, le […] […] 2007, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session ainsi qu'à chacun des autres États ayant participé à cette Session.

* Ne sont reproduits dans ce tome que les documents de travail ayant trait au projet de Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille. Les autres documents de travail sont publiés dans les tomes II et III de la Vingt et unième session.

Working Document No 3*

Distributed on Thursday 22 November 2007

No 3 – Proposal of the Drafting Committee

DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Last paragraph of the draft Convention:

Done at The Hague, on the […] […] 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session and to each of the other States which have participated in that Session.

* Only working documents dealing with the draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance are reproduced in this volume. The other working documents will be found in Tomes II and III of the Twenty-First Session.

Procès-verbal No 2*

Minutes No 2*

Séance du jeudi 22 novembre 2007 (après-midi et soir)

Meeting of Thursday 22 November 2007 (afternoon and evening)

La séance est ouverte à 16 h 45 sous la présidence de M. Struycken (Pays-Bas).

Troisième lecture du projet de Convention (Doc. trav. Nos 1 et 3) / Third reading of the draft Convention (Work. Docs Nos 1 and 3)

1. **The President** greeted the delegates and stated that the third reading of the draft Convention would take place during that afternoon session. He noted that delegates had the opportunity to make any additional remarks but that in order to limit this, the President proposed to give an authority to the Permanent Bureau to look carefully at the text of the Convention for issues of consistency, grammar, cross-referencing and formatting, without making any substantive changes, for a duration of four weeks from the close of the Diplomatic Session. He noted that the text of the Convention would then be sent to all delegates for their review. The President expressed his hope that delegates would give that mandate to the Permanent Bureau and that if delegates had any comments with regard to the text of the Convention that was forwarded to them, they could e-mail the Permanent Bureau with those suggestions. The President asked the delegates whether they agreed with that proposal. There were no interventions and so the President concluded that the assembly approved the course of action that he had discussed. The President referred to the Rules of Procedure applicable to the third reading of the draft Convention and particularly to Article 16 that he stated the Secretary General would then discuss.

2. **Le Secrétaire général** indique que les participants peuvent lire l'article 16 en question dans la Note d'information relative aux procédures pour la Vingt et unième session de la Conférence de La Haye de droit international privé, préparée à l'attention des participants et se trouvant dans les dossiers remis aux participants à leur arrivée. L'article 16 du Règlement intérieur des Sessions plénières de la Conférence de La Haye indique que : « Lorsqu'une proposition est adoptée ou rejetée, elle ne peut être réexaminée que sur décision prise à la majorité absolue des délégations présentes lors du vote. L'autorisation de prendre la parole à l'occasion d'une motion tendant à un nouvel examen n'est accordée qu'à deux orateurs appuyant la motion et à deux orateurs opposés à celle-ci, après quoi elle est immédiatement mise aux voix ».

3. **The President** queried whether all delegates had understood the comments that had been made by the Secretary General. He noted that the third reading could proceed in one of several ways. Firstly, the text of the draft Convention could be read in both English and French which would probably take several hours to complete. Secondly, the text of the draft Convention could be read in full in either English or French. Thirdly, the text of the draft Convention would not be read but would be considered on an article-by-article basis so that delegates had an opportunity to intervene in relation to a specific article. There were no objections to approaching the third reading of the draft Convention on the latter basis and so the President concluded that that was what would occur. The President indicated to the delegates that Working Document No 1 as submitted to the Plenary Session would then be referred to. The President referred to the Preamble of the draft Convention and asked whether there were any objections.

There were none and so he concluded that the text of the Preamble to the draft Convention was accepted.

Le Président invite les participants à se prononcer, successivement, sur l'article premier intitulé « Objet » (*Object*), l'article 2 intitulé « Champ d'application » (*Scope*), l'article 3 intitulé « Définitions » (*Definitions*), l'article 4 intitulé « Désignation des Autorités centrales » (*Designation of Central Authorities*), l'article 5 intitulé « Fonctions générales des Autorités centrales » (*General functions of Central Authorities*), l'article 6 intitulé « Fonctions spécifiques des Autorités centrales » (*Specific functions of Central Authorities*), l'article 7 intitulé « Requêtes de mesures spécifiques » (*Requests for specific measures*), l'article 8 intitulé « Frais de l'autorité centrale » (*Central Authority costs*), l'article 9 intitulé « Demande par l'intermédiaire des Autorités centrales » (*Application through Central Authorities*), l'article 10 intitulé « Demandes disponibles » (*Available applications*), l'article 11 intitulé « Contenu de la demande » (*Application contents*), l'article 12 intitulé « Transmission, réception et traitement des demandes et des affaires par l'intermédiaire des Autorités centrales » (*Transmission, receipt and processing of applications and cases through Central Authorities*), l'article 13 intitulé « Moyens de communication » (*Means of communication*), l'article 14 intitulé « Accès effectif aux procédures » (*Effective access to procedures*), et l'article 15 intitulé « Assistance juridique gratuite pour les demandes d'aliments destinés aux enfants » (*Free legal assistance for child support applications*).

The President noted that Article 15 was the old Article 14 *bis*.

Le Président invite également les participants à se prononcer sur l'article 16 intitulé « Déclaration permettant un examen limité aux ressources de l'enfant » (*Declaration to permit use of child-centred means test*).

Le Président déclare, en l'absence de commentaires, que les articles premier à 16 sont adoptés.

Le Président invite les participants à se prononcer sur l'article 17 intitulé « Demandes ne permettant pas de bénéficier de l'article 15 ou de l'article 16 » (*Applications not qualifying under Article 15 or Article 16*).

4. **M. Bonomi** (Suisse) indique qu'il manque le mot « Convention » à la première ligne de l'article 17 de la version française du texte qui devrait se lire comme suit : « Pour les demandes présentées en application de la Convention qui ne relèvent pas de l'article 15 ou de l'article 16 ».

* Le Procès-verbal No 1 figure dans le Tome III, *Matières diverses*. Ne sont reproduits dans ce tome que les procès-verbaux ayant trait au projet de Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille.

* Minutes No 1 appears in Tome III, *Miscellaneous matters*. Only the Minutes dealing with the draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance are reproduced in this volume.

5. **Le Président** remercie le Délégué de la Suisse, indiquant que le mot « Convention » doit être ajouté à la première ligne de l'article 17. Il note que l'article 17 est adopté avec la correction susmentionnée.

Le Président invite les participants à examiner l'article 18 intitulé « Limite aux procédures » (*Limit on proceedings*).

The President noted that Article 18 was the old Article 15.

Le Président déclare, en l'absence de commentaires, que l'article 18 est adopté.

The President turned to discussion in relation to Chapter V, "Recognition and enforcement".

Le Président invite les participants à examiner l'article 19 intitulé « Champ d'application du chapitre » (*Scope of the Chapter*).

6. **Mme Borcy** (Belgique) souligne une faute d'orthographe à l'article 19, paragraphe 3, alinéa (b) au mot « équivalant ».

7. **Le Président** ne constatant aucun autre commentaire, l'article 19 est adopté avec la correction susmentionnée au mot « équivalant ».

Le Président invite les participants à examiner, successivement, l'article 20 intitulé « Bases de reconnaissance et d'exécution » (*Bases for recognition and enforcement*), l'article 21 intitulé « Divisibilité et reconnaissance ou exécution partielle » (*Severability and partial recognition and enforcement*), et l'article 22 intitulé « Motifs de refus de reconnaissance et d'exécution » (*Grounds for refusing recognition and enforcement*). Le Président déclare, en l'absence de commentaires, les articles 20 à 22 adoptés.

Le Président invite les participants à examiner l'article 23 intitulé « Procédure pour une demande de reconnaissance et d'exécution » (*Procedure on an application for recognition and enforcement*).

8. **Le Secrétaire général** note une différence entre les versions anglaise et française de l'article 23, paragraphe 2, alinéa (a). En effet, alors que le texte en français commence par « transmettre la décision à l'autorité compétente », la version anglaise commence par « *refer the application to the competent authority* ».

9. **The President** confirmed that the comments of the Secretary General were in relation to Article 23, paragraph 2, sub-paragraph (a) and that the French text stated "*transmettre la décision à l'autorité compétente*".

10. **Ms Doogue** (New Zealand) confirmed that the French text should in fact state "application" and not "decision".

11. **Le Président** confirme que l'expression « transmettre la décision » sera remplacée par « transmettre la demande » dans la version française de l'article 23, paragraphe 2, alinéa (a).

12. **Ms Cameron** (Australia) referred to Article 23, paragraph 5, and stated that she believed the reference to "paragraphs 2 and 3" should in fact be to paragraphs 3 and 4.

13. **The President** asked the Delegate of Australia to confirm her observation.

14. **Ms Cameron** (Australia) referred again to Article 23, paragraph 5, and stated that she believed the reference to "paragraphs 2 and 3" should in fact be to paragraphs 3 and 4.

15. **The President** confirmed that in relation to Article 23, paragraph 5, the reference to "paragraphs 2 and 3" should in fact be to paragraphs 3 and 4.

16. **Mme Mansilla y Mejía** (Mexique) souhaite indiquer une erreur dans la version espagnole du paragraphe 7, alinéa (c), de l'article 23.

17. **Le Secrétaire général** indique au Déléguée du Mexique que la version espagnole de la Convention ne peut faire l'objet d'une relecture pendant la Séance plénière. Il explique que l'anglais et le français étant les deux langues officielles de la Conférence de La Haye, seules les versions française et anglaise de la Convention sont examinées. Néanmoins, les commentaires relatifs à la version espagnole de la Convention seront certainement les bienvenus en dehors de la session.

18. **Le Président** réitère les propos du Secrétaire général et confirme que toutes les corrections jugées nécessaires seront effectuées dans la version espagnole de la Convention, ultérieurement.

19. **Mme Albuquerque Ferreira** (Chine) note que dans le texte français de l'article 23, paragraphe 7, alinéa (c), le mot « véracité » aurait dû être supprimé comme cela est le cas dans la version anglaise.

20. **The President** noted that Article 23 was still being discussed. He gave the floor to the delegation of Switzerland.

21. **Mr Markus** (Switzerland) thanked the President and stated that the word "veracity" had been deleted from the English text but that it still appeared in Article 23, paragraph 7, sub-paragraph (c): "*la véracité*". Mr Markus further noted that the word "veracity" also appeared in the English text of Working Document No 65, then located in Article 20, paragraph 7, sub-paragraph (c).

22. **The President** confirmed that in the French text of the draft Convention then being considered, Working Document No 1 of the Plenary Session, there was a reference to "*la véracité*" in Article 23, paragraph 7, sub-paragraph (c).

23. **Ms Doogue** (New Zealand) indicated that the appearance of the words "*la véracité*" in the French text of the draft Convention as contained in Working Document No 1 of the Plenary Session was a mistake and that it should have been deleted. She suggested that it be struck out.

24. **Le Président** conclut que le terme « véracité » est supprimé à l'article 23, paragraphe 7, alinéa (c).

25. **M. Voulgaris** (Grèce) note que le terme « véracité » n'est effectivement pas nécessaire tant dans la version française que dans la version anglaise du texte car cette expression est déjà comprise dans les mots « authenticité » et « intégrité ».

26. **M. Bonomi** (Suisse) demande ce qu'il en est de la différence constatée à l'article 23, paragraphe 2, alinéa (a), entre les textes anglais et français qui font référence l'un à l'« *application* » et l'autre à la « décision ».

Procès-verbal/Minutes No 2

27. **Le Président** répond que l'expression « transmettre la décision » a été remplacée par « transmettre la demande ». Il note que deux autres corrections ont été apportées à l'article 23 : la suppression du mot « véracité » dans l'article 23, paragraphe 7, alinéa (c), du texte français et le remplacement de la référence aux paragraphes 2 et 3 par la référence aux paragraphes 3 et 4, dans l'article 23, paragraphe 5, dans les deux versions.

28. **Mr Ding** (China) stated that the delegation of China had a question in relation to Article 23, paragraph 5. He believed that the reference to "paragraphs 2 and 3" as contained in that paragraph was in fact correct.

29. **The President** confirmed what the Delegate of China was stating and that the reference to "paragraphs 2 and 3" in Article 23, paragraph 5, was actually correct.

30. **Mr Ding** (China) confirmed that he believed that was the case.

31. **The President** observed that Article 23, paragraph 5, stated : "The applicant and the respondent shall be promptly notified of the declaration or registration, or the refusal thereof, made under paragraphs 2 and 3 and may bring a challenge or appeal on fact and on a point of law".

32. **Mme Borrás** (co-Rapporteur) observe que la remarque faite par le Délégué de la Chine est tout à fait correcte. En effet, le paragraphe 2 auquel il est fait référence à l'article 23, paragraphe 5, concerne les enregistrements et déclarations dans les cas où la demande est présentée par l'intermédiaire d'une Autorité centrale ; le paragraphe 3 porte quant à lui sur les enregistrements et déclarations dans les cas où la demande est adressée directement à l'autorité compétente. Or, ces deux situations doivent être visées à l'article 23, paragraphe 5. Par conséquent, la référence aux paragraphes 2 et 3 est juste.

33. **Le Président** en conclut qu'il convient de maintenir la référence aux paragraphes 2 et 3, comme dans le Document de travail No 1 et demande si cela satisfait la délégation de l'Australie.

34. **Ms Cameron** (Australia) insisted that the opening sentence of Article 23, paragraph 5, referred to the "refusal thereof" and that a refusal under Article 23, for recognition and enforcement, was made under Article 23, paragraph 4. Ms Cameron therefore insisted that under Article 23, paragraph 5, there should be a reference to paragraph 4.

35. **The President** thanked the Delegate of Australia and stated that this issue would be discussed further.

36. **Mrs Borrás** (co-*Rapporteur*) responded to the Delegate of Australia and stated that the focus of Article 23, paragraph 5, was on the applicant and the respondent being promptly notified of a declaration or registration, following an application made for recognition and enforcement. She noted that an application was either made through a Central Authority in accordance with Article 23, paragraph 2, or directly to a competent authority in accordance with Article 23, paragraph 3. Even though an application for recognition and enforcement may be refused, that was not the focus of the provision and she believed that that was why Article 23, paragraph 5, referred to "paragraphs 2 and 3" and not paragraphs 3 and 4.

37. **The President** thanked the co-*Rapporteur* and handed the floor to the Delegate of the United Kingdom.

38. **Mr Beaumont** (United Kingdom) thanked the President and suggested that a simple resolution to the discussion would be to just refer to paragraphs 2, 3 and 4 in Article 23, paragraph 5.

39. **Mme Borrás** (co-Rapporteur) observe qu'il est effectivement possible de se référer aux paragraphes « 2, 3 et 4 » à l'article 23, paragraphe 5, du texte en anglais. En revanche, dans la version française, la référence aux articles doit être scindée et être rédigée comme suit : « La déclaration ou l'enregistrement fait en application des paragraphes 2 et 3, ou leur refus, fait en application du paragraphe 4 […] ».

40. **The President** asked whether there were any objections to the proposal that had been made by the co-*Rapporteur*.

41. **Mr Voulgaris** (Greece) asked whether the proposed change to be made to Article 23, paragraph 5, could be repeated since he believed that some confusion existed.

42. **The President** repeated the proposed Article 23, paragraph 5, in English and stated that it would be reflected in the French text in the same way.

43. **M. Manly** (Burkina Faso) observe qu'effectivement, lors des discussions de la Commission I, c'est la référence aux paragraphes 2 et 3 qui avaient été retenue. Il se réfère notamment aux Documents de travail Nos 64 et 65.

44. **Le Président** note que l'article 23 est adopté sous réserve des corrections mentionnées précédemment.

Le Président propose d'aborder l'article 24 intitulé « Procédure alternative pour une demande de reconnaissance et d'exécution » (*Alternative procedure on an application for recognition and enforcement*).

45. **M. de Leiris** (France) note que, dans la version française, il convient de calquer le paragraphe 5 de l'article 24 sur le paragraphe 8 de l'article 23 et de supprimer la négation représentée par les mots « ne […] que » dans le paragraphe 5 de l'article 24. En effet, la reconnaissance et l'exécution doivent concerner les paiements échus.

46. **Le Président** prend note de la suppression des mots « ne » et « que » au paragraphe 5 de l'article 24, qui se lit désormais comme suit : « Un refus de reconnaissance et d'exécution peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution concernent les paiements échus ».

47. **M. Bonomi** (Suisse) indique qu'un changement identique à celui opéré à l'article 23 doit être opéré à l'article 24, paragraphe 2, alinéa (a), qui devrait donc commencer par « transmettre la demande ».

48. **Le Président** indique qu'à l'article 24, paragraphe 2, alinéa (a), il convient de remplacer « transmettre la décision » par « transmettre la demande ».

Le Président note que l'article 24 est adopté sous réserve des corrections susmentionnées.

The President opened the floor on Article 25 entitled "Documents" (*Documents*) and handed the floor to the Representative of the Commonwealth Secretariat.

49. **Mr McClean** (Commonwealth Secretariat) stated that he had a question in relation to whether the provision concerning documents should apply to both Articles 23 and 24

and whether, by Article 25, paragraph 1, simply referring to Article 23, there existed a suggestion to the contrary.

50. **Mr Beaumont** (United Kingdom) agreed with the comments made by the Representative of the Commonwealth Secretariat and stated that it was a reference that had mistakenly been left out.

51. **The President** confirmed that a reference to Article 24 should therefore also be added into the first line of Article 25, alongside the reference to Article 23. He noted that Article 25, paragraph 1, would therefore read : "An application for recognition and enforcement under Article 23 or Article 24 shall be accompanied by the following". He noted that in the French text of the draft Convention it would read : "*La demande de reconnaissance et d'exécution en application de l'article 23 ou de l'article 24 est accompagnée des documents suivants*".

The President thanked the Representative of the Commonwealth Secretariat and continued on to the first line of Article 25, paragraph 2, which referred to Article 23, paragraph 7, sub-paragraph (c). He queried whether Article 24 also needed to be referenced in that provision.

52. **Mr Beaumont** (United Kingdom) noted that the President's question in relation to Article 25, paragraph 2, was less straightforward than in relation to Article 25, paragraph 1, because there were cross-references to Article 23, paragraph 7, sub-paragraph (c), contained in Article 24 which may indicate that an additional reference in relation to Article 24 in Article 25, paragraph 2, was not necessary. For the avoidance of doubt, Mr Beaumont suggested that such a reference could be added in any event.

53. **The President** believed that the point should be clarified in order to settle on an appropriate text for Article 25, paragraph 2.

54. **M. de Leiris** (France) remarque en effet que la question relative au renvoi à l'article 23, paragraphe 7, alinéa (c), dans l'article 25, paragraphe 2, est un peu complexe. Il constate qu'un renvoi à l'article 24, paragraphe 4, serait plus large mais il n'est pas certain que cela changerait réellement l'article 25, paragraphe 2. Il se demande si le renvoi à l'article 23, paragraphe 7, alinéa (c), n'est pas suffisant d'autant que l'article 24, paragraphe 4, y renvoie également. Il s'en remet à la Séance plénière.

55. **Mme Borcy** (Belgique) s'interroge quant à la parfaite correspondance des deux versions, anglaise et française, de l'article 25, paragraphe 3, alinéa (a). En effet, alors que la version anglaise se réfère à « *a complete copy of the decision certified by* », la version française se lit « un texte complet de la décision certifié conforme par ».

56. **The President** thanked the Delegate of Belgium and stated that she had raised a good point with regard to Article 25, paragraph 3, sub-paragraph (a), and a difference that existed as between the English and French texts of the draft Convention. He noted that Article 25, paragraph 3, sub-paragraph (a), of the English text stated "that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application" whereas the French text stated "*qu'un texte complet de la décision certifié conforme par l'autorité compétente de l'État d'origine doit accompagner la demande*". He noted that the difference between the English and French texts of the draft Convention therefore raised the question of whether one certifies a decision or whether one certifies a text.

57. **Mme Alexandre** (Bureau Permanent) indique que le texte en français a été rédigé ainsi à dessein et qu'il ne s'agit pas d'une erreur de traduction. Elle précise que lors de la rédaction du texte français, la question avait été débattue de savoir si la certification portait sur la décision elle-même ou sur le texte. Elle s'en remet à la plénière pour décider de la solution à adopter.

58. **Le Président** répond qu'il s'agit sans doute d'une question qui pourra être prise en compte par le Bureau Permanent lors de son opération de « toilettage » du texte.

Il note que l'article 25 est adopté, sous réserve de la correction précitée.

Le Président invite désormais les participants à se prononcer, successivement, sur l'article 26 intitulé « Procédure relative à une demande de reconnaissance » (*Procedure on an application for recognition*), l'article 27 intitulé « Constatations de fait » (*Findings of fact*), l'article 28 intitulé « Interdiction de la révision au fond » (*No review of the merits*), et l'article 29 intitulé « Présence physique de l'enfant ou du demandeur non requise » (*Physical presence of the child or the applicant not required*).

Le Président déclare, en l'absence de commentaires, que les articles 26 à 29 sont adoptés.

Le Président invite les participants à se prononcer sur l'article 30 intitulé « Conventions en matière d'aliments » (*Maintenance arrangements*).

59. **Mme Ménard** (Canada) indique qu'au paragraphe 5, alinéa (a), de l'article 30, la référence au « paragraphe 3, alinéa (a) » doit être remplacée par la référence au « paragraphe 4, alinéa (a) »

60. **Le Président** prend note de cette correction dans les deux versions du texte.

61. **Mme Ménard** (Canada) ajoute qu'au paragraphe 3, alinéa (a), de l'article 30, les mots « et » en français, et « *and* » en anglais, doivent être ajoutés à la fin de l'alinéa afin de faire le lien avec l'alinéa suivant.

62. **Le Président** prend note de cette correction dans les deux versions du texte.

63. **Mme Ménard** (Canada) précise qu'à l'article 30, paragraphe 5, alinéa (b), lettre (i), le renvoi au paragraphe 3 doit être remplacé par un renvoi au paragraphe 4. Il convient également de remplacer la référence au paragraphe 2 par une référence au paragraphe 3, à la lettre (ii) de cette même disposition.

64. **Le Président** prend note de ces corrections : il indique que lettre (i) doit donc se lire comme suit : « les motifs de refus de reconnaissance et d'exécution prévus au paragraphe 4 », et lettre (ii) : « l'authenticité ou l'intégrité d'un document transmis conformément au paragraphe 3 ».

The President opened discussion with respect to Article 31 entitled "Decisions produced by the combined effect of provisional and confirmation orders" (*Décisions résultant de l'effet combiné d'ordonnances provisoires et de confirmation*). He noted that this Article was of special concern to the Representative of the Commonwealth Secretariat.

65. **Mme Marnier** (France) se demande si, à l'article 30, paragraphe 5, alinéa (a), la référence à l'article 23, paragraphe 4, ne devrait pas être remplacée par une référence à

Procès-verbal/Minutes No 2

l'article 23, paragraphes 2 et 3. Il lui semble en effet qu'une déclaration ou un enregistrement devrait être fait conformément à ces deux derniers paragraphes.

66. **Le Président** remercie la Déléguée de la France et indique que cette observation sera examinée lors de l'opération de toilettage du texte.

67. **Ms Carlson** (United States of America) queried what had just occurred in the exchange that took place in French between the President and the Delegate of France.

68. **The President** replied, in response to the delegation of the United States of America, that Article 30, paragraph 5, sub-paragraph (a), stated that: "a declaration or registration in accordance with Article 23(4) may be refused only for the reasons specified in paragraph 3(a) […]". He stated that the Delegate of France had observed that the reference to Article 23, paragraph 4, should in fact be to Article 23, paragraphs 2 and 3. He noted that this could be checked by the Permanent Bureau

69. **Ms Carlson** (United States of America) noted that the delegation of the United States of America would be happy with the Permanent Bureau checking the referencing contained within Article 23, paragraph 5.

70. **Ms Albuquerque Ferreira** (China) did not believe that the reference to Article 23, paragraph 4, within Article 30, paragraph 5, sub-paragraph (a), was incorrect because she noted that the focus of Article 30, paragraph 5, sub-paragraph (a), was on the refusal of an application for recognition and enforcement and not in relation to the declaration or registration of a maintenance decision.

71. **The President** acknowledged the comments that had been made by the Delegate of China and noted that the Permanent Bureau would certainly check Article 30, paragraph 5, to ensure that it was correct.

72. **Mr Beaumont** (United Kingdom) reiterated that the Permanent Bureau would review the referencing contained in Article 30, paragraph 5, sub-paragraph (a), but he also believed that the reference within that Article to Article 23, paragraph 4, was correct.

73. **Le Président** note que l'article 30 est adopté sous réserve des corrections et observations précédentes.

Le Président invite les participants à examiner l'article 31 intitulé « Décisions résultant de l'effet combiné d'ordonnances provisoires et de confirmation » (*Decisions produced by the combined effect of provisional and confirmation orders*). Le Président ne constate aucune intervention.

Le Président note que l'article 31 est adopté.

Le Président invite les participants à considérer l'article 32 intitulé « Exécution en vertu du droit interne » (*Enforcement under internal law*).

74. **Mme Borcy** (Belgique) indique que dans le texte en français de l'article 32, paragraphe 5, le mot « celle » devrait être remplacé par « celui » car l'on se réfère plutôt au délai qu'à la prescription.

75. **Le Président** répète la proposition de la Déléguée de la Belgique mais constate que l'assemblée a des doutes concernant cette observation.

76. **M. de Leiris** (France) reconnaît que cette disposition est particulièrement difficile à lire. Il observe cependant que « celle » vise la loi de l'État d'origine ou la loi de l'État requis. Aussi convient-il de conserver le mot « celle ».

77. **Le Président** conclut que l'article 32 doit être maintenu tel que rédigé dans le Document de travail No 1. Il s'assure que la Déléguée de la Belgique approuve ce choix et note que l'article 32 est adopté.

Le Président invite les participants à se prononcer, successivement, sur l'article 33 intitulé « Non-discrimination » (*Non-discrimination*), l'article 34 intitulé « Mesures d'exécution » (*Enforcement measures*), l'article 35 intitulé « Transferts de fonds » (*Transfer of funds*), l'article 36 intitulé « Organismes publics en qualité de demandeur » (*Public bodies as applicants*), l'article 37 intitulé « Demandes présentées directement aux autorités compétentes » (*Direct requests to competent authorities*), l'article 38 intitulé « Protection des données à caractère personnel » (*Protection of personal data*), l'article 39 intitulé « Confidentialité » (*Confidentiality*), l'article 40 intitulé « Non-divulgation de renseignements » (*Non-disclosure of information*), l'article 41 intitulé « Dispense de légalisation » (*No legalisation*), l'article 42 intitulé « Procuration » (*Power of attorney*), l'article 43 intitulé « Recouvrement des frais » (*Recovery of costs*), l'article 44 intitulé « Exigences linguistiques » (*Language requirements*), l'article 45 intitulé « Moyens et coûts de traduction » (*Means and costs of translation*), et l'article 46 intitulé « Systèmes juridiques non unifiés – interprétation » (*Non-unified legal systems – interpretation*).

78. **Le Président** ne constate aucune observation et conclut que les articles 33 à 46 sont adoptés.

79. **Mrs Borrás** (co-Rapporteur) noted with respect to Article 46, paragraph 1, sub-paragraph (b), that while the reference was correct, there could be recognition and enforcement or only recognition. Accordingly, both cases needed to be taken into account in this provision.

80. **The President** confirmed with the co-*Rapporteur* that she was referring to Article 46, paragraph 1, sub-paragraph (b), which stated that "any reference to a decision established, recognised and / or enforced, and modified in that State shall be construed as referring, where appropriate, to a decision established, recognised and / or enforced, and modified in a territorial unit".

81. **Ms Borrás** (co-*Rapporteur*) repeated that the referencing in Article 46, paragraph 1, sub-paragraph (b), had to be clarified because there can be recognition and enforcement or just recognition and the provision did not accurately reflect that situation.

82. **The President** opened the floor on Article 47 entitled "Non-unified legal systems – substantive rules" (*Systèmes juridiques non unifiés – règles matérielles*)

83. **Mme Riendeau** (Canada) rappelle que sa délégation avait proposé, lors des discussions, de supprimer dans l'article 47, paragraphe premier, l'expression « [n]onobstant l'article 46 ». En effet, l'article 47 portant sur les règles matérielles et l'article 46 concernant uniquement l'interprétation, il n'y pas lieu d'avoir cette référence dans l'article 47.

84. **The President** asked the delegates whether the point that had been raised by the Delegate of Canada should be considered further.

85. **Mr Beaumont** (United Kingdom) stated that the delegation of the United Kingdom agreed with Canada and that the phrase "[n]otwithstanding Article 46" contained in Article 47, paragraph 1, should be deleted.

86. **The President** observed that the reference to "[n]otwithstanding Article 46" in Article 47, paragraph 1, would therefore be deleted.

Le Président note que l'article 47 est adopté sous réserve de la correction susmentionnée.

The President opened the floor on Article 48 entitled "Coordination with prior Hague Maintenance Conventions" (*Coordination avec les Conventions de La Haye antérieures en matière d'obligations alimentaires*).

87. **Mr Thøgersen** (Denmark) referred to the third line of Article 48 and asked whether the "Hague Convention of 15 April 1958" should be written in italics.

88. **Mr Lortie** (First Secretary) noted that there were internal rules within the Permanent Bureau of the Hague Conference in relation to styles and in this case, the reference to the "Hague Convention of 15 April 1958" was not an official title because that Convention was only officially adopted in French, and so its non-official English title was not italicised within the text of this Convention.

89. **Mr Thøgersen** (Denmark) queried whether the reference to the "Hague Convention of 1 March 1954" in Article 50 would also be in that same category.

90. **Mr Lortie** (First Secretary) confirmed that that was correct.

91. **Le Président** note que l'article 48 est adopté.

Le Président invite les participants à se prononcer, successivement, sur l'article 49 intitulé « Coordination avec la Convention de New York de 1956 » (*Co-ordination with the 1956 New York Convention*), l'article 50 intitulé « Relations avec les Conventions de La Haye antérieures relatives à la notification d'actes et à l'obtention de preuves » (*Relationship with prior Hague Conventions on service of documents and taking of evidence*), l'article 51 intitulé « Coordination avec les instruments et accords complémentaires » (*Co-ordination of instruments and supplementary agreements*), l'article 52 intitulé « Règle de l'efficacité maximale » (*Most effective rule*), l'article 53 intitulé « Interprétation uniforme » (*Uniform interpretation*), et l'article 54 intitulé « Examen du fonctionnement pratique de la Convention » (*Review of practical operation of the Convention*).

Le Président déclare, en l'absence de commentaires, que les articles 49 à 54 sont adoptés.

The President opened the floor on Article 55 entitled "Amendment of forms" (*Amendement des formulaires*).

92. **Le Secrétaire général** indique que dans la version française du texte, les termes « et prenant part au vote » auraient dû être supprimés à l'article 55, paragraphe 2, première phrase.

93. **Le Président** répète la partie de phrase qui doit être supprimée.

The President noted that Article 55, paragraph 2, of the English text of the draft Convention was missing a phrase. In the French text of the draft Convention, he observed that the phrase "*et prenant part au vote*" was included but that such phrase was not to be found in the English text. He noted that it would be checked and queried whether the phrase had to be deleted in the French text to the draft Convention.

94. **The Secretary General** recalled that it was discussed that Article 55, concerning the amendment of forms, was to operate via consensus and so the phrase contained in the French text of the draft Convention should probably be removed.

95. **The President** therefore concluded that the phrase "*et prenant part au vote*" had to be deleted from the French text of the draft Convention.

The President opened the floor on Article 56 entitled "Transitional provisions" (*Dispositions transitoires*), Article 57 entitled "Provision of information concerning laws, procedures and services" (*Informations relatives aux lois, procédures et services*), and Article 58 entitled "Signature, ratification and accession" (*Signature, ratification et adhésion*). He noted that Articles 56 to 58 were adopted.

The President then opened the floor on Article 59 entitled "Regional Economic Integration Organisations" (*Organisations régionales d'intégration économique*).

96. **Mr McClean** (Commonwealth Secretariat) noted that in Article 59, paragraph 5, of the English text of the draft Convention, the last sentence stated: "[…] applies equally to the relevant Member States of the Organisation, where appropriate". He queried whether the word "relevant" also appeared and was reflected in the French text of the draft Convention.

97. **Le Président** remercie le Délégué du *Commonwealth Secretariat* et note effectivement une incohérence entre les versions anglaise et française, à l'article 59, paragraphe 5, dernière ligne. Il demande à la délégation de la Communauté européenne si elle a une suggestion sur ce point.

98. **Mme Lenzing** (Communauté européenne – Commission) acquiesce et propose d'ajouter le mot « concernés » après « aux États membres de l'Organisation » dans l'article 59, paragraphe 5, dernière ligne.

99. **Le Président** note que l'article 59 est adopté sous réserve de la correction indiquée.

The President noted that the Permanent Bureau would confirm the consistency of Article 59 as between the French and English texts of the draft Convention.

100. **Mme Ménard** (Canada) constate une erreur à l'article 52, paragraphe premier, alinéa (b). Elle évoque une proposition qui a été faite par la délégation des États-Unis d'Amérique d'inclure l'expression « *simplified, more expeditious procedures* ». Or, cette modification a bien été intégrée dans la version anglaise mais pas dans le texte en français. Aussi, propose-t-elle de remplacer « ou » par une virgule afin que l'article 52, paragraphe premier, alinéa (b), se lise comme suit : « des procédures simplifiées, accélérées relatives à une demande de reconnaissance et d'exécution de décisions en matières d'aliments ».

101. **Le Président** prend note de la correction dans la version française de l'article 52, paragraphe premier, alinéa (b), et constate que la version anglaise est correcte.

The President noted the comments that had been made by the Delegate of Canada that, in relation to Article 52, paragraph 1, sub-paragraph (b), the word "more" that appeared in the English text of the draft Convention was missing in the French text of the draft Convention, as well as a comma that appeared after the word "simplified" in the English text but not in the French text.

102. **M. de Leiris** (France) confirme la remarque faite par la délégation du Canada. Il observe en outre que par souci de coordination avec le texte en anglais, il conviendrait de remplacer « accélérées » par « plus expéditives ». L'article 52, paragraphe premier, alinéa (b), devrait donc se lire comme suit : « des procédures simplifiées et plus expéditives relatives à […] ».

103. **Le Président** souhaite confirmer que la proposition du Délégué de la France est bien de remplacer « accélérées » par « plus expéditives ».

104. **M. de Leiris** (France) confirme sa proposition si, toutefois, l'ensemble des délégués et observateurs approuve ce changement.

105. **Le Président** prend note de la correction proposée par le Délégué de la France et observe également qu'il manque le chiffre « 1 » au début du premier paragraphe de l'article 52, dans la version française.

106. **Ms Carlson** (United States of America) thanked the President and stated that the delegation of the United States of America did not believe that there should be any difference at all as between the French and English texts of the draft Convention in relation to Article 52, paragraph 1, sub-paragraph (b). She noted that otherwise, there may be a different, unintended result as between the operation of the two texts of the draft Convention.

107. **The President** confirmed with the Delegate of the United States of America that in the French version, the text of the draft Convention in relation to Article 52, paragraph 1, sub-paragraph (b), would be amended so that it would read: "*des procédures simplifiées et plus expéditives relatives à une demande de reconnaissance et d'exécution de décisions en matière d'aliments*".

108. **Ms Carlson** (United States of America) queried whether that meant that the President was also changing the English text to the draft Convention.

109. **The President** noted that the English text of the draft Convention would not be changed and that it would just be the French text of the draft Convention that would be amended in the manner that he had just stated.

110. **Ms Carlson** (United States of America) conferred with the delegation of Canada as to the outcome of what would appear in the English and French texts to the draft Convention and noted with the President that the delegation of the United States of America was content with the outcome.

111. **M. Voulgaris** (Grèce) note qu'il n'est pas francophone mais sa connaissance de la langue française le porte à penser que l'expression « expéditives » à une mauvaise consonance juridique. Il est en effet convaincu que le terme « accélérées » serait plus adapté et correspondrait mieux au terme anglais « *expeditious* ».

112. **Le Président** demande à la délégation de la France, qu'il qualifie d'« autorité infaillible » en matière de langue française, ce qu'elle pense de la proposition du Délégué de la Grèce.

113. **M. de Leiris** (France) remarque tout d'abord que sa délégation n'est pas la seule délégation francophone présente et qu'elle n'est pas non plus « infaillible ». Il observe en outre que si le terme « accélérées » est maintenu à l'article 52, paragraphe premier, alinéa (b), alors il convient de remplacer également « plus expéditives » par « accélérées » au paragraphe 2 de l'article 52.

114. **Le Président** conclut que le terme « accélérées » est maintenu à l'article 52, paragraphe premier, alinéa (b), et que le terme « plus expéditives » sera en revanche remplacé par « accélérées » au paragraphe 2 de l'article 52.

115. **Ms Kulikova** (Russian Federation) queried what the current version of the English text was for Article 52, paragraph 1, sub-paragraph (b).

116. **The President** noted that the English text was not modified and all that had occurred was that it had been attempted to find a corresponding text for the French version of the draft Convention. He noted that the Delegate of Greece had been helpful in that regard.

The President opened the floor on Article 60 entitled "Entry into force" (*Entrée en vigueur*).

117. **The Secretary General** wondered if in relation to Article 60, paragraph 2, sub-paragraph (b), the reference to "or Regional Economic Integration Organisation" should be deleted, because Article 58 that was also referred to in that same sub-paragraph dealt with States while Regional Economic Integration Organisations were dealt with in Article 59. He mentioned that his comments were subject to the further comments of the delegation of the European Community.

118. **The President** confirmed that the Secretary General was referring to Article 60, paragraph 2, sub-paragraph (b), and had suggested to delete "or Regional Economic Integration Organisation".

119. **Le Secrétaire général** note que dans la version française de l'article 60, paragraphe 2, alinéa (b), l'article « le » a été omis devant le mot « lendemain ».

120. **Le Président** note que deux changements ont donc été proposés pour l'article 60, paragraphe 2, alinéa (b) : d'une part, la suppression de l'expression « ou Organisation régionale d'intégration économique » et d'autre part, l'ajout du mot « le » devant « lendemain ».

The President therefore noted that changes would be made in both the English and French texts of the draft Convention.

121. **Ms Lenzing** (European Community – Commission) was hesitant to remove the phrase "or Regional Economic Integration Organisation" from Article 60, paragraph 2, sub-paragraph (b), because she stated that Article 59 did not currently allow a Regional Economic Integration Organisation to object to the accession of another Contracting State to the Convention. She noted, however, that the reference to the relevant phrase in Article 60, paragraph 2, sub-paragraph (b), allowed such an objection to be made and so the removal of that phrase would not be desired.

122. **The President** stated that the comments of the Delegate of the European Community were thoughtful but he

considered that the text of Article 60 should remain as it currently stood.

123. **Mme Riendeau** (Canada) indique qu'elle souhaiterait des clarifications concernant l'article 60, paragraphe premier.

She referred to Article 60, paragraph 1, and stated that this Article provided that "[t]he Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 58". She recalled that a twelve-month period had been previously discussed in the event that the second instrument deposited in relation to this Convention was one of accession.

124. **The President** noted that the Delegate of Canada had raised a different question. He suggested that the most convenient change to Article 60, paragraph 1, would therefore probably be to just strike out "or accession" in that paragraph.

125. **Mme Borrás** (co-Rapporteur) indique que le paragraphe premier de l'article 60 fait référence à l'article 58. Or, cette dernière disposition permet aux États non membres de la Conférence de La Haye, mais qui ont participé à la Session, d'adhérer à la Convention après son entrée en vigueur. Néanmoins, comme ces États ont pris part aux discussions ayant conduit à l'adoption de cette Convention, il ne sera pas possible d'élever d'objection à l'encontre de leur adhésion. La période de trois mois s'appliquera étant donné que pour ces États, aucune objection n'est prévue.

126. **Le Secrétaire général** souhaite clarifier la situation. Il remarque que l'article 58 fait référence aux États non membres de la Conférence de La Haye qui ont participé à la présente Session. Or, conformément à l'article 58, paragraphe 2, ces États peuvent ratifier, accepter ou approuver la Convention mais ils n'y adhèrent pas. Aussi, le Secrétaire général estime-t-il qu'il convient de supprimer les mots « ou d'adhésion » à l'article 60, paragraphe premier.

127. **The President** noted that the issue would be considered and finalised by the Permanent Bureau during the period of four weeks after the conclusion of the Diplomatic Session and in accordance with the mandate that had been given to it by the delegates. The President gave the floor to the delegation of France.

128. **Mme Marnier** (France) souhaite intervenir concernant la question du délai de 12 mois. En effet, une délégation a demandé si ce délai était pris en compte à l'article 60. Or, effectivement, Mme Marnier note que le cas où le délai de 12 mois devra être appliqué est visé à l'article 60, paragraphe 2, alinéa (b). Cette disposition prévoit en effet que pour les États visés à l'article 58, paragraphe 3, c'est-à-dire les États non membres de la Conférence, la Convention entrera en vigueur le lendemain de l'expiration de la période durant laquelle des objections peuvent être élevées en vertu de l'article 58, paragraphe 5, c'est-à-dire une période de 12 mois.

129. **The Deputy Secretary General** agreed with the comments that had been made by the Delegate of Canada and the Secretary General to the effect that the words "or accession" should be deleted from Article 60, paragraph 1, because in accordance with Article 58, paragraph 3, accessions to the Convention may only be made after it has entered into force. Therefore, it did not make sense to state that a State may accede to the Convention before it has entered into forced.

130. **Mr Beaumont** (United Kingdom) agreed with what had been said by the Deputy Secretary General and stated, in reference to Article 60, paragraph 2, sub-paragraph (b), and the comments that had been made by the Delegate of the European Community, that if more Regional Economic Integration Organisations came into existence, a provision to enable those Regional Economic Integration Organisations to accede to the Convention would need to be added. He suggested that a change may therefore need to be made to Article 58, paragraph 3, and while this prospect was not necessarily foreseeable at that stage, there was no harm in adding to that provision.

131. **The President** thanked the Delegate of the United Kingdom for his suggestion. He noted that it had been previously agreed to leave the text in Article 60, paragraph 2, sub-paragraph (b), as it currently stood. The President handed the floor to the Delegate of Sweden.

132. **Mr Hellner** (Sweden) thanked the President and suggested that Article 58, paragraph 3, should in fact refer to Article 60, paragraph 1, and not just Article 60 since the reference was to when the Convention itself entered into force, being Article 60, paragraph 1, while Article 60, paragraph 2, referred to the Convention entering into force with respect to a State or Regional Economic Integration Organisation.

133. **The President** confirmed that the Delegate of Sweden had suggested that the reference in Article 58, paragraph 3, to Article 60 should in fact be to Article 60, paragraph 1. He queried whether the delegates agreed to this change and thereafter noted that it was accepted.

The President noted that Article 60 was adopted and moved the discussion to Article 61 entitled "Declarations with respect to non-unified legal systems" (*Déclarations relatives aux systèmes juridiques non unifiés*). The President noted that Article 61 was adopted and moved the discussion to Article 62 entitled "Reservations" (*Réserves*). The President handed the floor to the delegation of Denmark.

134. **Mr Thøgersen** (Denmark) stated that he did not believe that the reference to Article 55, paragraph 3, in Article 62, paragraph 1, was correct. He noted that Article 62, paragraph 1, stated that: "Any Contracting State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 61, make one or more of the reservations provided for in […]". He noted that Article 55, paragraph 3, related to the amendment of forms which would occur at a later time, not at the time of that State's ratification, acceptance, approval or accession to the Convention or at the time of making a declaration in accordance with Article 61.

135. **The President** thanked the Delegate of Denmark for his remark but noted that the language contained within Article 62, paragraph 1, had to remain. The President noted that Article 62 was adopted. The President then moved the discussion to Article 63 entitled "Declarations" (*Déclarations*). He noted that Article 63 was adopted and moved the discussion to Article 64 entitled "Denunciation" (*Dénonciation*). He noted that Article 64 was adopted and moved the discussion to Article 65 entitled "Notification" (*Notification*).

136. **The Secretary General** noted that at the very end of Article 65, the following would be inserted to the last para-

graph of the draft Convention: "and to each of the other States which have participated in that Session".

Le Secrétaire général indique qu'il convient d'ajouter à la fin de l'article 65 la phrase « ainsi qu'à chacun des autres États ayant participé à cette Session ». Cette proposition figure dans le Document de travail No 3.

137. **The President** noted that the amendment discussed by the Secretary General appeared in Working Document No 3 of the Plenary Session and was on white paper and being circulated. He noted the correction that had to be added to the last line of the last paragraph of the draft Convention and which was contained in that working document. He asked whether there were any objections to the proposed amendment. There were no objections and so the President noted that Working Document No 3 was accepted.

Annexes (Doc. trav. / Work. Doc. *No 1)*

138. **The President** returned to discuss the forms in relation to the Convention as contained in the annexes to the draft Convention. He referred to the first page of the "Transmittal Form under Article 12(2)" as was located in Annex 1 of Working Document No 1 of the Plenary Session. There were no objections and so he noted that the first page of the form as contained in Annex 1 was adopted. The President then turned to the second page of the "Transmittal Form under Article 12(2)". He noted that the language of paragraph 7 of the form had been simplified on Wednesday 21 November 2007. There were no objections and so he noted that the second page of the form as contained in Annex 1 was adopted.

139. **Ms John** (Switzerland) proposed to amend paragraph 8, sub-paragraph (a), of the "Transmittal Form under Article 12(2)" as contained in Annex 1 of Working Document No 1 in relation to the third box that stated: "Document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements (Art. 25(1)(b))". Ms John noted that Article 25, paragraph 3, also stated that "[a] Contracting State may specify in accordance with Article 57 […] (c) that it does not require a document stating that the requirements of Article 19(3) are met", and so she believed that a reference to Article 25, paragraph 3, sub-paragraph (c), where a State had specified that it did not require such a document, should be inserted at the end of the sentence starting at the third box contained in paragraph 8, sub-paragraph (a), on the second page of the Transmittal Form in Working Document No 1.

140. **The President** confirmed that the Delegate of Switzerland had suggested to add something along the lines of: "and unless that State had specified in accordance with Article 57 that it does not require a document stating that the requirements of Article 19(3) were met" at the end of the text currently contained alongside the third box of paragraph 8, sub-paragraph (a), on the "Transmittal Form under Article 12(2)".

141. **Ms John** (Switzerland) confirmed that the President had understood her correctly.

142. **The President** queried with the Delegate of Switzerland what the effect of her proposed amendment was.

143. **Ms John** (Switzerland) explained that the result of her proposed addition would be that in cases where a State had specified under Article 57 and in accordance with Article 25, paragraph 3, sub-paragraph (c), that they did not require a document stating that the requirements of Article 19, paragraph 3, were met, then a requesting State transmitting an application to the aforementioned State would not be required to provide such a document along with the other documents mentioned in paragraph 8, sub-paragraph (a), of the "Transmittal Form under Article 12(2)".

144. **The President** wished to confirm that the addition to the end of the third box of paragraph 8, sub-paragraph (a), of the "Transmittal Forum under Article 12(2)" as he had stated previously was what was desired by the delegation of Switzerland.

145. **Ms John** (Switzerland) confirmed that that was the case.

146. **The President** noted that the addition of text to the second page of the "Transmittal Form under Article 12(2)" as proposed by the delegation of Switzerland would be considered.

The President moved the discussion to the "Acknowledgement Form under Article 12(3)" in Annex 2 of Working Document No 1 of the Plenary Session. He noted that there were no objections and so concluded that the "Acknowledgement Form under Article 12(3)" was adopted.

The President noted that the text of the draft Convention had been approved by the delegates attending the Twenty-First Diplomatic Session of the Hague Conference on Private International Law. He stated that the Protocol to the draft Convention would then be read next but that it was not yet ready to be handed out to delegates. He gave the floor to the Deputy Secretary General in the meantime.

Extrait du Procès-verbal de la Séance de clôture*

Extract from the Minutes of the Closing Session*

Séance du vendredi 23 novembre 2007 (matin)

Meeting of Friday 23 November 2007 (morning)

Le Président donne la parole au Secrétaire général.

Le Secrétaire général remercie les ambassadeurs et l'ensemble des personnes présentes. Le Secrétaire général annonce que l'Acte final de la Convention ne sera pas lu dans son intégralité. Ainsi, le Secrétaire général adjoint et les Premiers secrétaires procéderont à la lecture des préambules de la Convention et du Protocole ainsi que des dispositions symbolisant l'essentiel de ces instruments.

Il est procédé à la lecture de l'Acte final.

Ensuite, tous les délégués présents et le Secrétaire général signent l'Acte final.

* Le Procès-verbal de la Séance de clôture figure dans le tome III, *Matières diverses*.
* The Minutes of the Closing Session appear in Tome III, *Miscellaneous matters*.

Convention

Extrait de l'Acte final de la Vingt et unième session signé le 23 novembre 2007*

CONVENTION SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS DESTINÉS AUX ENFANTS ET À D'AUTRES MEMBRES DE LA FAMILLE

Les États signataires de la présente Convention,

Désireux d'améliorer la coopération entre les États en matière de recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille,

Conscients de la nécessité de disposer de procédures produisant des résultats et qui soient accessibles, rapides, efficaces, économiques, équitables et adaptées à diverses situations,

Souhaitant s'inspirer des meilleures solutions des Conventions de La Haye existantes, ainsi que d'autres instruments internationaux, notamment la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies,

Cherchant à tirer parti des avancées technologiques et à créer un système souple et susceptible de s'adapter aux nouveaux besoins et aux opportunités offertes par les technologies et leurs évolutions,

Rappelant que, en application des articles 3 et 27 de la *Convention relative aux droits de l'enfant* du 20 novembre 1989, établie par les Nations Unies,

– l'intérêt supérieur de l'enfant doit être une considération primordiale dans toutes les décisions concernant les enfants,

– tout enfant a droit à un niveau de vie suffisant pour permettre son développement physique, mental, spirituel, moral et social,

– il incombe au premier chef aux parents ou autres personnes ayant la charge de l'enfant d'assurer, dans la limite de leurs possibilités et de leurs moyens financiers, les conditions de vie nécessaires au développement de l'enfant,

– les États parties devraient prendre toutes les mesures appropriées, notamment la conclusion d'accords internationaux, en vue d'assurer le recouvrement des aliments destinés aux enfants auprès de leurs parents ou d'autres personnes ayant une responsabilité à leur égard, en particulier lorsque ces personnes vivent dans un État autre que celui de l'enfant,

Ont résolu de conclure la présente Convention, et sont convenus des dispositions suivantes :

CHAPITRE PREMIER – OBJET, CHAMP D'APPLICATION ET DÉFINITIONS

Article premier Objet

La présente Convention a pour objet d'assurer l'efficacité du recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille, en particulier en :

(a) établissant un système complet de coopération entre les autorités des États contractants ;

(b) permettant de présenter des demandes en vue d'obtenir des décisions en matière d'aliments ;

(c) assurant la reconnaissance et l'exécution des décisions en matière d'aliments ; et

(d) requérant des mesures efficaces en vue de l'exécution rapide des décisions en matière d'aliments.

Article 2 Champ d'application

1 La présente Convention s'applique :

(a) aux obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne âgée de moins de 21 ans ;

(b) à la reconnaissance et à l'exécution ou à l'exécution d'une décision relative aux obligations alimentaires entre époux et ex-époux lorsque la demande est présentée conjointement à une action comprise dans le champ d'application de l'alinéa (a) ; et

(c) à l'exception des chapitres II et III, aux obligations alimentaires entre époux et ex-époux.

2 Tout État contractant peut, conformément à l'article 62, se réserver le droit de limiter l'application de la Convention, en ce qui concerne l'alinéa (a) du paragraphe premier, aux personnes n'ayant pas atteint l'âge de 18 ans. Tout État contractant faisant une telle réserve ne sera pas fondé à demander l'application de la Convention aux personnes exclues par sa réserve du fait de leur âge.

3 Tout État contractant peut, conformément à l'article 63, déclarer qu'il étendra l'application de tout ou partie de la Convention à d'autres obligations alimentaires découlant de relations de famille, de filiation, de mariage ou d'alliance, incluant notamment les obligations envers les personnes vulnérables. Une telle déclaration ne crée d'obligation entre deux États contractants que dans la mesure où leurs déclarations recouvrent les mêmes obligations alimentaires et les mêmes parties de la Convention.

4 Les dispositions de la présente Convention s'appliquent aux enfants indépendamment de la situation matrimoniale de leurs parents.

Article 3 Définitions

Aux fins de la présente Convention :

* Pour le texte complet de l'Acte final, voir *Actes et documents de la Vingt et unième session*, tome III, *Matières diverses*.

Extract from the Final Act of the Twenty-First Session signed on the 23rd of November 2007*

CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

The States signatory to the present Convention,

Desiring to improve co-operation among States for the international recovery of child support and other forms of family maintenance,

Aware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive and fair,

Wishing to build upon the best features of existing Hague Conventions and other international instruments, in particular the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956,

Seeking to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities,

Recalling that, in accordance with Articles 3 and 27 of the United Nations *Convention on the Rights of the Child* of 20 November 1989,

– in all actions concerning children the best interests of the child shall be a primary consideration,

– every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,

– the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development, and

– States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child,

Have resolved to conclude this Convention and have agreed upon the following provisions –

CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

Article 1 Object

The object of the present Convention is to ensure the effective international recovery of child support and other forms of family maintenance, in particular by –

(a) establishing a comprehensive system of co-operation between the authorities of the Contracting States;

(b) making available applications for the establishment of maintenance decisions;

(c) providing for the recognition and enforcement of maintenance decisions; and

(d) requiring effective measures for the prompt enforcement of maintenance decisions.

Article 2 Scope

1 This Convention shall apply –

(a) to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years;

(b) to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of sub-paragraph (a); and

(c) with the exception of Chapters II and III, to spousal support.

2 Any Contracting State may reserve, in accordance with Article 62, the right to limit the application of the Convention under sub-paragraph 1(a), to persons who have not attained the age of 18 years. A Contracting State which makes this reservation shall not be entitled to claim the application of the Convention to persons of the age excluded by its reservation.

3 Any Contracting State may declare in accordance with Article 63 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.

4 The provisions of this Convention shall apply to children regardless of the marital status of the parents.

Article 3 Definitions

For the purposes of this Convention –

* For the complete text of the Final Act, see *Proceedings of the Twenty-First Session*, Tome III, *Miscellaneous matters*.

(a) « créancier » désigne une personne à qui des aliments sont dus ou allégués être dus ;

(b) « débiteur » désigne une personne qui doit ou de qui on réclame des aliments ;

(c) « assistance juridique » désigne l'assistance nécessaire pour permettre aux demandeurs de connaître et de faire valoir leurs droits et pour garantir que leurs demandes seront traitées de façon complète et efficace dans l'État requis. Une telle assistance peut être fournie, le cas échéant, au moyen de conseils juridiques, d'une assistance lorsqu'une affaire est portée devant une autorité, d'une représentation en justice et de l'exonération des frais de procédure ;

(d) « accord par écrit » désigne un accord consigné sur tout support dont le contenu est accessible pour être consulté ultérieurement ;

(e) « convention en matière d'aliments » désigne un accord par écrit relatif au paiement d'aliments qui :

(i) a été dressé ou enregistré formellement en tant qu'acte authentique par une autorité compétente ; ou

(ii) a été authentifié ou enregistré par une autorité compétente, conclu avec elle ou déposé auprès d'elle,

et peut faire l'objet d'un contrôle et d'une modification par une autorité compétente ;

(f) une « personne vulnérable » désigne une personne qui, en raison d'une altération ou d'une insuffisance de ses facultés personnelles, n'est pas en état de pourvoir à ses besoins.

CHAPITRE II – COOPÉRATION ADMINISTRATIVE

Article 4 Désignation des Autorités centrales

1 Chaque État contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.

2 Un État fédéral, un État dans lequel plusieurs systèmes de droit sont en vigueur ou un État ayant des unités territoriales autonomes, est libre de désigner plus d'une Autorité centrale et doit spécifier l'étendue territoriale ou personnelle de leurs fonctions. L'État qui fait usage de cette faculté désigne l'Autorité centrale à laquelle toute communication peut être adressée en vue de sa transmission à l'Autorité centrale compétente au sein de cet État.

3 Au moment du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration faite conformément à l'article 61, chaque État contractant informe le Bureau Permanent de la Conférence de La Haye de droit international privé de la désignation de l'Autorité centrale ou des Autorités centrales, ainsi que de leurs coordonnées et, le cas échéant, de l'étendue de leurs fonctions visées au paragraphe 2. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

Article 5 Fonctions générales des Autorités centrales

Les Autorités centrales doivent :

(a) coopérer entre elles et promouvoir la coopération entre les autorités compétentes de leur État pour réaliser les objectifs de la Convention ;

(b) rechercher, dans la mesure du possible, des solutions aux difficultés pouvant survenir dans le cadre de l'application de la Convention.

Article 6 Fonctions spécifiques des Autorités centrales

1 Les Autorités centrales fournissent une assistance relative aux demandes prévues au chapitre III, notamment en :

(a) transmettant et recevant ces demandes ;

(b) introduisant ou facilitant l'introduction de procédures relatives à ces demandes.

2 Concernant ces demandes, elles prennent toutes les mesures appropriées pour :

(a) accorder ou faciliter l'octroi d'une assistance juridique, lorsque les circonstances l'exigent ;

(b) aider à localiser le débiteur ou le créancier ;

(c) faciliter la recherche des informations pertinentes relatives aux revenus et, si nécessaire, au patrimoine du débiteur ou du créancier, y compris la localisation des biens ;

(d) encourager les règlements amiables afin d'obtenir un paiement volontaire des aliments, lorsque cela s'avère approprié par le recours à la médiation, à la conciliation ou à d'autres modes analogues ;

(e) faciliter l'exécution continue des décisions en matière d'aliments, y compris les arrérages ;

(f) faciliter le recouvrement et le virement rapide des paiements d'aliments ;

(g) faciliter l'obtention d'éléments de preuve documentaire ou autre ;

(h) fournir une assistance pour établir la filiation lorsque cela est nécessaire pour le recouvrement d'aliments ;

(i) introduire ou faciliter l'introduction de procédures afin d'obtenir toute mesure nécessaire et provisoire à caractère territorial et ayant pour but de garantir l'aboutissement d'une demande d'aliments pendante ;

(j) faciliter la signification et la notification des actes.

3 Les fonctions conférées à l'Autorité centrale en vertu du présent article peuvent être exercées, dans la mesure prévue par la loi de l'État concerné, par des organismes publics ou d'autres organismes soumis au contrôle des autorités compétentes de cet État. La désignation de tout organisme, public ou autre, ainsi que ses coordonnées et l'étendue de ses fonctions sont communiquées par l'État contractant au Bureau Permanent de la Conférence de La Haye de droit international privé. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

4 Le présent article et l'article 7 ne peuvent en aucun cas être interprétés comme imposant à une Autorité centrale l'obligation d'exercer des attributions qui relèvent exclusivement des autorités judiciaires selon la loi de l'État requis.

Convention adoptée

(a) "creditor" means an individual to whom maintenance is owed or is alleged to be owed;

(b) "debtor" means an individual who owes or who is alleged to owe maintenance;

(c) "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The means of providing such assistance may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings;

(d) "agreement in writing" means an agreement recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference;

(e) "maintenance arrangement" means an agreement in writing relating to the payment of maintenance which –

(i) has been formally drawn up or registered as an authentic instrument by a competent authority; or

(ii) has been authenticated by, or concluded, registered or filed with a competent authority,

and may be the subject of review and modification by a competent authority;

(f) "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself.

CHAPTER II – ADMINISTRATIVE CO-OPERATION

Article 4 Designation of Central Authorities

1 A Contracting State shall designate a Central Authority to discharge the duties that are imposed by the Convention on such an authority.

2 Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

3 The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited or when a declaration is submitted in accordance with Article 61. Contracting States shall promptly inform the Permanent Bureau of any changes.

Article 5 General functions of Central Authorities

Central Authorities shall –

(a) co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention;

(b) seek as far as possible solutions to difficulties which arise in the application of the Convention.

Article 6 Specific functions of Central Authorities

1 Central Authorities shall provide assistance in relation to applications under Chapter III. In particular they shall –

(a) transmit and receive such applications;

(b) initiate or facilitate the institution of proceedings in respect of such applications.

2 In relation to such applications they shall take all appropriate measures –

(a) where the circumstances require, to provide or facilitate the provision of legal assistance;

(b) to help locate the debtor or the creditor;

(c) to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;

(d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;

(e) to facilitate the ongoing enforcement of maintenance decisions, including any arrears;

(f) to facilitate the collection and expeditious transfer of maintenance payments;

(g) to facilitate the obtaining of documentary or other evidence;

(h) to provide assistance in establishing parentage where necessary for the recovery of maintenance;

(i) to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;

(j) to facilitate service of documents.

3 The functions of the Central Authority under this Article may, to the extent permitted under the law of its State, be performed by public bodies, or other bodies subject to the supervision of the competent authorities of that State. The designation of any such public bodies or other bodies, as well as their contact details and the extent of their functions, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. Contracting States shall promptly inform the Permanent Bureau of any changes.

4 Nothing in this Article or Article 7 shall be interpreted as imposing an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested State.

Article 7 Requêtes de mesures spécifiques

1 Une Autorité centrale peut, sur requête motivée, demander à une autre Autorité centrale de prendre les mesures spécifiques appropriées prévues à l'article 6(2)(b), (c), (g), (h), (i) et (j) lorsqu'aucune demande prévue à l'article 10 n'est pendante. L'Autorité centrale requise prend les mesures s'avérant appropriées si elle considère qu'elles sont nécessaires pour aider un demandeur potentiel à présenter une demande prévue à l'article 10 ou à déterminer si une telle demande doit être introduite.

2 Une Autorité centrale peut également prendre des mesures spécifiques, à la requête d'une autre Autorité centrale, dans une affaire de recouvrement d'aliments pendante dans l'État requérant et comportant un élément d'extranéité.

Article 8 Frais de l'Autorité centrale

1 Chaque Autorité centrale prend en charge ses propres frais découlant de l'application de la Convention.

2 Les Autorités centrales ne peuvent mettre aucun frais à la charge du demandeur pour les services qu'elles fournissent en vertu de la Convention, sauf s'il s'agit de frais exceptionnels découlant d'une requête de mesures spécifiques prévue à l'article 7.

3 L'Autorité centrale requise ne peut pas recouvrer les frais exceptionnels mentionnés au paragraphe 2 sans avoir obtenu l'accord préalable du demandeur sur la fourniture de ces services à un tel coût.

CHAPITRE III – DEMANDES PAR L'INTERMÉDIAIRE DES AUTORITÉS CENTRALES

Article 9 Demande par l'intermédiaire des Autorités centrales

Toute demande prévue au présent chapitre est transmise à l'Autorité centrale de l'État requis par l'intermédiaire de l'Autorité centrale de l'État contractant dans lequel réside le demandeur. Aux fins de la présente disposition, la résidence exclut la simple présence.

Article 10 Demandes disponibles

1 Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un créancier qui poursuit le recouvrement d'aliments en vertu de la présente Convention :

(a) la reconnaissance ou la reconnaissance et l'exécution d'une décision ;

(b) l'exécution d'une décision rendue ou reconnue dans l'État requis ;

(c) l'obtention d'une décision dans l'État requis lorsqu'il n'existe aucune décision, y compris l'établissement de la filiation si nécessaire ;

(d) l'obtention d'une décision dans l'État requis lorsque la reconnaissance et l'exécution d'une décision n'est pas possible, ou est refusée, en raison de l'absence d'une base de reconnaissance et d'exécution prévue à l'article 20 ou pour les motifs prévus à l'article 22(b) ou (e) ;

(e) la modification d'une décision rendue dans l'État requis ;

(f) la modification d'une décision rendue dans un État autre que l'État requis.

2 Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un débiteur à l'encontre duquel existe une décision en matière d'aliments :

(a) la reconnaissance d'une décision ou une procédure équivalente ayant pour effet de suspendre ou de restreindre l'exécution d'une décision antérieure dans l'État requis ;

(b) la modification d'une décision rendue dans l'État requis ;

(c) la modification d'une décision rendue dans un État autre que l'État requis.

3 Sauf disposition contraire de la Convention, les demandes prévues aux paragraphes premier et 2 sont traitées conformément au droit de l'État requis et, dans le cas des demandes prévues aux paragraphes premier (c) à (f) et 2(b) et (c), sont soumises aux règles de compétence applicables dans cet État.

Article 11 Contenu de la demande

1 Toute demande prévue à l'article 10 comporte au moins :

(a) une déclaration relative à la nature de la demande ou des demandes ;

(b) le nom et les coordonnées du demandeur, y compris son adresse et sa date de naissance ;

(c) le nom du défendeur et, lorsqu'elles sont connues, son adresse et sa date de naissance ;

(d) le nom et la date de naissance des personnes pour lesquelles des aliments sont demandés ;

(e) les motifs sur lesquels la demande est fondée ;

(f) lorsque la demande est formée par le créancier, les informations relatives au lieu où les paiements doivent être effectués ou transmis électroniquement ;

(g) à l'exception de la demande prévue à l'article 10(1)(a) et (2)(a), toute information ou tout document exigé par une déclaration de l'État requis faite conformément à l'article 63 ;

(h) les noms et coordonnées de la personne ou du service de l'Autorité centrale de l'État requérant responsable du traitement de la demande.

2 Lorsque cela s'avère approprié, la demande comporte également les informations suivantes lorsqu'elles sont connues :

(a) la situation financière du créancier ;

(b) la situation financière du débiteur, y compris le nom et l'adresse de l'employeur du débiteur, ainsi que la localisation et la nature des biens du débiteur ;

(c) toute autre information permettant de localiser le défendeur.

Convention adoptée

Article 7 Requests for specific measures

1 A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2)(b), (c), (g), (h), (i) and (j) when no application under Article 10 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 10 or in determining whether such an application should be initiated.

2 A Central Authority may also take specific measures on the request of another Central Authority in relation to a case having an international element concerning the recovery of maintenance pending in the requesting State.

Article 8 Central Authority costs

1 Each Central Authority shall bear its own costs in applying this Convention.

2 Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention save for exceptional costs arising from a request for a specific measure under Article 7.

3 The requested Central Authority may not recover the costs of the services referred to in paragraph 2 without the prior consent of the applicant to the provision of those services at such cost.

CHAPTER III – APPLICATIONS THROUGH CENTRAL AUTHORITIES

Article 9 Application through Central Authorities

An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State. For the purpose of this provision, residence excludes mere presence.

Article 10 Available applications

1 The following categories of application shall be available to a creditor in a requesting State seeking to recover maintenance under this Convention –

(a) recognition or recognition and enforcement of a decision;

(b) enforcement of a decision made or recognised in the requested State;

(c) establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage;

(d) establishment of a decision in the requested State where recognition and enforcement of a decision is not possible, or is refused, because of the lack of a basis for recognition and enforcement under Article 20, or on the grounds specified in Article 22(b) or (e);

(e) modification of a decision made in the requested State;

(f) modification of a decision made in a State other than the requested State.

2 The following categories of application shall be available to a debtor in a requesting State against whom there is an existing maintenance decision –

(a) recognition of a decision, or an equivalent procedure leading to the suspension, or limiting the enforcement, of a previous decision in the requested State;

(b) modification of a decision made in the requested State;

(c) modification of a decision made in a State other than the requested State.

3 Save as otherwise provided in this Convention, the applications in paragraphs 1 and 2 shall be determined under the law of the requested State, and applications in paragraphs 1(c) to (f) and 2(b) and (c) shall be subject to the jurisdictional rules applicable in the requested State.

Article 11 Application contents

1 All applications under Article 10 shall as a minimum include –

(a) a statement of the nature of the application or applications;

(b) the name and contact details, including the address and date of birth of the applicant;

(c) the name and, if known, address and date of birth of the respondent;

(d) the name and date of birth of any person for whom maintenance is sought;

(e) the grounds upon which the application is based;

(f) in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;

(g) save in an application under Article 10(1)(a) and (2)(a), any information or document specified by declaration in accordance with Article 63 by the requested State;

(h) the name and contact details of the person or unit from the Central Authority of the requesting State responsible for processing the application.

2 As appropriate, and to the extent known, the application shall in addition in particular include –

(a) the financial circumstances of the creditor;

(b) the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor;

(c) any other information that may assist with the location of the respondent.

3 La demande est accompagnée de toute information ou tout document justificatif nécessaire, y compris tout document pouvant établir le droit du demandeur à l'assistance juridique gratuite. La demande prévue à l'article 10(1)(a) et (2)(a) n'est accompagnée que des documents énumérés à l'article 25.

4 Toute demande prévue à l'article 10 peut être présentée au moyen d'un formulaire recommandé et publié par la Conférence de La Haye de droit international privé.

Article 12 Transmission, réception et traitement des demandes et des affaires par l'intermédiaire des Autorités centrales

1 L'Autorité centrale de l'État requérant assiste le demandeur afin que soient joints tous les documents et informations qui, à la connaissance de cette autorité, sont nécessaires à l'examen de la demande.

2 Après s'être assurée que la demande satisfait aux exigences de la Convention, l'Autorité centrale de l'État requérant la transmet, au nom du demandeur et avec son consentement, à l'Autorité centrale de l'État requis. La demande est accompagnée du formulaire de transmission prévu à l'annexe 1. Lorsque l'Autorité centrale de l'État requis le demande, l'Autorité centrale de l'État requérant fournit une copie complète certifiée conforme par l'autorité compétente de l'État d'origine des documents énumérés aux articles 16(3), 25(1)(a), (b) et (d) et (3)(b) et 30(3).

3 Dans un délai de six semaines à compter de la date de réception de la demande, l'Autorité centrale requise en accuse réception au moyen du formulaire prévu à l'annexe 2, avise l'Autorité centrale de l'État requérant des premières démarches qui ont été ou qui seront entreprises pour traiter la demande et sollicite tout document ou toute information supplémentaire qu'elle estime nécessaire. Dans ce même délai de six semaines, l'Autorité centrale requise informe l'Autorité centrale requérante des nom et coordonnées de la personne ou du service chargé de répondre aux questions relatives à l'état d'avancement de la demande.

4 Dans un délai de trois mois suivant l'accusé de réception, l'Autorité centrale requise informe l'Autorité centrale requérante de l'état de la demande.

5 Les Autorités centrales requérante et requise s'informent mutuellement :

(a) de l'identité de la personne ou du service responsable d'une affaire particulière ;

(b) de l'état d'avancement de l'affaire,

et répondent en temps utile aux demandes de renseignements.

6 Les Autorités centrales traitent une affaire aussi rapidement qu'un examen adéquat de son contenu le permet.

7 Les Autorités centrales utilisent entre elles les moyens de communication les plus rapides et efficaces dont elles disposent.

8 Une Autorité centrale requise ne peut refuser de traiter une demande que s'il est manifeste que les conditions requises par la Convention ne sont pas remplies. Dans ce cas, cette Autorité centrale informe aussitôt l'Autorité centrale requérante des motifs de son refus.

9 L'Autorité centrale requise ne peut rejeter une demande au seul motif que des documents ou des informations supplémentaires sont nécessaires. Toutefois, l'Autorité centrale requise peut demander à l'Autorité centrale requérante de fournir ces documents ou ces informations supplémentaires. À défaut de les fournir dans un délai de trois mois ou dans un délai plus long spécifié par l'Autorité centrale requise, cette dernière peut décider de cesser de traiter la demande. Dans ce cas, elle en informe l'Autorité centrale requérante.

Article 13 Moyens de communication

Toute demande présentée par l'intermédiaire des Autorités centrales des États contractants, conformément à ce chapitre, et tout document ou information qui y est annexé ou fourni par une Autorité centrale ne peuvent être contestés par le défendeur uniquement en raison du support ou des moyens de communication utilisés entre les Autorités centrales concernées.

Article 14 Accès effectif aux procédures

1 L'État requis assure aux demandeurs un accès effectif aux procédures, y compris les procédures d'exécution et d'appel, qui découlent des demandes prévues à ce chapitre.

2 Pour assurer un tel accès effectif, l'État requis fournit une assistance juridique gratuite conformément aux articles 14 à 17, à moins que le paragraphe 3 ne s'applique.

3 L'État requis n'est pas tenu de fournir une telle assistance juridique gratuite si, et dans la mesure où, les procédures de cet État permettent au demandeur d'agir sans avoir besoin d'une telle assistance et que l'Autorité centrale fournit gratuitement les services nécessaires.

4 Les conditions d'accès à l'assistance juridique gratuite ne doivent pas être plus restrictives que celles fixées dans les affaires internes équivalentes.

5 Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans les procédures introduites en vertu de la Convention.

Article 15 Assistance juridique gratuite pour les demandes d'aliments destinés aux enfants

1 L'État requis fournit une assistance juridique gratuite pour toute demande relative aux obligations alimentaires découlant d'une relation parent-enfant envers une personne âgée de moins de 21 ans présentées par un créancier en vertu de ce chapitre.

2 Nonobstant le paragraphe premier, l'État requis peut, en ce qui a trait aux demandes autres que celles prévues à l'article 10(1)(a) et (b) et aux affaires couvertes par l'article 20(4), refuser l'octroi d'une assistance juridique gratuite s'il considère que la demande, ou quelque appel que ce soit, est manifestement mal fondée.

Convention adoptée

3 The application shall be accompanied by any necessary supporting information or documentation including documentation concerning the entitlement of the applicant to free legal assistance. In the case of applications under Article 10(1)(a) and (2)(a), the application shall be accompanied only by the documents listed in Article 25.

4 An application under Article 10 may be made in the form recommended and published by the Hague Conference on Private International Law.

Article 12 Transmission, receipt and processing of applications and cases through Central Authorities

1 The Central Authority of the requesting State shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application.

2 The Central Authority of the requesting State shall, when satisfied that the application complies with the requirements of the Convention, transmit the application on behalf of and with the consent of the applicant to the Central Authority of the requested State. The application shall be accompanied by the transmittal form set out in Annex 1. The Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 16(3), 25(1)(a), (b) and (d) and (3)(b) and 30(3).

3 The requested Central Authority shall, within six weeks from the date of receipt of the application, acknowledge receipt in the form set out in Annex 2, and inform the Central Authority of the requesting State what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information. Within the same six-week period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.

4 Within three months after the acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.

5 Requesting and requested Central Authorities shall keep each other informed of –

(a) the person or unit responsible for a particular case;

(b) the progress of the case,

and shall provide timely responses to enquiries.

6 Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.

7 Central Authorities shall employ the most rapid and efficient means of communication at their disposal.

8 A requested Central Authority may refuse to process an application only if it is manifest that the requirements of the Convention are not fulfilled. In such case, that Central Authority shall promptly inform the requesting Central Authority of its reasons for refusal.

9 The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to provide these additional documents or information. If the requesting Central Authority does not do so within three months or a longer period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application. In this case, it shall inform the requesting Central Authority of this decision.

Article 13 Means of communication

Any application made through Central Authorities of the Contracting States in accordance with this Chapter, and any document or information appended thereto or provided by a Central Authority, may not be challenged by the respondent by reason only of the medium or means of communication employed between the Central Authorities concerned.

Article 14 Effective access to procedures

1 The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under this Chapter.

2 To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14 to 17 unless paragraph 3 applies.

3 The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

4 Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

5 No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

Article 15 Free legal assistance for child support applications

1 The requested State shall provide free legal assistance in respect of all applications by a creditor under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

2 Notwithstanding paragraph 1, the requested State may, in relation to applications other than those under Article 10(1)(a) and (b) and the cases covered by Article 20(4), refuse free legal assistance if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Article 16 Déclaration permettant un examen limité aux ressources de l'enfant

1 Nonobstant les dispositions de l'article 15(1), un État peut déclarer, conformément à l'article 63, qu'en ce qui a trait aux demandes autres que celles prévues à l'article 10(1)(a) et (b) et aux affaires couvertes par l'article 20(4), il fournira une assistance juridique gratuite sur le fondement d'un examen des ressources de l'enfant.

2 Un État, au moment où il fait une telle déclaration, fournit au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont l'examen des ressources de l'enfant sera effectué, ainsi que les conditions financières qui doivent être remplies.

3 Une demande présentée en vertu du paragraphe premier, adressée à un État qui a fait une déclaration conformément à ce paragraphe, devra inclure une attestation formelle du demandeur indiquant que les ressources de l'enfant satisfont aux conditions mentionnées au paragraphe 2. L'État requis ne peut demander de preuves additionnelles des ressources de l'enfant que s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

4 Si l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne les demandes présentées en vertu de ce chapitre relatives aux obligations alimentaires découlant d'une relation parent-enfant envers un enfant est plus favorable que celle fournie conformément aux paragraphes premier à 3, l'assistance juridique la plus favorable doit être fournie.

Article 17 Demandes ne permettant pas de bénéficier de l'article 15 ou de l'article 16

Pour les demandes présentées en application de la Convention qui ne relèvent pas de l'article 15 ou de l'article 16 :

(a) l'octroi d'une assistance juridique gratuite peut être subordonné à l'examen des ressources du demandeur ou à l'analyse de son bien-fondé ;

(b) un demandeur qui, dans l'État d'origine, a bénéficié d'une assistance juridique gratuite, bénéficie, dans toute procédure de reconnaissance ou d'exécution, d'une assistance juridique gratuite au moins équivalente à celle prévue dans les mêmes circonstances par la loi de l'État requis.

CHAPITRE IV – RESTRICTIONS À L'INTRODUCTION DE PROCÉDURES

Article 18 Limite aux procédures

1 Lorsqu'une décision a été rendue dans un État contractant où le créancier a sa résidence habituelle, des procédures pour modifier la décision ou obtenir une nouvelle décision ne peuvent être introduites par le débiteur dans un autre État contractant, tant que le créancier continue à résider habituellement dans l'État où la décision a été rendue.

2 Le paragraphe premier ne s'applique pas :

(a) lorsque, dans un litige portant sur une obligation alimentaire envers une personne autre qu'un enfant, la compétence de cet autre État contractant a fait l'objet d'un accord par écrit entre les parties ;

(b) lorsque le créancier se soumet à la compétence de cet autre État contractant, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en est offerte pour la première fois ;

(c) lorsque l'autorité compétente de l'État d'origine ne peut ou refuse d'exercer sa compétence pour modifier la décision ou rendre une nouvelle décision ; ou

(d) lorsque la décision rendue dans l'État d'origine ne peut être reconnue ou déclarée exécutoire dans l'État contractant dans lequel des procédures tendant à la modification de la décision ou à l'obtention d'une nouvelle décision sont envisagées.

CHAPITRE V – RECONNAISSANCE ET EXÉCUTION

Article 19 Champ d'application du chapitre

1 Le présent chapitre s'applique aux décisions rendues par une autorité judiciaire ou administrative en matière d'obligations alimentaires. Par le mot « décision », on entend également les transactions ou accords passés devant de telles autorités ou homologués par elles. Une décision peut comprendre une indexation automatique et une obligation de payer des arrérages, des aliments rétroactivement ou des intérêts, de même que la fixation des frais ou dépenses.

2 Si la décision ne concerne pas seulement l'obligation alimentaire, l'effet de ce chapitre reste limité à cette dernière.

3 Aux fins du paragraphe premier, « autorité administrative » désigne un organisme public dont les décisions, en vertu de la loi de l'État où il est établi :

(a) peuvent faire l'objet d'un appel devant une autorité judiciaire ou d'un contrôle par une telle autorité ; et

(b) ont une force et un effet équivalant à une décision d'une autorité judiciaire dans la même matière.

4 Ce chapitre s'applique aussi aux conventions en matière d'aliments, conformément à l'article 30.

5 Les dispositions de ce chapitre s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à l'autorité compétente de l'État requis, conformément à l'article 37.

Article 20 Bases de reconnaissance et d'exécution

1 Une décision rendue dans un État contractant (« l'État d'origine ») est reconnue et exécutée dans les autres États contractants si :

(a) le défendeur résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

(b) le défendeur s'est soumis à la compétence de l'autorité, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en a été offerte pour la première fois ;

Convention adoptée

Article 16 Declaration to permit use of child-centred means test

1 Notwithstanding Article 15(1), a State may declare, in accordance with Article 63, that it will provide free legal assistance in respect of applications other than under Article 10(1)(a) and (b) and the cases covered by Article 20(4), subject to a test based on an assessment of the means of the child.

2 A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's means will be carried out, including the financial criteria which would need to be met to satisfy the test.

3 An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a formal attestation by the applicant stating that the child's means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child's means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

4 If the most favourable legal assistance provided for by the law of the requested State in respect of applications under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a child is more favourable than that provided for under paragraphs 1 to 3, the most favourable legal assistance shall be provided.

Article 17 Applications not qualifying under Article 15 or Article 16

In the case of all applications under this Convention other than those under Article 15 or Article 16 –

(a) the provision of free legal assistance may be made subject to a means or a merits test;

(b) an applicant, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

CHAPTER IV – RESTRICTIONS ON BRINGING PROCEEDINGS

Article 18 Limit on proceedings

1 Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made.

2 Paragraph 1 shall not apply –

(a) where, except in disputes relating to maintenance obligations in respect of children, there is agreement in writing between the parties to the jurisdiction of that other Contracting State;

(b) where the creditor submits to the jurisdiction of that other Contracting State either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

(c) where the competent authority in the State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or make a new decision; or

(d) where the decision made in the State of origin cannot be recognised or declared enforceable in the Contracting State where proceedings to modify the decision or make a new decision are contemplated.

CHAPTER V – RECOGNITION AND ENFORCEMENT

Article 19 Scope of the Chapter

1 This Chapter shall apply to a decision rendered by a judicial or administrative authority in respect of a maintenance obligation. The term "decision" also includes a settlement or agreement concluded before or approved by such an authority. A decision may include automatic adjustment by indexation and a requirement to pay arrears, retroactive maintenance or interest and a determination of costs or expenses.

2 If a decision does not relate solely to a maintenance obligation, the effect of this Chapter is limited to the parts of the decision which concern maintenance obligations.

3 For the purpose of paragraph 1, "administrative authority" means a public body whose decisions, under the law of the State where it is established –

(a) may be made the subject of an appeal to or review by a judicial authority; and

(b) have a similar force and effect to a decision of a judicial authority on the same matter.

4 This Chapter also applies to maintenance arrangements in accordance with Article 30.

5 The provisions of this Chapter shall apply to a request for recognition and enforcement made directly to a competent authority of the State addressed in accordance with Article 37.

Article 20 Bases for recognition and enforcement

1 A decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if –

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

(b) the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

(c) le créancier résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

(d) l'enfant pour lequel des aliments ont été accordés résidait habituellement dans l'État d'origine lors de l'introduction de l'instance, à condition que le défendeur ait vécu avec l'enfant dans cet État ou qu'il ait résidé dans cet État et y ait fourni des aliments à l'enfant ;

(e) la compétence a fait l'objet d'un accord par écrit entre les parties sauf dans un litige portant sur une obligation alimentaire à l'égard d'un enfant ; ou

(f) la décision a été rendue par une autorité exerçant sa compétence sur une question relative à l'état des personnes ou à la responsabilité parentale, sauf si cette compétence est uniquement fondée sur la nationalité de l'une des parties.

2 Un État contractant peut faire une réserve portant sur le paragraphe premier (c), (e) ou (f), conformément à l'article 62.

3 Un État contractant ayant fait une réserve en application du paragraphe 2 doit reconnaître et exécuter une décision si sa législation, dans des circonstances de fait similaires, confère ou aurait conféré compétence à ses autorités pour rendre une telle décision.

4 Lorsque la reconnaissance d'une décision n'est pas possible dans un État contractant en raison d'une réserve faite en application du paragraphe 2, cet État prend toutes les mesures appropriées pour qu'une décision soit rendue en faveur du créancier si le débiteur réside habituellement dans cet État. La phrase précédente ne s'applique ni aux demandes directes de reconnaissance et d'exécution prévues à l'article 19(5) ni aux actions alimentaires mentionnées à l'article 2(1)(b).

5 Une décision en faveur d'un enfant âgé de moins de 18 ans, qui ne peut être reconnue uniquement en raison d'une réserve portant sur le paragraphe premier (c), (e) ou (f), est acceptée comme établissant l'éligibilité de cet enfant à des aliments dans l'État requis.

6 Une décision n'est reconnue que si elle produit des effets dans l'État d'origine et n'est exécutée que si elle est exécutoire dans l'État d'origine.

Article 21 Divisibilité et reconnaissance ou exécution partielle

1 Si l'État requis ne peut reconnaître ou exécuter la décision pour le tout, il reconnaît ou exécute chaque partie divisible de la décision qui peut être reconnue ou déclarée exécutoire.

2 La reconnaissance ou l'exécution partielle d'une décision peut toujours être demandée.

Article 22 Motifs de refus de reconnaissance et d'exécution

La reconnaissance et l'exécution de la décision peuvent être refusées si :

(a) la reconnaissance et l'exécution de la décision sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) la décision résulte d'une fraude commise dans la procédure ;

(c) un litige entre les mêmes parties et ayant le même objet est pendant devant une autorité de l'État requis, première saisie ;

(d) la décision est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque la dernière décision remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis ;

(e) dans les cas où le défendeur n'a ni comparu, ni été représenté dans les procédures dans l'État d'origine :

(i) lorsque la loi de l'État d'origine prévoit un avis de la procédure, le défendeur n'a pas été dûment avisé de la procédure et n'a pas eu l'opportunité de se faire entendre ; ou

(ii) lorsque la loi de l'État d'origine ne prévoit pas un avis de la procédure, le défendeur n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester ou de former un appel en fait et en droit ; ou

(f) la décision a été rendue en violation de l'article 18.

Article 23 Procédure pour une demande de reconnaissance et d'exécution

1 Sous réserve des dispositions de la Convention, les procédures de reconnaissance et d'exécution sont régies par la loi de l'État requis.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire des Autorités centrales conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre la demande à l'autorité compétente qui doit sans retard déclarer la décision exécutoire ou procéder à son enregistrement aux fins d'exécution ; ou

(b) si elle est l'autorité compétente, prendre elle-même ces mesures.

3 Lorsque la demande est présentée directement à l'autorité compétente dans l'État requis en vertu de l'article 19(5), cette autorité déclare sans retard la décision exécutoire ou procède à son enregistrement aux fins d'exécution.

4 Une déclaration ou un enregistrement ne peut être refusé que pour le motif prévu à l'article 22(a). À ce stade, ni le demandeur ni le défendeur ne sont autorisés à présenter d'objection.

5 La déclaration ou l'enregistrement fait en application des paragraphes 2 et 3, ou leur refus en vertu du paragraphe 4, est notifié promptement au demandeur et au défendeur qui peuvent le contester ou former un appel, en fait et en droit.

6 La contestation ou l'appel est formé dans les 30 jours qui suivent la notification en vertu du paragraphe 5. Si l'auteur de la contestation ou de l'appel ne réside pas dans l'État contractant où la déclaration ou l'enregistrement a été fait ou refusé, la contestation ou l'appel est formé dans les 60 jours qui suivent la notification.

Convention adoptée

(c) the creditor was habitually resident in the State of origin at the time proceedings were instituted;

(d) the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;

(e) except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or

(f) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

2 A Contracting State may make a reservation, in accordance with Article 62, in respect of paragraph 1(c), (e) or (f).

3 A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

4 A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 19(5) or to claims for support referred to in Article 2(1)(b).

5 A decision in favour of a child under the age of 18 years which cannot be recognised by virtue only of a reservation in respect of paragraph 1(c), (e) or (f) shall be accepted as establishing the eligibility of that child for maintenance in the State addressed.

6 A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

Article 21 Severability and partial recognition and enforcement

1 If the State addressed is unable to recognise or enforce the whole of the decision, it shall recognise or enforce any severable part of the decision which can be so recognised or enforced.

2 Partial recognition or enforcement of a decision can always be applied for.

Article 22 Grounds for refusing recognition and enforcement

Recognition and enforcement of a decision may be refused if –

(a) recognition and enforcement of the decision is manifestly incompatible with the public policy ("*ordre public*") of the State addressed;

(b) the decision was obtained by fraud in connection with a matter of procedure;

(c) proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;

(d) the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;

(e) in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin –

(i) when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or

(ii) when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or

(f) the decision was made in violation of Article 18.

Article 23 Procedure on an application for recognition and enforcement

1 Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or

(b) if it is the competent authority take such steps itself.

3 Where the request is made directly to a competent authority in the State addressed in accordance with Article 19(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

4 A declaration or registration may be refused only on the ground set out in Article 22(a). At this stage neither the applicant nor the respondent is entitled to make any submissions.

5 The applicant and the respondent shall be promptly notified of the declaration or registration, made under paragraphs 2 and 3, or the refusal thereof in accordance with paragraph 4, and may bring a challenge or appeal on fact and on a point of law.

6 A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

7 La contestation ou l'appel ne peut être fondé que sur :

(a) les motifs de refus de reconnaissance et d'exécution prévus à l'article 22 ;

(b) les bases de reconnaissance et d'exécution prévues à l'article 20 ;

(c) l'authenticité ou l'intégrité d'un document transmis conformément à l'article 25(1)(a), (b) ou (d) ou (3)(b).

8 La contestation ou l'appel formé par le défendeur peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution concernent les paiements échus.

9 La décision sur la contestation ou l'appel est promptement notifiée au demandeur et au défendeur.

10 Un appel subséquent, s'il est permis par la loi de l'État requis, ne peut avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

11 L'autorité compétente doit agir rapidement pour rendre une décision en matière de reconnaissance et d'exécution, y compris en appel.

Article 24 Procédure alternative pour une demande de reconnaissance et d'exécution

1 Nonobstant l'article 23(2) à (11), un État peut déclarer, conformément à l'article 63, qu'il appliquera la procédure de reconnaissance et d'exécution prévue par le présent article.

2 Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

(a) transmettre la demande à l'autorité compétente qui prend une décision sur la demande de reconnaissance et d'exécution ; ou

(b) si elle est l'autorité compétente, prendre elle-même une telle décision.

3 Une décision de reconnaissance et d'exécution est rendue par l'autorité compétente après que le défendeur s'est vu dûment et promptement notifier la procédure et que chacune des parties a eu une opportunité adéquate d'être entendue.

4 L'autorité compétente peut contrôler d'office les motifs de refus de reconnaissance et d'exécution prévus à l'article 22(a), (c) et (d). Elle peut contrôler tous les motifs prévus aux articles 20, 22 et 23(7)(c) s'ils sont soulevés par le défendeur ou si un doute relatif à ces motifs existe au vu des documents soumis conformément à l'article 25.

5 Un refus de reconnaissance et d'exécution peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution concernent les paiements échus.

6 Un appel subséquent, s'il est permis par la loi de l'État requis, ne doit pas avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

7 L'autorité compétente doit agir rapidement pour rendre une décision en matière de reconnaissance et d'exécution, y compris en appel.

Article 25 Documents

1 Une demande de reconnaissance et d'exécution en application de l'article 23 ou de l'article 24 est accompagnée des documents suivants :

(a) le texte complet de la décision ;

(b) un document établissant que la décision est exécutoire dans l'État d'origine et, si la décision émane d'une autorité administrative, un document établissant que les conditions prévues à l'article 19(3) sont remplies à moins que cet État n'ait précisé, conformément à l'article 57, que les décisions de ses autorités administratives remplissent dans tous les cas ces conditions ;

(c) si le défendeur n'a ni comparu, ni été représenté dans les procédures dans l'État d'origine, un document ou des documents attestant, selon le cas, que le défendeur a été dûment avisé de la procédure et a eu l'opportunité de se faire entendre ou qu'il a été dûment avisé de la décision et a eu la possibilité de la contester ou de former un appel, en fait et en droit ;

(d) si nécessaire, un document établissant le montant des arrérages et indiquant la date à laquelle le calcul a été effectué ;

(e) si nécessaire, dans le cas d'une décision prévoyant une indexation automatique, un document contenant les informations qui sont utiles à la réalisation des calculs appropriés ;

(f) si nécessaire, un document établissant dans quelle mesure le demandeur a bénéficié de l'assistance juridique gratuite dans l'État d'origine.

2 Dans le cas d'une contestation ou d'un appel fondé sur un motif visé à l'article 23(7)(c) ou à la requête de l'autorité compétente dans l'État requis, une copie complète du document en question, certifiée conforme par l'autorité compétente dans l'État d'origine, est promptement fournie :

(a) par l'Autorité centrale de l'État requérant, lorsque la demande a été présentée conformément au chapitre III ;

(b) par le demandeur, lorsque la demande a été présentée directement à l'autorité compétente de l'État requis.

3 Un État contractant peut préciser, conformément à l'article 57 :

(a) qu'une copie complète de la décision certifiée conforme par l'autorité compétente de l'État d'origine doit accompagner la demande ;

(b) les circonstances dans lesquelles il accepte, au lieu du texte complet de la décision, un résumé ou un extrait de la décision établi par l'autorité compétente de l'État d'origine, qui peut être présenté au moyen du formulaire recommandé et publié par la Conférence de La Haye de droit international privé ; ou

(c) qu'il n'exige pas de document établissant que les conditions prévues à l'article 19(3) sont remplies.

Convention adoptée

7 A challenge or appeal may be founded only on the following –

(a) the grounds for refusing recognition and enforcement set out in Article 22;

(b) the bases for recognition and enforcement under Article 20;

(c) the authenticity or integrity of any document transmitted in accordance with Article 25(1)(a), (b) or (d) or (3)(b).

8 A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

9 The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

10 A further appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

11 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 24 Alternative procedure on an application for recognition and enforcement

1 Notwithstanding Article 23(2) to (11), a State may declare, in accordance with Article 63, that it will apply the procedure for recognition and enforcement set out in this Article.

2 Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

(a) refer the application to the competent authority which shall decide on the application for recognition and enforcement; or

(b) if it is the competent authority, take such a decision itself.

3 A decision on recognition and enforcement shall be given by the competent authority after the respondent has been duly and promptly notified of the proceedings and both parties have been given an adequate opportunity to be heard.

4 The competent authority may review the grounds for refusing recognition and enforcement set out in Article 22(a), (c) and (d) of its own motion. It may review any grounds listed in Articles 20, 22 and 23(7)(c) if raised by the respondent or if concerns relating to those grounds arise from the face of the documents submitted in accordance with Article 25.

5 A refusal of recognition and enforcement may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

6 Any appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

7 In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

Article 25 Documents

1 An application for recognition and enforcement under Article 23 or Article 24 shall be accompanied by the following –

(a) a complete text of the decision;

(b) a document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements;

(c) if the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law;

(d) where necessary, a document showing the amount of any arrears and the date such amount was calculated;

(e) where necessary, in the case of a decision providing for automatic adjustment by indexation, a document providing the information necessary to make the appropriate calculations;

(f) where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin.

2 Upon a challenge or appeal under Article 23(7)(c) or upon request by the competent authority in the State addressed, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly –

(a) by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;

(b) by the applicant, where the request has been made directly to a competent authority of the State addressed.

3 A Contracting State may specify in accordance with Article 57 –

(a) that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application;

(b) circumstances in which it will accept, in lieu of a complete text of the decision, an abstract or extract of the decision drawn up by the competent authority of the State of origin, which may be made in the form recommended and published by the Hague Conference on Private International Law; or

(c) that it does not require a document stating that the requirements of Article 19(3) are met.

Article 26 Procédure relative à une demande de reconnaissance

Ce chapitre s'applique *mutatis mutandis* à une demande de reconnaissance d'une décision, à l'exception de l'exigence du caractère exécutoire qui est remplacée par l'exigence selon laquelle la décision produit ses effets dans l'État d'origine.

Article 27 Constatations de fait

L'autorité compétente de l'État requis est liée par les constatations de fait sur lesquelles l'autorité de l'État d'origine a fondé sa compétence.

Article 28 Interdiction de la révision au fond

L'autorité compétente de l'État requis ne procède à aucune révision au fond de la décision.

Article 29 Présence physique de l'enfant ou du demandeur non exigée

La présence physique de l'enfant ou du demandeur n'est pas exigée lors de procédures introduites en vertu du présent chapitre dans l'État requis.

Article 30 Conventions en matière d'aliments

1 Une convention en matière d'aliments conclue dans un État contractant doit pouvoir être reconnue et exécutée comme une décision en application de ce chapitre si elle est exécutoire comme une décision dans l'État d'origine.

2 Aux fins de l'article 10(1)(a) et (b) et (2)(a), le terme « décision » comprend une convention en matière d'aliments.

3 La demande de reconnaissance et d'exécution d'une convention en matière d'aliments est accompagnée des documents suivants :

(a) le texte complet de la convention en matière d'aliments ; et

(b) un document établissant que la convention en matière d'aliments est exécutoire comme une décision dans l'État d'origine.

4 La reconnaissance et l'exécution d'une convention en matière d'aliments peuvent être refusées si :

(a) la reconnaissance et l'exécution sont manifestement incompatibles avec l'ordre public de l'État requis ;

(b) la convention en matière d'aliments a été obtenue par fraude ou a fait l'objet de falsification ;

(c) la convention en matière d'aliments est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque cette dernière décision remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis.

5 Les dispositions de ce chapitre, à l'exception des articles 20, 22, 23(7) et 25(1) et (3), s'appliquent *mutatis mutandis* à la reconnaissance et à l'exécution d'une convention en matière d'aliments, toutefois :

(a) une déclaration ou un enregistrement fait conformément à l'article 23(2) et (3) ne peut être refusé que pour le motif prévu au paragraphe 4(a) ;

(b) une contestation ou un appel en vertu de l'article 23(6) ne peut être fondé que sur :

(i) les motifs de refus de reconnaissance et d'exécution prévus au paragraphe 4 ;

(ii) l'authenticité ou l'intégrité d'un document transmis conformément au paragraphe 3 ;

(c) en ce qui concerne la procédure prévue à l'article 24(4), l'autorité compétente peut contrôler d'office le motif de refus de reconnaissance et d'exécution spécifié au paragraphe 4(a) de cet article. Elle peut contrôler l'ensemble des bases de reconnaissance et d'exécution prévues au paragraphe 4, ainsi que l'authenticité ou l'intégrité de tout document transmis conformément au paragraphe 3 si cela est soulevé par le défendeur ou si un doute relatif à ces motifs existe au vu de ces documents.

6 La procédure de reconnaissance et d'exécution d'une convention en matière d'aliments est suspendue si une contestation portant sur la convention est pendante devant une autorité compétente d'un État contractant.

7 Un État peut déclarer conformément à l'article 63 que les demandes de reconnaissance et d'exécution des conventions en matière d'aliments ne peuvent être présentées que par l'intermédiaire des Autorités centrales.

8 Un État contractant pourra, conformément à l'article 62, se réserver le droit de ne pas reconnaître et exécuter les conventions en matière d'aliments.

Article 31 Décisions résultant de l'effet combiné d'ordonnances provisoires et de confirmation

Lorsqu'une décision résulte de l'effet combiné d'une ordonnance provisoire rendue dans un État et d'une ordonnance rendue par l'autorité d'un autre État qui confirme cette ordonnance provisoire (« État de confirmation ») :

(a) chacun de ces États est considéré, aux fins du présent chapitre, comme étant un État d'origine ;

(b) les conditions prévues à l'article 22(e) sont remplies si le défendeur a été dûment avisé de la procédure dans l'État de confirmation et a eu la possibilité de contester la confirmation de l'ordonnance provisoire ;

(c) la condition prévue à l'article 20(6) relative au caractère exécutoire de la décision dans l'État d'origine est remplie si la décision est exécutoire dans l'État de confirmation ; et

(d) l'article 18 ne fait pas obstacle à ce qu'une procédure en vue de la modification d'une décision soit initiée dans l'un ou l'autre des États.

Convention adoptée

Article 26 Procedure on an application for recognition

This Chapter shall apply *mutatis mutandis* to an application for recognition of a decision, save that the requirement of enforceability is replaced by the requirement that the decision has effect in the State of origin.

Article 27 Findings of fact

Any competent authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.

Article 28 No review of the merits

There shall be no review by any competent authority of the State addressed of the merits of a decision.

Article 29 Physical presence of the child or the applicant not required

The physical presence of the child or the applicant shall not be required in any proceedings in the State addressed under this Chapter.

Article 30 Maintenance arrangements

1 A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.

2 For the purpose of Article 10(1)(a) and (b) and (2)(a), the term "decision" includes a maintenance arrangement.

3 An application for recognition and enforcement of a maintenance arrangement shall be accompanied by the following –

(a) a complete text of the maintenance arrangement; and

(b) a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin.

4 Recognition and enforcement of a maintenance arrangement may be refused if –

(a) the recognition and enforcement is manifestly incompatible with the public policy of the State addressed;

(b) the maintenance arrangement was obtained by fraud or falsification;

(c) the maintenance arrangement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

5 The provisions of this Chapter, with the exception of Articles 20, 22, 23(7) and 25(1) and (3), shall apply *mutatis mutandis* to the recognition and enforcement of a maintenance arrangement save that –

(a) a declaration or registration in accordance with Article 23(2) and (3) may be refused only on the ground set out in paragraph 4(a);

(b) a challenge or appeal as referred to in Article 23(6) may be founded only on the following –

(i) the grounds for refusing recognition and enforcement set out in paragraph 4;

(ii) the authenticity or integrity of any document transmitted in accordance with paragraph 3;

(c) as regards the procedure under Article 24(4), the competent authority may review of its own motion the ground for refusing recognition and enforcement set out in paragraph 4(a) of this Article. It may review all grounds listed in paragraph 4 of this Article and the authenticity or integrity of any document transmitted in accordance with paragraph 3 if raised by the respondent or if concerns relating to those grounds arise from the face of those documents.

6 Proceedings for recognition and enforcement of a maintenance arrangement shall be suspended if a challenge concerning the arrangement is pending before a competent authority of a Contracting State.

7 A State may declare, in accordance with Article 63, that applications for recognition and enforcement of a maintenance arrangement shall only be made through Central Authorities.

8 A Contracting State may, in accordance with Article 62, reserve the right not to recognise and enforce a maintenance arrangement.

Article 31 Decisions produced by the combined effect of provisional and confirmation orders

Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order –

(a) each of those States shall be deemed for the purposes of this Chapter to be a State of origin;

(b) the requirements of Article 22(e) shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order;

(c) the requirement of Article 20(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State; and

(d) Article 18 shall not prevent proceedings for the modification of the decision being commenced in either State.

Article 32 Exécution en vertu du droit interne

1 Sous réserve des dispositions du présent chapitre, les mesures d'exécution ont lieu conformément à la loi de l'État requis.

2 L'exécution doit être rapide.

3 En ce qui concerne les demandes présentées par l'intermédiaire des Autorités centrales, lorsqu'une décision a été déclarée exécutoire ou enregistrée pour exécution en application du chapitre V, l'exécution a lieu sans qu'aucune autre action du demandeur ne soit nécessaire.

4 Il est donné effet à toute règle relative à la durée de l'obligation alimentaire applicable dans l'État d'origine de la décision.

5 Le délai de prescription relatif à l'exécution des arrérages est déterminé par la loi, de l'État d'origine de la décision ou de l'État requis, qui prévoit le délai le plus long.

Article 33 Non-discrimination

Dans les affaires relevant de la Convention, l'État requis prévoit des mesures d'exécution au moins équivalentes à celles qui sont applicables aux affaires internes.

Article 34 Mesures d'exécution

1 Les États contractants doivent rendre disponibles dans leur droit interne des mesures efficaces afin d'exécuter les décisions en application de la Convention.

2 De telles mesures peuvent comporter :

(a) la saisie des salaires ;

(b) les saisies-arrêts sur comptes bancaires et autres sources ;

(c) les déductions sur les prestations de sécurité sociale ;

(d) le gage sur les biens ou leur vente forcée ;

(e) la saisie des remboursements d'impôt ;

(f) la retenue ou saisie des pensions de retraite ;

(g) le signalement aux organismes de crédit ;

(h) le refus de délivrance, la suspension ou le retrait de divers permis (le permis de conduire par exemple) ;

(i) le recours à la médiation, à la conciliation et à d'autres modes alternatifs de résolution des différends afin de favoriser une exécution volontaire.

Article 35 Transferts de fonds

1 Les États contractants sont encouragés à promouvoir, y compris au moyen d'accords internationaux, l'utilisation des moyens disponibles les moins coûteux et les plus efficaces pour effectuer les transferts de fonds destinés à être versés à titre d'aliments.

2 Un État contractant dont la loi impose des restrictions aux transferts de fonds accorde la priorité la plus élevée aux transferts de fonds destinés à être versés en vertu de la présente Convention.

CHAPITRE VII – ORGANISMES PUBLICS

Article 36 Organismes publics en qualité de demandeur

1 Aux fins d'une demande de reconnaissance et d'exécution en application de l'article 10(1)(a) et (b) et des affaires couvertes par l'article 20(4), le terme « créancier » comprend un organisme public agissant à la place d'une personne à laquelle des aliments sont dus ou un organisme auquel est dû le remboursement de prestations fournies à titre d'aliments.

2 Le droit d'un organisme public d'agir à la place d'une personne à laquelle des aliments sont dus ou de demander le remboursement de la prestation fournie au créancier à titre d'aliments est soumis à la loi qui régit l'organisme.

3 Un organisme public peut demander la reconnaissance ou l'exécution :

(a) d'une décision rendue contre un débiteur à la demande d'un organisme public qui poursuit le paiement de prestations fournies à titre d'aliments ;

(b) d'une décision rendue entre un créancier et un débiteur, à concurrence des prestations fournies au créancier à titre d'aliments.

4 L'organisme public qui invoque la reconnaissance ou qui sollicite l'exécution d'une décision produit, sur demande, tout document de nature à établir son droit en application du paragraphe 2 et le paiement des prestations au créancier.

CHAPITRE VIII – DISPOSITIONS GÉNÉRALES

Article 37 Demandes présentées directement aux autorités compétentes

1 La Convention n'exclut pas la possibilité de recourir aux procédures disponibles en vertu du droit interne d'un État contractant autorisant une personne (le demandeur) à saisir directement une autorité compétente de cet État dans une matière régie par la Convention, y compris, sous réserve de l'article 18, en vue de l'obtention ou de la modification d'une décision en matière d'aliments.

2 Les articles 14(5) et 17(b) et les dispositions des chapitres V, VI, VII et de ce chapitre, à l'exception des articles 40(2), 42, 43(3), 44(3), 45 et 55, s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à une autorité compétente d'un État contractant.

3 Aux fins du paragraphe 2, l'article 2(1)(a) s'applique à une décision octroyant des aliments à une personne vulnérable dont l'âge est supérieur à l'âge précisé dans ledit alinéa, lorsqu'une telle décision a été rendue avant que la personne n'ait atteint cet âge et a accordé des aliments au-delà de cet âge en raison de l'altération de ses capacités.

Convention adoptée

CHAPTER VI – ENFORCEMENT BY THE STATE ADDRESSED

Article 32 Enforcement under internal law

1 Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed.

2 Enforcement shall be prompt.

3 In the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement under Chapter V, enforcement shall proceed without the need for further action by the applicant.

4 Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation.

5 Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.

Article 33 Non-discrimination

The State addressed shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases.

Article 34 Enforcement measures

1 Contracting States shall make available in internal law effective measures to enforce decisions under this Convention.

2 Such measures may include –

(a) wage withholding;

(b) garnishment from bank accounts and other sources;

(c) deductions from social security payments;

(d) lien on or forced sale of property;

(e) tax refund withholding;

(f) withholding or attachment of pension benefits;

(g) credit bureau reporting;

(h) denial, suspension or revocation of various licenses (for example, driving licenses);

(i) the use of mediation, conciliation or similar processes to bring about voluntary compliance.

Article 35 Transfer of funds

1 Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance.

2 A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable under this Convention.

CHAPTER VII – PUBLIC BODIES

Article 36 Public bodies as applicants

1 For the purposes of applications for recognition and enforcement under Article 10(1)(a) and (b) and cases covered by Article 20(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance.

2 The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

3 A public body may seek recognition or claim enforcement of –

(a) a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;

(b) a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.

4 The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.

CHAPTER VIII – GENERAL PROVISIONS

Article 37 Direct requests to competent authorities

1 The Convention shall not exclude the possibility of recourse to such procedures as may be available under the internal law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by the Convention including, subject to Article 18, for the purpose of having a maintenance decision established or modified.

2 Articles 14(5) and 17(b) and the provisions of Chapters V, VI, VII and this Chapter, with the exception of Articles 40(2), 42, 43(3), 44(3), 45 and 55, shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.

3 For the purpose of paragraph 2, Article 2(1)(a) shall apply to a decision granting maintenance to a vulnerable person over the age specified in that sub-paragraph where such decision was rendered before the person reached that age and provided for maintenance beyond that age by reason of the impairment.

Article 38 Protection des données à caractère personnel

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises.

Article 39 Confidentialité

Toute autorité traitant de renseignements en assure la confidentialité conformément à la loi de son État.

Article 40 Non-divulgation de renseignements

1 Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle estime que la santé, la sécurité ou la liberté d'une personne pourrait en être compromise.

2 Une décision en ce sens prise par une Autorité centrale doit être prise en compte par une autre Autorité centrale, en particulier dans les cas de violence familiale.

3 Le présent article ne fait pas obstacle au recueil et à la transmission de renseignements entre autorités, dans la mesure nécessaire à l'accomplissement des obligations découlant de la Convention.

Article 41 Dispense de légalisation

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention.

Article 42 Procuration

L'Autorité centrale de l'État requis ne peut exiger une procuration du demandeur que si elle agit en son nom dans des procédures judiciaires ou dans des procédures engagées devant d'autres autorités ou afin de désigner un représentant à ces fins.

Article 43 Recouvrement des frais

1 Le recouvrement de tous frais encourus pour l'application de cette Convention n'a pas priorité sur le recouvrement des aliments.

2 Un État peut recouvrer les frais à l'encontre d'une partie perdante.

3 Pour les besoins d'une demande en vertu de l'article 10(1)(b), afin de recouvrer les frais d'une partie qui succombe conformément au paragraphe 2, le terme « créancier » dans l'article 10(1) comprend un État.

4 Cet article ne déroge pas à l'article 8.

Article 44 Exigences linguistiques

1 Toute demande et tout document s'y rattachant sont rédigés dans la langue originale et accompagnés d'une traduction dans une langue officielle de l'État requis ou dans toute autre langue que l'État requis aura indiqué pouvoir accepter, par une déclaration faite conformément à l'article 63, sauf dispense de traduction de l'autorité compétente de cet État.

2 Tout État contractant qui a plusieurs langues officielles et qui ne peut, pour des raisons de droit interne, accepter pour l'ensemble de son territoire les documents dans l'une de ces langues, doit faire connaître, par une déclaration faite conformément à l'article 63, la langue dans laquelle ceux-ci doivent être rédigés ou traduits en vue de leur présentation dans les parties de son territoire qu'il a déterminées.

3 Sauf si les Autorités centrales en ont convenu autrement, toute autre communication entre elles est adressée dans une langue officielle de l'État requis ou en français ou en anglais. Toutefois, un État contractant peut, en faisant la réserve prévue à l'article 62, s'opposer à l'utilisation soit du français, soit de l'anglais.

Article 45 Moyens et coûts de traduction

1 Dans le cas de demandes prévues au chapitre III, les Autorités centrales peuvent convenir, dans une affaire particulière ou de façon générale, que la traduction dans la langue officielle de l'État requis sera faite dans l'État requis à partir de la langue originale ou de toute autre langue convenue. S'il n'y a pas d'accord et si l'Autorité centrale requérante ne peut remplir les exigences de l'article 44(1) et (2), la demande et les documents s'y rattachant peuvent être transmis accompagnés d'une traduction en français ou en anglais pour traduction ultérieure dans une langue officielle de l'État requis.

2 Les frais de traduction découlant de l'application du paragraphe premier sont à la charge de l'État requérant, sauf accord contraire des Autorités centrales des États concernés.

3 Nonobstant l'article 8, l'Autorité centrale requérante peut mettre à la charge du demandeur les frais de traduction d'une demande et des documents s'y rattachant, sauf si ces coûts peuvent être couverts par son système d'assistance juridique.

Article 46 Systèmes juridiques non unifiés – interprétation

1 Au regard d'un État dans lequel deux ou plusieurs systèmes de droit ou ensembles de règles ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

(a) toute référence à la loi ou à la procédure d'un État vise, le cas échéant, la loi ou la procédure en vigueur dans l'unité territoriale considérée ;

(b) toute référence à une décision obtenue, reconnue, reconnue et exécutée, exécutée et modifiée dans cet État vise, le cas échéant, une décision obtenue, reconnue, reconnue et exécutée, exécutée et modifiée dans l'unité territoriale considérée ;

(c) toute référence à une autorité judiciaire ou administrative de cet État vise, le cas échéant, une autorité judiciaire ou administrative de l'unité territoriale considérée ;

Convention adoptée

Article 38 Protection of personal data

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

Article 39 Confidentiality

Any authority processing information shall ensure its confidentiality in accordance with the law of its State.

Article 40 Non-disclosure of information

1 An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.

2 A determination to this effect made by one Central Authority shall be taken into account by another Central Authority, in particular in cases of family violence.

3 Nothing in this Article shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under the Convention.

Article 41 No legalisation

No legalisation or similar formality may be required in the context of this Convention.

Article 42 Power of attorney

The Central Authority of the requested State may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.

Article 43 Recovery of costs

1 Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

2 A State may recover costs from an unsuccessful party.

3 For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with paragraph 2, the term "creditor" in Article 10(1) shall include a State.

4 This Article shall be without prejudice to Article 8.

Article 44 Language requirements

1 Any application and related documents shall be in the original language, and shall be accompanied by a translation into an official language of the requested State or another language which the requested State has indicated, by way of declaration in accordance with Article 63, it will accept, unless the competent authority of that State dispenses with translation.

2 A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents in one of those languages shall, by declaration in accordance with Article 63, specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.

3 Unless otherwise agreed by the Central Authorities, any other communications between such Authorities shall be in an official language of the requested State or in either English or French. However, a Contracting State may, by making a reservation in accordance with Article 62, object to the use of either English or French.

Article 45 Means and costs of translation

1 In the case of applications under Chapter III, the Central Authorities may agree in an individual case or generally that the translation into an official language of the requested State may be made in the requested State from the original language or from any other agreed language. If there is no agreement and it is not possible for the requesting Central Authority to comply with the requirements of Article 44(1) and (2), then the application and related documents may be transmitted with translation into English or French for further translation into an official language of the requested State.

2 The cost of translation arising from the application of paragraph 1 shall be borne by the requesting State unless otherwise agreed by Central Authorities of the States concerned.

3 Notwithstanding Article 8, the requesting Central Authority may charge an applicant for the costs of translation of an application and related documents, except in so far as those costs may be covered by its system of legal assistance.

Article 46 Non-unified legal systems – interpretation

1 In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

(a) any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

(b) any reference to a decision established, recognised, recognised and enforced, enforced or modified in that State shall be construed as referring, where appropriate, to a decision established, recognised, recognised and enforced, enforced or modified in the relevant territorial unit;

(c) any reference to a judicial or administrative authority in that State shall be construed as referring, where appropriate, to a judicial or administrative authority in the relevant territorial unit;

(d) toute référence aux autorités compétentes, organismes publics ou autres organismes de cet État à l'exception des Autorités centrales vise, le cas échéant, les autorités ou organismes habilités à agir dans l'unité territoriale considérée ;

(e) toute référence à la résidence ou la résidence habituelle dans cet État vise, le cas échéant, la résidence ou la résidence habituelle dans l'unité territoriale considérée ;

(f) toute référence à la localisation des biens dans cet État vise, le cas échéant, la localisation des biens dans l'unité territoriale considérée ;

(g) toute référence à une entente de réciprocité en vigueur dans un État vise, le cas échéant, une entente de réciprocité en vigueur dans l'unité territoriale considérée ;

(h) toute référence à l'assistance juridique gratuite dans cet État vise, le cas échéant, l'assistance juridique gratuite dans l'unité territoriale considérée ;

(i) toute référence à une convention en matière d'aliments conclue dans un État vise, le cas échéant, une convention en matière d'aliments conclue dans l'unité territoriale considérée ;

(j) toute référence au recouvrement des frais par un État vise, le cas échéant, le recouvrement des frais par l'unité territoriale considérée.

2 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 47 Systèmes juridiques non unifiés – règles matérielles

1 Un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

2 Une autorité compétente dans une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenue de reconnaître ou d'exécuter une décision d'un autre État contractant au seul motif que la décision a été reconnue ou exécutée dans une autre unité territoriale du même État contractant selon la présente Convention.

3 Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

Article 48 Coordination avec les Conventions de La Haye antérieures en matière d'obligations alimentaires

Dans les rapports entre les États contractants, et sous réserve de l'application de l'article 56(2), la présente Convention remplace la *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires* et la *Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants*, dans la mesure où leur champ d'application entre lesdits États coïncide avec celui de la présente Convention.

Article 49 Coordination avec la Convention de New York de 1956

Dans les rapports entre les États contractants, la présente Convention remplace la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies, dans la mesure où son champ d'application entre lesdits États correspond au champ d'application de la présente Convention.

Article 50 Relations avec les Conventions de La Haye antérieures relatives à la notification d'actes et à l'obtention de preuves

La présente Convention ne déroge pas à la *Convention de La Haye du premier mars 1954 relative à la procédure civile*, ni à la *Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale*, ni à la *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale*.

Article 51 Coordination avec les instruments et accords complémentaires

1 La présente Convention ne déroge pas aux instruments internationaux conclus avant la présente Convention auxquels des États contractants sont Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention.

2 Tout État contractant peut conclure avec un ou plusieurs États contractants des accords qui contiennent des dispositions sur les matières réglées par la Convention afin d'améliorer l'application de la Convention entre eux, à condition que de tels accords soient conformes à l'objet et au but de la Convention et n'affectent pas, dans les rapports de ces États avec d'autres États contractants, l'application des dispositions de la Convention. Les États qui auront conclu de tels accords en transmettront une copie au dépositaire de la Convention.

3 Les paragraphes premier et 2 s'appliquent également aux ententes de réciprocité et aux lois uniformes reposant sur l'existence entre les États concernés de liens spéciaux.

4 La présente Convention n'affecte pas l'application d'instruments d'une Organisation régionale d'intégration économique partie à la présente Convention, ayant été adoptés après la conclusion de la Convention, en ce qui a trait aux matières régies par la Convention, à condition que de tels instruments n'affectent pas, dans les rapports des États membres de l'Organisation régionale d'intégration économique avec d'autres États contractants, l'application des dispositions de la Convention. En ce qui concerne la reconnaissance ou l'exécution de décisions entre les États membres de l'Organisation régionale d'intégration économique, la Convention n'affecte pas les règles de l'Organisation régionale d'intégration économique, que ces règles aient été adoptées avant ou après la conclusion de la Convention.

Article 52 Règle de l'efficacité maximale

1 La présente Convention ne fait pas obstacle à l'application d'un accord, d'une entente ou d'un instrument international en vigueur entre l'État requérant et l'État requis ou

Convention adoptée

(d) any reference to competent authorities, public bodies, and other bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;

(e) any reference to residence or habitual residence in that State shall be construed as referring, where appropriate, to residence or habitual residence in the relevant territorial unit;

(f) any reference to location of assets in that State shall be construed as referring, where appropriate, to the location of assets in the relevant territorial unit;

(g) any reference to a reciprocity arrangement in force in a State shall be construed as referring, where appropriate, to a reciprocity arrangement in force in the relevant territorial unit;

(h) any reference to free legal assistance in that State shall be construed as referring, where appropriate, to free legal assistance in the relevant territorial unit;

(i) any reference to a maintenance arrangement made in a State shall be construed as referring, where appropriate, to a maintenance arrangement made in the relevant territorial unit;

(j) any reference to recovery of costs by a State shall be construed as referring, where appropriate, to the recovery of costs by the relevant territorial unit.

2 This Article shall not apply to a Regional Economic Integration Organisation.

Article 47 Non-unified legal systems – substantive rules

1 A Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

2 A competent authority in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

3 This Article shall not apply to a Regional Economic Integration Organisation.

Article 48 Co-ordination with prior Hague Maintenance Conventions

In relations between the Contracting States, this Convention replaces, subject to Article 56(2), the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.

Article 49 Co-ordination with the 1956 New York Convention

In relations between the Contracting States, this Convention replaces the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention.

Article 50 Relationship with prior Hague Conventions on service of documents and taking of evidence

This Convention does not affect the Hague Convention of 1 March 1954 on civil procedure, the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

Article 51 Co-ordination of instruments and supplementary agreements

1 This Convention does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention.

2 Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, with a view to improving the application of the Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

3 Paragraphs 1 and 2 shall also apply to reciprocity arrangements and to uniform laws based on special ties between the States concerned.

4 This Convention shall not affect the application of instruments of a Regional Economic Integration Organisation that is a Party to this Convention, adopted after the conclusion of the Convention, on matters governed by the Convention provided that such instruments do not affect, in the relationship of Member States of the Regional Economic Integration Organisation with other Contracting States, the application of the provisions of the Convention. As concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation, the Convention shall not affect the rules of the Regional Economic Integration Organisation, whether adopted before or after the conclusion of the Convention.

Article 52 Most effective rule

1 This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or a

d'une entente de réciprocité en vigueur dans l'État requis qui prévoit :

(a) des bases plus larges pour la reconnaissance des décisions en matière d'aliments, sans préjudice de l'article 22(f) de la Convention ;

(b) des procédures simplifiées et accélérées relatives à une demande de reconnaissance ou de reconnaissance et d'exécution de décisions en matière d'aliments ;

(c) une assistance juridique plus favorable que celle prévue aux articles 14 à 17 ; ou

(d) des procédures permettant à un demandeur dans un État requérant de présenter une demande directement à l'Autorité centrale de l'État requis.

2 La présente Convention ne fait pas obstacle à l'application d'une loi en vigueur dans l'État requis prévoyant des règles plus efficaces telles que mentionnées au paragraphe premier (a) à (c). Cependant, en ce qui concerne les procédures simplifiées et accélérées mentionnées au paragraphe premier (b), elles doivent être compatibles avec la protection offerte aux parties en vertu des articles 23 et 24, en particulier en ce qui a trait aux droits des parties de se voir dûment notifier les procédures et de se voir offrir une opportunité adéquate d'être entendues, et en ce qui a trait aux effets d'une contestation ou d'un appel.

Article 53 Interprétation uniforme

Pour l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

Article 54 Examen du fonctionnement pratique de la Convention

1 Le Secrétaire général de la Conférence de La Haye de droit international privé convoque périodiquement une Commission spéciale afin d'examiner le fonctionnement pratique de la Convention et d'encourager le développement de bonnes pratiques en vertu de la Convention.

2 À cette fin, les États contractants collaborent avec le Bureau Permanent de la Conférence de La Haye de droit international privé afin de recueillir les informations relatives au fonctionnement pratique de la Convention, y compris des statistiques et de la jurisprudence.

Article 55 Amendement des formulaires

1 Les formulaires annexés à la présente Convention pourront être amendés par décision d'une Commission spéciale qui sera convoquée par le Secrétaire général de la Conférence de La Haye de droit international privé, à laquelle seront invités tous les États contractants et tous les Membres. La proposition d'amender les formulaires devra être portée à l'ordre du jour qui sera joint à la convocation.

2 Les amendements seront adoptés par les États contractants présents à la Commission spéciale. Ils entreront en vigueur pour tous les États contractants le premier jour du septième mois après la date à laquelle le dépositaire les aura communiqués à tous les États contractants.

3 Au cours du délai prévu au paragraphe 2, tout État contractant pourra notifier par écrit au dépositaire qu'il entend faire une réserve à cet amendement, conformément à l'article 62. L'État qui aura fait une telle réserve sera traité, en ce qui concerne cet amendement, comme s'il n'était pas Partie à la présente Convention jusqu'à ce que la réserve ait été retirée.

Article 56 Dispositions transitoires

1 La Convention s'applique dans tous les cas où :

(a) une requête visée à l'article 7 ou une demande prévue au chapitre III a été reçue par l'Autorité centrale de l'État requis après l'entrée en vigueur de la Convention entre l'État requérant et l'État requis ;

(b) une demande de reconnaissance et d'exécution a été présentée directement à une autorité compétente de l'État requis après l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis.

2 En ce qui concerne la reconnaissance et l'exécution des décisions entre les États contractants à la présente Convention qui sont également parties aux Conventions de La Haye mentionnées à l'article 48, si les conditions pour la reconnaissance et l'exécution prévues par la présente Convention font obstacle à la reconnaissance et à l'exécution d'une décision rendue dans l'État d'origine avant l'entrée en vigueur de la présente Convention dans cet État et qui à défaut aurait été reconnue et exécutée en vertu de la Convention qui était en vigueur lorsque la décision a été rendue, les conditions de cette dernière Convention s'appliquent.

3 L'État requis n'est pas tenu, en vertu de la Convention, d'exécuter une décision ou une convention en matière d'aliments pour ce qui concerne les paiements échus avant l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis sauf en ce qui concerne les obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne âgée de moins de 21 ans.

Article 57 Informations relatives aux lois, procédures et services

1 Un État contractant, au moment où il dépose son instrument de ratification ou d'adhésion ou fait une déclaration en vertu de l'article 61 de la Convention, fournit au Bureau Permanent de la Conférence de La Haye de droit international privé :

(a) une description de sa législation et de ses procédures applicables en matière d'obligations alimentaires ;

(b) une description des mesures qu'il prendra pour satisfaire à ses obligations en vertu de l'article 6 ;

(c) une description de la manière dont il procurera aux demandeurs un accès effectif aux procédures conformément à l'article 14 ;

(d) une description de ses règles et procédures d'exécution, y compris les limites apportées à l'exécution, en particulier les règles de protection du débiteur et les délais de prescription ;

(e) toute précision à laquelle l'article 25(1)(b) et (3) fait référence.

Convention adoptée

reciprocity arrangement in force in the requested State that provides for –

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 22(f) of the Convention;

(b) simplified, more expeditious procedures on an application for recognition or recognition and enforcement of maintenance decisions;

(c) more beneficial legal assistance than that provided for under Articles 14 to 17; or

(d) procedures permitting an applicant from a requesting State to make a request directly to the Central Authority of the requested State.

2 This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1(a) to (c). However, as regards simplified, more expeditious procedures referred to in paragraph 1(b), they must be compatible with the protection offered to the parties under Articles 23 and 24, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal.

Article 53 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

Article 54 Review of practical operation of the Convention

1 The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices under the Convention.

2 For the purpose of such review, Contracting States shall co-operate with the Permanent Bureau of the Hague Conference on Private International Law in the gathering of information, including statistics and case law, concerning the practical operation of the Convention.

Article 55 Amendment of forms

1 The forms annexed to this Convention may be amended by a decision of a Special Commission convened by the Secretary General of the Hague Conference on Private International Law to which all Contracting States and all Members shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.

2 Amendments adopted by the Contracting States present at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the depositary to all Contracting States.

3 During the period provided for in paragraph 2 any Contracting State may by notification in writing to the depositary make a reservation, in accordance with Article 62, with respect to the amendment. The State making such reservation shall, until the reservation is withdrawn, be treated as a State not Party to the present Convention with respect to that amendment.

Article 56 Transitional provisions

1 The Convention shall apply in every case where –

(a) a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;

(b) a direct request for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.

2 With regard to the recognition and enforcement of decisions between Contracting States to this Convention that are also Parties to either of the Hague Maintenance Conventions mentioned in Article 48, if the conditions for the recognition and enforcement under this Convention prevent the recognition and enforcement of a decision given in the State of origin before the entry into force of this Convention for that State, that would otherwise have been recognised and enforced under the terms of the Convention that was in effect at the time the decision was rendered, the conditions of that Convention shall apply.

3 The State addressed shall not be bound under this Convention to enforce a decision or a maintenance arrangement, in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed, except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

Article 57 Provision of information concerning laws, procedures and services

1 A Contracting State, by the time its instrument of ratification or accession is deposited or a declaration is submitted in accordance with Article 61 of the Convention, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –

(a) a description of its laws and procedures concerning maintenance obligations;

(b) a description of the measures it will take to meet the obligations under Article 6;

(c) a description of how it will provide applicants with effective access to procedures, as required under Article 14;

(d) a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods;

(e) any specification referred to in Article 25(1)(b) and (3).

2 Les États contractants peuvent, pour satisfaire à leurs obligations découlant du paragraphe premier, utiliser un formulaire de profil des États recommandé et publié par la Conférence de La Haye de droit international privé.

3 Les informations sont tenues à jour par les États contractants.

CHAPITRE IX – DISPOSITIONS FINALES

Article 58 Signature, ratification et adhésion

1 La Convention est ouverte à la signature des États qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session et des autres États qui ont participé à cette Session.

2 Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

3 Tout autre État ou Organisation régionale d'intégration économique pourra adhérer à la Convention après son entrée en vigueur en vertu de l'article 60(1).

4 L'instrument d'adhésion sera déposé auprès du dépositaire.

5 L'adhésion n'aura d'effet que dans les rapports entre l'État adhérant et les États contractants qui n'auront pas élevé d'objection à son encontre dans les 12 mois suivant la date de la notification prévue à l'article 65. Une telle objection pourra également être élevée par tout État au moment d'une ratification, acceptation ou approbation de la Convention, postérieure à l'adhésion. Ces objections seront notifiées au dépositaire.

Article 59 Organisations régionales d'intégration économique

1 Une Organisation régionale d'intégration économique constituée uniquement d'États souverains et ayant compétence pour certaines ou toutes les matières régies par la présente Convention peut également signer, accepter ou approuver la présente Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la Convention.

2 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres ont transféré leur compétence à cette Organisation. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

3 Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer, conformément à l'article 63, qu'elle a compétence pour toutes les matières régies par la présente Convention et que les États membres qui ont transféré leur compétence à l'Organisation régionale d'intégration économique dans ce domaine seront liés par la présente Convention par l'effet de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

4 Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique ne fasse une déclaration conformément au paragraphe 3.

5 Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique qui y est Partie. Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique conformément au paragraphe 3, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres concernés de l'Organisation.

Article 60 Entrée en vigueur

1 La Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du deuxième instrument de ratification, d'acceptation ou d'approbation visé par l'article 58.

2 Par la suite, la Convention entrera en vigueur :

(a) pour chaque État ou Organisation régionale d'intégration économique au sens de l'article 59(1) ratifiant, acceptant ou approuvant postérieurement, le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt de son instrument de ratification, d'acceptation ou d'approbation ;

(b) pour chaque État ou Organisation régionale d'intégration économique mentionné à l'article 58(3), le lendemain de l'expiration de la période durant laquelle des objections peuvent être élevées en vertu de l'article 58(5) ;

(c) pour les unités territoriales auxquelles la Convention a été étendue conformément à l'article 61, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification visée dans ledit article.

Article 61 Déclarations relatives aux systèmes juridiques non unifiés

1 Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la Convention peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer, conformément à l'article 63, que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

2 Toute déclaration est notifiée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

3 Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

4 Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

Convention adoptée

2 Contracting States may, in fulfilling their obligations under paragraph 1, utilise a country profile form recommended and published by the Hague Conference on Private International Law.

3 Information shall be kept up to date by the Contracting States.

CHAPTER IX – FINAL PROVISIONS

Article 58 Signature, ratification and accession

1 The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twenty-First Session and by the other States which participated in that Session.

2 It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

3 Any other State or Regional Economic Integration Organisation may accede to the Convention after it has entered into force in accordance with Article 60(1).

4 The instrument of accession shall be deposited with the depositary.

5 Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the 12 months after the date of the notification referred to in Article 65. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

Article 59 Regional Economic Integration Organisations

1 A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by the Convention.

2 The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

3 At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 63 that it exercises competence over all the matters governed by this Convention and that the Member States which have transferred competence to the Regional Economic Integration Organisation in respect of the matter in question shall be bound by this Convention by virtue of the signature, acceptance, approval or accession of the Organisation.

4 For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation makes a declaration in accordance with paragraph 3.

5 Any reference to a "Contracting State" or "State" in this Convention shall apply equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a "Contracting State" or "State" in this Convention shall apply equally to the relevant Member States of the Organisation, where appropriate.

Article 60 Entry into force

1 The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance or approval referred to in Article 58.

2 Thereafter the Convention shall enter into force –

(a) for each State or Regional Economic Integration Organisation referred to in Article 59(1) subsequently ratifying, accepting or approving it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance or approval;

(b) for each State or Regional Economic Integration Organisation referred to in Article 58(3) on the day after the end of the period during which objections may be raised in accordance with Article 58(5);

(c) for a territorial unit to which the Convention has been extended in accordance with Article 61, on the first day of the month following the expiration of three months after the notification referred to in that Article.

Article 61 Declarations with respect to non-unified legal systems

1 If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 63 that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2 Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

3 If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

4 This Article shall not apply to a Regional Economic Integration Organisation.

Article 62 Réserves

1 Tout État contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu de l'article 61, faire une ou plusieurs des réserves prévues aux articles 2(2), 20(2), 30(8), 44(3) et 55(3). Aucune autre réserve ne sera admise.

2 Tout État pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au dépositaire.

3 L'effet de la réserve cessera le premier jour du troisième mois après la notification mentionnée au paragraphe 2.

4 Les réserves faites en application de cet article ne sont pas réciproques, à l'exception de la réserve prévue à l'article 2(2).

Article 63 Déclarations

1 Les déclarations visées aux articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) et (2), 59(3) et 61(1) peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion ou à tout moment ultérieur et pourront être modifiées ou retirées à tout moment.

2 Les déclarations, modifications et retraits sont notifiés au dépositaire.

3 Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion prendra effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

4 Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

Article 64 Dénonciation

1 Tout État contractant pourra dénoncer la Convention par une notification écrite au dépositaire. La dénonciation pourra se limiter à certaines unités territoriales d'un État à plusieurs unités auxquelles s'applique la Convention.

2 La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est spécifiée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

Article 65 Notification

Le dépositaire notifiera aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé ou adhéré conformément aux articles 58 et 59, les renseignements suivants :

(a) les signatures, ratifications, acceptations et approbations visées aux articles 58 et 59 ;

(b) les adhésions et les objections aux adhésions visées aux articles 58(3) et (5) et 59 ;

(c) la date d'entrée en vigueur de la Convention conformément à l'article 60 ;

(d) les déclarations prévues aux articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) et (2), 59(3) et 61(1) ;

(e) les accords prévus à l'article 51(2) ;

(f) les réserves prévues aux articles 2(2), 20(2), 30(8), 44(3), 55(3) et le retrait des réserves prévu à l'article 62(2) ;

(g) les dénonciations prévues à l'article 64.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 23 novembre 2007, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session ainsi qu'à chacun des autres États ayant participé à cette Session.

Convention adoptée

Article 62 Reservations

1 Any Contracting State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 61, make one or more of the reservations provided for in Articles 2(2), 20(2), 30(8), 44(3) and 55(3). No other reservation shall be permitted.

2 Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.

3 The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in paragraph 2.

4 Reservations under this Article shall have no reciprocal effect with the exception of the reservation provided for in Article 2(2).

Article 63 Declarations

1 Declarations referred to in Articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1), may be made upon signature, ratification, acceptance, approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

2 Declarations, modifications and withdrawals shall be notified to the depositary.

3 A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

4 A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

Article 64 Denunciation

1 A Contracting State to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a multi-unit State to which the Convention applies.

2 The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 65 Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 58 and 59 of the following –

(a) the signatures, ratifications, acceptances and approvals referred to in Articles 58 and 59;

(b) the accessions and objections raised to accessions referred to in Articles 58(3) and (5) and 59;

(c) the date on which the Convention enters into force in accordance with Article 60;

(d) the declarations referred to in Articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1);

(e) the agreements referred to in Article 51(2);

(f) the reservations referred to in Articles 2(2), 20(2), 30(8), 44(3) and 55(3), and the withdrawals referred to in Article 62(2);

(g) the denunciations referred to in Article 64.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 23rd day of November 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session and to each of the other States which have participated in that Session.

ANNEXE 1

Formulaire de transmission en vertu de l'article 12(2)

AVIS DE CONFIDENTIALITÉ ET DE PROTECTION DES DONNÉES À CARACTÈRE PERSONNEL

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises. Toute autorité traitant de telles données en assure la confidentialité conformément à la loi de son État.

Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle juge que ce faisant la santé, la sécurité ou la liberté d'une personne pourrait être compromise, conformément à l'article 40.

☐ Une décision de non-divulgation a été prise par une Autorité centrale conformément à l'article 40.

1 Autorité centrale requérante	2 Personne à contacter dans l'État requérant
a Adresse	a Adresse (si différente)
b Numéro de téléphone	b Numéro de téléphone (si différent)
c Numéro de télécopie	c Numéro de télécopie (si différent)
d Courriel	d Courriel (si différent)
e Numéro de référence	e Langue(s)

3 Autorité centrale requise .....

Adresse .....

.....

4 Renseignements à caractère personnel concernant le demandeur

a Nom(s) de famille : .....

b Prénom(s) : .....

c Date de naissance : ..... (jj/mm/aaaa)

ou

a Nom de l'organisme public : .....

.....

ANNEX 1

Transmittal form under Article 12(2)

CONFIDENTIALITY AND PERSONAL DATA
PROTECTION NOTICE

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such data shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 40.

☐ A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.

1 Requesting Central Authority	2 Contact person in requesting State
a Address	a Address (if different)
b Telephone number	b Telephone number (if different)
c Fax number	c Fax number (if different)
d E-mail	d E-mail (if different)
e Reference number	e Language(s)

3 Requested Central Authority .....

Address .....

.....

4 Particulars of the applicant

a Family name(s): .....

b Given name(s): .....

c Date of birth: ..... (dd/mm/yyyy)

or

a Name of the public body: .....

.....

5 Renseignements à caractère personnel concernant la (les) personne(s) pour qui des aliments sont demandés ou dus

a ☐ La personne est la même que le demandeur identifié au point 4

b i Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

ii Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

iii Nom(s) de famille : .....

Prénom(s) : .....

Date de naissance : ..... (jj/mm/aaaa)

6 Renseignements à caractère personnel concernant le débiteur[1]

a ☐ La personne est la même que le demandeur identifié au point 4

b Nom(s) de famille : .....

c Prénom(s) : .....

d Date de naissance : ..... (jj/mm/aaaa)

7 Ce formulaire de transmission concerne et est accompagné d'une demande visée à :

☐ l'article 10(1)(a)

☐ l'article 10(1)(b)

☐ l'article 10(1)(c)

☐ l'article 10(1)(d)

☐ l'article 10(1)(e)

☐ l'article 10(1)(f)

☐ l'article 10(2)(a)

☐ l'article 10(2)(b)

☐ l'article 10(2)(c)

8 Les documents suivants sont annexés à la demande :

a Aux fins d'une demande en vertu de l'article 10(1)(a) et :

Conformément à l'article 25 :

☐ Texte complet de la décision (art. 25(1)(a))

☐ Résumé ou extrait de la décision établi par l'autorité compétente de l'État d'origine (art. 25(3)(b)) (le cas échéant)

[1] En vertu de l'art. 3 de la Convention, « 'débiteur' signifie [sic] une personne qui doit ou de qui on réclame des aliments ».

5 Particulars of the person(s) for whom maintenance is sought or payable

a ☐ The person is the same as the applicant named in point 4

b i Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

ii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

iii Family name(s): .....

Given name(s): .....

Date of birth: ..... (dd/mm/yyyy)

6 Particulars of the debtor[1]

a ☐ The person is the same as the applicant named in point 4

b Family name(s): .....

c Given name(s): .....

d Date of birth: ..... (dd/mm/yyyy)

7 This transmittal form concerns and is accompanied by an application under:

☐ Article 10(1)(a)

☐ Article 10(1)(b)

☐ Article 10(1)(c)

☐ Article 10(1)(d)

☐ Article 10(1)(e)

☐ Article 10(1)(f)

☐ Article 10(2)(a)

☐ Article 10(2)(b)

☐ Article 10(2)(c)

8 The following documents are appended to the application:

a For the purpose of an application under Article 10(1)(a) and:

In accordance with Article 25:

☐ Complete text of the decision (Art. 25(1)(a))

☐ Abstract or extract of the decision drawn up by the competent authority of the State of origin (Art. 25(3)(b)) (if applicable)

[1] According to Art. 3 of the Convention "'debtor' means an individual who owes or who is alleged to owe maintenance".

☐ Document établissant que la décision est exécutoire dans l'État d'origine et, dans le cas d'une décision d'une autorité administrative, un document établissant que les exigences prévues à l'article 19(3) sont remplies à moins que cet État n'ait précisé conformément à l'article 57 que les décisions de ses autorités administratives remplissent dans tous les cas ces conditions (art. 25(1)(b)) ou lorsque l'article 25(3)(c) s'applique

☐ Si le défendeur n'a ni comparu ni été représenté dans les procédures dans l'État d'origine, un document ou des documents attestant, selon le cas, que le défendeur a été dûment avisé de la procédure et a eu la possibilité de se faire entendre ou qu'il a été dûment avisé de la décision et a eu la possibilité de la contester ou de former un appel, en fait et en droit (art. 25(1)(c))

☐ Si nécessaire, le document établissant l'état des arrérages et indiquant la date à laquelle le calcul a été effectué (art. 25(1)(d))

☐ Si nécessaire, le document contenant les informations qui sont utiles à la réalisation des calculs appropriés dans le cadre d'une décision prévoyant une indexation automatique (art. 25(1)(e))

☐ Si nécessaire, le document établissant dans quelle mesure le demandeur a bénéficié de l'assistance juridique gratuite dans l'État d'origine (art. 25(1)(f))

Conformément à l'article 30(3) :

☐ Texte complet de la convention en matière d'aliments (art. 30(3)(a))

☐ Document établissant que la convention en matière d'aliments visée est exécutoire comme une décision de l'État d'origine (art. 30(3)(b))

☐ Tout autre document accompagnant la demande (par ex. : si requis, un document pour les besoins de l'art. 36(4)) :

.....

.....

b Aux fins d'une demande en vertu de l'article 10(1)(b), (c), (d), (e), (f) et (2)(a), (b) ou (c), le nombre de documents justificatifs (à l'exclusion du formulaire de transmission et de la demande elle-même) conformément à l'article 11(3) :

☐ article 10(1)(b) .....

☐ article 10(1)(c) .....

☐ article 10(1)(d) .....

☐ article 10(1)(e) .....

☐ article 10(1)(f) .....

☐ article 10(2)(a) .....

☐ article 10(2)(b) .....

☐ article 10(2)(c) .....

Nom : ..... (en majuscules) Date : .....

Nom du fonctionnaire autorisé de l'Autorité centrale (jj/mm/aaaa)

☐ Document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements (Art. 25(1)(b)) or if Article 25(3)(c) is applicable

☐ If the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law (Art. 25(1)(c))

☐ Where necessary, a document showing the amount of any arrears and the date such amount was calculated (Art. 25(1)(d))

☐ Where necessary, a document providing the information necessary to make appropriate calculations in case of a decision providing for automatic adjustment by indexation (Art. 25(1)(e))

☐ Where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin (Art. 25(1)(f))

In accordance with Article 30(3):

☐ Complete text of the maintenance arrangement (Art. 30(3)(a))

☐ A document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin (Art. 30(3)(b))

☐ Any other documents accompanying the application (e.g., if required, a document for the purpose of Art. 36(4)):

.....

.....

b For the purpose of an application under Article 10(1)(b), (c), (d), (e), (f) and (2)(a), (b) or (c), the following number of supporting documents (excluding the transmittal form and the application itself) in accordance with Article 11(3):

☐ Article 10(1)(b) .....

☐ Article 10(1)(c) .....

☐ Article 10(1)(d) .....

☐ Article 10(1)(e) .....

☐ Article 10(1)(f) .....

☐ Article 10(2)(a) .....

☐ Article 10(2)(b) .....

☐ Article 10(2)(c) .....

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

ANNEXE 2

Accusé de réception en vertu de l'article 12(3)

AVIS DE CONFIDENTIALITÉ ET DE PROTECTION DES DONNÉES À CARACTÈRE PERSONNEL

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises. Toute autorité traitant de telles données en assure la confidentialité conformément à la loi de son État.

Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle juge que ce faisant, la santé, la sécurité ou la liberté d'une personne pourrait être compromise, conformément à l'article 40.

☐ *Une décision de non-divulgation a été prise par une Autorité centrale conformément à l'article 40.*

1 Autorité centrale requise	2 Personne à contacter dans l'État requis
a Adresse	a Adresse (si différente)
b Numéro de téléphone	b Numéro de téléphone (si différent)
c Numéro de télécopie	c Numéro de télécopie (si différent)
d Courriel	d Courriel (si différent)
e Numéro de référence	e Langue(s)

3 Autorité centrale requérante .....

Nom du contact .....

Adresse .....

.....

4 L'Autorité centrale requise confirme la réception le ..... (jj/mm/aaaa) du formulaire de transmission de l'Autorité centrale requérante (numéro de référence ..... ; en date du ..... (jj/mm/aaaa)) concernant la demande visée à :

- ☐ l'article 10(1)(a)
- ☐ l'article 10(1)(b)
- ☐ l'article 10(1)(c)
- ☐ l'article 10(1)(d)
- ☐ l'article 10(1)(e)
- ☐ l'article 10(1)(f)
- ☐ l'article 10(2)(a)
- ☐ l'article 10(2)(b)
- ☐ l'article 10(2)(c)

ANNEX 2

Acknowledgement form under Article 12(3)

CONFIDENTIALITY AND PERSONAL DATA PROTECTION NOTICE

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which it was gathered or transmitted. Any authority processing such data shall ensure its confidentiality, in accordance with the law of its State.

An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person in accordance with Article 40.

☐ *A determination of non-disclosure has been made by a Central Authority in accordance with Article 40.*

1 Requested Central Authority	2 Contact person in requested State
a Address	a Address (if different)
b Telephone number	b Telephone number (if different)
c Fax number	c Fax number (if different)
d E-mail	d E-mail (if different)
e Reference number	e Language(s)

3 Requesting Central Authority .....

Contact person .....

Address .....

.....

4 The requested Central Authority acknowledges receipt on ..... (dd/mm/yyyy) of the transmittal form from the requesting Central Authority (reference number .....; dated ..... (dd/mm/yyyy)) concerning the following application under:

- ☐ Article 10(1)(a)
- ☐ Article 10(1)(b)
- ☐ Article 10(1)(c)
- ☐ Article 10(1)(d)
- ☐ Article 10(1)(e)
- ☐ Article 10(1)(f)
- ☐ Article 10(2)(a)
- ☐ Article 10(2)(b)
- ☐ Article 10(2)(c)

Nom de famille du demandeur : .....

Nom de famille de la (des) personne(s) pour qui des aliments sont demandés ou dus : .....

.....

.....

Nom de famille du débiteur : .....

5 Premières démarches entreprises par l'Autorité centrale requise :

☐ Le dossier est complet et pris en considération

☐ Voir le rapport sur l'état d'avancement ci-joint

☐ Un rapport sur l'état d'avancement suivra

☐ Veuillez fournir ces informations et / ou ces documents supplémentaires :

.....

.....

☐ L'Autorité centrale requise refuse de traiter la demande puisqu'il est manifeste que les conditions requises par la Convention ne sont pas remplies (art. 12(8)). Les raisons :

☐ sont énumérées dans un document en annexe

☐ seront énumérées dans un document à suivre

L'Autorité centrale requise demande à l'Autorité centrale requérante de l'informer de tout changement dans l'état d'avancement de la demande.

Nom : ..... (en majuscules) Date : .....

Nom du fonctionnaire autorisé de l'Autorité centrale (jj/mm/aaaa)

Family name(s) of applicant: .....

Family name(s) of the person(s) for whom maintenance is sought or payable: .....

.....

.....

Family name(s) of debtor: .....

5 Initial steps taken by the requested Central Authority:

☐ The file is complete and is under consideration

☐ See attached status of application report

☐ Status of application report will follow

☐ Please provide the following additional information and / or documentation:

.....

.....

☐ The requested Central Authority refuses to process this application as it is manifest that the requirements of the Convention are not fulfilled (Art. 12(8)). The reasons:

☐ are set out in an attached document

☐ will be set out in a document to follow

The requested Central Authority requests that the requesting Central Authority inform it of any change in the status of the application.

Name: ..... (in block letters) Date: .....

Authorised representative of the Central Authority (dd/mm/yyyy)

Rapport
Report

Rapport explicatif de Mmes Alegría Borrás et Jennifer Degeling

AVEC L'ASSISTANCE DE WILLIAM DUNCAN ET PHILIPPE LORTIE (BUREAU PERMANENT)

(traduction)

Table du Rapport Page

Rapport explicatif

Explanatory Report by Alegría Borrás and Jennifer Degeling

WITH THE ASSISTANCE OF WILLIAM DUNCAN AND PHILIPPE LORTIE (PERMANENT BUREAU)

Contents of the Report Page

PREMIÈRE PARTIE : HISTORIQUE

1 Le mandat officiel relatif aux négociations en vue d'élaborer une nouvelle Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille remonte à la Décision prise par les États représentés à la Dix-neuvième session (2002) de la Conférence de La Haye de droit international privé. Aux termes de ce mandat, la Session :

> « *a)* Décide d'inclure à l'ordre du jour de la Vingtième Session, la préparation d'une nouvelle convention plus étendue en matière d'obligations alimentaires qui devrait se fonder sur les aspects les plus efficaces des Conventions de La Haye existantes en la matière et inclure des dispositions sur la coopération judiciaire et administrative, et invite le Secrétaire général à continuer le travail préliminaire et à convoquer une Commission spéciale à cette fin ;
>
> *b)* Considère souhaitable la participation des États non membres de la Conférence de La Haye, notamment les États parties à la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger*, et prie le Secrétaire général de faire de son mieux pour obtenir leur participation aux travaux, et de s'assurer d'un processus inclusif, comprenant si possible la traduction des documents principaux et l'interprétation en espagnol lors des réunions plénières. »[1]

2 La Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille s'est réunie en avril 1999 pour examiner le fonctionnement pratique des quatre Conventions de La Haye existantes (la *Convention de La Haye du 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants* (ci-après la « Convention Obligations alimentaires de 1956 »), la *Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants* (ci-après la « Convention Obligations alimentaires de 1958 »), la *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires* (ci-après la « Convention Obligations alimentaires de 1973 (Exécution) ») et la *Convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires* (ci-après la « Convention Obligations alimentaires de 1973 (Loi applicable) ») ainsi que de la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger* (ci-après la « Convention de New York de 1956 »)[2, 3]. Les problèmes recensés allaient de l'échec complet de certains États à remplir leurs obligations conventionnelles, notamment au regard de la Convention de New York de 1956, aux différences d'interprétation et de pratiques au titre des diverses Conventions. Ces différences concernaient des questions telles que l'établissement de la paternité, la localisation du défendeur, les approches en matière d'octroi de l'aide juridique et de paiement des coûts, le statut des autorités publiques et des débiteurs d'aliments au titre de la Convention de New York de 1956, l'exécution des jugements prévoyant une indexation des aliments, l'application cumulative des Conventions et des questions de détail d'une grande importance pratique, telles que les mécanismes de transfert international de fonds.

3 La Commission spéciale de 1999 a jugé clairement décevant que nombre des problèmes recensés aient paru rester sans solution malgré l'attention qui avait été attirée sur eux par la Commission spéciale de 1995. Celle-ci n'avait pas jugé utile d'envisager des réformes d'envergure des Conventions concernées et avait mis l'accent sur l'amélioration des pratiques en vertu des Conventions existantes[4]. C'est la démarche qui a été également préconisée lors de la Commission spéciale de 1999. Dans l'ensemble, les délégués éprouvaient des réticences naturelles à envisa-

[1] Voir Acte final de la Dix-neuvième session du 13 décembre 2002, partie C, Décision 1, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Dix-neuvième session (2001/2002)*, tome I, *Matières diverses*, La Haye, Koninklijke Brill, 2008, p. 34 à 47, à la p. 44.
[2] Voir abréviations et références au para. 15 du présent Rapport.
[3] Voir « Rapport et Conclusions de la Commission spéciale sur les obligations alimentaires d'avril 1999 », document établi par le Bureau Permanent, Doc. prél. No 1 de mars 2000 à l'intention de la Commission spéciale de mai 2000 sur les affaires générales et la politique de la Conférence, *in Actes et documents de la Dix-neuvième session*, tome I (*op. cit.* note 1), p. 216 à 234 et « Note sur l'opportunité de réviser les Conventions de La Haye sur les obligations alimentaires et d'inclure dans un nouvel instrument des dispositions sur la coopération judiciaire et administrative », établie par W. Duncan, Premier secrétaire, Doc. prél. No 2 de janvier 1999 à l'intention de la Commission spéciale d'avril 1999, ci-dessus p. I-12 du présent tome (également accessible à l'adresse <www.hcch.net>).
[4] Voir « Conclusions générales de la Commission spéciale de novembre 1995 sur le fonctionnement des Conventions de La Haye relatives aux obligations alimentaires et de la *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger* », établies par le Bureau Permanent, Doc. prél. No 10 de mai 1996 à l'intention de la Dix-huitième session du 19 octobre 1996, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Dix-huitième session (1996)*, tome I, *Matières diverses*, La Haye, SDU, 1999, p. 122 à 132.

Rapport explicatif

PART I: BACKGROUND

1 The formal mandate for negotiations on a new Convention on the international recovery of child support and other forms of family maintenance is to be found in the Decision taken by the States represented at the Nineteenth Session (2002) of the Hague Conference on Private International Law. According to this mandate, the Session:

> "*a)* Decides to include in the Agenda for the Twentieth Session the preparation of a new comprehensive convention on maintenance obligations, which would build on the best features of the existing Hague Conventions on this matter and include rules on judicial and administrative co-operation, and requests the Secretary General to continue the preliminary work and to convene a Special Commission for this purpose;
>
> *b)* Considers to be desirable the participation of non-Member States of the Conference, in particular signatory States to the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*, and requests that the Secretary General make his best efforts to obtain their participation in this work, and 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."[1]

2 A meeting of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance was held in April 1999 to examine the practical operation of the four existing Hague Conventions (the Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children (hereinafter "1956 Hague Maintenance Convention"); the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children (hereinafter "1958 Hague Maintenance Convention"); the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations* (hereinafter "1973 Hague Maintenance Convention (Enforcement)"); and the *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations* (hereinafter "1973 Hague Maintenance Convention (Applicable Law)")) as well as the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance* (hereinafter "1956 New York Convention").[2, 3] A variety of problems was identified ranging from, on the one hand, a complete failure by certain States to fulfil their Convention obligations, particularly under the 1956 New York Convention, to, on the other hand, differences in interpretation and practice under the various Conventions. These differences related to such matters as the establishment of paternity, locating the defendant, approaches to the grant of legal aid and the payment of costs, the status of public authorities and of maintenance debtors under the 1956 New York Convention, enforcement of index-linked judgments, the question of the cumulative application of the Conventions and detailed matters of great practical importance such as mechanisms for transferring funds across international borders.

3 There was clearly disappointment at the 1999 Special Commission meeting that many of the problems identified appeared to have remained unresolved despite the attention that had already been drawn to them by the previous Special Commission of 1995. That earlier Special Commission had taken the view that there was no need to consider major reforms of the relevant Conventions. The emphasis was placed on improving practice under the existing Conventions.[4] This approach was advocated again during the 1999 Special Commission. There was a natural reluctance among

[1] See Final Act of the Nineteenth Session of 13 December 2002, Part C, Decision 1, in Hague Conference on Private International Law, *Proceedings of the Nineteenth Session (2001/2002)*, Tome I, *Miscellaneous matters*, The Hague, Koninklijke Brill, 2008, pp. 35-47, at p. 45.
[2] See abbreviations and references under para. 15 of this Report.
[3] See "Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999", drawn up by the Permanent Bureau, Prel. Doc. No 1 of March 2000 for the attention of the Special Commission of May 2000 on general affairs and policy of the Conference, in *Proceedings of the Nineteenth Session*, Tome I (*op. cit.* note 1), pp. 217-235 and "Note on the desirability of revising the Hague Conventions on Maintenance Obligations and including in a new instrument rules on judicial and administrative co-operation", drawn up by W. Duncan, First Secretary, Prel. Doc. No 2 of January 1999 for the attention of the Special Commission of April 1999, *supra* p. I-13 of this tome (also available at <www.hcch.net>).
[4] See "General Conclusions of the Special Commission of November 1995 on the operation of the Hague Conventions relating to maintenance obligations and of the *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*", drawn up by the Permanent Bureau, Prel. Doc. No 10 of May 1996 for the attention of the Eighteenth Session of 19 October 1996, in Hague Conference on Private International Law, *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous matters*, The Hague, SDU, 1999, pp. 123-133.

ger de nouveaux instruments internationaux dans un domaine où il existe déjà de si nombreux instruments. En effet, aux quatre Conventions de La Haye précitées et à la Convention de New York de 1956 s'ajoutent divers accords et conventions régionaux, notamment la Convention de Bruxelles, le Règlement de Bruxelles, la Convention de Lugano, la Convention de Montevideo et le système en vigueur au sein du Commonwealth[5], ainsi qu'une multiplicité de traités bilatéraux et d'accords moins formels.

4 En dépit de ces réticences naturelles, la Commission spéciale de 1999 s'est finalement prononcée en faveur d'une approche radicale, à savoir que la Conférence de La Haye devait engager des travaux sur l'élaboration d'un nouvel instrument mondial. Les raisons de cette conclusion peuvent se résumer ainsi :

– préoccupations face au caractère chronique de nombre des problèmes associés à certaines Conventions existantes ;

– impression d'une importante disproportion entre le nombre relativement faible d'affaires instruites dans le cadre du dispositif international et les besoins réels ;

– acceptation croissante de l'idée que la Convention de New York de 1956, tout en ayant constitué un important progrès à son époque, était devenue obsolète, que la texture ouverte de certaines de ses dispositions favorisait des interprétations et des pratiques hétérogènes et que son fonctionnement n'avait pas fait l'objet d'un suivi efficace ;

– admission de la nécessité de tenir compte des nombreux changements intervenus au sein des systèmes nationaux de fixation et de recouvrement des pensions alimentaires (en particulier en matière d'aliments destinés aux enfants) et des possibilités offertes par les progrès des technologies de l'information ;

– prise de conscience du fait que la multiplication des instruments (multilatéraux, régionaux et bilatéraux), avec leurs différentes dispositions et leur degré divers de formalisme, compliquaient la tâche des autorités nationales et des conseillers juridiques.

5 La recommandation d'engager les travaux sur un nouvel instrument mondial faite par la Commission spéciale de 1999 comprenait les instructions suivantes :

> « Ce nouvel instrument devrait
>
> – prévoir comme l'un de ses éléments essentiels des dispositions en matière de coopération administrative,
>
> – être complet et s'inspirer des meilleurs aspects des Conventions existantes, en particulier des dispositions en matière de reconnaissance et d'exécution des obligations alimentaires,
>
> – prendre en considération les besoins futurs, les développements survenant dans les systèmes nationaux et internationaux de recouvrement d'obligations alimentaires et les possibilités offertes par les progrès des techniques d'information,
>
> – être structuré de manière à combiner l'efficacité maximale avec la flexibilité nécessaire pour assurer une large ratification. »[6]

6 Conformément à la Décision de la Dix-neuvième session (2002), le Secrétaire général a convoqué une Commission spéciale qui s'est réunie à La Haye du 5 au 16 mai 2003, du 7 au 18 juin 2004, du 4 au 15 avril 2005, du 19 au 28 juin 2006 et du 8 au 16 mai 2007. Celle-ci a donné son accord à l'élaboration d'un avant-projet de Convention qui, accompagné d'un projet de Rapport explicatif[7], a servi de base aux discussions de la Vingt et unième session de la Conférence, qui s'est déroulée à La Haye du 5 au 23 novembre 2007.

7 M. Fausto Pocar (Italie) a été élu président de la Commission spéciale et Mme Mary Helen Carlson (États-Unis d'Amérique), Mme Mária Kurucz (Hongrie), et M. Jin Sun (Chine), ont été élus vice-présidents. Mmes Alegría Borrás (Espagne) et Jennifer Degeling (Australie) ont été élues Rapporteurs. Un Comité de rédaction a été constitué sous la présidence de Mme Jan Doogue[8] (Nouvelle-Zélande). Le travail de la Commission spéciale et du Comité de rédaction a été grandement facilité par d'importants Documents préliminaires[9] et par les remarques de M. William Duncan, Secrétaire général adjoint, qui était chargé des travaux scientifiques du Secrétariat, et de M. Philippe Lortie, Premier secrétaire.

8 Conformément au mandat donné par la Commission spéciale, le Comité de rédaction s'est réuni en même temps que celle-ci, mais aussi du 27 au 30 octobre 2003, du 12 au 16 janvier 2004, du 19 au 22 octobre 2004, du 5 au 9 septembre 2005, du 11 au 15 février 2006 et du 16 au 18 mai 2007. Deux réunions téléphoniques ont également eu lieu le 28 novembre et le 7 décembre 2006.

9 Un Groupe de travail sur la loi applicable, présidé par M. Andrea Bonomi (Suisse) et un Groupe de travail sur la coopération administrative, co-présidé par Mme Mary Helen Carlson (États-Unis d'Amérique), Mme Mária Kurucz (Hongrie) et M. Jorge Aguilar Castillo (Costa Rica), se sont réunis à plusieurs reprises, soit en personne, soit par téléphone. D'autre part, un Groupe de travail chargé des formulaires, coordonné par le Bureau Permanent de la Conférence de La Haye de droit international privé, a travaillé en étroite concertation avec le Groupe de travail sur la coopération administrative, et quelques réunions et conférences téléphoniques ont eu lieu.

[5] Voir abréviations et références au para. 15 du présent Rapport.
[6] Rapport et Conclusions de la Commission spéciale de 1999 (*op. cit.* note 3), au para. 46.

[7] « Avant-projet révisé de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », établi par le Comité de rédaction sous l'autorité de la Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille, Doc. prél. No 29 de juin 2007 à l'intention de la Vingt et unième session de novembre 2007, ci-dessus p. I-412 du présent tome, et « Avant-projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille – Projet de Rapport explicatif » (version provisoire), établi par A. Borrás et J. Degeling, Doc. prél. No 32 d'octobre 2007 à l'intention de la Vingt et unième session de novembre 2007 (accessible à l'adresse <www.hcch.net>).
[8] Ce Comité réunissait, outre son président, les rapporteurs, membres d'office, et les membres du Bureau Permanent, ainsi que les experts suivants : Mmes Denise Gervais (Canada), Katja Lenzing (Commission européenne), Namira Negm (Égypte), Mary Helen Carlson (États-Unis d'Amérique), Mária Kurucz (Hongrie), Stefania Bariatti (Italie), María Elena Mansilla y Mejía (Mexique) et Cecilia Fresnedo de Aguirre (Inter-American Children's Initiative) et MM. James Ding (Chine), Jin Sun (Chine), Lixiao Tian (Chine), Antoine Buchet (Commission européenne), Miloš Hatapka (Commission européenne), Robert Keith (États-Unis d'Amérique), Jérôme Déroulez (France), Edouard de Leiris (France) et Paul Beaumont (Royaume-Uni).
[9] La liste complète des documents préliminaires est présentée à l'annexe I. Voir, en particulier, W. Duncan, « Vers un nouvel instrument mondial sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », Doc. prél. No 3 d'avril 2003 établi à l'intention de la Commission spéciale de mai 2003 sur le recouvrement des aliments envers les enfants et d'autres membres de la famille (ci-après « le Rapport Duncan »), ci-dessus p. I-54 du présent tome (également accessible à l'adresse <www.hcch.net>).

delegates to consider further international instruments in an area in which so many instruments already exist. Apart from the four Hague Conventions and the 1956 New York Convention, there are various regional conventions and arrangements, including the Brussels Convention, the Brussels Regulation, the Lugano Convention, the Montevideo Convention and the system that operates among Commonwealth countries,[5] as well as a proliferation of bilateral treaties and less formal agreements.

4 Despite this natural reluctance, the Special Commission of 1999 in the end came down in favour of a radical approach, namely that the Hague Conference should commence work on the elaboration of a new worldwide instrument. The reasons for this conclusion may be summarised as follows:

– disquiet at the chronic nature of many of the problems associated with some of the existing Conventions;

– a perception that the number of cases being processed through the international machinery was very small in comparison with real needs;

– a growing acceptance that the 1956 New York Convention, though an important advance in its day, had become somewhat obsolete, that the open texture of some of its provisions was contributing to inconsistent interpretation and practice, and that its operation had not been effectively monitored;

– an acceptance of the need to take account of the many changes that have occurred in national (especially child support) systems for determining and collecting maintenance payments, as well as the opportunities presented by advances in information technology;

– a realisation that the proliferation of instruments (multilateral, regional and bilateral), with their varying provisions and different degrees of formality, were complicating the tasks of national authorities, as well as legal advisers.

5 The recommendation to begin work on a new worldwide international instrument adopted by the 1999 Special Commission included the following directions:

"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."[6]

6 In carrying out the Decision of the Nineteenth Session (2002), the Secretary General convened a Special Commission which met at The Hague from 5 to 16 May 2003, from 7 to 18 June 2004, from 4 to 15 April 2005, from 19 to 28 June 2006 and from 8 to 16 May 2007. This Special Commission authorised the drawing up of a preliminary draft Convention, which, accompanied by a draft Explanatory Report,[7] served as a basis for the discussions at the Conference's Twenty-First Session which took place at The Hague from 5 to 23 November 2007.

7 Mr Fausto Pocar, expert from Italy, was elected as Chairman of the Special Commission and Ms Mária Kurucz, expert from Hungary, Ms Mary Helen Carlson, expert from the United States of America, and Mr Jin Sun, expert from China, were elected as Vice-Chairs. Ms Alegría Borrás, expert from Spain, and Ms Jennifer Degeling, expert from Australia, were elected as *Rapporteurs*. A Drafting Committee was constituted under the chairmanship of Ms Jan Doogue,[8] expert from New Zealand. The work of the Special Commission and of the Drafting Committee was greatly facilitated by the substantial Preliminary Documents[9] and remarks of Mr William Duncan, Deputy Secretary General, who was responsible for the scientific work of the Secretariat, and of Mr Philippe Lortie, First Secretary.

8 According to the mandate given by the Special Commission, the Drafting Committee not only met during the Special Commission, but also met from 27 to 30 October 2003, from 12 to 16 January 2004, from 19 to 22 October 2004, from 5 to 9 September 2005, from 11 to 15 February 2006 and from 16 to 18 May 2007. Also, two meetings by conference call took place on 28 November and 7 December 2006.

9 A Working Group on Applicable Law, chaired by Mr Andrea Bonomi (Switzerland) and a Working Group on Administrative Co-operation, convened by Ms Mária Kurucz (Hungary), Ms Mary Helen Carlson (United States of America) and Mr Jorge Aguilar Castillo (Costa Rica) met several times in person and through conference calls. In addition, a Forms Working Group, co-ordinated by the Permanent Bureau of the Hague Conference on Private International Law, worked in close co-operation with the Working Group on Administrative Co-operation and some meetings and conference calls took place.

[5] See abbreviations and references under para. 15 of this Report.
[6] Report and Conclusions of the 1999 Special Commission (*op. cit.* note 3), at para. 46.

[7] "Revised preliminary draft Convention on the international recovery of child support and other forms of family maintenance", drawn up by the Drafting Committee under the authority of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance, Prel. Doc. No 29 of June 2007 for the attention of the Twenty-First Session of November 2007, *supra* p. I-413 of this tome, and "Preliminary draft Convention on the international recovery of child support and other forms of family maintenance – Draft Explanatory Report" (provisional version), drawn up by A. Borrás and J. Degeling, Prel. Doc. No 32 of August 2007 for the attention of the Twenty-First Session of November 2007 (available at <www.hcch.net>).
[8] This Committee was made up, in addition to its Chairman, by the *Rapporteurs*, as members *ex officio*, and the members of the Permanent Bureau, as well as the following experts: Mmes Denise Gervais (Canada), Namira Negm (Egypt), Katja Lenzing (European Commission), Mária Kurucz (Hungary), Stefania Bariatti (Italy), María Elena Mansilla y Mejía (Mexico), Mary Helen Carlson (United States of America) and Cecilia Fresnedo de Aguirre (Inter-American Children's Initiative) and Messrs James Ding (China), Jin Sun (China), Lixiao Tian (China), Antoine Buchet (European Commission), Miloš Hatapka (European Commission), Jérôme Déroulez (France), Edouard de Leiris (France), Paul Beaumont (United Kingdom) and Robert Keith (United States of America).
[9] A full list of the preliminary documents is set out in Annex I. See, in particular, W. Duncan, "Towards a new global instrument on the international recovery of child support and other forms of family maintenance", Prel. Doc. No 3 of April 2003 drawn up for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter "the Duncan Report"), *supra* p. I-55 of this tome (also available at <www.hcch.net>).

10 La Séance plénière de la Vingt et unième session de la Conférence de La Haye était présidée par M. Teun Struycken (Pays-Bas). Les vice-présidents étaient : Mme Hlengiwe B. Mkhize (Ambassadeur de l'Afrique du Sud), M. Gilberto Vergne Saboia (Ambassadeur du Brésil), M. Xue Hanqin (Ambassadeur de la Chine), Mme Mary Helen Carlson (États-Unis d'Amérique), M. Ioannis Voulgaris (Grèce), Mme Jan Doogue (Nouvelle-Zélande), Mme Dorothée van Iterson (Pays-Bas) et M. Alexander Y. Bavykin (Fédération de Russie).

11 La Vingt et unième session de la Conférence a confié la rédaction de la Convention à sa Commission I, qui s'est réunie à 22 reprises, et la rédaction d'un Protocole sur la loi applicable aux obligations alimentaires à sa Commission II. La Commission I était présidée par Mme Mária Kurucz (Hongrie), la Commission II par M. Andrea Bonomi (Suisse). Les vice-présidents de la Commission I étaient Mme Mary Helen Carlson (États-Unis d'Amérique) et M. Lixiao Tian (Chine) ; les vice-présidents de la Commission II étaient Mme Nádia de Araújo (Brésil) et M. Shinichiro Hayakawa (Japon). Outre les délégués de 56 Membres de la Conférence représentés à la Vingt et unième session, ont également participé des observateurs de 14 États et de neuf organisations intergouvernementales et non gouvernementales.

12 Un Comité de rédaction présidé par Mme Jan Doogue (Nouvelle-Zélande) a été constitué pour traiter des travaux des Commissions I et II. Outre sa Présidente, le Comité de rédaction réunissait les Rapporteurs des deux Commissions, membres d'office, les membres du Bureau Permanent, ainsi que les experts suivants : Mmes Denise Gervais (Canada), Katja Lenzing (Commission européenne), Mary Helen Carlson (États-Unis d'Amérique) et María Elena Mansilla y Mejía (Mexique), ainsi que MM. James Ding (Chine), Lixiao Tian (Chine), Miloš Hatapka (Commission européenne), Robert Keith (États-Unis d'Amérique), Edouard de Leiris (France) et Paul Beaumont (Royaume-Uni).

13 Il convient de souligner que l'espagnol a été mentionné pour la première fois dans l'Acte final d'une Session diplomatique[10] signifiant son accord au lancement des travaux de rédaction de la Convention. L'interprétation en espagnol a également été assurée au cours des négociations et les Documents préliminaires ont été traduits en espagnol. Il ne s'ensuit pas cependant que l'espagnol a acquis un nouveau statut à la Conférence de La Haye.

14 Ce Rapport porte sur la *Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille* qui a été établi par le Comité de rédaction sous l'autorité de la Vingt et unième session de novembre 2007. La troisième lecture du projet de Convention s'est achevée lors de la Séance plénière du 22 novembre 2007. Le projet de Convention a été formellement adopté pendant la Séance de clôture du 23 novembre 2007, par la signature de l'Acte final de la Vingt et unième session. Les États-Unis d'Amérique ont signé la Convention le jour de son adoption.

[10] Voir *supra*, note 1.

DEUXIÈME PARTIE : ABRÉVIATIONS ET RÉFÉRENCES

15 Afin de faciliter et de simplifier les renvois, les divers instruments et Conventions cités dans ce Rapport, brièvement décrits ci-après, sont désignés par les abréviations suivantes :

– **Convention de New York de 1956** – *Convention de New York du 20 juin 1956 sur le recouvrement des aliments à l'étranger*. C'est la première Convention qui institue un système de coopération entre des autorités. Ce n'est pas une Convention sur l'exécution et elle peut être appliquée conjointement avec la Convention Obligations alimentaires de 1958 ou la Convention Obligations alimentaires de 1973 (Exécution) (voir annexe 1 du Rapport Duncan[11]).

– **Convention des Nations unies relative aux droits de l'enfant** – *Convention de New York du 20 novembre 1989 relative aux droits de l'enfant*. L'article 2 de la Convention dispose que les Parties s'engagent à respecter les droits qui sont énoncés dans la Convention et à les garantir à tout enfant relevant de leur juridiction sans aucune forme de discrimination. L'article 27 vise expressément les obligations alimentaires.

– **Convention Obligations alimentaires de 1956** – *Convention de La Haye du 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants*. La grande majorité des États parties à cette Convention sont également Parties à la Convention Obligations alimentaires de 1973 (Loi applicable).

– **Convention Obligations alimentaires de 1958** – *Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants*. La grande majorité des États parties à cette Convention sont également Parties à la Convention Obligations alimentaires de 1973 (Exécution).

– **Convention Obligations alimentaires de 1973 (Loi applicable)** – *Convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires*. Aux termes de l'article premier, la Convention s'applique « aux obligations alimentaires découlant de relations de famille, de parenté, de mariage ou d'alliance, y compris les obligations alimentaires envers un enfant non légitime ». La loi désignée par la Convention (art. 3) « s'applique indépendamment de toute condition de réciprocité, même s'il s'agit de la loi d'un État non contractant ».

– **Convention Obligations alimentaires de 1973 (Exécution)** – *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires*. Le champ d'application défini à l'article premier de la Convention est identique à celui de la Convention de La Haye de la même date sur la loi applicable.

– **Rapport Verwilghen** – Rapport explicatif sur les Conventions Obligations alimentaires de 1973, par Michel Verwilghen (1975)[12].

– **Convention Enlèvement d'enfants de 1980** – *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*. L'expérience

[11] *Op. cit.* (note 9).

[12] Conférence de La Haye de droit international privé, *Actes et documents de la Douzième session (1972)*, tome IV, *Obligations alimentaires*, La Haye, Imprimerie Nationale, 1975, p. 383 à 465 (également accessible à l'adresse <www.hcch.net>).

10 The President of the Plenary Session of the Twenty-First Session of the Hague Conference was Mr Teun Struycken (Netherlands). The Vice-Chairs of the Plenary Session were: Mr Gilberto Vergne Saboia (Ambassador of Brazil), Mr Xue Hanqin (Ambassador of China), Mr Ioannis Voulgaris (Greece), Ms Dorothée van Iterson (Netherlands), Ms Jan Doogue (New Zealand), Mr Alexander Y. Bavykin (Russian Federation), Ms Hlengiwe B. Mkhize (Ambassador of South Africa) and Ms Mary Helen Carlson (United States of America).

11 The Conference's Twenty-First Session entrusted the drafting of the Convention to its Commission I, which held 22 sittings, and the drafting of a Protocol on the law applicable to maintenance obligations to its Commission II. Commission I was chaired by Ms Mária Kurucz, expert from Hungary, and Commission II was chaired by Mr Andrea Bonomi, expert from Switzerland. Vice-Chairs for Commission I were Ms Mary Helen Carlson (United States of America) and Mr Lixiao Tian (China), and Vice-Chairs for Commission II were Ms Nádia de Araújo (Brazil) and Mr Shinichiro Hayakawa (Japan). Participating in the negotiations, in addition to the delegates of 56 Members of the Conference represented at the Twenty-First Session, were observers from 14 States as well as from nine intergovernmental and non-governmental organisations.

12 A Drafting Committee chaired by Ms Jan Doogue (New Zealand) was constituted to address the work of Commissions I and II. In addition to its Chair, the *Rapporteurs* of both Commissions, as members *ex officio*, and members of the Permanent Bureau, the Drafting Committee was made up of the following experts: Mmes Denise Gervais (Canada), Katja Lenzing (European Commission), María Elena Mansilla y Mejía (Mexico) and Mary Helen Carlson (United States of America) and Messrs James Ding (China), Lixiao Tian (China), Miloš Haťapka (European Commission), Edouard de Leiris (France), Paul Beaumont (United Kingdom) and Robert Keith (United States of America).

13 It is noteworthy that, for this Convention, it is the first time that, in the Final Act of the Diplomatic Session[10] in which the agreement to start the drafting of the Convention was adopted, Spanish is mentioned. Interpretation in Spanish was also available throughout the negotiations and Preliminary Documents were translated into Spanish. However, this does not mean a new status for Spanish in the Hague Conference.

14 This Report deals with the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* which was drawn up by the Drafting Committee under the authority of the Twenty-First Session of November 2007. The Plenary Session, in its meeting of 22 November 2007, completed the third reading of the draft Convention, which was formally adopted in the Closing Session of 23 November 2007, with the signing of the Final Act of the Twenty-First Session. The United States of America signed the Convention on the day of its adoption.

[10] See *supra*, note 1.

PART II: ABBREVIATIONS AND REFERENCES

15 To facilitate and simplify the references to the different Conventions and instruments throughout this Report, the following abbreviations are used, and a short description is also included.

– **1956 New York Convention** – *New York Convention of 20 June 1956 on the Recovery Abroad of Maintenance*. It is the first Convention in which a system of co-operation of authorities is established. It is not a Convention on enforcement and it can be applied in combination with the 1958 Hague Maintenance Convention or with the 1973 Hague Maintenance Convention (Enforcement) (see Annex 1 of the Duncan Report[11]).

– **UN Convention on the Rights of the Child** – *New York Convention of 20 November 1989 on the Rights of the Child*. Article 2 of the Convention establishes that the Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. Article 27 refers specifically to maintenance obligations.

– **1956 Hague Maintenance Convention** – Hague Convention of 24 October 1956 on the law applicable to maintenance obligations towards children. A great majority of States Party to this Convention are also Parties to the 1973 Hague Maintenance Convention (Applicable Law).

– **1958 Hague Maintenance Convention** – Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children. A great majority of States Party to this Convention are also Parties to the 1973 Hague Maintenance Convention (Enforcement).

– **1973 Hague Maintenance Convention (Applicable Law)** – *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*. According to Article 1, the Convention applies "to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate". The law designated by the Convention (Art. 3) "shall apply irrespective of any requirement of reciprocity and whether or not it is the law of a Contracting State".

– **1973 Hague Maintenance Convention (Enforcement)** – *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*. Article 1 of the Convention defines the scope of application as does the Hague Convention of the same date on applicable law.

– **Verwilghen Report** – Explanatory Report on the 1973 Hague Maintenance Conventions, by Michel Verwilghen (1975).[12]

– **1980 Hague Child Abduction Convention** – *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The experience from the

[11] *Op. cit.* (note 9).

[12] Conférence de La Haye de droit international privé, *Actes et documents de la Douzième session (1972)*, Tome IV, *Obligations alimentaires*, The Hague, Imprimerie Nationale, 1975, pp. 383-465 (also available at <www.hcch.net>).

tirée du fonctionnement des dispositions de cette Convention relatives à la coopération administrative et aux fonctions des Autorités centrales a servi de base à l'élaboration de dispositions similaires dans la nouvelle Convention.

– **Convention Adoption internationale de 1993** – *Convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale*. Comme pour la Convention Enlèvement d'enfants de 1980, l'expérience tirée de la mise en œuvre des dispositions de cette Convention relatives à la coopération administrative et aux fonctions des Autorités centrales a servi de base à l'élaboration de dispositions similaires dans la nouvelle Convention.

– **Convention Protection des enfants de 1996** – *Convention de La Haye du 19 octobre 1996 concernant la compétence, la loi applicable, la reconnaissance, l'exécution et la coopération en matière de responsabilité parentale et de mesures de protection des enfants*. L'article 4(e) exclut les « obligations alimentaires » du champ d'application de la Convention, exclusion jugée nécessaire en raison de l'existence d'autres Conventions de La Haye et des règles édictées par les Conventions de Bruxelles et de Lugano[13].

– **Convention Protection des adultes de 2000** – *Convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes*. L'article 4(1)(a) exclut les « obligations alimentaires » du champ d'application de la Convention pour les mêmes raisons que la Convention Protection des enfants de 1996[14].

– **Convention Élection de for de 2005** – *Convention de La Haye du 30 juin 2005 sur les accords d'élection de for*.

– **Convention de Bruxelles** – *Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale*. Elle a été ouverte à la signature à Bruxelles le 27 septembre 1968. Les Parties initiales étaient les six Membres fondateurs de la Communauté économique européenne. Les nouveaux États membres de ce qui est aujourd'hui l'Union européenne sont devenus Parties à la Convention de Bruxelles en entrant dans l'Union. La Convention ne s'applique plus aujourd'hui qu'entre les 14 États membres de l'ancienne Union européenne et les Antilles néerlandaises et les territoires français d'outremer. Les obligations alimentaires sont visées à la Convention, laquelle prévoit une règle spéciale sur la compétence (art. 5(2)).

– **Convention de Lugano** – *Convention concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale*. Elle a été ouverte à la signature à Lugano, Suisse, le 16 septembre 1988. Elle contient des dispositions similaires à celles de la Convention de Bruxelles (on dit aussi que c'est une convention « parallèle »). Les États contractants à la Convention de Lugano sont les 15 États qui étaient membres de la Communauté européenne à la date du 16 septembre 1988 ainsi que l'Islande, la Norvège, la Pologne et la Suisse. La différence entre les deux Conventions apparaît à l'article 54 *ter* de la Convention de Lugano : elle ne s'applique pas aux relations entre les États membres de l'Union européenne, mais elle entre en jeu lorsqu'un des autres pays mentionnés ci-dessus est impliqué. Comme la Convention de Bruxelles, elle vise les obligations alimentaires. Une nouvelle Convention de Lugano révisée a été conclue le 30 octobre 2007. Le texte, tel qu'adopté en mars 2007, reprend la même règle que celle de la Convention de 1988 en ce qui concerne les obligations alimentaires. Cette nouvelle Convention de Lugano s'appliquera entre les États membres de l'Union européenne et l'Islande, la Norvège et la Suisse.

– **Règlement Bruxelles I** – Règlement (CE) No 44/2001 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale[15]. Il s'applique dans toute l'Union européenne excepté au Danemark et remplace la Convention de Bruxelles dans les relations mutuelles entre les États auxquels il s'applique. Il contient des règles similaires à celles de la Convention de Bruxelles. Un accord entre la Communauté européenne et le Danemark a été conclu le 19 octobre 2005 pour appliquer les dispositions du Règlement Bruxelles I aux relations entre la Communauté européenne et le Danemark. Cet accord est entré en vigueur le premier juillet 2007.

– **Règlement Bruxelles II** – Règlement (ce) No 1347/2000 du Conseil du 29 mai 2000 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs[16].

– **Règlement Bruxelles II *bis*** – Règlement (CE) No 2201/2003 du Conseil du 27 novembre 2003 relatif à la compétence, la reconnaissance et l'exécution des décisions en matière matrimoniale et en matière de responsabilité parentale abrogeant le Règlement (CE) No 1347/2000[17].

– **Règlement TEE** – Règlement (CE) No 805/2004 du Parlement européen et du Conseil du 21 avril 2004 portant création d'un titre exécutoire européen pour les créances incontestées[18]. Il crée un titre exécutoire européen pour les créances incontestées, ce qui signifie (art. 5) qu'une décision qui a été certifiée en tant que titre exécutoire européen dans l'État membre d'origine est reconnue et exécutée dans les autres États membres sans qu'une déclaration de force exécutoire soit nécessaire et sans qu'il soit possible de s'opposer à sa reconnaissance. Tout comme le Règlement Bruxelles I, le Règlement TEE vise aussi les aliments.

– **Règlement Obligations alimentaires** – Règlement (CE) No 4/2009 du Conseil du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires[19]. Son article 76 dispose qu'il s'applique « à compter du 18 juin 2011, sous réserve que le protocole de La Haye de 2007 soit applicable dans la Communauté à cette date. À défaut, le présent règlement s'applique à compter de la date d'application dudit protocole dans la Communauté. »

– **Convention de Montevideo** – *Convention interaméricaine sur les obligations alimentaires*, adoptée à Montevideo le 15 juillet 1989. Les États parties à la Convention sont l'Argentine, le Belize, la Bolivie, le Brésil, le Costa Rica, l'Équateur, le Guatemala, le Mexique, le Panama, le Paraguay et l'Uruguay (voir annexe 2 du Rapport Duncan[20]).

[13] P. Lagarde, Rapport explicatif sur la Convention Protection des enfants de 1996, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Dix-huitième session (1996)*, tome II, *Protection des enfants*, La Haye, SDU, 1998, p. 534 à 604, para. 31.

[14] P. Lagarde, Rapport explicatif sur la Convention Protection des adultes de 2000, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Commission spéciale à caractère diplomatique de septembre – octobre 1999 (1999), Protection des adultes*, La Haye, SDU, 2003, p. 390 à 450, para. 32.

[15] *JO* L 12 du 16.1.2001.

[16] *JO* L 160 du 30.6.2000.

[17] *JO* L 338 du 23.12.2003.

[18] *JO* L 143 du 30.4.2004.

[19] *JO* L 7 du 10.1.2009.

[20] *Op. cit.* (note 9).

operation of the provisions of this Convention concerning administrative co-operation and the functions of Central Authorities provided a basis on which similar provisions were developed in the new Convention.

– **1993 Hague Intercountry Adoption Convention** – *Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*. As with the 1980 Hague Child Abduction Convention, the experience from the implementation of the provisions of this Convention concerning administrative co-operation and the functions of Central Authorities provided a basis on which similar provisions were developed in the new Convention.

– **1996 Hague Child Protection Convention** – *Hague 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*. Article 4(e) excludes "maintenance obligations" from the scope of application of the Convention, an exclusion that is considered as necessary, taking into account the existence of other Hague Conventions and the existing rules in the Brussels and Lugano Conventions.[13]

– **2000 Hague Adults Convention** – *Hague Convention of 13 January 2000 on the International Protection of Adults*. Article 4(1)(a) excludes "maintenance obligations" from the scope of the Convention, for the same reasons as the 1996 Hague Child Protection Convention.[14]

– **2005 Hague Choice of Court Convention** – *Hague Convention of 30 June 2005 on Choice of Court Agreements.*

– **Brussels Convention** – *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. It was opened for signature in Brussels, Belgium, on 27 September 1968. The original Parties were the six original Member States of what was the European Economic Community. As new States have joined the European Union, as it is now called, they have become Parties to the Brussels Convention. It now applies only between the 14 old European Union Member States and the Netherlands Antilles and French overseas territories. Maintenance obligations are included in the Convention and the Convention includes a special rule on jurisdiction (Art. 5(2)).

– **Lugano Convention** – *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*. It was opened for signature in Lugano, Switzerland, on 16 September 1988. It contains similar provisions to the Brussels Convention (it is also called the "Parallel" Convention). The Contracting States to the Lugano Convention are the 15 States which were Members of the European Community on 16 September 1988 and Iceland, Norway, Poland and Switzerland. The demarcation between the Brussels and Lugano Conventions is laid down in Article 54 B of the Lugano Convention. It is based on the principle that the Lugano Convention will not apply to relations among the European Union Member States, but will apply where one of the other countries mentioned above is involved. As in the Brussels Convention, maintenance obligations are included in the Lugano Convention. A new revised Lugano Convention was concluded on 30 October 2007. The text, as adopted in March 2007, maintains the same rule on maintenance obligations as the Convention of 1988. This new Lugano Convention will apply between the Member States of the European Union and Iceland, Norway and Switzerland.

– **Brussels I Regulation** – Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[15] It applies throughout the European Union except Denmark and replaces the Brussels Convention in the mutual relations between those States to which it applies. The Regulation includes similar rules as in the Brussels Convention. An agreement, which entered into force on 1 July 2007, between the European Community and Denmark was concluded on 19 October 2005 to apply the provisions of the Brussels I Regulation to the relations of the European Community with Denmark.

– **Brussels II Regulation** – Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.[16]

– **Brussels IIa Regulation** – Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.[17]

– **EEO Regulation** – Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.[18] It creates a European Enforcement Order for uncontested claims, which means (Art. 5) that a decision which has been certified as a European Enforcement Order in the Member State of origin shall be recognised and enforced in the other Member States without the need for a declaration of enforceability and without any possibility of opposing its recognition. The EEO Regulation, just as the Brussels I Regulation, also includes maintenance.

– **Maintenance Regulation** – Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[19] According to its Article 76, the Regulation "shall apply from 18 June 2011, subject to the 2007 Hague Protocol being applicable in the Community by that date. Failing that, this Regulation shall apply from the date of application of that Protocol in the Community."

– **Montevideo Convention** – *Inter-American Convention on Support Obligations*, adopted in Montevideo, on 15 July 1989. The States Parties to the Convention are Argentina, Belize, Bolivia, Brazil, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay and Uruguay (see Annex 2 of the Duncan Report[20]).

[13] P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention, in Hague Conference on Private International Law, *Proceedings of the Eighteenth Session (1996)*, Tome II, *Protection of children*, The Hague, SDU, 1998, pp. 535-605, at para. 31.

[14] P. Lagarde, Explanatory Report on the 2000 Hague Adults Convention, in Hague Conference on Private International Law, *Proceedings of the Special Commission with a diplomatic character of September – October 1999 (1999)*, *Protection of adults*, The Hague, SDU, 2003, pp. 391-451, at para. 32.

[15] *OJ* L 12, 16.1.2001.

[16] *OJ* L 160, 30.6.2000.

[17] *OJ* L 338, 23.12.2003.

[18] *OJ* L 143, 30.4.2004.

[19] *OJ* L 7, 10.1.2009.

[20] *Op. cit.* (note 9).

– **ORIE** – Organisation régionale d'intégration économique.

– **REMO** – *Reciprocal Enforcement of Maintenance Orders*. Le système du Commonwealth pour la reconnaissance et l'exécution des décisions portant sur les aliments, dont les ordonnances provisoires, couvre la plupart des États du Commonwealth y compris leurs unités territoriales, par exemple les provinces et territoires canadiens et les territoires outre-mer dépendants du Royaume-Uni. Ces accords bilatéraux sont négociés entre ces États et territoires et parfois avec des États tiers tels que l'Allemagne, l'Autriche, la Norvège ou les états des États-Unis d'Amérique.

– **UIFSA** – *Uniform Interstate Family Support Act* (États-Unis d'Amérique) de 1996. Cette loi a été élaborée par la *National Conference of Commissioners on Uniform State Laws* pour instaurer un processus uniforme d'établissement et d'exécution des obligations alimentaires envers les enfants dans tous les états des États-Unis. Elle a été promulguée par chacun des états des États-Unis et modifiée en 2001 et 2008.

– « **La Convention** » – Ce terme désigne le texte de la *Convention de La Haye du 23 novembre 2007 sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille*.

– « **Le Protocole** » – Ce terme désigne le texte du *Protocole de La Haye du 23 novembre 2007 sur la loi applicable aux obligations alimentaires*.

TROISIÈME PARTIE : CADRE GÉNÉRAL

16 La protection des enfants est un des domaines privilégiés de la coopération internationale en général et de la Conférence de La Haye de droit international privé en particulier. Dans ce contexte, les aliments sont un élément fondamental. Il est certain que les problèmes d'obligations alimentaires peuvent découler d'autres liens de famille, de filiation, de mariage ou d'alliance, mais une grande majorité des demandes relatives à des obligations alimentaires concerne des enfants[21]. La période qui a suivi la fin de la Seconde Guerre mondiale a été marquée par la conclusion de trois Conventions relatives aux obligations alimentaires, d'une part, la Convention de New York de 1956 et, d'autre part, à la Conférence de La Haye de droit international privé, les Conventions Obligations alimentaires de 1956 et de 1958. Ces Conventions ont été renouvelées et étendues par la Convention Obligations alimentaires de 1973 (Exécution) et la Convention Obligations alimentaires de 1973 (Loi applicable)[22].

17 Il n'est pas inutile de souligner que la Conférence de La Haye a adopté assez récemment avec succès plusieurs Conventions sur la protection des enfants et des adultes, qui comprennent notamment des règles modernes de coopération entre autorités et de reconnaissance et d'exécution des décisions. Il s'agit de la Convention Enlèvement d'enfants de 1980, la Convention Adoption internationale de 1993, la Convention Protection des enfants de 1996 et la Convention Protection des adultes de 2000[23]. Entre-temps, la Convention des Nations Unies relative aux droits de l'enfant[24] est elle aussi entrée en vigueur dans de nombreux pays du monde. La présente Convention sur les aliments est conforme aux principes de toutes ces Conventions et peut être considérée comme un important progrès en matière de protection des enfants et des adultes.

QUATRIÈME PARTIE : RÈGLES DE COMPÉTENCE DIRECTE

18 La question des règles de compétence directe a été abordée dès le début des négociations[25] et à plusieurs reprises par la suite. Les débats ont porté sur la question de savoir si l'insertion de règles uniformes apporterait de réels avantages pratiques au système international et s'il était réaliste de penser que des négociations sur cette question permettraient d'aboutir à un accord ou à un consensus[26]. Les principes en vigueur en matière de compétence s'opposent dans deux grands domaines. Premièrement, en ce qui concerne la compétence pour rendre une décision initiale sur les aliments, on distingue, d'une part, les systèmes pour lesquels le critère de la résidence / du domicile du créancier est une base suffisante à l'exercice de la compétence (principe illustré par les régimes de Bruxelles / Lugano et de Montevideo), et d'autre part, les systèmes qui exigent un lien minimal entre l'autorité qui exerce la compétence et le débiteur (principe illustré par le système des États-Unis d'Amérique). Deuxièmement, comme l'explique le commentaire relatif à l'article 18, en ce qui concerne la compétence pour modifier une décision existante relative aux aliments, on distingue les systèmes qui adoptent le concept général de « compétence continue » de l'État où a été rendue la décision d'origine (voir le modèle des États-Unis) et ceux qui acceptent que la compétence pour modifier une décision puisse être transférée aux tribunaux ou autorités d'un autre État, en particulier celui où le créancier a établi sa nouvelle résidence ou son nouveau domicile (voir les systèmes régionaux mentionnés plus haut).

19 Les experts ont envisagé plusieurs options, notamment les suivantes :

a) Un noyau commun de bases de compétence directe faisant l'objet d'un important accord devrait être recherché, en commençant, par exemple, avec la compétence du for du défendeur et l'acceptation de se soumettre à la compétence, en ajoutant ensuite la compétence du for du créancier, sujet aux limites nécessaires pour satisfaire les préoccupations de certains États quant aux exigences de procès équitable (« *due process* »).

b) Un noyau commun de règles de compétence directe, incluant la compétence du for du créancier car ce principe est très largement accepté, pourrait être recherché. Il pourrait toutefois être combiné avec un type de disposition de sortie pour les États qui ne peuvent accepter la compétence du for du créancier en son état pur.

c) La recherche de règles uniformes de compétence directe devrait être mise de côté et l'accent devrait être mis sur le développement d'un système efficace de coopération combiné avec des règles de compétence indirecte en ma-

[21] Sans préjudice du fait que le vieillissement progressif de la population peut engendrer une modification de ces termes.
[22] Voir les Conventions adoptées ainsi que le Rapport explicatif de M. Verwilghen (*op. cit.* para. 15). Le para. 1 du Rapport souligne que « l'on connaît peu d'exemples, dans les annales de cette discipline juridique, d'une matière soumise à autant de tentatives d'unification ».
[23] Voir abréviations et références au para. 15 du présent Rapport.
[24] *Id.*
[25] Un résumé de ces discussions peut être consulté dans le « Rapport relatif à la Première réunion 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, Doc. prél. 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 (ci-après Doc. prél. No 5/2003), ci-dessus p. I-160 du présent tome (également accessible à l'adresse <www.hcch.net>), para. 86 à 89.
[26] Cette discussion est intervenue dans le contexte de la description présentée dans le Rapport Duncan (*op. cit.* note 9), para. 103 à 134.

Rapport explicatif

– **REIO** – Regional Economic Integration Organisation.

– **REMO** – Reciprocal Enforcement of Maintenance Orders. The Commonwealth scheme for recognition and enforcement of maintenance orders including provisional orders is embraced by most of the States of the Commonwealth including by the territorial units of these States, *e.g.*, Canadian provinces and territories and overseas dependent territories of the United Kingdom. Such bilateral agreements are negotiated between these jurisdictions and sometimes with third States such as Austria, Germany, Norway or the states of the United States of America.

– **UIFSA** – The Uniform Interstate Family Support Act (United States of America) of 1996. Developed by the National Conference of Commissioners on Uniform State Laws to provide for a uniform process of establishment and enforcement of child support obligations, across state lines. Enacted by all individual states within the United States of America. Amended in 2001 and 2008.

– **"The Convention"** – This refers to the text of the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

– "**The Protocol"** – This refers to the text of the *Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations*.

PART III: GENERAL FRAMEWORK

16 The protection of children is one of the main concerns in international co-operation in general and in the Hague Conference on Private International Law in particular. And, in this context, maintenance is a fundamental element. It is true that problems of maintenance obligations can arise from other family relationships, parentage, marriage or affinity. But a great majority of claims related to maintenance obligations involve children.[21] In the period which followed the end of the Second World War three Conventions were concluded on maintenance obligations: first, the 1956 New York Convention and thereafter, in the Hague Conference on Private International Law, the 1956 and the 1958 Hague Maintenance Conventions. These Conventions were renewed and broadened by the 1973 Hague Maintenance Convention (Enforcement) and the 1973 Hague Maintenance Convention (Applicable Law).[22]

17 It is worth underlining how the Hague Conference, in recent times, has successfully adopted several Conventions on the protection of children and adults, which notably include modern rules on the co-operation of authorities and on the recognition and enforcement of decisions. These are the 1980 Hague Child Abduction Convention, the 1993 Hague Intercountry Adoption Convention, the 1996 Hague Child Protection Convention and the 2000 Hague Adults Convention.[23] In the meantime, the UN Convention on the Rights of the Child[24] also entered into force in a large number of States in the world. The current Convention on maintenance is in harmony with the principles in all of these Conventions and can be considered as a significant further step in the protection of children and adults.

PART IV: DIRECT RULES OF JURISDICTION

18 The subject of direct rules of jurisdiction was discussed from the beginning of the negotiations[25] and at different moments thereafter. The discussions focussed on the questions of whether the inclusion of 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.[26] There are two important areas of divergence in relation to current approaches to jurisdiction. First, in the case of jurisdiction to make original maintenance decisions, there is the divergence between on the one hand those systems which accept 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 require some minimum nexus between the authority exercising jurisdiction and the debtor (typified by the system operating within the United States of America). Second, as described under Article 18, in the case of jurisdiction to modify an existing maintenance decision, there is the divergence between systems that adopt the general concept of "continuing jurisdiction" in the State where the original decision was made (see the United States of America 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 regional systems mentioned above).

19 The experts considered a number of options, including the following:

a) That the attempt should be made to identify a common core of direct grounds of jurisdiction 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 direct rules of jurisdiction 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 direct rules of jurisdiction should be set aside, and concentration should be placed on developing an effective system of co-operation combined

[21] Without prejudice to the fact that the progressive aging of the population may give rise to a change in those terms.
[22] See the Conventions and the Explanatory Report by M. Verwilghen (*op. cit.* para. 15). In para. 1 of the Report it is pointed out that "there are few examples in the annals of this legal discipline of subject-matter which has been made the subject of so many attempts at unification".
[23] See abbreviations and references under para. 15 of this Report.
[24] *Id.*
[25] A summary of these discussions can be read in "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, Prel. Doc. No 5 of October 2003 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 5/2003), *supra* p. I-161 of this tome (also available at <www.hcch.net>), paras 86-89.
[26] The discussions took place in the context of the description found in the Duncan Report (*op. cit.* note 9), paras 103-134.

tière de reconnaissance et d'exécution des décisions ou ordonnances alimentaires.

20 À l'issue de la Première réunion de la Commission spéciale, un groupe de travail informel sur la compétence directe a été constitué[27] suivant une proposition soutenue par plusieurs experts afin de procéder à un échange de vues sur la question[28]. Cependant, comme il n'y avait pas de consensus sur cette question, le groupe de travail informel n'avait pas le mandat de faire rapport à la Commission spéciale ou au Comité de rédaction[29].

21 Les arguments en faveur de l'insertion de règles de compétence directe dans la Convention et contre celle-ci sont résumés comme suit dans le « Rapport relatif à la Première réunion de la Commission spéciale sur le recouvrement international des aliments envers les enfants et autres membres de la famille (5-16 mai 2003) »[30] au paragraphe 88 :

> « Voici un résumé des arguments exprimés lors de la Commission spéciale en faveur et contre l'inclusion de règles uniformes de compétence directe dans le nouvel instrument, tant en ce qui concerne la compétence d'origine qu'en matière de modification.
>
> C *Arguments en faveur de règles de compétence directe*
>
> a) Convenir d'un ensemble uniforme de règles quant à la compétence favoriserait les objectifs de clarté, prévisibilité et simplicité.
>
> b) Convenir de critères juridictionnels de compétence favoriserait la confiance mutuelle et fournirait une structure solide permettant d'établir un système efficace de coopération administrative. Il serait difficile pour les autorités administratives de travailler avec des systèmes étrangers opérant des critères juridictionnels de compétence variés.
>
> c) Des règles uniformes de compétence directe fourniront une base solide à un système de reconnaissance et d'exécution des décisions alimentaires et permettrait le traitement de façon simple et rapide des procédures de reconnaissance et d'exécution.
>
> d) Des règles uniformes aident à éviter la duplication des litiges et les nombreuses décisions contradictoires. Malgré que cela ne soit pas un problème sérieux quant à l'exercice de la compétence d'origine (particulièrement lorsqu'il s'agit d'aliments destinés aux enfants), cela constitue un problème véritable en ce qui concerne la compétence en matière de modification d'une ordonnance existante. Il est difficile de concevoir des règles concernant la compétence en matière de modification sans considérer en même temps les bases d'exercice de la compétence d'origine.
>
> e) Il est probable que certains chefs de compétence fassent l'objet d'un important accord tels que la résidence du défendeur (peu importe sa définition) ou l'acceptation du défendeur de se soumettre à la compétence. En outre, l'idée selon laquelle la résidence du créancier (peu importe sa définition) devrait être une base de compétence est très largement acceptée.
>
> f) Si plusieurs États ou la majorité d'entre eux semblent être en accord sur les règles de compétence directe, il faut que cet accord soit reflété dans le nouvel instrument. La minorité d'États, ne pouvant se joindre au consensus, devrait pouvoir bénéficier d'un type de disposition de sortie.
>
> g) Si, comme cela semble être le cas, les différences concrètes sont minimes entre les systèmes qui acceptent la compétence du créancier sans qualification et ceux qui ne l'acceptent pas, il doit être possible de formuler des principes juridictionnels de compétence qui satisfassent le plus grand nombre d'opinions possible.
>
> h) Les règles uniformes de compétence prévues dans les Conventions de La Haye fournissent un excellent modèle de réforme pour les systèmes nationaux.
>
> D *Arguments contre l'inclusion de règles de compétence directe*
>
> a) L'absence de critères juridictionnels de compétence au niveau international n'a pas été une source sérieuse d'inquiétudes en pratique, ni la cause des défauts présentement rencontrés dans le système international. Ainsi, l'harmonisation des règles de compétence directe suscite peu d'intérêt pour plusieurs États.
>
> b) L'expérience a démontré qu'il peut être extrêmement difficile d'obtenir un consensus sur une approche uniforme lorsque différentes approches en matière de compétence sont appliquées dans différents systèmes, qu'elles font toutes l'objet d'un appui en principe et semblent toutes bien fonctionner en pratique et sont satisfaisantes dans leur contexte respectif.
>
> c) Les avantages escomptés d'un système uniforme ne justifient pas l'énergie et le temps que l'on devrait investir dans la recherche d'un consensus qui pourrait s'avérer futile et prolonger les négociations inutilement. Il y a un risque que l'accent ne soit pas mis sur ce qui constitue les véritables problèmes pratiques, tels que la mise en place d'un système de coopération administrative efficace et réceptif.
>
> d) Un système de reconnaissance et d'exécution peut fonctionner efficacement à l'aide de règles de compétence indirecte sans qu'il ne soit nécessaire d'avoir un accord sur des règles uniformes de compétence directe. Voir, par exemple, la *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires*.
>
> e) Le problème des décisions multiples découlant de l'exercice de la compétence en matière de modification pourrait être amélioré par l'utilisation de règles autres que celles de compétence directe, incluant, par exemple, les dispositions concernant la reconnaissance et l'exécution.
>
> f) L'établissement de règles de compétence directe au niveau international différera inévitablement, quant à certains aspects, des règles adoptées dans les instruments régionaux, créant ainsi un problème complexe de 'déconnexion', *i.e.* un problème quant à l'emplacement de la ligne séparant les affaires comprises dans le champ d'application respectif des instruments régionaux et internationaux.

[27] Coordonné par M. Matthias Heger, de l'Allemagne.
[28] Voir Doc. prél. No 5/2003 (*op. cit.* note 25), para. 94.
[29] *Ibid.*, para. 147.
[30] *Ibid.*

with indirect rules of jurisdiction for the purposes of recognition and enforcement of maintenance decisions or orders.

20 At the end of the First Meeting of the Special Commission, further to a proposal supported by several experts, an informal working group on direct jurisdiction was established[27] to proceed with an exchange of views on the subject.[28] However, since there was no consensus on this issue, the informal working group did not have any mandate to report to the Special Commission or the Drafting Committee.[29]

21 The agreements for and against including in the Convention direct rules of jurisdiction are summarised as follows in the "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)"[30] at paragraph 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 advantages 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.

[27] Co-ordinated by Mr Matthias Heger, from Germany.
[28] See Prel. Doc. No 5/2003 (*op. cit.* note 25), at para. 94.
[29] *Ibid.*, at para. 147.
[30] *Ibid.*

g) Tout désavantage qui pourrait être causé par l'absence de critères uniformes de compétence, et en particulier celui qui affecte le créancier alimentaire, pourrait être amélioré par l'introduction d'un système de coopération efficace et réceptif qui maximiserait le support offert au créancier indifféremment du pays où la demande alimentaire a été introduite. »

22 Au fil du temps, la majorité des experts s'est ralliée à l'idée qu'il convenait d'écarter la question globale des règles de compétence directe. Bien que de nombreux experts aient reconnu les avantages potentiels des règles uniformes, l'idée qui l'a finalement emporté était que les bénéfices pratiques qui pourraient découler de règles uniformes étaient insuffisants par rapport au coût qu'engendrerait une longue tentative d'obtention d'un consensus qui pourrait s'avérer futile[31].

CINQUIÈME PARTIE : TECHNOLOGIES DE L'INFORMATION

23 Le quatrième considérant du préambule de la Convention dispose que les États signataires de la présente Convention « cherch[ent] à tirer parti des avancées technologiques et à créer un système souple et susceptible de s'adapter aux nouveaux besoins et aux opportunités offertes par les technologies et leurs évolutions ». À cet égard, la Convention invite à recourir aux transferts de fonds électroniques (art. 35) et s'oriente vers l'utilisation de systèmes électroniques transfrontaliers de gestion des dossiers et de communication tels que le programme *iSupport*, qui a été présenté à plusieurs occasions à la Commission spéciale au cours de ses travaux[32].

24 Ce système contribuerait à l'efficacité de la mise en œuvre de la Convention et à une cohérence accrue des pratiques nationales. Il concourrait sensiblement à améliorer les communications entre Autorités centrales et à atténuer les problèmes et les coûts de traduction car il fonctionnerait en plusieurs langues. Il pourrait faciliter le fonctionnement courant des Autorités centrales instituées en vertu de la Convention et contribuerait à l'amélioration de la gestion des dossiers. Il pourrait également produire les statistiques nécessaires, entre autres moyens, au suivi du fonctionnement de la Convention. Outre la gestion et le suivi des dossiers, ce système pourrait permettre de donner des instructions aux banques pour les transferts électroniques de fonds et pourrait envoyer et recevoir des communications et des demandes électroniques sécurisées en application de la Convention. Alors que la Convention permet de rapprocher les différents systèmes juridiques internes en vue du recouvrement des aliments, le programme *iSupport* reliera les systèmes de technologies de l'information nationaux existants.

25 Dans la perspective de ces évolutions importantes, le Comité de rédaction a veillé à élaborer un texte permettant le recours aux technologies sans remettre en cause les principes du respect des règles de procès équitable. Il a grandement bénéficié sur ce point des travaux du Groupe de travail chargé des formulaires, qui a examiné les questions pratiques entourant la communication électronique de formulaires et d'autres documents annexés. Il en résulte un texte qui évite autant que possible l'emploi de termes tels que « signature » (lorsque n'est requise qu'une simple identification), « écrit », « original », « sous serment » et « certifié ». En outre, un échange de vues avec le Secrétariat de la Commission des Nations Unies pour le droit commercial international (CNUDCI) sur les questions « d'authentification » a contribué à inspirer de nouvelles dispositions sur la transmission de documents et d'informations connexes. Des termes ont été ajoutés aux articles 12(2), 13, 25 et 30 conformément au mandat de la Commission spéciale afin de garantir la neutralité du langage de la Convention quant au support sans altérer sa substance et de permettre ainsi la transmission des documents dans les meilleurs délais par les moyens de communication les plus rapides (neutralité quant à la technologie).

26 L'objectif de la terminologie utilisée aux articles 12(2), 13, 25 et 30 est, dans un premier temps, de garantir la transmission rapide (quel que soit le support utilisé) des demandes et des documents annexés entre les Autorités centrales, tout en reconnaissant qu'il pourra parfois s'avérer nécessaire à un stade ultérieur (le plus souvent à des fins probatoires), de transmettre une copie complète certifiée conforme par l'autorité compétente de l'État d'origine des documents énoncés aux articles 25(1)(a), (b) et (d) et 30(3) à la demande soit de l'Autorité centrale requise (art. 12(2)), soit de l'autorité compétente de l'État requis (art. 25(2)) ou dans le cas d'une contestation ou d'un appel par le défendeur (art. 25(2))[33].

SIXIÈME PARTIE : TITRE ET STRUCTURE GÉNÉRALE DE LA CONVENTION

27 Le titre de la Convention – *Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille* – souligne l'objectif premier de la Convention : garantir le respect des obligations alimentaires dans les affaires transfrontalières, en particulier lorsque le créancier et le débiteur ne sont pas dans le même pays. Reflétant les dispositions de l'article 2 sur le champ d'application, les aliments destinés aux enfants sont mentionnés en premier lieu mais, en second lieu, les aliments destinés à d'autres membres de la famille sont également envisagés. Contrairement à d'autres Conventions de La Haye, en particulier la Convention Protection des enfants de 1996, les techniques envisagées (telles que la reconnaissance et l'exécution, la coopération) ne sont pas mentionnées dans le titre. Outre l'élégance accrue que ce choix lui confère, ce titre présente l'avantage d'être simple et de se distinguer de celui des autres Conventions sur les obligations alimentaires.

28 Le préambule expose les préoccupations et réflexions qui ont présidé à la préparation de la Convention. Il mentionne en particulier la Convention des Nations Unies rela-

[31] *Ibid.*, para. 88.

[32] Le système *iSupport* est décrit dans « Développement d'un système international électronique de gestion de dossiers et de communication à l'appui de la future Convention de La Haye sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », Doc. info. No 1 de juin 2006 à l'intention de la Commission spéciale de juin 2006 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (accessible à l'adresse <www.hcch.net>). Il s'inspire du programme *iChild* qui est en cours de déploiement au sein de plusieurs Autorités centrales au titre de la Convention Enlèvement d'enfants de 1980.

[33] À cet égard, le Comité de rédaction a souscrit aux observations du Secrétariat de la CNUDCI sur le fait qu'au moment de la rédaction, très peu d'autorités judiciaires ou administratives délivraient ou acceptaient des documents électroniques qui répondent aux exigences d'intégrité, d'irrévocabilité et d'authentification notamment. En outre, dans l'hypothèse où de tels documents électroniques seraient transmis par delà les frontières, leur transmission électronique sécurisée en chaîne par différents intermédiaires (par ex. la transmission d'une décision rendue par une autorité judiciaire d'un État A à une autorité judiciaire d'un État B par l'intermédiaire des Autorités centrales requérante et requise des États A et B respectivement) pourrait être : a) complexe, car le destinataire final du document aurait besoin d'une technologie lui permettant de vérifier tout au long de la chaîne de communication l'authenticité, l'intégrité et l'irrévocabilité du document ou b) impossible, lorsque les deux États concernés utiliseraient deux standards de communication électronique différents (par ex. infrastructures à clé publique (ICP)).

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."

22 Over time, the balance of opinion among experts favoured leaving aside the general issue of uniform direct rules of jurisdiction. While many experts acknowledged the possible 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.[31]

PART V: INFORMATION TECHNOLOGY

23 The fourth recital of the Preamble of the Convention provides that the States signatory to the present Convention are "[s]eeking to take advantage of advances in technologies and to create a flexible system which can continue to evolve as needs change and further advances in technology create new opportunities". In that respect the Convention invites the use of electronic funds transfers (Art. 35) and is geared towards the use of cross-border electronic case management and communications systems such as the iSupport software that was presented on several occasions to the Special Commission during the course of its work.[32]

24 The system would assist the effective implementation of the Convention and lead to greater consistency in practice in the different countries. The system would help significantly to improve communications between Central Authorities and alleviate translation problems and costs as it could operate in different languages. Such a system could assist the daily operations of the Central Authorities established under the Convention and help to improve standards of case management. The system could also generate the required statistics as part of the means of monitoring the operation of the Convention. In addition to the management and monitoring of cases, the system could provide instructions to banks with regard to electronic transfers of funds and could send and receive secured online communications and applications under the Convention. Where the Convention creates bridges between the different internal legal systems for the recovery of maintenance, the iSupport system will create bridges between existing local information technology systems.

25 In order to pave the way for these important developments, the Drafting Committee has taken great care to develop a text that would allow the implementation of technologies without endangering due process principles. In this regard, the Drafting Committee benefited to a large extent from the work of the Forms Working Group that examined the practical issues surrounding electronic communication of Forms and other accompanying documents. The result is a text that avoids as much as possible the use of terms such as "signature" (where what is usually needed is a simple identification), "writing", "original", "sworn", and "certified". Furthermore, exchange of views with the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) in relation to "authentication" issues helped to inspire new provisions on the transmission of documents and related information. Language has been added to Articles 12(2), 13, 25 and 30, further to the mandate of the Special Commission, to ensure that the language of the Convention is media-neutral, without altering its substance and thereby making possible the swift transmission of documents by the most rapid means of communication available (*i.e.*, technology-neutral).

26 The aim of the language under Articles 12(2), 13, 25 and 30 is to ensure in a first stage the swift transmission (whatever the medium employed) of applications, including accompanying documents, between Central Authorities while recognising the need for sometimes making available at a later stage (most often probably for evidence purposes), either at the request of the requested Central Authority (Art. 12(2)), or at the request of the competent authority of the State addressed (Art. 25(2)), or upon a challenge or an appeal by the defendant (Art. 25(2)), a complete copy certified by the competent authority in the State of origin of any document specified under Articles 25(1)(a), (b) and (d) and 30(3).[33]

PART VI: TITLE AND GENERAL LAYOUT OF THE CONVENTION

27 The title of the Convention – *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* – stresses the main objective of the Convention: to ensure that maintenance obligations are respected in cross-border cases in particular when the creditor and debtor are in different countries. Reflecting the provisions of Article 2 on Scope, child support is mentioned in the first place but, in the second place, other forms of family maintenance are also envisaged. In contrast to other Hague Conventions, in particular the 1996 Hague Child Protection Convention, the techniques which are envisaged (such as recognition and enforcement, co-operation) are not mentioned in the title. Besides being a more elegant title, it has the advantage of simplicity and of being distinct from the titles of other Conventions on maintenance obligations.

28 The Preamble explains the main concerns and the thinking underlying the preparation of the Convention. A special mention is made of the UN Convention on the

[31] *Ibid.*, at para. 88.

[32] The iSupport system is described in "Development of an International Electronic Case Management and Communication System in Support of the Future Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance", Info. Doc. No 1 of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance (available at <www.hcch.net>). It is inspired by the iChild software which is now being implemented around the world in several Central Authorities under the 1980 Hague Child Abduction Convention.

[33] As a background to this language, the Drafting Committee took on board comments from the UNCITRAL Secretariat to the effect that, at the time of drafting, very few judicial or administrative authorities delivered or accepted electronic documents that meet in particular integrity, irrevocability and authentification requirements. Furthermore, where such electronic documents would be transmitted across borders, their in-chain secured electronic transmission through different intermediaries (*e.g.*, the transmission of a decision from a judicial authority in State A to a judicial authority in State B through the requesting and requested Central authorities of States A and B respectively) could either be: a) complex, as the final recipient of the document would need a technology to be able to verify through the chain of communication the authenticity, integrity and irrevocability of the document; or, b) not possible at all, where the two States involved could be using two different electronic communication standards (*e.g.*, Public Key Infrastructures (PKIs)).

tive aux droits de l'enfant[34], qui dispose en son article 2 que les États parties s'engagent à respecter les droits qui sont énoncés dans la Convention et à les garantir à tout enfant relevant de leur juridiction, sans distinction aucune. Il mentionne aussi expressément l'article 3 de la Convention des Nations Unies relative aux droits de l'enfant, qui dispose que l'intérêt supérieur de l'enfant doit être une considération primordiale, ainsi que l'article 27, qui énonce :

> « 1. Les États parties reconnaissent le droit de tout enfant à un niveau de vie suffisant pour permettre son développement physique, mental, spirituel, moral et social.
>
> 2. C'est aux parents ou autres personnes ayant la charge de l'enfant qu'incombe au premier chef la responsabilité d'assurer, dans les limites de leurs possibilités et de leurs moyens financiers, les conditions de vie nécessaires au développement de l'enfant.
>
> 3. Les États parties adoptent les mesures appropriées, compte tenu des conditions nationales et dans la mesure de leurs moyens, pour aider les parents et autres personnes ayant la charge de l'enfant à mettre en œuvre ce droit et offrent, en cas de besoin, une assistance matérielle et des programmes d'appui, notamment en ce qui concerne l'alimentation, le vêtement et le logement.
>
> 4. Les États parties prennent toutes les mesures appropriées en vue d'assurer le recouvrement de la pension alimentaire de l'enfant auprès de ses parents ou des autres personnes ayant une responsabilité financière à son égard, que ce soit sur leur territoire ou à l'étranger. En particulier, pour tenir compte des cas où la personne qui a une responsabilité financière à l'égard de l'enfant vit dans un État autre que celui de l'enfant, les États parties favorisent l'adhésion à des accords internationaux ou la conclusion de tels accords ainsi que l'adoption de tous autres arrangements appropriés. »

29 La Convention est organisée en neuf chapitres : Objet, champ d'application et définitions, Coopération administrative, Demandes par l'intermédiaire des Autorités centrales, Restrictions à l'introduction de procédures, Reconnaissance et exécution, Exécution par l'État requis, Organismes publics, Dispositions générales, et Dispositions finales.

30 Le chapitre I de la Convention (Objet, champ d'application et définitions) expose tout d'abord à l'article premier l'objet de la Convention. L'article 2 énonce ensuite le champ d'application matériel de la Convention, longuement débattu lors des travaux préparatoires de la Convention. Enfin, l'article 3 donne quelques définitions.

31 Le chapitre II (Coopération administrative) contient des dispositions relatives aux Autorités centrales, en particulier leur désignation, leurs fonctions et leurs coûts. Il régit aussi les requêtes de mesures spécifiques d'assistance, lorsqu'aucune demande n'est pendante.

32 Le chapitre III (Demandes par l'intermédiaire des Autorités centrales) précise les catégories de demandes qui doivent pouvoir être présentées en vertu de la Convention. Il décrit aussi le contenu obligatoire des demandes et les procédures à suivre pour leur transmission, leur réception et leur traitement. Il contient en outre des dispositions essentielles, destinées à garantir l'accès effectif aux procédures en vertu de la Convention.

33 Le chapitre IV (Restrictions à l'introduction de procédures) ne comprend qu'un article, l'article 18.

34 Le chapitre V (Reconnaissance et exécution) règle les questions de la reconnaissance et de l'exécution des décisions, c'est-à-dire les formalités intermédiaires auxquelles la reconnaissance et l'exécution d'une décision étrangère sont soumises (voir les commentaires concernant le chapitre V) avant l'exécution *stricto sensu*, qui est traitée au chapitre VI (Exécution par l'État requis). Le chapitre VII (Organismes publics) précise qu'aux fins de la reconnaissance et de l'exécution en application de l'article 10(1)(a) et (b) et de l'obtention de décisions dans les affaires relevant de l'article 20(4), le terme « créancier » comprend un organisme public dans certaines circonstances.

35 Enfin les chapitres VIII et IX contiennent respectivement les dispositions générales et les dispositions finales.

SEPTIÈME PARTIE : COMMENTAIRE ARTICLE PAR ARTICLE

CHAPITRE PREMIER – OBJET, CHAMP D'APPLICATION ET DÉFINITIONS

Article premier Objet[35]

La présente Convention a pour objet d'assurer l'efficacité du recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille, en particulier en :

36 L'objectif premier de la Convention est de garantir l'efficacité au niveau international du recouvrement des aliments et à cette fin, le préambule souligne que les États sont « [c]onscients de la nécessité de disposer de procédures produisant des résultats et qui soient accessibles, rapides, efficaces, économiques, équitables et adaptées à diverses situations » aux fins du recouvrement des aliments.

37 Cet article liste les principaux éléments de la Convention. La liste n'est pas exhaustive et l'expression « en particulier » indique que la Convention comprend en réalité de nombreuses autres dispositions qui contribueront à améliorer le recouvrement des aliments.

38 Rien dans cet article n'interdit les demandes d'aliments « présentées directement » (voir l'art. 37) par un demandeur à une autorité compétente de l'État requis, mais celles-ci n'y sont pas mentionnées, cela parce qu'il serait trompeur de suggérer que les « demandes présentées directement » constituent un objectif prioritaire de la Convention[36].

[34] En vigueur dans 193 États (au 3 septembre 2013).

[35] À l'instar des Conventions les plus récentes élaborées à la Conférence de La Haye – *Convention du 5 juillet 2006 sur la loi applicable à certains droits sur des titres détenus auprès d'un intermédiaire* (ci-après la « Convention Titres de 2006 »), Convention Élection de for de 2005 – un titre figure au regard du numéro de chaque article, ce qui améliore la lisibilité de la Convention. Dans ce Rapport explicatif, il a également été décidé d'insérer le texte de l'article analysé pour faciliter la lecture.

[36] Voir « Observations du Comité de rédaction sur le texte de l'avant-projet de Convention », Doc. prél. No 26 de janvier 2007 à l'intention de la Vingt et unième session de novembre 2007 (ci-après Doc. prél. No 26/2007), ci-dessus p. I-406 du présent tome (également accessible à l'adresse <www.hcch.net>), à l'art. 1er.

Rapport explicatif

Rights of the Child.[34] According to Article 2 of that Convention, the States Parties shall respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. And the Preamble of the Convention specifically mentions Article 3 of the UN Convention on the Rights of the Child, which establishes that the best interests of the child shall be a primary consideration, and Article 27, which states the following:

> "1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
>
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
>
> 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
>
> 4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements."

29 The Convention is divided into nine Chapters: Object, scope and definitions; Administrative co-operation; Applications through Central Authorities; Restrictions on bringing proceedings; Recognition and enforcement; Enforcement by the State addressed; Public bodies; General provisions; and, Final provisions.

30 Chapter I of the Convention (Object, scope and definitions) includes, firstly, in Article 1, the object of the Convention. Secondly, Article 2 sets out the material scope of the Convention, discussed at length during the preparation of the Convention. Finally, Article 3 provides some definitions.

31 Chapter II (Administrative co-operation) contains provisions concerning Central Authorities, in particular, their designation, functions and costs. It also provides for requests for specific measures of assistance where no applications are pending.

32 Chapter III (Applications through Central Authorities) specifies the types of applications which must be available under the Convention. It also describes the required contents of the applications and the procedures to follow for the transmission, receipt and processing of applications. In addition, Chapter III contains key provisions which are intended to guarantee effective access to procedures under the Convention.

33 Chapter IV (Restrictions on bringing proceedings) includes only one article, Article 18.

34 Chapter V (Recognition and enforcement) deals with the recognition and enforcement of decisions, which means the intermediate formalities to which recognition and enforcement of a foreign decision are subject (see comments on Chapter V) before enforcement *stricto sensu*, which is the subject of Chapter VI (Enforcement by the State addressed). Chapter VII (Public bodies) clarifies that for the purpose of recognition and enforcement under Article 10(1)(a) and (b) and cases of establishment of a decision covered by Article 20(4), "creditor" includes a public body in certain circumstances.

35 Chapter VIII contains the general provisions, while Chapter IX contains the final provisions.

PART VII: ARTICLE-BY-ARTICLE COMMENTARY

CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

Article 1 Object[35]

The object of the present Convention is to ensure the effective international recovery of child support and other forms of family maintenance, in particular by –

36 The main objective of the Convention is to make internationally effective the recovery of maintenance and, to the same end, the Preamble underlines that the States are "[a]ware of the need for procedures which produce results and are accessible, prompt, efficient, cost-effective, responsive and fair" for the recovery of maintenance.

37 This Article includes a list of the principal elements in the Convention. The list is not exhaustive, and the words "in particular" indicate that the Convention in fact includes many other provisions which will improve the recovery of maintenance.

38 Nothing in this Article precludes "direct requests" for maintenance (see Art. 37) by an applicant to a competent authority in the requested State, but they are not mentioned in the Article. The reason is that it would be misleading to suggest that provision for "direct requests" is a primary object of the Convention.[36]

[34] In force in 193 States (as at 3 September 2013).

[35] Following the most recent Conventions prepared in the Hague Conference (*Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (hereinafter "2006 Hague Securities Convention"), 2005 Hague Choice of Court Convention), a heading appears after the number of every article, thereby facilitating the readability of the Convention. In this Explanatory Report, it was also decided to include the text of the article being discussed to further facilitate the readability of the Report.

[36] See "Observations of the Drafting Committee on the text of the preliminary draft Convention", Prel. Doc. No 26 of January 2007 for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 26/2007), *supra* p. I-407 of this tome (also available at <www.hcch.net>), under Art. 1.

Paragraphe (a) – établissant un système complet de coopération entre les autorités des États contractants[37] ;

39 Dès le début des travaux préparatoires de la Convention, il a été jugé souhaitable d'instaurer une solide coopération entre les autorités des États membres, pour améliorer le système de la Convention de New York de 1956. La Conférence de La Haye offre d'excellents exemples en la matière avec la Convention Enlèvement d'enfants de 1980 et la Convention Adoption internationale de 1993.

40 La règle de l'article premier (a) est liée au champ d'application de la Convention (art. 2). En fait, alors que le système de coopération reposant sur les Autorités centrales est instauré aux fins du recouvrement international des aliments destinés aux enfants, son application aux aliments destinés à d'autres membres de la famille peut être limitée en application de l'article 2.

41 Les projets de Convention antérieurs faisaient référence, dans le paragraphe (a), au fait que le système de la Convention comprend « l'établissement de la filiation à cette fin », c'est-à-dire quand cela est nécessaire au recouvrement efficace des aliments. Les arguments opposés à cette insertion étaient que dans certains systèmes, il est difficile de n'établir la filiation qu'aux seules fins des aliments et que l'établissement de la filiation est souvent une affaire judiciaire. Voir la discussion dans le présent Rapport relative à l'article 6(2)(h) et à l'article 10(1)(c). La solution prévue dans ces articles supprime la nécessité de la référence à l'article premier (a). La Convention ne préjuge pas des effets que la législation de l'État confère à l'établissement de la filiation. C'est une solution ouverte qui permet que cette question soit résolue par le droit interne de chaque État.

Paragraphe (b) – permettant de présenter des demandes en vue d'obtenir des décisions en matière d'aliments ;

42 L'objet de ce paragraphe est de souligner que la Convention instaure un système de demandes en vue de l'établissement de décisions en matière d'aliments, ainsi que de demandes de reconnaissance de décisions en matière d'aliments et d'autres procédures pouvant être utiles au recouvrement efficace des aliments. Les demandes qu'il est possible de présenter sont énoncées à l'article 10.

Paragraphe (c) – assurant la reconnaissance et l'exécution des décisions en matière d'aliments ; et

43 La référence de l'article premier (c) de la Convention à la reconnaissance et à l'exécution des décisions en matière d'aliments vise les dispositions de la Convention conçues pour faciliter et simplifier les procédures auxquelles une décision étrangère est soumise (ce que l'on désigne dans certains systèmes par le terme exequatur) avant de pouvoir être exécutée en vertu du droit interne[38].

Paragraphe (d) – requérant des mesures efficaces en vue de l'exécution rapide des décisions en matière d'aliments.

44 La Convention ne se limite pas à la procédure traditionnelle de l'exequatur ; elle s'efforce véritablement de faciliter l'exécution de la décision, ce qui la rend efficace, et cet objectif est souligné au paragraphe (d). Cependant, la formulation de cette disposition ne peut aller plus loin car la Convention ne requiert pas de mesures d'exécution spécifiques. Les mesures d'exécution précises nécessaires pour satisfaire aux exigences d'efficacité et de rapidité sont du ressort des États contractants[39].

Article 2 Champ d'application

45 L'article 2 définit positivement le champ d'application matériel de la Convention en énonçant les affaires auxquelles elle s'applique. Il commence par décrire les obligations alimentaires auxquelles l'ensemble des chapitres de la Convention s'applique (para. 1er), avec la possibilité d'émettre une réserve (para. 2) puis les obligations alimentaires auxquelles la Convention ou des parties de celle-ci peuvent être étendues par déclaration (para. 3). Enfin, le paragraphe 4 introduit une règle interprétative.

Paragraphe premier – La présente Convention s'applique :

Alinéa (a) – aux obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne âgée de moins de 21 ans ;

46 L'alinéa (a) décrit les obligations alimentaires fondamentales auxquelles toutes les dispositions de la Convention s'appliquent ; ce sont celles qui découlent d'une relation parent-enfant à l'égard d'une personne de moins de 21 ans. Ce point ne fait aucun doute et a été accepté par toutes les délégations. La référence à l'âge de 21 ans ne produit pas le même effet que dans la Convention des Nations Unies relative aux droits de l'enfant. Cela n'implique pas que les États sont tenus de modifier leurs règles internes lorsque la limite d'âge à laquelle des aliments peuvent être accordés à des enfants est inférieure à 21 ans. Cela ne signifie pas non plus que les États sont tenus de modifier l'âge de la majorité. Le paragraphe premier fixe simplement le champ d'application de la Convention. Il en résulte, principalement, une obligation au titre de la Convention de reconnaître et d'exécuter une décision étrangère prise en faveur d'un enfant jusqu'à l'âge de 21 ans[40] et de fournir une assistance administrative, y compris une assistance juridique, s'agissant des aliments à l'égard de ces personnes. Voir les commentaires relatifs au paragraphe 2.

Alinéa (b) – à la reconnaissance et à l'exécution ou à l'exécution d'une décision relative aux obligations alimentaires entre époux et ex-époux lorsque la demande est présentée conjointement à une action comprise dans le champ d'application de l'alinéa (a) *;* et

47 Le cas des obligations alimentaires à l'égard des époux et ex-époux au regard de la Convention a été plus longuement débattu. Les alinéas (b) et (c) visent deux hypothèses distinctes. L'alinéa (b) concerne le cas où une demande d'aliments entre époux ou ex-époux est présentée conjointement à une demande d'aliments destinés à un enfant tel que défini à l'alinéa (a). Il a été convenu lors de la Session diplomatique qu'une telle demande tombe dans le champ d'application obligatoire de la Convention dans son intégralité (c.-à-d., y compris les dispositions portant sur la coopération par l'intermédiaire des Autorités centrales), seulement

[37] Il faut souligner qu'en vertu de l'art. 59(5) :
« Toute référence à un 'État contractant' ou à un 'État' dans la […] Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique qui y est Partie. Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique conformément au paragraphe 3, toute référence à un 'État contractant' ou à un 'État' dans la […] Convention s'applique également, le cas échéant, aux États membres concernés de l'Organisation. » (Voir para. 700 du présent Rapport.)

[38] Voir les commentaires relatifs au chapitre V (Reconnaissance et exécution).

[39] Voir les commentaires relatifs au chapitre VI (Exécution par l'État requis).

[40] À cet égard, voir aussi les commentaires relatifs à l'art. 20(5), para. 471 du présent Rapport.

Rapport explicatif

Paragraph (a) – establishing a comprehensive system of co-operation between the authorities of the Contracting States;[37]

39 From the beginning of the preparation of the Convention there was a clear desire to establish strong co-operation between the authorities of the Member States, improving the system of the 1956 New York Convention. In this matter, the Hague Conference provides excellent examples with the 1980 Hague Child Abduction Convention and the 1993 Hague Intercountry Adoption Convention.

40 The rule in Article 1(a) is linked to the scope of the Convention (Art. 2). In fact, while the system of co-operation based on Central Authorities is established for the purpose of the international recovery of child support, its application to other forms of family maintenance may be limited according to the text of Article 2.

41 In previous drafts of the Convention a reference was made in paragraph (a) to the fact that the system of the Convention includes the "establishment of parentage when required for such purpose", *i.e.*, where this is necessary for the effective recovery of maintenance. The arguments against this inclusion were that it is difficult in some systems for parentage to be established only for the purpose of maintenance and that the establishment of parentage is often a judicial matter. See the discussion in this Report on Article 6(2)(h) and on Article 10(1)(c). The solution in these Articles makes the reference in Article 1(a) no longer necessary. The Convention is not prejudging the effects that the legislation of the State gives to the establishment of parentage. It is an open solution that allows that in every State this question may be solved by the internal law.

Paragraph (b) – making available applications for the establishment of maintenance decisions;

42 This paragraph is intended to underline the fact that the Convention establishes a system of applications for the establishment of maintenance decisions, as well as applications for recognition of maintenance decisions and other procedures that could be useful for the effective collection of maintenance. The available applications are set out in Article 10.

Paragraph (c) – providing for the recognition and enforcement of maintenance decisions; and

43 The reference in Article 1(c) of the Convention to the recognition and enforcement of maintenance decisions is to those provisions of the Convention which are designed to facilitate and to simplify the procedures to which a foreign decision is submitted (known in some systems as *exequatur*) before enforcement under internal law may take place.[38]

Paragraph (d) – requiring effective measures for the prompt enforcement of maintenance decisions.

44 The Convention is not limited to the traditional procedure of *exequatur*, but also seeks truly to facilitate the execution of the decision, thereby making it effective and this objective is underlined in paragraph (d). But the wording of this provision cannot go further, as specific enforcement measures are not required by the Convention. The precise enforcement measures necessary to meet the broad requirements of effectiveness and promptness are a matter for individual Contracting States.[39]

Article 2 Scope

45 Article 2 defines the material scope of the Convention in a positive way by stating to which cases it applies. The Article begins by describing the core maintenance obligations to which all the Chapters of the Convention apply (para. 1), with a possibility of a reservation (para. 2), followed by the maintenance obligations to which the Convention or parts of the Convention may be extended by declaration (para. 3). Finally, paragraph 4 introduces an interpretative rule.

Paragraph 1 – This Convention shall apply –

Sub-paragraph (a) – to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years;

46 Sub-paragraph (a) describes the core maintenance obligations to which the whole of the Convention applies and these are maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years. There are no doubts on this point, accepted by all delegations. The effect of the reference to the age of 21 years is different from that in the UN Convention on the Rights of the Child. It does not mean that States are obliged to modify internal rules if the limit for according maintenance in respect of children is below 21 years. Nor does it mean that States are obliged to modify the age of majority. Paragraph 1 merely fixes the scope of application of the Convention. The main effect of this is that there is an obligation under the Convention to recognise and enforce a foreign decision made in favour of a child up to the age of 21 years[40] and to provide administrative assistance, including legal assistance, in respect of maintenance towards such persons. See comments to paragraph 2.

Sub-paragraph (b) – to recognition and enforcement or enforcement of a decision for spousal support when the application is made with a claim within the scope of sub-paragraph (a); and

47 There was much discussion of the situation of spousal support under the Convention. There are two different situations envisaged in sub-paragraph (b) and sub-paragraph (c). In sub-paragraph (b) there is the situation where a claim for spousal support is made in combination with the claim for maintenance in respect of a child as defined in sub-paragraph (a). It was accepted during the Diplomatic Session that such a claim would fall within the compulsory scope of the whole Convention (*i.e.*, including the provisions on co-operation through Central Authorities) only

[37] It is important to note that, in accordance with Art. 59(5):
"Any reference to a 'Contracting State' or 'State' in [the] Convention shall apply equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a 'Contracting State' or 'State' in [the] Convention shall apply equally to the relevant Member States of the Organisation, where appropriate." (See para. 700 of this Report.)

[38] See comments on Chapter V (Recognition and enforcement).

[39] See comments on Chapter VI (Enforcement by the State addressed).

[40] In this respect, see also comments on Art. 20(5), para. 471 of this Report.

si la demande porte sur la reconnaissance et l'exécution, ou sur l'exécution d'une décision, et non dans le cas d'une demande d'obtention ou de modification d'une décision relative à des aliments entre époux ou ex-époux. L'expression « la demande est présentée conjointement à une action comprise dans le champ d'application de l'alinéa (a) » signifie que la demande doit être « apparentée » ou « liée » aux aliments destinés à un enfant, c'est-à-dire que les deux demandes peuvent être traitées en même temps, que des aliments entre époux ou ex-époux soient ou non demandés en même temps que les aliments destinés à un enfant et qu'ils soient compris ou non dans une seule et même décision.

Alinéa (c) – à l'exception des chapitres II et III, aux obligations alimentaires entre époux et ex-époux.

48 Après de longues discussions au sein de la Commission spéciale, un consensus s'est dégagé sur le fait que les demandes concernant exclusivement des aliments entre époux et ex-époux devraient relever du champ d'application obligatoire de la Convention mais que les États contractants ne devraient pas être contraints d'appliquer les dispositions contenues aux chapitres II et III sur la coopération administrative à de telles affaires. Cette approche fut confirmée par la Session diplomatique. Aussi a-t-il été convenu que les dispositions des chapitres II et III s'appliqueront uniquement dans la mesure où les deux États concernés auront fait une déclaration visant à étendre l'application de ces chapitres aux obligations alimentaires entre époux et ex-époux, conformément à l'article 63. En revanche, le système de reconnaissance et d'exécution, ainsi que les autres règles prévues à la Convention s'appliqueront aux obligations alimentaires entre époux et ex-époux.

49 Une proposition visant à étendre les dispositions sur le champ d'application des obligations alimentaires entre époux et ex-époux aux « situations analogues au mariage en vertu de la loi applicable » n'a pas recueilli le consensus nécessaire[41].

Paragraphe 2 – Tout État contractant peut, conformément à l'article 62, se réserver le droit de limiter l'application de la Convention, en ce qui concerne l'alinéa (a) du paragraphe premier, aux personnes n'ayant pas atteint l'âge de 18 ans. Tout État contractant faisant une telle réserve ne sera pas fondé à demander l'application de la Convention aux personnes exclues par sa réserve du fait de leur âge.

50 Certains États ayant des difficultés à accepter que la Convention soit applicable dans toutes les affaires jusqu'à l'âge de 21 ans, la possibilité de faire une réserve visant à limiter l'application de la Convention aux personnes n'ayant pas atteint l'âge de 18 ans a été insérée. Dans cette hypothèse, la réserve produit un effet réciproque, étant donné que l'État qui a fait une telle réserve ne peut pas revendiquer l'application de la Convention aux personnes ayant entre 18 et 21 ans. En vertu de l'article 62(4)[42], il s'agit de la seule réserve prévue par la Convention qui soit réciproque.

Paragraphe 3 – Tout État contractant peut, conformément à l'article 63, déclarer qu'il étendra l'application de tout ou partie de la Convention à d'autres obligations alimentaires découlant de relations de famille, de filiation, de mariage ou d'alliance, incluant notamment les obligations envers les personnes vulnérables. Une telle déclaration ne crée d'obligation entre deux États contractants que dans la mesure où leurs déclarations recouvrent les mêmes obligations alimentaires et les mêmes parties de la Convention.

51 Bien que les États aient été en grande majorité favorables à un champ d'application étendu, certains rencontrent des difficultés liées à la distribution interne des compétences qui les empêchent d'accepter l'application générale de la Convention à toute obligation alimentaire découlant de relations de famille ou d'alliance spécifiées autre que celles envers des enfants.

52 C'est pourquoi le paragraphe 3 dispose que les États « peu[ven]t » déclarer qu'ils étendront l'application de tout ou partie de la Convention à l'une ou l'autre des obligations alimentaires découlant de ces relations. À cette fin, une déclaration doit être faite conformément à l'article 63.

53 Suivant cette règle, ces déclarations auront un effet réciproque, au sens où elles ne créeront des obligations entre États contractants « que dans la mesure où leurs déclarations recouvrent les mêmes obligations alimentaires et les mêmes parties de la Convention ». Cette règle appelle quelques explications, car les situations peuvent être différentes du fait des diverses possibilités autorisées par cette disposition. Aucun problème ne se pose dans l'hypothèse où les déclarations de deux États contractants sont exactement identiques quant aux relations couvertes et à la partie de la Convention à appliquer. Mais la situation est plus complexe lorsque les déclarations ne sont pas identiques ou lorsqu'un seul des États contractants a fait une déclaration visée à l'article 2.

54 Si un État contractant a fait une déclaration étendant l'application de l'ensemble de la Convention, par exemple, aux relations d'alliance, une décision fondée sur une telle relation ne sera pas nécessairement reconnue dans un autre État contractant qui n'a pas fait la même déclaration. En revanche, l'État qui fait cette déclaration doit accepter les demandes émanant d'un État contractant qui a fait une déclaration identique, et peut, sans être toutefois tenu de le faire, accepter celles qui émanent d'États contractants qui n'ont pas fait cette déclaration.

55 Lors de la Session diplomatique, une attention particulière a été portée aux obligations envers les personnes vulnérables[43] (voir la définition de « personne vulnérable » à l'art. 3(f)). Les personnes vulnérables sont visées à l'article 2(3) et une règle particulière les concernant a été prévue à l'article 37(3) pour les demandes présentées directement. Enfin la Recommandation No 9[44] de la Vingt et unième session, approuvée dans l'Acte final :

> « Recommande que le Conseil sur les affaires générales et la politique examine, en priorité, la possibilité d'élaborer un Protocole à la *Convention de La Haye sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille*, portant sur le recouvrement des aliments à l'égard des personnes vulnérables.

[41] Voir la proposition des délégations de l'Argentine, du Brésil, du Chili et du Pérou (États membres du Mercosur et États associés), Doc. trav. No 48. Voir également *infra*, para. 58.
[42] Voir les commentaires relatifs à l'art. 62(4), aux para. 707 et s. du présent Rapport.
[43] Voir Doc. trav. No 48 des délégations de l'Argentine, du Brésil, du Chili et du Pérou (États membres du Mercosur et États associés), et Doc. trav. No 60 des délégations de l'Argentine, du Brésil, du Chili, de l'Équateur, du Pérou et de l'Uruguay.
[44] Acte final de la Vingt et unième session, partie C, Recommandation No 9, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Vingt et unième session (2007)*, tome III, *Matières diverses*.

Rapport explicatif

where the application is for recognition and enforcement, or enforcement, of a decision, and not in the case of an application for establishment or modification of a decision concerning spousal support. The words "application is made with a claim within the scope of sub-paragraph (a)" mean that the application has to be "related" or "linked" to child support, meaning that both applications can be handled together, irrespective of whether the spousal support is claimed together with the child support and irrespective of whether both are included in one and the same decision.

Sub-paragraph (c) – with the exception of Chapters II and III, to spousal support.

48 After long discussions within the Special Commission, a consensus was developing that, while claims for spousal support alone should come within the compulsory scope of the Convention, Contracting States should not be bound to apply the provisions of Chapters II and III on administrative co-operation to such cases. This approach was confirmed by the Diplomatic Session, with the result that the provisions of Chapters II and III will only apply where two States concerned have made a declaration extending those Chapters to spousal support in accordance with Article 63. On the other hand, the system for recognition and enforcement, as well as all the other provisions of the Convention, will apply to spousal support.

49 A proposal to extend the provisions on scope concerning spousal support to "analogous situations to marriage according to the applicable law" did not achieve the needed consensus.[41]

Paragraph 2 – Any Contracting State may reserve, in accordance with Article 62, the right to limit the application of the Convention under sub-paragraph 1(a), to persons who have not attained the age of 18 years. A Contracting State which makes this reservation shall not be entitled to claim the application of the Convention to persons of the age excluded by its reservation.

50 The difficulties for some States to accept the application of the Convention in all cases until the age of 21 years resulted in the inclusion of the possibility to make a reservation to limit the application of the Convention to persons who have not attained the age of 18 years. In this case, the reservation has reciprocal effect, as the State which has made the reservation cannot claim the application of the Convention to persons between 18 and 21 years. According to Article 62(4),[42] it is the only reservation provided in the Convention which has reciprocal effect.

Paragraph 3 – Any Contracting State may declare in accordance with Article 63 that it will extend the application of the whole or any part of the Convention to any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons. Any such declaration shall give rise to obligations between two Contracting States only in so far as their declarations cover the same maintenance obligations and parts of the Convention.

51 Although a broad majority of States were in favour of a large scope of application for the Convention, other States have difficulties, related to the internal distribution of competences, that prevent them from accepting the application of the Convention in general to maintenance obligations in respect of any of the specified family relationships or relationships based on affinity, other than maintenance obligations in respect of children.

52 This is why paragraph 3 includes a rule according to which the States "may" declare the extension of the application of the whole or of any part of the Convention to maintenance obligations in respect of any of those relationships. To this end, a declaration has to be made in accordance with Article 63.

53 Under this rule, such declarations will have reciprocal effect, in the sense that such declarations shall give rise to obligations between Contracting States "only in so far as their declarations cover the same maintenance obligations and parts of the Convention". This rule requires some explanation, as the situations may be different as a result of the different possibilities that are allowed under this provision. No problems arise in the case where the declarations of two Contracting States are exactly the same as to the relationship covered and as to the part of the Convention to be applied. But the situation is more complicated when the declarations are not the same or only one of the Contracting States has made a declaration covered by Article 2.

54 If a Contracting State has made a declaration extending the application of the whole Convention, for example, to a relationship based on affinity, a decision based on such a relationship need not be recognised in another Contracting State that has not made the same declaration. The State making the declaration must accept applications coming from a Contracting State that has made the same declaration and may, but is not obliged to, accept applications from Contracting States that have not made such a declaration.

55 Special attention was paid in the Diplomatic Session to the obligations in respect of vulnerable persons[43] (see the definition of "vulnerable person" in Art. 3(f)). As well as being highlighted in Article 2(3), a special rule applies to vulnerable persons in direct requests, in Article 37(3). Finally, a Recommendation No 9[44] of the Twenty-First Session, as approved in the Final Act:

> "Recommends that the Council on General Affairs and Policy should consider as a matter of priority the feasibility of developing a Protocol to the *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* to deal with the international recovery of maintenance in respect of vulnerable persons.

[41] See the proposal of the delegations of Argentina, Brazil, Chile and Peru (Mercosur States and associate States), Work. Doc. No 48. See also below, para. 58.
[42] See comments on Art. 62(4), under paras 707 *et seq.* of this Report.
[43] See Work. Doc. No 48 of the delegations of Argentina, Brazil, Chile and Peru (Mercosur States and associate States), and Work. Doc. No 60 of the delegations of Argentina, Brazil, Chile, Ecuador, Peru and Uruguay.
[44] Final Act of the Twenty-First Session, Part C, Recommendation No 9, in Hague Conference on Private International Law, *Proceedings of the Twenty-First Session (2007)*, Tome III, *Miscellaneous matters*.

Un tel Protocole serait fondé sur la *Convention de La Haye du 13 janvier 2000 sur la protection internationale des adultes* et en constituerait un complément. »

56 Aucune référence particulière n'est faite, dans cette règle, aux demandes des organismes publics relatives aux obligations alimentaires (voir chapitre VII, art. 36). Il convient de préciser que même si les organismes publics ne sont pas mentionnés dans la disposition relative au champ d'application, alors qu'ils l'étaient dans l'article premier de la Convention Obligations alimentaires de 1973 (Exécution), la Convention s'applique à eux. Les États contractants sont libres d'étendre les dispositions relatives aux organismes publics figurant au chapitre VII à tout ou partie des autres obligations alimentaires ayant fait l'objet d'une déclaration d'extension de la Convention par cet État en vertu de l'article 2(3). De plus, il résulte de façon implicite que toute extension des dispositions sur les organismes publics peut être limitée à certains chapitres seulement de la Convention. Ainsi, par exemple, un État peut, tout en étendant les dispositions relatives aux organismes publics à certaines relations d'alliance précisées, indiquer que l'extension ne concerne pas les dispositions des chapitres II et III relatives à la coopération.

57 Le terme « relation de famille » n'est pas défini au paragraphe 3. Il appartient à chaque État de trancher la question pour lui-même. Les relations précises visées par ce terme seront indiquées par un État contractant lorsqu'il fera une déclaration en vertu du paragraphe 3. Des obligations mutuelles ne naîtront qu'entre les États contractants ayant fait des déclarations équivalentes. Ainsi, l'extension par un État contractant de la Convention aux obligations nationales découlant d'un partenariat enregistré n'aura d'effet que pour un État contractant qui a fait une déclaration équivalente.

Paragraphe 4 – Les dispositions de la présente Convention s'appliquent aux enfants indépendamment de la situation matrimoniale de leurs parents.

58 Les Conventions de 1973 faisaient référence aux obligations alimentaires envers « un enfant non légitime ». Dans la nouvelle Convention, cette expression a été remplacée en faisant référence aux obligations alimentaires envers les enfants « indépendamment de la situation matrimoniale de leurs parents », conformément à la terminologie moderne.

59 Cela reflète l'opinion générale selon laquelle les avantages procurés par la Convention doivent pouvoir profiter à tous les enfants, sans discrimination, conformément aux articles 2 et 27 de la Convention des Nations Unies relative aux droits de l'enfant.

Article 3 Définitions

60 L'article 3 donne quelques définitions aux fins de la Convention. On a longuement débattu de la nécessité de définir le terme « décision » et, si une définition était nécessaire, de l'endroit auquel il convenait de l'insérer, dans cet article ou à l'article 19, au début du chapitre V (Reconnaissance et exécution). Cela parce que cette définition n'est nécessaire que pour les chapitres V (Reconnaissance et exécution), VI (Exécution par l'État requis) et VII (Organismes publics). L'autre possibilité aurait été de définir le terme « décision » à l'article 3, en notant que la définition n'est donnée qu'aux fins des chapitres V, VI et VII. La solution finalement retenue a consisté à structurer l'article 19 de la Convention comme un article définissant le champ d'application des chapitres V, VI et VII et précisant ce que le terme « décision » couvre aux fins de la Convention.

61 Il n'a pas été jugé nécessaire de définir les « obligations alimentaires ». En faveur d'une telle définition, il a été avancé qu'il pourrait être possible de refuser l'aide au recouvrement d'arrérages en arguant qu'ils n'entrent pas dans le champ de la Convention, même si le droit interne l'autorise. Toutefois, cette définition n'est pas indispensable parce que l'article 19(1) (définition d'une « décision »)[45] indique clairement que la Convention couvre le recouvrement des arrérages. Il n'était donc pas nécessaire de répéter à l'article 10(1) qu'une demande relative à des arrérages est autorisée par la Convention.

62 Les délégués ont longuement débattu de la nécessité de définir les termes « résidence habituelle » ou « résidence ». Finalement, il a été décidé que ce n'était pas nécessaire à l'article 3. Une définition partielle de « résidence » apparaît à l'article 9, où le terme sert de facteur de rattachement. Pour une explication, voir le présent Rapport, sous article 9.

63 S'agissant de la « résidence habituelle », des délégations ont suggéré, pendant la Commission spéciale, d'insérer une définition positive, d'autres une définition négative. Il s'agissait essentiellement de déterminer si des raisons justifiaient de remplacer le terme « résidence habituelle », qui apparaît dans les Conventions de La Haye sur la protection des enfants, en particulier la Convention Enlèvement d'enfants de 1980 et la Convention Protection des enfants de 1996, par le terme « résidence ». Il a finalement été décidé que la « résidence habituelle » demeurait un facteur de rattachement approprié aux fins de la reconnaissance et de l'exécution et qu'aucune définition ne devrait figurer dans la Convention. Pour un complément d'explications, voir plus loin au paragraphe 444 de ce Rapport, sous article 20.

64 Au cours de la Commission spéciale, il a été envisagé de définir « l'État requis » et « l'État requérant ». L'opportunité de cette définition a suscité quelques interrogations car pour la Convention Élection de for de 2005, il avait été décidé de ne pas faire figurer ces définitions dans le texte de la Convention, mais de les insérer dans le Rapport explicatif établi par MM. Hartley et Dogauchi[46]. Dans le cadre de la présente Convention, il a été décidé de ne pas définir ces termes, que ce soit dans le texte de la Convention ou dans celui du présent Rapport[47].

65 Il a également été envisagé d'insérer une définition des « aliments », mais cette option a finalement été écartée. Outre les versements périodiques, les aliments peuvent, selon les systèmes, comprendre le versement d'un capital (paiement forfaitaire) ou des transferts de propriété[48]. Il n'a pas été suggéré de restreindre les aliments aux versements périodiques. En fait, il a été admis que toute décision ordonnant un transfert monétaire ou un transfert de propriété peut constituer une ordonnance relative aux aliments lorsqu'elle vise à permettre au créancier de pourvoir à ses be-

[45] Voir les commentaires relatifs à l'art. 19, au para. 436 du présent Rapport.
[46] T. Hartley et M. Dogauchi, Rapport explicatif sur la Convention Élection de for de 2005, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Vingtième session (2005)*, tome III, *Élection de for*, Anvers – Oxford – Portland, Intersentia, 2010, p. 784 à 862 (également accessible à l'adresse <www.hcch.net>).
[47] Voir les commentaires relatifs à l'art. 10, au para. 236 du présent Rapport.
[48] Pour un complément d'informations, voir le Rapport Duncan (*op. cit.* note 9), aux para. 180 à 182.

Such a Protocol would complement and build upon the Hague Convention of 13 January 2000 on the International Protection of Adults."

56 No specific reference is made in this rule to the claims by a public body in respect of maintenance obligations (see Chapter VII, Art. 36). It is to be noted that whilst public bodies are not mentioned in the scope provision, as they were in Article 1 of the 1973 Hague Maintenance Convention (Enforcement), the Convention applies to them. It is open to a Contracting State to extend the provisions on public bodies in Chapter VII to all or any of the additional maintenance obligations which are the subject of a declaration by that State under Article 2(3). In addition, it is implicit that any such extension of the provisions on public bodies may be limited to certain Chapters of the Convention. Thus, for example, a State may, while extending the provisions on public bodies to certain specified relationships based on affinity, indicate that this should not extend to the co-operation provisions of Chapters II and III.

57 The term "family relationship" is not defined in paragraph 3. The matter is left for each Contracting State to determine for itself. The precise relationships which fall within the meaning of that term will be specified by a Contracting State when making a declaration under paragraph 3. Mutual obligations will only arise as between Contracting States which have made equivalent declarations. Thus, for example, the extension by one Contracting State by virtue of the Convention to national obligations arising for a registered partnership will only have effect in relation to another Contracting State which has made an equivalent declaration.

Paragraph 4 – The provisions of this Convention shall apply to children regardless of the marital status of the parents.

58 The 1973 Conventions made a reference to maintenance obligations towards "an infant who is not legitimate". In the new Convention, this has been substituted by including a maintenance obligation in respect of a child "regardless of the marital status of the parents", in line with modern terminology.

59 It expresses the overwhelming view that the benefits of the Convention should extend to all children without discrimination in line with Articles 2 and 27 of the UN Convention on the Rights of the Child.

Article 3 Definitions

60 Article 3 includes some definitions for the purposes of the Convention. There was lengthy discussion as to whether a definition of "decision" was needed and, in the affirmative, if it should be placed in this Article or in Article 19, at the beginning of Chapter V (Recognition and enforcement). The reason was that this definition is only needed for Chapters V (Recognition and enforcement), VI (Enforcement by the State addressed) and VII (Public bodies). Another possibility would have been to include the definition of "decision" in Article 3, pointing out that the definition is only for the purposes of Chapters V, VI and VII. The final solution was to structure Article 19 of the Convention as a "scope-article" for Chapters V, VI and VII, specifying what is included, for the purposes of the Convention, under the term "decision".

61 A definition of "maintenance obligations" was not considered necessary. In favour of the inclusion of such a definition it was argued that it might be possible to refuse assistance for the recovery of arrears by arguing that they are not included in the scope of the Convention, even if the internal law allows this. But such a definition is not needed because Article 19(1) (definition of "decision")[45] makes clear that the recovery of arrears is covered by the Convention. In consequence, there was no need to repeat in Article 10(1) that an application for arrears is an available application.

62 There was prolonged discussion of whether definitions were needed of "habitual residence" or "residence". In the end it was decided that this was not necessary in Article 3. A partial definition of "residence" appears in Article 9, where it is used as the connecting factor. For an explanation, see below under Article 9 of this Report.

63 As for "habitual residence", some suggestions had been made by delegations during the Special Commission to include a definition in a positive sense or in a negative one. The main question was to ascertain if there were reasons for changing the term "habitual residence", which appears in the Hague Conventions on the protection of children, in particular, the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, to "residence". In the end, it was decided that "habitual residence" was still an appropriate connecting factor for the purposes of recognition and enforcement, and that no definition should appear in the Convention. For further explanation, see below at paragraph 444 of this Report under Article 20.

64 The possibility of including a definition of "requested State" and of "requesting State" had been proposed during the Special Commission. Doubts arose from the fact that in the recent 2005 Hague Choice of Court Convention it was decided not to have such definitions in the text of the Convention, but to include them in the Explanatory Report thereto (drawn up by Messrs Hartley and Dogauchi).[46] In the context of the present Convention, it was decided not to define these terms in either the text of the Convention or of the present Report.[47]

65 The possibility of including a definition of "maintenance" was considered but, in the end, rejected. In addition to periodic payments, maintenance may in different systems for example include capital (lump sum) payments or property transfers.[48] It was not suggested that maintenance should be restricted to periodic payments. Indeed it was accepted that any monetary or property order may constitute a maintenance order where its purpose is to enable the creditor to provide for himself or herself and where the needs

[45] See comments on Art. 19, under para. 436 of this Report.
[46] T. Hartley and M. Dogauchi, Explanatory Report on the 2005 Hague Choice of Court Convention, in Hague Conference on Private International Law, *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, pp. 785-863 (also available at <www.hcch.net>).
[47] See comments on Art. 10, under para. 236 of this Report.
[48] For further details, see the Duncan Report (*op. cit.* note 9), at paras 180-182.

soins et lorsque les besoins et ressources du créancier et du débiteur sont pris en compte dans la détermination de la mesure appropriée[49].

Aux fins de la présente Convention :

Paragraphe (a) – « créancier » désigne une personne à qui des aliments sont dus ou allégués être dus ;

66 Le premier terme défini au paragraphe (a) de l'article 3 est le « créancier ». En général, le créancier désigne la personne qui a besoin des aliments ; ce peut être une personne à laquelle des aliments ont été attribués ou qui sollicite une décision en matière d'aliments pour la première fois. Il est utile que la Convention précise ce point pour qu'on ne puisse pas penser que seule la personne en faveur de laquelle une décision a déjà été prononcée peut être considérée comme un créancier, et non la personne qui demande des aliments pour la première fois. Aussi, il ne fait aucun doute que le terme « créancier » comprend l'enfant pour lequel des aliments ont été octroyés ou réclamés.

67 Bien que le paragraphe (a) ne fasse pas mention de la position des organismes publics, l'article 36(1) indique clairement qu'aux fins des demandes de reconnaissance et d'exécution en vertu de l'article 10(1)(a) et (b) et dans les affaires couvertes par l'article 20(4), le « créancier » comprend un « organisme public agissant à la place d'une personne à laquelle des aliments sont dus ou un organisme auquel est dû le remboursement de prestations fournies à titre d'aliments »[50].

Paragraphe (b) – « débiteur » désigne une personne qui doit ou de qui on réclame des aliments ;

68 Parallèlement à la définition du créancier, l'article 3(b) contient une définition du « débiteur ». Le débiteur est une personne qui doit des aliments et, pour couvrir l'hypothèse d'une première demande d'aliments, à qui on réclame des aliments.

Paragraphe (c) – « assistance juridique » désigne l'assistance nécessaire pour permettre aux demandeurs de connaître et de faire valoir leurs droits et pour garantir que leurs demandes seront traitées de façon complète et efficace dans l'État requis. Une telle assistance peut être fournie, le cas échéant, au moyen de conseils juridiques, d'une assistance lorsqu'une affaire est portée devant une autorité, d'une représentation en justice et de l'exonération des frais de procédure ;

69 La définition d'assistance juridique a été longuement débattue pendant la réunion de la Commission spéciale de mai 2007. La définition qui apparaît maintenant à l'article 3(c) a été élaborée par le Comité de rédaction à la lumière de ces discussions. La signification d'« assistance juridique » dans le cadre particulier des articles 6(2)(a) et des articles 14 à 17 est détaillée ci-dessous, aux paragraphes 126 à 134 et 370 à 373. Lorsque la fourniture d'une assistance juridique est requise en vertu de la Convention, il en découle une obligation essentielle de fournir les éléments de l'assistance juridique nécessaires à l'accomplissement des objectifs visés dans la première phrase du paragraphe (c), à savoir permettre aux demandeurs de connaître et de faire valoir leurs droits et garantir que leurs demandes sont traitées de façon complète et efficace dans l'État requis. La liste des « moyens » visés dans la seconde phrase précise le type d'assistance juridique qu'il sera peut-être nécessaire de mettre à disposition. Les termes « peut être fournie, le cas échéant, au moyen de » impliquent que lorsque de tels modes d'assistance sont effectivement nécessaires pour atteindre les objectifs énoncés dans la première phrase, ces moyens doivent être fournis. L'étendue de l'obligation d'octroyer une assistance juridique gratuite est déterminée aux articles 14 à 17.

70 Il convient de remarquer que la version française du texte de la Convention utilise toujours l'expression « État requis », quand la version anglaise utilise, elle, les expressions « *requested State* » ou « *State addressed* ». Néanmoins, ces deux expressions ont la même signification et sont équivalentes à l'expression « État requis ».

Paragraphe (d) – « accord par écrit » désigne un accord consigné sur tout support dont le contenu est accessible pour être consulté ultérieurement ;

71 Des termes ont été ajoutés à plusieurs articles de la Convention[51] conformément au mandat donné au Comité de rédaction par le Président de la Commission spéciale réunie en juin 2006 de veiller à la neutralité du langage de la Convention quant au support sans que sa substance en soit altérée (notamment que soient respectés les principes du respect des droits de la défense et que soit garantie la transmission rapide des documents par les moyens de communication les plus rapides). Étant donné la neutralité du langage additionnel quant au support, il restera approprié à l'avenir, lorsque les progrès techniques permettront des communications électroniques sécurisées dans le monde entier qui pourront être transmises « en chaîne ». Cela impose de définir « l'accord écrit », au paragraphe (d), lequel a deux caractéristiques : il couvre tout support sur lequel l'accord est consigné et il doit être accessible pour consultation ultérieure.

Paragraphe (e) – « convention en matière d'aliments » désigne un accord par écrit relatif au paiement d'aliments qui :

72 La question de l'inclusion dans le champ d'application de la Convention des actes authentiques et accords privés, c'est-à-dire des conventions en matière d'aliments, a fait l'objet de longues discussions. Voir les commentaires relatifs à l'article 30. La définition de l'expression « convention en matière d'aliments » est destinée à couvrir les actes authentiques et les accords privés. La convention doit être faite par écrit et remplir l'une des conditions établies aux alinéas (i) et (ii). Les États contractants ne sont pas tenus de reconnaître et d'exécuter les conventions en matière d'aliments du seul fait qu'elles sont définies dans cette section[52]. Les États qui font une réserve en vertu de l'article 30(8) ne sont pas obligés de reconnaître et d'exécuter les conventions en matière d'aliments.

Alinéa (i) – a été dressé ou enregistré formellement en tant qu'acte authentique par une autorité compétente ; ou

73 La notion d'« acte authentique » est connue dans de nombreux États et pas seulement en matière d'obligations alimentaires. Un acte authentique est établi par une autorité spécialement chargée de cette tâche par l'État, qui authentifie la signature des parties et vérifie son contenu. Dans

[49] C'est dans les grandes lignes l'approche adoptée par la Cour de justice des Communautés européennes pour définir le terme « entretien » dans le contexte du système de Bruxelles / Lugano. Voir *De Cavel* c. *De Cavel* (No 2) [1980] CJCE Rec. 731, et *Van den Boogaard* c. *Laamen*, C-220/95 (27 février 1997).

[50] Voir les commentaires relatifs à l'art. 10(1)(a) et (b), au para. 235 du présent Rapport.

[51] Voir art. 12(2), 13, 25 et 30 et les commentaires relatifs à ces articles dans le présent Rapport.

[52] Voir Procès-verbal No 17, para. 58.

Rapport explicatif

and resources of the creditor and debtor are taken into account in determining what order is appropriate.[49]

For the purposes of this Convention –

Paragraph (a) – "creditor" means an individual to whom maintenance is owed or is alleged to be owed;

66 The first definition in paragraph (a) of Article 3 is the definition of "creditor". In general, a creditor means the person who needs the maintenance and it can be a person to whom the maintenance has been awarded or the person who seeks a maintenance decision for the first time. It is helpful that the Convention clarifies this point, in order to avoid any assumption that it is only the person who is beneficiary of a decision who may be considered as a creditor, and not the person who is seeking maintenance for the first time. The term "creditor" includes, without any doubt, the child for whom maintenance was ordered or sought.

67 Although paragraph (a) does not refer to the position of public bodies, Article 36(1) makes it clear that, for the purposes of applications for recognition and enforcement under Article 10(1)(a) and (b) and in the cases covered by Article 20(4), "creditor" includes a "public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance".[50]

Paragraph (b) – "debtor" means an individual who owes or who is alleged to owe maintenance;

68 In parallel with the definition of creditor, Article 3(b) contains a definition of a "debtor". The debtor is both a person who owes the maintenance and, to cover the case of a first claim for maintenance, a person who is alleged to owe maintenance.

Paragraph (c) – "legal assistance" means the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The means of providing such assistance may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings;

69 The definition of "legal assistance" was discussed at length at the Special Commission meeting of May 2007, and the definition which now appears in Article 3(c) was developed by the Drafting Committee in the light of those discussions. The meaning of "legal assistance" in the particular contexts of Article 6(2)(a) and Articles 14 to 17 is explained in greater detail below, at paragraphs 126 to 134 and 370 to 373. Where provision of legal assistance is required under the Convention, the overriding obligation is to provide those elements of legal assistance which are necessary to achieve the purposes set out in the first sentence of paragraph (c), namely to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State. The list of "means" set out in the second sentence specifies the kinds of legal assistance that may need to be made available. The words "may include as necessary" indicate that where such forms of assistance are indeed "necessary" to achieve the purposes set out in the first sentence, they must be made available. The extent of any obligation to provide free legal assistance is determined by Articles 14 to 17.

70 It has to be underlined that in the French version reference is always made to "*État requis*", while in English the terms "requested State" and "State addressed" are used. Both terms have the same meaning and are equivalent to "*État requis*".

Paragraph (d) – "agreement in writing" means an agreement recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference;

71 Additional language has been added to different articles of the Convention[51] further to the mandate of the Chair of the Special Commission meeting of June 2006 to the Drafting Committee to ensure that the language of the Convention is media-neutral without altering the substance (*inter alia*, respecting due process principles and ensuring the swift transmission of documents by the most rapid means of communication available). As the additional language is media-neutral, it would still be adequate in the future, once advances in technology will allow worldwide secured electronic communications that could be transmitted "in-chain". This requires the definition of "agreement in writing", which is included in paragraph (d) and has two characteristics: first, the inclusion of any medium in which the agreement may be recorded and, second, the need to be accessible for subsequent reference.

Paragraph (e) – "maintenance arrangement" means an agreement in writing relating to the payment of maintenance which –

72 Extensive discussions took place on including authentic instruments and private agreements, *i.e.*, maintenance arrangements, in the scope of the Convention. See comments on Article 30. The definition of "maintenance arrangements" is meant to encompass both authentic instruments and private agreements. The arrangement has to be in writing and meet one of the conditions referred to in sub-paragraphs (i) and (ii). Contracting States do not have to recognise and enforce maintenance arrangements just because they are defined in the general definition section.[52] States that make the reservation in Article 30(8) are not obliged to recognise and enforce maintenance arrangements.

Sub-paragraph (i) – has been formally drawn up or registered as an authentic instrument by a competent authority; or

73 The notion of "authentic instruments" is known in many States not only in connection with maintenance obligations. They are drawn up by an authority which is especially entrusted with this task by the State and which authenticates the signature of the parties and verifies the con-

[49] This broadly is the approach adopted by the European Court of Justice in defining maintenance in the context of the Brussels / Lugano system. See *De Cavel v. De Cavel* (No 2) [1980] ECR 731, and *Van den Boogaard v. Laamen*, C-220/95 (27 February 1997).
[50] See comments on Art. 10(1)(a) and (b), under para. 235 of this Report.
[51] See Arts 12(2), 13, 25 and 30 and related comments in this Report.
[52] See Minutes No 17, para. 58.

plusieurs États (par ex. en Allemagne, en Belgique, en Espagne, en France ou en Pologne), cette autorité est un notaire et l'acte prend la forme d'un acte notarié.

Alinéa (ii) – a été authentifié ou enregistré par une autorité compétente, conclu avec elle ou déposé auprès d'elle,

74 Cet alinéa couvre une palette de situations diverses dans lesquelles une autorité compétente intervient dans le cadre d'accords relatifs au paiement d'aliments. La définition entend refléter la diversité des pratiques développées par les États en la matière. Ainsi, par exemple, dans certains États, les accords sont confirmés par une autorité compétente qui, tout en ayant une marge d'appréciation pour confirmer ou non un accord, ne procède pas habituellement à un examen exhaustif de son contenu mais peut, par exemple dans le cas d'un accord en matière d'aliments destinés aux enfants, examiner si celui-ci semble à première vue conforme à l'intérêt supérieur de l'enfant. En Allemagne et en Autriche, les conventions en matière d'aliments sont souvent conclues avec l'autorité chargée de la protection de l'enfance (*Jugendamt*). Dans ce contexte, il convient d'observer qu'en vertu de l'article 19(1), une convention peut être considérée comme une « décision » aux fins de la reconnaissance et de l'exécution, dès lors qu'elle a été passée devant une autorité judiciaire ou administrative ou homologuée par une telle autorité. Cependant, une des particularités des conventions en matière d'aliments est que l'autorité concernée n'est pas nécessairement judiciaire ou administrative, mais peut être également une « autorité compétente », telle qu'un notaire. L'autre particularité est que l'article 19 ne s'applique qu'aux accords passés « devant » une autorité judiciaire ou administrative, alors que l'article 3(e) couvre les accords conclus « avec » une autorité compétente.

et peut faire l'objet d'un contrôle et d'une modification par une autorité compétente ;

75 Outre la nécessité que la convention soit écrite, dans les deux cas, la convention en matière d'aliments doit pouvoir être contrôlée ou modifiée par une autorité compétente.

Paragraphe (f) – une « personne vulnérable » désigne une personne qui, en raison d'une altération ou d'une insuffisance de ses facultés personnelles, n'est pas en état de pourvoir à ses besoins.

76 Une définition de « personne vulnérable » était nécessaire en raison de la référence particulière qui y est faite à l'article 2(3). Cette définition est très proche de celle de l'article 8(3) du Protocole qui, à son tour, reprend la rédaction utilisée dans la Convention Protection des adultes de 2000. Néanmoins, la différence introduite volontairement entre la formulation retenue dans la Convention (« n'est pas en état de pourvoir à ses besoins ») et celle du Protocole (« n'est pas en mesure de pourvoir à ses intérêts ») découle de ce que le contexte dans lequel il est fait référence aux personnes vulnérables n'est pas identique dans les deux instruments.

77 Les négociations ont souligné l'importance d'une coopération administrative efficace et effective pour le succès de la Convention, ce qui se reflète actuellement dans les objectifs de la Convention énoncés à l'article premier (a).

78 Dans son rapport, « Vers un nouvel instrument mondial sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », William Duncan, Secrétaire général adjoint, a conclu que la coopération administrative « sera une composante essentielle, voire primordiale, du nouvel instrument sur le recouvrement international des aliments »[53]. Les discussions de la réunion de la Commission spéciale de 2004 ont fait ressortir une préférence pour une coopération harmonisée, voire globalement homogène, dont le point de départ serait la Convention de New York de 1956. À cette fin, il est ressorti qu'il était fondamental d'établir une liste claire et précise des fonctions des Autorités centrales, en prenant soin de conserver un équilibre entre précision et flexibilité dans la description du mode d'exécution de ces fonctions.

79 Les experts étaient d'accord sur le fait que le système actuel de recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille était excessivement complexe et que les dispositions relatives à la coopération administrative devaient faire l'objet d'une refonte et d'un suivi adéquat[54]. Une coopération administrative performante et efficace constitue le pilier sur lequel s'appuie cette Convention pour aboutir à un système simple, économique et rapide de recouvrement international des aliments. Le Rapport Duncan dresse la liste des objectifs d'un système moderne de coopération administrative. Ce système devrait : a) être en mesure de traiter rapidement les demandes ; b) être économique, c'est-à-dire que les coûts administratifs ne devraient pas être disproportionnés par rapport au montant des aliments perçus ; c) être assez souple pour permettre une coopération entre des systèmes internes très différents ; d) être efficace au sens où il doit éviter des formalités et des procédures superflues ou complexes ; e) être convivial et f) garantir que les obligations à la charge des États contractants ne soient pas trop lourdes[55].

80 Il ressort de l'expérience tirée de la mise en œuvre des instruments internationaux applicables en matière d'obligations alimentaires que les affaires qui seront traitées conformément à la présente Convention se distingueront à deux titres des affaires relevant d'autres Conventions relatives aux enfants : premièrement, la quantité extraordinaire d'affaires et deuxièmement, la longue durée des affaires relatives aux aliments. Ces affaires sont connues pour durer et s'étaler sur plusieurs années. Elles peuvent rester ouvertes pendant 18 ans, pendant toute l'enfance, et plus longtemps encore si des études sont entreprises dans l'enseignement supérieur. En 18 ans, l'évolution des conditions de vie des parents et des enfants nécessitera sans aucun doute de modifier au moins une fois la décision d'origine qui a accordé les aliments. Il faudra souvent demander une intervention et une assistance des services administratifs et juridiques. Si l'on ajoute à cela la complexité résultant des questions pratiques et juridiques transfrontalières, des différentes exigences des systèmes administratifs et judiciaires de recouvrement des aliments, ainsi que de l'éventualité de différentes lois applicables dans un même État aux différents membres de la famille, il est évident qu'une coopération internationale efficace est nécessaire, à tous les stades de la procédure.

[53] Rapport Duncan (*op. cit.* note 9), para. 15 à 17.
[54] Doc. prél. No 5/2003 (*op. cit.* note 25), para. 10.
[55] Rapport Duncan (*op. cit.* note 9), para. 16.

tent of the instrument. In several States (*e.g.*, Belgium, France, Germany, Poland or Spain) this authority will be a notary public and the instrument will be produced in the form of a notarial deed.

Sub-paragraph (ii) – has been authenticated by, or concluded, registered or filed with a competent authority,

74 This sub-paragraph covers a range of different situations in which a competent authority intervenes in the context of agreements relating to the payment of maintenance. The definition intends to reflect the diverse practice States have developed in relation to such agreements. Thus, for example, in some States, agreements are confirmed by a competent authority which has some discretion as to whether or not to confirm an agreement. However, it will typically not go into a full investigation of the content of the agreement but may, for example in the case of an agreement concerning child support, consider whether the agreement appears at face value to be in the child's best interests. In Germany and Austria, maintenance arrangements are often concluded with the child welfare authority (*Jugendamt*). In this context, it should be noted that, by virtue of Article 19(1), an agreement may be regarded as a "decision" for the purposes of recognition and enforcement if it has been "concluded before or approved by" a judicial or administrative authority. One difference in the case of a "maintenance arrangement" is that the authority involved may be a "competent authority", such as a notary public, and need not be a judicial or administrative authority. A further difference is that Article 19 only applies to agreements concluded "before" a judicial or administrative authority whereas Article 3(e) covers agreements concluded "with" a competent authority.

and may be the subject of review and modification by a competent authority;

75 Beside the need to be an agreement in writing, in both cases the maintenance arrangement has to be capable of being reviewed or modified by a competent authority.

Paragraph (f) – "vulnerable person" means a person who, by reason of an impairment or insufficiency of his or her personal faculties, is not able to support him or herself.

76 The special reference in Article 2(3) to "vulnerable persons" gives rise to the need for a definition. This definition is along similar lines to that used in Article 8(3) of the Protocol, which in turn follows the wording used in the 2000 Hague Adults Convention. The one deliberate difference between the wording used in the Convention ("is not able to support him or herself") and the Protocol ("is not in a position to protect his or her interest") arises from the different contexts in which the references to vulnerable persons are used in the two instruments.

77 The importance of effective and efficient administrative co-operation for the success of the Convention was recognised throughout the negotiations. This is now reflected in the objects of the Convention in Article 1(a).

78 In his report, "Towards a new global instrument on the international recovery of child support and other forms of family maintenance", William Duncan, Deputy Secretary General, concluded that administrative co-operation "will be an essential, and perhaps the most important, element in the new instrument on the international recovery of maintenance".[53] In discussions in the 2004 Special Commission meeting, a harmonised, or universally consistent, approach to co-operation that used the 1956 New York Convention as a starting point was favoured. To achieve this goal, it became apparent that a clear and detailed list of the Central Authorities' functions would be essential, while maintaining a balance between specificity and flexibility in describing how those functions might be performed.

79 Experts were in agreement that the current system for the international 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.[54] Effective and efficient administrative co-operation is the corner-stone of this Convention for achieving a simple, low cost and rapid system for the international recovery of child support. The Duncan Report listed the objectives of a modern system of administrative co-operation. It should be: a) capable of processing requests swiftly, b) cost effective when comparing administrative costs against amounts of maintenance recovered; c) flexible enough to allow co-operation between very different internal systems; d) efficient in avoiding unnecessary or complex formalities or procedures; e) user-friendly; and f) it should ensure that obligations imposed on Contracting States are not too burdensome.[55]

80 It is evident from experience under other international instruments concerning maintenance that cases to be dealt with according to this Convention will have two distinguishing features, compared with other Children's Conventions: first, the exceptionally high volume of cases, and second, the long duration of maintenance cases. Cases involving child support are typically ongoing and drawn out for years. They can potentially be active for 18 years, the entire childhood of the child, and longer if tertiary study is undertaken. The changing circumstances of the parents and children in an 18-year period will undoubtedly lead to the need to modify the original support decision at least once at some point. Administrative and legal intervention and assistance will often be required. Add to these features the complexities thrown up by transborder legal and practical issues, the different requirements of administrative and judicial maintenance systems, as well as the possibility of different laws within one country applying to different family members, and it is evident that there is a need for effective international co-operation, at all stages of the process.

[53] The Duncan Report (*op. cit.* note 9), paras 15-17.
[54] Prel. Doc. No 5/2003 (*op. cit.* note 25), para. 10.
[55] The Duncan Report (*op. cit.* note 9), para. 16.

81 Les fonctions des Autorités centrales et les procédures de demandes présentées par leur intermédiaire, décrites aux chapitres II et III de la Convention, visent à traiter les problèmes recensés dans le Rapport Duncan[56], à savoir les problèmes structurels liés aux insuffisances des instruments internationaux existants, les problèmes d'organisation dus à l'absence de collaboration des autorités et les problèmes procéduraux liés à l'inefficacité ou à l'inadéquation des procédures de traitement des demandes qui entraînent des retards.

82 Un groupe de travail informel sur la coopération administrative, créé à la suite de la réunion de la Commission spéciale de 2003, devait aussi discuter des solutions pratiques à ces problèmes. L'année suivante, la Commission spéciale a donné mandat au Groupe de travail informel pour se transformer en un Groupe de travail pleinement constitué de la Commission spéciale sur les aspects opérationnels de la coopération administrative dans le cadre de la Conférence de La Haye (le Groupe de travail sur la coopération administrative). Quatre coprésidents ont été désignés par le Groupe de travail : Mary Helen Carlson (États-Unis d'Amérique), Mária Kurucz (Hongrie), Jorge Aguilar Castillo (Costa Rica) et Jennifer Degeling (Australie). Environ 60 personnes de 24 pays et organisations ont participé au Groupe de travail sur la coopération administrative[57], qui était ouvert aux États et organisations internationales ayant participé à la Commission spéciale.

83 L'objectif principal du Groupe de travail sur la coopération administrative était d'« améliorer la coopération administrative entre les pays qui traitent des obligations alimentaires envers les enfants et d'autres membres de la famille »[58].

84 La création du Groupe de travail sur la coopération administrative fut une nouveauté des négociations de la Conférence de La Haye. De plus, trois sous-comités ont été formés pour examiner des éléments particuliers de la coopération administrative : les formulaires[59] (coprésidé par Mme Shireen Fisher (*International Association of Women Judges* (IAWJ)) et Mme Sheila Bird (Australie), remplacée ensuite par Mme Zoe Cameron (Australie)), le Profil des États (coprésidé par Mme Danièle Ménard (Canada) et Mme Margot Bean (*National Child Support Enforcement Association* (NCSEA)), puis Mme Ann Barkley (NCSEA)) et le suivi et l'examen (coprésidé par Mme Mária Kurucz (Hongrie) et Mme Elizabeth Matheson (États-Unis d'Amérique)). Les travaux des comités ont permis d'améliorer le texte de la Convention, de mettre au point des formulaires pour les demandes et les procédures afférentes, et de commencer à réfléchir aux conditions de suivi et d'examen de la Convention.

Article 4 Désignation des Autorités centrales

Paragraphe premier – Chaque État contractant désigne une Autorité centrale chargée de satisfaire aux obligations qui lui sont imposées par la Convention.

85 La désignation d'une Autorité centrale pour satisfaire aux obligations qui lui sont imposées par la Convention est caractéristique de nombreuses Conventions de La Haye modernes[60]. Ces autorités sont au cœur d'une coopération internationale au niveau administratif et elles sont destinées à jouer un rôle principal dans un « système complet de coopération », l'un des objectifs de la Convention prévu à l'article premier.

86 L'expérience des autres Conventions de La Haye relatives aux enfants a montré que les nouveaux États contractants doivent veiller à ce que leurs mesures de mise en œuvre de la Convention (leurs lois, règlements ou procédures) prévoient des pouvoirs et des ressources appropriés pour permettre à l'Autorité centrale de « satisfaire aux obligations qui lui sont imposées par la Convention »[61]. Le terme « Autorité centrale » n'est pas défini. La notion reste ouverte en fonction de la capacité et des structures administratives de chaque État contractant, ainsi que des particularités des différents systèmes juridiques[62].

87 L'acte de désignation de l'Autorité centrale prévu au paragraphe premier ne libère pas un État contractant de l'obligation de fournir d'autres informations importantes en vertu du paragraphe 3. Les termes des paragraphes premier et 2 relatifs à la désignation s'inspirent d'articles analogues d'autres Conventions de La Haye[63]. Cependant, les termes du paragraphe 3 qui se rapportent au moment de la désignation – celui du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration en vertu de l'article 61 – ont pour modèle l'article 2 de la Convention de New York de 1956.

Paragraphe 2 – Un État fédéral, un État dans lequel plusieurs systèmes de droit sont en vigueur ou un État ayant des unités territoriales autonomes, est libre de désigner plus d'une Autorité centrale et doit spécifier l'étendue territoriale ou personnelle de leurs fonctions. L'État qui fait usage de cette faculté désigne l'Autorité centrale à laquelle toute communication peut être adressée en vue de sa transmission à l'Autorité centrale compétente au sein de cet État.

88 La pratique des autres Conventions de La Haye a bien montré qu'il était nécessaire de pouvoir désigner plus d'une Autorité centrale. Le paragraphe 2 reconnaît trois catégories de structures gouvernementales pour lesquelles se pose le choix d'avoir « plus d'une Autorité centrale » : un État fédéral, un État dans lequel plusieurs systèmes de droit sont en vigueur ou un État ayant des unités territoriales autonomes. La répartition constitutionnelle des pouvoirs entre les gouvernements fédéraux, provinciaux ou régionaux autonomes impose une certaine latitude dans la désignation de plusieurs Autorités centrales.

89 Une caractéristique importante de ce paragraphe est que l'État contractant doit veiller, lorsqu'il désigne plusieurs Autorités centrales, à désigner une Autorité centrale principale à laquelle toute communication pourra être adressée. Une telle désignation simplifie, clarifie et accélère les communications lorsqu'un État contractant compte plusieurs Autorités centrales. L'Autorité centrale principale

[56] *Ibid.*, para. 24 à 28.
[57] « Rapport du Groupe de travail sur la coopération administrative », préparé par le Groupe de travail sur la coopération administrative, Doc. prél. No 34 d'octobre 2007 à l'intention de la Vingt et unième session de novembre 2007, ci-dessus p. I-458 du présent tome (également accessible à l'adresse <www.hcch.net>), para. 3 et 4.
[58] *Ibid.*, para. 5 et 6.
[59] Suite à la Commission spéciale de 2005, le Sous-comité chargé des formulaires est devenu un groupe de travail à part entière, coordonné par le Bureau Permanent.
[60] Voir par ex. les Conventions de La Haye de 1980, 1993, 1996 et 2000. La Convention de New York de 1956 a également introduit une nouveauté en créant des agences de transmission et de réception pour gérer le flot des demandes.
[61] Voir le *Guide de bonnes pratiques en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants, Première partie – Pratique des Autorités centrales* (Family Law, Jordan Publishing, 2003), chapitre II, « Établir et consolider l'Autorité centrale ». Ce Guide peut également être consulté à l'adresse <www.hcch.net>.
[62] Le Guide de bonnes pratiques sur la pratique des Autorités centrales (*ibid.*) présente également des suggestions sur les modalités, le moment, le lieu et la raison de l'établissement d'une Autorité centrale.
[63] Art. 6 de la Convention Enlèvement d'enfants de 1980, art. 6 de la Convention Adoption internationale de 1993, art. 29 de la Convention Protection des enfants de 1996 et art. 28 de la Convention Protection des adultes de 2000.

81 The Central Authority functions and application processes described in Chapters II and III of the Convention are intended to address the problems identified in the Duncan Report,[56] namely structural problems, concerning the shortcomings of existing international instruments; organisational problems, concerning lack of co-operation between authorities; and problems of process, concerning inefficient or inadequate procedures for processing applications which cause delays.

82 Practical solutions to these shortcomings were also to be the focus of discussions by an informal Administrative Co-operation Working Group which was established following the 2003 Special Commission meeting. The following year, the informal Working Group was given a mandate by the Special Commission to become a fully constituted Hague Special Commission Working Group on the Operational Aspects of Administrative Co-operation (the Administrative Co-operation Working Group). Four co-convenors were appointed for the Working Group: Mary Helen Carlson (United States of America), Mária Kurucz (Hungary), Jorge Aguilar Castillo (Costa Rica) and Jennifer Degeling (Australia). Approximately 60 individuals from 24 countries and organisations participated in the Administrative Co-operation Working Group,[57] whose membership was open to States and international organisations participating in the Special Commission.

83 The main goal of the Administrative Co-operation Working Group was "to improve administrative co-operation among those countries that handle international child support and other forms of family maintenance".[58]

84 The establishment of the Administrative Co-operation Working Group was an innovation for Hague Conference negotiations. In addition, three Sub-Committees were established to consider particular aspects of administrative co-operation: Forms[59] (co-chaired by Ms Shireen Fisher (International Association of Women Judges (IAWJ)) and Ms Sheila Bird (Australia) who was later replaced by Ms Zoe Cameron (Australia)), Country Profiles (co-chaired by Ms Danièle Ménard (Canada) and Ms Margot Bean (NCSEA) and later Ms Ann Barkley (NCSEA)), and Monitoring and Review (co-chaired by Ms Mária Kurucz (Hungary) and Ms Elizabeth Matheson (United States of America)). The work of the Committees led to improvements in the text of the Convention, the development of forms for applications and related procedures, as well as the consideration, at an early stage, of the future requirements for post-Convention monitoring and review.

Article 4 Designation of Central Authorities

Paragraph 1 – A Contracting State shall designate a Central Authority to discharge the duties that are imposed by the Convention on such an authority.

85 The designation of a Central Authority to discharge the duties that are imposed on it by a Convention is a feature of many modern Hague Conventions.[60] These authorities act as the focal point for international co-operation at the administrative level and are intended to play the primary role in the "comprehensive system of co-operation", one of the objects of the Convention referred to in Article 1.

86 Experience with other Hague Children's Conventions has highlighted the need for new Contracting States to ensure that their implementing measures (their laws, regulations or procedures) for the Convention provide adequate powers and resources for the Central Authority to "discharge the duties that are imposed by the Convention".[61] The term "Central Authority" is not defined. The concept is left open, having regard to differences of capacity and administrative structures of each Contracting State, and taking account of the peculiarities of different legal systems.[62]

87 The act of designating the Central Authority under paragraph 1 does not relieve a Contracting State of its obligations to provide the other important details in accordance with paragraph 3. The words of paragraphs 1 and 2 relating to designation are inspired by similar articles in other Hague Conventions.[63] However the words as to timing of the designation in paragraph 3 – at the time when the instrument of ratification or accession or a declaration made under Article 61 is deposited – follow the model of Article 2 of the 1956 New York Convention.

Paragraph 2 – Federal States, States with more than one system of law or States having autonomous territorial units shall be free to appoint more than one Central Authority and shall specify the territorial or personal extent of their functions. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which any communication may be addressed for transmission to the appropriate Central Authority within that State.

88 The need for the possibility to appoint more than one Central authority is well understood from the practice of other Hague Conventions. Three categories of governmental arrangements are recognised in paragraph 2 as requiring the option of "more than one Central Authority": Federal States, States with more than one system of law or States having autonomous territorial units. The constitutional division of powers between federal, provincial or autonomous regional governments necessitates the flexibility to appoint multiple Central Authorities.

89 An important feature of this paragraph is to ensure that when multiple Central Authorities are appointed, the Contracting State designates the principal Central Authority to which communications may be sent. Such designation simplifies, clarifies and expedites the process of communication where one Contracting State has multiple Central Authorities. The principal Central Authority to which gen-

[56] *Ibid.*, paras 24-28.
[57] "Report of the Administrative Co-operation Working Group", prepared by the Administrative Co-operation Working Group, Prel. Doc. No 34 of October 2007 for the attention of the Twenty-First Session of November 2007, *supra* p. I-459 of this tome (also available at <www.hcch.net>), paras 3 and 4.
[58] *Ibid.*, paras 5 and 6.
[59] After the 2005 Special Commission, the Forms Sub-Committee became a working group in its own right co-ordinated by the Permanent Bureau.
[60] See, *e.g.*, the Hague Conventions of 1980, 1993, 1996 and 2000. The 1956 New York Convention was also innovative in establishing Transmitting and Receiving Agencies to manage the flow of applications.
[61] See the *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice* (Family Law, Jordan Publishing, 2003), in Chapter II, "Establishing and consolidating the Central Authority". The Guide is also available at <www.hcch.net>.
[62] The Guide to Good Practice on Central Authority Practice (*ibid.*) also contains suggestions on how, when, where and why a Central Authority may be established.
[63] Art. 6 of the 1980 Hague Child Abduction Convention, Art. 6 of the 1993 Hague Intercountry Adoption Convention, Art. 29 of the 1996 Hague Child Protection Convention and Art. 28 of the 2000 Hague Adults Convention.

à laquelle pourra être adressée toute communication d'ordre général sera souvent située dans un bureau gouvernemental fédéral ou national. Les communications d'ordre général, comme celles émanant du Bureau Permanent ou d'un autre État contractant, sont à distinguer des demandes ou des requêtes d'assistance, lesquelles sont traitées, dans certains pays, au niveau territorial, voire local. En cas de doute, les demandes pourront toujours être adressées à l'Autorité centrale principale.

90 Bien que les États contractants soient « libre[s] de désigner plus d'une Autorité centrale », ils doivent, s'ils choisissent cette option, spécifier la portée territoriale ou personnelle des fonctions de chaque Autorité centrale désignée. Le moment adéquat pour ce faire est celui de la désignation de l'Autorité centrale, au moment du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration en vertu de l'article 61. Les coordonnées doivent être communiquées au Bureau Permanent en vertu du paragraphe 3.

91 Les États qui souhaitent élargir le fonctionnement de la Convention à certaines de leurs unités territoriales autonomes mais pas à d'autres devront indiquer au Bureau Permanent si les communications ou les demandes doivent être adressées directement aux Autorités centrales des unités territoriales dans lesquelles la Convention s'applique.

Paragraphe 3 – Au moment du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration faite conformément à l'article 61, chaque État contractant informe le Bureau Permanent de la Conférence de La Haye de droit international privé de la désignation de l'Autorité centrale ou des Autorités centrales, ainsi que de leurs coordonnées et, le cas échéant, de l'étendue de leurs fonctions visées au paragraphe 2. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

92 Le paragraphe 3 souligne l'importance de l'exactitude et de la mise à jour des informations relatives au nom et aux coordonnées des Autorités centrales, indispensables à des communications rapides et performantes et à une coopération efficace des autorités. Un État contractant qui compte plusieurs Autorités centrales doit informer le Bureau Permanent de la répartition des fonctions entre ces Autorités centrales.

93 Le paragraphe 3 désigne le Bureau Permanent comme destinataire ou dépositaire des informations relatives aux coordonnées et aux fonctions des Autorités centrales, lesquelles sont publiées sur le site Internet de la Conférence de La Haye[64]. Il est essentiel de tenir ces informations à jour pour faciliter les communications entre les États contractants. Il appartient à chaque État contractant de fournir des informations exactes et actuelles sur leur Autorité centrale, et d'informer le Bureau Permanent de tout changement de ces informations. Dans la pratique, l'Autorité centrale est habituellement la mieux placée pour fournir ces informations.

94 Le paragraphe 3 fait obligation aux États contractants d'informer le Bureau Permanent de la désignation et des fonctions de l'Autorité centrale au moment du dépôt de l'instrument de ratification ou d'adhésion ou d'une déclaration en vertu de l'article 61. Les États présentant des systèmes juridiques non unifiés devront informer le Bureau Permanent au moment du dépôt de la déclaration faite en vertu de l'article 61 visant à étendre la Convention à une autre unité territoriale. Le moment de la désignation est de la plus haute importance. L'expérience des autres Conventions de La Haye relatives aux enfants montre que si la désignation n'a pas lieu au moment de la ratification ou de l'adhésion, l'État contractant court le risque que son Autorité centrale ne soit pas opérationnelle au moment de l'entrée en vigueur de la Convention sur son territoire. L'obligation relative au moment a été suggérée dans le Rapport du Sous-comité chargé du suivi et de l'examen dans le Document préliminaire No 19 de juin 2006[65]. Lors de la Commission spéciale de 2006, les délégués ont accepté l'idée que l'obligation de désigner l'Autorité centrale édictée à l'article 4(1) devait être renforcée par l'obligation d'informer le Bureau Permanent des coordonnées et des fonctions de l'Autorité centrale au moment de la ratification ou de l'adhésion ou d'une déclaration en vertu de l'article 61.

Article 5 Fonctions générales des Autorités centrales

95 La répartition des fonctions qui figurent aux articles 5 et 6 met en jeu un équilibre entre, d'une part, le besoin de définir avec précision certaines des fonctions de l'Autorité centrale et, d'autre part, le souhait de laisser une certaine latitude aux États contractants concernant d'autres fonctions. Cette flexibilité permet de tenir compte des restrictions inhérentes aux ressources et pouvoirs conférés à l'Autorité centrale, tout en prévoyant la possibilité d'une amélioration progressive des services fournis par l'Autorité centrale.

96 L'article 5 énonce les fonctions d'ordre général que les Autorités centrales doivent assumer pour réaliser les objectifs définis dans la Convention et assurer son respect. Ces fonctions générales incombent directement aux Autorités centrales et ne peuvent être ni exercées par d'autres organismes, ni déléguées. L'article 6(1) précise ce qui incombe aux Autorités centrales, à des organismes publics ou à d'autres organismes dans les affaires de recouvrement d'aliments. L'article 6(1) énumère des fonctions à caractère obligatoire relatives à la transmission des demandes et à l'introduction de procédures qui peuvent être exercées par l'Autorité centrale ou par d'autres organismes, publics ou non. Il est important de souligner que ces fonctions (de l'art. 6(1)) ne sont pas facultatives et qu'elles doivent être exercées dans leur intégralité. Il ne s'agit pas de fonctions pour lesquelles il suffit de prendre « toutes les mesures appropriées ». L'article 6(2) déploie une liste de fonctions spécifiques à caractère obligatoire qui doivent être exercées par les Autorités centrales, des organismes publics ou d'autres organismes dans les affaires individuelles, dans la mesure permise par leurs pouvoirs, leurs ressources et le droit interne.

97 Les obligations des articles 5 et 6 s'appliquent à toutes les affaires d'aliments destinés aux enfants et aux affaires de reconnaissance et d'exécution de décisions relatives aux obligations alimentaires entre époux et ex-époux lorsque la demande est présentée conjointement à une demande d'aliments destinés à un enfant. Elles ne s'appliquent pas de façon automatique aux seules affaires d'aliments entre époux et ex-époux, celles-ci étant exclues par l'article 2(1) du champ d'application des chapitres II et III. Cependant, les articles 5 et 6 pourraient s'appliquer aux aliments entre époux et ex-époux et aux aliments destinés à d'autres mem-

[64] <www.hcch.net>.

[65] « Rapport du Groupe de travail sur la coopération administrative de la Commission spéciale de juin 2006 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », préparé par le Groupe de travail sur la coopération administrative, Doc. prél. No 19 de juin 2006 à l'intention de la Commission spéciale de juin 2006 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (accessible à l'adresse <www.hcch.net>).

Rapport explicatif

eral communications may be addressed is usually located in a federal or national government office. General communications, such as those from the Permanent Bureau, or another Contracting State, are to be distinguished from applications or requests for assistance, which in some countries are handled at the territorial or even local level. Where there is any doubt, applications can always be sent to the principal Central Authority.

90 While Contracting States are "free to appoint more than one Central Authority", if they do so, they must specify the territorial or personal extent of the functions of each of the appointed Central Authorities. The appropriate time for making this specification is at the time of designating the Central Authority when the instrument of ratification or accession or a declaration made under Article 61 is deposited. The details are to be communicated to the Permanent Bureau in accordance with paragraph 3.

91 States which may extend the operation of the Convention to some of their autonomous territorial units but not to others will need to notify the Permanent Bureau whether communications or applications should be sent directly to the Central Authorities of those territorial units to which the Convention is extended.

Paragraph 3 – The designation of the Central Authority or Central Authorities, their contact details, and where appropriate the extent of their functions as specified in paragraph 2, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law at the time when the instrument of ratification or accession is deposited or when a declaration is submitted in accordance with Article 61. Contracting States shall promptly inform the Permanent Bureau of any changes.

92 Paragraph 3 emphasises the importance of accurate and current information about the name and contact details of Central Authorities, which are necessary for speedy and efficient communications and effective co-operation between authorities. A Contracting State with multiple Central Authorities must inform the Permanent Bureau of the division of functions between these Central Authorities.

93 Paragraph 3 makes the Permanent Bureau the recipient or repository of information about Central Authority contact details and functions, which are published on the Hague Conference website.[64] It is essential that these be kept up to date, in order to facilitate communications between Contracting States. The responsibility for providing the correct and current information about the Central Authority, and for notifying the Permanent Bureau of any changes in those details, rests with each Contracting State. In practice, the Central Authority is usually best placed to provide this information.

94 Paragraph 3 imposes an obligation on Contracting States to inform the Permanent Bureau of the Central Authority designations and functions at the time of depositing the instrument of ratification or accession or a declaration made under Article 61. For States with non-unified legal systems, the time to inform the Permanent Bureau is when a declaration is made under Article 61 extending the Convention to another territorial unit. The timing of the designation is most important. Experience with other Hague Children's Conventions has shown that if it is not done at the time of ratification or accession, there is a risk that a Contracting State will not have a functioning Central Authority in operation when the Convention enters into force for that State. The obligation as to timing was suggested in the Report of the Monitoring and Review Sub-Committee in Preliminary Document No 19 of June 2006.[65] It was accepted by delegates at the 2006 Special Commission that the obligation in Article 4(1) to designate the Central Authority needed to be reinforced by the obligation to communicate to the Permanent Bureau, at the time of ratification or accession or a declaration made under Article 61, the information about Central Authority contact details and functions.

Article 5 General functions of Central Authorities

95 The division of functions in Articles 5 and 6 involves a balance between, on the one hand, the need to define with precision certain Central Authority functions and, on the other hand, the wish to have some flexibility for Contracting States in relation to other functions. This flexibility allows account to be taken of the limitations imposed by the resources and powers given to the Central Authority; at the same time it envisages the possibility of a gradual improvement of services provided by the Central Authority.

96 Article 5 lays down what must be done by Central Authorities in a general sense to achieve the objects of, and ensure compliance with, the Convention. Article 5 contains general functions which are imposed directly on Central Authorities, and cannot be performed by or delegated to other bodies. Article 6(1) states what must be done by Central Authorities, public bodies or other bodies in individual maintenance cases. Article 6(1) contains mandatory functions concerning transmission of applications and the institution of proceedings which may be performed by the Central Authority or by public or other bodies. It is important to emphasise that these functions (in Art. 6(1)) are not discretionary and must be performed comprehensively. They are not functions for which it is sufficient that "all appropriate measures" could be taken. Article 6(2) lists specific mandatory functions which must be performed by Central Authorities, public bodies or other bodies in individual cases, to the extent permitted by their powers and resources and their internal law.

97 The obligations in Articles 5 and 6 apply to all child support cases and to cases of recognition and enforcement of spousal support decisions when made in combination with a child support claim. They do not automatically apply to spousal support alone, such cases being excluded by Article 2(1) from the operation of Chapters II and III. However, Articles 5 and 6 could apply to spousal and other

[64] <www.hcch.net>.

[65] "Report of the Administrative Co-operation Working Group of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance", prepared by the Administrative Co-operation Working Group, Prel. Doc. No 19 of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance (available at <www.hcch.net>).

bres de la famille si un État contractant fait une déclaration appropriée au titre de l'article 63, dont il est fait mention à l'article 2(3).

Les Autorités centrales doivent :

Paragraphe (a) – coopérer entre elles et promouvoir la coopération entre les autorités compétentes de leur État pour réaliser les objectifs de la Convention ;

98 L'usage du présent de l'indicatif dans l'ensemble de l'article 5 met l'accent sur le caractère obligatoire des fonctions qu'il énonce. Le paragraphe (a) requiert une collaboration au niveau international et interne, c'est-à-dire aussi bien une collaboration entre les Autorités centrales des États contractants qu'une incitation et une promotion de la coopération entre les autorités au sein de chaque État. La nature de la coopération envisagée par les termes de ce paragraphe n'est pas précisée ; il peut s'agir de tout ce qui permettra de réaliser les objectifs de la Convention. La coopération prévue aux articles 5, 6 et 7 est particulièrement importante.

99 L'obligation de « coopérer entre elles et promouvoir la coopération », énoncée au paragraphe (a), met en valeur la nécessité et l'importance d'une collaboration, comme principe de base positif qui fonde les communications régulières entre les Autorités centrales en ce qui concerne la mise en œuvre générale de la Convention ou une assistance pour des affaires précises.

100 L'Autorité centrale doit jouer un rôle actif pour « promouvoir la coopération » entre les autorités de son État. Cette obligation implique que l'Autorité centrale veille à ce que les autorités compétentes de son État soient informées du fonctionnement de la Convention et de leurs rôles respectifs, mais aussi des moyens de favoriser ou d'améliorer leur collaboration.

101 Le paragraphe (a) reprend les dispositions de l'article 30 de la Convention Protection des enfants de 1996 et de l'article 29 de la Convention Protection des adultes de 2000. Il rappelle aussi l'article 7 de la Convention Enlèvement d'enfants de 1980 et l'article 7 de la Convention Adoption internationale de 1993.

Paragraphe (b) – rechercher, dans la mesure du possible, des solutions aux difficultés pouvant survenir dans le cadre de l'application de la Convention.

102 Le paragraphe (b) dispose clairement que les Autorités centrales doivent aider, dans la mesure du possible, à résoudre les difficultés qui peuvent survenir dans le cadre de l'application d'une disposition de la Convention. La formule « recherchent des solutions » a été empruntée au Règlement Bruxelles II[66]. Il a le mérite d'énoncer de façon positive l'obligation de faire tout ce qui est possible pour assurer le fonctionnement efficace de la Convention, contrairement à la formulation négative de l'obligation d'« éliminer des obstacles », termes d'un projet antérieur qui s'inspiraient d'un certain nombre de Conventions existantes, notamment l'article 7(2)(i) de la Convention Enlèvement d'enfants de 1980 et l'article 7(2)(b) de la Convention Adoption internationale de 1993.

103 Les mots « notamment aux chapitres II et III » qui faisaient suite à l'expression « dans le cadre de l'application de la Convention » ont été supprimés du projet de texte d'octobre 2005[67] car jugés inutilement restrictifs. Le chapitre II (Coopération administrative) et le chapitre III (Demandes par l'intermédiaire des Autorités centrales) sont les deux domaines pour lesquels les Autorités centrales exercent une responsabilité principale ; elles sont en conséquence les plus aptes à aider à recenser et résoudre les difficultés qui résulteraient de l'application de ces chapitres, mais il ne faut pas considérer que leurs responsabilités se limitent à ces domaines.

104 Les difficultés liées à l'application de la Convention que les Autorités centrales pourraient aider à résoudre sont par exemple : recenser les problèmes juridiques et procéduraux au sein de leurs propres systèmes et proposer des solutions à l'autorité compétente ; résoudre les problèmes qui surviennent au sein des Autorités centrales ou entre elles ; résoudre les problèmes de communication ou de liaison entre les agences nationales ou les autorités compétentes ; encourager une application plus cohérente de la Convention grâce à des sessions d'informations pour les juges, avocats, administrateurs et autres personnes impliqués dans le fonctionnement de la Convention.

Article 6 Fonctions spécifiques des Autorités centrales

105 Les obligations créées par les articles 5, 6(1) et 6(2) sont très différentes. Cependant, toutes ont un caractère obligatoire. L'article 5 impose des obligations d'ordre général aux Autorités centrales. L'article 6(1) pose des obligations spécifiques qui peuvent être exercées par des Autorités centrales, des organismes publics ou d'autres organismes. L'article 6(2) pose quant à lui des obligations moins spécifiques et laisse aux Autorités centrales ou aux organismes davantage de latitude dans le mode d'exercice de leurs fonctions. En dépit de cette latitude quant au niveau de services, l'Autorité centrale a une obligation de fournir tous les types de services mentionnés aux alinéas (a) à (j) et ainsi, de faire tout son possible dans les limites de ses pouvoirs et de ses ressources pour fournir l'assistance requise. Progressivement, les Autorités centrales pourront acquérir plus de pouvoirs et de ressources et apporter davantage d'assistance[68].

106 Les fonctions énumérées à l'article 6 sont des fonctions administratives. Les obligations qu'elles énoncent sont liées à une coopération administrative (avec l'exception éventuelle de l'art. 6(1)(b), lorsque l'Autorité centrale a le pouvoir d'introduire des procédures). L'article 6 n'est pas censé imposer aux Autorités centrales des fonctions « judiciaires » irréalistes (voir ci-dessous les commentaires relatifs à l'art. 6(2)(c) et (g)). Cependant, lorsque l'exercice d'une fonction de l'article 6 peut être amélioré par une demande d'intervention judiciaire et que l'Autorité centrale a le pouvoir d'entreprendre une telle démarche, celle-ci bénéficierait grandement à l'enfant et au créancier, ainsi qu'à l'État requérant, par exemple pour localiser le débiteur ou ses biens.

107 Les verbes (« faciliter », « encourager », « aider ») et l'expression « toutes les mesures appropriées » employés dans l'article 6 procèdent d'une volonté de flexibilité. La formulation de l'article 6 permet en effet aux États contractants de bénéficier d'une certaine latitude dans l'organisa-

[66] Voir abréviations et références au para. 15 du présent Rapport.

[67] « Esquisse d'un projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », préparé par le Comité de rédaction, Doc. prél. No 16 d'octobre 2005 à l'intention de la Commission spéciale de juin 2006 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (ci-après Doc. prél. No 16/2005), ci-dessus p. I-298 du présent tome (également accessible à l'adresse <www.hcch.net>).

[68] Voir note 69.

forms of family maintenance if a Contracting State makes an appropriate declaration under Article 63 as referred to in Article 2(3).

Central Authorities shall –

Paragraph (a) – co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention;

98 The use of the word "shall" in the chapeau to Article 5 emphasises the mandatory nature of the functions in this Article. Paragraph (a) requires both international and intra-national co-operation, that is, co-operation between the Central Authorities of Contracting States, as well as the promotion or encouragement of co-operation between authorities within each State. The nature of the co-operation envisaged by the words of this paragraph is not specified and may be anything that achieves the purposes of the Convention. Co-operation in relation to the functions in Articles 5, 6 and 7 will be particularly important.

99 The obligation to "co-operate with each other and promote co-operation" in paragraph (a) highlights the need for and importance of co-operation as a basic positive principle that underpins the regular communications between Central Authorities concerning the implementation of the Convention generally, or assistance for individual cases.

100 The Central Authority must take an active role to "promote co-operation" amongst the authorities in its State. This obligation implies that the Central Authority must ensure that the competent authorities in its State are informed about the operation of the Convention and their respective roles in it, and how co-operation between them can be fostered or improved.

101 Paragraph (a) replicates the provisions of Article 30 of the 1996 Hague Child Protection Convention and Article 29 of the 2000 Hague Adults Convention. It is also similar to Article 7 of the 1980 Hague Child Abduction Convention and Article 7 of the 1993 Hague Intercountry Adoption Convention.

Paragraph (b) – seek as far as possible solutions to difficulties which arise in the application of the Convention.

102 Paragraph (b) makes clear that Central Authorities must assist, as far as possible, in finding solutions for difficulties arising in the application of any part of the Convention. The formulation "seek solutions" is taken from the Brussels II Regulation.[66] It has the advantage of stating positively the obligation to do everything possible to ensure the effective working of the Convention, compared with the negatively stated obligation implied in "eliminating obstacles", the words of a previous draft that were drawn from a number of existing Conventions, including Article 7(2)(i) of the 1980 Hague Child Abduction Convention and Article 7(2)(b) of the 1993 Hague Intercountry Adoption Convention.

103 The words "in particular, Chapters II and III" were omitted after the words "in the application of the Convention" from the October 2005 draft text[67] as being unnecessarily restrictive. Chapter II (Administrative co-operation) and Chapter III (Applications through Central Authorities) are the two areas for which Central Authorities will have primary responsibility, and therefore they are best placed to assist in identifying and resolving difficulties arising from the application of those parts of the Convention, but their responsibilities should not be seen as being confined to those areas.

104 Examples of the difficulties arising in the application of the Convention which Central Authorities could assist in resolving include: identifying legal or procedural problems within their own systems and proposing solutions to the appropriate authority; resolving problems within or between Central Authorities; resolving communication or liaison problems between national agencies or competent authorities; promoting more consistent application of the Convention through information sessions for judges, lawyers, administrators and others in the operation of the Convention.

Article 6 Specific functions of Central Authorities

105 There are notable differences in the obligations created by Articles 5, 6(1) and 6(2). However, in each Article the obligations are mandatory. In Article 5 the obligations are of a general nature and are imposed directly on Central Authorities. In Article 6(1), the obligations are specific, but may be performed by Central Authorities, public bodies or by other bodies. In Article 6(2) the obligations are less specific, and allow Central Authorities or bodies more flexibility as to how the functions will be performed. In spite of this flexibility as regards the level of services, there is an obligation to provide all types of services mentioned in sub-paragraphs (a) to (j) and thereby to do everything possible within the powers and resources of the Central Authority to provide the assistance requested. Progressively, Central Authorities may acquire more powers and resources to offer more assistance.[68]

106 The functions listed in Article 6 are administrative functions, and the obligations they impose relate to administrative co-operation (with the possible exception of Art. 6(1)(b) – if the Central Authority has the power to institute proceedings). Article 6 is not intended to impose any unrealistic judicial functions on Central Authorities (see the explanations below for Art. 6(2)(c) and (g)). However, if the carrying out of a function in Article 6 would be improved by applying for judicial intervention, and if the Central Authority has the power to take such a step, this may be a great benefit to both the child or creditor, and to the requesting State, for example, to locate a debtor or identify his or her assets.

107 The choice of verbs in Article 6 ("facilitate", "encourage", "help"), as well as the use of the term "all appropriate measures", is deliberate in order to provide flexibility. The language in Article 6 allows Contracting States some flexi-

[66] See abbreviations and references under para. 15 of this Report.

[67] "Tentative draft Convention on the international recovery of child support and other forms of family maintenance", prepared by the Drafting Committee, Prel. Doc. No 16 of October 2005 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 16/2005), *supra* p. I-299 of this tome (also available at <www.hcch.net>).

[68] See note 69.

tion de l'exercice de ces fonctions (par les Autorités centrales ou d'autres organismes), afin de remplir leurs obligations autant que faire se peut.

108 Certains experts ont estimé que le verbe « faciliter », mis en rapport avec un certain nombre de fonctions de l'article 6, manquait de clarté et qu'il serait préférable d'employer des termes plus concrets pour définir clairement les fonctions de base des Autorités centrales. Néanmoins, il a été admis que l'utilisation d'une formulation plus souple était mieux adaptée à la grande diversité des pouvoirs, des ressources et des capacités dont les Autorités centrales disposent pour exécuter les fonctions en question. Pour compenser en partie cette formulation souple, l'article 57(1)(b) prévoit que les États contractants doivent fournir au Bureau Permanent une description des mesures qu'ils prendront pour satisfaire à leurs obligations en vertu de l'article 6.

109 L'article 6 a été l'un des articles les plus débattus pendant les premières phases des négociations, principalement en raison des différentes interprétations de cette disposition et de la crainte de voir les Autorités centrales aller au-delà de leurs pouvoirs et ressources ou de se voir confier un trop grand nombre de fonctions. Parallèlement, lors des débats de la Commission spéciale, il a été accepté que les Autorités centrales conservent une grande variété de fonctions administratives dans les affaires de recouvrement d'aliments destinés aux enfants.

Paragraphe premier – Les Autorités centrales fournissent une assistance relative aux demandes prévues au chapitre III, notamment en :

110 La référence aux fonctions obligatoires de transmission et de réception des demandes et d'introduction ou de facilitation des procédures dans l'article 6(1) vise à laisser aux États contractants la liberté de décider à quels organismes incomberont ces responsabilités au sein de leur État, en laissant ouverte la possibilité que ces tâches soient accomplies par d'autres organismes que les Autorités centrales. La lecture combinée des paragraphes premier et 3 de l'article 6 permet d'atteindre cet objectif.

111 Le paragraphe premier pose deux obligations. La première, qui incombe aux Autorités centrales, est d'apporter une assistance générale pour toute catégorie de demande visée à l'article 10 et toute autre procédure visée au chapitre III. La seconde est de fournir les formes d'assistance plus spécifiques, énumérées au paragraphe premier. L'expression « notamment » signifie que l'assistance prévue à l'article 6(1) comprend sans s'y limiter les fonctions plus précises de transmission et de réception des demandes ou encore d'introduction ou de facilitation des procédures judiciaires.

112 L'article 6 doit être lu conjointement avec l'article 9 (Demande par l'intermédiaire des Autorités centrales). On a voulu que l'assistance des Autorités centrales prévue à l'article 6 se limite aux affaires dans lesquelles les requêtes (art. 7) ou les demandes (art. 10) sont déposées par l'intermédiaire des Autorités centrales. Bien qu'il ait été convenu de ne pas empêcher une personne de s'adresser directement à un tribunal ou à une autorité compétente au titre du chapitre V pour faire reconnaître et exécuter une décision (art. 19(5)) ou au titre du chapitre VIII pour d'autres procédures (art. 37), le demandeur direct ne bénéficiera pas de l'assistance des Autorités centrales visée aux articles 5, 6, 7 et 8.

Alinéa (a) – transmettant et recevant ces demandes ;

113 La transmission et la réception des demandes constituent une fonction spécifique principale des Autorités centrales. Ce n'est pas une obligation pour laquelle l'Autorité centrale peut prendre « toutes les mesures appropriées ». Comme cette obligation doit être exercée de manière complète, l'Autorité centrale doit disposer des pouvoirs et des ressources suffisants pour ce faire. En vertu de l'article 6(3), cette fonction peut être exercée par une Autorité centrale, un organisme public ou un autre organisme.

114 Comme indiqué au paragraphe 110 ci-dessus, les États doivent disposer d'une certaine latitude pour décider eux-mêmes de la manière d'exercer les fonctions de l'article 6(1) et qui doit les exercer. Dans certains États, ces fonctions étaient déjà exercées de manière efficace par des organismes publics ou d'autres organismes. Dans de telles circonstances, il serait contraire aux objectifs de la Convention d'exiger que ces fonctions soient exercées directement par une Autorité centrale. Un important garde-fou a cependant été introduit (à l'art. 6(3)), lequel prévoit que lorsque ces fonctions sont exercées par d'« autres organismes » (c.-à-d. des organismes qui ne sont pas publics), ces derniers restent « soumis au contrôle des autorités compétentes de cet État ».

Alinéa (b) – introduisant ou facilitant l'introduction de procédures relatives à ces demandes.

115 L'alinéa (b) s'inspire de l'article 7(2)(f) de la Convention Enlèvement d'enfants de 1980. Dans cette dernière, les termes « judiciaire ou administrative » succédaient à « procédure ». Cette disposition n'a causé aucun problème d'interprétation de cette Convention.

116 Dans certains États, l'Autorité centrale elle-même a le pouvoir d'engager des procédures judiciaires (« introduisant »). Dans les États où les autorités n'ont pas ce pouvoir, l'Autorité centrale ou l'autorité ou l'organisme désigné doit prendre des mesures pour garantir l'introduction des procédures judiciaires (« facilitant »).

117 Lorsque l'Autorité centrale « facilite » une fonction, cela signifie qu'elle contribue à son exercice ou à sa réalisation en prenant toutes mesures nécessaires, mais qu'elle n'exerce pas habituellement cette fonction elle-même. Une autre personne ou un autre organisme exercera la fonction, en général sur demande de l'Autorité centrale. Voir aussi la discussion relative à la signification de « faciliter » ci-dessus aux paragraphes 107 et 108 (commentaire de l'art. 6 en général). Le terme « faciliter » est également utilisé à l'article 6(2)(a), (e), (f), (g), (i) et (j).

118 L'expression « introduisant ou facilitant l'introduction de procédures » fait obligation à l'Autorité centrale ou à l'organisme désigné de traiter les demandes reçues, conformément aux obligations procédurales de l'article 12. Dans un système judiciaire, lorsqu'une solution amiable ne peut être obtenue en vertu de l'article 6(2)(d), il sera peut-être nécessaire d'introduire une procédure judiciaire. L'Autorité centrale peut faciliter ce processus en demandant à l'organisme ou la personne compétent d'introduire la procédure. Dans un système administratif, la procédure consécutive à la demande prévue au chapitre III doit être engagée. L'obligation se rapporte ici de manière spécifique à l'introduction de toutes procédures nécessaires, judiciaires ou administratives, pour la demande en question.

119 L'alinéa (b) doit être lu conjointement avec les articles 14, 15, 16 et 17. Il doit être également rapproché de l'article 42, qui fait référence aux circonstances dans les-

bility in organising (through Central Authorities or other bodies) the performance of these functions in order to fulfil their responsibilities to the extent possible.

108 Some experts believed that the term "facilitate", used in relation to a number of Article 6 functions, lacked clarity and that it would be preferable to use more concrete terms in order to clearly define the basic functions of Central Authorities. However, the accepted view was that more flexible language was more appropriate in order to accommodate the wide divergence in the powers, resources and capabilities of Central Authorities to perform the functions in question. Partly to compensate for this flexible language, Article 57(1)(b) requires Contracting States to provide to the Permanent Bureau a description of the measures they will take to meet the obligations under Article 6.

109 Article 6 was one of the most extensively debated articles during the early phases of the negotiations. This arose principally from the different interpretations attributed to the provision, as well as concerns that Central Authorities should not be expected to act beyond their powers and resources, or be unreasonably burdened with too many functions. At the same time, there was support in Special Commission debates for maintaining a broad range of administrative functions for Central Authorities in child support cases.

Paragraph 1 – Central Authorities shall provide assistance in relation to applications under Chapter III. In particular they shall –

110 The placement of the mandatory functions of transmitting and receiving applications and initiating or facilitating proceedings in Article 6(1) is intended to give Contracting States the freedom to decide by which bodies these responsibilities should be carried out within their State, including the possibility that these tasks might be performed by bodies other than the Central Authorities. This is achieved when Article 6(1) is read in combination with Article 6(3).

111 Paragraph 1 imposes two obligations. The first is an obligation on Central Authorities to provide general assistance with any of the categories of applications in Article 10 and any other procedures described in Chapter III. The second is an obligation to provide the specific forms of assistance which are listed in paragraph 1. The phrase "in particular" means that the assistance mentioned in Article 6(1) includes, but is not restricted to, the more precise functions of transmitting and receiving applications, or initiating or facilitating legal proceedings.

112 Article 6 should be read in conjunction with Article 9 (Application through Central Authorities). It is intended that assistance from Central Authorities under Article 6 be restricted to those cases where requests (in Art. 7) or applications (in Art. 10) are made through Central Authorities. Although it was agreed that a person should not be prevented from applying directly to a court or competent authority under Chapter V for recognition and enforcement of a decision (Art. 19(5)) or under Chapter VIII for other procedures (Art. 37), the direct applicant will not be entitled to the assistance of Central Authorities that is mandated in Articles 5, 6, 7 and 8.

Sub-paragraph (a) – transmit and receive such applications;

113 The transmission and receipt of applications is a specific primary function of Central Authorities. This is not an obligation for which a Central Authority can take "all appropriate measures". The obligation must be carried out comprehensively and the Central Authority must have sufficient powers and resources to do so. This function may be performed by a Central Authority or a public body or other body in accordance with Article 6(3).

114 As stated in paragraph 110 above, States needed the flexibility to decide themselves how and by whom the functions in Article 6(1) would be performed. In some States these functions were already being performed effectively by public or other bodies. In such circumstances, it would be counter-productive to the objects of the Convention to require that these functions be performed directly by a Central Authority. However, an important safeguard was added (in Art. 6(3)), ensuring that where these functions were performed by "other bodies" (*i.e.*, non-public authorities), such bodies would be "subject to the supervision of the competent authorities of that State".

Sub-paragraph (b) – initiate or facilitate the institution of proceedings in respect of such applications.

115 Sub-paragraph (b) is inspired by Article 7(2)(f) of the 1980 Hague Child Abduction Convention. In that Convention the phrase "judicial or administrative" is inserted before "proceedings". The provision has not caused any problems of interpretation in that Convention.

116 In some States, the Central Authority itself has the power to commence the legal proceedings ("initiate"). In States whose authorities do not have this power, the Central Authority or designated authority or body must take steps to ensure that legal proceedings are initiated ("facilitate").

117 When the Central Authority "facilitates" a function it means the Central Authority helps to bring it about or to make it happen by taking whatever steps are necessary, but does not usually perform the function itself. Some other person or body performs the function, usually upon the request of the Central Authority. See also the discussion on the meaning of "facilitate" above at paragraphs 107 and 108 (general comments on Art. 6). The term "facilitate" is also used in Article 6(2)(a), (e), (f), (g), (i) and (j).

118 The phrase "initiate or facilitate the institution of proceedings" creates the obligation on the Central Authority or designated body to act upon the applications received, subject to the procedural requirements of Article 12. In a court-based system, if an amicable solution has not been reached under Article 6(2)(d), judicial proceedings may have to be instituted. The Central Authority may facilitate this process by requesting the appropriate body or person to initiate the proceedings. In an administrative system, the procedure in response to the application under Chapter III must be commenced. The obligation here is specifically to institute whatever proceedings are necessary, whether judicial or administrative, for the particular application in question.

119 Sub-paragraph (b) should be read in conjunction with Articles 14, 15, 16 and 17. Sub-paragraph (b) should also be read in conjunction with Article 42 which refers to the

quelles une Autorité centrale peut exiger une procuration du demandeur.

Paragraphe 2 – Concernant ces demandes, elles prennent toutes les mesures appropriées pour :

120 L'obligation de l'article 6(2) concernant les demandes visées au chapitre III est celle de prendre « toutes les mesures appropriées » pour apporter les formes d'assistance prévues aux alinéas (a) à (j). Elle oblige les États contractants à faire tout leur possible au sein de leur État, ce qui sera fonction des ressources disponibles, des contraintes d'ordre juridique ou constitutionnel et de la répartition des différentes fonctions au sein de l'État. Il est probable que seul un petit nombre des fonctions énoncées sera requis ou exigé dans un cas particulier. Comme l'indique le paragraphe 3, il n'est pas attendu des Autorités centrales qu'elles exercent elles-mêmes ces fonctions.

121 L'expression « toutes les mesures appropriées » est issue de l'article 7(2) de la Convention Enlèvement d'enfants de 1980. Des expressions similaires, « les dispositions appropriées » et « toutes dispositions appropriées », sont utilisées respectivement aux articles 30 et 31 de la Convention Protection des enfants de 1996. Dans la Convention de 1980, les termes « toutes les mesures appropriées » renvoient clairement à toutes les mesures qu'une Autorité centrale pourrait prendre pour obtenir le résultat désiré, en fonction de ses propres pouvoirs et ressources et sous réserve que ces mesures soient permises par le droit interne des États contractants. Cette interprétation n'a posé aucun problème aux États contractants. Au contraire, la pratique de la Convention de 1980 s'est améliorée de manière significative au fil des ans à mesure que se sont renforcées les capacités des États contractants à exercer certaines fonctions. De telles avancées ont souvent été inspirées de bonnes pratiques suivies par d'autres États. La formulation utilisée est ouverte – elle demande aux États de faire tout leur possible dans le cadre de leurs pouvoirs et ressources et les autorise à développer progressivement leur aptitude à exercer ces fonctions, mettant ainsi en pratique le principe de « mise en œuvre progressive »[69].

122 La formulation « toutes les mesures appropriées » est large. Toutes les mesures, si elles sont appropriées, doivent être prises ; les Autorités centrales peuvent prendre les devants pour chercher comment accorder une assistance. La formulation « toutes les mesures appropriées » se conforme davantage au principe de « mise en œuvre progressive » de la Convention.

123 Il n'est pas possible de définir exactement la nature et l'étendue des fonctions du paragraphe 2. Chaque État contractant a un système interne de lois et procédures distinct, qui doit s'adapter à cet instrument international. Les États contractants et les Autorités centrales doivent bénéficier d'une certaine latitude pour déterminer comment les obligations visées au paragraphe 2 pourraient être exercées, actuellement et à l'avenir. Il convient de rappeler qu'en vertu de l'article 57(1)(b), les États contractants sont tenus de communiquer au Bureau Permanent un descriptif des mesures qu'ils prendront pour remplir les obligations énoncées à l'article 6.

124 Ce serait faire erreur que de considérer les obligations visées au paragraphe 2 comme des obligations « souples », voire « facultatives ». L'emploi du présent de l'indicatif signifie en effet qu'il existe une obligation claire et précise de prendre « toutes les mesures appropriées ». Si les modalités d'exécution de l'obligation sont susceptibles de varier, l'obligation doit être exécutée. La formulation souple de l'article 6(2) doit être lue à la lumière du principe essentiel de l'accès effectif aux procédures établi à l'article 14.

125 En vertu de la terminologie ouverte employée au paragraphe 2, toute Autorité centrale doit être capable de remplir ces obligations, soit par elle-même, soit en coopération avec des organismes publics ou d'autres organismes, soit en orientant le demandeur vers l'autorité appropriée ou en le conseillant sur les démarches à suivre. Une bonne pratique consisterait, pour un État contractant, à s'assurer au moment de la ratification ou de l'adhésion que son Autorité centrale ou ses organismes désignés disposent des pouvoirs et ressources suffisants pour exercer leurs fonctions.

Alinéa (a) – accorder ou faciliter l'octroi d'une assistance juridique, lorsque les circonstances l'exigent ;

126 L'alinéa (a) est en partie inspiré des inquiétudes exprimées lors de la Commission spéciale de 1999 selon lesquelles quelques États n'avaient pas ratifié la Convention Obligations alimentaires de 1973 (Exécution) faute de dispositions appropriées en matière d'aide judiciaire. De plus, « sans harmonisation plus étroite à cet égard [d'une conception plus uniforme de l'attribution de l'aide judiciaire], l'efficacité d'une refonte du système international de recouvrement sera amoindrie »[70].

127 L'obligation visée à l'alinéa (a) n'aura pas lieu d'être exercée dans tous les cas. C'est ce qui résulte clairement de l'expression « lorsque les circonstances l'exigent ». Lorsque les circonstances l'exigent, l'Autorité centrale ou l'organisme désigné doit prendre des dispositions pour garantir l'apport d'une assistance juridique. Si l'Autorité centrale n'accorde pas elle-même ce service, elle doit prendre toutes les mesures appropriées pour aider à l'obtenir ou veiller à ce que ce service soit fourni par un autre organisme ou une autre personne, dans la mesure permise par les lois et les procédures de l'État requis. Cette obligation est renforcée par celle, énoncée à l'article 14, d'assurer un accès effectif aux procédures et doit être lue à la lumière des obligations découlant de l'assistance juridique dans les affaires d'aliments destinés aux enfants prévue aux articles 15 et 16. Le sens de « faciliter » est expliqué dans le commentaire de l'article 6(1)(b).

128 L'expression « assistance juridique » est définie à l'article 3(c). On a voulu qu'elle prenne tout en compte, c'est-à-dire toute forme d'aide, de conseil ou de représentation juridiques pouvant « permettre aux demandeurs de connaître et de faire valoir leurs droits et pour garantir […] que leurs demandes seront traitées de façon complète et efficace dans l'État requis »[71]. Les versions antérieures du projet de Convention faisaient une distinction entre conseil juridique, représentation en justice et assistance judiciaire. Dans un souci de trouver un compromis entre les différents systèmes juridiques et administratifs des États et les différents niveaux de ressources, la Commission spéciale de 2005 a cependant préféré l'expression générale « assistance juridique », laquelle permet à différents États de fournir ce service en fonction de leurs structures et ressources. Ainsi que souligné au paragraphe 69 du présent Rapport, ce terme a été à nouveau débattu pendant la Commission spéciale de

[69] La « mise en œuvre progressive » est un principe de fonctionnement clé du Guide de bonnes pratiques sur la pratique des Autorités centrales (*op. cit.* note 61).

[70] Rapport et Conclusions de la Commission spéciale de 1999 (*op. cit.* note 3), au para. 12.

[71] De tels conseils, assistance ou représentation pourraient comprendre toute démarche juridique relative aux fonctions énumérées à l'art. 6(2) comme la localisation des biens du débiteur, l'obtention de preuves, l'établissement de la filiation le cas échéant par des tests génétiques ou relative aux mesures d'exécution visées à l'art. 34.

circumstances in which a Central Authority may require a power of attorney from an applicant.

Paragraph 2 – In relation to such applications they shall take all appropriate measures –

120 The obligation in Article 6(2) is an obligation in relation to Chapter III applications to take "all appropriate measures" to provide the kinds of assistance listed in sub-paragraphs (a) to (j). It obliges Contracting States to do what is possible within their State. This will be determined by available resources, legal or constitutional constraints, and the manner in which different functions are distributed within the State. It is expected that only a small number of the listed functions would be requested or required for any one case. There is no expectation that Central Authorities themselves must perform these functions, as paragraph 3 makes clear.

121 The phrase "all appropriate measures" is taken from Article 7(2) of the 1980 Hague Child Abduction Convention. A similar phrase, "all appropriate steps", is used in Articles 30 and 31 of the 1996 Hague Child Protection Convention. The phrase "all appropriate measures" has been clearly understood in the 1980 Convention to mean any measures that a Central Authority could take to achieve the required result, depending on its own powers and resources, and provided those measures are permitted by the internal laws of the Contracting State. This interpretation has not caused any difficulties for Contracting States. On the contrary, practice under the 1980 Convention has improved significantly over time as Contracting States have acquired a greater capacity to perform certain functions. Such improvements have often been in response to good practices established in other States. The formula has been a flexible one, requiring States to do everything within their powers and resources, allowing them to gradually expand their capacity to carry out these functions, thereby putting into practice the principle of "progressive implementation".[69]

122 The phrase "all appropriate measures" is expansive. All measures, if appropriate, shall be taken; Central Authorities can be more proactive in finding appropriate ways to assist. "All appropriate measures" lends itself more effectively to the principle of "progressive implementation" of the Convention.

123 It is not possible to provide absolute clarity about the nature and extent of the functions in paragraph 2. Every Contracting State has a different internal system of laws and procedures that must be accommodated in this international instrument. There must be some flexibility for Contracting States and Central Authorities to decide how the obligations in paragraph 2 can be fulfilled, at the present time and in the future. It is recalled that Article 57(1)(b) requires Contracting States to provide to the Permanent Bureau a description of the measures they will take to meet the obligations under Article 6.

124 It is a misunderstanding to consider the obligations in paragraph 2 as "soft" obligations, even "optional". The word "shall" means there is a clear obligation to "take all appropriate measures". There is flexibility in how an obligation may be carried out, but not in whether it is or is not carried out. The flexible language in Article 6(2) needs to be read in the light of the overarching principle of effective access to procedures set out in Article 14.

125 By virtue of the flexible language employed in paragraph 2, any Central Authority should be able to fulfil these obligations either by itself or in co-operation with public bodies or other bodies, or by referral of the applicant to the appropriate authority, or by advising the applicant of steps she or he needs to take. As a matter of good practice, a Contracting State, at the time of ratification or accession, should ensure its Central Authority or designated bodies have sufficient powers and resources to perform their functions.

Sub-paragraph (a) – where the circumstances require, to provide or facilitate the provision of legal assistance;

126 Sub-paragraph (a) was inspired partly by concerns expressed in the 1999 Special Commission that some countries had not ratified the 1973 Hague Maintenance Convention (Enforcement) because of the absence of adequate provisions on legal aid. Furthermore, "[w]ithout greater harmony in this matter [of a more uniform approach to the provision of legal aid], the efficacy of any re-shaping of the international system of recovery would be diminished".[70]

127 The obligation imposed by sub-paragraph (a) will not arise in every case. This is clear from the opening words "where the circumstances require". When the circumstances do so require, the Central Authority or designated body must take steps to ensure that legal assistance is provided. If the Central Authority itself does not provide the service, it must take all appropriate measures to help to obtain it or to ensure that this service is provided by another body or person, to the extent permitted by the laws and procedures in the requested State. This obligation is given additional emphasis by the obligation in Article 14 to provide effective access to procedures and should be read in the light of the obligations arising from legal assistance in child support cases set out in Articles 15 and 16. The meaning of "facilitate" is explained under Article 6(1)(b).

128 The term "legal assistance" is defined in Article 3(c). It is intended to be an all-encompassing term that may include any kind of legal help, advice or representation that will "enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State".[71] Previous drafts of the Convention text made a distinction between legal advice, legal representation and legal assistance. However, due to the need to accommodate differences in the legal and administrative systems of States, as well as differences in resources, it was agreed in the 2005 Special Commission that the general term "legal assistance" would be preferable, allowing different countries to provide the service according to their structure and resources. As mentioned in paragraph 69 of this Report, the term was discussed again in the

[69] "Progressive implementation" is a key operating principle in the Guide to Good Practice on Central Authority Practice (*op. cit.* note 61).

[70] Report and Conclusions of the 1999 Special Commission (*op. cit.* note 3), at para. 12.

[71] Such help, advice or representation may include any legal steps needed in relation to functions listed in Art. 6(2) such as locating a debtor's assets, the taking of evidence and establishing parentage, including genetic testing if necessary, or in relation to enforcement measures referred to in Art. 34.

2007 et sa définition étendue afin de lui conférer une plus grande clarté. La définition révisée est également connectée plus clairement avec l'obligation commune de l'article 14 de fournir un accès effectif aux procédures, quel que soit le moyen utilisé pour y parvenir.

129 Les moyens d'octroyer l'« assistance juridique » peuvent comprendre, si besoin est : « conseils juridiques, [...] assistance lorsqu'une affaire est portée devant une autorité, [...] représentation en justice et [...] l'exonération des frais de procédure ». L'assistance juridique générale qu'accorde l'Autorité centrale peut prendre la forme, par exemple, d'une assistance à la préparation d'une demande ou à l'obtention de documents, d'une assistance au demandeur pour les demandes d'informations juridiques complémentaires émanant de l'État requis, d'un contact avec le représentant juridique du demandeur dans l'État requis, d'une exonération des frais de procédure, d'un accès à des services de médiation. Souvent, les questions juridiques soulevées dans une affaire sont trop complexes pour être résolues par un employé administratif et l'assistance d'un avocat sera nécessaire. L'assistance prévue à l'article 12(1) peut également comprendre l'assistance juridique selon les circonstances. Un mandataire pour représenter le demandeur pourrait aussi fournir une assistance juridique.

130 L'« assistance juridique » peut prendre la forme d'une aide à l'obtention d'une « représentation juridique », c'est-à-dire d'une représentation du demandeur dans l'État requis par un avocat ou conseiller juridique devant le tribunal ou en dehors, dans les procédures judiciaires ou les négociations avec l'autre partie, ou pour bénéficier de conseils juridiques portant particulièrement sur le déroulement de l'affaire du demandeur dans l'État requis. Dans certains pays, la « représentation en justice » par l'Autorité centrale signifie la représentation en justice de la créance, non du demandeur, et les implications de cette distinction doivent être expliquées conformément à l'article 57(1)(b).

131 L'obligation de l'article 6(2) ne signifie pas qu'il appartient à l'Autorité centrale de rechercher une représentation en justice pour un demandeur au sein de son État. Cette fonction relève du système interne d'aide judiciaire.

132 L'« assistance juridique » peut prendre la forme d'une aide à l'obtention de « conseils juridiques ». Ces conseils juridiques pourraient être dispensés par l'Autorité centrale ou un conseiller juridique privé. Lorsque c'est l'Autorité centrale qui dispense ce service et qu'elle est localisée dans un ministère ou un département gouvernemental, il est peu probable qu'elle offre des « conseils juridiques » d'ordre privé aux individus. Les « conseils juridiques » dispensés par l'Autorité centrale requise ou requérante dans le cadre de l'article 6 sont d'ordre général et l'Autorité centrale sera la mieux placée pour les accorder. Il s'agit par exemple de conseils sur le fonctionnement des lois relatives aux obligations alimentaires envers les enfants dans cet État, de conseils sur le mode de mise en œuvre de la Convention au niveau interne et international, de conseils destinés à déterminer si la Convention est l'instrument le plus efficace à utiliser dans un cas particulier, de conseils sur l'accueil à réserver dans un cas particulier à une proposition de solution amiable, en application de l'article 6(2)(d). Ce sont des questions sur lesquelles il est probable qu'un juriste d'une Autorité centrale sera particulièrement qualifié et informé. Les conseils juridiques ne devront pas être fournis par une personne qui n'est pas qualifiée et formée pour ce faire.

133 Lorsqu'une aide est accordée pour faciliter l'obtention d'une représentation en justice, des conseils juridiques similaires à ceux dispensés dans le cadre d'une relation avocat-client protégée par le secret professionnel peuvent assurément être dispensés par un autre organisme (par ex. un organisme d'aide juridique) ou un mandataire (désigné pour représenter le demandeur).

134 Le texte de l'alinéa (a) est emprunté à l'article 7(2)(g) de la Convention Enlèvement d'enfants de 1980. Cette disposition de la Convention de 1980 n'avait pas pour objectif de confier directement à l'Autorité centrale la responsabilité de fournir une représentation ou une aide juridique gratuite. Cette disposition n'a pas engendré de problèmes d'interprétation dans cette Convention.

Alinéa (b) – aider à localiser le débiteur ou le créancier ;

135 Une assistance pour localiser les débiteurs ou les créanciers peut être nécessaire dans deux cas de figure : premièrement, suite à la réception d'une demande fondée sur le chapitre III, lorsque l'on sait ou présume que le débiteur ou le créancier se trouve dans l'État requis ; ou, deuxièmement, avant l'envoi de la demande, lorsqu'il est nécessaire de déterminer si le débiteur ou le créancier se trouve dans l'État requis (voir art. 7(1)). Certains États accordent cette assistance en vertu d'instruments bilatéraux ou multilatéraux existants.

136 On peut penser que la majorité des demandes auront pour objet de localiser le débiteur. Cependant, une assistance à la localisation d'un créancier peut être nécessaire lorsque celui-ci est défendeur dans le cadre d'une demande de modification d'une décision introduite par le débiteur conformément à l'article 10(2).

137 Lorsqu'elle reçoit une demande fondée sur le chapitre III et si l'adresse du débiteur ou du créancier est inconnue, l'Autorité centrale requise doit faire tout son possible pour localiser le débiteur ou le créancier. Il importe peu que l'Autorité centrale ait accès ou non à certaines bases de données. L'Autorité centrale sait quels registres publics, tels que les annuaires téléphoniques ou les registres civils qui contiennent des coordonnées personnelles, peuvent être consultés dans son propre État ; à défaut, elle saura quels organismes publics conservent des données sur l'adresse d'une personne.

138 L'obligation d'assistance à la localisation du débiteur ou du créancier peut être soumise aux lois internes sur la protection des données personnelles. Si les informations relatives à la situation géographique du débiteur ou du créancier sont protégées par ces lois, l'Autorité centrale requise devra déterminer comment procéder pour obtenir des informations permettant de localiser le débiteur ou le créancier. Il faut souligner que les informations auxquelles il est fait référence ici sont requises aux fins de la procédure judiciaire ou administrative dans l'État requis et non pour les dévoiler à l'autre parent ou à l'Autorité centrale requérante. La protection des données personnelles obtenues pour les besoins de la présente Convention est garantie par les articles 38, 39 et 40. L'État contractant devra prévoir, dans ses mesures de mise en œuvre, un équilibre entre le droit de l'enfant à bénéficier d'un soutien financier et le droit de l'adulte à la protection de ses données personnelles. Cela dit, la Convention des Nations Unies relative aux droits de l'enfant implique que les droits de l'enfant, en raison de sa vulnérabilité, devraient prévaloir.

139 Le deuxième cas de figure mentionné ci-dessus – déterminer si le débiteur ou le créancier se trouve dans l'État requis avant l'envoi de la demande – se présente lors d'une requête de mesures spécifiques en application de l'article 7.

2007 Special Commission and the definition was expanded to give it greater clarity. The revised definition also makes a clearer connection with the overarching obligation in Article 14 to provide effective access to procedures, however that may be achieved.

129 The means of providing "legal assistance" may include as necessary "legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". "Legal assistance" of a general nature provided by a Central Authority could, for example, include: assistance in preparing an application or obtaining documents; assistance to the applicant in responding to requests from the requested State for more legal information; liaising with the applicant's legal representative in the requested State; exemption from court fees; access to mediation services. There are often legal issues arising in a case that are too complex for an administrative officer to resolve and the assistance of a lawyer is needed. The assistance envisaged under Article 12(1) may also include legal assistance, depending on the circumstances. A private attorney appointed to represent the applicant could also provide legal assistance.

130 Provision of "legal assistance" may include helping to obtain "legal representation". This could mean having a lawyer, attorney or solicitor in the requested State to represent the applicant in and out of court; in legal proceedings or negotiations with the other party; or to provide legal advice specifically in relation to the conduct of the applicant's case in the requested State. In some countries, "legal representation" by the Central Authority will mean legal representation of the claim, not the applicant, and the implications of this should be explained in accordance with Article 57(1)(b).

131 The obligation in Article 6(2) should not be interpreted as requiring a Central Authority to find legal representation for an applicant within his or her own country. That is a function of the internal legal aid system.

132 Provision of "legal assistance" may include help to obtain "legal advice". This could be legal advice from the Central Authority or legal advice from a private attorney. If the Central Authority is the service provider and is located in a government ministry or department, the Central Authority is unlikely to give private "legal advice" to individuals. "Legal advice" given by the requested or requesting Central Authority in the context of Article 6 is intended to be of a general nature, but which a Central Authority may be best placed to give, for example, advice on how the child support laws operate in that country; advice on how the Convention is implemented internally or internationally; advice on whether the Convention is the most effective instrument to use in a particular case; advice on whether an amicable solution proposed under Article 6(2)(d) is acceptable in a particular case. These are matters on which a Central Authority lawyer is likely to have particular knowledge and expertise. Legal advice should not be given by a person who does not have appropriate qualifications and training.

133 Private legal advice of the privileged and protected nature given in an attorney-client relationship could certainly be given by another body (such as a legal aid body) or a private attorney (appointed to represent the applicant) when help is provided to obtain legal representation.

134 The text of sub-paragraph (a) is drawn from Article 7(2)(g) of the 1980 Hague Child Abduction Convention. The interpretation of this provision in the 1980 Convention has not been to impose directly on the Central Authority the responsibility to provide free legal representation or free legal aid. The provision has not caused any problems of interpretation in that Convention.

Sub-paragraph (b) – to help locate the debtor or the creditor;

135 Assistance in locating debtors or creditors may be needed in two situations: first, following receipt of an application under Chapter III, when it is known or assumed that the debtor or creditor is in the requested State; or second, before sending an application, when it is necessary to establish if the debtor or creditor is in the requested State (see Art. 7(1)). Such assistance is provided by a number of countries under existing multilateral and bilateral instruments.

136 The majority of requests will presumably be to locate the debtor. However, assistance in locating a creditor may be needed when the creditor is the respondent to an application by the debtor for modification of a decision in accordance with Article 10(2).

137 When a Chapter III application is received, and the debtor's or creditor's whereabouts is not known, the requested Central Authority must do everything possible to locate the debtor or creditor. Whether or not the Central Authority has access to databases of information is irrelevant. The Central Authority knows, in its own country, whether public records such as telephone lists or population registers with personal contact details can be searched, and if not, which public bodies store information about a person's address.

138 The obligation to help locate the debtor or creditor may be subject to internal privacy laws. If the information about the debtor's or creditor's location may not be released because of privacy laws, the requested Central Authority will need to consider what steps could be taken to obtain the information needed to locate the debtor or creditor. It must be emphasised that the information referred to here is obtained for the purpose of legal or administrative proceedings in the requested State, and not for disclosure to the other parent or the requesting Central Authority. Protection of personal information, obtained for the purposes of this Convention, is guaranteed by Articles 38, 39 and 40. In its implementing measures, a Contracting State will need to balance a child's right to financial support against an adult's right to privacy. However, the UN Convention on the Rights of the Child implies that the rights of the child, by virtue of her / his vulnerability, should take precedence.

139 The second situation referred to above – establishing if the debtor or creditor is in the requested State before sending an application – is covered by a specific measures request under Article 7. Some countries already confirm

Certains États confirment que le débiteur réside dans leur État avant de conseiller à l'Autorité centrale requérante d'envoyer une demande formelle. Par exemple, dans un État, lorsqu'une assistance à la localisation du débiteur est demandée, l'Autorité centrale prendra des dispositions pour confirmer que le débiteur réside sur son territoire, sans dévoiler son adresse ni aucune autre information d'ordre personnel. Dès qu'elle est informée que le débiteur se trouve sur ce territoire, l'Autorité centrale de l'État requérant formalisera une demande d'aliments destinés à un enfant.

140 Cet exemple montre bien que la recherche d'une assistance limitée par l'intermédiaire d'une requête de mesures spécifiques visée à l'article 7 a ses avantages. Elle évite au demandeur ou à l'État requérant de perdre du temps et de l'argent à préparer une demande et à payer des frais de traduction si le défendeur ne se trouve pas dans l'État concerné.

141 La Convention Enlèvement d'enfants de 1980 comprend une disposition similaire qui impose aux Autorités centrales de prendre, soit directement, soit avec le concours d'un intermédiaire, toutes les mesures appropriées pour localiser un enfant déplacé ou retenu illicitement[72]. Cette disposition n'a pas soulevé de difficulté de fonctionnement de la Convention de 1980. Les affaires d'enlèvement d'enfants sont marquées par les niveaux de ressources très différents d'un État à l'autre pour aider à la localisation d'un enfant enlevé. Certains États ont des services de localisation très sophistiqués qui permettent de retrouver des parents grâce aux informations figurant dans des bases de données gouvernementales. Dans d'autres États, des ordonnances judiciaires peuvent être sollicitées afin d'obtenir certaines informations d'autres organismes, par exemple un établissement bancaire[73]. En revanche, certains États ne sont pas en mesure d'obtenir une aide de la police lorsque l'adresse de l'enfant n'a pas été communiquée par l'État requérant. Comme dans les affaires d'enlèvement d'enfants où il est fondamental d'aider à localiser l'enfant disparu, dans les affaires d'aliments destinés aux enfants, il est fondamental d'aider à localiser le débiteur.

Alinéa (c) – faciliter la recherche des informations pertinentes relatives aux revenus et, si nécessaire, au patrimoine du débiteur ou du créancier, y compris la localisation des biens ;

142 Les informations recherchées doivent être pertinentes aux fins du recouvrement des aliments. L'expression « si nécessaire » renvoie au patrimoine du débiteur et à la localisation des biens. En effet, de telles informations ne sont pas toujours nécessaires et une Autorité centrale ne devrait pas se voir imposer de rechercher ces informations lorsqu'elles sont inutiles. À titre d'exemple, l'Autorité centrale requise aiderait à obtenir des informations sur la situation financière du débiteur à réception d'une demande de reconnaissance et d'exécution d'une décision ou d'une demande d'obtention ou de modification d'une décision. Dans certains pays, le revenu du débiteur n'est qu'une information parmi d'autres, requise pour évaluer le montant de l'obligation alimentaire du débiteur, et des informations sur d'autres aspects de la situation financière seront nécessaires. Pour remplir cette obligation, l'Autorité centrale peut contacter le débiteur pour l'inviter à communiquer volontairement ces renseignements. Elle pourra aussi renvoyer la requête à un autre organisme ou au ministère public, au Ministère de la Justice ou à un comité d'aide juridique si l'obtention de ces informations requiert une procédure judiciaire. Des informations sur la situation financière du créancier peuvent être nécessaires pour rendre une décision dans l'État du débiteur ou si le débiteur cherche à modifier la décision.

143 L'assistance prévue à l'alinéa (c) peut aussi être sollicitée pour déterminer s'il vaut la peine de poursuivre la demande d'aliments. Dans ce cas, une requête de mesures spécifiques sera déposée conformément à l'article 7(1). Ainsi, il sera préférable de savoir à l'avance si le débiteur perçoit des allocations familiales ou de chômage car, dans ce cas, le paiement d'aliments ne sera probablement pas prononcé contre lui et il serait inutile de payer des frais de préparation et de traduction d'une demande.

144 Lorsque l'assistance prévue à l'alinéa (c) aboutit, à savoir débouche sur la localisation des biens, l'État requérant peut alors solliciter une assistance aux termes de l'alinéa (i) (mesure provisoire à caractère territorial) pour bloquer les biens du débiteur dans l'État requis si, par exemple, la reconnaissance et l'exécution d'une décision d'aliments est pendante dans ce dernier. Les requêtes en vue d'une assistance prévue par les alinéas (c) et (i) peuvent être déposées en même temps par application de l'article 7.

145 Les informations auxquelles se réfère l'alinéa (c) ont, dans certains cas, été sollicitées par l'intermédiaire d'une commission rogatoire, par exemple en vertu de l'article 7 de la Convention de New York de 1956 ou de la Convention Obtention des preuves de 1970[74]. Ces deux voies peuvent impliquer un processus long et complexe qui pourrait aller à l'encontre des objectifs de rapidité et de simplicité de la présente Convention. L'alinéa (g) ci-dessous mentionne une autre procédure d'obtention des preuves, fondée sur la Convention, qui est destinée à réduire au minimum les retards.

146 Des inquiétudes similaires à celles exprimées sur la protection des informations et des données personnelles dans le cadre de l'alinéa (b) relatif à la localisation du débiteur sont apparues dans le cadre de l'alinéa (c) lors des discussions de la Commission spéciale. Certains experts ont déclaré que l'obligation de l'alinéa (c) était contraire à leurs principes de droit bancaire et de protection des données personnelles. D'autres experts ont indiqué que ces informations ne pouvaient être obtenues que par le biais d'une procédure judiciaire. Un État a trouvé une solution en modifiant sa législation de façon à exclure du champ d'application de ses lois relatives à la protection des données personnelles toute requête déposée en vertu de la Convention.

147 Il est souligné que l'alinéa (c) n'impose pas à l'Autorité centrale elle-même de rassembler les preuves ni n'autorise les Autorités centrales à exercer des pouvoirs réservés aux autorités judiciaires. Dans certains pays, il peut être nécessaire d'appliquer la Convention Obtention des preuves de 1970, la Convention Procédure civile de 1954[75] ou d'autres règles juridiques internes. Cependant, chaque État contractant ou Autorité centrale doit prendre des dispositions pour faciliter l'obtention de ces informations le plus rapidement possible.

[72] Art. 7(2)(a).

[73] Par exemple, un tribunal avait ordonné à une banque de dévoiler les lieux où le parent ravisseur avait utilisé sa carte de crédit, pour permettre à la police de retracer les mouvements du parent et d'éventuellement localiser l'enfant. Aux États-Unis d'Amérique, un service fédéral de localisation des parents a été créé pour des affaires internes, mais il est également possible d'y recourir pour les affaires internationales.

[74] *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale*.

[75] *Convention de La Haye du premier mars 1954 relative à la procédure civile*.

Rapport explicatif

that a debtor resides in the country before advising a requesting Central Authority to send a formal application. For example, in one country, when requested to assist in locating a debtor, the Central Authority would take steps to confirm that the debtor resided in the territory, but would not disclose the debtor's address or other personal information. Upon notification that the debtor is present in that territory, the Central Authority in the requesting State would make a formal application for child support.

140 This example also usefully illustrates the benefits of seeking limited assistance through a request for specific measures in Article 7. It guarantees that the applicant or the requesting State does not spend time and money on preparing an application and paying for translations if the respondent is not in the State addressed.

141 A comparable provision in the 1980 Hague Child Abduction Convention obliges Central Authorities, either directly or through an intermediary, to take all appropriate measures to discover the whereabouts of a child who has been wrongfully removed or retained.[72] This provision has not caused any difficulties in the operation of the 1980 Convention. What is noticeable in child abduction cases is the different level of resources in different countries to help locate an abducted child. Some countries have very sophisticated locate services where abducting parents may be traced through information on government databases. In other countries, court orders may be sought to direct other bodies such as banks to disclose certain information.[73] On the other hand, some countries are not able to obtain any police assistance if an address for the abducted child is not provided by the requesting State. Just as in a child abduction case it is of fundamental importance to help locate the missing child, so in a child support case it is of fundamental importance to help locate the debtor.

Sub-paragraph (c) – to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;

142 Any information sought must be relevant to the purpose of the recovery of maintenance. The words "if necessary" relate to the financial circumstances and location of assets. Such information may not be necessary in every case, and there should be no obligation on a Central Authority to obtain it when it is not necessary. For example, a requested Central Authority would help obtain information about the debtor's financial circumstances upon receipt of a request to recognise and enforce a decision, or upon receipt of a request to establish (or modify) a decision. In some countries, the income of the debtor is only one of the relevant details needed to assess the amount of the debtor's obligation to pay maintenance, and information about other financial circumstances will be necessary. The Central Authority might fulfil this obligation by contacting the debtor to request the information voluntarily. Or it may refer the request to another body to perform the function. Or it may refer the request to the Public Prosecutor / State Attorney's Office / Legal Aid Board if legal proceedings are necessary to obtain the information. Information about the creditor's financial circumstances may be requested if a decision is to be established in the debtor's jurisdiction, or if the debtor seeks modification of a decision.

143 The assistance provided for in sub-paragraph (c) may also be sought in order to establish if it is worth pursuing a claim for maintenance. In that case a specific measures request would be made in accordance with Article 7(1). For example, it is preferable to know in advance if a debtor is receiving welfare or unemployment payments, as it is likely that she or he would not be ordered to pay maintenance. In such a case, it may not be worth the cost of preparing and translating an application.

144 If the assistance under sub-paragraph (c) is successful, *i.e.*, leads to a location of assets, the requesting State may then seek assistance under sub-paragraph (i) (a provisional territorial measure) to freeze the debtor's assets in the requested State if, for example, recognition and enforcement of a maintenance decision is pending in the latter country. Requests for assistance under sub-paragraphs (c) and (i) could be made simultaneously under Article 7.

145 The information referred to in sub-paragraph (c) has in some cases been sought by means of a letter of request, for example, under Article 7 of the 1956 New York Convention, or under the 1970 Hague Evidence Convention.[74] Both these avenues can involve a lengthy and complicated process, which could defeat the aims of speed and simplicity in the present Convention. In sub-paragraph (g) below, another procedure for requesting evidence under this Convention is mentioned, to minimise delays.

146 Similar concerns about privacy and protection of information mentioned in sub-paragraph (b) in relation to locating the debtor were expressed about sub-paragraph (c) in Special Commission debates. Some experts stated that the obligation in sub-paragraph (c) contravened their principles of banking law and protection of personal information. Other experts stated that such information could only be obtained by a judicial process. One country resolved the issue by amending its legislation to exempt from its privacy and data protection laws any such requests if made in accordance with the Convention.

147 It is emphasised that sub-paragraph (c) does not impose an obligation on the Central Authority itself to gather the evidence and does not permit Central Authorities to exercise powers which can only be exercised by judicial authorities. In some countries, it may be necessary to apply the 1970 Hague Evidence Convention, the 1954 Hague Civil Procedure Convention[75] or other internal legal rules. But each Contracting State or Central Authority must take steps to help obtain the information as quickly as possible.

[72] Art. 7(2)(a).
[73] For example, a bank was ordered by a court to disclose the locations where a credit card had been used by an abducting parent, as a way of enabling the police to trace the movements of the parent and eventually to locate the child. In the United States of America, the Federal Parent Locator Service was developed for domestic purposes but is also available in international cases.

[74] *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.
[75] Hague Convention of 1 March 1954 on civil procedure.

Alinéa (d) – encourager les règlements amiables afin d'obtenir un paiement volontaire des aliments, lorsque cela s'avère approprié par le recours à la médiation, à la conciliation ou à d'autres modes analogues ;

148 Cette obligation exige que l'Autorité centrale favorise et encourage de manière active le recours à des méthodes ou procédures qui aboutissent à un règlement amiable. L'exécution volontaire est souhaitable dans les affaires d'obligations alimentaires envers les enfants. L'Autorité centrale est ainsi moins sollicitée pour des mesures d'exécution et les frais et retards liés aux procédures judiciaires sont évités.

149 La fonction prévue à l'alinéa (d) est liée à un principe important selon lequel les efforts fournis pour encourager le paiement volontaire des aliments ne doivent pas empêcher l'accès effectif aux procédures au sens de l'article 14.

150 La médiation, la conciliation et autres moyens analogues ont été introduits dans la liste des fonctions de l'Autorité centrale en vue d'encourager la prise en considération d'autres modes de résolution des différends, notamment dans les cas difficiles qui n'ont pas fait l'objet de procédures judiciaires ou de mesures juridiques. Le recours à la médiation, à la conciliation ou à d'autres moyens analogues est soumis à une condition importante, rendue par l'expression « lorsque cela s'avère approprié ». Ainsi, la médiation pourrait aider à résoudre une situation dans laquelle le refus du créancier d'accepter un contact ou un droit de visite entre le débiteur et son enfant entraînerait le non-paiement des aliments par le débiteur. On admet généralement que si des accords volontaires sont les plus efficaces dans certains cas, toutes les affaires ne se prêtent pas à un règlement amiable ou à une médiation.

151 Il est admis que la médiation et la conciliation peuvent présenter quelques difficultés logistiques dans les affaires de recouvrement international d'aliments destinés aux enfants. Bien qu'il soit très difficile de pouvoir réunir les parties en vue d'une médiation, le recours aux technologies audio-visuelles peut être envisagé. Les nouvelles techniques de médiation en matière familiale internationale font l'objet d'un examen continu.

152 Cette fonction consisterait au minimum à se renseigner sur les possibilités d'une médiation entre les parties. D'autres possibilités seraient de recourir à l'aide d'un médiateur externe dans les cas difficiles ou d'orienter les parties vers un service international de médiation. L'alinéa (d) n'oblige en rien le personnel de l'Autorité centrale à mener ou à superviser une médiation. Une Autorité centrale a témoigné du large succès d'un projet visant à obtenir le paiement des aliments de débiteurs défaillants. Un personnel formé à cet effet contactait directement les débiteurs pour discuter des solutions possibles pour payer les aliments en cours et réduire les arrérages.

153 On a préféré le verbe « encourager » à « faciliter » car certains experts ont estimé que ce dernier aurait créé une obligation que certains États ne pourraient assumer.

Alinéa (e) – faciliter l'exécution continue des décisions en matière d'aliments, y compris les arrérages ;

154 Le verbe « faciliter » est employé dans l'article 6(1)(b) et (2)(a), (e), (f), (g), (i) et (j). Son sens est expliqué ci-dessus aux paragraphes 116 et 117 (sous art. 6(1)(b)).

155 Les obligations prévues à l'alinéa (e) font peser sur les Autorités centrales une obligation générale de prendre les mesures appropriées afin de garantir la régularité des paiements des aliments aux créanciers. L'Autorité centrale devrait s'assurer que les mesures initiales prises en vue de la perception des paiements ou de l'exécution de la décision en matière d'aliments seront efficaces. Des mesures d'exécution efficaces sont énumérées à l'article 34.

156 L'action de l'alinéa (e) est également recommandée dans les cas difficiles de défaillances répétées. La Convention recherche des moyens d'éviter que le créancier ait à introduire de fréquentes demandes d'exécution. Une « exécution continue », dans ce contexte, implique une relance des mesures d'exécution ou des efforts dans l'hypothèse où le débiteur ne procède pas au paiement des aliments. L'assistance fournie par les Autorités centrales dans de telles hypothèses peut comprendre la fourniture de conseils ou d'une assistance au créancier concernant des mesures d'exécution, un contrôle plus approfondi des affaires difficiles exercé par l'Autorité centrale, l'annulation de l'option de paiement volontaire dont bénéficie le débiteur et faire procéder à une saisie sur salaire. La mention des arrérages dans cette disposition tient à deux raisons. Tout d'abord, elle souligne que la décision en matière d'aliments peut concerner soit les arrérages seulement, soit les aliments en cours et les arrérages. Deuxièmement, l'existence ou l'accumulation des arrérages signifie que le débiteur est déjà en retard sur ses paiements d'aliments et que l'exécution est ou peut être source de problème dans ce cas particulier.

157 Les versions antérieures de cette disposition mentionnaient un « examen et une exécution continus ». La notion d'« examen » a été retirée car certains experts ont estimé qu'elle faisait peser sur les Autorités centrales une obligation de suivi et de contrôle de chaque affaire impossible à tenir, que des problèmes d'exécution se posent ou non. L'obligation prévue à l'alinéa (e) présuppose que la reconnaissance et l'exécution ont déjà eu lieu.

158 Les discussions de la Commission spéciale sur cette question ont mis en avant les différences entre les systèmes de suivi et d'exécution. Certains experts ont fortement soutenu l'obligation de l'alinéa (e), estimant qu'un contrôle effectif de la procédure d'exécution était essentiel pour garantir le recouvrement régulier des aliments, tandis que d'autres, issus d'autres États, ont estimé qu'il serait impossible de remplir cette obligation et que des problèmes de recouvrement des aliments ou d'exécution des obligations alimentaires ne seraient portés à l'attention des autorités que par les créanciers.

159 Il a été souligné que certains pays ont des systèmes informatisés de gestion des affaires qui permettent un suivi plus rapide et efficace des dossiers. Lorsque les aliments sont recouvrés et redistribués par une autorité publique, tout non-paiement sera immédiatement détecté par un système informatisé. Dans un État, un avis de non-paiement est généré automatiquement et envoyé au débiteur dès qu'il y a défaut de paiement. Un registre des non-paiements récurrents peut être mis en place pour faciliter le déclenchement de mesures d'exécution appropriées. L'exécution continue sera également améliorée grâce à une grande palette de mesures d'exécution graduées, éventuellement à mettre en œuvre par la voie administrative, sans les retards classiques inhérents à certains systèmes judiciaires. Toutes ces mesures possibles ne représenteront pas une diminution des garanties juridiques.

Alinéa (f) – faciliter le recouvrement et le virement rapide des paiements d'aliments ;

Sub-paragraph (d) – to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;

148 This obligation requires the Central Authority to actively promote or encourage the use of methods or procedures which achieve amicable solutions. Voluntary compliance is a desirable outcome in child support cases. It results in fewer demands on the Central Authority for enforcement measures, and avoids the costs and delays involved in judicial proceedings.

149 An important principle concerning the function in sub-paragraph (d) is that efforts to encourage the voluntary payment of maintenance should not impede the effective access to procedures within the meaning of Article 14.

150 Mediation, conciliation and similar processes were included in the list of Central Authority functions to encourage the consideration of other forms of dispute resolution, especially in intractable cases, that did not involve judicial or legal proceedings. An important condition on the use of mediation, conciliation and similar processes is created by the use of the words "where suitable". For example, if a creditor's opposition to contact or visitation between the debtor and his or her children results in the debtor defaulting on maintenance payments, this situation could be assisted by mediation. It is generally accepted that, while voluntary arrangements can be the most effective solution in some cases, not all cases will be suited to a voluntary resolution or the use of mediation.

151 It is acknowledged that mediation and conciliation may present some logistical difficulties in the context of international child support. Although the possibility of bringing parties together for mediation may be remote, the use of audio-visual technology may be explored. New techniques for mediation in international family matters are continually being explored.

152 The minimum requirements in this function would be to obtain advice about mediation facilities for the parties. Other possibilities include enlisting the aid of an external mediator in an intractable case, or referring the parties to an international mediation service. Sub-paragraph (d) in no way obliges the Central Authority personnel to conduct or be responsible for the mediation. One Central Authority reported a very high success rate with a project aimed at getting defaulting debtors to pay child support. Debtors were contacted directly by specially trained personnel to discuss ways of paying both the ongoing maintenance amount and reducing the arrears debt.

153 The word "encourage" is used instead of "facilitate" as some experts believed the latter word may have created an obligation that could not be met in some countries.

Sub-paragraph (e) – to facilitate the ongoing enforcement of maintenance decisions, including any arrears;

154 The word "facilitate" is used in Article 6(1)(b) and (2)(a), (e), (f), (g), (i) and (j). Its meaning is explained above at paragraphs 116 and 117 (under Art. 6(1)(b)).

155 The obligations imposed by sub-paragraph (e) include a general obligation on Central Authorities to take appropriate steps to guarantee the regularity of maintenance payments to creditors. The Central Authority should ensure that the initial measures to collect payments or to enforce the maintenance decision will be effective. Some effective enforcement measures are listed in Article 34.

156 The operation of sub-paragraph (e) will also arise in cases of repeat "defaulters". The Convention seeks ways to avoid requiring a creditor to submit frequent applications for enforcement. "Ongoing enforcement" in this context implies a resumption of enforcement measures or efforts should the debtor default on the maintenance payments. The assistance provided by Central Authorities in such cases might include providing advice or assistance to a creditor about enforcement measures; providing closer supervision of problem cases in the Central Authority; removing the debtor's option of voluntary payment and instituting wage withholding. Arrears are included in this provision for two reasons. First, it emphasises that a maintenance decision may be either a decision for arrears only, or a decision for ongoing maintenance and an arrears component. Second, the existence or accrual of arrears means the debtor has already defaulted on the maintenance payments and enforcement is or may be a problem in the particular case.

157 The earlier drafts of this provision referred to "ongoing monitoring and enforcement". The reference to "monitoring" was deleted as it implied to some experts an impossible burden on Central Authorities to monitor and review every case, whether or not enforcement problems arose. The obligation as stated in sub-paragraph (e) assumes that recognition and enforcement has already occurred.

158 The Special Commission discussions on this issue highlighted the differences in monitoring and enforcement systems. Some experts strongly supported the obligation in sub-paragraph (e) in the belief that effective control of the enforcement process was crucial for ensuring the regular recovery of maintenance. Some experts from other States believed this obligation would be impossible to meet, and problems with collection or enforcement of maintenance would only be brought to the attention of authorities by creditors.

159 It was pointed out that some countries have computerised case management systems which allowed faster, more efficient review of case records. Where maintenance payments are being collected and distributed by a public authority, any occurrences of non-payment will be apparent immediately through a computerised system. In one country, a notice of non-payment is generated automatically and sent to the debtor as soon as the payment is not received on the due date. A record of recurring non-payments can be created to assist decision-making on appropriate enforcement measures. Ongoing enforcement can also be improved through the availability of a range of enforcement measures, of increasing severity, possibly to be implemented administratively, and without the delays common to some court-based systems. All these possible measures will not represent a decrease of the juridical guarantees.

Sub-paragraph (f) – to facilitate the collection and expeditious transfer of maintenance payments;

160 L'alinéa (f) est destiné à régler les problèmes liés aux méthodes inefficaces de recouvrement et de transfert des paiements effectués par les débiteurs. Quelle que soit la rapidité du virement, si les méthodes de recouvrement sont inefficaces, aucune somme ne pourra être transférée. Les mesures d'exécution pour un recouvrement efficace sont mentionnées à l'article 34(2). Des inefficacités risquent d'engendrer une diminution du montant perçu par le créancier après déduction des commissions bancaires et de change. Ces inefficacités peuvent également entraîner un retard dans la réception des paiements par les créanciers, même si les débiteurs paient régulièrement.

161 Les services bancaires en ligne sont aujourd'hui courants dans de nombreux États, et la Convention reconnaît et encourage les avantages apportés par les nouvelles technologies, qui permettent d'accélérer le versement des aliments, notamment destinés aux enfants. L'article 35 encourage le recours aux méthodes de transfert de fonds les plus économiques et les plus efficaces.

162 Les différentes méthodes de transfert électronique de fonds, ainsi que leurs avantages et inconvénients ont été étudiés dans le Document préliminaire No 9 de mai 2004, « Transfert de fonds et utilisation des technologies de l'information dans le cadre du recouvrement international des aliments envers les enfants et d'autres membres de la famille »[76].

Alinéa (g) – faciliter l'obtention d'éléments de preuve documentaire ou autre ;

163 Les termes de l'alinéa (g) sont empruntés à l'article 7 de la Convention de New York de 1956, qui vise les commissions rogatoires. Cette disposition vient en complément de l'alinéa (c) relatif à l'obtention des informations sur le revenu, le patrimoine et les biens des parties.

164 En application de l'alinéa (g), il peut être demandé à une Autorité centrale de faciliter l'obtention de preuves dans son propre ressort ou à l'étranger. La première situation peut se présenter, par exemple, lorsqu'un créancier sollicite la modification d'une décision dans le ressort du débiteur et demande à l'Autorité centrale de ce ressort de faciliter l'obtention de preuves auprès du débiteur conformément au droit interne de celui-ci.

165 La seconde situation peut se présenter, par exemple, lorsqu'un créancier souhaite obtenir une augmentation des aliments dans le ressort du débiteur, où la décision d'origine a été rendue. Dans ce cas, l'Autorité centrale du ressort du débiteur peut demander à l'Autorité centrale du ressort du créancier de faciliter l'obtention des preuves dans le ressort du créancier dans la mesure où ces informations n'ont pas été fournies par le créancier. Lorsque la modification de la décision doit être demandée dans l'État du créancier, celui-ci peut solliciter l'assistance de l'Autorité centrale de son ressort pour obtenir de l'État du débiteur les preuves qu'il présentera à la juridiction de son ressort. Il s'agit alors d'une requête de mesures spécifiques concernant « une affaire de recouvrement d'aliments pendante dans l'État requérant », comme l'autorise l'article 7(2).

166 Il est important que les Autorités centrales distinguent bien les deux situations. Dans la première, les preuves sont obtenues dans le ressort de l'Autorité centrale ; dans la seconde, elles sont obtenues à l'étranger. Dans les deux cas, les droits procéduraux et les intérêts des parties doivent être protégés. Cette distinction est d'autant plus importante que dans la seconde situation, l'obtention de preuves à l'étranger peut être régie par un autre traité.

167 À titre d'exemple, l'obtention de preuves à l'étranger peut être régie par la Convention Procédure civile de 1954 ou la Convention Obtention des preuves de 1970, auxquelles la Convention ne déroge pas (art. 50)[77], ou par un accord bilatéral ou une entente régissant les matières relatives aux preuves, comme le prévoit l'article 51 de la Convention. Le recours à de tels mécanismes ne serait pas contraire aux obligations de l'Autorité centrale en vertu de la Convention. Cependant, en l'absence de tels mécanismes, l'alinéa (g) pourrait être utilisé seul pour obtenir des preuves à l'étranger conformément au droit interne applicable.

168 Le terme « preuve » doit être interprété au sens large. Il peut s'agir de toute information publique dans l'État requis ou d'un document disponible sur demande, ou encore d'une preuve qui ne peut être obtenue que dans le cadre d'une procédure judiciaire.

169 L'obligation suggérée par l'emploi du verbe « faciliter » est analysée aux paragraphes 107 et 108 (commentaire de l'art. 6 en général) et au paragraphe 118 (commentaire de l'art. 6(1)(b)).

Alinéa (h) – fournir une assistance pour établir la filiation lorsque cela est nécessaire pour le recouvrement d'aliments ;

170 Dans de nombreux États, l'établissement du lien de filiation est si étroitement lié à l'établissement de l'obligation alimentaire qu'on a estimé que son omission dans la nouvelle Convention ne remplirait pas l'objectif poursuivi, à savoir élaborer un instrument d'avenir. L'alinéa (h) met l'accent sur le lien de connexion nécessaire : la filiation doit être établie aux fins d'obtenir le recouvrement d'aliments.

171 L'alinéa (h) n'oblige en rien l'Autorité centrale à entreprendre des tests génétiques, par exemple ; en revanche, elle l'oblige à accorder une assistance au demandeur pour réaliser les tests génétiques nécessaires. Le terme « test génétique » employé dans ce Rapport s'entend aussi de la notion de « test de filiation ».

172 L'assistance à l'établissement de la filiation prévue à l'alinéa (h) peut être sollicitée à l'occasion d'une demande fondée sur l'article 10(1)(c) ou d'une requête fondée sur l'article 7. Lorsqu'une demande est fondée sur l'article 10(1)(c), l'Autorité centrale est tenue, en vertu de l'alinéa (h), de prendre « toutes les mesures appropriées » pour « fournir une assistance pour établir la filiation ».

173 Lorsqu'une requête de mesures spécifiques pour établir la filiation est déposée en vertu de l'article 7(1), l'assistance visée à l'article 6(2)(h) doit être fournie par le biais de telles mesures « s'avérant appropriées » et « nécessaires pour aider un demandeur potentiel à présenter une demande prévue à l'article 10 ou à déterminer si une telle demande doit être introduite ».

[76] Rapport établi par P. Lortie, Premier secrétaire, Doc. prél. No 9 de mai 2004 à l'intention de la Commission spéciale de juin 2004 sur le recouvrement des aliments envers les enfants et d'autres membres de la famille (ci-après Doc. prél. No 9/2004), ci-dessus p. I-236 du présent tome (également accessible à l'adresse <www.hcch.net>).

[77] Le Rapport ne traite pas des obligations légales des États en vertu de la Convention Obtention des preuves de 1970 ; il se contente d'attirer l'attention sur sa pertinence possible dans le contexte de l'art. 6(2)(g) et de l'art. 50, qui indique clairement que la nouvelle Convention ne déroge pas à la Convention Obtention des preuves. Une analyse plus détaillée des obligations en vertu de cette dernière Convention n'est pas nécessaire ici.

160 Sub-paragraph (f) is intended to address existing problems of inefficient methods of collecting and transmitting payments by debtors. If collection methods are not effective, there will be no funds to transfer, regardless of how expeditious the transfer procedures may be. Enforcement measures for effective collection are mentioned in Article 34(2). Inefficiencies may result in reduced payments to creditors after bank charges and currency conversion fees have been deducted. Inefficiencies also result in delays for creditors receiving payments, even if debtors make regular payments.

161 Electronic banking is now the norm in many countries, and the Convention recognises and encourages the benefits that new technologies can bring to expedite child support or other maintenance payments. Article 35 encourages the use of the most cost-effective and efficient methods to transfer funds.

162 The different methods of electronic transfer of funds and their relative advantages and disadvantages were examined in Preliminary Document No 9 of May 2004, "Transfer of funds and the use of information technology in relation to the international recovery of child support and other forms of family maintenance".[76]

Sub-paragraph (g) – to facilitate the obtaining of documentary or other evidence;

163 The wording of sub-paragraph (g) has its origins in Article 7 of the 1956 New York Convention which deals with Letters of Request. Sub-paragraph (g) is intended to supplement sub-paragraph (c) on obtaining information on the income, financial circumstances and assets of the parties.

164 Under sub-paragraph (g), a Central Authority may be requested to facilitate the obtaining of evidence within its own jurisdiction or to facilitate the obtaining of evidence abroad. The first situation may arise where, for example, a creditor applies for establishment of a decision in the debtor's jurisdiction and requests the Central Authority in that jurisdiction to facilitate the taking of evidence from the debtor in accordance with the internal laws of that jurisdiction.

165 The second situation may arise where, for example, a creditor seeks to obtain an increase in maintenance in the debtor's jurisdiction where the original order was made. In such a case, the Central Authority in the debtor's jurisdiction may require the Central Authority in the creditor's jurisdiction to facilitate the taking of evidence in the creditor's jurisdiction to the extent that such information has not already been submitted by the creditor. If modification of the order has to be sought in the creditor's jurisdiction, she / he may request the assistance of the Central Authority in her / his jurisdiction to obtain evidence from the debtor's jurisdiction to put before the court in the creditor's jurisdiction. This latter request would be a request for special measures "concerning the recovery of maintenance pending in the requesting State" as permitted by Article 7(2).

166 It is important that Central Authorities carefully distinguish the two situations. In the first situation, the evidence is taken in the Central Authority's own jurisdiction; in the second situation, the evidence is taken abroad. In both cases, the procedural rights and interests of the parties must be protected. The distinction is all the more important as in the second case the taking of evidence abroad may be subject to another treaty.

167 For example, the taking of evidence abroad may be subject to the 1954 Hague Civil Procedure Convention or 1970 Hague Evidence Convention which are not affected by the Convention (Art. 50),[77] or a bilateral treaty or arrangement dealing with evidence matters as contemplated in Article 51 of the Convention. The use of such mechanisms, where applicable, would not be inconsistent with the obligation of the Central Authority under the Convention. However, where no such mechanisms are applicable, sub-paragraph (g) could be used on its own to seek evidence abroad in accordance with the applicable internal laws.

168 The term "evidence" should be interpreted broadly. It could be any data that is publicly available in the requested State or it could be a document obtainable upon request, or it could be evidence that can only be obtained through a judicial process.

169 The obligation implied by the term "facilitate" is discussed in paragraphs 107 and 108 (general comments on Art. 6) and paragraph 118 (on Art. 6(1)(b)).

Sub-paragraph (h) – to provide assistance in establishing parentage where necessary for the recovery of maintenance;

170 In many countries the establishment of parentage has become so inextricably linked to the establishment of child support that it was felt that its omission from the new Convention would be a failure to live up to the objective of developing a forward looking instrument. Sub-paragraph (h) emphasises the necessary connection: that the establishment of parentage must be for the purpose of recovery of maintenance.

171 Sub-paragraph (h) does not in any way oblige the Central Authority to undertake, for example, genetic testing, but instead to provide assistance to the applicant to have the necessary genetic testing procedures performed. Throughout this Report the term "genetic testing" is used and is intended to include "parentage testing".

172 Assistance on the question of parentage may be sought under sub-paragraph (h) in relation to an application under Article 10(1)(c) or a request under Article 7. When an application is submitted under Article 10(1)(c), a Central Authority's obligation under sub-paragraph (h) will be to take "all appropriate measures" to "provide assistance in establishing parentage".

173 When a request for specific measures to establish parentage is submitted under Article 7(1), assistance under Article 6(2)(h) must be offered by such measures "as are appropriate" and if they "are necessary to assist a potential applicant in making an application under Article 10 or in determining whether such an application should be initiated".

[76] Report drawn up by P. Lortie, First Secretary, Prel. Doc. No 9 of May 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 9/2004), *supra* p. I-237 of this tome (also available at <www.hcch.net>).

[77] The Report does not address the legal obligations of States under the 1970 Hague Evidence Convention but only draws attention to its possible relevance in the context of Art. 6(2)(g) as well as Art. 50, which makes clear that this Convention is not affected by the new Convention. A more detailed discussion of obligations under the Evidence Convention is not needed in this Report.

174 Dans le cadre de l'alinéa (h), « fournir une assistance » pourrait consister, au minimum, à transmettre les coordonnées des laboratoires compétents pour procéder aux tests génétiques dans l'État requis, à offrir des conseils au créancier ou à l'Autorité centrale requérante sur les lois internes ou encore à orienter le créancier vers les autorités compétentes. Un service de niveau supérieur pourrait consister à apporter une assistance à l'obtention des documents liés à l'établissement de la filiation par présomption, à faire suite à une demande de contacter le père putatif pour obtenir une reconnaissance volontaire de paternité, à introduire des procédures judiciaires pour établir la filiation ou à aider à l'organisation d'un test ADN volontaire du parent présumé[78].

175 Les lois et procédures internes sur la question sont très variées. Dans certains États, l'établissement de la filiation est recherché « pour le recouvrement d'aliments ». Dans d'autres États, l'établissement de la filiation dans le seul objectif de recouvrer des aliments est impossible, en raison de l'effet *erga omnes* d'une telle action. Le Document préliminaire No 4 d'avril 2003, « Filiation et aliments internationaux envers les enfants – Réponses au Questionnaire de 2002 et analyse des différents points »[79], offre un panorama des différents systèmes nationaux d'établissement de la filiation[80], ainsi que des variations dans les procédures et les coûts au niveau interne[81]. Il étudie aussi en détail les domaines qui pourraient se prêter à une coopération administrative[82]. Dans certains États, le test génétique ne peut être ordonné que par les autorités judiciaires et nécessiterait donc une commission rogatoire internationale. Quelques experts ont estimé que le recours aux instruments internationaux tels que la Convention Obtention des preuves de 1970 était préférable aux commissions rogatoires, mais cette procédure ne serait valable que pour les États parties à cette Convention. Certains États acceptent les demandes fondées sur la Convention de New York de 1956[83]. D'autres, comme le Canada (Québec), acceptent une combinaison des procédures judiciaires et administratives. Quelques Autorités centrales acceptent de contacter le débiteur pour lui demander de se soumettre volontairement au test génétique. Le Document préliminaire No 4 montre que la plupart des États proposent une aide juridique pour le test génétique et que lorsqu'il est requis dans le cadre d'une procédure judiciaire, ce test est gratuit pour ceux qui bénéficient de cette aide juridique.

Alinéa (i) – introduire ou faciliter l'introduction de procédures afin d'obtenir toute mesure nécessaire et provisoire à caractère territorial et ayant pour but de garantir l'aboutissement d'une demande d'aliments pendante ;

176 Une mesure provisoire visée à l'alinéa (i) peut être demandée dans l'État où une demande de recouvrement d'aliments a été introduite ou dans un autre État contractant dans lequel se trouvent les biens du débiteur. Ces mesures provisoires peuvent viser à prévenir une dispersion des biens ou à empêcher le débiteur de quitter le territoire pour se soustraire à une procédure judiciaire. Le blocage des biens du débiteur (en attendant l'aboutissement de toute procédure judiciaire) sera la mesure la plus fréquemment requise dans le cadre de cette disposition.

177 Les mesures requises au titre de l'alinéa (i) doivent être « provisoires », c'est-à-dire temporaires, et « à caractère territorial », c'est-à-dire que leur effet se limitera au territoire de l'État requis (celui qui prend les mesures) ou de plusieurs États, conformément aux règles applicables. Les mesures provisoires sont, de par leur nature, limitées dans le temps. Elles doivent en conséquence être obtenues le plus rapidement possible, si nécessaire par le biais d'une audience *ex parte*. Dans les affaires d'obligations alimentaires, une intervention rapide est souvent essentielle pour saisir des biens situés à l'étranger. Voir également l'exemple portant sur l'article 6(2)(c) au paragraphe 144 du présent Rapport.

178 La mesure doit également être « nécessaire » pour « garantir l'aboutissement d'une demande d'aliments pendante ». Cette formule laisse entendre que l'État requérant doit justifier sa requête en démontrant que les mesures sont en effet nécessaires au recouvrement des aliments. Une demande d'aliments doit être « pendante » au moment où l'assistance de l'alinéa (i) est recherchée. Cela implique qu'une demande fondée sur l'article 10 a déjà été soumise à l'Autorité centrale requise ou qu'une demande interne d'aliments est pendante dans l'État requérant.

179 Les mesures provisoires prises dans l'État requis (par ex. le gel des biens du débiteur) visent à aider le créancier à finalement recouvrer certains aliments (« garantir l'aboutissement ») pour sa « demande d'aliments pendante ». Les termes de l'alinéa (i) laissent ouverte la possibilité d'une demande d'aliments à caractère purement interne ou d'une affaire à caractère international[84]. Par exemple, une assistance en vertu de l'alinéa (i) peut être sollicitée pour les demandes en cours fondées sur l'article 10 (affaire à caractère international). Le cas de figure type est celui du créancier qui cherche à obtenir la reconnaissance et l'exécution de sa décision d'aliments dans l'État du débiteur, où l'on sait que le débiteur a des biens. Pour que l'exécution de la décision en matière d'aliments aboutisse effectivement au recouvrement des aliments, le créancier doit s'assurer que le débiteur ne dépensera, ne cachera ni ne déplacera ses biens pour échapper à son obligation alimentaire. L'alinéa (i) aidera le créancier dans cet objectif. Une requête de mesures spécifiques fondée sur l'article 7(1) pourra également être introduite afin d'obtenir des mesures provisoires à caractère territorial, lorsqu'aucune demande de recouvrement international des aliments en vertu de l'article 10 n'est pendante (la demande peut concerner une affaire interne, ou bien, en tant que requête préliminaire, une affaire à caractère international).

180 Il convient de rappeler que l'Autorité centrale n'est pas tenue de prendre elle-même les mesures provisoires. L'Autorité centrale a pour fonction de prendre toutes les mesures appropriées pour introduire ou faciliter l'introduction de procédures judiciaires afin d'assurer la protection nécessaire du demandeur. La nature de cette obligation est semblable à celle prévue à l'article 6(1)(b).

181 L'alinéa (i) s'inspire de l'article 15(1) de la Convention de Montevideo.

Alinéa (j) – faciliter la signification et la notification des actes.

[78] Doc. prél. No 5/2003 (*op. cit.* note 25), para. 115.
[79] Rapport établi par P. Lortie, Premier secrétaire, Doc. prél. No 4 d'avril 2003 à l'intention de la Commission spéciale de mai 2003 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (ci-après Doc. prél. No 4/2003), ci-dessus p. I-128 du présent tome (également accessible à l'adresse <www.hcch.net>).
[80] Para. 3 à 21.
[81] Para. 13, 23 et 24.
[82] Para. 43 et 44.
[83] Doc. prél. No 5/2003 (*op. cit.* note 25), para. 112.
[84] Voir la discussion dans « Application d'un instrument sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille sans égard au caractère international ou interne de la réclamation d'aliments », Note établie par P. Lortie, Premier secrétaire, Doc. prél. No 11 de mai 2004 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, ci-dessus p. I-278 du présent tome (également accessible à l'adresse <www.hcch.net>).

174 In the context of sub-paragraph (h), "providing assistance" could mean, at a minimum, providing contact details of the laboratories qualified to undertake genetic testing in the requested State, or providing advice to the creditor or the requesting Central Authority about internal laws, or referring the creditor to the proper authorities. At a higher level of service, it could mean providing assistance in obtaining relevant documents in relation to the establishment of parentage by presumption, acting on a request to contact the putative father to obtain a voluntary acknowledgement of paternity, initiating judicial proceedings for the establishment of parentage, or assisting with arrangements for a voluntary DNA test of the presumed parent.[78]

175 Internal laws and procedures vary considerably on this question. In some countries, the establishment of parentage is for the "purpose of recovery of maintenance". In other countries, determination of parentage for the "limited purpose" of child support would be impossible due to the "*erga omnes*" effect ("for all purposes") of any such determination. Preliminary Document No 4 of April 2003, "Parentage and international child support – Responses to the 2002 Questionnaire and an analysis of the issues",[79] gives an overview of the different domestic systems for the establishment of parentage,[80] as well as internal variations in both procedures and costs.[81] It also examines in detail the possible areas of administrative co-operation.[82] In some countries genetic testing can only be ordered by judicial authorities and would require an international letter of request. Some experts believed the use of international instruments such as the 1970 Hague Evidence Convention was preferable to letters of request, but this would only assist those countries that are Party to that Convention. Some States accept an application under the 1956 New York Convention.[83] In other countries, such as in Canada (Quebec), it may be a combination of judicial and administrative processes. Some Central Authorities are willing to contact the debtor to request his or her voluntary participation in genetic testing. Preliminary Document No 4 indicates that legal aid for genetic testing is available in most countries and the testing is free to those entitled to legal aid if testing occurs in the course of legal proceedings.

Sub-paragraph (i) – to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;

176 A provisional measure referred to in sub-paragraph (i) might be sought in the State to which an application for the recovery of maintenance has been made, or in another Contracting State in which assets of the debtor are located. Provisional measures include measures to prevent the dissipation of assets, or measures to prevent the debtor leaving the jurisdiction to avoid legal proceedings. The freezing of the debtor's assets (pending the outcome of any legal proceedings) may be the measure most frequently requested under this provision.

177 The measures requested under sub-paragraph (i) must be both "provisional", meaning interim or temporary, and "territorial in nature", meaning that their effect must be confined to the territory of the requested State (the State which takes the measures) or of several States in accordance with the applicable rules. Provisional measures are, by their nature, of limited duration. They should, therefore, be obtainable by the most expeditious procedures, if necessary in an undefended (*ex parte*) hearing. Frequently in maintenance cases, speed is of the essence to secure assets located abroad. See also the example given under Article 6(2)(c) in paragraph 144 of this Report.

178 The measure must also be "necessary" to "secure the outcome of a pending maintenance application". This requirement implies that the Requesting State must justify the request by showing that the measures are indeed necessary for the recovery of maintenance. A maintenance application must be "pending" at the time when assistance under sub-paragraph (i) is sought. This implies either that an application under Article 10 has already been made to the requested Central Authority, or that there is an internal maintenance application pending in the requesting State.

179 The provisional measures taken in the requested State (*e.g.*, to freeze the debtor's assets) are intended to help the creditor to eventually recover some maintenance ("secure the outcome") in a "pending maintenance application". The words of sub-paragraph (i) leave open the possibility that a maintenance application could be purely domestic in nature or it could be an international case.[84] For example, assistance under sub-paragraph (i) may be sought in relation to current applications under Article 10 (an international case). A typical situation might begin with a creditor seeking recognition and enforcement of a maintenance decision in the debtor's jurisdiction, where it is known the debtor has assets. In order that enforcement of the maintenance decision actually results in the recovery of maintenance, the creditor needs to be sure the debtor will not spend, hide or move the assets to avoid his or her maintenance liability. Sub-paragraph (i) will assist the creditor to achieve this aim. A specific measures request may also be made under Article 7(1) for provisional territorial measures, when there is no Article 10 application pending for the international recovery of maintenance (the request may be for a domestic case, or as a preliminary enquiry for an international case).

180 It is recalled that the Central Authority itself is not required to take the provisional measures. The Central Authority function is to take all appropriate measures to initiate, or facilitate the initiation of, legal proceedings, to obtain the necessary protection for the applicant. The nature of this obligation is no different from the obligation under Article 6(1)(b).

181 Sub-paragraph (i) is inspired by Article 15(1) of the Montevideo Convention.

Sub-paragraph (j) – to facilitate service of documents.

[78] Prel. Doc. No 5/2003 (*op. cit.* note 25), para. 115.
[79] Report drawn up by P. Lortie, First Secretary, Prel. Doc. No 4 of April 2003 for the attention of the Special Commission of May 2003 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 4/2003), *supra* p. I-129 of this tome (also available at <www.hcch.net>).
[80] Paras 3-21.
[81] Paras 13, 23 and 24.
[82] Paras 43 and 44.
[83] Prel. Doc. No 5/2003 (*op. cit.* note 25), para. 112.
[84] See the discussion in "Application of an instrument on the international recovery of child support and other forms of family maintenance irrespective of the international or internal character of the maintenance claim", Note drawn up by P. Lortie, First Secretary, Prel. Doc. No 11 of May 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance, *supra* p. I-279 of this tome (also available at <www.hcch.net>).

182 En application de l'alinéa (j), il peut être demandé à une Autorité centrale de faciliter la signification ou notification dans son ressort ou à l'étranger. La première situation peut se présenter, par exemple, lorsqu'un créancier présente une demande de modification d'une décision dans le ressort du débiteur. Dans cette situation, le créancier peut demander à l'Autorité centrale du ressort du débiteur de faciliter la signification des actes de procédure au débiteur conformément aux exigences légales de celui-ci. Par exemple, l'Autorité centrale pourrait devoir envoyer les documents à une personne privée chargée de la signification et de la notification, au procureur ou à une autre autorité ou personne compétente pour effectuer ou faire effectuer la signification ou notification sur le territoire de son ressort.

183 La seconde situation peut se présenter, par exemple, lorsqu'un créancier demande l'obtention d'une décision dans son ressort et que le débiteur doit en être notifié dans un autre ressort. Dans ce cas, l'Autorité centrale du ressort du créancier peut être tenue de faciliter la transmission des actes à l'étranger afin qu'ils puissent être signifiés ou notifiés au débiteur conformément aux obligations légales du ressort de ce dernier.

184 Il est important que les Autorités centrales distinguent bien ces deux situations. Dans la première, les actes n'ont pas à être transmis à l'étranger pour y être signifiés ou notifiés ; dans la seconde, la loi du ressort de l'Autorité centrale (loi du for) exigera probablement que les actes soient transmis à l'étranger aux fins de la signification ou notification. Dans les deux cas, les droits procéduraux et les intérêts des parties doivent être protégés. La distinction est d'autant plus importante que dans la seconde situation, la transmission des actes aux fins de la signification ou notification à l'étranger peut être régie par un autre traité.

185 À titre d'exemple, la signification ou notification à l'étranger peut être régie par la Convention Procédure civile de 1954 ou la Convention Notification de 1965[85], auxquelles la Convention ne déroge pas (art. 50)[86], ou par un accord bilatéral ou une entente régissant les matières relatives à la signification ou à la notification, comme le prévoit l'article 51 de la Convention. Le recours à de tels mécanismes ne serait pas contraire aux obligations de l'Autorité centrale en vertu de la Convention. Cependant, en l'absence de tels mécanismes, l'alinéa (j) pourrait être utilisé seul pour faciliter la signification ou la notification à l'étranger conformément au droit interne applicable.

Paragraphe 3 – Les fonctions conférées à l'Autorité centrale en vertu du présent article peuvent être exercées, dans la mesure prévue par la loi de l'État concerné, par des organismes publics ou d'autres organismes soumis au contrôle des autorités compétentes de cet État. La désignation de tout organisme, public ou autre, ainsi que ses coordonnées et l'étendue de ses fonctions sont communiquées par l'État contractant au Bureau Permanent de la Conférence de La Haye de droit international privé. En cas de changement, les États contractants en informent aussitôt le Bureau Permanent.

186 Cette disposition offre aux États une plus grande latitude pour déterminer comment ces fonctions obligatoires pourront être exercées le plus efficacement possible sur leur territoire.

187 En vertu de la deuxième partie du paragraphe 3, l'État contractant a la responsabilité d'informer le Bureau Permanent de la désignation et des coordonnées d'organismes publics ou d'autres organismes, ainsi que de toute modification de ces informations.

188 Une certaine souplesse du texte de la Convention était nécessaire pour s'adapter aux systèmes internes, mais on a insisté sur le fait que les « autres organismes » devaient être étroitement surveillés. À titre d'exemple, la protection des données personnelles doit être garantie, et si d'autres organismes gèrent ces données, les individus concernés et les États contractants doivent avoir l'assurance que les garanties appropriées sont en place.

189 Certains experts ont estimé qu'il fallait une répartition parfaitement claire des responsabilités entre les Autorités centrales, les organismes publics et les autres organismes. Cependant, ce n'est pas possible si la Convention doit rester flexible et s'adapter aux besoins des divers systèmes juridiques et administratifs de tous les États contractants. Ainsi, une Autorité centrale qui n'aurait pas accès à une base de données contenant des adresses pour localiser le débiteur pourrait se tourner vers une agence qui disposerait de cet accès. Cette collaboration entre des agences ou institutions nationales répondrait à l'obligation de « prendre toutes les mesures appropriées » en vertu de la Convention, sans nécessairement impliquer de réelle délégation de responsabilités. Ce serait, de plus, conforme à l'obligation de l'article 5(a) de favoriser la collaboration entre les autorités compétentes de leur État. Seuls les organismes désignés ou délégués de manière formelle pour exercer les fonctions doivent être désignés en vertu du paragraphe 3. Les organismes ou agences qui ne font qu'assister une Autorité centrale dans l'exercice de ses fonctions, comme dans l'exemple mentionné, ne doivent pas être désignés en vertu du paragraphe 3.

Paragraphe 4 – Le présent article et l'article 7 ne peuvent en aucun cas être interprétés comme imposant à une Autorité centrale l'obligation d'exercer des attributions qui relèvent exclusivement des autorités judiciaires selon la loi de l'État requis.

190 Le paragraphe 4 délimite les pouvoirs des Autorités centrales requises. Il vise également à répondre aux préoccupations selon lesquelles les articles 6 et 7 paraissent imposer aux Autorités centrales des obligations qui ne pourraient être exercées dans leur État que par des autorités judiciaires.

Article 7 Requêtes de mesures spécifiques

191 Une requête de mesures spécifiques est une requête d'assistance limitée et non une demande visée à l'article 10 (Demandes disponibles). La requête sera introduite avant une demande formelle en vertu du chapitre III ou en l'absence de celle-ci. C'est pourquoi elle figure au chapitre II et non au chapitre III. De plus, il n'est pas prévu de procédure ou de formulaire particulier pour les requêtes de mesures spécifiques. On peut penser qu'elles n'auraient pas un caractère aussi formel que les demandes du chapitre III.

192 Il faut savoir qu'une demande d'assistance limitée avait été prévue à l'article 10 dans les projets antérieurs de

[85] *Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale*.

[86] Le Rapport ne traite pas des obligations légales des États en vertu de la Convention Notification de 1965 ; il se contente d'attirer l'attention sur sa pertinence possible dans le contexte de l'art. 6(2)(j) et de l'art. 50, qui indique clairement que la nouvelle Convention ne déroge pas à la Convention Notification. Une analyse plus approfondie des obligations en vertu de la Convention Notification n'est pas nécessaire ici.

182 Under sub-paragraph (j), a Central Authority may be requested to facilitate service within its own jurisdiction or to facilitate service abroad. The first situation may arise where, for example, a creditor applies in the debtor's jurisdiction to establish or modify a decision. In such a case, the creditor may require the Central Authority in the debtor's jurisdiction to facilitate service of process on the debtor in accordance with legal requirements in the Central Authority's jurisdiction. For example, the Central Authority might have to send the documents to a private process server, the Public Prosecutor or any other authority or person competent to effect service, or to have service effected, in that jurisdiction.

183 The second situation may arise where, for example, a creditor applies to establish or modify a decision in his or her own jurisdiction, and service must be effected on the debtor in another jurisdiction. In this case, the Central Authority in the creditor's jurisdiction may be required to facilitate the transmission of the documents abroad so that they can be served on the debtor in accordance with legal requirements in the debtor's jurisdiction.

184 It is important that Central Authorities carefully distinguish these two situations. In the first situation, the documents do not have to be transmitted abroad for service; in the second situation, the law of the Central Authority's jurisdiction (law of the forum) is likely to require that documents be transmitted abroad for service. In both cases, the procedural rights and interests of the parties must be protected. The distinction is all the more important as in the second situation, the transmission of the documents for service abroad may be subject to another treaty.

185 For example, the service abroad may be subject to the 1954 Hague Civil Procedure Convention or the 1965 Hague Service Convention[85] which are not affected by the Convention (Art. 50),[86] or a bilateral treaty or arrangement dealing with matters of service as contemplated in Article 51 of the Convention. The use of such mechanisms, where applicable, would not be inconsistent with the obligation of the Central Authority under the Convention. However, where no such mechanisms are applicable, sub-paragraph (j) could be used on its own to facilitate service abroad in accordance with the applicable internal laws.

Paragraph 3 – The functions of the Central Authority under this Article may, to the extent permitted under the law of its State, be performed by public bodies, or other bodies subject to the supervision of the competent authorities of that State. The designation of any such public bodies or other bodies, as well as their contact details and the extent of their functions, shall be communicated by a Contracting State to the Permanent Bureau of the Hague Conference on Private International Law. Contracting States shall promptly inform the Permanent Bureau of any changes.

186 This provision gives greater flexibility to States to decide how mandatory functions will be most effectively performed in their State.

187 The second part of paragraph 3 makes the Contracting State responsible for informing the Permanent Bureau of the designation or appointment of public or other bodies, and their contact details, as well as any changes to those details.

188 Flexibility in the Convention text was needed to accommodate all internal systems, but concerns were expressed that "other bodies" will need to be closely supervised. For example, the privacy of information about individuals must be safeguarded, and if that information is being handled by "other bodies", the individuals concerned and Contracting States need reassurance that proper safeguards are in place.

189 Some experts believed there was a need for absolute clarity in the division of all the responsibilities between Central Authorities, public bodies and other bodies. However, this is not possible if the Convention is to remain flexible and able to accommodate the needs of the varied legal and administrative systems of all the Contracting States. For example, a Central Authority without access to a database of addresses to locate a debtor could turn to an agency that did have such access. Such co-operation between national agencies or institutions would constitute "taking all appropriate measures" under the Convention, without necessarily implying a true delegation of responsibilities. It would also comply with the obligation in Article 5(a) to promote co-operation between competent authorities within the State. Only bodies which are appointed or delegated in a formal sense to perform functions need to be designated under paragraph 3. Bodies or agencies which merely assist a Central Authority to perform its functions, as in the preceding example, should not be designated under paragraph 3.

Paragraph 4 – Nothing in this Article or Article 7 shall be interpreted as imposing an obligation on a Central Authority to exercise powers that can be exercised only by judicial authorities under the law of the requested State.

190 Paragraph 4 provides clarity about the limits of the requested Central Authorities' powers. It is also intended to overcome any concerns that Articles 6 and 7 may appear to impose obligations on Central Authorities that could only be carried out in their countries by judicial authorities.

Article 7 Requests for specific measures

191 A request for specific measures is a request for limited assistance rather than an application of the kind referred to in Article 10 (Available applications). The request will be made preliminary to, or in the absence of, a formal Chapter III application. Hence it is placed in Chapter II rather than Chapter III. Furthermore, no specific procedures or forms are prescribed for specific measures or requests. One might expect that they would not have the same degree of formality as a Chapter III application.

192 It is useful to recall that an application for limited assistance had been included in Article 10 in early drafts of

[85] *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*.
[86] The Report does not address the legal obligations of States under the 1965 Hague Service Convention but only draws attention to its possible relevance in the context of Art. 6(2)(j) as well as Art. 50, which makes clear that this Convention is not affected by the new Convention. A more detailed discussion of obligations under the Service Convention is not needed in this Report.

la Convention[87]. On a craint cependant que ce type d'assistance constitue une charge trop lourde pour les Autorités centrales. À titre de compromis et afin de donner une base conventionnelle à cette forme d'assistance limitée, la « demande d'assistance limitée » du chapitre III a été remplacée par la « requête de mesures spécifiques » au chapitre II. En outre, une certaine marge d'appréciation étant laissée à l'Autorité centrale requise quant aux modalités de fourniture du service, aucune obligation insupportable n'est imposée aux Autorités centrales, et le fait de prévoir un plus large éventail de services à l'article 7(1) pourrait apporter d'importants avantages. Par conséquent, une référence à l'article 6(2)(b), (c), (g), (h), (i) et (j) a été ajoutée à l'article 7(1).

193 Trois cas de figure au moins pourraient amener l'Autorité centrale à introduire une requête de mesures spécifiques : i) une requête préliminaire à une demande d'obtention, de modification ou d'exécution d'une décision d'aliments (par ex. une demande d'assistance auprès de l'Autorité centrale pour vérifier que le débiteur réside dans l'État auprès duquel l'Autorité centrale requérante souhaite déposer une demande d'aliments) ; ii) lorsqu'est déposée une demande d'aliments ou une demande de modification ou d'exécution d'une décision obtenue dans l'État requérant et que l'aide de l'État requis est nécessaire pour la procédure (par ex. une requête d'assistance faite auprès d'un autre État afin de localiser les biens du débiteur) ; et iii) une requête d'assistance dans le cadre d'une affaire purement interne de recouvrement d'aliments dans laquelle, quelle qu'en soit la raison, l'assistance d'un autre État est requise (par ex. pour établir la filiation ou pour déterminer les biens à l'étranger). La situation iii) relève de l'article 7(2). La requête de mesures spécifiques la plus courante se rapportera probablement à l'article 6(2)(b) et à la localisation du débiteur. Cette mesure permettrait de minimiser les frais de manière significative. De nombreuses Autorités centrales et les créanciers qu'elles assistent voudront s'assurer que le débiteur réside effectivement dans un État particulier avant de consacrer du temps, des efforts et de l'argent à la préparation et à la traduction d'une demande relevant du chapitre III. Les requêtes visées à l'article 6(2)(c) destinées à obtenir des informations sur les revenus du débiteur peuvent également être faites régulièrement. Ces informations permettent de décider aux premiers stades de la demande s'il vaut la peine de poursuivre la réclamation.

194 Une requête en application de l'article 7 doit être soumise par l'intermédiaire d'une Autorité centrale. Le paragraphe premier indique : « Une Autorité centrale peut […] demander à une autre Autorité centrale […] » et le paragraphe 2 qu'« [u]ne Autorité centrale peut [...] à la requête d'une autre Autorité centrale […] ». Cette condition est nécessaire car l'article 9 (Demande par l'intermédiaire des Autorités centrales) ne s'applique pas à l'article 7, et il ne s'agit pas d'autoriser les demandeurs à adresser des requêtes de mesures spécifiques directement à l'État requis.

195 De nombreux experts ont estimé que la forme d'assistance prévue à l'article 7 était essentielle pour développer un nouveau système complet de coopération en matière de recouvrement des aliments. Cette assistance était déjà offerte par certains États en vertu de la Convention de New York de 1956, notamment pour la localisation du débiteur.

196 Le premier paragraphe de l'article 6 qui dispose que « [l]es Autorités centrales fournissent une assistance relative aux demandes prévues au chapitre III » n'est pas applicable dans le cadre de la requête de mesures spécifiques de l'article 7, car ce n'est pas une demande au sens du chapitre III. Dans l'hypothèse d'une demande introduite sur la base de l'article 10, une Autorité centrale offrirait une assistance à caractère obligatoire en vertu de l'article 6(2), et non une assistance via les mesures spécifiques visées à l'article 7.

197 Lorsqu'une demande d'assistance impliquant des mesures spécifiques, par exemple la localisation des biens du débiteur, requiert l'introduction de procédures judiciaires ou d'une autre action judiciaire analogue, il appartient à l'autorité requise de déterminer si elle peut prendre les dispositions nécessaires. Dans la négative, l'Autorité centrale peut être en mesure d'offrir une autre forme d'assistance administrative ou des conseils pour répondre à la requête, par exemple par le biais d'instruments internationaux applicables.

198 La question des coûts engendrés par les mesures spécifiques est traitée à l'article 8(2) et (3). Il appartient à l'État requis de déterminer comment gérer ces coûts, lesquels peuvent également faire l'objet d'un accord bilatéral ou réciproque entre États en application de l'article 51(2).

199 La formulation de l'article 7 est prévisionnelle. Les États ayant les moyens de s'acquitter très largement de cette obligation ne rencontrent pas de limites à l'éventail de services qu'ils peuvent offrir. D'autres États peuvent remplir leurs obligations en offrant des services moindres, mais au fil du temps, si leurs ressources s'améliorent et que les lois changent, un meilleur service pourrait progressivement être offert.

200 Il ne faut pas détourner l'article 7 pour aller à la « pêche aux informations » ou tenter d'obtenir des informations avant le procès. Le recours à la requête de mesures spécifiques n'est possible que dans les affaires d'aliments entrant dans le champ d'application principal de la Convention, sous réserve d'une déclaration étendant le champ d'application sur une base réciproque. Voir les explications relatives à l'article 2 sur le champ d'application.

Paragraphe premier – Une Autorité centrale peut, sur requête motivée, demander à une autre Autorité centrale de prendre les mesures spécifiques appropriées prévues à l'article 6(2)(b), (c), (g), (h), (i) et (j) lorsqu'aucune demande prévue à l'article 10 n'est pendante. L'Autorité centrale requise prend les mesures s'avérant appropriées si elle considère qu'elles sont nécessaires pour aider un demandeur potentiel à présenter une demande prévue à l'article 10 ou à déterminer si une telle demande doit être introduite.

201 La première phrase de l'article 7(1) énumère les conditions applicables à une requête de mesures spécifiques de l'Autorité centrale requérante. La requête est celle de « mesures spécifiques appropriées », elle doit être motivée, elle ne peut être introduite que dans le cadre des fonctions prévues à l'article 6(2)(b), (c), (g), (h), (i) et (j) et il n'est pas nécessaire qu'une demande en vertu de l'article 10 ait été introduite ou soit en cours d'examen. La seconde phrase du paragraphe premier décrit la réaction attendue de l'Autorité centrale requise. Sur la base des raisons communiquées, elle doit considérer que les mesures spécifiques requises sont nécessaires pour faciliter une demande au titre de l'article 10 ou déterminer s'il y a lieu d'introduire une telle demande. À titre d'exemple, lorsqu'un créancier sollicite une assistance pour localiser le débiteur, l'Autorité centrale requérante devra indiquer les motifs de la requête à l'Au-

[87] Voir l'art. 11(1)(h) dans « Esquisse d'une Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », préparé par le Comité de rédaction, Doc. prél. No 7 d'avril 2004 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, ci-dessus p. I-206 du présent tome (également accessible à l'adresse <www.hcch.net>).

the Convention.[87] However, concerns were expressed that it could be too burdensome on Central Authorities to be obliged to provide this type of assistance. As a compromise, and to give a treaty basis to this form of limited assistance, the "application for limited assistance" in Chapter III became the "request for specific measures" in Chapter II. Furthermore, as the requested Central Authority has some discretion in how the service is to be provided, no unmanageable obligations are imposed on Central Authorities, and there could be great benefits generated from having a wider range of services available under Article 7(1). Hence a reference to Article 6(2)(b), (c), (g), (h), (i) and (j) has been added to Article 7(1).

193 There are at least three possible situations in which a request for specific measures might be made by a Central Authority: i) a request that is preliminary to an application for the establishment, modification or enforcement of a maintenance decision, for example, a request for assistance made to a Central Authority to verify whether a debtor resides in the State to which the requesting Central Authority wishes to make a maintenance application; ii) where establishment, modification or enforcement of a maintenance decision is being undertaken in the requesting State and help from the requested State is needed for the proceedings, for example, a request for assistance made to another State to help locate a debtor's assets; and iii) a request for assistance in the context of a purely internal maintenance matter in which, for whatever reason, there was a need for assistance from another State, for example, in relation to the establishment of parentage or identification of assets abroad. The situation referred to in iii) is covered by Article 7(2). It is likely that the most common request for specific measures would relate to Article 6(2)(b) and location of the debtor. This has the potential to be a significant cost-saving measure. Many Central Authorities and the creditors they are assisting will want to ascertain that a debtor is in fact residing in a particular country before expending time, effort and money in preparing and translating a Chapter III application. Requests under Article 6(2)(c) to obtain details of the debtor's income might also be made regularly. Such information will help decide in the early stages if it is worth pursuing a claim.

194 A request under Article 7 must be made through a Central Authority. Paragraph 1 states: "A Central Authority may make a request […] to another Central Authority […]", and paragraph 2 states: "A Central Authority may […] on the request of another Central Authority […]". This requirement is necessary because Article 9 (Application through Central Authorities) does not apply to Article 7 and it is not the intention to allow applicants to apply directly to a requested State for specific measures.

195 Many experts believed that the type of assistance envisaged by Article 7 was essential to the development of a new and comprehensive system of co-operation in matters relating to the recovery of maintenance. This type of assistance, particularly to help locate a debtor, was already offered by some countries under the 1956 New York Convention.

196 The first paragraph of Article 6 which states "Central Authorities shall provide assistance in relation to applications under Chapter III" does not apply to an Article 7 specific measure request because it is not a Chapter III application. If an application has been made under Article 10, a Central Authority would rely on assistance under Article 6(2) which is mandatory, and not on assistance through specific measures under Article 7.

197 Where a specific measures request for assistance, such as locating a debtor's assets, requires the initiation of legal proceedings or similar judicial action, it is a matter for the requested authority to decide if it is able to take those particular steps. If not, the Central Authority may be able to offer other administrative assistance or advice on how to achieve the purpose of the request, by, for example, the use of the applicable international instruments.

198 The issue of costs for specific measures is dealt with in Article 8(2) and (3). How such costs are treated is a matter for the requested State. They could also be the subject of bilateral or reciprocity agreements between States under Article 51(2).

199 The language of Article 7 is forward looking. Countries that already have the ability to meet this obligation at a high level are not restricted in the range of services they may provide. Other countries may still meet their obligations with a lower level of services, but with the passage of time, if resources improve and laws change, there could be the progressive implementation of a better service.

200 Article 7 must not be misused for "fishing expeditions" or pre-trial discovery. The request for specific measures may only be used in cases falling within the core scope of the Convention, subject to, on a reciprocal basis, a declaration extending the scope. See the explanations on the scope provision in Article 2.

Paragraph 1 – A Central Authority may make a request, supported by reasons, to another Central Authority to take appropriate specific measures under Article 6(2)(b), (c), (g), (h), (i) and (j) when no application under Article 10 is pending. The requested Central Authority shall take such measures as are appropriate if satisfied that they are necessary to assist a potential applicant in making an application under Article 10 or in determining whether such an application should be initiated.

201 The requirements of the specific measures request which apply to the requesting Central Authority are set out in the first sentence of Article 7(1). The request will be for "appropriate specific measures", it must be supported by reasons, it can only be made in relation to one or more of the functions specified in Article 6(2)(b), (c), (g), (h), (i) and (j), and no Article 10 application needs to have been made or be in preparation. The second sentence of paragraph 1 describes the required response of the requested Central Authority. It must be satisfied, from the reasons given, that the specific measures requested are necessary to assist in making, or deciding to make, an Article 10 application. For example, if a creditor seeks assistance in locating a debtor, the requesting Central Authority should provide the requested Central Authority with the reasons for its

[87] See Art. 11(1)(h) in "Working draft of a Convention on the international recovery of child support and other forms of family maintenance", prepared by the Drafting Committee, Prel. Doc. No 7 of April 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance, *supra* p. I-207 of this tome (also available at <www.hcch.net>).

torité centrale requise. Le type et l'étendue de l'assistance à fournir sont ceux qui sont considérés « appropriés » dans l'État requis. Il appartient à l'Autorité centrale requise de déterminer quelles mesures sont « appropriées » selon les circonstances. L'Autorité centrale peut donc refuser une assistance si elle « considère » que les mesures ne sont pas nécessaires. Cependant, dès lors qu'elle juge les mesures nécessaires, elle est tenue de prendre des mesures appropriées. Une mesure appropriée au sens de l'article 7 peut être le renvoi par l'Autorité centrale requise de la requête à l'autorité appropriée. Par souci de simplification, la requête pourra être présentée sous la même forme qu'une demande fondée sur l'article 10, mais ce n'est pas obligatoire.

202 Alors que la première phrase du paragraphe premier dispose qu'une demande peut être présentée lorsqu'aucune demande prévue à l'article 10 n'est pendante, la seconde phrase impose l'existence d'un lien entre la mesure spécifique et la possibilité d'introduire une demande en vertu de l'article 10. Cette phrase reflète l'opinion générale selon laquelle il fallait délimiter le champ des requêtes de mesures spécifiques. On craignait en particulier que cet article soit utilisé à d'autres fins que le recouvrement d'aliments. On a également souhaité ajouter certains mots spécifiques encadrant de telles requêtes afin de refléter les objectifs de la Convention.

203 La seconde phrase montre clairement que les informations obtenues par une mesure spécifique sont destinées à aider une personne à faire une demande prévue à l'article 10 ou à déterminer si une demande prévue à l'article 10 doit être introduite. Il n'existe pas d'obligation à la charge de la personne d'introduire une telle demande suite à la réception des informations.

204 En conséquence, dès qu'elle reçoit une requête de mesures spécifiques et qu'elle a vérifié le lien avec une demande potentielle en vertu de l'article 10, une Autorité centrale est tenue de prendre des mesures appropriées, d'apporter un niveau d'assistance et de coopération adapté à la requête traitée et compatible, non seulement avec ses pouvoirs et ses ressources, mais aussi avec son droit interne. La requête pourrait, par exemple, viser l'obtention d'informations relatives aux revenus du débiteur, qui permettront à l'État requérant de rendre une décision d'aliments qui sera ultérieurement reconnue et exécutée dans l'État requis. Cette hypothèse serait couverte par le paragraphe premier plutôt que le paragraphe 2 car une demande future en vertu de la Convention est incontestablement envisagée, même si la procédure doit d'abord être achevée dans l'État requérant (situation envisagée au para. 2).

Paragraphe 2 – Une Autorité centrale peut également prendre des mesures spécifiques, à la requête d'une autre Autorité centrale, dans une affaire de recouvrement d'aliments pendante dans l'État requérant et comportant un élément d'extranéité.

205 L'affaire pendante visée au paragraphe 2 est une affaire interne de recouvrement d'aliments dans l'État requérant et pour laquelle l'aide d'un autre État est nécessaire. L'article 7(2) se limite aux affaires internes comportant un élément international et concernant le « recouvrement des aliments ». Les termes « dans une affaire de recouvrement d'aliments » ont été ajoutés pour préciser que cette disposition se limitait à de telles affaires et non simplement à « toute » affaire interne. Afin de ne pas désavantager un créancier qui cherche à obtenir une décision en matière d'aliments dans son propre État et qui a préalablement besoin d'une assistance en vue d'établir la filiation, l'article 7(2) prévoit une telle assistance « dans une affaire de recouvrement d'aliments pendante dans l'État requérant et comportant un élément d'extranéité ».

206 Bien qu'il ait été entendu que si une requête est déposée auprès d'une Autorité centrale dans un autre État contractant, l'affaire présente déjà un « élément international », l'expression « comportant un élément d'extranéité » a été ajoutée pour conférer plus de certitude aux conditions applicables aux requêtes de mesures spécifiques concernant une affaire internationale.

207 Lorsqu'une requête est soumise en vertu de l'article 7(2), l'Autorité centrale « peut également prendre des mesures spécifiques ». Le recours au verbe « peut » au paragraphe 2 ouvre une option à l'Autorité centrale et ne lui impose pas une obligation comme au paragraphe premier, qui emploie le présent de l'indicatif sans auxiliaire d'aspect. Cela, notamment, parce que les mesures spécifiques mentionnées au paragraphe 2 peuvent être toutes les mesures prévues à l'article 6(2) et qu'elles ne sont pas limitées à celles prévues à l'article 7(1).

208 Le paragraphe 2 pourrait s'appliquer même si le débiteur et le créancier vivaient tous les deux dans l'État requérant. Dans certains cas, les procédures judiciaires dans l'État requérant nécessitent des informations ou des mesures dans l'État requis, comme la localisation des biens ou la déposition d'un témoin étranger. Pour une demande d'aliments d'ordre purement interne, par exemple, le paragraphe 2 autoriserait l'introduction d'une requête de mesures spécifiques pour prendre des mesures provisoires à caractère territorial prévues à l'article 6(2)(i) ; mais si les biens ne peuvent pas d'abord être sécurisés dans l'État requis (ou un autre État), il sera peut-être inutile que le créancier poursuive sa demande interne. Dans la mesure où les Autorités centrales peuvent offrir une assistance administrative via un réseau de coopération bien établi, il est logique de passer par ce réseau, même dans une affaire interne comportant un élément d'extranéité, à condition que cela ne crée pas une charge de travail trop lourde pour l'Autorité centrale requise.

209 Si un service ou une attribution figurant dans la liste de l'article 6 est fourni en réponse à une requête fondée sur l'article 7 (quand aucune demande n'est pendante en vertu de l'art. 10), l'article 14 ne s'applique pas et les requêtes ne sont pas assorties des mêmes avantages que les demandes fondées sur le chapitre III, tels que l'accès effectif aux procédures et la gratuité des services. Toutefois, seuls les coûts et frais exceptionnels relatifs aux requêtes fondées sur l'article 7 peuvent être imposés par les Autorités centrales au titre de l'article 8(2) et (3).

Article 8 Frais de l'Autorité centrale

210 L'article 8 pose comme principe général qu'aucun des services fournis par l'Autorité centrale ne doit être payant. Ce principe général de gratuité des services administratifs pour les demandeurs et les Autorités centrales a été largement soutenu et jugé conforme aux objectifs de la Convention, à savoir une procédure simple, rapide et économique[88]. Ce principe a été considéré comme particulière-

[88] Ces principes ont été proposés dans « Coûts et frais judiciaires et administratifs, comprenant assistance et aide juridique, en vertu de la nouvelle Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », Rapport établi par W. Duncan, Secrétaire général adjoint, avec l'assistance de C. Harnois, Collaboratrice juridique, Doc. prél. No 10 de mai 2004 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 (ci-après Doc. prél. No 10/2004), ci-dessus p. I-258 du présent tome (également accessible à l'adresse <www.hcch.net>), para. 41 à 44.

request. The type and extent of assistance to be provided is such as is considered "appropriate" in the requested State. Therefore, it is for the requested Central Authority to evaluate on the basis of the reasons given which measures are "appropriate" in the circumstances. The Central Authority thus has discretion to refuse assistance when it is not "satisfied" that the measures are necessary. However, when the Central Authority is "satisfied" it is bound to take appropriate measures. An appropriate measure in Article 7 could be the referral of the request by the requested Central Authority to an appropriate authority. For simplicity the request could be presented in the same format as an Article 10 application, but this is not mandatory.

202 While the first sentence of paragraph 1 states that a request may be made when no Article 10 application is pending, the second sentence of paragraph 1 does impose a necessary connection between the specific measure and the possibility of an application under Article 10. This sentence reflects the common view that there needed to be limits imposed on the scope of requests for specific measures. In particular, there was concern about the use of this Article for purposes other than the recovery of maintenance. There was also the desire for specific words to be added to limit such requests to reflect the purposes of this Convention.

203 The second sentence makes clear that the information obtained by the specific measure is intended to assist a person to make an Article 10 application or to decide if an Article 10 application should be made. There is no compulsion on the person to make such an application following receipt of the information.

204 Hence, upon receipt of a request for specific measures, if satisfied of the connection to a possible Article 10 application, a Central Authority is expected to take appropriate measures and provide a level of assistance and co-operation that is appropriate for that particular request and is in accordance not only with its own powers and resources, but also with its internal laws. For example, the request could be for information about the debtor's income that will allow the requesting State to make a maintenance decision that is later to be recognised and enforced in the requested State. This example would be one covered by paragraph 1 rather than paragraph 2 because a future application under the Convention is definitely contemplated, even though proceedings must first be completed in the Requesting State (the situation envisaged under para. 2).

Paragraph 2 – A Central Authority may also take specific measures on the request of another Central Authority in relation to a case having an international element concerning the recovery of maintenance pending in the requesting State.

205 The pending case to which paragraph 2 refers is an internal case concerning the recovery of maintenance in the requesting State, and for which there was a need for assistance from another State. Article 7(2) is limited to internal cases having an international element and concerning "recovery of maintenance". The words "concerning the recovery of maintenance" were added to make clear that the scope of this provision was restricted to those cases so described, and not simply to "any" internal case. In order not to disadvantage a creditor who seeks to establish a maintenance decision in her / his own jurisdiction and first needs assistance to establish parentage, Article 7(2) provides for such assistance in "a case having an international element concerning the recovery of maintenance pending in the requesting State".

206 Although it was understood that if a request is made to a Central Authority in another Contracting State, there exists already an "international element" in the case, the words "having an international element" were added to give greater certainty to the conditions for making a specific measures request concerning an international case.

207 When a request is submitted under Article 7(2), the Central Authority "may also take specific measures". The word "may" in paragraph 2 denotes a discretion and not an obligation of the kind imposed by the word "shall" in paragraph 1. One reason for this is that the specific measures referred to in paragraph 2 could be any of the measures in Article 6(2) and are not restricted to those mentioned in Article 7(1).

208 Paragraph 2 could apply even if both the debtor and creditor lived in the requesting State. There are circumstances where information or measures in the requested State, such as the location of assets or evidence from a foreign witness, are needed for legal proceedings in the requesting State. For example, paragraph 2 would permit a specific measures request for provisional territorial measures referred to in Article 6(2)(i) to be made for a purely internal maintenance claim, but if assets cannot first be secured in the requested State (or another State), it may be pointless for a creditor to proceed with the internal application. As there is a well-established and co-operative network of Central Authorities that can provide administrative assistance, it is logical to use that network even for a domestic case with an international element, provided it does not create an unacceptable burden on the requested Central Authority.

209 If a service or function listed in Article 6 is provided in response to a request under Article 7 (when no application under Art. 10 is pending), Article 14 does not apply and requests do not attract the same benefits as Chapter III applications, such as effective access to procedures and cost-free services. However, only exceptional costs or expenses for Article 7 requests may be charged for by Central Authorities under Article 8(2) and (3).

Article 8 Central Authority costs

210 The general principle of Article 8 is that there should be no costs imposed for services provided by the Central Authority. The general principle of cost-free administrative services for applicants and Central Authorities was well supported, and consistent with the Convention's aims for a simple, low cost and rapid procedure.[88] This principle was

[88] These principles were proposed in "Administrative and legal costs and expenses under the new Convention on the international recovery of child support and other forms of family maintenance, including legal aid and assistance", Report drawn up by W. Duncan, Deputy Secretary General, with the assistance of C. Harnois, Legal Officer, Prel. Doc. No 10 of May 2004 for the attention of the Special Commission of June 2004 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 10/2004), *supra* p. I-259 of this tome (also available at <www.hcch.net>), at paras 41-44.

ment important en matière d'aliments destinés aux enfants. En outre, il a été jugé important de garantir que l'accès aux avantages et services de la Convention ne serait pas refusé aux demandeurs en raison de leurs ressources financières limitées. L'article 8 souligne un certain nombre de principes importants : a) la nécessité d'accorder un accès effectif aux services et aux procédures prévus par la Convention ; b) garantir un équilibre entre les droits et les obligations prévus par la Convention ; c) garantir un certain degré de réciprocité entre les États contractants qui permettrait d'instaurer la confiance et le respect mutuels nécessaires au succès de la Convention et d) la préséance du recouvrement des aliments sur le paiement de frais judiciaires et des autres frais.

211 L'article 8 porte sur les frais administratifs des Autorités centrales. Néanmoins, il est essentiel de bien comprendre que les explications relatives à l'article 8 sont données dans le contexte des demandes faites en vertu du chapitre III et que toute référence à la facturation de frais doit être rapprochée des articles 14, 15, 16, 17 et 43 relatifs à l'accès effectif aux procédures, à l'assistance juridique gratuite pour les demandes d'aliments destinés aux enfants, et au recouvrement des frais. Il convient également de souligner que l'Autorité centrale peut seulement recouvrer les frais exceptionnels encourus en vertu de l'article 7 mais pas ceux encourus en vertu de l'article 6. Il doit en outre être précisé que l'ensemble des services mentionnés dans la Convention, nécessaires à l'obtention ou l'exécution d'une décision d'aliments destinés aux enfants, sont couverts soit par l'article 8, soit par les articles 14, 15, 16, 17 et 43 (à l'exception des services de traduction).

Paragraphe premier – Chaque Autorité centrale prend en charge ses propres frais découlant de l'application de la Convention.

212 Cette disposition est issue de l'article 26 de la Convention Enlèvement d'enfants de 1980 et de l'article 38 de la Convention Protection des enfants de 1996. Les États ont la possibilité de conclure des accords bilatéraux ou régionaux, conformément à l'article 51(2), pour fournir d'autres services gratuits sur une base réciproque.

213 La formulation du paragraphe premier précise que l'Autorité centrale ne peut facturer ses services à une autre Autorité centrale et qu'elle doit supporter ses propres frais. Elle n'empêche pas l'Autorité centrale de facturer les frais à tout organisme ou personne autre que le demandeur visé au paragraphe 2. Voir les paragraphes 215 et 216 ci-dessous.

Paragraphe 2 – Les Autorités centrales ne peuvent mettre aucun frais à la charge du demandeur pour les services qu'elles fournissent en vertu de la Convention, sauf s'il s'agit de frais exceptionnels découlant d'une requête de mesures spécifiques prévue à l'article 7.

214 Le paragraphe 2 s'applique à l'Autorité centrale de l'État requérant comme à celle de l'État requis. Le « demandeur » est une personne ou un organisme public qui dépose une demande en vertu de l'article 10. Lorsque le demandeur est un organisme public, le même principe de gratuité des services s'applique. On a estimé qu'il n'était pas souhaitable de pénaliser un État en lui imposant des frais au simple motif qu'il avançait les aliments préalablement à leur recouvrement auprès du débiteur.

215 Bien que le paragraphe 2 dispose que l'Autorité centrale ne doit faire payer aucun des services qu'elle apporte au demandeur, d'autres personnes pourraient se voir imposer des frais pour les services de l'Autorité centrale ou être condamnées par une cour à payer des frais. À titre d'exemple, le débiteur qui s'est opposé sans succès aux procédures judiciaires ou l'employeur du débiteur qui s'est opposé à la mise en place d'une décision de saisie sur salaire pourrait avoir à payer des frais administratifs. L'article 43 peut faire référence au recouvrement des frais administratifs ou judiciaires. Lors des négociations, quelques-uns ont soutenu l'idée de faire payer les services de l'Autorité centrale au débiteur. On a estimé qu'à l'idée d'avoir à payer des frais supplémentaires, le débiteur serait encouragé à payer les aliments volontairement.

216 Le principe général du paragraphe 2 porte sur les services et attributions des Autorités centrales énumérés aux articles 5, 6, 7 et 12. La référence particulière aux « services qu'elles fournissent » à l'article 8(2) exprime clairement que les Autorités centrales ne peuvent pas faire payer leurs services, mais qu'un service apporté par un autre organisme qu'une Autorité centrale peut être payant sauf dans le cadre d'une demande d'aliments destinés aux enfants, auquel cas l'assistance juridique gratuite doit être fournie et aucun frais ne peut être facturé (art. 15(1)). Cependant, l'organisme visé à l'article 6(3) ne doit pas faire payer des services qui entrent dans le cadre des attributions qu'il exerce en qualité d'Autorité centrale.

217 Les versions antérieures de la Convention[89] prévoyaient une dérogation au principe général défini à l'article 8 qui aurait permis de faire payer des services additionnels ou des services juridiques de niveau plus élevé à moins qu'ils ne fassent obstacle à l'obligation de fournir un accès effectif aux procédures édictée par l'article 14.

218 Cette disposition a toutefois été remplacée lors de la Commission spéciale de 2006 par une disposition plus simple, maintenant prévue à l'article 8(2), qui exonère le demandeur de tous frais administratifs, tout en autorisant certains frais liés aux requêtes de mesures spécifiques fondées sur l'article 7. Les experts sont convenus que laisser la possibilité de faire payer des services additionnels ou de niveau plus élevé pourrait avoir pour conséquence involontaire d'inciter certaines Autorités centrales à en faire moins ou à ne proposer que les services minimaux à titre gracieux tout en faisant payer un nombre maximal de services[90]. Il a été également admis que des coûts de procédure qui empêcheraient un créancier d'introduire une demande d'aliments légitime feraient échec à la Convention.

219 Le principe de l'accès effectif aux procédures posé à l'article 14 est donc un principe prépondérant. Un demandeur ne doit pas être privé de l'accès effectif aux procédures parce que certains services risquent d'être payants. Voir également les explications relatives aux articles 15 et 16 qui mettent en exergue le principe de l'accès effectif.

220 Si le demandeur (autre que le créancier d'aliments destinés à un enfant) n'a pas les moyens de payer les frais, l'État requis doit l'aider à obtenir un accès effectif aux procédures, par exemple en l'aidant à faire une demande d'aide juridique dans l'État requis s'il y a droit et si celle-ci couvre les services en question.

[89] Doc. prél. No 16/2005 (*op. cit.* note 67).

[90] Voir « Observations portant sur l'esquisse d'un projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », reçues par le Bureau Permanent, Doc. prél. No 23 de juin 2006 à l'intention de la Commission spéciale de juin 2006 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (ci-après Doc. prél. No 23/2006, accessible à l'adresse <www.hcch.net>).

considered to be particularly important with regard to maintenance for children. It was also considered important to ensure that access to the benefits and services of the Convention was not denied to applicants because of their limited financial circumstances. A number of other important principles underpin Article 8: a) the need to provide effective access to services and procedures provided under the Convention; b) ensuring that the burdens and benefits of the Convention are not disproportionate; c) ensuring a certain level of reciprocity among Contracting States which would contribute to mutual confidence and respect which are necessary for a successful Convention; and d) the recovery of maintenance should take precedence over the payment of legal and other costs.

211 The subject of Article 8 is administrative costs of Central Authorities. Nevertheless, it should be understood that the explanation of Article 8 is in the context of applications under Chapter III and any reference to charging for services must be read in relation to Articles 14, 15, 16, 17 and 43 concerning effective access to procedures, free legal assistance for child support applications, and recovery of costs. It should also be clear that the Central Authority may only charge for exceptional costs incurred under Article 7 and not under Article 6. It is also important to make clear that all the services mentioned in the Convention which are necessary to have a child support order established or enforced are covered by either Article 8 or Articles 14, 15, 16, 17 and 43 (the only exception being translation services).

Paragraph 1 – Each Central Authority shall bear its own costs in applying this Convention.

212 This provision derives from Article 26 of the 1980 Hague Child Abduction Convention and Article 38 of the 1996 Hague Child Protection Convention. The possibility is left open for States to enter into bilateral or regional arrangements under Article 51(2) to provide other cost-free services on a reciprocal basis.

213 The formulation in paragraph 1 clarifies that a Central Authority may not charge another Central Authority for services and must bear its own costs. It does not prevent the possibility of a Central Authority imposing charges on any other person or body apart from the applicant referred to in paragraph 2. See paragraphs 215 and 216 below.

Paragraph 2 – Central Authorities may not impose any charge on an applicant for the provision of their services under the Convention save for exceptional costs arising from a request for a specific measure under Article 7.

214 Paragraph 2 applies to the Central Authority in both the requesting and requested States. The "applicant" is a person or public body making an application under Article 10. When the applicant is a public body, the same principle of cost-free services applies. It was considered undesirable to penalise a State by imposing charges simply because that State has provided maintenance to children in advance of recovery from the debtor.

215 Although paragraph 2 states that there shall be no charge to the applicant for services provided by the Central Authority, there may be other persons who could be charged for Central Authority services, or ordered by a court to pay costs. For example, a debtor who unsuccessfully opposed the legal proceedings, or the debtor's employer who refused to implement a wage withholding order, could be required to pay administrative costs. Article 43 may refer to the recovery of administrative or legal costs. During negotiations, there was some support for imposing charges for Central Authority services on a debtor. It was said this could encourage the debtor to pay maintenance voluntarily if faced with the prospect of paying other costs.

216 The general principle in paragraph 2 applies to the services or functions of Central Authorities listed in Articles 5, 6, 7 and 12. The specific reference to "their services" in Article 8(2) clarifies that Central Authorities cannot charge for their services, but it is possible that a service that has to be provided by a body other than a Central Authority might be charged for except in the context of an application for child support, in which case free legal assistance must be provided and no costs can be imposed (Art. 15(1)). However, a body referred to in Article 6(3) must not charge for services if it is performing functions as the Central Authority.

217 In earlier drafts of the Convention,[89] there was an exception to the general principle set out in Article 8 according to which a charge could have been imposed for additional services or higher level services unless they would interfere with the obligation under Article 14 to provide effective access to procedures.

218 However, that provision was substituted at the 2006 Special Commission by a simpler provision, now in Article 8(2), which exempts the applicant from any administrative charges, while allowing for some charges in relation to requests for specific measures under Article 7. Experts agreed that to allow for the possibility of charging for additional or higher level services could have the unintended consequence that some Central Authorities may do less or offer only the minimum services for free while charging for the maximum number of services.[90] It was also recognised that it would be a failure of the Convention if the costs of the procedure prevented a creditor from making a legitimate claim for maintenance.

219 The principle of effective access to procedures set out in Article 14 is thus an overriding principle. An applicant must not be denied effective access to procedures because charges may have to be imposed for some services. See also the explanations for Articles 15 and 16, in which the principle of effective access is further emphasised.

220 If the applicant (apart from the child support creditor) cannot afford to pay the charges, the requested State must assist the applicant to have effective access to procedures, for example, by assisting the applicant to make an application for legal aid in the requested State if the applicant is eligible to apply and if the legal aid would cover the services in question.

[89] Prel. Doc. No 16/2005 (*op. cit.* note 67).
[90] See "Comments on the tentative draft Convention on the international recovery of child support and other forms of family maintenance", received by the Permanent Bureau, Prel. Doc. No 23 of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 23/2006, available at <www.hcch.net>).

221 Une Autorité centrale doit prendre en charge ses propres frais découlant de la fourniture de services liés à une demande fondée sur l'article 10. Les personnes susceptibles d'en bénéficier peuvent être le créancier, le débiteur ou un organisme public. Tout créancier auquel les chapitres II et III ont été étendus en vertu d'une déclaration faite en application de l'article 2(3), peut également bénéficier de services gratuits.

222 Cette règle générale connaît une exception en ce qui concerne les frais de traduction, qui peuvent être mis à la charge d'un demandeur en vertu de l'article 45.

223 Les « frais exceptionnels » du paragraphe 2 sont ceux qui sont inhabituels, sortent de l'ordinaire ou font exception à la règle générale. La formulation de l'article 8(2), qui prévoit que les Autorités centrales « ne peuvent » mettre aucun frais à la charge du demandeur « sauf s'il s'agit de frais exceptionnels », signifie que l'Autorité centrale est libre de mettre ou non des frais exceptionnels à la charge du demandeur ; rien ne l'empêche de le faire (alors qu'elle l'était lorsque la formulation était « ne mettent aucun frais »).

Paragraphe 3 – L'Autorité centrale requise ne peut pas recouvrer les frais exceptionnels mentionnés au paragraphe 2 sans avoir obtenu l'accord préalable du demandeur sur la fourniture de ces services à un tel coût.

224 Le paragraphe 3 a été inséré à l'initiative de la Suisse[91]. La Session diplomatique était favorable aux arguments présentés par la délégation de la Suisse, à savoir que lorsque des frais exceptionnels sont encourus, l'autorité requérante devrait en être informée préalablement à la fourniture du service concerné. Des requêtes de mesures spécifiques faites en application de l'article 7 peuvent en effet engendrer des frais considérables bien qu'aucune demande ne sera présentée. Par exemple, certaines mesures spécifiques nécessitant le recours à des autorités externes, telles que la recherche des coordonnées du débiteur ou des détails concernant la situation financière du débiteur, pourraient ne pas être prises gratuitement[92]. Cependant, la suggestion selon laquelle l'autorité requérante devrait, d'une certaine manière, garantir le recouvrement de ces frais n'a pas été retenue pour être incluse dans la Convention. Cela ne préjuge en rien de la possibilité pour les États contractants de conclure de tels accords entre eux.

225 Un exemple peut illustrer les relations entre l'article 8(3) et l'article 43(1). Un créancier accepte, conformément à l'article 8(3), la fourniture de services pour localiser un débiteur, qui engendrera des « frais exceptionnels ». Si la recherche du débiteur n'aboutit pas, les frais seront à la charge du créancier, tandis que si la recherche aboutit, les frais devraient être recouvrés auprès du débiteur en vertu de l'article 8(2) ou de l'article 43(2). Cependant, la règle de l'article 43(1) doit être appliquée. Le créancier peut accepter une réduction des paiements d'aliments pour compenser les frais de localisation du débiteur, mais ce cas de figure n'est ni impliqué ni exigé par la Convention.

[91] Voir « Liste complète des observations relatives à l'avant-projet révisé de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », établie par le Bureau Permanent, Doc. prél. No 36 d'octobre 2007 à l'intention de la Vingt et unième session de novembre 2007 (ci-après Doc. prél. No 36/2007), ci-dessus p. I-470 du présent tome (également accessible à l'adresse <www.hcch.net>).

[92] Voir Procès-verbal No 2, para. 53.

CHAPITRE III – DEMANDES PAR L'INTERMÉDIAIRE DES AUTORITÉS CENTRALES

226 Les titres du chapitre III et de l'article 9 sont destinés à éliminer toute ambiguïté relative aux demandes et procédures. Toute demande fondée sur le chapitre III doit être présentée aux Autorités centrales et transmise par celles-ci. Le demandeur doit résider dans l'État requérant et doit s'adresser à l'Autorité centrale de celui-ci. La demande doit être une des demandes autorisées par l'article 10, revêtir les formes prévues à l'article 11 et être présentée conformément aux procédures prévues à l'article 12.

227 Une personne qui présente une demande relevant du chapitre III est fondée à solliciter tout l'éventail des services de l'Autorité centrale listés au chapitre II. À l'exception des mesures spécifiques de l'article 7, ces services sont réservés aux demandes présentées en vertu du chapitre III[93].

Article 9 Demande par l'intermédiaire des Autorités centrales

Toute demande prévue au présent chapitre est transmise à l'Autorité centrale de l'État requis par l'intermédiaire de l'Autorité centrale de l'État contractant dans lequel réside le demandeur. Aux fins de la présente disposition, la résidence exclut la simple présence.

228 L'article 9 définit la résidence aux seules fins de cette disposition. La « résidence » du demandeur ne doit pas être une « simple présence ». En revanche, la « résidence habituelle » n'est pas imposée. L'intention qui a présidé au choix de ce terme de « résidence » est de faciliter l'accès aux Autorités centrales et de faciliter le plus possible les demandes de recouvrement international d'aliments destinés aux enfants. Un enfant a besoin d'un soutien financier quel que soit le lieu où il vit et il ne devrait pas avoir à remplir de strictes conditions de résidence pour demander de l'assistance afin de le recevoir.

229 La question se pose de savoir si un demandeur peut directement présenter une demande en vertu du chapitre III à l'Autorité centrale d'un autre État contractant. Cette hypothèse pourrait se présenter, par exemple, lorsqu'un créancier qui a obtenu une décision dans le pays où il réside et s'établit ensuite dans un autre pays s'adresse directement à l'Autorité centrale de l'État d'origine pour faire exécuter la décision. Il a été convenu que bien qu'une Autorité centrale puisse accepter une telle demande si son droit interne l'y autorise, celle-ci ne sera pas considérée comme une demande relevant du chapitre III. L'action unilatérale du demandeur ne créera aucune obligation de coopération au titre de la Convention entre les deux pays concernés.

230 La question des relations juridiques entre le demandeur et l'Autorité centrale a été débattue, notamment la question de savoir si une procuration obligatoire était nécessaire. Certains délégués ont jugé que la relation pouvait être clarifiée en exigeant une procuration. D'autres ont déclaré qu'il peut arriver que l'Autorité centrale ne représente ni le demandeur ni l'État requérant, mais qu'elle remplisse les obligations de la Convention pour son propre État. Le demandeur ne pourrait alors donner instruction à l'Autorité centrale dans le cadre de la procédure. Les délégués ont pensé qu'il serait inopportun d'imposer à tous les États contractants un modèle uniforme de relations entre une Autorité centrale et un demandeur. L'article 42 autorise

[93] La Convention ne fait pas obstacle aux droits d'une personne de demander à un autre pays, en dehors de cette Convention, une procédure ou une voie de droit autorisée par la loi de ce pays. Voir art. 37.

221 A Central Authority must bear its own costs in providing all services in connection with an application under Article 10. Those entitled to benefit include the creditor, the debtor and a public body. Any creditor who is brought within the scope of the Convention by a declaration under Article 2(3) which extends Chapter II or III to that creditor may also benefit from cost-free services.

222 A specific exception to the general rule is that an applicant may be charged for translation costs under Article 45.

223 In the context of paragraph 2, "exceptional costs" are those which are unusual, out of the ordinary or making an exception to a general rule. The wording of Article 8(2) that the Central Authority "may" not impose any charge "save for exceptional costs" means that the Central Authority has discretion as to whether or not it will impose charges in such cases. It is not prohibited from imposing those charges (as it was when the word "shall" was used instead of "may").

Paragraph 3 – The requested Central Authority may not recover the costs of the services referred to in paragraph 2 without the prior consent of the applicant to the provision of those services at such cost.

224 Paragraph 3 was included on the initiative of Switzerland.[91] The Diplomatic Session supported the arguments of the Swiss delegation concerning the situations in which exceptional costs or expenses can arise, namely that the requesting authority should be notified of the costs prior to a service being provided. Article 7 requests for specific measures could trigger costs which are considerable, even though it is possible that the result will be that no application is made. For example, some specific measures which need the support of external authorities might not be taken free of charge, such as finding details of the debtor's location or details of the debtor's financial situation.[92] However, the suggestion that the requesting authority should somehow guarantee payment of these costs was not supported as an inclusion in the Convention text, but that does not limit the possibility that Contracting States might make such arrangements between themselves.

225 An example may help to illustrate the relationship between Article 8(3) and Article 43(1). Take the example of a creditor who agrees under Article 8(3) to the provision of services to locate a debtor which will result in "exceptional costs". If the search for the debtor is unsuccessful, the creditor will have to bear the costs. But if the search is successful, the costs should be recovered from the debtor under Article 8(2) or Article 43(2). However, the rule in Article 43(1) must be applied. The creditor may agree to a reduction in maintenance payments to offset the cost of locating the debtor, but this is neither implied nor required by the Convention.

[91] See "Consolidated list of comments on the revised preliminary draft Convention on the international recovery of child support and other forms of family maintenance", drawn up by the Permanent Bureau, Prel. Doc. No 36 of October 2007 for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 36/2007), *supra* p. I-470 of this tome (also available at <www.hcch.net>).
[92] Minutes No 2, para. 53.

CHAPTER III – APPLICATIONS THROUGH CENTRAL AUTHORITIES

226 The titles of Chapter III and of Article 9 are intended to remove any ambiguity about applications and procedures. Any application made in accordance with Chapter III must be made to and transmitted through the Central Authorities. The applicant must reside in the Requesting State and must apply to the Central Authority of that State. The application must be one as permitted by Article 10 and must be in the form required by Article 11, and in accordance with the procedures in Article 12.

227 A person who makes an application under Chapter III is entitled to seek the full range of Central Authority services that are listed in Chapter II. With the exception of specific measures under Article 7, these services are only available if an application is made under Chapter III.[93]

Article 9 Application through Central Authorities

An application under this Chapter shall be made through the Central Authority of the Contracting State in which the applicant resides to the Central Authority of the requested State. For the purpose of this provision, residence excludes mere presence.

228 Article 9 contains a definition of residence for the purpose of this provision only. The "residence" of the applicant must be more than "mere presence". On the other hand, "habitual residence" is not required; the intention behind the use of simple "residence" is to provide easier access to the Central Authorities and to ensure that it is as easy as possible to apply for the international recovery of child support. A child requires financial support wherever she or he may be living and should not have to satisfy a strict residency test in order to apply for assistance to receive it.

229 The question arises whether an applicant may make an application under Chapter III directly to the Central Authority of another Contracting State. This might occur, for example, where a creditor, who has obtained a decision in the country where she / he resides, and then moves to live in another country, applies directly to the Central Authority in the originating country to have the order enforced. It was agreed that while a Central Authority might, if its internal law permits, accept such an application, this would not be regarded as an application made under Chapter III. The unilateral action of the applicant will not create obligations of co-operation under the Convention between the two countries concerned.

230 The question of the legal relationship between the applicant and the Central Authority was discussed, in particular, whether a mandatory power of attorney was needed. Some delegates agreed that the relationship could be clarified by requiring a power of attorney. Others stated that the Central Authority may represent neither the applicant nor the requesting State, but be regarded as fulfilling the obligations of the Convention for its own State. The applicant in such case could not direct the Central Authority how to act in the proceedings. It was felt that it would be wrong to impose on all Contracting States a uniform model of how the Central Authority relates to an applicant. Now, Article 42

[93] The Convention does not interfere with the rights of any person to apply, outside of this Convention, to another country, for any procedure or remedy available under the law of the other country. See Art. 37.

maintenant une Autorité centrale requise à demander une procuration seulement si elle représente le demandeur en justice.

Article 10 Demandes disponibles

231 L'article 10 définit le champ d'application de la Convention du point de vue des demandes qu'il est possible de présenter. Selon le cas, différentes catégories de demandes peuvent être formées ensemble ou alternativement.

232 Les catégories de demandes de l'article 10 sont conformes aux recommandations de la Commission spéciale de 1999 suivant lesquelles le nouvel instrument devrait « être complet et s'inspirer des meilleurs aspects des Conventions existantes »[94], notamment en ce qui concerne les procédures d'obtention et de modification des décisions alimentaires prévues par la Convention de New York de 1956.

233 Une demande séparée de recouvrement d'arrérages avait été prévue dans les versions antérieures de l'article 10. Cependant, il a été convenu que le recouvrement des arrérages concernera toujours la reconnaissance et l'exécution d'une décision existante aux termes de laquelle des arrérages ont été cumulés. Une demande séparée était donc redondante. Le recouvrement des arrérages est prévu à l'article 6(2)(e) relatif à l'exécution continue et à l'article 19(1), aux termes duquel l'obligation de payer des arrérages entre explicitement dans le champ d'application d'une décision en matière d'aliments aux fins du chapitre V sur la reconnaissance et l'exécution.

Paragraphe premier – Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un créancier qui poursuit le recouvrement d'aliments en vertu de la présente Convention :

234 Le premier paragraphe de l'article 10 a été insérée à la suite des discussions de la Commission spéciale de 2006. Les termes « les catégories de demandes suivantes doivent pouvoir être présentées par un créancier » éliminent toute incertitude ou ambiguïté quant à l'obligation faite à un État contractant de permettre à un créancier de présenter toutes les demandes énumérées à l'article 10(1). Le règlement des demandes est conforme à l'article 10(3). Les demandes visées au paragraphe premier peuvent être soumises aux limites de compétences prévues au paragraphe 3.

235 L'article 10(1) s'applique exclusivement au créancier. Bien que la définition du « créancier » à l'article 3 ne couvre qu'une « personne » physique, l'article 36(1) prévoit que pour la reconnaissance et l'exécution d'une décision rendue sur le fondement de l'article 10(1), un créancier peut également être un organisme public. La disposition décrit les critères que doit satisfaire le créancier qui sollicite l'assistance d'une Autorité centrale en vertu de l'article 10(1) : le demandeur doit être dans l'État requérant ; le demandeur doit être le créancier (ou une personne agissant pour le créancier) qui poursuit le recouvrement d'aliments dans un autre État contractant (l'État requis) ; la demande doit être l'une de celles prévues à l'article 10(1)(a) à (f). Enfin, la demande doit être présentée par l'intermédiaire des Autorités centrales, conformément à l'article 9.

236 Le créancier doit être dans l'État requérant pour présenter une demande. Le choix des termes « Dans un État requérant » a permis que l'article 10 s'applique également aux créanciers personnes physiques et aux organismes publics et a supprimé la nécessité de définir « l'État requérant » à l'article 3 comme le lieu de résidence du demandeur et d'origine de la demande. Une telle définition n'aurait pas été adaptée au cas des organismes publics. Le terme « État requérant » a été jugé suffisamment clair pour ne pas être défini.

Alinéa (a) – la reconnaissance ou la reconnaissance et l'exécution d'une décision ;

237 La décision visée par l'article 10(1)(a) et (b) est décrite à l'article 19[95]. Elle peut aussi faire partie d'une décision décrite à l'article 21. Voir également les explications des termes « reconnaissance » et « exécution » au paragraphe 429.

238 Aux fins de l'article 10(1)(a), une demande de reconnaissance ou de reconnaissance et d'exécution sera traitée conformément à l'article 23, ou, le cas échéant, l'article 24, et sera accompagnée des documents énumérés à l'article 25[96].

239 Pour les besoins du traitement d'une demande de reconnaissance ou de reconnaissance et d'exécution d'une décision, la question peut se poser de savoir si la décision émane d'une autorité judiciaire ou d'une autorité administrative. Si la décision remplit les critères de l'article 19, est exécutoire dans le pays d'origine et est prononcée par l'autorité compétente pour rendre ce type de décision dans cet État contractant, elle doit être reconnue et exécutée, sous réserve que les bases de reconnaissance et d'exécution énoncées à l'article 20 soient remplies et que les motifs de refus prévus à l'article 22 ne soient pas soulevés. L'identité de l'autorité qui a prononcé la décision est sans incidence.

240 Bien que cela ne soit pas expressément indiqué, une décision dont la reconnaissance, ou la reconnaissance et l'exécution, est demandée sur le fondement de la Convention doit être une décision rendue dans un État contractant, conformément à l'article 20(1). Toutefois, il n'est pas obligatoire que la décision ait été rendue dans l'État requérant. À titre d'exemple, un créancier qui vivait dans l'État X et y a obtenu une décision alimentaire s'établit dans l'État Y. Le débiteur s'est établi dans l'État Z. Les États X, Y et Z sont tous trois des États contractants. Le créancier qui vit dans l'État Y peut demander dans l'État Z la reconnaissance ou la reconnaissance et l'exécution de la décision rendue dans l'État X.

241 La question de savoir si la même règle doit s'appliquer lorsque l'État d'origine est un État non contractant a été débattue et il a été convenu que seule une décision rendue dans un État contractant peut être reconnue et exécutée dans l'État requis en vertu du chapitre V (voir art. 20(1)). En revanche, l'article 10(1)(a) n'interdit pas la transmission d'une décision rendue dans un État non contractant aux fins de reconnaissance et d'exécution en vertu de la loi de l'État requis, sur le fondement de la courtoisie internationale entre États.

[94] Rapport et Conclusions de la Commission spéciale de 1999 (*op. cit.* note 3), para. 46.

[95] Une demande de reconnaissance et d'exécution d'une décision alimentaire peut être présentée en vertu du chapitre III par l'intermédiaire d'une Autorité centrale. Une demande directe de reconnaissance et d'exécution d'une décision alimentaire est également possible aux termes des art. 19(5) et 37, mais ce n'est pas une demande fondée sur le chapitre III. L'assistance de l'Autorité centrale ne peut être sollicitée car le chapitre II ne s'applique pas à ces demandes. Voir les explications des art. 19 et 37.

[96] « Rapport du Groupe de travail chargé des formulaires – Formulaires recommandés », coordonné par le Bureau Permanent, Doc. prél. No 31-B de juillet 2007 à l'intention de la Vingt et unième session de novembre 2007 (ci-après Doc. prél. No 31-B/2007, accessible à l'adresse <www.hcch.net>). L'annexe A comprend le formulaire de demande proposé par le Groupe de travail chargé des formulaires. Voir également l'art. 11(4).

permits a requested Central Authority to ask for a power of attorney only if it acts as legal representative of the applicant.

Article 10 Available applications

231 Article 10 establishes the scope of the Convention in terms of available applications. Where appropriate, different types of application may be made in combination or in the alternative.

232 The range of applications in Article 10 reflects the recommendations of the 1999 Special Commission that the Convention should be "comprehensive in nature, building upon the best features of the existing Conventions",[94] including for example the establishment and modification of maintenance decisions as provided for in the 1956 New York Convention.

233 A separate application for recovery of arrears had been included in earlier drafts of Article 10. However, it was agreed that recovery of arrears will always be a question of recognition and enforcement of an existing order under which arrears have accrued. Therefore, a separate application was redundant. The recovery of arrears is provided for in Article 6(2)(e) concerning ongoing enforcement, and in Article 19(1), where an obligation to pay arrears is explicitly included within the scope of a maintenance decision for the purposes of Chapter V on recognition and enforcement.

Paragraph 1 – The following categories of application shall be available to a creditor in a requesting State seeking to recover maintenance under this Convention –

234 The first paragraph of Article 10 was inserted following discussions at the 2006 Special Commission. The words "The following categories of application shall be available to a creditor" are intended to remove any doubt or ambiguity that a Contracting State must make available to a creditor all the applications listed in Article 10(1). The applications will be determined in accordance with Article 10(3). The applications in paragraph 1 may be subject to the jurisdictional limitations in paragraph 3.

235 Article 10(1) applies exclusively to the creditor. Although the definition of "creditor" in Article 3 refers only to an "individual", Article 36(1) provides that for the purposes of applications for recognition and enforcement of a decision in Article 10(1), a creditor may also be a public body. The provision describes the threshold criteria to be met by the creditor when seeking the assistance of a Central Authority under Article 10(1): the applicant must be in the requesting State; the applicant must be the creditor (or a person acting for the creditor) who is seeking to recover maintenance in another Contracting State (the requested State); and the application must be one of the applications described in Article 10(1)(a) to (f). The application must be made through the Central Authorities in accordance with Article 9.

236 The creditor must be in the requesting State in order to make an application. The choice of the words "in a requesting State" ensured that Article 10 applied equally to individual creditors and to public bodies, and removed the need to define "requesting State" in Article 3 as the place where the applicant has his or her residence and from where the application is made. Such a definition would not have been appropriate for a public body. The term "requesting State" was considered to be self-defining.

Sub-paragraph (a) – recognition or recognition and enforcement of a decision;

237 A decision to which Article 10(1)(a) and (b) applies is a decision as described in Article 19.[95] It may also be a part of a decision as described in Article 21. See also the explanation of "recognition" and "enforcement" in paragraph 429.

238 For the purposes of Article 10(1)(a), an application for recognition or recognition and enforcement of a decision would be processed in accordance with Article 23 or, as the case may be, Article 24, and would be accompanied by the documents listed in Article 25.[96]

239 For the purposes of processing an application for recognition or recognition and enforcement of a decision, the question may arise whether the maintenance decision is made by a judicial authority or an administrative authority. If the decision meets the requirements of Article 19, and it is enforceable in the State of origin and is made by the legal authority competent to make such decisions in that Contracting State, it must be recognised and / or enforced, provided the bases for recognition and enforcement in Article 20 are met and the grounds for refusal in Article 22 are not raised. The deciding authority is irrelevant.

240 Although not stated explicitly, a decision for which recognition, or recognition and enforcement, under the Convention is sought must, in accordance with Article 20(1), be a decision made in a Contracting State. However, it need not be a decision of the requesting State. For example, a creditor who was living in State X and obtained a maintenance order there moves to State Y. The debtor has moved to State Z. States X, Y and Z are all Contracting States. The creditor living in State Y can request recognition, or recognition and enforcement, in State Z of the decision made in State X.

241 Whether the same rule would apply if the originating jurisdiction is a non-Contracting State was discussed and it was agreed that only a decision made in a Contracting State is entitled to recognition and enforcement under Chapter V in the State addressed (see Art. 20(1)). On the other hand, Article 10(1)(a) does not prohibit, as an act of comity between States, the transmission of a decision made in a non-Contracting State for recognition and enforcement under the law of the requested State.

[94] Report and Conclusions of the 1999 Special Commission (*op. cit.* note 3), para. 46.

[95] An application for the recognition and enforcement of a maintenance decision may be made under Chapter III, through a Central Authority. Alternatively, a direct request for the recognition and enforcement of a maintenance decision is available in accordance with Arts 19(5) and 37, but this is not a Chapter III application. Central Authority assistance cannot be sought as Chapter II does not apply to such applications. See explanation for Arts 19 and 37.

[96] "Report of the Forms Working Group – Recommended Forms", co-ordinated by the Permanent Bureau, Prel. Doc. No 31-B of July 2007 for the attention of the Twenty-First Session of November 2007 (hereinafter Prel. Doc. No 31-B/2007, available at <www.hcch.net>). Annex A contains the application form proposed by the Forms Working Group. See also Art. 11(4).

Alinéa (b) – l'exécution d'une décision rendue ou reconnue dans l'État requis ;

242 Une demande d'exécution d'une décision rendue dans l'État requis est une demande faite à un État contractant d'exécuter sa propre décision. Une telle demande pourrait notamment survenir dans l'hypothèse de la défaillance d'un débiteur qui réside dans l'État d'origine alors que le créancier n'y réside plus (ou n'y a jamais résidé).

243 Les termes « ou reconnue » de l'alinéa (b) autoriseraient aussi une demande d'exécution d'une décision déjà reconnue dans l'État requis. Ces mêmes termes de l'alinéa (b) couvrent aussi les hypothèses telles qu'une demande de reconnaissance d'une décision présentée antérieurement alors que l'exécution n'était pas un problème ou une décision (y compris une décision prise dans un État non contractant) reconnue antérieurement dans l'État requis en vertu d'une autre procédure et non de cette Convention.

Alinéa (c) – l'obtention d'une décision dans l'État requis lorsqu'il n'existe aucune décision, y compris l'établissement de la filiation si nécessaire ;

244 L'alinéa (c) autorise le créancier à présenter une demande de décision alimentaire lorsqu'aucune décision n'existe dans un autre État. Si l'établissement préalable de la filiation est nécessaire, il est autorisé par l'alinéa (c)[97].

245 L'obtention d'une décision alimentaire était autorisée par la Convention de New York de 1956. Une demande au titre de l'alinéa (c) est soumise au paragraphe 3, si bien que les règles de compétence du for peuvent restreindre les hypothèses dans lesquelles une demande de décision peut être présentée et les règles de procédure et de droit matériel du for gouverneront la procédure.

246 De nombreux systèmes autorisent, à juste titre, le créancier à former une demande dans l'État du débiteur. Cela peut être plus rapide et plus efficace, car il n'y aura pas de conditions internationales à remplir pour la signification ou la notification au défendeur et il n'y aura pas besoin de procédures de reconnaissance et d'exécution des jugements étrangers. L'évaluation de la capacité de paiement d'un débiteur sera plus exacte et un créancier pourrait obtenir une pension alimentaire plus élevée ; le patrimoine pris en compte pourrait être plus large ; et la probabilité de nouvelles demandes de modification est moindre. En outre, les autorités de l'État du débiteur pourront exécuter leur propre décision plus rapidement et plus efficacement. Voir également les explications relatives à l'article 6(2)(j).

247 La deuxième partie de l'alinéa (c) relative à la filiation peut entrer en jeu dans l'hypothèse où un créancier dépose une demande pour obtenir des aliments dans l'État du débiteur, mais la demande ne peut être instruite sans preuve de la filiation. La Convention ne prévoit pas de demande séparée d'établissement de la filiation, qui ne peut être sollicitée que dans le cadre d'une demande d'obtention des aliments. Tel est l'esprit de l'alinéa (c). L'article 10(1)(c) est un compromis entre les experts qui jugeaient indispensable que la Convention prête assistance à l'établissement de la filiation et souhaitaient une demande séparée d'établissement de la filiation (comme c'était le cas dans le projet de Convention du Doc. prél. No 13 de janvier 2005[98]) et ceux qui voulaient totalement exclure les questions de filiation de la Convention. Les raisons avancées par certains experts en faveur de l'exclusion étaient que l'établissement de la filiation pour les besoins restreints des aliments était contraire à l'ordre public de leur État ou que dans leur État, une décision sur la filiation avait un effet *erga omnes*, ce qui signifie que si la filiation est établie, elle est opposable à tous et son effet n'est pas limité au litige sur les aliments.

248 L'effet conjugué de l'alinéa (c) lu conjointement avec le paragraphe 3 est qu'il appartient à la loi de chaque État de déterminer les circonstances dans lesquelles ses autorités sont compétentes pour statuer sur la filiation et l'effet (*erga omnes* ou entre les seules parties au litige sur les aliments) de leur décision.

249 Le nécessaire lien entre l'obtention d'une décision alimentaire et la filiation de l'alinéa (c) ne limite en aucune façon l'assistance qui peut être offerte en vertu de l'article 6(2)(h). Celui-ci affirme que dans le cadre d'une demande en vertu de l'alinéa (c), « toutes les mesures appropriées » doivent être prises conformément au droit interne et « sont soumises aux règles de compétences » énoncées au paragraphe 3.

250 Les règles relatives à la loi applicable à l'établissement de la filiation sont diverses. La loi applicable peut être la loi du for, la loi du pays du domicile ou de la nationalité – de l'enfant ou de toutes les parties, la loi applicable à la décision alimentaire ou celle du pays de naissance de l'enfant[99].

251 Il faut souligner que lorsqu'un État requérant adresse une demande de recouvrement d'aliments comprenant l'établissement de la filiation, l'Autorité centrale n'est pas tenue d'envoyer les preuves biologiques avec la demande initiale et ne doit pas le faire. Les preuves éventuellement nécessaires seront sollicitées après acceptation de la demande.

252 Chaque État contractant doit indiquer dans son Profil ou dans les informations fournies au titre de l'article 57 la manière dont il sera procédé à l'établissement de la filiation au regard des articles 6(2)(h) et 10(1)(c). Voir également les commentaires relatifs à l'article 15(1).

Alinéa (d) – l'obtention d'une décision dans l'État requis lorsque la reconnaissance et l'exécution d'une décision n'est pas possible, ou est refusée, en raison de l'absence d'une base de reconnaissance et d'exécution prévue à l'article 20 ou pour les motifs prévus à l'article 22(b) ou (e) *;*

253 Cette règle se limite aux hypothèses de non-reconnaissance ou d'inexécution de la décision découlant d'une absence de compétence en vertu de l'article 20 ou de l'établissement d'un des motifs énumérés à l'article 22(b) ou (e).

254 Un net soutien lors des débats de la Commission spéciale et un soutien écrasant dans les réponses au Questionnaire de 2002[100] ont été exprimés en faveur d'une règle de la Convention autorisant l'obtention d'une décision dans les hypothèses visées à l'alinéa (d). On peut également avancer que ce principe figure implicitement à l'article 20(4).

[97] *Ibid*. L'annexe C comprend un formulaire de demande proposé par le Groupe de travail chargé des formulaires. Voir également l'art. 11(4).

[98] « Esquisse d'une Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », préparé par le Comité de rédaction, Doc. prél. No 13 de janvier 2005 à l'intention de la Commission spéciale d'avril 2005 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (ci-après Doc. prél. No 13/2005), ci-dessus p. I-282 du présent tome (également accessible à l'adresse <www.hcch.net>).

[99] Doc. prél. No 4/2003 (*op. cit.* note 79), para. 25 à 33.

[100] Dont il est fait état dans le Rapport Duncan (*op. cit.* note 9), para. 24, sous (v).

Sub-paragraph (b) – enforcement of a decision made or recognised in the requested State;

242 An application to enforce a decision made in the requested State is a request to a Contracting State to enforce its own decision. This may arise, for example, when a debtor resides in the originating jurisdiction and defaults on payment, but a creditor no longer resides (or never resided) in that jurisdiction.

243 The words "or recognised" in sub-paragraph (b) would also permit an application for the enforcement of a decision already recognised in the requested State. The words "or recognised" in sub-paragraph (b) will also cover situations such as those where an earlier application to recognise a decision was made when enforcement was not a problem, or where a decision, including a decision made in a non-Contracting State, has previously been recognised in the requested State under some other procedure, and not this Convention.

Sub-paragraph (c) – establishment of a decision in the requested State where there is no existing decision, including where necessary the establishment of parentage;

244 Sub-paragraph (c) permits the creditor to make an application to establish a maintenance decision when no decision exists in any other State. If parentage must be determined before the maintenance decision can be established, that is authorised by sub-paragraph (c).[97]

245 The establishment of a maintenance decision was authorised under the 1956 New York Convention. An application under sub-paragraph (c) is subject to paragraph 3, so that jurisdictional rules of the forum may limit the circumstances in which an application for establishment might be made, and the forum's rules of procedure and substance will govern the proceedings.

246 Many systems allow for the creditor to apply for establishment in the debtor's jurisdiction, and for good reasons. It may be faster and more efficient, as there will be no international requirements to meet for service of process or notification of the respondent and no need for procedures for the recognition and enforcement of foreign judgments. There will be a more accurate assessment of the debtor's ability to pay and a creditor may get more child support; more assets may be found; and further applications for modification are less likely. In addition, authorities in the debtor's jurisdiction may be able to enforce their own decision more quickly and more effectively. See also the explanation for Article 6(2)(j).

247 The operation of the second part of sub-paragraph (c) concerning parentage may arise in a situation where a creditor applies for the establishment of a maintenance decision in the debtor's jurisdiction, but the application cannot proceed without proof of parentage. A separate application for the establishment of parentage is not available under the Convention. It can only be requested in connection with a request to establish a maintenance decision. This is the intention of sub-paragraph (c). Article 10(1)(c) was a compromise between those experts who considered it crucial for the Convention to provide assistance to establish parentage and wanted a separate application for establishment of parentage (as appeared in the draft Convention in Prel. Doc. No 13 of January 2005[98]), and those who wanted parentage issues excluded completely from the Convention. Reasons given by some experts for opposing inclusion were that establishing parentage for the restricted purposes of maintenance was against public policy in their jurisdictions, or that the *erga omnes* effect of a decision on parentage prevailed in their jurisdiction, meaning that if parentage is established, it is established for all purposes, not just maintenance.

248 The combined effect of sub-paragraph (c), read in conjunction with paragraph 3, is that it is a matter for the law of each State to determine the circumstances in which its authorities have jurisdiction to determine parentage and the effect (whether *erga omnes*, or for the purpose of maintenance only) of such determination.

249 The necessary connection between the establishment of a maintenance decision and parentage in sub-paragraph (c) does not in any way limit the assistance that may be offered under Article 6(2)(h). This latter article affirms that in relation to an application under sub-paragraph (c), "all appropriate measures" must be taken, according to the internal law and "subject to the jurisdictional rules" as mentioned in paragraph 3.

250 The existing rules on the law applicable to the establishment of parentage are variable. The applicable law may be: the law of the forum, or the law of the country of domicile or of nationality – of the child or of all the parties, the law applicable to the maintenance decision, or the law of the country of the child's birth.[99]

251 It should be emphasised that when a requesting State sends an application for recovery of maintenance including establishment of parentage, the Central Authority is not required to and should not send any biological evidence with the initial application. Any necessary evidence will be sought after the application has been accepted.

252 Each Contracting State should indicate in its Country Profile or in information provided under Article 57 how the establishment of parentage will be carried out in relation to Articles 6(2)(h) and 10(1)(c). See also the explanation under Article 15(1).

Sub-paragraph (d) – establishment of a decision in the requested State where recognition and enforcement of a decision is not possible, or is refused, because of the lack of a basis for recognition and enforcement under Article 20, or on the grounds specified in Article 22(b) or (e);

253 This rule is confined to cases where the bases for not recognising or enforcing a decision are a lack of jurisdiction under Article 20 or if either of the grounds specified in Article 22(b) or (e) has been established.

254 There was strong support in Special Commission discussions and overwhelming support in the 2002 Questionnaire[100] for a rule in the Convention allowing establishment of a decision in the circumstances of sub-paragraph (d). It may also be argued that existence of this principle is implicit in Article 20(4).

[97] *Ibid.*, Annex C contains the application form proposed by the Forms Working Group. See also Art. 11(4).

[98] "Working draft of a Convention on the international recovery of child support and other forms of family maintenance", prepared by the Drafting Committee, Prel. Doc. No 13 of January 2005 for the attention of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 13/2005), *supra* p. I-283 of this tome (also available at <www.hcch.net>).

[99] Prel. Doc. No 4/2003 (*op. cit.* note 79), paras 25-33.

[100] Noted in the Duncan Report (*op. cit.* note 9), para. 24, at (v).

255 L'alinéa (d) est nécessaire pour atténuer les risques d'injustice, par exemple dans le cas d'un créancier dans un État A qui bénéficie d'une ordonnance alimentaire émanant d'un État B, dont la reconnaissance et l'exécution sont refusées dans un État C, le pays de résidence du débiteur. De plus, la règle *res judicata* ne s'applique pas dans ce cas. Si une décision étrangère ne peut être reconnue, l'effet juridique est que la décision n'existe pas pour l'État requis et qu'une nouvelle décision peut être prononcée. L'autre exemple est celui de l'impossibilité de reconnaître ou d'exécuter une décision relative à des aliments destinés à un enfant exprimée en pourcentage du salaire, jugée trop vague par les lois de certains pays. Une nouvelle procédure peut être nécessaire pour rendre une nouvelle décision indiquant un montant précis.

256 La question se pose de savoir s'il est possible de présenter une demande au titre de l'alinéa (d) avant de demander ou d'obtenir une décision sur la reconnaissance et l'exécution, lorsqu'on sait à l'avance que celles-ci seront refusées (faute de base de reconnaissance en vertu de l'art. 20). À titre d'exemple, lorsqu'une décision obtenue est fondée sur la compétence du for du créancier et qu'on sait qu'une telle décision ne peut être reconnue dans l'État où le débiteur réside actuellement, doit-on perdre du temps à effectuer les formalités pour obtenir un refus de reconnaissance ? L'emploi des mots « n'est pas possible » implique que la Convention ne crée aucune obligation de demander la reconnaissance avant de solliciter la décision lorsqu'on sait que la reconnaissance sera refusée. Cependant, la procédure d'obtention de la décision est habituellement plus longue que la procédure de reconnaissance et d'exécution. Pour éviter de perdre du temps, le demandeur soumettrait une demande d'obtention d'une décision. Cependant, il est également permis de présenter une demande de reconnaissance de la précédente décision pour le cas où l'État requis pourrait trouver une autre base de reconnaissance en dehors de la compétence du for du créancier. Malheureusement, les coûts de traduction et les autres coûts afférents à deux demandes pourraient être prohibitifs pour un créancier.

Alinéa (e) – la modification d'une décision rendue dans l'État requis ;

257 Les questions qui entourent la modification d'une décision ont été examinées dans le Rapport Duncan[101] et il a été suggéré que « l'une des principales conditions pour surmonter les problèmes liés à la compétence en matière de modification est d'instaurer un système de coopération rapide et efficace, combiné à un soutien approprié pour le créancier ou le débiteur, de sorte que lorsqu'une modification doit être sollicitée dans un for incommode pour l'une des parties, l'inconvénient est minimisé pour le demandeur »[102]. Ces questions ont été à nouveau résumées dans le Rapport de la réunion de la Commission spéciale de 2003, au Document préliminaire No 5 d'octobre 2003[103].

258 Compte tenu de la règle prévue par la Convention de New York de 1956, la réunion de la Commission spéciale de 2004 a été très favorable à l'insertion d'une demande de modification dans la Convention et a admis que la coopération administrative est essentielle. L'importance de la coopération administrative pour réduire les injustices ou les inconvénients pour les parties est soulignée[104].

259 L'alinéa (e) fournit une base juridique permettant au créancier de demander à l'État d'origine de modifier sa propre décision. Le grand avantage de la modification dans l'État d'origine est qu'il n'existe qu'une ordonnance, mais la personne qui sollicite la modification (le créancier dans ce cas) aura habituellement besoin d'être assistée ou d'être représentée en justice dans l'État requis.

260 Les bases sur lesquelles la modification est autorisée sont régies par la loi de l'État requis. Quelques principes pertinents ont été recensés dans le Rapport Duncan[105]. Lorsque le créancier sollicite une modification, c'est habituellement en vue d'augmenter les aliments. La règle habituelle est que cette modification est autorisée en cas de modification de la situation matérielle du créancier ou du débiteur.

261 La règle de l'article 31 clarifie le statut d'une décision modifiée par une ordonnance provisoire en vertu des accords dits de réciprocité du Commonwealth.

Alinéa (f) – la modification d'une décision rendue dans un État autre que l'État requis.

262 Bien que la modification dans l'État d'origine puisse être la voie privilégiée dans la majorité des affaires, la Convention a besoin de flexibilité pour les situations dans lesquelles il est nécessaire ou approprié que le créancier sollicite une modification dans un autre État que l'État d'origine. Dans ces hypothèses, la modification est prévue à l'alinéa (f). La décision à modifier aurait pu être rendue dans un État contractant ou dans un État non contractant, mais la possibilité ou l'impossibilité de la modifier dépend de la loi de l'État requis. La demande doit être tranchée conformément à l'article 10(3)[106].

263 Si le créancier demande la modification d'une décision rendue dans un autre État que l'État requis en vertu de l'alinéa (f), c'est peut-être parce qu'il a quitté l'État d'origine ou qu'il demeure dans l'État d'origine et sollicite la modification dans l'État du débiteur. L'autre hypothèse est que les deux parties ont quitté l'État d'origine et que le créancier sollicite une modification dans l'État du débiteur. En tout état de cause, il faudrait, pour qu'une modification puisse intervenir, que la décision d'origine puisse être reconnue dans l'État requis.

264 La loi interne de certains États permet seulement aux tribunaux de rendre une nouvelle décision et non de modifier une décision. Étant donné que, quel que soit le terme utilisé, le résultat serait le même, un État satisferait à ses obligations de fournir une décision de modification en vertu de la Convention s'il rendait une nouvelle décision suite à une demande de modification de décision. La Session diplomatique a convenu que le terme « modification » devait couvrir le cas où une nouvelle décision est rendue lorsque la loi interne d'un État contractant ne permet que ce seul mécanisme au lieu d'une « modification » proprement dite[107].

Paragraphe 2 – Dans un État requérant, les catégories de demandes suivantes doivent pouvoir être présentées par un débiteur à l'encontre duquel existe une décision en matière d'aliments :

265 Le paragraphe 2 fait référence au débiteur, la personne « à l'encontre de [laquelle] existe une décision en matière

[101] *Ibid.*, chapitre IV, para. 103 à 134.
[102] *Ibid.*, para. 132.
[103] *Op. cit.* (note 25), para. 90 à 94.
[104] *Ibid.*, para. 92 et 93.

[105] *Op. cit.* (note 9), aux para. 132 et 133.
[106] Il n'y a pas d'incohérence entre le traitement d'une décision à modifier et celui d'une décision à reconnaître et exécuter (voir para. 240). Toute décision (y compris une décision émanant d'un État non contractant) peut être modifiée dans un État contractant et la nouvelle décision modifiée peut être envoyée aux fins de reconnaissance et d'exécution dans un autre État contractant. Cependant, pour la reconnaissance et l'exécution, une règle différente doit être respectée : la décision à reconnaître et exécuter doit avoir été rendue dans un État contractant.
[107] Voir Procès-verbal No 8, para. 53.

255 Sub-paragraph (d) is necessary to alleviate potential injustices, for example where a creditor in State A has a maintenance order from State B which is refused recognition and enforcement in State C, the country of the debtor's residence. Moreover, this is not a situation to which the *res judicata* rule applies. If a foreign decision cannot be recognised, the legal effect is that the decision does not exist for the requested State and a new decision can be established. Another example arises when an order for a percentage amount of salary as child support cannot be recognised and enforced because, according to some countries' laws, it is too vague. Fresh proceedings may be necessary to make a new decision with a specific amount.

256 The question arises whether an application under sub-paragraph (d) can be sent before requesting or obtaining a decision on recognition and enforcement, when it is known in advance that recognition and enforcement will be refused (because the basis of recognition in Art. 20 cannot be met). For example, when a decision is obtained on the basis of the creditor's jurisdiction, and it is known that such a decision cannot be recognised in the country in which the debtor now resides, should time be wasted by going through the formalities to obtain a refusal of recognition? The use of the words "is not possible" imply that there is no obligation in the Convention to first apply for recognition before applying for establishment, when it is known that recognition will be refused. However, the procedure for establishment would usually take longer than the procedure for recognition and enforcement. To avoid losing time, the applicant would submit an application to establish a decision. However, it is also permitted to submit an application for recognition of the previous decision, in case the requested State is able to find some other basis for recognition apart from creditor's jurisdiction. Unfortunately, translation and other costs for two applications could be prohibitive for a creditor.

Sub-paragraph (e) – modification of a decision made in the requested State;

257 The issues surrounding modification of a decision were examined in the Duncan Report,[101] and it was suggested "that one of the principal requirements for overcoming the problems associated with modification jurisdiction is the establishment of a fast and effective system of co-operation, combined with appropriate supports for the creditor or debtor, so that when a modification has to be applied for in what appears to one of the parties to be an inconvenient forum, the inconvenience is minimised for the applicant".[102] The issues were summarised again in the Report on the 2003 Special Commission meeting in Preliminary Document No 5 of October 2003.[103]

258 Having regard to the existing rule in the 1956 New York Convention, the 2004 Special Commission meeting strongly supported the inclusion of an application for modification in the Convention and accepted that administrative co-operation is essential for the process. The importance of administrative co-operation to minimise unfairness or inconvenience to either party is emphasised.[104]

259 Sub-paragraph (e) provides for an application by the creditor to the originating jurisdiction to modify its own decision. The great advantage of modification in the originating country is that that there is only one order in existence, but the person seeking modification (the creditor in this case) will usually need to be assisted or legally represented in the requested State.

260 The bases on which modification is allowed are governed by the law of the requested State. Some relevant principles were identified in the Duncan Report.[105] When the creditor seeks modification, it will usually be for an increase in maintenance. The usual rule is that modification is permitted if there has been a material change of circumstances of either the creditor or debtor.

261 The status of a decision modified by a provisional order under the so-called Commonwealth reciprocal arrangements is clarified through the rule in Article 31.

Sub-paragraph (f) – modification of a decision made in a State other than the requested State.

262 Although modification in the originating jurisdiction may be the preferred course for the majority of cases, the Convention needs flexibility to deal with those cases in which it is necessary or appropriate for the creditor to seek modification in a State other than the originating jurisdiction. Modification in these circumstances is provided for by sub-paragraph (f). The decision to be modified could have been made in a Contracting State or a non-Contracting State, but whether it can be modified depends on the law of the requested State. The application must be determined in accordance with Article 10(3).[106]

263 If the creditor applies under sub-paragraph (f) for modification of a decision made in a State other than the requested State, the reason may be that the creditor has moved from the originating jurisdiction, or the creditor remains in the originating jurisdiction and seeks modification in the debtor's jurisdiction. Alternatively, both parties could have left the originating jurisdiction, and the creditor seeks modification in the debtor's jurisdiction. In any event, the original decision to be modified would need to be entitled to recognition in the requested State if modification is to occur.

264 In some countries, the internal law of a State only allows courts to make a new decision, and not a modification decision. As the result would be the same regardless of the terms used, a State would be in compliance with its obligation to provide for modification decisions under the Convention if it made a new decision upon a request for a modification decision. The Diplomatic Session agreed that the word "modification" should include the concept of "making a new decision" if the internal law of a Contracting State permits only this concept instead of "modification".[107]

Paragraph 2 – The following categories of application shall be available to a debtor in a requesting State against whom there is an existing maintenance decision –

265 Paragraph 2 refers to the debtor, the person "against whom there is an existing maintenance decision". The para-

[101] *Ibid.*, Chapter IV, paras 103-134.
[102] *Ibid.*, para. 132.
[103] *Op. cit.* (note 25), paras 90-94.
[104] *Ibid.*, paras 92-93.
[105] *Op. cit.* (note 9), at paras 132-133.
[106] There is no inconsistency in the treatment of a decision to be modified, and a decision to be recognised and enforced (see para. 240). Any decision (including one from a non-Contracting State) can be modified in a Contracting State and the new, modified decision can be sent for recognition and enforcement in another Contracting State. However, for recognition and enforcement, a different standard is expected: the decision to be recognised and enforced must have been made in a Contracting State.
[107] Minutes No 8, para. 53.

d'aliments ». Le paragraphe fixe les critères à satisfaire par le débiteur qui sollicite l'assistance d'une Autorité centrale au titre du paragraphe 2 : le demandeur doit résider dans un État contractant (l'État requérant) ; le demandeur doit être le débiteur à l'encontre duquel existe une décision alimentaire ; la demande peut uniquement concerner soit la reconnaissance d'une décision nécessaire à la suspension ou la restriction de l'exécution d'une décision antérieure, soit la modification d'une décision. La demande de modification doit aussi respecter les règles de l'article 18 (Limite aux procédures), qui limite le choix de l'État dans lequel une modification peut être sollicitée par un débiteur. La première phrase de l'article 10(2) a été insérée à la suite de discussions de la Commission spéciale de 2006. Les termes « les catégories de demandes suivantes doivent pouvoir être présentées par un débiteur » éliminent toute incertitude ou ambiguïté quant à l'obligation faite aux États contractants de mettre à disposition d'un débiteur les demandes énoncées à l'article 10(2).

266 L'article 10(3) s'applique aux demandes fondées sur l'article 10(2). Aux termes de l'article 10(3), les critères de compétence ainsi que la portée de la modification sont déterminés par le droit de l'État requis pour chaque cas d'espèce. Les demandes visées à l'article 10(2) sont des demandes relevant du chapitre III. Elles sont donc soumises à l'obligation générale d'assistance prévue à l'article 6 et d'accès effectif aux procédures prévu à l'article 14. Il a été jugé important (mais pas par toutes les délégations) d'ouvrir aux débiteurs l'accès aux services des Autorités centrales pour les aider à remplir leurs obligations alimentaires en fonction de leur capacité à payer. L'assistance apportée aux débiteurs pour modifier une décision peut réduire les problèmes d'exécution et, par conséquent, alléger la charge de travail des Autorités centrales.

267 Les pratiques nationales en la matière diffèrent considérablement, car certains pays n'aident pas les débiteurs et pensent que prêter assistance aux créanciers *et* aux débiteurs engendre un conflit d'intérêts. Les experts les plus préoccupés par un conflit d'intérêts considéraient par exemple que le fait pour l'Autorité centrale de « représenter » le créancier pour la procédure de reconnaissance et d'exécution et de « représenter » le débiteur pour la procédure de modification revient à un conflit d'intérêts. Cependant, d'autres experts ont déclaré que l'avocat ou le fonctionnaire de l'Autorité centrale ne représente pas le demandeur mais l'État, afin de remplir les obligations conventionnelles de ce dernier. Par conséquent, « représenter » ou assister les débiteurs et les créanciers ne devrait susciter aucun conflit d'intérêts.

Alinéa (a) – la reconnaissance d'une décision ou une procédure équivalente ayant pour effet de suspendre ou de restreindre l'exécution d'une décision antérieure dans l'État requis ;

268 La Session diplomatique a estimé qu'il existait d'importantes raisons d'autoriser une demande de reconnaissance d'une décision de modification. Par exemple, si un débiteur a obtenu une décision de modification, il devrait être en mesure de la faire reconnaître dans l'État requis. Cela évitera des problèmes liés à des décisions contradictoires et peut aider un débiteur à formaliser ou régulariser des paiements ou apporter des garanties quant à sa situation financière. Cependant, cette demande doit être justifiée. Le débiteur devrait uniquement pouvoir demander la reconnaissance d'une décision qui aurait pour effet de suspendre ou de restreindre l'exécution d'une décision. Cela permettrait de garantir que le débiteur a un intérêt véritable à voir la reconnaissance produire ses effets. En outre, la formulation additionnelle « ou une procédure équivalente » permettra aux États qui ne disposent pas de procédure de reconnaissance seule ou de reconnaissance d'une décision à la demande d'un débiteur, d'utiliser une procédure équivalente de leur droit interne. De tels États devraient informer le Bureau Permanent de la nature de ladite procédure conformément à l'article 57 de la Convention.

269 La rédaction du paragraphe 2 tient compte des différents systèmes utilisés dans les États concernant la modification de décisions à la demande d'un débiteur. La reconnaissance et l'exécution seront sollicitées uniquement si la décision antérieure était ou devait être exécutée dans l'État requis[108]. En outre, il convient de souligner que l'article 10(2) n'affecte pas les limites établies aux articles 18 et 22.

270 Les délégués ont été moins favorables aux demandes d'obtention de décision présentées par des débiteurs car beaucoup estimaient qu'il ne serait pas justifié d'octroyer aux débiteurs un même niveau d'assistance que pour les créanciers dans ces hypothèses. C'est pourquoi de telles demandes n'ont pas été incluses dans le champ d'application de la Convention.

Alinéa (b) – la modification d'une décision rendue dans l'État requis ;

271 L'alinéa (b) prévoit une demande de modification d'une décision rendue par l'État requis adressée par le débiteur à celui-ci en tant qu'État d'origine. Si le débiteur peut demander la modification de la décision en cas de changement de circonstances, il a plus de chance de s'acquitter volontairement des aliments.

272 Le créancier est ou n'est pas dans l'État d'origine. Si celui-ci modifie la décision, il pourra être nécessaire de demander la reconnaissance et l'exécution de la décision modifiée dans l'État du débiteur si celui-ci cesse de verser volontairement les aliments.

273 Les principes généraux qui gouvernent la modification, expliqués dans les commentaires de l'article 10(1)(e) et (f), s'appliquent également à l'article 10(2)(b) et (c).

Alinéa (c) – la modification d'une décision rendue dans un État autre que l'État requis.

274 Le choix de l'État dans lequel un débiteur peut solliciter la modification d'une décision en matière d'aliments est limité par l'article 18. Néanmoins, des hypothèses peuvent se présenter dans lesquelles le débiteur demande la modification d'une décision rendue dans un État autre que l'État requis. Un premier exemple est celui d'une ordonnance d'origine rendue dans l'État A où le créancier vivait alors. Puis le créancier s'établit dans l'État B. Le débiteur sollicite auprès des autorités de l'État B la modification de l'ordonnance rendue dans l'État A.

Paragraphe 3 – Sauf disposition contraire de la Convention, les demandes prévues aux paragraphes premier et 2 sont traitées conformément au droit de l'État requis et, dans le cas des demandes prévues aux paragraphes premier (c) à (f) et 2(b) et (c), sont soumises aux règles de compétence applicables dans cet État.

275 Il est implicite que le « droit de l'État requis » couvre les règles de conflit de lois. Cependant, les États liés par le Protocole appliqueront les règles du Protocole. En outre, les demandes de l'article 10(1)(c) à (f) et (2)(b) et (c) se-

[108] Voir Procès-verbal No 22, para. 62.

graph sets out the threshold criteria to be met by the debtor when seeking the assistance of a Central Authority under paragraph 2: the applicant must reside in a Contracting State (the requesting State); the applicant must be the debtor against whom there is an existing maintenance decision; the application can only be for either recognition of a decision which is necessary to suspend or limit enforcement of a previous decision, or modification of a decision. The application for modification must also comply with the rules in Article 18 (Limit on proceedings) which limits the choice of jurisdiction in which modification by a debtor may be sought. The opening phrase of Article 10(2) was inserted following discussions at the 2006 Special Commission. The words "The following categories of application shall be available to a debtor" remove any doubt or ambiguity that a Contracting State must make available to a debtor all the applications listed in Article 10(2).

266 An application under Article 10(2) is subject to Article 10(3), according to which it is left to the law of the requested State to determine whether, in the particular circumstances, jurisdictional requirements are satisfied, as well as the extent to which modification is possible. The applications in Article 10(2) are Chapter III applications. They are therefore subject to the general obligation to provide assistance in accordance with Article 6 and to provide effective access to procedures in accordance with Article 14. It was considered important (but not by all delegations) to give debtors access to services of Central Authorities to help them comply with their maintenance responsibilities in accordance with their ability to pay. Assistance to debtors to modify a decision has the potential to reduce enforcement problems, and consequently, to reduce the burden on Central Authorities.

267 There is considerable divergence in existing State practice on this issue, as some countries do not assist debtors and believe there is a conflict of interest in assisting both creditors and debtors. Those experts most concerned about a conflict of interest considered that, for example, when the Central Authority "represented" the creditor for recognition and enforcement proceedings, and then had to "represent" the debtor for modification proceedings, this amounted to a conflict of interest. However, it was said by others that the Central Authority attorney or official does not represent the applicant but the State, in order to fulfil the State's Convention obligations. Therefore no conflict of interest should arise by "representing" or assisting both debtors and creditors.

Sub-paragraph (a) – recognition of a decision, or an equivalent procedure leading to the suspension, or limiting the enforcement, of a previous decision in the requested State;

268 The Diplomatic Session recognised the strong justification for allowing an application for recognition of a modification decision. For example, if the debtor has obtained a modification decision, she or he should be able to have it recognised in the requested State. This will avoid the problem of conflicting decisions and may assist a debtor to formalise or regularise payments or bring some certainty to his or her financial situation. However, this application had to be qualified. The debtor should only be able to make a request for recognition of a decision that would lead to the suspension, or limitation, of the enforcement of a decision. This would ensure that the debtor had a genuine interest in the effect of recognition. Secondly, the additional wording "or an equivalent procedure" would allow those States that did not have a procedure for simple recognition, or recognition of a decision at the application of a debtor, to use an equivalent procedure available in their internal laws. Such States should inform the Permanent Bureau of the nature of the said procedure in accordance with Article 57 of the Convention.

269 The drafting of paragraph 2 takes into account the different systems used in States regarding modification of decisions on the application of a debtor. The recognition and enforcement would be sought only if the previous decision was, or was to be, enforced in the requested State.[108] Furthermore, it should be made clear that Article 10(2) does not affect the limits established in Articles 18 and 22.

270 There was less support for an application for establishment by a debtor as many delegates believed that the same level of assistance for debtors as for creditors could not be justified. Therefore, such an application was not included in the Convention.

Sub-paragraph (b) – modification of a decision made in the requested State;

271 Sub-paragraph (b) provides for an application by the debtor, to the requested State as the originating jurisdiction, to modify its own order. If the debtor is able to apply for modification of the decision when there is a change of circumstances, she or he is more likely to pay maintenance voluntarily.

272 The creditor may or may not be in the originating jurisdiction. If the originating jurisdiction modifies the decision, it may at some stage become necessary to request recognition and enforcement of the modified decision in the debtor's jurisdiction should the debtor cease to pay maintenance voluntarily.

273 The general principles regarding modification, explained under Article 10(1)(e) and (f), are also relevant to Article 10(2)(b) and (c).

Sub-paragraph (c) – modification of a decision made in a State other than the requested State.

274 The choice of jurisdiction in which a debtor may apply for modification of a maintenance decision is limited by Article 18. Nevertheless, there may be circumstances in which a debtor applies for modification of a decision made in a State other than the requested State. For example, the original order is made in State A where at that time the creditor was living. The creditor moves to State B. The debtor applies to the authorities in State B to modify the order made in State A.

Paragraph 3 – Save as otherwise provided in this Convention, the applications in paragraphs 1 and 2 shall be determined under the law of the requested State, and applications in paragraphs 1(c) to (f) and 2(b) and (c) shall be subject to the jurisdictional rules applicable in the requested State.

275 It is understood that the "law of the requested State" includes the conflict of laws rules. However, States bound by the Protocol will be applying the rules of the Protocol. Furthermore, the applications in Article 10(1)(c) to (f)

[108] Minutes No 22, para. 62.

ront soumises aux règles de compétence de l'État requis. Il est donc possible que dans certaines circonstances, les règles de compétence empêchent certaines personnes de présenter une des demandes visées à l'article 10(1)(c) à (f). Exemple 1 : Un État requis n'est pas tenu d'accueillir une demande de décision alimentaire concernant un enfant étudiant de 21 ans fondée sur l'article 10(1)(c) s'il n'a pas compétence pour rendre une décision alimentaire concernant un enfant de plus de 18 ans. Exemple 2 : Aux États-Unis d'Amérique, il n'est pas possible d'obtenir une décision en matière d'aliments au seul motif que le créancier y réside, de même qu'il n'est pas possible de reconnaître et d'exécuter une telle décision rendue dans un autre État. Exemple 3 : En vertu du « régime de Bruxelles », un créancier peut choisir de solliciter une modification dans son propre État ou dans l'État du débiteur, alors que le débiteur ne peut solliciter de modification que dans l'État du créancier.

276 Le but de la Convention n'est pas d'harmoniser le droit des obligations alimentaires internationales. La Convention instaure cependant des procédures partiellement harmonisées de reconnaissance et d'exécution d'une décision au chapitre V. L'article 10 vise à créer une obligation pour garantir que les mêmes catégories de demandes puissent être présentées dans tous les États contractants. Dans l'article 10, l'effet conjugué des paragraphes premier, 2 et 3 est que toutes les catégories de demandes énumérées aux paragraphes premier et 2 doivent pouvoir être présentées dans chaque État contractant.

277 La comparution personnelle du demandeur dans l'État ne doit pas, en règle générale, être imposée pour la procédure judiciaire. Les États devraient veiller à ne pas exiger la présence du demandeur pour toute procédure dans l'État requis, sauf si elle est absolument nécessaire. En effet, les frais de voyage et de séjour dans l'État requis pour toute la durée de la procédure risqueraient de constituer un obstacle insurmontable pour la plupart des demandeurs. La présence physique du demandeur et de l'enfant n'est pas exigée lors de procédures de reconnaissance et d'exécution ; voir à cet égard, l'article 29.

Article 11 Contenu de la demande

278 L'article 11 est destiné à répondre aux préoccupations exprimées dans le Rapport et les Conclusions de la Commission spéciale de 1999 en ce qui concerne les informations et les documents[109], et en particulier le fait que les institutions intermédiaires ont souvent des difficultés à obtenir un dossier complet, tandis que les autorités expéditrices bien souvent ne savent pas exactement ce dont l'institution intermédiaire a besoin.

279 Le défi posé par la conception d'une procédure de demande pour la Convention a été décrit dans le Rapport Duncan en ces termes : « comment réduire l'incertitude, les coûts et les retards liés aux exigences en matière de documents et en particulier : comment préciser clairement la nature des documents requis pour une demande donnée ; comment réduire le nombre de documents exigés au minimum indispensable ; comment apporter un certain degré d'uniformité ou de cohérence dans les exigences des différents États en matière de documents »[110].

280 Un Sous-comité chargé des formulaires (aujourd'hui le Groupe de travail chargé des formulaires) a été constitué par le Groupe de travail sur la coopération administrative (GTCA) en novembre 2004[111] pour préparer des projets de formulaires en vue de faciliter la discussion par la Commission spéciale de 2005 pour concevoir une procédure de demande économique et efficace. Le Groupe de travail chargé des formulaires a accompli un travail capital en vue de l'élaboration de l'article 11. Un jeu complet de formulaires pour l'ensemble des demandes visées à l'article 10[112] a été préparé pour la Session diplomatique[113]. Dans l'Acte final de la Vingt et unième session, la Session a émis les Recommandations suivantes. Elle :

> « 1 Se félicite des travaux du Groupe de travail chargé des formulaires, institué par la Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.
>
> 2 Souscrit en général aux formulaires présentés dans le Document préliminaire No 31 de juillet 2007, 'Rapport du Groupe de travail chargé des formulaires', notamment quant à l'uniformité de leur structure.
>
> 3 Recommande que le Groupe de travail chargé des formulaires poursuive ses travaux et examine plus avant les projets de formulaires, dans la perspective de leur adoption lors d'une future Commission spéciale et de leur publication par le Bureau Permanent de la Conférence de La Haye de droit international privé, en application de l'article 11(4) de la *Convention de La Haye sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille*. »

281 Qu'elle soit obligatoire ou recommandée, l'utilisation des formulaires modèles offre de nombreux avantages. Les formulaires modèles aident à mettre en place des procédures uniformes, ils favorisent la prévisibilité et la certitude pour les demandeurs et les autorités, ce qui permettra un service plus rapide et plus économique, ils réduisent les coûts de traduction, ils facilitent les communications entre les Autorités centrales sur les affaires et ils répondent aux objectifs de procédure simple, rapide et économique poursuivis par la Convention. De plus, ils « facilitent la présentation des données et permettent de résumer et d'énumérer les documents. [S'ils] ne peuvent se substituer aux documents exigés, [ils] peuvent cependant réduire la nécessité d'une traduction intégrale des originaux. »[114] Ces avantages ont été soulignés et développés par le Groupe de travail chargé des formulaires dans ses rapports à la Commission spéciale en 2005 et 2006 et à la Session diplomatique de 2007[115].

[109] *Op. cit.* (note 3), au para. 14, et le Rapport Duncan (*op. cit.* note 9), para. 37.
[110] *Ibid.*, para. 41.

[111] Le Sous-comité chargé des formulaires a été transformé en Groupe de travail autonome lors de la Commission spéciale de 2005.
[112] Le Groupe de travail chargé des formulaires s'est également prononcé sur les documents nécessaires aux fins de l'art. 25.
[113] Doc. prél. No 31-B/2007 (*op. cit.* note 96).
[114] Rapport et Conclusions de la Commission spéciale de 1999 (*op. cit.* note 3), para. 18.
[115] « Rapport du Groupe de travail sur la coopération administrative de la Commission spéciale d'avril 2005 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », préparé par le Groupe de travail sur la coopération administrative, Doc. prél. No 15 de mars 2005 à l'intention de la Commission spéciale d'avril 2005 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (ci-après Doc. prél. No 15/2005, accessible à l'adresse <www.hcch.net>), para. 8 et 9 ; « Rapport du Groupe de travail chargé des formulaires de la Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille », coordonné par le Bureau Permanent, Doc. prél. No 17 de mai 2006 à l'intention de la Commission spéciale de juin 2006 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille (accessible à l'adresse <www.hcch.net>) ; et Doc. prél. No 31-B/2007 (*op. cit.* note 96).

and (2)(b) and (c) will be subject to the jurisdictional rules of the requested State. Thus, it is possible that in certain circumstances one of the applications in Article 10(1)(c) to (f) will not be available to certain persons because of the jurisdictional rules. Example 1: If an application is made under Article 10(1)(c) for the establishment of a maintenance decision in relation to a student child aged 21 years, the requested State is not bound to admit the application if it does not have jurisdiction to establish a maintenance decision for a child over the age of 18 years. Example 2: In the United States of America, it is not possible to establish a maintenance decision based solely on the creditor's residence in the jurisdiction, or to have such a decision from another country recognised and enforced in the United States of America. Example 3: Under the Brussels regime, a creditor has the choice to seek modification in her / his own jurisdiction or in the debtor's jurisdiction. But the debtor can only seek modification in the creditor's jurisdiction.

276 It is not the aim of the Convention to harmonise the law of international maintenance. The Convention does however create partially harmonised procedures for recognition and enforcement of a decision in Chapter V. It is the intention of Article 10 to create an obligation to ensure the same categories of applications are available in every Contracting State. In Article 10, the combined effect of paragraphs 1, 2 and 3 is that all the categories of applications listed in paragraphs 1 and 2 must be made available by each Contracting State.

277 The physical presence of the applicant in the jurisdiction should not, as a general rule, be required for the legal proceedings. States should be careful not to insist on the presence of the applicant for any proceedings in the requested State, unless absolutely necessary. The costs of travel to, and remaining in, the requested State for the duration of any proceedings could be an insurmountable obstacle for most applicants. The physical presence of the applicant and child for recognition and enforcement proceedings is not required – see Article 29.

Article 11 Application contents

278 Article 11 is intended to address the concerns about information and documentation identified in the Report and Conclusions of the 1999 Special Commission,[109] in particular, that receiving agencies often experience difficulties in obtaining a complete dossier, while transmitting agencies often do not know precisely what is required by the receiving agency.

279 The challenge in developing an application process for the Convention was described in the Duncan Report as being "how to reduce uncertainty, costs and delays arising from documentary requirements and, in particular: how to achieve clarity as to what documents are required in relation to a particular application; how to reduce documentary requirements to a necessary minimum; [and] how to bring some degree of uniformity or consistency in the documentary requirements of different States".[110]

280 A Forms Sub-Committee (now the Forms Working Group) was first established by the Administrative Co-operation Working Group (ACWG) in November 2004[111] to prepare draft forms in order to assist the discussion by the 2005 Special Commission to develop an effective and efficient application process. The work of the Forms Working Group was pivotal to the development of Article 11. A complete set of forms for all applications under Article 10[112] was prepared for the Diplomatic Session.[113] In the Final Act of the Twenty-First Session, the Session made the following Recommendations. It:

> "1 Commends the work of the Working Group on Forms established by the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance.
>
> 2 Gives its general endorsement to the forms set out in Preliminary Document No 31 of July 2007, 'Report of the Forms Working Group – Report & Recommended Forms', in particular with regard to their uniform structure.
>
> 3 Recommends that the Working Group on Forms should continue its work and give further consideration to the draft forms, with a view to their adoption by a future Special Commission and publication by the Permanent Bureau of the Hague Conference on Private International Law in accordance with Article 11(4) of the *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*."

281 There are many advantages in using model forms, whether mandatory or recommended. Model or standard forms help develop uniform procedures, they foster predictability and certainty for applicants and authorities that will lead to a faster and cheaper service, they reduce translation costs, they allow Central Authorities to communicate more easily with each other on individual cases, and they meet the aims of the Convention for a simple, rapid and low cost procedure. In addition, they "facilitate the presentation of information and provide the opportunity to summarise and list documents. While they cannot act as substitutes for required documents, they may reduce the need for full translations of the original documents."[114] These advantages were emphasised and enlarged upon by the Forms Working Group in its reports to the Special Commission in 2005 and 2006 and to the Diplomatic Session in 2007.[115]

[109] *Op. cit.* (note 3), at para. 14, and noted in the Duncan Report (*op. cit.* note 9), para. 37.
[110] *Ibid.*, para. 41.
[111] The Sub-Committee on Forms was made an independent Working Group at the Special Commission of 2005.
[112] The Forms Working Group also advised on the documents necessary for the purposes of Art. 25.
[113] Prel. Doc. No 31-B/2007 (*op. cit.* note 96).
[114] Report and Conclusions of the 1999 Special Commission (*op. cit.* note 3), para. 18.
[115] "Report of the Administrative Co-operation Working Group of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance", prepared by the Administrative Co-operation Working Group, Prel. Doc. No 15 of March 2005 for the attention of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance (hereinafter Prel. Doc. No 15/2005, available at <www.hcch.net>), paras 8 and 9; "Report of the Forms Working Group of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance", co-ordinated by the Permanent Bureau, Prel. Doc. No 17 of May 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance (available at <www.hcch.net>); and Prel. Doc. No 31-B/2007 (*op. cit.* note 96).

282 Un rapprochement a également été effectué entre le formulaire relatif au Profil des États (élaboré par le Sous-comité sur le Profil des États du GTCA), les informations sur les lois, les procédures et les services exigées par l'article 57 et l'emploi de ces formulaires. Les informations portées dans les Profils pourraient servir à fournir les informations obligatoires (art. 57(2)) et indiquer quelles parties du formulaire sont indispensables et quelles parties sont optionnelles pour chaque pays.

283 Les formulaires ont également été conçus pour être utilisés dans un environnement électronique, à la lumière du principe de neutralité du texte de la Convention quant au support.

284 Certains experts étaient favorables à la recommandation du Groupe de travail chargé des formulaires de rendre les formulaires obligatoires et ont souligné les avantages de formulaires de demande uniformes. Cependant, d'autres experts ont craint que des formulaires obligatoires ne posent des difficultés constitutionnelles à leur État, en particulier si des amendements ultérieurs s'avéraient nécessaires. Toute modification des formulaires obligatoires qui seront intégrés à la Convention s'effectuera conformément à l'article 55.

285 Un compromis a été trouvé pour n'utiliser qu'un courrier de couverture obligatoire (le Formulaire de transmission) sur lequel ne figureraient que des renseignements élémentaires et qui accompagnerait un formulaire recommandé contenant les informations détaillées nécessaires à la demande présentée à l'autorité judiciaire ou administrative compétente (l'organe qui statue) dans l'État requis. Il a été reconnu que les formulaires recommandés, s'ils sont bien conçus, pourraient être largement utilisés si les États contractants voulaient voir leurs demandes traitées rapidement. Les informations ou demandes présentées de manière non standard seraient plus longues à traiter.

286 Le Groupe de travail chargé des formulaires a suggéré que la Convention devait également protéger tous les renseignements à caractère personnel communiqués dans les demandes ou requêtes ou à l'appui de celles-ci. À cette fin, les articles 38 (Protection des données à caractère personnel), 39 (Confidentialité) et 40 (Non-divulgation de renseignements) ont été rédigés. L'article 40 a été reformulé afin que ses protections s'étendent à tous renseignements sur toute personne (et non seulement le demandeur), sous réserve qu'ils soient recueillis aux fins de la Convention.

287 Les références au contenu de la demande ou aux formulaires, contenues dans l'article 11, s'appliquent aux seules demandes fondées sur l'article 10 et non aux requêtes visées à l'article 7. Étant donné qu'il n'y a aucune prescription relative à la forme d'une requête, rien dans la Convention n'empêche de soumettre une requête en employant le même format qu'une demande. Les renseignements figurant dans la requête devraient bénéficier des mêmes protections que les demandes du chapitre III.

288 Comme les formulaires ne sont pas obligatoires (à l'exception du Formulaire de transmission et de l'Accusé de réception), les renseignements de base à porter dans une demande doivent être ceux qui sont énumérés dans la Convention. Le premier paragraphe de l'article 11 dispose qu'il existe des obligations minimales. Tout renseignement supplémentaire qui assistera les autorités requises ou accélérera le traitement de la demande pourra être communiqué. Les exigences d'informations particulières d'un État contractant doivent être précisées dans une déclaration visée à l'article 11(1)(g).

Paragraphe premier – Toute demande prévue à l'article 10 comporte au moins :

Alinéa (a) – une déclaration relative à la nature de la demande ou des demandes ;

289 La demande devrait préciser la catégorie à laquelle appartient une demande visée à l'article 10 : obtention, modification, reconnaissance, reconnaissance et exécution ou exécution d'une décision alimentaire. Une demande de décision alimentaire peut exiger l'établissement préalable de la filiation.

Alinéa (b) – le nom et les coordonnées du demandeur, y compris son adresse et sa date de naissance ;

290 Le nom et l'adresse du demandeur sont des renseignements indispensables dans toute demande. Les coordonnées (telles que le numéro de téléphone et l'adresse électronique) du demandeur sont nécessaires pour le contacter rapidement et à faible coût (par ex. pour obtenir des renseignements complémentaires ou pour transmettre des rapports sur l'état d'avancement). Le Groupe de travail chargé des formulaires a relevé, dans le Document préliminaire No 15 de mars 2005, que la Convention « n'empêche pas l'Autorité centrale de l'État requérant de contacter directement le créancier / demandeur afin d'obtenir de l'information supplémentaire lorsque cela s'avère nécessaire et tel que cela constitue la pratique dans plusieurs États »[116].

291 La date de naissance du demandeur est indiquée afin de respecter une certaine cohérence avec le Formulaire de transmission annexé à la Convention. Il a été recommandé d'indiquer la date de naissance du demandeur pour assurer l'identification exacte des parties et prévenir toute confusion entre des personnes du même nom.

292 L'adresse du demandeur ne doit pas être communiquée au défendeur par quelque autorité que ce soit lorsque l'autorité estime que « la santé, la sécurité ou la liberté d'une personne pourrait en être compromise »[117]. Le Formulaire de transmission et les projets de formulaire de demande contiennent un avis de confidentialité et de protection des renseignements à caractère personnel conforme aux termes des articles 38, 39 et 40. L'article 40 souligne l'importance de la non-divulgation de renseignements à caractère personnel si la santé, la sécurité ou la liberté d'une partie ou d'un enfant peut être compromise.

293 Il est important de noter qu'en cas de violence familiale, plutôt que de fournir les coordonnées personnelles du demandeur, il est possible d'insérer dans la demande les coordonnées de l'Autorité centrale. Dans une affaire particulière, il se peut que l'autorité compétente de l'État requis insiste pour obtenir les coordonnées personnelles du demandeur mais dans ce cas, il reviendra au demandeur de décider s'il souhaite poursuivre sa demande.

Alinéa (c) – le nom du défendeur et, lorsqu'elles sont connues, son adresse et sa date de naissance ;

294 Dans le cadre de l'élaboration du Formulaire de transmission obligatoire (visé à l'art. 12(2)), le Groupe de travail chargé des formulaires a recommandé que les renseignements à caractère personnel communiqués soient identiques pour les demandeurs et les défendeurs. Toute infor-

[116] Doc. prél. No 15/2005 (*op. cit.* note 115), para. 12.
[117] Art. 40.

282 The link was also made between the Country Profiles form (developed by the Country Profiles Sub-Committee), the provision of information about laws, procedures and services required by Article 57, and the use of the forms. The information in Country Profiles could be used to provide the mandatory information (Art. 57(2)) as well as explain which parts of the forms were essential and which were optional for each country.

283 The forms were also developed with a view to their use in an electronic environment, in the light of the media-neutral character of the Convention text.

284 Some experts supported the recommendation of the Forms Working Group that the forms be mandatory and emphasised the benefits of using uniform application forms. However, other experts were concerned that if the forms were mandatory this could pose constitutional difficulties for their States, particularly if later amendments to the forms were required. Mandatory forms that are part of the Convention will, if necessary, be amended in accordance with Article 55.

285 A compromise was reached whereby a mandatory cover letter (the Transmittal Form) with only basic information would be used to accompany a recommended form which contained the detailed information needed to support the application to the competent judicial or administrative authority (the decision-making body) in the requested State. It was acknowledged that the recommended forms, if well developed, could become widely used if Contracting States wanted their applications to be processed quickly. Information or applications presented in other non-standard ways would take longer to process.

286 The Forms Working Group suggested that the Convention also needed to protect any personal information provided in or with applications or requests. To achieve this purpose, Article 38 (Protection of personal data), Article 39 (Confidentiality) and Article 40 (Non-disclosure of information) were drafted. Article 40 was redrafted to ensure that its protections extended to any information about any person (not just the applicant), provided it is gathered for the purpose of the Convention.

287 In Article 11, references to application contents or forms only apply to Article 10 applications, and not to Article 7 requests. As the form of a request is not prescribed, there is nothing in the Convention to prevent a request being submitted in the same format as an application. The information in the request should attract the same protections as Chapter III applications.

288 As forms are not mandatory (with the exception of the Transmittal Form and Acknowledgement Form), the basic items of information to be included in an application must be those listed in the Convention. The first paragraph of Article 11 states that there will be minimum requirements. Any additional information that will assist the requested authorities or expedite the progress of the application could also be included. The particular information requirements of a Contracting State must be specified by a declaration referred to in Article 11(1)(g).

Paragraph 1 – All applications under Article 10 shall as a minimum include –

Sub-paragraph (a) – a statement of the nature of the application or applications;

289 The application should specify to which category of application an Article 10 application belongs: establishment, modification, recognition, recognition and enforcement or enforcement of a maintenance decision. An application for the establishment of a maintenance decision may require the establishment of parentage as a preliminary step.

Sub-paragraph (b) – the name and contact details, including the address and date of birth of the applicant;

290 The name and address of the applicant are essential basic items of information in any application. The contact details (such as telephone number and e-mail address) of the applicant are requested for the purpose of contacting the applicant quickly and cheaply (for example, in order to obtain additional information or to provide progress reports). The Forms Working Group in Preliminary Document No 15 of March 2005 noted that the Convention "does not prevent the Central Authority of the requested State to contact directly the creditor / applicant [in the requesting State] in order to collect additional information if necessary as it is done in practice in a good number of States".[116]

291 The date of birth of the applicant is included for consistency with the Transmittal Form annexed to the Convention. The date of birth of the applicant was recommended for inclusion to ensure the accurate identification of the parties, and to prevent any possible confusion between two people of the same name.

292 The address of the applicant should not be disclosed by any authority to the respondent in some circumstances where "to do so could jeopardise the health, safety or liberty of a person".[117] The Transmittal Form and the draft application forms contain a confidentiality and personal information protection notice which reflects the terms of Articles 38, 39 and 40. Article 40 emphasises the importance of non-disclosure of personal information if the health, safety or liberty of a party or child would be jeopardised.

293 It is important to note that in a domestic violence case, the contact information of the Central Authority, rather than the personal details concerning the applicant, can initially be included on the application. In a particular case, the competent authority in the requested State may insist on the applicant's personal contact information. In such a case, the applicant will need to decide whether she or he wishes to continue with the application.

Sub-paragraph (c) – the name and, if known, address and date of birth of the respondent;

294 The Forms Working Group, in developing the mandatory Transmittal Form (referred to in Art. 12(2)), recommended having the same personal details for applicants and respondents. Any information is valuable if it helps locate

[116] Prel. Doc. No 15/2005 (*op. cit.* note 115), para. 12.
[117] Art. 40.

mation est précieuse si elle aide à localiser le défendeur plus rapidement. Les États qui disposent d'un « numéro d'identification officiel » devraient préciser par une déclaration visée à l'article 11(1)(g) si une telle information est exigée dans la demande.

295 L'exactitude du nom, de l'adresse et de la date de naissance du défendeur est particulièrement importante pour les États contractants qui ont la possibilité de vérifier des registres électroniques ou des bases de données afin de localiser les débiteurs.

Alinéa (d) – le nom et la date de naissance des personnes pour lesquelles des aliments sont demandés ;

296 Lorsque la personne pour laquelle les aliments sont demandés n'est pas le créancier, le défendeur et les autorités compétentes doivent connaître son identité. Pour des aliments destinés aux enfants, le nom et la date de naissance des enfants concernés doivent être indiqués.

Alinéa (e) – les motifs sur lesquels la demande est fondée ;

297 Les experts ont considéré que l'obligation de préciser les motifs sur lesquels la demande est censée se fonder, accélérerait son traitement. Cela pourrait également aider le personnel de l'Autorité centrale à déterminer si d'autres renseignements ou documents sont nécessaires pour prouver ces motifs et si les motifs allégués sont conformes à la demande soumise.

298 Il convient de clarifier le sens de l'expression « les motifs sur lesquels la demande est fondée », au regard des différentes catégories de demandes susceptibles d'être présentées en application de la Convention. Dans le cas d'une demande de reconnaissance et d'exécution d'une décision, les « motifs » de la demande pourraient renvoyer aux « bases » de reconnaissance et d'exécution visées à l'article 20 – c'est-à-dire, les motifs pour lesquels une décision peut être reconnue et exécutée en vertu de la Convention. Dans le cas d'une demande de modification d'une décision, les « motifs » de la demande peuvent résulter d'un changement de situation du demandeur. La demande pourrait également faire référence aux motifs de l'obligation alimentaire concernée, comme par exemple, le lien de filiation. Il s'agit dans ce contexte du fondement juridique de l'obligation alimentaire et non pas du chef de compétence.

Alinéa (f) – lorsque la demande est formée par le créancier, les informations relatives au lieu où les paiements doivent être effectués ou transmis électroniquement ;

299 Cette disposition a été recommandée par le Groupe de travail chargé des formulaires afin d'accélérer le versement des aliments destinés aux enfants. Elle fait obligation à l'Autorité centrale de prendre les mesures appropriées pour « faciliter le recouvrement et le virement rapide des paiements d'aliments » (art. 6(2)(f)) et aux États contractants de promouvoir « l'utilisation des moyens disponibles les moins coûteux et les plus efficaces pour effectuer les transferts de fonds destinés à être versés à titre d'aliments » (art. 35).

Alinéa (g) – à l'exception de la demande prévue à l'article 10(1)(a) et (2)(a), toute information ou tout document exigé par une déclaration de l'État requis faite conformément à l'article 63 ;

300 Pour toute autre demande qu'une demande de reconnaissance ou de reconnaissance et d'exécution d'une décision alimentaire présentée en vertu de l'article 10(1)(a) ou (2)(a), un État contractant peut indiquer par une déclaration conforme à l'article 63 les informations ou documents exigés par son Autorité centrale pour traiter la demande, ou par ses autorités judiciaires ou administratives pour conduire les procédures nécessaires.

301 Pour une demande de reconnaissance ou de reconnaissance et d'exécution formée en vertu de l'article 10(1)(a) ou (2)(a), seuls les informations ou documents visés à l'article 25 peuvent être demandés.

302 Les demandes d'informations ou de documents sont également assorties d'une limite relative aux procurations : aux termes de l'article 42, une Autorité centrale de l'État requis « ne peut exiger une procuration du demandeur que si elle agit en son nom dans les procédures judiciaires ou dans des procédures engagées devant d'autres autorités ou afin de désigner un représentant à ces fins ».

Alinéa (h) – les noms et coordonnées de la personne ou du service de l'Autorité centrale de l'État requérant responsable du traitement de la demande.

303 L'alinéa (h) a été ajouté sur proposition du Groupe de travail chargé des formulaires. Il prévoit le nom et les coordonnées de la personne ou du service de l'Autorité centrale de l'État requérant qui est chargé de traiter la demande et dont les coordonnées sont nécessaires au suivi en vertu de l'article 12(3), (4), (5), (8) et (9).

304 L'objet de cette disposition est d'améliorer et d'accélérer les communications entre les Autorités centrales. Elle équilibre l'obligation que l'article 12(3) fait à l'Autorité centrale requise de fournir des renseignements similaires.

Paragraphe 2 – Lorsque cela s'avère approprié, la demande comporte également les informations suivantes lorsqu'elles sont connues :

305 Le paragraphe 2 impose d'indiquer certains renseignements complémentaires dans la demande. Cette obligation ressort de manière évidente de l'emploi du présent simple de l'indicatif mais, contrairement à celle qui est énoncée au paragraphe premier, elle est assortie de limites. Les informations ne doivent être communiquées que « lorsque cela s'avère approprié » et « lorsqu'elles sont connues ».

Alinéa (a) – la situation financière du créancier ;

306 Si cela s'avère approprié et si les informations sont connues, la demande doit comporter des renseignements sur la situation financière du créancier. Ces renseignements concernent ses revenus et son patrimoine, y compris ses biens immeubles ou meubles. La profession du créancier, sa situation au regard de l'emploi, ses éventuelles obligations alimentaires envers un autre enfant ou une autre personne (qui ne fait pas l'objet de la demande), les frais de scolarité ou médicaux de l'enfant et le fait que le créancier ait un nouveau conjoint qui contribue au revenu familial sont des éléments pertinents au regard de sa situation financière.

307 Ces questions et d'autres sont couvertes par le Formulaire relatif à la situation financière qui a été élaboré par le Groupe de travail chargé des formulaires[118]. Ce formulaire

[118] Doc. prél. No 31-B/2007 (*op. cit.* note 96), annexe E.

Rapport explicatif

the respondent more quickly. Countries which have an "official identification number" should specify by declaration referred to in Article 11(1)(g) if such information is required in the application.

295 The accurate details of the name, address and date of birth of the respondent are particularly important for those Contracting States that are able to check electronic registers or databases to locate debtors.

Sub-paragraph (d) – the name and date of birth of any person for whom maintenance is sought;

296 When the person for whom maintenance is sought is not the creditor, the respondent and the competent authorities must know for whom the claim is being made. In relation to child support, the names and dates of birth of the children in question would be provided.

Sub-paragraph (e) – the grounds upon which the application is based;

297 It was considered that a requirement to specify the grounds on which the application is claimed to be based would expedite the processing of applications. It may also assist the Central Authority personnel to identify if any additional information or documents are required as evidence of those grounds, and whether the grounds claimed are consistent with the application submitted.

298 It is desirable to clarify the meaning of the term "the grounds upon which the application is based", with regard to the different types of application that may be made under the Convention. For an application for recognition and enforcement of a decision, the "grounds" for the application might refer to the bases for recognition and enforcement under Article 20, *i.e.*, the grounds on which it is a decision entitled to recognition and enforcement under the Convention. For an application for modification of a decision, the "grounds" for the application might be that the applicant's circumstances have changed. The application might also refer to the grounds of the maintenance obligation in question, for example, parentage. The grounds in this context do not refer to jurisdictional grounds but to the legal basis of the maintenance order.

Sub-paragraph (f) – in an application by a creditor, information concerning where the maintenance payment should be sent or electronically transmitted;

299 This provision was recommended by the Forms Working Group to expedite the transfer of child support payments. It is an obligation of the Central Authority to take appropriate measures to "facilitate the collection and expeditious transfer of maintenance payments" (Art. 6(2)(f)) and for Contracting States to promote "the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance" (Art. 35).

Sub-paragraph (g) – save in an application under Article 10(1)(a) and (2)(a), any information or document specified by declaration in accordance with Article 63 by the requested State;

300 For any application other than an application for recognition, or recognition and enforcement of a maintenance decision made under Article 10(1)(a) or (2)(a), a Contracting State may specify by declaration in accordance with Article 63 the additional information or documents required by its Central Authority to process the application, or by its judicial or administrative authorities to carry out the necessary procedures.

301 In an application for recognition, or recognition and enforcement of a maintenance decision made under Article 10(1)(a) or (2)(a), only the information or documents referred to in Article 25 may be requested.

302 Another specific limitation on requests for information or documents concerns a power of attorney. According to Article 42, the Central Authority of the requested State "may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act".

Sub-paragraph (h) – the name and contact details of the person or unit from the Central Authority of the requesting State responsible for processing the application.

303 Sub-paragraph (h) was added at the suggestion of the Forms Working Group. It provides for the name and contact details of the person or unit from the Central Authority of the requesting State who is responsible for processing the application and whose details are necessary for follow-up purposes under Article 12(3), (4), (5), (8) and (9).

304 The purpose of this provision is to improve and expedite communications between Central Authorities. It balances the obligation on the requested Central Authority in Article 12(3) to provide similar details.

Paragraph 2 – As appropriate, and to the extent known, the application shall in addition in particular include –

305 Paragraph 2 requires the inclusion of certain additional information with the application. This is evident from the use of the word "shall". However, unlike paragraph 1, there are some limitations on the obligation. The information must only be provided "as appropriate" and "to the extent known".

Sub-paragraph (a) – the financial circumstances of the creditor;

306 The application must, if appropriate and if known, include information about the financial circumstances of the creditor. Financial circumstances information includes income and assets, including real or personal property. It will be relevant to the financial circumstances of the creditor to state his or her occupation, whether or not she or he is employed, whether she or he has an obligation to support any other child or person (not the subject of this application), the costs of the child's schooling or medical care, and whether or not the creditor has a new partner who contributes to the family's income.

307 These matters and others are covered by the Financial Circumstances Form which was developed by the Forms Working Group.[118] The form may appear complex but it is

[118] Prel. Doc. No 31-B/2007 (*op. cit.* note 96), Annex E.

peut sembler complexe, mais il faut souligner qu'il *n'est pas* obligatoire de le remplir intégralement dans chaque affaire.

Alinéa (b) – la situation financière du débiteur, y compris le nom et l'adresse de l'employeur du débiteur, ainsi que la localisation et la nature des biens du débiteur ;

308 Les mêmes aspects mentionnés à propos de l'alinéa (a) concernant la situation financière du créancier s'appliquent à cette disposition relative au débiteur. De plus, le nom et l'adresse de l'employeur du débiteur sont nécessaires, et ce à plusieurs titres : il sera peut-être nécessaire de prononcer une ordonnance de saisie-arrêt sur salaire et de la notifier à l'employeur, de connaître le détail des revenus du débiteur ou de connaître l'adresse de l'employeur pour localiser le débiteur.

309 Les informations relatives au patrimoine du débiteur doivent être elles aussi indiquées « lorsque cela s'avère approprié » et « lorsqu'elles sont connues ». Ces informations reposent souvent sur les informations ou les conjectures du créancier demandeur. Une procédure judiciaire sera peut-être nécessaire (dans l'État requis, dans l'État requérant ou dans un autre État contractant) pour confirmer l'existence du patrimoine ou le localiser.

Alinéa (c) – toute autre information permettant de localiser le défendeur.

310 L'alinéa (c) s'applique au créancier ou au débiteur, selon l'identité du « défendeur ». Des renseignements complémentaires susceptibles d'aider à localiser le défendeur doivent être fournis si les renseignements à caractère personnel visés au paragraphe premier (b) ou (c) risquent de ne pas suffire.

Paragraphe 3 – La demande est accompagnée de toute information ou tout document justificatif nécessaire, y compris tout document pouvant établir le droit du demandeur à l'assistance juridique gratuite. La demande prévue à l'article 10(1)(a) et (2)(a) n'est accompagnée que des documents énumérés à l'article 25.

311 Alors que le paragraphe premier énonce les exigences minimales d'une demande et le paragraphe 2 les exigences complémentaires essentielles si cela s'avère approprié, la première phrase du paragraphe 3 autorise un État requérant ou requis à indiquer ou exiger « toute information ou tout document justificatif nécessaire » pour les demandes autres que celles présentées sur le fondement de l'article 10(1)(a) ou (2)(a).

312 L'expression « toute information ou tout document justificatif nécessaire » peut aussi comprendre tout document ou information justifiant la nature de la demande ou apportant des preuves des motifs visés à l'article 11(1)(e). Il peut y avoir une certaine superposition avec l'article 11(1)(g), excepté que les documents précisés par déclaration seront habituellement requis dans toutes les affaires ou dans certaines catégories d'affaires, alors que « toute information ou tout document justificatif nécessaire» peut n'être applicable que dans une affaire particulière. L'article 11(3) autorise par conséquent un État requis à exiger certaines informations nécessaires dans une affaire particulière, même si ce type de renseignement n'est pas exigé dans tous les cas et n'a pas été visé dans la déclaration mentionnée à l'article 11(1)(g).

313 Le paragraphe 3 fait référence à « tout document pouvant établir le droit du demandeur à l'assistance juridique gratuite ». Toutefois, dans la majorité des affaires d'aliments destinés aux enfants, ces documents ne seront pas nécessaires, étant donné que l'assistance juridique gratuite doit être fournie dans toutes ces affaires en vertu de l'article 15, sous réserve de quelques exceptions limitées. Cependant, lorsqu'un demandeur n'a pas droit à l'assistance juridique gratuite ou lorsque la demande n'est pas l'une de celles visées par l'article 15(1), alors les justificatifs de l'admissibilité du demandeur à l'assistance juridique dans l'État requérant doivent être communiqués. Le document en question peut être un courrier ou une déclaration de l'autorité qui octroie l'aide juridique dans l'État requérant attestant que le demandeur bénéficierait de l'assistance juridique dans cet État s'il la sollicitait, ou qu'il en a bénéficié dans l'État d'origine. Cette formulation a été insérée sur recommandation du Groupe de travail chargé des formulaires. Le Formulaire relatif à la situation financière, élaboré par le Groupe de travail chargé des formulaires, mentionne le droit décrit au paragraphe 3 et pourrait, si nécessaire, être utilisé à l'appui d'une demande d'assistance juridique faite par le demandeur, mais il ne suffit pas en lui-même à établir le droit du demandeur à l'assistance juridique. Il convient de souligner que le contenu du formulaire est conforme aux exigences de la Convention Accès à la justice de 1980[119].

314 La première phrase du paragraphe 3 ne s'applique pas aux demandes de reconnaissance ou de reconnaissance et d'exécution d'une décision alimentaire en vertu de l'article 10(1)(a) ou (2)(a), car les conditions relatives aux documents sont prescrites par l'article 25. En outre, la question du droit à l'assistance juridique ne devrait pas se poser dans le cadre d'une demande fondée sur l'article 10(1)(a) ou (2)(a). La procédure relative à une demande de reconnaissance et d'exécution est prescrite par l'article 23 et l'assistance juridique ne devrait pas être nécessaire à moins que la décision concernant la reconnaissance et l'exécution ne fasse l'objet d'une contestation ou d'un appel. Les documents exigés par l'article 25 sont les suivants : la décision ou un résumé de celle-ci ; un certificat attestant de son caractère exécutoire ; un document certifiant que le défendeur a été avisé de la procédure ou a eu la possibilité d'être entendu ; un état des arrérages ; s'il y a lieu, la preuve de l'ajustement automatique par indexation et la documentation relative à l'admissibilité du demandeur à l'assistance juridique gratuite. L'État requis ne peut exiger aucune autre information en ce qui concerne une demande de reconnaissance ou de reconnaissance et d'exécution d'une décision en matière d'aliments.

Paragraphe 4 – Toute demande prévue à l'article 10 peut être présentée au moyen d'un formulaire recommandé et publié par la Conférence de La Haye de droit international privé.

315 Les projets de formulaires établis par le Groupe de travail chargé des formulaires sont regroupés dans le Document préliminaire No 31-B de juillet 2007[120]. L'élaboration des formulaires recommandés est mentionnée plus haut aux paragraphes 280 à 282. Les termes de l'article 11(4) sont extraits de l'article 13(3) de la Convention Élection de for de 2005[121]. Les formulaires de demande seront mis à

[119] *Convention de La Haye du 25 octobre 1980 tendant à faciliter l'accès international à la justice*.
[120] *Op. cit.* (note 96).
[121] Voir aussi l'art. 5 de la Convention Accès à la justice de 1980.

important to emphasise that *not* every part needs to be completed in every case.

Sub-paragraph (b) – the financial circumstances of the debtor, including the name and address of the employer of the debtor and the nature and location of the assets of the debtor;

308 The same matters mentioned in relation to sub-paragraph (a) concerning financial circumstances also apply to this provision about the debtor. In addition, details of the name and address of the debtor's employer are required. These are necessary for several reasons: a wage-withholding order may have to be made and served on the employer; details of the debtor's income may be needed; or the employer's address may be necessary to locate the debtor.

309 Information about the assets of the debtor should also be provided "as appropriate, and to the extent known". This information is often based on the knowledge or conjecture of the applicant creditor. Legal proceedings may be necessary (in the requested State, in the requesting State, or in another Contracting State) to confirm the existence of assets or to locate them.

Sub-paragraph (c) – any other information that may assist with the location of the respondent.

310 Sub-paragraph (c) may apply to the creditor or debtor, depending on who is the "respondent". Additional information that would help locate the respondent should be provided if there is a possibility that the personal information provided under paragraph 1(b) or (c) will not be sufficient for the purposes of locating the respondent.

Paragraph 3 – The application shall be accompanied by any necessary supporting information or documentation including documentation concerning the entitlement of the applicant to free legal assistance. In the case of applications under Article 10(1)(a) and (2)(a), the application shall be accompanied only by the documents listed in Article 25.

311 Whereas paragraph 1 states the essential minimum requirements of an application and paragraph 2 states the essential additional requirements as appropriate, the first sentence of paragraph 3 permits requesting and requested States to include or require any additional "necessary supporting information or documentation", for applications other than those made under Article 10(1)(a) or (2)(a).

312 The phrase "any necessary supporting information or documentation" might also include any information or document that substantiates the nature of the claim or provides evidence of the grounds in Article 11(1)(e). There may be some overlap with Article 11(1)(g), except that documents specified by declaration will usually be required in every case, or certain categories of case, whereas "necessary supporting information or documentation" may only be applicable in a particular case. Article 11(3) therefore allows a requested State to require certain necessary information in a particular case, even if that type of information is not required in all cases and has not been specified by declaration referred to in Article 11(1)(g).

313 Paragraph 3 refers to "documentation concerning the entitlement of the applicant to free legal assistance". This documentation will not be necessary in the majority of child support cases as free legal assistance must be provided in all such cases under Article 15, with limited exceptions. However, when an applicant does not qualify for free legal assistance, or the application is not one to which Article 15(1) refers, then the documentation supporting the applicant's entitlement to free legal assistance in the requesting State must be provided. The document in question could be a letter or statement from the authority which grants legal aid in the requesting State, and declaring that the applicant, if she or he were to apply, would be granted legal assistance in that State, or has benefited from such assistance in the State of origin. These words were included on the recommendation of the Forms Working Group. The Financial Circumstances Form devised by the Forms Working Group mentions the entitlement described in paragraph 3 and could, if necessary, be used to support a claim by the applicant for legal assistance, but it is not sufficient, by itself, to establish the applicant's entitlement to legal assistance. It is to be noted that the contents of the form are in conformity with the requirements of the 1980 Hague Access to Justice Convention.[119]

314 The first sentence of paragraph 3 does not apply to applications for recognition, or recognition and enforcement of a maintenance decision under Article 10(1)(a) or (2)(a), as specific documentary requirements are prescribed in Article 25. Furthermore, the question of entitlement to legal assistance should not arise in an application under Article 10(1)(a) or (2)(a). The procedure on an application for recognition and enforcement is prescribed by Article 23 and legal assistance should not be necessary unless the decision concerning recognition and enforcement is challenged or appealed. The documents required by Article 25 are: the maintenance decision or an abstract of it; a certificate of enforceability; evidence that the respondent was given notice of the proceedings or an opportunity to be heard; a statement of arrears; where necessary, evidence of automatic adjustment by indexation; where necessary, documentation concerning the entitlement of the applicant to free legal assistance. No other information may be required by the requested State in relation to an application for recognition, or recognition and enforcement of a maintenance decision.

Paragraph 4 – An application under Article 10 may be made in the form recommended and published by the Hague Conference on Private International Law.

315 The draft forms devised by the Forms Working Group are collected in Preliminary Document No 31-B of July 2007.[120] The development of the recommended forms is referred to above at paragraphs 280 to 282. The words of Article 11(4) are drawn from Article 13(3) of the 2005 Hague Choice of Court Convention.[121] The application forms will

[119] *Hague Convention of 25 October 1980 on International Access to Justice*.
[120] *Op. cit.* (note 96).
[121] See also Art. 5 of the 1980 Hague Access to Justice Convention.

jour dans la perspective de leur adoption en tant que formulaires recommandés lors d'une future Commission spéciale[122].

Article 12 Transmission, réception et traitement des demandes et des affaires par l'intermédiaire des Autorités centrales

316 La conclusion de la Commission spéciale de 1999 suivant laquelle la Convention devrait constituer un progrès sur les instruments antérieurs et une garantie d'efficacité maximale a trouvé un large écho favorable lors des réunions suivantes. Des progrès peuvent notamment être réalisés en établissant une procédure de traitement des demandes claire, qui fixerait des délais pour des mesures particulières, en gardant à l'esprit les objectifs de procédure rapide, simple et économique qui sont ceux de la Convention. Le manque de clarté des procédures a été pointé comme l'une des principales préoccupations suscitées par les autres instruments, à régler par la Convention[123]. Une autre préoccupation majeure relative aux instruments existants concernait les délais de traitement des demandes de recouvrement des aliments et d'exécution des décisions. Les causes de ces délais sont décrites dans le Rapport Duncan[124].

317 L'article 12 énonce les conditions élémentaires d'une gestion des dossiers efficace et économe et souligne l'obligation de rapidité à tous les stades de la procédure – « en temps utile » au paragraphe 5, « rapidement » au paragraphe 6, « rapides » au paragraphe 7 et « aussitôt » au paragraphe 8. Des délais sont introduits à l'article 12 pour réduire le temps de traitement : six semaines pour accuser réception de la demande et notifier les premières démarches (art. 12(3)) et trois mois pour un rapport sur l'état d'avancement (art. 12(4)).

318 La procédure et les délais de l'article 12 s'appliquent aux demandes et aux affaires soumises au chapitre III. Le terme « affaires » dans le titre de l'article 12 vise les demandes « en cours », ce qui ressort clairement du contexte dans lequel il est employé aux paragraphes 5 et 6. Il n'y a aucune obligation directe de traiter les requêtes de mesures spécifiques de l'article 7 de la même façon que les demandes relevant de l'article 10. Il appartiendra à chaque État contractant de déterminer si les requêtes et les demandes seront traitées de la même façon ou soumises aux mêmes délais.

Paragraphe premier – L'Autorité centrale de l'État requérant assiste le demandeur afin que soient joints tous les documents et informations qui, à la connaissance de cette autorité, sont nécessaires à l'examen de la demande.

319 La mise en œuvre du paragraphe premier s'appuiera sur les informations comprises dans les Profils des États et sur les obligations instaurées par l'article 11(1)(g) et par l'article 57 de transmettre des informations sur les lois et procédures de chaque pays pour connaître les informations et documents qu'il exigera. Bien entendu, d'autres informations pourront être exigées dans une affaire particulière et outre les informations auxquelles il est fait référence à l'article 11(2)(c) et (3), l'article 12(3) permet lui aussi de solliciter des informations complémentaires à réception d'une demande.

320 Le caractère obligatoire de l'assistance à apporter par les Autorités centrales au paragraphe premier est exprimé par le présent simple « assiste ». De manière générale, on pourrait dire que l'obligation est d'aider le demandeur à préparer la meilleure demande possible. Cette obligation peut consister à aider le demandeur à préparer ou réunir un dossier complet de demande, comprenant tous les documents et renseignements nécessaires ; s'informer des renseignements et documents exigés par l'État requis, soit en consultant les sources à disposition, soit en adressant une demande d'information à l'Autorité centrale requise. Cela ne signifie pas que l'Autorité centrale doit établir la demande à la place du demandeur. Cependant, le paragraphe premier reconnaît qu'une Autorité centrale acquiert généralement une certaine expertise de la gestion des affaires internationales et des relations avec les autorités étrangères. Un demandeur qui n'a pas d'expérience dans ce domaine bénéficiera de cette expertise si l'Autorité centrale le conseille ou l'assiste dans l'établissement de la demande. Il sera également nécessaire d'appliquer les exigences linguistiques de la Convention (art. 44 et 45) aux documents indispensables qui accompagnent la demande.

321 Le paragraphe premier s'inspire de l'article 6 de la Convention Accès à la justice de 1980.

Paragraphe 2 – Après s'être assurée que la demande satisfait aux exigences de la Convention, l'Autorité centrale de l'État requérant la transmet, au nom du demandeur et avec son consentement, à l'Autorité centrale de l'État requis. La demande est accompagnée du formulaire de transmission prévu à l'annexe 1. Lorsque l'Autorité centrale de l'État requis le demande, l'Autorité centrale de l'État requérant fournit une copie complète certifiée conforme par l'autorité compétente de l'État d'origine des documents énumérés aux articles 16(3), 25(1)(a), (b) et (d) et (3)(b) et 30(3).

322 L'emploi des termes « après s'être assurée » précise le moment auquel l'Autorité centrale doit envoyer la demande, à savoir lorsqu'elle s'est assurée de sa conformité, et lui donne la possibilité de refuser de transmettre la demande si elle n'est pas satisfaite de sa conformité à la Convention. La demande devrait contenir une déclaration attestant que la demande est transmise « au nom du demandeur et avec son consentement ».

323 La non-conformité aux exigences de la Convention est la seule base sur laquelle l'Autorité centrale requérante (expéditrice) peut refuser de transmettre la demande. Il a été envisagé d'insérer une disposition autorisant l'Autorité centrale requérante à refuser de transmettre une demande pour d'autres motifs. L'article 4(1) de la Convention de New York de 1956 contient une telle disposition, qui est formulée ainsi : « L'autorité expéditrice transmet le dossier à l'institution intermédiaire désignée par l'État du débiteur à moins qu'elle ne considère la demande comme téméraire. » La version antérieure de l'article 12(4) dans le Document préliminaire No 13 de janvier 2005[125] et une autre proposition faite pendant la Commission spéciale de 2005 prévoyaient qu'une demande qui n'était pas « fondée » n'avait pas à être acceptée par l'Autorité centrale requérante ou par l'Autorité centrale requise. Excepté sur la question de la conformité à la Convention, la possibilité de contrôle d'office (et de rejet ou de refus) par l'Autorité centrale n'a pas été soutenue (voir aussi l'explication de l'art. 12(8) et (9) ci-dessous). Il revient à l'Autorité centrale

[122] Acte final de la Vingt et unième session, partie C, Recommandation No 3.
[123] Le Rapport Duncan (*op. cit.* note 9), au para. 36.
[124] *Ibid.*, para. 25 à 27.
[125] *Op. cit.* (note 98).

be updated with a view to their adoption by a future Special Commission as recommended forms.[122]

Article 12 Transmission, receipt and processing of applications and cases through Central Authorities

316 The conclusion of the 1999 Special Commission that the Convention should improve on earlier instruments to achieve maximum efficiency was strongly supported in later meetings. In particular, advances could be made by establishing a clear procedural framework for the application process including time limits by which particular steps should be taken, bearing in mind the Convention's aims of a rapid, simple and low cost procedure. A lack of clarity in procedures was identified as one of the major concerns with other instruments, to be addressed by the Convention.[123] Another major concern with existing instruments was delays in processing applications for the recovery of maintenance and in enforcing decisions. The range of causes contributing to delays is described in the Duncan Report.[124]

317 Article 12 states the basic requirements for effective and efficient case management and emphasises the requirement for speed at every stage of the process – "timely" in paragraph 5, "quickly" in paragraph 6, "rapid" in paragraph 7 and "promptly" in paragraph 8. Time limits are introduced in Article 12 to minimise delays: six weeks for an acknowledgement of receipt of the application and response to initial steps (Art. 12(3)) and three months for a status report (Art. 12(4)).

318 The procedure and time limits in Article 12 apply to applications and cases under Chapter III. The term "cases" in the heading of Article 12 refers to the applications after they are "in process". This is evident from the context in which it is used in paragraphs 5 and 6. There is no direct requirement that specific measures requests in Article 7 be treated in the same way as applications under Article 10. It will be a matter for each Contracting State whether requests and applications will be treated similarly or subject to the same time limits.

Paragraph 1 – The Central Authority of the requesting State shall assist the applicant in ensuring that the application is accompanied by all the information and documents known by it to be necessary for consideration of the application.

319 To implement paragraph 1 there will be a reliance on the information in Country Profiles and on the obligations created by Article 11(1)(g) and Article 57 to provide information about each country's laws and procedures to know what its information and documentation requirements will be. There may, of course, be additional information required for a particular case, and in addition to the information referred to in Article 11(2)(c) and (3), Article 12(3) also envisages the possibility of requests for further information following receipt of an application.

320 The obligations imposed on Central Authorities by paragraph 1 are made mandatory by the words "shall assist". In general terms, it could be said that the obligation is to assist the applicant to prepare the best possible application. The obligations may include: to assist the applicant to prepare or compile a complete application with all necessary information and documents; and, to discover from available sources or by enquiry to the requested Central Authority the information and documentation requirements of the requested State. This does not mean that the Central Authority must prepare the application for the applicant. However, paragraph 1 recognises that a Central Authority will usually develop some expertise in handling international cases and dealing with foreign authorities. An applicant who is not experienced in such matters will benefit from that expertise if the Central Authority advises or assists her or him with preparation of the application. It will also be necessary to apply the language requirements of the Convention (in Arts 44 and 45) to those essential documents that accompany the application.

321 Paragraph 1 is inspired by Article 6 of the 1980 Hague Access to Justice Convention.

Paragraph 2 – The Central Authority of the requesting State shall, when satisfied that the application complies with the requirements of the Convention, transmit the application on behalf of and with the consent of the applicant to the Central Authority of the requested State. The application shall be accompanied by the transmittal form set out in Annex 1. The Central Authority of the requesting State shall, when requested by the Central Authority of the requested State, provide a complete copy certified by the competent authority in the State of origin of any document specified under Articles 16(3), 25(1)(a), (b) and (d) and (3)(b) and 30(3).

322 The use of the words "when satisfied" first specifies the time at which the application must be sent by the Central Authority, *i.e.*, when satisfied, and second, gives the Central Authority a discretion to refuse to transmit the application if it is not satisfied as to its compliance with the Convention. The application should contain a statement that it is "sent on behalf of and with the consent of the applicant".

323 A failure to comply with the Convention requirements is the only basis on which the requesting (sending) Central Authority may refuse to transmit the application. Consideration was given to the possibility of including a provision allowing the requesting Central Authority to refuse to transmit an application for other reasons. Article 4(1) of the 1956 New York Convention has such a provision. It states: "The Transmitting Agency shall transmit the documents to the Receiving Agency of the State of the respondent, unless satisfied that the application is not made in good faith." Previous drafts of Article 12(4) in Preliminary Document No 13 of January 2005[125] and another proposal made during the Special Commission provided that an application which was not "well-founded" need not be accepted, either by the requesting or requested Central Authority. Except on the question of compliance with the Convention, the possibility of *ex officio* review (and the possibility of rejection or refusal) by the Central Authority was not supported (see also the explanation of Art. 12(8) and (9) below). It will be

[122] Final Act of the Twenty-First Session, Part C, Recommendation No 3.
[123] The Duncan Report (*op. cit.* note 9), at para. 36.
[124] *Ibid.*, paras 25-27.
[125] *Op. cit.* (note 98).

requise de déterminer si elle estime que les conditions requises de la Convention sont ou non remplies[126].

324 L'article 12(2) vise la procédure administrative de vérification et d'évaluation de la conformité de la demande aux exigences de la Convention sur la base des informations et documents communiqués par le demandeur. La procédure juridique consistant à statuer définitivement sur la demande ne peut être engagée que lorsque les preuves du demandeur et du défendeur sont soumises à l'autorité compétente. Il est possible qu'au cours de la procédure juridique, il ressorte des preuves présentées que les obligations de la Convention ne sont pas satisfaites. Cette issue ne met pas en cause la procédure de vérification de l'Autorité centrale requérante ou de l'Autorité centrale requise, dont la décision d'accepter la demande ne doit reposer que sur les informations communiquées par une seule des parties. Pour des raisons juridiques, il peut être souhaitable d'inclure dans la demande une déclaration sur les conséquences d'une fausse déclaration, telle celle figurant à la fin du Formulaire relatif à la situation financière.

325 Le Formulaire de transmission visé à l'article 12(2) est un formulaire obligatoire exposant les renseignements devant obligatoirement accompagner une demande et qu'il convient d'utiliser en guise de courrier de couverture, étant donné que les formulaires de demande ne sont pas obligatoires. Élaboré par le Groupe de travail chargé des formulaires, il est conçu pour accompagner toutes les demandes permises par la Convention.

326 La troisième phrase de l'article 12(2) vise les documents spécifiques qui, aux termes des articles 16(3), 25(1) et (3) et 30(3), doivent obligatoirement être fournis concernant, respectivement, la déclaration de ressources de l'enfant, une demande de reconnaissance et d'exécution d'une décision, un résumé de la décision, ou une demande de reconnaissance et d'exécution d'une convention en matière d'aliments. En outre, elle reprend en partie l'article 25(2) selon lequel une copie certifiée conforme du document concerné doit être fournie promptement à l'État requis.

Paragraphe 3 – Dans un délai de six semaines à compter de la date de réception de la demande, l'Autorité centrale requise en accuse réception au moyen du formulaire prévu à l'annexe 2, avise l'Autorité centrale de l'État requérant des premières démarches qui ont été ou qui seront entreprises pour traiter la demande et sollicite tout document ou toute information supplémentaire qu'elle estime nécessaire. Dans ce même délai de six semaines, l'Autorité centrale requise informe l'Autorité centrale requérante des nom et coordonnées de la personne ou du service chargé de répondre aux questions relatives à l'état d'avancement de la demande.

327 La nécessité de délais clairs a été évoquée plus haut aux paragraphes 317 et 318. Afin d'éviter de surcharger l'Autorité centrale requise, il a été considéré qu'un délai de six semaines suffirait pour accuser réception de la demande et traiter les autres aspects visés au paragraphe 3. Ces six semaines sont un compromis entre le délai le plus court et le délai le plus long envisagés. Dans un délai de six semaines suivant la réception de la demande, l'Autorité centrale requise doit prendre les mesures suivantes : accuser réception, aviser des premières démarches entreprises, solliciter d'autres informations ou documents et communiquer le nom et les coordonnées de la personne ou du service chargé de l'affaire. Il a été considéré que l'envoi d'une seule communication (courrier électronique, télécopie ou courrier) accusant réception, décrivant les premières démarches engagées ou à engager et sollicitant, si nécessaire, des informations ou documents complémentaires éviterait des pertes de temps aux Autorités centrales. Cependant, le cas échéant, l'Autorité centrale requise peut aussi demander d'autres informations ou documents à un stade ultérieur (voir aussi ci-dessous para. 346).

328 Le Formulaire d'accusé de réception est un formulaire obligatoire adopté par la Session diplomatique et contenu à l'annexe 2 de la Convention. Il a été établi par le Groupe de travail chargé des formulaires. Il est conçu pour accuser réception de la demande dans un délai de six semaines suivant la réception. Simultanément ou postérieurement à l'envoi de l'accusé de réception, mais toujours dans un délai de six semaines après la réception, l'Autorité centrale requise doit également informer l'Autorité centrale requérante des premières démarches qui ont été ou seront engagées et des coordonnées de la personne ou du service chargé de la demande. L'Autorité centrale requise peut profiter de cette étape « d'information » pour solliciter des informations ou documents complémentaires. Le paragraphe 3 envisage au moins une, voire deux communications de l'Autorité centrale requise dans un délai de six semaines suivant réception de la demande. Cependant, l'obligation pesant sur l'Autorité centrale *ne serait pas* satisfaite si un accusé de réception n'était suivi d'aucun autre envoi dans ce délai de six semaines.

329 Plusieurs Autorités centrales ne communiquent pas le nom et l'adresse de la personne chargée d'instruire la demande et, dans ce cas, il suffit d'indiquer le service responsable ou un numéro de téléphone.

330 Le Formulaire d'accusé de réception est destiné à simplifier et à accélérer la procédure instaurée au paragraphe 3. Il peut être utilisé conjointement avec le formulaire de Rapport sur l'état d'avancement pour rendre compte de l'avancement d'une demande. Un formulaire de Rapport sur l'état d'avancement est adapté à chaque type de demande. Ces formulaires sont conçus de façon à minimiser la charge de travail de l'Autorité centrale. Après avoir indiqué les renseignements élémentaires – coordonnées de l'Autorité centrale et référence de l'affaire – il suffit de cocher les démarches engagées ou à engager dans la liste proposée.

Paragraphe 4 – Dans un délai de trois mois suivant l'accusé de réception, l'Autorité centrale requise informe l'Autorité centrale requérante de l'état de la demande.

331 Le paragraphe 4 garantit qu'il y aura une communication dans un délai de trois mois suivant l'accusé de réception pour informer de l'état d'avancement de l'affaire. À l'issue des trois premiers mois, d'autres communications seront habituellement nécessaires, selon les développements, pour expliquer de façon plus détaillée les autres mesures prises ou informer des résultats obtenus jusque-là. Ces communications garantiront le respect des paragraphes 4 et 5.

332 Le fonctionnement conjugué des paragraphes 3 et 4 sert de contrôle qualité garantissant que les premières démarches ont été engagées et que l'affaire est en cours d'instruction. Le respect des deux délais constituera une avancée significative du point de vue de l'efficacité de la coopération.

[126] Voir Doc. prél. No 36/2007 (*op. cit.* note 91), observations relatives à l'art. 12(2).

up to the requested Central Authority to determine whether it is satisfied that the requirements of the Convention are fulfilled or not.[126]

324 Article 12(2) refers to the administrative process of checking the application and making an assessment, on the basis of the information and documents provided by the applicant, that the Convention requirements are satisfied. The legal process of making a final determination on the application can only be undertaken when the evidence of both the applicant and the respondent is placed before the competent legal authority. It is possible that during the legal proceedings, it may become apparent from the evidence presented that the Convention requirements are not met. This outcome is no reflection on the checking processes of either the requesting or requested Central Authority which are required to make a decision to accept the application on the basis of one party's information only. For legal reasons it may be desirable to include in the application a statement such as the one appearing at the end of the Financial Circumstances Form, referring to the consequences of making a false statement.

325 The Transmittal Form referred to in Article 12(2) is a mandatory form to be used as a cover letter setting out the minimum information required in an application, as application forms themselves are not mandatory. It was developed by the Forms Working Group and is designed to accompany any of the available applications.

326 The third sentence of Article 12(2) refers to the obligations in Articles 16(3), 25(1) and (3) and 30(3) to provide specific documents concerning, respectively, an attestation of a child's means, an application for recognition and enforcement of a decision, the abstract of a decision, or recognition and enforcement of a maintenance arrangement. In addition, it repeats in part Article 25(2), according to which a certified copy of the document concerned must be provided promptly to the requested State.

Paragraph 3 – The requested Central Authority shall, within six weeks from the date of receipt of the application, acknowledge receipt in the form set out in Annex 2, and inform the Central Authority of the requesting State what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information. Within the same six-week period, the requested Central Authority shall provide to the requesting Central Authority the name and contact details of the person or unit responsible for responding to inquiries regarding the progress of the application.

327 The need for clear time limits was referred to above at paragraphs 317 and 318. In order to avoid overburdening the requested Central Authority, it was considered that a period of six weeks would be sufficient to acknowledge receipt of the application and deal with the other matters listed in paragraph 3. The time limit of six weeks was a compromise between the shortest and the longest periods proposed. Within six weeks of receipt of the application, the requested Central Authority must take the following steps: acknowledge receipt, advise on initial steps, request further information or documents, and provide contact details of the responsible case officer or unit. It was considered a more efficient use of time if Central Authorities would send one communication only (e-mail, fax or letter), which contains an acknowledgment, with an outline of steps taken or to be taken, and a request for further information or documents if necessary. However, should the need arise, the requested Central Authority may also request further information or documents at a later stage. See also paragraph 346 below.

328 The Acknowledgement Form is a mandatory form, approved by the Diplomatic Session and contained in Annex 2 of the Convention. It was prepared by the Forms Working Group. It is designed to acknowledge receipt of the application within six weeks of the date of receipt. At the same time as sending the acknowledgement, or at a later time, but also within six weeks of receipt, the requested Central Authority must also inform the requesting Central Authority of the initial steps that have been or will be taken, and the contact details of the person or unit handling the application. The requested Central Authority may use the "informing" stage of the process to request additional information or documents. Paragraph 3 envisages at least one and possibly two communications from the requested Central Authority within six weeks of receiving the application. However an acknowledgment only and nothing further within six weeks would *not* satisfy this obligation.

329 A number of Central Authorities do not provide the name and address of the person responsible for dealing with the application, and in those cases it is sufficient to indicate the unit responsible or provide a contact number.

330 The Acknowledgement Form is intended to simplify and expedite the procedure established in paragraph 3. It could be used in conjunction with a Status of Application Form to report on the progress of an application. A Status of Application Form is specifically adapted for each type of application. The forms are designed so as to require the minimum possible input by, or burden on, the Central Authority. The basic Central Authority contact details and details to identify the case must be entered on the form, and a checklist of possible actions which have been or will be taken is included. Only the relevant actions need to be indicated on the list.

Paragraph 4 – Within three months after the acknowledgement, the requested Central Authority shall inform the requesting Central Authority of the status of the application.

331 Paragraph 4 ensures there will be a follow-up communication within three months of the acknowledgement, to give a progress or status report. After the first three months, as developments occur, further communications will usually be needed to explain in more detail what additional steps may be taken, or to provide progress reports on what has been achieved to date. These communications will ensure compliance with paragraphs 4 and 5.

332 The combined operation of paragraphs 3 and 4 serves as a type of quality control to ensure that the first steps were initiated, and a guarantee that the case is ongoing. Adherence to the two time limits will indicate significant progress towards achieving effective co-operation.

[126] See Prel. Doc. No 36/2007 (*op. cit.* note 91), comments on Art. 12(2).

333 Le Rapport sur l'état d'avancement peut être établi sur le formulaire[127] préparé à cette fin par le Groupe de travail chargé des formulaires. Comme le Formulaire d'accusé de réception, il est conçu pour une efficacité maximale avec un minimum de travail de la part de l'Autorité centrale. Il fera l'objet de discussions lors d'une future Commission spéciale conformément à la Recommandation No 3 de l'Acte final de la Vingt et unième session.

Paragraphe 5 – Les Autorités centrales requérante et requise s'informent mutuellement :

334 Le paragraphe 5 impose aux Autorités centrales requises et requérantes des obligations minimales directes de coopération pour chaque affaire.

Alinéa (a) – de l'identité de la personne ou du service responsable d'une affaire particulière ;

335 Les experts ont reconnu qu'étant donné le grand nombre d'affaires qui seront probablement traitées et des délais de résolution souvent longs, des changements de personnel au sein des Autorités centrales sont inévitables. Afin de préserver la continuité et d'empêcher qu'une affaire soit négligée, il a été jugé important de transmettre les coordonnées de la personne ou du service responsable de chaque dossier. Cette obligation de l'alinéa (a) impose d'actualiser les coordonnées après leur communication au début de la procédure, conformément aux exigences de l'article 11(1)(h) (Autorité centrale requérante) et de l'article 12(3) (Autorité centrale requise).

336 Dans certains pays, un service, et non une personne, est chargé d'une affaire et seules les coordonnées du service sont communiquées. Dans d'autres, une personne a la responsabilité d'une affaire de bout en bout. Il appartient à chaque Autorité centrale de décider des coordonnées à communiquer.

337 L'obligation imposée par cette disposition sera aisément remplie en établissant régulièrement des rapports sur l'état d'avancement au moyen du formulaire préparé à cette fin et en veillant à amender s'il y a lieu les coordonnées figurant sur le formulaire.

Alinéa (b) – de l'état d'avancement de l'affaire,

338 Les affaires d'aliments se caractérisent par leur fréquente lenteur et par l'irrégularité et la rareté des rapports d'avancement. Il y a une réticence compréhensible des Autorités centrales requises à envoyer des rapports n'indiquant aucun avancement et à recevoir de trop fréquentes demandes d'informations sur l'état d'avancement. Un compromis est nécessaire entre « le besoin de savoir » du demandeur et de l'Autorité centrale requérante et « la capacité à fournir » des informations sur l'avancement du dossier de l'Autorité centrale requise. Après l'accusé de réception et un premier rapport dans les six semaines suivant la réception, et le rapport de suivi dans les trois mois qui suivent l'accusé de réception, une obligation continue d'information sur l'état d'avancement demeure, comme le souligne l'alinéa (b). Le Formulaire sur l'état d'avancement est un moyen rapide pour les Autorités centrales de se tenir mutuellement informées.

et répondent en temps utile aux demandes de renseignements.

339 L'obligation de répondre en temps utile aux demandes de renseignements est un des aspects de l'obligation de coopération visée à l'article 5(a) qui est lié à l'objet de la Convention mentionné à l'article premier (a) et dans le préambule. Le besoin de procédures et de réponses rapides est relaté plus haut, aux paragraphes 327 et 328.

Paragraphe 6 – Les Autorités centrales traitent une affaire aussi rapidement qu'un examen adéquat de son contenu le permet.

340 Le paragraphe 6 met l'accent sur la rapidité, mais pas aux dépens d'un examen approprié des questions en jeu. Cet « examen adéquat [du] contenu » peut être affecté par divers aspects, notamment la complexité juridique de l'affaire, la disponibilité de personnel qualifié pour évaluer l'affaire, la capacité à localiser le débiteur, le délai dans lequel l'Autorité centrale requérante peut transmettre les renseignements complémentaires demandés par l'Autorité centrale requise.

341 La Convention vise à régler les « problèmes chroniques de retard dans le traitement des demandes » et les raisons de ces retards évoqués dans le Rapport Duncan[128]. Ce rapport note aussi l'existence d'un consensus universel sur l'idée « qu'instaurer un système de traitement des demandes plus rapide et plus réactif doit être un objectif essentiel du nouvel instrument »[129]. Toutes les dispositions de l'article 12 visent cet objectif.

Paragraphe 7 – Les Autorités centrales utilisent entre elles les moyens de communication les plus rapides et efficaces dont elles disposent.

342 Le paragraphe 7 met lui aussi l'accent sur la rapidité et l'efficacité, mais l'expression « dont elles disposent » reconnaît que les Autorités centrales n'ont pas toutes le même niveau de ressources et de matériel. De nombreuses Autorités centrales s'échangent des rapports d'avancement et des demandes d'informations informels par courrier électronique. C'est indéniablement l'outil de communication le plus rapide et le plus économique. Des communications plus formelles peuvent exiger d'autres modes d'expédition. Certains documents originaux ou copies certifiées conformes devront peut-être être adressés par courrier postal si une version électronique n'est pas acceptable ou est impossible. Les Autorités centrales doivent choisir le mode de communication ou d'envoi de documents le plus rapide, en gardant à l'esprit la nature des documents ou de la communication, la date limite de réception et la distance.

Paragraphe 8 – Une Autorité centrale requise ne peut refuser de traiter une demande que s'il est manifeste que les conditions requises par la Convention ne sont pas remplies. Dans ce cas, cette Autorité centrale informe aussitôt l'Autorité centrale requérante des motifs de son refus.

343 Le paragraphe 8 s'inspire de l'article 27 de la Convention Enlèvement d'enfants de 1980.

344 Les Autorités centrales requérante et requise ont, respectivement aux termes des paragraphes 2 et 8, la possibilité de refuser une demande si elles la jugent non conforme aux exigences de la Convention. Toutefois, le paragraphe 8, qui s'applique à l'Autorité centrale requise, emploie un langage plus restrictif que le paragraphe 2, qui s'applique à l'Autorité centrale requérante. Dans le paragraphe 8, l'inexé-

[127] Doc. prél. No 31-B/2007 (*op. cit.* note 96), annexes A à D.

[128] *Op. cit.* (note 9), para. 50.
[129] *Ibid.*

Rapport explicatif

333 The Status of Application Report may be made on the form[127] developed by the Forms Working Group for this purpose. As with the Acknowledgement Form, the Status of Application Form is designed to achieve the maximum efficiency for minimum input by the Central Authority. The Status of Application Form will be discussed in a future Special Commission in accordance with Recommendation No 3 of the Final Act of the Twenty-First Session.

Paragraph 5 – Requesting and requested Central Authorities shall keep each other informed of –

334 Paragraph 5 places direct obligations on both requesting and requested Central Authorities to provide, as a minimum, basic levels of co-operation for individual cases.

Sub-paragraph (a) – the person or unit responsible for a particular case;

335 Experts recognised that due to the large numbers of maintenance cases that are likely to be processed and the often lengthy periods taken to resolve them, changes in Central Authority personnel are inevitable. In order to maintain continuity and prevent cases being overlooked, it was considered important that information be provided on the contact details of the person or unit responsible for each case. This obligation in sub-paragraph (a) requires that the contact information be kept updated after providing the necessary contact information at the beginning of the application process, as required in Article 11(1)(h) (the requesting Central Authority) and in Article 12(3) (the requested Central Authority).

336 In some countries, a unit rather than an individual is responsible for a case, and only the unit's contact details are provided. In other countries, an individual case officer will have continuing responsibility for the case. It is a matter for each Central Authority to decide whose contact details may be disclosed.

337 The obligation imposed by this provision will be easily met by making regular status or progress reports on the Status of Application Report Form, and ensuring that the contact details on the form are amended as necessary.

Sub-paragraph (b) – the progress of the case,

338 It has been a feature of international maintenance cases to date that progress is often very slow, and progress reports can be irregular and infrequent. There is an understandable reluctance by requested Central Authorities to send reports of "no progress" and to be overburdened with too frequent requests for progress reports. A compromise is needed between the applicant's and the requesting Central Authority's "need to know" and the requested Central Authority's "ability to provide" details of progress. Following the acknowledgment and initial report within six weeks of the receipt of an application, and the follow-up report within three months after the acknowledgement, there is still an ongoing obligation to provide progress reports, as sub-paragraph (b) emphasises. The Status of Application Form provides a quick method for Central Authorities to keep each other informed.

and shall provide timely responses to enquiries.

339 The obligation to provide timely responses to enquiries is an aspect of the obligation of co-operation mentioned in Article 5(a), and relates to that object of the Convention referred to in Article 1(a) and in the Preamble. The need for expeditious procedures and responses is referred to above, at paragraphs 327 and 328.

Paragraph 6 – Central Authorities shall process a case as quickly as a proper consideration of the issues will allow.

340 The emphasis in paragraph 6 is on speed but not at the expense of a proper consideration of the issues. A "proper consideration of the issues" may be affected by a number of matters, including: the legal complexity of the case; the availability of properly qualified personnel to assess the case; the ability to locate the debtor; the speed with which the requesting Central Authority can provide additional information sought by the requested Central Authority.

341 The Convention aims to address the "chronic problems of delay in processing applications" and the reasons for such delay, referred to in the Duncan Report.[128] That report also notes the universal consensus that "a primary objective of the new instrument must be to provide a faster moving and more responsive system for the processing of applications".[129] All the provisions of Article 12 are directed to this aim.

Paragraph 7 – Central Authorities shall employ the most rapid and efficient means of communication at their disposal.

342 The emphasis in paragraph 7 is also on speed and efficiency, but the phrase "at their disposal" acknowledges that Central Authorities will have different levels of resources and equipment. Many Central Authorities communicate informally by e-mail for progress reports and information requests. E-mail is certainly the most rapid and inexpensive communication tool. More formal communications may require other methods of sending. Some original documents or certified copies might have to be sent by mail, if an electronic version is not acceptable or possible. Central Authorities should choose the most rapid means of communication, or of sending documents, bearing in mind the nature of the documents or communication, the deadline for their receipt, and the distance to be sent.

Paragraph 8 – A requested Central Authority may refuse to process an application only if it is manifest that the requirements of the Convention are not fulfilled. In such case, that Central Authority shall promptly inform the requesting Central Authority of its reasons for refusal.

343 Paragraph 8 is inspired by Article 27 of the 1980 Hague Child Abduction Convention.

344 Both requesting and requested Central Authorities, under paragraphs 2 and 8 respectively, have a discretion to refuse an application if not satisfied that it complies with the requirements of the Convention. However, paragraph 8 which applies to the requested Central Authority has more restrictive language than paragraph 2 which applies to the requesting Central Authority. In paragraph 8, the applica-

[127] Prel. Doc. No 31-B/2007 (*op. cit.* note 96), Annexes A-D.

[128] *Op. cit.* (note 9), para. 50.
[129] *Ibid.*

cution des obligations par le demandeur doit être « manifeste », autrement dit, évidente d'après les documents reçus, tandis qu'il suffit à l'Autorité centrale requérante d'être « satisfaite » au paragraphe 2. L'établissement d'un cadre plus restrictif à l'égard de l'Autorité centrale requise est justifié car la demande aura déjà fait l'objet d'un contrôle par l'Autorité centrale requérante, tenue de s'assurer de sa conformité à la Convention.

345 L'examen impliqué par l'expression « manifeste que les conditions requises par la Convention ne sont pas remplies » couvre le cas où le demandeur abuse de la procédure instaurée par la Convention. Par exemple, une Autorité centrale requise serait en droit de refuser de traiter une demande lorsqu'une demande antérieure présentée par la même partie à l'égard du même débiteur a déjà été traitée et a échoué pour un motif déterminé ; une demande subséquente fondée sur les mêmes motifs sans changement de situation pourrait valablement être refusée. En revanche, il est certain que les experts n'ont pas souhaité maintenir l'examen visant à permettre de refuser une demande jugée sans fondement[130]. Cela aurait donné à l'Autorité centrale requise un pouvoir d'appréciation plus large pour refuser une demande dans certaines hypothèses. Il revient à l'Autorité centrale requise de déterminer s'il est manifeste que les conditions requises par la Convention ne sont pas remplies.

346 Il est toujours loisible à l'Autorité centrale requise, si elle n'est pas satisfaite, de demander des informations complémentaires si cela s'avère nécessaire pour établir la conformité de la demande aux exigences de la Convention. Elle devra préciser à l'État requérant en quoi la demande est jugée irrégulière ou incomplète afin que les problèmes puissent être corrigés. Même lorsque des incertitudes demeurent quant à la conformité de la demande aux exigences de la Convention, il est préférable que l'Autorité centrale pèche par excès de prudence et, en tout état de cause, qu'elle ne prenne aucune décision qu'il conviendrait de laisser à l'autorité statuant sur la demande.

347 Dans la seconde phrase du paragraphe 8, l'Autorité centrale requise doit informer l'Autorité centrale requérante des motifs de son refus de recevoir la demande. L'Autorité centrale requise n'est pas tenue d'informer le demandeur car l'article 9 indique clairement qu'un demandeur dans un État requérant ne peut présenter directement une demande en vertu du chapitre III à l'Autorité centrale de l'État requis. Des communications directes entre l'Autorité centrale requise et le demandeur peuvent s'avérer nécessaires dans des situations exceptionnelles et la Convention ne les interdit pas (voir aussi l'explication relative aux coordonnées, sous l'art. 11(1)(b), ci-dessus para. 290).

348 L'emploi du terme « aussitôt » dans la seconde phrase du paragraphe 8 impose à l'Autorité centrale requise d'informer l'Autorité centrale requérante au plus vite de ses motifs de refus.

Paragraphe 9 – L'Autorité centrale requise ne peut rejeter une demande au seul motif que des documents ou des informations supplémentaires sont nécessaires. Toutefois, l'Autorité centrale requise peut demander à l'Autorité centrale requérante de fournir ces documents ou ces informations supplémentaires. À défaut de les fournir dans un délai de trois mois ou dans un délai plus long spécifié par l'Autorité centrale requise, cette dernière peut décider de cesser de traiter la demande. Dans ce cas, elle en informe l'Autorité centrale requérante.

349 L'objet du paragraphe 9 est de garantir que l'Autorité centrale requise traite équitablement une demande incomplète sans être en même temps placée dans une situation difficile par une Autorité centrale requérante ou un demandeur qui ne répond pas. Il incombe à l'Autorité centrale requérante de fournir les informations ou documents nécessaires et il n'est pas nécessaire de laisser ouverts les dossiers inactifs si ces informations ou documents ne sont pas produits.

350 Si les documents ou informations ne sont pas produits dans le délai de trois mois à compter de la date de la demande de documents ou d'informations, ou dans un délai plus long spécifié par l'Autorité centrale requise, l'Autorité centrale requise n'est pas tenue de poursuivre le traitement de la demande. Cela étant, les termes « peut décider » lui laissent une marge d'appréciation : si elle est disposée à attendre les documents ou informations plus de trois mois, elle peut le faire. Le traitement de la demande peut être suspendu jusqu'à réception des documents ou informations. On peut raisonnablement penser que l'Autorité centrale requise accepterait de prolonger le délai si l'Autorité centrale requérante répond qu'elle n'est pas en mesure de respecter le délai de trois mois mais fournira les documents ou informations après ce délai.

Article 13 Moyens de communication

Toute demande présentée par l'intermédiaire des Autorités centrales des États contractants, conformément à ce chapitre, et tout document ou information qui y est annexé ou fourni par une Autorité centrale ne peuvent être contestés par le défendeur uniquement en raison du support ou des moyens de communication utilisés entre les Autorités centrales concernées.

351 L'article 13 a été rédigé pour permettre à la Convention de progressivement fonctionner dans un environnement neutre quant au support. Cependant, au moment des négociations, les États contractants n'autorisaient pas tous l'utilisation de documents transmis par la voie électronique. Il faut comprendre que cette disposition doit se lire en combinaison avec l'article 12(7), qui prévoit que « les Autorités centrales utilisent entre elles les moyens de communication les plus rapides et efficaces dont elles disposent ».

352 Cette disposition permettrait que l'ensemble des demandes et des documents et informations afférents transmis par l'Autorité centrale de l'État requérant par des procédés électroniques puissent être utilisés, lorsque les lois et procédures internes l'autorisent, devant les tribunaux et les autorités administratives des États contractants, indépendamment du support ou du moyen de communication utilisé. On notera que les termes « par le défendeur » ont été ajoutés dans le texte de l'article 13 afin de préciser qu'il est fait interdiction au seul défendeur de contester le document au seul motif de son mode de transmission, et qu'une autorité compétente peut toujours demander une copie certifiée des documents soumis, conformément à l'article 25(2). Toutefois, les règles probatoires internes resteraient applicables en ce qui concerne le fond des documents et informations.

353 L'expression « entre les Autorités centrales concernées » désigne les Autorités centrales de l'État requis et de l'État requérant, et non les Autorités centrales au sein d'un État fédéral. Elle a été ajoutée pour qu'il soit clair que la Convention ne tente pas de réguler les moyens de communication entre une Autorité centrale et d'autres autorités au sein d'un même État.

[130] Cependant, l'art. 15(2) prévoit qu'un État peut refuser l'octroi d'une assistance juridique gratuite si la demande ou l'appel est manifestement mal fondé.

tion's failure to fulfil requirements must be "manifest", in other words, clear on the face of the documents received, whereas the requesting Central Authority must merely be "satisfied" in paragraph 2. It is sensible to have a more stringent standard for the requested Central Authority, as the application will already have been reviewed by the requesting Central Authority to ensure that it complies with the Convention.

345 The test for "manifest that the requirements of the Convention are not fulfilled" covers the situation where the Convention process is abused. For example, a requested Central Authority may refuse to process an application if a previous application by the same party concerning the same debtor had already been processed, and had failed on a specific ground; a subsequent application on the same grounds with no change of circumstances would be properly refused. At the same time, it was clear that experts did not want to retain "being without foundation" as the test for refusal of an application.[130] This would have given the requested Central Authority a wider discretion to refuse the application. It will be a matter for the requested Central Authority to determine whether it is manifest that the requirements of the Convention are not fulfilled.

346 It is always open to a requested Central Authority, if it is not satisfied, to request further information when necessary to establish that the application does in fact comply with the requirements of the Convention. Such a request should clarify for the requesting State where the application is considered to be defective or deficient so that the problems may be rectified. Even when some uncertainty remains as to whether an application satisfies the Convention requirements, it is preferable for the Central Authority to err on the side of caution and certainly not make any decision which should more properly be left to the authority deciding upon the application.

347 In the second sentence of paragraph 8, the requested Central Authority must inform the requesting Central Authority of its reasons for refusing to accept the application. The requested Central Authority is not required to inform the applicant, as Article 9 makes clear that an applicant in a requesting State cannot make a Chapter III application direct to the Central Authority of the requested State. Direct communication between the requested Central Authority and the applicant may be necessary in exceptional cases, and the Convention does not prohibit such communication (see also the explanation of contact details in Art. 11(1)(b) at para. 290 above).

348 The use of the word "promptly" in the second sentence of paragraph 8 requires the requested Central Authority to inform the requesting Central Authority with the minimum delay of its reasons for not accepting the application.

Paragraph 9 – The requested Central Authority may not reject an application solely on the basis that additional documents or information are needed. However, the requested Central Authority may ask the requesting Central Authority to provide these additional documents or information. If the requesting Central Authority does not do so within three months or a longer period specified by the requested Central Authority, the requested Central Authority may decide that it will no longer process the application. In this case, it shall inform the requesting Central Authority of this decision.

349 The purpose of paragraph 9 is to ensure that the requested Central Authority deals fairly with an incomplete application, without at the same time being placed in a difficult situation by an unresponsive requesting Central Authority or applicant. The onus is on the requesting Central Authority to provide the necessary information or document, and inactive cases need not be kept open if the information or document is not forthcoming.

350 If the document or information is not provided within three months from the time of the request, or any longer period permitted by the requested Central Authority, the requested Central Authority is not obliged to process the application any further. On the other hand, the words "may decide" give a discretion to the requested Central Authority: if it is willing to wait longer than three months for the document or information, it may do so. Processing of the application may be suspended until the information or document is received. It is reasonable to expect that the requested Central Authority would agree to an extension of time if the requesting Central Authority responded that it was unable to meet the three-month deadline, but would provide the document or information at a later date.

Article 13 Means of communication

Any application made through Central Authorities of the Contracting States in accordance with this Chapter, and any document or information appended thereto or provided by a Central Authority, may not be challenged by the respondent by reason only of the medium or means of communication employed between the Central Authorities concerned.

351 Article 13 was developed to help ensure that the Convention might gradually be able to operate in a medium-neutral environment. However, at the time of negotiations, not all Contracting States allowed the use of documents which have been transmitted by electronic means. It is to be understood that this provision has to be read in conjunction with Article 12(7) which provides that "Central Authorities shall employ the most rapid and efficient means of communication at their disposal".

352 This provision would allow any application and related documents or information transmitted by electronic means by the Central Authority of the requesting State to be used, where permitted under internal laws and procedures, in the courts or administrative authorities of the Contracting States irrespective of the medium or means of communication employed. It is noted that the words "by the respondent" were added to the text of Article 13 in order to clarify that only the respondent is prevented from challenging the document simply because of the form of its transmission and that a competent authority can always request a certified copy of the documents submitted in accordance with Article 25(2). However, domestic rules of evidence would still be applicable with regard to the substance of the documents and information.

353 The phrase "between the Central Authorities concerned" refers to the Central Authorities of the requested and requesting States, and not to the Central Authorities within a federal State. The phrase was added to avoid any misunderstanding that the Convention may have been attempting to regulate the means of communication between a Central Authority and other authorities within the same State.

[130] However, Art. 15(2) provides that a State may refuse free legal assistance if the application or appeal is "manifestly unfounded".

354 Le Document préliminaire No 26 de janvier 2007[131] donne un exemple du fonctionnement de cette disposition. Il faut noter qu'à l'époque des négociations, très peu d'autorités judiciaires ou administratives délivraient ou acceptaient les documents électroniques répondant aux critères d'intégrité, d'irrévocabilité et d'identification (authentification) garantissant la sécurité des transmissions électroniques.

355 Le langage de l'article 13 est emprunté à l'article 30 de la Convention Enlèvement d'enfants de 1980 et a été inséré à la demande de la Commission spéciale.

Article 14 Accès effectif aux procédures

356 Le droit à un accès effectif aux services et procédures est un principe fondamental de la Convention. Les procédures visées à l'article 14 peuvent être administratives ou judiciaires.

357 La justification de l'accès effectif aux procédures, et les avantages que celui-ci peut apporter, ont été clairement énoncés dans le rapport sur les « Coûts et frais judiciaires et administratifs, comprenant assistance et aide juridique, en vertu de la nouvelle Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille » :

> « 39 Les demandeurs d'aliments ont généralement très peu de ressources, et des obstacles financiers même mineurs peuvent les dissuader d'user des possibilités prévues par la nouvelle Convention. Les coûts à la charge du demandeur ne devraient pas être de nature à empêcher le recours ou l'accès effectif aux services et procédures prévues par la Convention.
>
> 40 Cependant, pour que la Convention suscite l'adhésion d'un large éventail de Parties contractantes, les charges financières qu'elle leur fait encourir ne devraient pas être considérées comme excessives. Cela ne signifie pas que les services fournis au titre de la Convention n'auront aucun coût pour les Parties contractantes, mais plutôt que les coûts des services rendus ne devraient pas être disproportionnés par rapport aux avantages qu'apporteraient le versement d'aliments à un plus grand nombre d'enfants et à d'autres membres dépendants de la famille et la réduction des budgets d'aide sociale qui en découlerait. »[132]

358 « L'accès effectif aux procédures » implique qu'une personne qui sollicite une assistance au titre de cette Convention a la possibilité, avec l'aide des autorités de l'État requis, de soumettre son cas de la manière la plus exhaustive et la plus efficace possible aux autorités compétentes de l'État requis. Il implique en outre que le manque de moyens ne doit pas être un obstacle.

359 L'obligation de s'assurer que l'accès aux procédures est équivalent dans les différents pays, s'applique indépendamment de la nature judiciaire ou administrative des systèmes relatifs aux aliments destinés aux enfants. La démarche peut différer d'un système à l'autre, mais les résultats doivent être équivalents. Ainsi, l'accès effectif à certaines procédures administratives peut être garanti sans obligation de représentation légale ou même de comparution (procédure rapide, efficace et économique), tandis que dans les procédures judiciaires, l'État peut avoir à prendre en charge les coûts de la représentation en justice et du conseil juridique (l'État apporte une assistance dans le cadre d'un système plus complexe). Les besoins particuliers des demandeurs étrangers, tels que les problèmes liés à la distance et à la langue, doivent être également pris en compte.

360 La Convention prévoit des normes minimales pour garantir « l'accès effectif aux procédures ». Les États contractants sont toujours encouragés à fournir s'ils le peuvent des services de niveau plus élevé.

361 Les dispositions particulières au travers desquelles le principe général de l'accès effectif aux procédures devait être explicité, et plus particulièrement celles concernant l'assistance juridique gratuite, sont demeurées source de désaccord jusqu'à la toute fin des négociations. Un consensus général s'était d'ores et déjà dégagé visant à reconnaître qu'un traitement favorable devait être accordé aux demandes d'aliments destinés aux enfants. De même, il était convenu qu'il ne devrait pas y avoir d'obligation de fournir une assistance juridique gratuite lorsque des procédures simples sont disponibles et permettent à un demandeur d'agir sans qu'une assistance juridique lui soit nécessaire. Cependant, pour les cas où une assistance juridique s'avère requise, plusieurs États demeuraient réticents à admettre une exigence de fournir des services juridiques gratuits trop large. Plusieurs arguments ont été avancés pour expliquer ces réticences. Certains États ont argué que la fourniture d'une assistance juridique gratuite dans les affaires internationales serait source d'une discrimination inacceptable entre les demandeurs locaux et des demandeurs internationaux. Certains estimaient qu'une exigence de services juridiques gratuits trop large serait trop onéreuse. D'autres souhaitaient éviter de souscrire à une obligation de fournir des services juridiques gratuits à des demandeurs fortunés. En outre, des inquiétudes ont été exprimées concernant l'application du principe de services juridiques gratuits aux demandes des organismes publics ou des débiteurs.

362 Concernant la question du traitement plus favorable des demandeurs étrangers, un expert de la Communauté européenne a remarqué que dans l'Union européenne, le traitement égalitaire des demandes est de principe. Cependant, un traitement plus favorable des demandeurs étrangers peut se justifier dans les affaires transfrontières, compte tenu des difficultés plus grandes et des coûts plus importants auxquels les plaideurs transfrontières sont confrontés[133].

363 Les demandes des organismes publics sont limitées à la reconnaissance et l'exécution d'une décision ou l'obtention d'une décision en vertu de l'article 20(4) lorsque la reconnaissance est refusée[134]. Aussi, un traitement différent des autres créanciers ne se justifie pas et les organismes publics pourront bénéficier de l'assistance juridique gratuite dans toutes ces affaires de reconnaissance et d'exécution.

364 Le point de vue qui l'a emporté lors de la Session diplomatique préférait réserver un traitement plus favorable au créancier qu'au débiteur. La raison en était que le créancier est généralement la partie plus faible. En outre, le débiteur recevait déjà un traitement équivalent en vertu des articles 14 et 17, et un débiteur en difficulté pourrait recevoir l'assistance juridique gratuite en vertu de l'article 17(a), alors qu'une assistance juridique gratuite totale risquerait d'encourager les débiteurs à engager des procédures de modifications.

[131] *Op. cit.* (note 36).
[132] Doc. prél. No 10/2004 (*op. cit.* note 88). Voir aussi le para. 3.
[133] Voir Procès-verbal No 1, para. 18.
[134] Voir Procès-verbal No 4, para. 45.

354 An example of the operation of this provision is given in Preliminary Document No 26 of January 2007.[131] It is to be noted that at the time of negotiations, very few judicial or administrative authorities delivered and / or accepted electronic documents that meet the requirements of integrity, irrevocability and identification (authentication) for secured electronic transmission.

355 The language of Article 13 is borrowed from Article 30 of the 1980 Hague Child Abduction Convention, the inclusion of which is at the request of the Special Commission.

Article 14 Effective access to procedures

356 The right to have effective access to services and procedures is a fundamental principle of the Convention. The procedures referred to in Article 14 may be administrative or judicial procedures.

357 The rationale for providing effective access to procedures, and the potential benefits to be gained, were clearly stated in the report on "Administrative and legal costs and expenses under the new Convention on the international recovery of child support and other forms of family maintenance, including legal aid and assistance":

> "39 Applicants for maintenance generally have very limited resources, and even small financial barriers may inhibit use by them of the opportunities otherwise provided by the new Convention. The costs for the applicant should not be such as to inhibit the use of, or prevent effective access to, the services and procedures provided for in the Convention.
>
> 40 At the same time the Convention, if it is to be attractive to a wide range of Contracting Parties, should not be seen to impose excessive financial burdens on them. This does not mean that the provision of services under the Convention will be free of cost to Contracting Parties, but rather that the costs of providing services should not be disproportionate to the benefits in terms of achieving support for more children and other family dependants and in consequence reducing welfare budgets."[132]

358 "Effective access to procedures" for a person seeking assistance under this Convention implies the ability, with the assistance of authorities in the requested State, to put one's case as fully and as effectively as possible to the appropriate authorities of the requested State. It also implies that a lack of means should not be a barrier.

359 The obligation to ensure that access to procedures in different countries is equivalent applies regardless of whether the child support systems are court-based or administrative. The approach may be different from one system to another, but the results should be equivalent. On the one hand, for example, effective access to certain administrative procedures may be ensured without the need for legal representation or even appearance requirements (*i.e.*, a cost effective and swift procedure). On the other hand, in judicial procedures, the State may need to pay the costs for legal representation and legal advice (*i.e.*, State assistance in relation to a more complex system). The special needs of foreign applicants, such as problems of distance and language, also need to be considered.

360 The Convention provides for minimum standards to ensure "effective access to procedures". Contracting States are always encouraged to provide services at a higher standard, if possible.

361 The manner in which the general principle of effective access to procedures should be spelled out in the form of specific provisions, particularly with regard to free legal assistance, remained the subject of disagreement until the closing stages of negotiations. A general consensus had already been reached that favourable treatment should be accorded to child support applications. There was also general agreement that there should be no obligation to provide free legal assistance where simple procedures operated, enabling an applicant to make a case without the need for legal assistance. However, for cases where legal assistance was required, there was reluctance on the part of several States to accept a broad requirement to provide free legal services. There were different reasons for this reluctance. Some States objected that the provision of free legal assistance in international cases would give rise to unacceptable discrimination between the treatment of domestic and international applicants. Some thought that a broad requirement of free legal services might be too costly. Others were concerned not to take on an obligation to provide free legal services for wealthy applicants. In addition there were concerns about the application of the general principle of free legal services to applications by public bodies or by debtors.

362 On the question of more favourable treatment for foreign applicants, an expert of the European Community noted that in the European Union, equal treatment of applicants is the accepted principle, but additional benefits for foreign applicants in cross-border cases may be justified, in recognition of the greater difficulties and costs for cross-border litigants.[133]

363 As for public bodies, their applications are limited to recognition and enforcement and establishment of a decision under Article 20(4) when recognition is refused.[134] Therefore, there was no reason to treat them any differently from any other creditor and free legal assistance would be available to public bodies in all such recognition and enforcement cases.

364 As for debtors, the prevailing view in the Diplomatic Session preferred more favourable treatment of creditors. The reason in support of this approach was that creditors were usually the weaker party. Furthermore, the debtor received equal treatment in Articles 14 and 17, and a debtor in need could receive free legal assistance under Article 17(a), whereas completely free legal assistance could encourage debtors to bring modification proceedings.

[131] *Op. cit.* (note 36).
[132] Prel. Doc. No 10/2004 (*op. cit.* note 88). See also para. 3.
[133] Minutes No 1, para. 18.
[134] Minutes No 4, para. 45.

365 Le principal argument avancé en faveur d'un traitement des débiteurs équivalent à celui des créanciers était le manque d'équité à l'égard de débiteurs qui sont pourtant confrontés aux mêmes obstacles inhérents aux litiges transfrontières que les créanciers. L'incapacité (ou la capacité limitée) du débiteur à faire modifier une décision dans son propre État (art. 18), ajoutée à l'absence d'assistance dans l'État requis (art. 15(1)), place le débiteur dans une situation difficile et risque de conduire à une suspension d'exécution si le débiteur ne peut pas payer. L'utilisation de la règle « manifestement mal fondée » de l'article 15(2) limitera les abus de la Convention par le débiteur. En outre, des discriminations pourraient engendrer un manque de confiance à l'égard de la Convention parmi le public et le monde judiciaire.

366 Une semaine après le début des négociations de la Session diplomatique, les questions particulièrement complexes liées à la règle de l'accès effectif aux procédures n'étaient toujours pas résolues. Un Groupe de travail a donc été constitué pour aider à trouver un compromis. Le Groupe de travail était présidé par Mme Danièle Ménard (Canada) et était composé des délégations suivantes : l'Allemagne, l'Australie, le Brésil, le Canada, le Chili, la Chine, la Communauté européenne, les États-Unis d'Amérique, la France, Israël, le Japon, le Royaume-Uni, la Fédération de Russie et la Suisse. Le Bureau Permanent, les Rapporteurs et le président du Comité de rédaction ont également participé à ce groupe[135]. Le Groupe de travail s'est réuni sept fois et ses propositions ont aidé à rédiger les articles 14 à 17.

367 L'intérêt commun poursuivi lors de la Session diplomatique était d'élaborer une Convention qui fonctionnerait parfaitement et qui bénéficierait au plus grand nombre d'enfants possibles. Le compromis obtenu concernant l'accès effectif aux procédures (art. 14 à 17) est particulièrement remarquable, notamment en ce qui concerne la gratuité des services pour la majorité des enfants. Il a été rappelé qu'il s'agissait, en effet, d'une immense avancée par rapport à la situation de 1999, si l'on considère qu'il avait alors été estimé qu'il ne serait plus possible de progresser à l'égard des instruments existants[136].

Paragraphe premier – L'État requis assure aux demandeurs un accès effectif aux procédures, y compris les procédures d'exécution et d'appel, qui découlent des demandes prévues à ce chapitre.

368 Le paragraphe premier impose à l'État contractant d'assurer qu'un demandeur ayant fait une demande entrant dans les catégories visées à l'article 10(1) ou (2) a effectivement accès aux procédures de l'État requis susceptibles d'entrer en jeu dans le cadre de la demande en question. Le terme « demandeur » peut par conséquent comprendre un créancier, un débiteur ou un organisme public. Les procédures en question peuvent être administratives ou judiciaires et couvrent aussi les procédures d'appel. Elles comprennent toutes les procédures distinctes qui peuvent être nécessaires au stade de l'exécution ou pour un appel.

369 La mise en œuvre de l'article 14 est étroitement liée à l'article 6(1)(b), qui fait obligation à l'Autorité centrale d'introduire ou de faciliter l'introduction de procédures, et à l'article 6(2)(a), aux termes duquel l'Autorité centrale peut, si les circonstances l'exigent, être tenue d'accorder ou de faciliter l'octroi d'une assistance juridique. La manière dont chaque État contractant entend remplir ses obligations au titre des articles 6 et 14(1) doit être expliquée conformément à l'article 57(1)(b) et (c). Cette information peut être également portée dans le formulaire de Profil de l'État, mentionné à l'article 57(2).

Paragraphe 2 – Pour assurer un tel accès effectif, l'État requis fournit une assistance juridique gratuite conformément aux articles 14 à 17, à moins que le paragraphe 3 ne s'applique.

370 Le paragraphe 2 confirme sans ambigüité comment l'accès effectif aux procédures visé au paragraphe premier doit être assuré : l'État contractant « fournit une assistance juridique gratuite ». Une exception spécifique est prévue au paragraphe 3 pour les procédures simplifiées et d'autres conditions régissent l'octroi d'une assistance juridique gratuite à l'article 14(4) et (5) ainsi qu'aux articles 15 et 17.

371 L'article 3 définit l'expression « assistance juridique » comme « l'assistance nécessaire pour permettre aux demandeurs de faire valoir leurs droits et pour garantir que leurs demandes seront traitées de façon complète et efficace dans l'État requis » et comprend l'assistance telle que le conseil juridique, l'assistance dans le cadre d'une affaire portée devant une autorité, la représentation en justice et l'exonération des frais de procédure. Un ou plusieurs des éléments couverts par cette définition peuvent s'appliquer dans une même affaire. L'expression « assistance juridique » est également expliquée et analysée aux paragraphes 126 à 134 de ce Rapport dans le contexte de l'article 6(2)(a). L'explication de « l'assistance juridique » aux paragraphes premier et 2 doit donc être rapprochée de celle qui est donnée pour l'article 6(2)(a).

372 Comme l'indique clairement la définition de « l'assistance juridique » de l'article 3(c), l'octroi d'une « assistance juridique gratuite » est censé, s'il y a lieu, comprendre le conseil juridique et la représentation en justice. Il ne peut y avoir de véritable accès effectif aux procédures si l'un ou l'autre est nécessaire et n'est pas octroyé. Mais si le conseil juridique ou la représentation en justice ne sont pas octroyés gratuitement dans l'État requis, une assistance gratuite doit être apportée au demandeur afin de lui permettre de solliciter l'aide juridique ou une assistance financière d'une autre nature qui lui donnera accès aux procédures nécessaires (voir art. 14(4)).

373 Le conseil juridique est un élément important de l'assistance juridique. Il peut être nécessaire pour déterminer si une demande a des chances d'aboutir et quelle autre assistance ou représentation éventuelle est nécessaire. Le conseil pourrait indiquer que l'assistance juridique ou la représentation en justice n'est pas nécessaire ou qu'une aide juridique sera disponible pour obtenir une représentation indépendante en justice. Le fait de ne pas offrir de conseil juridique en premier lieu peut être constitutif d'un déni d'accès à la justice.

Paragraphe 3 – L'État requis n'est pas tenu de fournir une telle assistance juridique gratuite si, et dans la mesure où, les procédures de cet État permettent au demandeur d'agir sans avoir besoin d'une telle assistance et que l'Autorité centrale fournit gratuitement les services nécessaires.

374 Le paragraphe premier énonce le principe général et dominant de l'obligation faite aux États contractants d'assurer l'accès effectif aux procédures. Le paragraphe 2 confirme que l'accès effectif aux procédures signifie l'assistance juridique gratuite et impose certaines conditions. Le paragraphe 3 fait référence à un État requis où les procédures sont simplifiées et où l'obligation d'assurer un accès

[135] *Ibid.*, para. 29.
[136] Voir Procès-verbal No 15, para. 46.

365 The main reason given in support of the equal treatment of debtors with creditors was that there is a lack of fairness to the debtor who faces the same obstacles in cross-border litigation as the creditor. The inability (or limited ability) of the debtor to modify a decision in his or her own jurisdiction (Art. 18) and a lack of assistance in the requested State (Art. 15(1)) puts the debtor in a difficult situation, and may lead to a stay on enforcement if the debtor cannot pay; the use of the "manifestly unfounded" rule in Article 15(2) will limit misuse of the Convention by the debtor. Furthermore, there could be a lack of confidence in the Convention amongst the public and the judiciary due to discrimination.

366 After the first week of negotiations in the Diplomatic Session, the complex issues around effective access to procedures remained unresolved. A Working Group was established to help find a compromise. It was chaired by Ms Danièle Ménard (Canada) and the following delegations participated: Australia, Brazil, Canada, Chile, China, European Community, France, Germany, Israel, Japan, the Russian Federation, Switzerland, the United Kingdom, the United States of America as well as the Permanent Bureau, the *Rapporteurs* and the Chair of the Drafting Committee.[135] The Working Group met on seven occasions and its proposals assisted the drafting of Articles 14 to 17.

367 There was a common interest in the Diplomatic Session to achieve a Convention which will work well and will benefit the largest number of children possible. The compromise reached in relation to effective access to procedures (Arts 14-17) achieved a great deal, most notably cost-free services for the majority of children. It was recalled that this was a huge step forward from the position in 1999 when it was thought that it was impossible to advance on the existing instruments.[136]

Paragraph 1 – The requested State shall provide applicants with effective access to procedures, including enforcement and appeal procedures, arising from applications under this Chapter.

368 Paragraph 1 imposes an obligation on the Contracting State to ensure that an applicant who has made an application of the kind referred to in Article 10(1) or (2) has effective access to the procedures of the requested State which may arise in connection with the particular application. "Applicant" may therefore include a creditor, a debtor or a public body. The procedures in question may be administrative or judicial. The procedures include appeal procedures and any separate procedures that may be required at the enforcement stage.

369 The implementation of Article 14 is closely linked to Article 6(1)(b) which imposes an obligation on the Central Authority to institute or facilitate the institution of legal proceedings, and Article 6(2)(a) under which the Central Authority may, if the circumstances require, be required to provide or facilitate the provision of legal assistance. The manner in which each Contracting State intends to fulfil its obligations in Articles 6 and 14(1) must be explained in accordance with Article 57(1)(b) and (c). This information can also be included in the Country Profile form referred to in Article 57(2).

Paragraph 2 – To provide such effective access, the requested State shall provide free legal assistance in accordance with Articles 14 to 17 unless paragraph 3 applies.

370 Paragraph 2 confirms unambiguously how effective access to procedures referred to in paragraph 1 must be provided: the Contracting State "shall provide free legal assistance". There is a specific exception in paragraph 3 for simplified procedures, and there are other conditions on the provision of free legal assistance in Article 14(4) and (5) and Articles 15 and 17.

371 The phrase "legal assistance" is defined in Article 3 as "the assistance necessary to enable applicants to know and assert their rights and to ensure that applications are fully and effectively dealt with in the requested State" and "may include as necessary legal advice, assistance in bringing a case before an authority, legal representation and exemption from costs of proceedings". In a particular case, one or more of the elements included in that definition may be relevant. The phrase "legal assistance" is also explained and discussed at paragraphs 126 to 134 of this Report in relation to Article 6(2)(a). The explanation of "legal assistance" in paragraphs 1 and 2 should therefore be read in conjunction with the explanation for Article 6(2)(a).

372 As the definition of "legal assistance" in Article 3(c) makes clear, the provision of "free legal assistance" is intended, where necessary, to include legal advice and representation. If either are needed and not provided, there can be no genuinely effective access to procedures. But if legal advice or representation is not provided free of charge in the requested State, free assistance must be given to the applicant to apply for whatever legal aid or other financial assistance will give her or him access to the necessary procedures (see Art. 14(4)).

373 Provision of legal advice is an important component of legal assistance. It may be needed to help determine whether an application has a chance of success and what other assistance or representation, if any, is needed. The advice could indicate that legal assistance or representation is not needed, or that legal aid will be available to obtain independent legal representation. A failure to provide legal advice in the first instance may be a denial of access to justice.

Paragraph 3 – The requested State shall not be obliged to provide such free legal assistance if and to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance, and the Central Authority provides such services as are necessary free of charge.

374 Paragraph 1 states the general and overarching principle that Contracting States must provide applicants with effective access to procedures. Paragraph 2 confirms that effective access to procedures means free legal assistance, and imposes some conditions. Paragraph 3 refers to a requested State with simplified procedures where the obliga-

[135] *Ibid.*, para. 29.
[136] Minutes No 15, para. 46.

effectif n'impose pas toujours l'octroi d'une assistance juridique gratuite.

375 Le paragraphe 3 clarifie qu'il n'est pas indispensable pour un État d'assurer une assistance juridique gratuite lorsque ses procédures « permettent au demandeur d'agir sans avoir besoin d'une telle assistance ». Les procédures simplifiées des régimes administratifs prévues dans certains pays répondent à cette description. En règle générale, les systèmes administratifs sont en mesure de rendre une décision alimentaire exécutoire sans représentation juridique et sans comparution du demandeur. Toutefois, si une décision administrative doit faire l'objet d'un appel devant un tribunal, les procédures simplifiées ne pourront plus être utilisées et il est très probable qu'une assistance juridique ou une représentation en justice seraient nécessaires ; l'obligation visée au paragraphe premier s'appliquerait alors. Le paragraphe premier vise spécifiquement l'assistance juridique pour les procédures d'exécution et d'appel.

376 La deuxième condition de mise en jeu de cette disposition est que l'Autorité centrale fournisse les services gratuits nécessaires pour « permett[re] au demandeur d'agir » sans assistance juridique. Cela signifie que l'Autorité centrale requise doit octroyer une assistance ou un conseil gratuit pour aider le demandeur potentiel à poursuivre sa demande de recouvrement des aliments.

Paragraphe 4 – Les conditions d'accès à l'assistance juridique gratuite ne doivent pas être plus restrictives que celles fixées dans les affaires internes équivalentes.

377 Le paragraphe 4 est destiné à prévenir les discriminations à l'égard des demandeurs étrangers. Si une assistance juridique gratuite (y compris le conseil juridique ou la représentation en justice) est offerte aux demandeurs dans les affaires internes, elle doit l'être aussi dans les affaires internationales aux mêmes conditions ou à des conditions équivalentes. La règle s'applique de manière égale aux débiteurs et aux créanciers.

Paragraphe 5 – Aucune caution ni aucun dépôt, sous quelque dénomination que ce soit, ne peut être imposé pour garantir le paiement des frais et dépens dans les procédures introduites en vertu de la Convention.

378 Le paragraphe 5 protège le demandeur de toute obligation de verser un montant en numéraire qui pourrait être exigé par l'Autorité centrale ou l'État requis à titre de caution ou de dépôt en garantie du paiement des frais ou dépens relatifs aux procédures judiciaires. L'objet de la disposition est de garantir qu'aucun obstacle financier n'empêchera ni ne dissuadera le demandeur d'introduire une procédure en vertu de la Convention.

379 Cette disposition, qui était à l'origine limitée au créancier, s'inspire de dispositions similaires de l'article 9 de la Convention de New York de 1956 et de l'article 16 de la Convention Obligations alimentaires de 1973 (Exécution), bien que dans ces Conventions, lesdites dispositions ne se limitent pas aux procédures introduites par un créancier. Lors de la Session diplomatique, il a été convenu que les avantages contenus dans cette disposition ne devraient pas être limités aux seuls créanciers mais devrait être étendus aux autres demandeurs.

380 La question de la prise en charge des coûts au cas où le demandeur perd son procès est réglée à l'article 43(2), qui autorise le recouvrement des coûts auprès de la partie qui succombe.

Article 15 Assistance juridique gratuite pour les demandes d'aliments destinés aux enfants

Paragraphe premier – L'État requis fournit une assistance juridique gratuite pour toute demande relative aux obligations alimentaires découlant d'une relation parent-enfant envers une personne âgée de moins de 21 ans présentées par un créancier en vertu de ce chapitre.

381 Le paragraphe premier fixe une règle générale selon laquelle une assistance juridique gratuite doit être assurée à l'égard de toute demande relative à des aliments présentée par un créancier en vertu du chapitre III. Conformément à la disposition relative au champ d'application (art. 2(1)), cette obligation ne s'applique qu'à l'égard d'une « personne » âgée de moins de 21 ans et seulement aux obligations alimentaires envers un enfant qui découlent d'une relation parent-enfant. Le terme « personne » a été préféré à « enfant » afin de refléter la terminologie utilisée à l'article 2.

382 L'obligation d'assurer une assistance juridique gratuite dans les affaires d'aliments destinés aux enfants est plus forte que dans les autres affaires en ce qu'aucun examen des ressources ni examen du bien-fondé de l'affaire n'est autorisé.

383 Cependant, la Convention privilégie le créancier. Si le débiteur est assuré de l'accès effectif aux procédures, il ne bénéficie pas de façon systématique de l'assistance juridique gratuite, contrairement au créancier en vertu de l'article 15(1). En effet, le débiteur qui demande l'octroi de l'assistance juridique gratuite peut être soumis à un examen de ses ressources et du bien-fondé de l'affaire dans l'État requis, conformément à l'article 17.

384 La règle générale de l'article 15(1) ne s'appliquera pas aux demandes directes relatives aux aliments destinés aux enfants, car elles ne relèvent pas du chapitre III. Les autres exceptions à la règle sont énoncées à l'article 15(2), mais dans la plupart des cas, il est peu probable qu'elles aient une influence. La Session diplomatique a décidé que l'article 15(1) devrait s'appliquer aux seules demandes présentées par les créanciers, y compris les organismes publics[137]. Par conséquent, la disposition ne s'appliquera pas aux demandes présentées par les débiteurs étant donné que des préoccupations avaient été exprimées quant à la possibilité qu'un débiteur bénéficie d'une assistance juridique gratuite pour réduire son obligation alimentaire envers un enfant en présentant une demande de modification en vertu de l'article 10(2). D'un autre côté, le principe d'une aide équitable aux débiteurs et aux créanciers a recueilli un large soutien. Un débiteur dont la situation a changé et qui n'a plus les moyens de maintenir le montant initial de la pension alimentaire est fondé à solliciter une réduction de l'obligation alimentaire envers son enfant et à éviter les conséquences d'une accumulation d'arrérages. Néanmoins, la Session a finalement accepté qu'une différence de traitement soit établie entre les créanciers et les débiteurs dans les affaires d'aliments destinés aux enfants.

385 Il est important de souligner que l'établissement de la filiation (y compris par les tests génétiques le cas échéant) relève de l'assistance juridique qui doit être fournie gratuitement dans les affaires d'aliments destinés aux enfants, sous réserve de quelques exceptions (voir art. 15(2)).

[137] Les organismes publics peuvent seulement présenter des demandes en vertu de l'art. 10(1)(a) et (b) et dans les situations visées à l'art. 20(4).

tion to provide effective access does not always require the provision of free legal assistance.

375 Paragraph 3 clarifies that free legal assistance need not be provided by a State where its procedures "enable the applicant to make the case without the need for such assistance". The simplified procedures of administrative schemes operating in certain countries come within this description. As a general rule, administrative systems are able to make an enforceable maintenance decision without the need for legal representation and without the need for the applicant to appear in person. However, if an administrative decision has to be appealed to a court, simplified procedures may no longer be used and it is most likely that legal assistance or representation would be needed. Then the obligation referred to in paragraph 1 would apply. Paragraph 1 refers specifically to legal assistance for enforcement and appeal procedures.

376 The second condition for operation of this provision is that the Central Authority must provide the free services necessary to "enable the applicant to make the case" without legal assistance. This means the requested Central Authority must provide free administrative assistance or advice to help the potential applicant to pursue the claim for recovery of maintenance.

Paragraph 4 – Entitlements to free legal assistance shall not be less than those available in equivalent domestic cases.

377 Paragraph 4 is intended to prevent discrimination against applicants from abroad. If free legal assistance (including advice or representation) is available to applicants in domestic cases, it should also be available on the same or equivalent conditions to applicants in international cases. The rule applies equally to debtors and creditors.

Paragraph 5 – No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in proceedings under the Convention.

378 Paragraph 5 protects the applicant from any requirement of the requested Central Authority or State for an amount of money as a security, bond or deposit to guarantee the payment of any costs or expenses for legal proceedings. The purpose of the provision is to ensure the applicant is not faced with any financial obstacle or disincentive before being able to bring proceedings under the Convention.

379 This provision, which was originally confined to the creditor, derives from similar provisions in Article 9 of the 1956 New York Convention and in Article 16 of the 1973 Hague Maintenance Convention (Enforcement), although in those Conventions the provisions are not limited to proceedings brought by a creditor. At the Diplomatic Session it was agreed that the benefits of the provision should not be confined to the creditor but should be extended to other applicants.

380 The question of who would pay costs where the applicant loses the case is addressed by Article 43(2) which permits recovery of costs from the unsuccessful party.

Article 15 Free legal assistance for child support applications

Paragraph 1 – The requested State shall provide free legal assistance in respect of all applications by a creditor under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

381 Paragraph 1 sets out a general rule that free legal assistance must be provided in all applications by a creditor in respect of child support under Chapter III. Reflecting the scope provision (Art. 2(1)), this obligation applies only in respect of "a person" below the age of 21 years and only to maintenance obligations towards a child which arise from a parent-child relationship. The word "person" and not "child" is used in paragraph 1 to reflect the language used in Article 2.

382 The obligation to provide free legal assistance in child support cases is stronger than in other cases in that neither a means nor a merits test may be applied.

383 However, the Convention favours the creditor, and the debtor is guaranteed effective access to procedures but not automatic free legal assistance for child support cases, as is the creditor, under Article 15(1). Instead, the debtor who requests free legal assistance may be subject to a means and merits test in the requested State, in accordance with Article 17.

384 The general rule in Article 15(1) will not apply to direct requests concerning child support, as they are not made under Chapter III. Other exceptions to the rule are stated in Article 15(2) but they are unlikely to affect the majority of cases. The Diplomatic Session resolved that Article 15(1) should only apply to applications by creditors including public bodies.[137] Therefore, the provision will not apply to applications by debtors, as concerns were expressed that a debtor would receive free legal assistance to reduce her / his child support obligation through a modification application under Article 10(2). On the other hand, there was much support for the principle that debtors and creditors should both be assisted fairly and equitably. A debtor whose circumstances have changed and who can no longer afford to make payments at the original level is entitled to seek a reduction in her / his child support obligation, and avoid the consequences of an accumulation of arrears. However, the Session eventually accepted that a differentiation should be made between creditors and debtors in child support cases.

385 It is important to note that establishment of parentage (including genetic testing if necessary) is part of "legal assistance" which must be provided at no cost in child support cases, with few exceptions (see Art. 15(2)).

[137] Public bodies can only make an application under Art. 10(1)(a) and (b) and in the circumstances of Art. 20(4).

Paragraphe 2 – Nonobstant le paragraphe premier, l'État requis peut, en ce qui a trait aux demandes autres que celles prévues à l'article 10(1)(a) et (b) et aux affaires couvertes par l'article 20(4), refuser l'octroi d'une assistance juridique gratuite s'il considère que la demande, ou quelque appel que ce soit, est manifestement mal fondée.

386 Le paragraphe 2 pose une exception limitée à la règle générale du paragraphe premier. Le paragraphe 2 s'applique aux demandes d'obtention ou de modification d'une décision ou aux appels découlant de telles demandes. Il ne s'applique ni à une demande présentée par un créancier en vue de la reconnaissance et de l'exécution ou en vue de l'exécution d'une décision relative à une obligation alimentaire envers un enfant, ni à la procédure d'obtention d'une décision suite à un refus de reconnaissance aux conditions visées à l'article 20(4).

387 L'exception du paragraphe 2 est nécessaire pour exonérer les Autorités centrales et les autorités compétentes de l'État requis de la charge et des frais du traitement de ces demandes « manifestement mal fondées ». La Convention permet une nouvelle appréciation du caractère manifestement mal fondé de la demande au stade de l'appel.

388 Le paragraphe 2 doit être rapproché de l'article 12(8) selon lequel une Autorité centrale requise peut refuser de traiter une demande lorsqu'il « est manifeste que les conditions requises par la Convention ne sont pas remplies ». Si les conditions requises par la Convention sont remplies, la demande doit être acceptée. Cependant, l'article 15(2) confère à l'État requis une certaine discrétion. Si l'État requis est obligé d'accepter une demande d'aliments destinés à un enfant en raison du fait que cette demande satisfait aux conditions posées par la Convention, mais que, parallèlement, cet État considère que la demande d'aliments est « manifestement mal fondée », il peut refuser l'assistance juridique gratuite. Le demandeur peut toujours poursuivre la demande à ses frais.

389 C'est à l'État et non à l'Autorité centrale qu'il incombe de déterminer que la demande (ou l'appel) est « manifestement mal fondée » et de refuser l'assistance juridique gratuite. C'est à l'État requis qu'il revient de déterminer quelle autorité compétente devrait prendre la décision.

390 Il convient de souligner qu'intrinsèquement l'expression « manifestement mal fondée » est d'application limitée et doit donc être interprétée de façon restrictive. Le caractère « manifestement mal fondé » d'une décision ou d'un appel sera déterminé au cas par cas et conformément au droit interne. Le sens de l'expression « manifestement mal fondée » sera sans doute mieux expliqué au travers d'exemples. Ainsi, une demande pourrait être considérée comme « manifestement mal fondée » si les ressources du demandeur sont excessivement élevées tandis que celles du débiteur sont si faibles que la demande n'a aucune chance d'aboutir. De même, une demande est manifestement mal fondée lorsqu'il résulte de l'analyse de son contenu que la demande d'aliments n'a pas de justification juridique. Toutefois, un créancier devrait être autorisé à poursuivre sa demande si ses perspectives d'obtenir gain de cause, au moins partiellement, sont bonnes.

391 L'article 15(2), dans sa rédaction originelle, excluait de la règle générale de l'assistance juridique gratuite les frais engendrés par les tests génétiques. Ainsi, à l'origine, lorsqu'un test génétique devait être effectué pour l'obtention d'une décision en matière d'aliments, l'État requis était autorisé à facturer des frais raisonnables. Il s'agissait cependant d'une question difficile à résoudre. D'un côté, il était admis que ces frais pouvaient être très élevés dans de nombreux États, et on tenait à ce que les États ne soient pas contraints de supporter ces coûts, surtout si le nombre d'affaires était également élevé. D'un autre côté, les contestations de paternité deviennent plus courantes dans les affaires où les parents ne sont pas mariés. Il est donc à craindre que l'inexécution du test génétique simplement en raison d'un manque de moyens du demandeur ne conduise à l'échec de nombreuses demandes valables de recouvrement d'aliments. En outre, ce serait un échec de la Convention d'offrir une assistance juridique gratuite pour toutes les mesures peu coûteuses conduisant au recouvrement des aliments et de refuser une telle assistance pour la mesure qui est sans doute la plus importante.

392 Conformément aux recommandations du Groupe de travail sur l'accès effectif aux procédures dans le Document de travail No 51, la Session diplomatique a convenu de résoudre cette question en supprimant les dispositions de l'article 15 (anciennement art. 14 *bis*) relatives à l'imposition de frais pour tests génétiques. Il a été reconnu que d'autres solutions étaient disponibles et que la question ne se posait que dans le cadre de l'article 6(2)(h) (recouvrement d'aliments) et de l'article 10(1)(c) (obtention d'une décision)[138]. Une demande présentée au titre de l'article 10(1)(c) peut donc bénéficier de l'assistance juridique gratuite prévue à l'article 15(1). Les États peuvent recouvrer les frais des tests génétiques à l'encontre de la partie perdante en vertu de l'article 43. Cette approche n'empêche pas un État de demander au débiteur le paiement par avance des frais des tests génétiques. Toutefois, sous réserve de l'article 15(2), un tel paiement par avance ne peut être réclamé au créancier dans les situations visées par l'article 15. Dans certains pays, il sera nécessaire de soumettre une demande d'assistance judiciaire pour des tests génétiques devant être effectués en application de la Convention Obtention des preuves de 1970, dans les pays où cette Convention s'applique ; cette procédure sera généralement sans frais. En prévision d'un grand volume d'affaires, certains pays pourraient conclure des accords bilatéraux afin de prévoir un traitement gratuit des demandes de tests génétiques, sur une base réciproque.

393 Dans sa rédaction initiale, le paragraphe 2 contenait également une règle excluant les demandeurs excessivement fortunés du bénéfice de l'assistance juridique gratuite prise en charge par l'État. Cette règle a finalement été abandonnée au profit de dispositions qui autorisent le recouvrement des frais à l'encontre de la partie perdante. Voir à cet égard l'article 43.

Article 16 Déclaration permettant un examen limité aux ressources de l'enfant

394 L'article 16 est une approche alternative qui a été conçue pour permettre aux États qui ne sont pas en mesure d'accepter le principe de l'assistance juridique gratuite de l'article 15 d'effectuer un examen fondé sur les ressources de l'enfant. Cependant, la majorité des États se sont déclarés favorables à ce que la règle de l'article 15 constitue la règle générale, et l'on ne s'attend pas à ce que de nombreux États aient besoin d'adopter l'examen limité aux ressources de l'enfant.

[138] Dans le cadre de l'art. 7, il est possible de facturer des frais raisonnables liés aux tests génétiques.

Paragraph 2 – Notwithstanding paragraph 1, the requested State may, in relation to applications other than those under Article 10(1)(a) and (b) and the cases covered by Article 20(4), refuse free legal assistance if it considers that, on the merits, the application or any appeal is manifestly unfounded.

386 Paragraph 2 establishes a limited exception to the general rule in paragraph 1. Paragraph 2 applies to applications for establishment or modification of a decision, or to appeals in relation to such applications. It does not apply to an application by a creditor for recognition and enforcement or for enforcement of a decision concerning child support, or to procedures for establishment of a decision following a refusal of recognition in the terms of Article 20(4).

387 The exception in paragraph 2 is necessary to protect Central Authorities and competent authorities in the requested State from the burden and costs of processing and providing free legal assistance for those applications which are "manifestly unfounded". The Convention allows a new assessment at the stage of appeal of whether the application is manifestly unfounded.

388 Paragraph 2 should be read in conjunction with Article 12(8), according to which a requested Central Authority may refuse to process an application where it is "manifest that the requirements of the Convention are not fulfilled". If the requirements of the Convention are met, the application must be accepted. But Article 15(2) gives the requested State a discretion. If the requested State is obliged to accept an application for child support because it meets the Convention's requirements, but at the same time, that State believes the application is "manifestly unfounded", it may refuse free legal assistance. The applicant may still proceed with the application at her / his own expense.

389 The responsibility lies with the State and not the Central Authority to make the determination that the application (or appeal) is "manifestly unfounded" and free legal assistance is refused. It is a matter for the requested State to decide which competent authority should make the determination.

390 It is emphasised that the term "manifestly unfounded" should be construed narrowly, as it is intrinsically a term of limited application. The question of whether an application or appeal is "manifestly unfounded" would be decided on a case-by-case basis and in accordance with the internal law. The meaning of the term "manifestly unfounded" might best be explained by way of examples. For instance, an application may be "manifestly unfounded" if the means of the applicant are so excessive while the means of the debtor are so small that it has no chance of success. As another example, an application is manifestly unfounded when it appears from an analysis of its content that there is no legal justification for the maintenance claim. Nevertheless, a creditor should be allowed to go ahead with an application if his or her prospects of getting at least part of the claim are good.

391 Article 15(2), as originally drafted, had excluded the costs of genetic testing from the general rule on free legal assistance. The requested State was originally permitted to impose reasonable charges for genetic testing when such testing was necessary to establish a maintenance decision. This was a difficult question to resolve. On the one hand, it was recognised that in many States the costs could be quite high, and there was a concern to ensure that States would not be obliged to bear these costs, especially if the number of cases was also high. On the other hand, it is becoming more common, in cases where the parents are not married, for the alleged father to challenge paternity. Hence there is a serious concern that a failure to undertake genetic testing procedures simply because the applicant cannot afford the costs, will result in the failure of many valid applications for the recovery of maintenance. Furthermore, it would be a failure of the Convention to offer free legal assistance for all the less expensive steps leading to the recovery of maintenance and then refuse such assistance at arguably the most important step.

392 Following the recommendations of the Working Group on effective access to procedures in Working Document No 51, the question was resolved by the agreement of the Diplomatic Session to delete the provisions in Article 15 (formerly Art. 14 *bis*) concerning the imposition of costs for genetic testing. It was recognised that other solutions were available, and the issue only arose in the context of Article 6(2)(h) (recovery of maintenance) and Article 10(1)(c) (establishment of a decision).[138] An application submitted under Article 10(1)(c) was thus entitled to free legal assistance under Article 15(1). States may recover the costs of genetic testing from the unsuccessful party under Article 43. This approach does not prevent a State from requiring advance payment from a debtor for genetic testing. However, subject to Article 15(2), such advance payment cannot be requested from the creditor in Article 15 situations. In some countries, a necessary solution will be to submit an application for judicial assistance for genetic testing under the 1970 Hague Evidence Convention in countries where this Convention applies, and this procedure will usually be free. Other countries which anticipate a high volume of cases could make bilateral arrangements for reciprocal free treatment of genetic testing cases.

393 Paragraph 2, as originally drafted, also contained a provision to exclude the exceptionally wealthy applicant from enjoying free legal assistance at the expense of the State. This was eventually dropped in favour of provisions allowing recovery of costs from the unsuccessful party. See Article 43.

Article 16 Declaration to permit use of child-centred means test

394 Article 16 is an alternative approach which was designed to allow States which cannot accept the principle of free legal assistance in Article 15 to apply a means test based on the means of the child. However, the majority of States supported the rule in Article 15 as the general rule and it is not anticipated that many States would need to adopt the child-centred means test.

[138] In the context of Art. 7, it is permitted to impose reasonable costs for genetic testing.

395 Le compromis reflété à l'article 16 a été préparé par le Groupe de travail sur l'accès effectif aux procédures afin de satisfaire aux conditions juridiques internes de certains États, parmi lesquels la Chine, la Fédération de Russie et le Japon. La solution de compromis retient l'article 15(1) comme règle de principe et l'article 16 comme faculté offerte aux États qui ne peuvent pas appliquer l'article 15(1). Cette solution permet d'assurer une plus grande flexibilité de la Convention, ce qui devrait susciter la plus large ratification possible.

Paragraphe premier – Nonobstant les dispositions de l'article 15(1), un État peut déclarer, conformément à l'article 63, qu'en ce qui a trait aux demandes autres que celles prévues à l'article 10(1)(a) et (b) et aux affaires couvertes par l'article 20(4), il fournira une assistance juridique gratuite sur le fondement d'un examen des ressources de l'enfant.

396 L'examen des ressources mentionné au paragraphe premier ne s'applique qu'aux demandes d'obtention ou de modification d'une décision, ou aux appels découlant de telles demandes. Il ne s'applique ni à une demande présentée par un créancier en vue de la reconnaissance et de l'exécution ou en vue de l'exécution d'une décision relative à une obligation alimentaire envers un enfant, ni à la procédure d'obtention d'une décision suite à un refus de reconnaissance aux conditions visées à l'article 20(4).

397 La déclaration qui a été convenue au paragraphe premier n'a pas d'effet réciproque. Par exemple, si l'État A (qui applique les règles de l'art. 15) reçoit une demande en provenance de l'État B qui a fait une telle déclaration, l'État A demeure lié par ses obligations en vertu de l'article 15.

398 Lors de la Session diplomatique, il a été craint que l'examen des ressources de l'enfant plutôt que de ses revenus ne conduise à l'exclusion involontaire d'un grand nombre d'enfants disposant de petits biens, tel qu'un compte bancaire. Toutefois, la Session diplomatique a admis que l'interprétation de l'article 16(1) qu'il convenait d'adopter était que l'examen devait seulement permettre d'exclure un enfant très fortuné de l'assistance juridique gratuite. La question de savoir si davantage de protection était nécessaire afin de s'assurer qu'un enfant n'est pas soumis à un examen trop rigoureux de ses ressources a également été soulevée. Cependant, il a été convenu que cette question pouvait être laissée au droit interne.

Paragraphe 2 – Un État, au moment où il fait une telle déclaration, fournit au Bureau Permanent de la Conférence de La Haye de droit international privé les informations relatives à la façon dont l'examen des ressources de l'enfant sera effectué, ainsi que les conditions financières qui doivent être remplies.

399 Les États qui adoptent la règle de l'examen des ressources de l'enfant doivent fournir au Bureau Permanent les informations permettant d'expliquer comment l'examen des ressources de l'enfant sera réalisé, notamment quels sont les critères et les seuils financiers appliqués pour l'octroi de l'assistance juridique gratuite. Cette information devra être tenue à jour afin que les demandeurs tenus de fournir une attestation des ressources de l'enfant, conformément au paragraphe 3, puissent avoir la certitude que leur attestation est correcte au regard des conditions financières requises par l'État.

Paragraphe 3 – Une demande présentée en vertu du paragraphe premier, adressée à un État qui a fait une déclaration conformément à ce paragraphe, devra inclure une attestation formelle du demandeur indiquant que les ressources de l'enfant satisfont aux conditions mentionnées au paragraphe 2. L'État requis ne peut demander de preuves additionnelles des ressources de l'enfant que s'il a des motifs raisonnables de croire que les informations fournies par le demandeur sont erronées.

400 Un demandeur sollicitant l'assistance juridique gratuite doit présenter une attestation indiquant que les ressources de l'enfant sont inférieures au seuil appliqué. Des informations additionnelles peuvent être demandées par l'État requis mais seulement s'il a des raisons de penser que l'attestation est erronée. Le demandeur devrait fournir, lorsqu'il présente la demande initiale, l'attestation ou l'état financier relatif aux ressources de l'enfant. L'utilisation de l'attestation ou de l'état financier relatif aux ressources de l'enfant constitue un moyen efficace et rapide de fournir l'information nécessaire à l'État requis. Cette méthode est simple sur le plan administratif et aucun document supplémentaire n'est exigé, à moins que les informations fournies ne se révèlent erronées. Le fait qu'il soit de notoriété publique que l'enfant a une fortune personnelle pourrait constituer des « motifs raisonnables » de croire que des informations sont erronées.

Paragraphe 4 – Si l'assistance juridique la plus favorable fournie par la loi de l'État requis en ce qui concerne les demandes présentées en vertu de ce chapitre relatives aux obligations alimentaires découlant d'une relation parent-enfant envers un enfant est plus favorable que celle fournie conformément aux paragraphes premier à 3, l'assistance juridique la plus favorable doit être fournie.

401 Le paragraphe 4 vise à assurer qu'un enfant bénéficiera toujours au moins de l'assistance juridique la plus favorable possible dans l'État requis. Il convient, néanmoins, de préciser que le paragraphe 4 ne doit pas être interprété comme dérogeant d'une quelconque manière aux paragraphes premier et 2 de cet article.

Article 17 Demandes ne permettant pas de bénéficier de l'article 15 ou de l'article 16

402 L'article 17 s'applique aux demandes d'aliments qui ne bénéficient pas des conditions d'assistance juridique gratuite en vertu des articles 15 ou 16. Une personne dont la demande répond à cette description peut solliciter une assistance juridique gratuite de l'État requis mais cette assistance peut être conditionnée à l'examen des ressources ou à l'analyse du bien-fondé de la demande (art. 17(a)). Les demandes ne sont pas limitées aux demandes relevant du chapitre III ni à celles déposées par les créanciers. Le champ d'application de l'article 17 couvre notamment les catégories de demandes suivantes [139]:

a) une demande d'aliments destinés à un enfant âgé de 21 ans révolus ;

b) une demande d'aliments destinés à un enfant, ou un appel, présenté par une personne à laquelle on refuse l'assistance juridique en vertu de l'article 15(2) ou 16(1) ;

c) une demande présentée par un débiteur ;

[139] C'est-à-dire, lorsque l'application de la Convention a été étendue à ces obligations alimentaires conformément à l'art. 2(3).

Rapport explicatif

395 The compromise reflected in Article 16 was developed by the Working Group on effective access to procedures to satisfy the internal legal requirements of certain countries, notably China, Japan and the Russian Federation. The compromise solution retained Article 15(1) as the main rule, and Article 16 as the option for States unable to apply Article 15(1). This ensured that there was greater flexibility in the Convention and therefore the widest possible ratification could be achieved.

Paragraph 1 – Notwithstanding Article 15(1), a State may declare, in accordance with Article 63, that it will provide free legal assistance in respect of applications other than under Article 10(1)(a) and (b) and the cases covered by Article 20(4), subject to a test based on an assessment of the means of the child.

396 The means test referred to in paragraph 1 may only be applied to applications for establishment or modification of a decision, or appeals in relation to such applications. It does not apply to an application by a creditor for recognition and enforcement or for enforcement of a decision concerning child support, or to procedures for establishment of a decision following a refusal of recognition in the terms of Article 20(4).

397 The declaration agreed to in paragraph 1 does not have reciprocal effect. For example, if State A (which follows the rule in Art. 15) receives an application from State B which made the declaration, State A is still bound by its obligations under Article 15.

398 Some concerns were expressed during the Diplomatic Session that a test based on the "means" of the child and not "income" could inadvertently exclude a large number of children who had small assets, such as a bank account. The Diplomatic Session agreed that the correct interpretation of Article 16(1) was that this test should only exclude the very wealthy child from receiving free legal assistance. The question was raised whether further safeguards were needed to ensure that a child is not made subject to a means test that is too stringent. However, it was agreed that this could be left to internal law.

Paragraph 2 – A State shall, at the time of making such a declaration, provide information to the Permanent Bureau of the Hague Conference on Private International Law concerning the manner in which the assessment of the child's means will be carried out, including the financial criteria which would need to be met to satisfy the test.

399 States which adopt the child-centred means test must provide information to the Permanent Bureau to explain how the assessments of the child's means will be reached, *e.g.*, what are the financial criteria and threshold amounts for grants of free legal assistance. The information must be kept up to date, so that applicants who need to make the attestation of the child's means, referred to in paragraph 3, can be sure that their attestation is accurate in the light of the financial criteria required by the State.

Paragraph 3 – An application referred to in paragraph 1, addressed to a State which has made the declaration referred to in that paragraph, shall include a formal attestation by the applicant stating that the child's means meet the criteria referred to in paragraph 2. The requested State may only request further evidence of the child's means if it has reasonable grounds to believe that the information provided by the applicant is inaccurate.

400 An applicant seeking free legal assistance must make a statement that the child's means are below the threshold, and the requested State may request further information only if it has reason to believe the statement is inaccurate. The applicant should, at the time of making the initial application, submit the attestation or statement concerning the child's means. The use of the attestation or statement of the child's means is an efficient and expeditious method to provide the necessary information to the requested State. It is administratively simple and no additional documents are required, unless the statement appears to be inaccurate. The "reasonable grounds" for believing that information is inaccurate might be that it is a matter of public record that the child has personal wealth.

Paragraph 4 – If the most favourable legal assistance provided for by the law of the requested State in respect of applications under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a child is more favourable than that provided for under paragraphs 1 to 3, the most favourable legal assistance shall be provided.

401 Paragraph 4 ensures that a child will always receive at least the most favourable legal assistance possible in the requested State. However, paragraph 4 should not be read in any way as derogating from paragraphs 1 and 2 of this Article.

Article 17 Applications not qualifying under Article 15 or Article 16

402 Article 17 applies to applications not qualifying for free legal assistance under Articles 15 or 16. A person whose application meets this description may apply to the requested State for free legal assistance, but such request for assistance may be subject to a means or merits test (Art. 17(a)). Applications are not restricted to Chapter III applications and are not restricted to applications by creditors. The categories of applications within the scope of Article 17 include:[139]

a) an application for the support of a child who is over the age of 21 years;

b) an application for child support, or an appeal, by a person who is refused free legal assistance under Articles 15(2) or 16(1);

c) an application by a debtor;

[139] *I.e.*, where an appropriate extension of the Convention is made in accordance with Art. 2(3).

d) une demande d'obtention ou de modification d'aliments destinés à un époux ou ex-époux, que celle-ci soit présentée conjointement à une demande d'aliments destinés à un enfant ou non ;

e) une demande relative à une obligation découlant d'une autre relation de famille.

403 En ce qui concerne les aliments destinés à d'autres membres de la famille, l'article 17 ne s'appliquera qu'entre les États contractants qui font la déclaration visée à l'article 2(3) concernant les « obligations alimentaires découlant des relations de famille, de filiation, de mariage ou d'alliance, incluant notamment les obligations envers les personnes vulnérables ». Les États contractants pourront également déclarer qu'ils appliqueront la Convention aux enfants de 21 ans révolus qui ont besoin d'aliments.

404 Lorsqu'un État fait une déclaration afin d'étendre le champ d'application de la Convention, celui-ci devra examiner quelles autres dispositions de la Convention devront être appliquées et par exemple déterminer si les règles relatives à l'accès effectif aux procédures s'appliqueront aux obligations alimentaires entre époux et ex-époux ou encore aux organismes publics. De telles dispositions ne s'appliquent pas automatiquement lorsque le champ d'application est étendu.

Pour les demandes présentées en application de la Convention qui ne relèvent pas de l'article 15 ou de l'article 16 :

Paragraphe (a) – l'octroi d'une assistance juridique gratuite peut être subordonné à l'examen des ressources du demandeur ou à l'analyse de son bien-fondé ;

405 Dans de nombreux pays, l'assistance juridique gratuite (y compris le conseil juridique ou la représentation en justice) est octroyée aux nationaux ou aux résidents après examen des ressources ou analyse du bien-fondé de l'affaire. Un « examen des ressources » porte sur les ressources financières d'une personne, lesquelles peuvent comprendre ses revenus, son patrimoine ou les deux, afin de déterminer si elles sont suffisamment faibles pour remplir les conditions d'octroi de l'assistance juridique gratuite. Une « analyse du bien-fondé » examine les perspectives de succès et l'intérêt d'une action en justice pour laquelle une personne pourrait bénéficier d'une assistance juridique gratuite. Si les perspectives de succès sont faibles, l'octroi d'une aide est peu probable, même si la personne en remplit les conditions d'obtention au titre de « l'examen des ressources ». L'objectif de l'examen des ressources et de l'analyse du bien-fondé de l'affaire est d'employer les fonds publics limités alloués à l'aide juridique et à la représentation en justice pour les affaires dignes d'intérêt, qui ont de bonnes perspectives d'aboutir.

406 Dans les cas qui ne sont pas visés à l'article 15 ou 16, les demandeurs peuvent être tenus de contribuer à leurs frais judiciaires selon leur revenu, et un revenu modeste peut, soit dispenser de la contribution, soit n'imposer qu'une contribution modique. Les différences de pratiques sont notées dans le rapport sur les « Coûts et frais judiciaires et administratifs, comprenant assistance et aide juridique, en vertu de la nouvelle Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille »[140].

407 L'article 17(a) ne concerne pas les demandes de reconnaissance et d'exécution présentées directement ; voir l'article 37(2) qui mentionne uniquement l'article 17(b) comme étant applicable aux demandes présentées directement.

Paragraphe (b) – un demandeur qui, dans l'État d'origine, a bénéficié d'une assistance juridique gratuite, bénéficie, dans toute procédure de reconnaissance ou d'exécution, d'une assistance juridique gratuite au moins équivalente à celle prévue dans les mêmes circonstances par la loi de l'État requis.

408 Le paragraphe (b) s'applique à tout demandeur, y compris en cas de demande de reconnaissance et d'exécution présentée directement (art. 37(2)). Son objectif est de garantir au demandeur le même niveau d'assistance juridique, au stade de la reconnaissance et de l'exécution, que celui dont il bénéficiait dans la procédure d'origine. Le demandeur doit avoir bénéficié de la prestation avant de faire la demande de reconnaissance et d'exécution. Il ressort clairement de sa lecture conjointe avec l'article 15, que l'article 17(b) ne concerne les affaires d'aliments destinés aux enfants que lorsqu'une demande de reconnaissance d'une décision en matière d'aliments destinés aux enfants est présentée par un débiteur. Autrement, il concerne uniquement les affaires d'aliments entre époux et ex-époux et les autres formes d'obligations alimentaires envers la famille, y compris celles à l'égard de personnes vulnérables, dans l'hypothèse où un État contractant a étendu la Convention à ces catégories de demandeurs.

409 Le paragraphe (b) est également destiné à répondre aux inquiétudes relatives au risque de discrimination à l'encontre des débiteurs et à leur permettre d'accéder à une aide financière lorsqu'ils sollicitent la reconnaissance et l'exécution d'une décision. Lors de la Session diplomatique, l'article 10(2) a été étendu afin de couvrir une nouvelle demande de reconnaissance et d'exécution d'une décision présentée par un débiteur (pour davantage d'explications, voir les commentaires relatifs à l'art. 10(2)(a)).

410 Le paragraphe (b) ne contraint pas l'État requis à fournir au demandeur le même type d'assistance juridique que celle qu'il a obtenue dans l'État d'origine. L'assistance juridique à consentir dans l'État requis devrait être « au moins équivalente » à celle dont un demandeur bénéficierait « dans les mêmes circonstances », c'est-à-dire les circonstances dans lesquelles le demandeur a bénéficié de l'assistance juridique dans l'État d'origine. À titre d'exemple, si le demandeur a bénéficié d'une représentation complète pour une procédure judiciaire, une assistance équivalente doit être fournie dans l'État requis. Il est entendu que l'expression « les mêmes circonstances » renvoie au contexte dans lequel le demandeur a bénéficié de l'assistance juridique gratuite, à savoir, la procédure d'origine qui a conduit à l'obtention de la décision en matière d'aliments à reconnaître (que celle-ci ait été la procédure principale ou une procédure accessoire à une autre procédure en droit de la famille).

411 La nature de l'assistance juridique s'entend suivant la définition de l'article 3(c). L'assistance juridique gratuite que l'on peut attendre est celle qui est « prévue par la loi de l'État requis ». Si la loi de l'État requis ne prévoit pas d'assistance juridique gratuite pour les demandes présentées directement, le demandeur n'en obtiendra pas. En particulier, cette disposition n'oblige pas un État à introduire un système d'assistance juridique gratuite pour une demande présentée directement lorsqu'un tel système n'existe pas et lorsque toute l'assistance et les services nécessaires

[140] Doc. prél. No 10/2004 (*op. cit.* note 88), para. 20, 21, 24 et 25.

d) an application for establishment or modification of spousal support, whether or not made in conjunction with an application for child support;

e) an application in respect of an obligation arising from another family relationship.

403 In relation to other forms of family maintenance, Article 17 will only apply between Contracting States which make the declaration referred to in Article 2(3) concerning "any maintenance obligation arising from a family relationship, parentage, marriage or affinity, including in particular obligations in respect of vulnerable persons". Contracting States may also declare that they will apply the Convention to children over the age of 21 years who need maintenance.

404 Where a declaration is made to extend the scope of the Convention, States must consider what other provisions of the Convention should apply, *e.g.*, whether effective access to procedures will apply to spousal support and public bodies. Such provisions do not apply automatically when scope is extended.

In the case of all applications under this Convention other than those under Article 15 or Article 16 –

Paragraph (a) – the provision of free legal assistance may be made subject to a means or a merits test;

405 In many countries, free legal assistance (including legal advice or legal representation) is provided to citizens or residents who satisfy a means and merits test. A "means test" examines the financial means of a person, which may include income and / or assets, to determine if their financial means are sufficiently low to enable them to qualify for a grant of free legal assistance. "Merits" in this context does not refer to the merits of the person as an individual but to her / his legal claim. A "merits test" examines the prospects of success and the worthiness of any legal proceedings for which a person may be granted free legal assistance. If prospects of success are poor, a grant of aid is unlikely to be made, even if the person qualifies for aid under the "means test". The purpose of the means and merits test is to ensure that limited public funds for legal aid and representation are used for the most deserving or needy cases which have a good chance of success.

406 In cases other than those under Article 15 or 16, applicants may be required to make a contribution to their legal costs based on their income, and a small income would mean either that no contribution or only a small contribution was required. Variations in practice are noted in the report on "Administrative and legal costs and expenses under the new Convention on the international recovery of child support and other forms of family maintenance, including legal aid and assistance".[140]

407 Article 17(a) is not relevant to direct requests for recognition and enforcement – see Article 37(2) which refers only to Article 17(b) as being applicable to direct requests.

Paragraph (b) – an applicant, who in the State of origin has benefited from free legal assistance, shall be entitled, in any proceedings for recognition or enforcement, to benefit, at least to the same extent, from free legal assistance as provided for by the law of the State addressed under the same circumstances.

408 Paragraph (b) applies to any applicant, including a direct request for recognition and enforcement (Art. 37(2)). Its purpose is to guarantee for the applicant, at the stage of recognition and enforcement, the same level of legal assistance which she / he enjoyed in the original proceedings. The applicant must have received the benefit before making the application for recognition and enforcement. When read in conjunction with Article 15, it is evident that Article 17(b) is only relevant to child support cases when an application is made by a debtor for recognition of a child support decision. Otherwise, it is only relevant to spousal support cases, and to other forms of family maintenance, including obligations in respect of vulnerable persons, in the event that a Contracting State extends the Convention to these categories of applicants.

409 Paragraph (b) is also intended to address concerns about discrimination against debtors and to give them access to some financial relief when they seek recognition and enforcement of a decision. At the Diplomatic Session, Article 10(2) was extended to include a new application by the debtor for recognition and enforcement of a decision (see further explanation under Art. 10(2)(a)).

410 Paragraph (b) does not direct the State addressed to provide to the applicant the same type of legal assistance she / he received in the State of origin. The legal assistance to be provided in the State addressed should be "at least to the same extent" that an applicant would receive in "the same circumstances", that is, the circumstances in which the applicant received the legal assistance in the State of origin. For example, if the applicant received full legal representation for court proceedings, the equivalent assistance must be provided in the State addressed. It is understood that "the same circumstances" refers to the circumstances in which the applicant benefited from free legal assistance, that is, the original proceedings which led to the establishment of the maintenance decision to be recognised (whether this was the principal proceeding or ancillary to other family law proceedings).

411 The nature of the legal assistance is to be understood according to the definition in Article 3(c). The free legal assistance to be expected is that "provided for by the law of the State addressed". If the law of the State addressed makes no provision for free legal assistance for direct requests, then the applicant will not receive anything. In particular, the provision does not oblige a State to introduce a system of free legal assistance for a direct request where such system does not exist and where all necessary assis-

[140] Prel. Doc. No 10/2004 (*op. cit.* note 88), at paras 20, 21, 24 and 25.

sont disponibles gratuitement au titre des demandes présentées par l'intermédiaire des Autorités centrales[141].

412 L'expression « *State addressed* » apparaît pour la première fois dans le texte anglais de la Convention au paragraphe (b) de l'article 17. Plutôt que l'expression « *requested State* », « *State addressed* » est normalement utilisée à l'égard des procédures de reconnaissance et d'exécution. Cependant, il convient de noter que dans le texte français de la Convention, seule l'expression « État requis » est utilisée et équivaut aux deux expressions utilisées dans le texte anglais.

413 Ce paragraphe s'inspire de l'article 15 de la Convention Obligations alimentaires de 1973 (Exécution). Il a été modifié par le Comité de rédaction afin d'adopter le terme « assistance juridique » employé dans l'ensemble de la Convention. Le paragraphe (b) a également été amélioré par la définition plus claire de l'« assistance juridique » proposée (voir art. 3) lors de la Commission spéciale de 2007. L'expression « aide juridique » n'est pas utilisée dans le texte de la Convention et a été remplacée par « assistance juridique ».

414 La question s'est posée de savoir si ce paragraphe était en réalité une règle sur la loi applicable, c'est-à-dire que la loi de l'État requérant s'applique au droit à une assistance juridique dans l'État requis. Il est clair toutefois que là n'est pas l'esprit de cette disposition, comme l'indiquent les termes « prévus par la loi de l'État requis ».

CHAPITRE IV – RESTRICTIONS À L'INTRODUCTION DE PROCÉDURES

Article 18 Limite aux procédures

415 En l'absence de règles positives de compétence directe, la Convention ne peut résoudre parfaitement le problème des conflits de décision susceptibles de résulter des procédures de modification[142]. La règle de l'article 18(1) apporte néanmoins une solution au problème dans une situation précise et fréquente. Elle a pour fonction d'empêcher le débiteur de saisir une autre juridiction pour modifier une décision ou obtenir une nouvelle décision, lorsque la décision d'origine est rendue dans un État contractant dans lequel le créancier a sa résidence habituelle.

416 Le fonctionnement pratique de cet article peut être illustré par deux exemples.

417 Dans le premier exemple, une décision est rendue dans l'État A, où le créancier et le débiteur résident tous les deux. Le débiteur se réinstalle dans l'État B. En raison de sa situation nouvelle, le débiteur souhaite faire modifier la décision d'origine. Aux termes de l'article 18(1), tant que le créancier réside habituellement dans l'État d'origine (État A), le débiteur est tenu d'introduire la procédure de modification dans ce pays et ne peut le faire dans aucun autre État contractant. Ce résultat est cohérent tant avec les régimes de compétence favorables au créancier[143] qu'avec ceux qui favorisent le maintien de la compétence de la juridiction d'origine[144].

418 Dans le second exemple, une décision est de même rendue dans l'État A où le créancier et le débiteur résident tous les deux, mais c'est le créancier qui se réinstalle dans l'État B. Puisque celui-ci n'a plus sa résidence habituelle dans l'État A, la règle de l'article 18(1) ne s'applique pas ; le débiteur ou le créancier peut introduire une procédure pour modifier la décision dans tout État qui, selon ses propres règles, peut exercer sa compétence. Cette décision sera reconnue dans les autres États contractants sous réserve qu'une des bases de reconnaissance et d'exécution prévue à l'article 20 soit présente.

419 Il n'y a pas eu d'accord sur l'insertion de règles positives de compétence directe dans la Convention. Cependant, la règle de l'article 18 fonctionne comme une règle de compétence négative. L'article 22(f) garantit son efficacité et empêche la reconnaissance d'une décision de modification rendue en violation de la règle.

420 La disposition contient une règle générale (para. 1[er]) et les exceptions à cette règle (para. 2)[145].

Paragraphe premier – Lorsqu'une décision a été rendue dans un État contractant où le créancier a sa résidence habituelle, des procédures pour modifier la décision ou obtenir une nouvelle décision ne peuvent être introduites par le débiteur dans un autre État contractant, tant que le créancier continue à résider habituellement dans l'État où la décision a été rendue.

421 La règle générale est que dès lors qu'une décision a été rendue dans le pays de résidence habituelle du créancier[146], le débiteur ne peut intenter aucune action pour obtenir une nouvelle décision ou une décision modifiée dans un autre État contractant tant que le créancier réside dans l'État d'origine. Il faut souligner que dans ce cas, la résidence du créancier doit être « habituelle ».

422 On peut voir dans cette disposition une certaine orientation vers des règles telles que la *perpetuatio fori* et le maintien de la compétence exclusive, qui avantagent la partie demeurant dans le for. C'est aussi une garantie pour l'autorité judiciaire ou administrative, qui sait qu'elle pourra modifier la décision si les circonstances l'exigent.

Paragraphe 2 – Le paragraphe premier ne s'applique pas :

423 La règle du paragraphe premier peut néanmoins être écartée dans certaines hypothèses exceptionnelles, quatre au total :

Alinéa (a) – lorsque, dans un litige portant sur une obligation alimentaire envers une personne autre qu'un enfant, la compétence de cet autre État contractant a fait l'objet d'un accord par écrit entre les parties ;

424 La première est celle d'un accord entre les parties sur la compétence de l'autorité judiciaire ou administrative de cet autre État contractant à condition que cet accord ne concerne pas un litige portant sur une obligation alimentaire envers un enfant. Les conditions sont identiques à celles qui sont énoncées à l'article 20(1)(e)[147], mais l'objet des deux dispositions diffère. L'article 18(2)(a) autorise simplement le débiteur à intenter une action.

[141] Voir Procès-verbal No 22, para. 98 à 102.
[142] Voir le Rapport Duncan (*op. cit.* note 9), aux para. 121 à 133.
[143] Par ex. sous le régime de Bruxelles / Lugano.
[144] Par ex. sous le régime de l'UIFSA et voir le Rapport Duncan (*ibid.*), au para. 124.
[145] La disposition est basée sur une proposition de la délégation de la Communauté européenne au cours de la Commission spéciale et des observations des États-Unis d'Amérique dans le Doc. prél. No 23/2006 (*op. cit.* note 90).
[146] Il s'agit de l'hypothèse la plus fréquente. Voir le Rapport Duncan (*op. cit.* note 9) et para. 21 du présent Rapport.
[147] Voir la définition d'un « accord par écrit » à l'art. 3(d).

tance and services are available cost-free through Central Authority applications.[141]

412 In paragraph (b) the term "State addressed" appears for the first time. This term is normally used in relation to proceedings for recognition and enforcement, rather than the term "requested State". However, in the French text of the Convention "*État requis*" is used for these two English terms.

413 This paragraph is inspired by Article 15 of the 1973 Hague Maintenance Convention (Enforcement). It was modified by the Drafting Committee to adopt the term "legal assistance" used throughout the Convention. Paragraph (b) was also improved when a clearer definition of "legal assistance" was also proposed (see Art. 3) at the 2007 Special Commission. The term "legal aid" is not used in the Convention and has been replaced by "legal assistance".

414 The question was raised whether this paragraph was really an applicable law rule, *i.e.*, that the law of the requesting State applies to the entitlement to legal assistance in the State addressed. This is clearly not the intention, as indicated by the words "provided for by the law of the State addressed".

CHAPTER IV – RESTRICTIONS ON BRINGING PROCEEDINGS

Article 18 Limit on proceedings

415 In the absence of positive direct rules of jurisdiction the Convention cannot address fully the problem of conflicting decisions which may arise out of modification proceedings.[142] The rule in Article 18(1), however, addresses the problem in one particular and frequently occurring set of circumstances. It operates by prohibiting the debtor from seizing another jurisdiction to modify a decision or obtain a new decision where the original decision has been made in a Contracting State in which the creditor is habitually resident.

416 Two examples illustrate the practical operation of this Article.

417 In the first case, a decision is given in State A where both creditor and debtor are resident. The debtor changes residence to State B. Because of the debtor's changed circumstances, she or he wishes to have the original decision modified. Under Article 18(1), as long as the creditor remains habitually resident in the originating country (State A), the debtor is obliged to bring modification proceedings in that country, and may not do so in any other Contracting State. This outcome is consistent both with jurisdictional regimes which favour the creditor[143] and with those which favour continuing jurisdiction in the originating court.[144]

418 In the second case a decision is likewise given in State A where both creditor and debtor are resident, but the creditor changes residence to State B. As the creditor no longer has a habitual residence in State A, the rule in Article 18(1) does not apply, and the debtor or creditor may bring proceedings to modify the decision in any State which, according to its own rules, may exercise jurisdiction. Such a decision will be recognised in other Contracting States provided that one of the bases for recognition and enforcement exists under Article 20.

419 There was no agreement on the inclusion in the Convention of positive direct rules of jurisdiction. However, the rule in Article 18 operates as a rule of negative jurisdiction. Its effectiveness is assured by Article 22(f), which prevents recognition of a modification decision where the rule is broken.

420 The provision includes a general rule (para. 1) and the exceptions to the general rule (para. 2).[145]

Paragraph 1 – Where a decision is made in a Contracting State where the creditor is habitually resident, proceedings to modify the decision or to make a new decision cannot be brought by the debtor in any other Contracting State as long as the creditor remains habitually resident in the State where the decision was made.

421 As a general rule, once a decision has been given in the country of the habitual residence of the creditor,[146] the debtor may not, as long as the creditor maintains residence in that State, bring proceedings for a new or modified decision in any other Contracting State. It has to be underlined that in this case it is required that the residence of the creditor be "habitual".

422 This provision could be seen as a certain trend toward rules such as *perpetuatio jurisdictionis* and continuing exclusive jurisdiction, which constitute a benefit for the party remaining in the jurisdiction. It is also a guarantee for the judicial or administrative authority, which knows that it could modify the decision if circumstances so require.

Paragraph 2 – Paragraph 1 shall not apply –

423 However, in certain exceptional circumstances the rule in paragraph 1 may be set aside. There are four cases:

Sub-paragraph (a) – where, except in disputes relating to maintenance obligations in respect of children, there is agreement in writing between the parties to the jurisdiction of that other Contracting State;

424 The first case is where there is an agreement between the parties on the jurisdiction of the judicial or administrative authority of this other Contracting State, provided the agreement does not concern disputes relating to maintenance obligations in respect of children. The conditions are the same as those expressed in Article 20(1)(e),[147] but the purpose of the two provisions is different. Article 18(2)(a) merely authorises the debtor to bring proceedings.

[141] See Minutes No 22, paras 98-102.
[142] See the Duncan Report (*op. cit.* note 9), at paras 121-133.
[143] For example, under the Brussels / Lugano scheme.
[144] For example, under the UIFSA regime and see the Duncan Report (*ibid.*), at para. 124.
[145] The provision is based on a proposal by the delegation of the European Community during the Special Commission and from the observations of the United States of America in Prel. Doc. No 23/2006 (*op. cit.* note 90).
[146] It is the most frequent case. See the Duncan Report (*op. cit.* note 9), and para. 21 of this Report.
[147] See definition of "agreement in writing" in Art. 3(d).

Alinéa (b) – lorsque le créancier se soumet à la compétence de cet autre État contractant, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en est offerte pour la première fois ;

425 La deuxième hypothèse est celle dans laquelle le créancier se soumet à la compétence d'un autre État contractant. Les conditions sont identiques à celles qui sont énoncées à l'article 20(1)(b).

Alinéa (c) – lorsque l'autorité compétente de l'État d'origine ne peut ou refuse d'exercer sa compétence pour modifier la décision ou rendre une nouvelle décision ; ou

426 L'alinéa (c) envisage l'hypothèse dans laquelle l'autorité judiciaire ou administrative de l'État d'origine ne peut pas exercer sa compétence ou refuse de l'exercer pour modifier la décision antérieure ou rendre une nouvelle décision sur le fondement de son droit interne. À titre d'exemple, un État d'origine ne pourrait pas exercer sa compétence pour modifier la décision lorsque son droit interne exige que le débiteur réside dans le for pour qu'une action puisse être engagée. On notera également que l'alinéa (c) ne s'applique pas aux affaires dans lesquelles une demande peut être présentée dans l'État d'origine, mais est rejetée car elle est mal fondée.

Alinéa (d) – lorsque la décision rendue dans l'État d'origine ne peut être reconnue ou déclarée exécutoire dans l'État contractant dans lequel des procédures tendant à la modification de la décision ou à l'obtention d'une nouvelle décision sont envisagées.

427 L'alinéa (d) envisage une dernière hypothèse, celle dans laquelle, pour les motifs exposés à l'article 22, la décision rendue dans l'État de résidence habituelle du créancier ne peut être reconnue ou déclarée exécutoire dans l'État où est tentée une procédure pour modifier une décision ou obtenir une nouvelle décision.

CHAPITRE V – RECONNAISSANCE ET EXÉCUTION

428 Le champ d'application du chapitre V sur la reconnaissance et l'exécution des décisions est à peu près identique à celui des Conventions Obligations alimentaires de 1958 et de 1973 (Exécution). Il présente toutefois, par rapport à ces deux instruments, d'importantes améliorations découlant de développements intervenus dans les systèmes internes, régionaux ou internationaux de recouvrement des aliments[148]. Ainsi, les systèmes administratifs de recouvrement des aliments destinés aux enfants (art. 19(1)), la possibilité de couvrir les conventions en matière d'aliments (art. 3(e) et 19(4))[149], l'approche « basée sur les faits » (art. 20(3)), la possibilité de faire enregistrer une décision aux fins d'exécution ou de la faire déclarer exécutoire lorsqu'une demande a été présentée par l'intermédiaire d'une Autorité centrale (art. 23(2)), les restrictions aux contrôles d'office (art. 23(4)) et la possibilité d'utiliser des formulaires standards (art. 25) sont pris en compte. Le chapitre est axé sur les opportunités offertes par les progrès des technologies de l'information qui facilitent les communications électroniques[150] tout en apportant des garanties en matière de transmission des documents (art. 23(7)(c), 25(2) et 30(5)(b)(ii)). La Convention prévoit un système efficace de reconnaissance et d'exécution qui permettra de reconnaître le plus grand nombre de décisions existantes. Elle élimine les coûts et les délais inhérents à l'obligation faite au créancier d'introduire une nouvelle demande parce qu'une décision existante ne peut être reconnue. Conjuguée au chapitre IV, elle aidera également à résoudre les problèmes découlant de jugements contradictoires[151].

429 Comme il a été mentionné plus haut, ce chapitre traite de la question traditionnelle du droit international privé en matière de reconnaissance et d'exécution. Une distinction doit être faite ici : le terme « reconnaissance » fait référence à l'acceptation par l'autorité compétente des droits et obligations tels que déterminés par les autorités d'origine. Les termes « reconnaissance et exécution » font référence aux procédures intermédiaires dans l'État requis auxquelles une décision étrangère est soumise, cela afin d'établir le caractère exécutoire de la décision dans cet État. Ce chapitre s'applique tant aux situations dans lesquelles seule la reconnaissance est recherchée (art. 26) qu'aux situations dans lesquelles la reconnaissance et l'exécution sont toutes deux recherchées. Il ne s'applique pas à « l'exécution » *stricto sensu*, laquelle est couverte par le chapitre VI.

Article 19 Champ d'application du chapitre

Paragraphe premier – Le présent chapitre s'applique aux décisions rendues par une autorité judiciaire ou administrative en matière d'obligations alimentaires. Par le mot « décision », on entend également les transactions ou accords passés devant de telles autorités ou homologués par elles. Une décision peut comprendre une indexation automatique et une obligation de payer des arrérages, des aliments rétroactivement ou des intérêts, de même que la fixation des frais ou dépenses.

430 Le premier article du chapitre V définit son champ d'application. À cette fin, le paragraphe premier détermine les décisions auxquelles il s'applique, sans définir le terme « décision »[152].

431 Comme dans la Convention Obligations alimentaires de 1973 (Exécution), le chapitre s'applique aux décisions rendues par une autorité judiciaire ou administrative, mais contrairement à celle-ci, le terme « autorité administrative » a été défini – cela à la demande des États moins familiers du concept d'autorité administrative ou qui connaissent des autorités administratives différentes de celles qui sont envisagées dans la Convention. Il est espéré que cela incitera des États qui n'avaient pas souhaité rejoindre la Convention de 1973 à devenir Parties à ce nouvel instrument. Il a été convenu que les décisions administratives doivent être reconnues et exécutées au même titre que des décisions judiciaires si « l'autorité administrative » qui a rendu la décision remplit les critères du paragraphe 3.

432 Plusieurs facteurs plaident pour l'insertion explicite des décisions rendues par une « autorité administrative » dans le champ d'application du chapitre V. Tout d'abord, suivant l'exemple de plusieurs États nordiques dans les années 60, un nombre croissant d'États tels la Nouvelle-Zélande, l'Australie et des états des États-Unis d'Amérique

[148] Les développements des systèmes nationaux, régionaux et internationaux intervenus jusqu'en 2003 sont décrits dans le Rapport Duncan (*ibid.*), para. 13 à 14, 59 à 80 et 108 à 118.

[149] Il convient de relever que dans la Convention Obligations alimentaires de 1973 (Exécution), les instruments authentiques et les accords privés étaient couverts par une déclaration. Il est espéré que les garanties prévues à l'art. 30 rassureront les États qui ne souhaitaient pas étendre l'application de la Convention de 1973 à cette question.

[150] Voir *supra*, partie V du présent Rapport.

[151] Voir *supra*, para. 21 du présent Rapport.

[152] Voir *supra*, para. 60 à 76 du présent Rapport, sous art. 3.

Rapport explicatif

Sub-paragraph (b) – where the creditor submits to the jurisdiction of that other Contracting State either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

425 The second case is where the creditor submits to the jurisdiction in another Contracting State. In this case, the conditions are the same as those expressed in Article 20(1)(b).

Sub-paragraph (c) – where the competent authority in the State of origin cannot, or refuses to, exercise jurisdiction to modify the decision or make a new decision; or

426 In sub-paragraph (c) a particular case is envisaged, when the judicial or administrative authority of the country of origin cannot, or refuses to, exercise jurisdiction to modify the previous decision or to give a new one, according to its internal law. For example, a State of origin would not be able to exercise jurisdiction to modify the decision where its laws require the debtor to be resident in the forum for modification proceedings to be brought. It should also be noted that sub-paragraph (c) does not apply in cases where an application can be made in the State of origin, but is "refused" due to a lack of merit.

Sub-paragraph (d) – where the decision made in the State of origin cannot be recognised or declared enforceable in the Contracting State where proceedings to modify the decision or make a new decision are contemplated.

427 A last possibility is contemplated in sub-paragraph (d). This is the case where the decision rendered in the State where the creditor is habitually resident cannot be recognised or declared enforceable, by virtue of the grounds established in Article 22 in the State where proceedings to modify the decision or to adopt a new decision are attempted.

CHAPTER V – RECOGNITION AND ENFORCEMENT

428 The scope of Chapter V on recognition and enforcement of decisions is more or less the same as the scope of the 1958 Hague Maintenance Convention and the 1973 Hague Maintenance Convention (Enforcement). Building on these two instruments, the Chapter sets out important improvements deriving from developments that have occurred in internal, regional or international systems of maintenance recovery,[148] such as the trend towards administrative systems of child support (Art. 19(1)), the possibility to cover authentic instruments and private agreements (Arts 3(e) and 19(4)),[149] the "fact-based approach" (Art. 20(3)), the possibility to register a decision for enforcement or to have it declared enforceable when an application has been made through a Central Authority (Art. 23(2)), the limitation of *ex officio* review (Art. 23(4)), and the possibility to use standardised forms (Art. 25). The Chapter is geared towards opportunities provided by advances in information technology facilitating electronic communications[150] while at the same time setting safeguards in relation to the transmission of documents (Arts 23(7)(c), 25(2) and 30(5)(b)(ii)). The Convention contains an efficient system for the recognition and enforcement of decisions, one that will provide the widest recognition of existing decisions. It eliminates the costs and delays that are incurred if the creditor has to pursue a fresh application because an existing decision cannot be recognised. In conjunction with Chapter IV, it will also help to reduce the problems arising from multiple conflicting orders.[151]

429 As stated before, this Chapter deals with the traditional question of private international law on recognition and enforcement. A distinction needs to be made here. The term "recognition" refers to the acceptance by the competent authority addressed of the determination of the legal rights and obligations made by the authorities of origin. The terms "recognition and enforcement" refer to the intermediate procedures in the State addressed to which a foreign decision is subject to establish the enforceability of the decision in that State. This Chapter applies both to situations where only recognition is sought (Art. 26) and to situations where recognition and enforcement are sought. It does not apply to the "enforcement" *stricto sensu*, which is covered by Chapter VI.

Article 19 Scope of the Chapter

Paragraph 1 – This Chapter shall apply to a decision rendered by a judicial or administrative authority in respect of a maintenance obligation. The term "decision" also includes a settlement or agreement concluded before or approved by such an authority. A decision may include automatic adjustment by indexation and a requirement to pay arrears, retroactive maintenance or interest and a determination of costs or expenses.

430 The first Article of the Chapter is devoted to determining the scope of application of Chapter V. To that end, paragraph 1 determines to which decisions this Chapter applies, without including a definition of "decision".[152]

431 As in the 1973 Hague Maintenance Convention (Enforcement), the Chapter will apply to a decision whether rendered by a judicial authority or an administrative authority. However, contrary to the 1973 Convention, the term "administrative authority" has been defined. This was at the request of States which are less familiar with the concept of administrative authority or that know of administrative authorities that are different from the ones contemplated under the Convention. Hopefully this may help to attract certain States to become Parties to the new Convention which were not willing to join the 1973 Convention. It was agreed that administrative decisions should be recognised and enforced in the same way as judicial decisions if the "administrative authority" which has rendered the decision meets the requirements set out in paragraph 3.

432 Several reasons militate in favour of an explicit inclusion of decisions given by an "administrative authority" in the scope of Chapter V. First, following the example of a number of Nordic States from the 1960s, an increasing number of jurisdictions such as New Zealand, Australia and states within the United States of America have introduced

[148] Developments as at 2003 in national, regional and international systems are described in the Duncan Report (*ibid.*), at paras 13-14, 59-80, 108-118.
[149] It is to be noted that authentic instruments and private agreements were covered by way of a declaration under the 1973 Hague Maintenance Convention (Enforcement). Hopefully, the safeguards developed under Art. 30 will reassure the States that were reluctant to extend the application of the 1973 Convention to that matter.

[150] See *supra*, at Part V of this Report.
[151] See *supra*, para. 21 of this Report.
[152] See *supra*, paras 60-76 of this Report, comments on Art. 3.

ont mis en place des systèmes administratifs pour le recouvrement des aliments, en particulier destinés aux enfants. Tout en offrant le même niveau de garanties juridiques que les autorités judiciaires, ces autorités spécialisées peuvent instruire les demandes plus rapidement et plus efficacement. Ensuite, il serait injuste d'obliger les États dotés d'un système administratif à reconnaître et exécuter des décisions judiciaires étrangères si leurs propres décisions n'étaient pas reconnues dans les pays dotés d'un système judiciaire.

433 Comme pour la Convention Obligations alimentaires de 1973 (Exécution)[153], le terme décision couvre les « transactions » ou les « accords » conclus ou homologués par une autorité judiciaire ou administrative. L'insertion des transactions et des accords conférera une large couverture au chapitre car la signification de ces deux termes diffère selon les systèmes juridiques.

434 La décision qui entre dans le champ d'application de la Convention « peut » comprendre d'autres éléments.

435 La Convention est adaptée à l'époque moderne car elle dispose que le terme « décision » peut comprendre « une indexation automatique », qui renvoie à une décision dynamique ou à un ajustement automatique de plein droit pour tenir compte de l'augmentation ou de la diminution prévisible du coût de la vie. De plus en plus fréquents, ces dispositifs consistent, soit en une formule insérée dans la décision pour calculer l'ajustement périodique du montant des aliments, soit en une table d'indexation jointe à la décision et indiquant l'augmentation périodique du montant des aliments à payer. Dans ce cas, les autorités de l'État requis devront reconnaître et exécuter la décision ajustée conformément à la formule d'indexation précisée dans la décision, par exemple, sur la base de l'indice du coût de la vie dans l'État d'origine. Grâce à ces ajustements automatiques, une modification de la décision d'origine est moins souvent nécessaire.

436 D'autre part, une décision peut également prévoir l'obligation de payer des arrérages, des aliments de manière rétroactive ou des intérêts. Il est clair que les arrérages entrent dans le champ d'application de la Convention. Les arrérages désignent les aliments impayés après la décision tandis que les aliments rétroactifs désignent les aliments relatifs aux périodes antérieures à la demande de décision.

437 Enfin, une décision peut également ordonner le paiement des frais et dépens. Il n'est donc pas nécessaire de prévoir une règle séparée pour leur reconnaissance et leur exécution. Cette règle est également censée couvrir les frais ou dépens ordonnés dans le cadre des demandes d'aliments infructueuses. Voir aussi ci-dessous, paragraphe 619, relatif à l'article 43.

Paragraphe 2 – Si la décision ne concerne pas seulement l'obligation alimentaire, l'effet de ce chapitre reste limité à cette dernière.

438 Cette règle provient de l'article 3 de la Convention Obligations alimentaires de 1973 (Exécution). Elle a été insérée à l'article 19 et non à l'article 2 car son application est limitée au chapitre V. Elle instaure une importante protection relative aux questions préliminaires ou accessoires. Ainsi, si une décision alimentaire comprend également une décision liée à l'établissement de la filiation, la reconnaissance et l'exécution de cette dernière ne sera pas obligatoire en vertu de la Convention. Ceci est très important car le droit interne de certains États impose que la filiation soit reconnue exclusivement *erga omnes* et il serait contraire à l'ordre public de la reconnaître aux seules fins des aliments. Cette disposition permet par conséquent à de tels États de ne reconnaître et de n'exécuter que la partie relative au paiement des aliments sans donner effet à la partie relative à l'établissement de la filiation en tant que tel.

Paragraphe 3 – Aux fins du paragraphe premier, « autorité administrative » désigne un organisme public dont les décisions, en vertu de la loi de l'État où il est établi :

Alinéa (a) – peuvent faire l'objet d'un appel devant une autorité judiciaire ou d'un contrôle par une telle autorité ; et

Alinéa (b) – ont une force et un effet équivalant à une décision d'une autorité judiciaire dans la même matière.

439 Comme il a été expliqué pour le paragraphe premier, une décision qui entre dans le champ d'application de ce chapitre peut être rendue par une autorité judiciaire ou par une autorité administrative. Toutefois, à la demande de certains États, une définition du terme « autorité administrative » a été insérée. Elle comporte trois éléments : 1) une autorité administrative est un « organisme public » dont les décisions 2) peuvent faire l'objet d'un appel devant une autorité judiciaire ou d'un contrôle par une telle autorité – soit directement, soit dans le cadre de procédures ultérieures – et 3) ont une force et un effet équivalant à ceux d'une décision émanant d'une autorité judiciaire. Il convient d'indiquer que l'utilisation du mot « équivalant » au lieu de « même », comme cela était le cas dans la version précédente du texte, a été suggérée par la délégation de la Suisse[154]. Il a été en effet expliqué que, dans certains cas, les décisions administratives n'ont pas la même force qu'une décision émanant d'une autorité judiciaire, mais se voient conférer une force comparable en vertu du droit suisse. Aussi cette modification, qui ne porte pas atteinte à l'essence de cette règle, facilitera la mise en œuvre de la Convention dans certains États.

Paragraphe 4 – Ce chapitre s'applique aussi aux conventions en matière d'aliments, conformément à l'article 30.

440 L'article 25 de la Convention Obligations alimentaires de 1973 (Exécution) dispose que l'application de la Convention peut être étendue aux actes authentiques au moyen d'une déclaration. L'insertion des « conventions en matière d'aliments » à l'article 30 comme pouvant être reconnues et exécutées en application du chapitre V, implique qu'il y soit fait mention à l'article 19.

Paragraphe 5 – Les dispositions de ce chapitre s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à l'autorité compétente de l'État requis, conformément à l'article 37.

441 La Convention est conçue avant tout pour s'insérer dans un système de coopération économique et efficace reposant sur des Autorités centrales désignées dans les États contractants. Cependant, rien dans la Convention n'empêche de présenter une demande directe de reconnaissance

[153] Voir son art. 3.

[154] Doc. trav. No 26.

administrative systems for maintenance, in particular child support. While offering the same level of legal safeguards as judicial authorities, these specialised authorities can process applications faster and more efficiently. Second, it would be unfair to oblige a State with an administrative system to recognise and enforce foreign judicial decisions, while decisions of a State with an administrative system would not be recognised in a country equipped with a judicial system.

433 As in the 1973 Hague Maintenance Convention (Enforcement),[153] a decision will include a "settlement" or "agreement", as long as it is concluded before or approved by a judicial or administrative authority. The inclusion of both settlements and agreements will ensure a broad coverage of the Chapter as the two terms have different meanings in the different legal systems.

434 The decision that would fall under the scope of the Convention "may" also include other elements.

435 The Convention is adapted to modern times by providing that the term "decision" may include "automatic adjustment by indexation", which refers to a dynamic maintenance order or automatic adjustment by operation of the law to take into account foreseeable increases or decreases in the costs of living. These adjustments which are increasingly more frequent consist either of providing a formula in the decision to calculate the periodic adjustment of the maintenance amount or of attaching to the decision a table of indexation indicating the periodic increase of the amount of maintenance to be paid. Where this is the case, the authorities in the State addressed will be required to recognise and enforce the decision as adjusted in accordance with the form of indexation specified by the decision, for example, one which is linked to a cost-of-living index in the State of origin. These automatic adjustments reduce the need to modify the original decision.

436 In the second place, a requirement to pay arrears, retroactive maintenance or interest may also be included. It is clear that arrears are included in the scope of the Convention. The difference between "arrears" and "retroactive maintenance" is that retroactive maintenance means maintenance for periods prior to the application for a decision while arrears refer to the unpaid maintenance for periods after the decision.

437 Finally, the determination of costs or expenses in proceedings may also constitute part of the decision. There is therefore no need to have a separate rule for their recognition and enforcement. This rule is also meant to cover costs or expenses ordered in unsuccessful maintenance applications. See also paragraph 619 under Article 43 of this Report.

Paragraph 2 – If a decision does not relate solely to a maintenance obligation, the effect of this Chapter is limited to the parts of the decision which concern maintenance obligations.

438 This rule comes from Article 3 of the 1973 Hague Maintenance Convention (Enforcement). It was included in Article 19 instead of Article 2 as the application of the rule is limited to Chapter V. This rule provides an important safeguard in relation to preliminary or ancillary questions. For example, if a maintenance decision also includes a decision in relation to the establishment of parentage, this latter decision would not necessarily have to be recognised and enforced under the Convention. This is very important since in some States it would be contrary to public policy to recognise the establishment of parentage only for the purposes of maintenance where their domestic law would require that the recognition of parentage could only be done *erga omnes*. Therefore through this provision it would be possible for such States to recognise and enforce only the part of the decision that deals with the maintenance payment without giving effect to the establishment of parentage per se.

Paragraph 3 – For the purpose of paragraph 1, "administrative authority" means a public body whose decisions, under the law of the State where it is established –

Sub-paragraph (a) – may be made the subject of an appeal to or review by a judicial authority; and

Sub-paragraph (b) – have a similar force and effect to a decision of a judicial authority on the same matter.

439 As explained in relation to paragraph 1, a decision within the scope of this Chapter can be one ordered either by a judicial authority or by an administrative authority. However, at the request of certain States, a definition of what constitutes an administrative authority has been included in the text. There are three elements: 1) the administrative authority has to be a "public body"; 2) the decision of the administrative authority may be subject to appeal before a judicial authority or to verification by such an authority – either directly or within the context of subsequent procedures; and 3) the decision of the administrative authority must have a similar force and effect as a decision of a judicial authority. It is to be noted that the use of the term "similar" instead of the expression "the same", which appeared in the previous version of the text, was suggested by the delegation of Switzerland[154] because it was explained that administrative decisions sometimes do not have the same force as a decision of a judicial authority but a comparable force under the laws of Switzerland. This modification, without affecting the substance of the rule, will facilitate the implementation of the Convention for certain States.

Paragraph 4 – This Chapter also applies to maintenance arrangements in accordance with Article 30.

440 Under Article 25 of the 1973 Hague Maintenance Convention (Enforcement), it is possible to extend the application of the Convention by way of declaration to authentic instruments. The inclusion of "maintenance arrangements" in Article 30, as entitled to recognition and enforcement under Chapter V, requires this reference in Article 19.

Paragraph 5 – The provisions of this Chapter shall apply to a request for recognition and enforcement made directly to a competent authority of the State addressed in accordance with Article 37.

441 The Convention is primarily developed to operate within a low cost and efficient system of co-operation resting on Central Authorities in the Contracting States. However, nothing in the Convention prevents application for recognition and enforcement of a decision directly (*i.e.*,

[153] Art. 3.

[154] In Work. Doc. No 26.

et d'exécution d'une décision (c.-à-d. sans passer par les Autorités centrales conformément à l'art. 9) à l'autorité compétente de l'État requis. Il appartiendra à chaque État de décider si l'autorité compétente pour la reconnaissance et l'exécution sera une autorité administrative ou judiciaire.

442 L'article 37 (ci-dessous) identifie clairement les dispositions de la Convention qui s'appliquent aux demandes présentées directement aux autorités compétentes.

Article 20 Bases de reconnaissance et d'exécution

443 Les bases de reconnaissance et d'exécution forment un ensemble de règles de compétence indirecte. Autrement dit, la reconnaissance est accordée à une décision rendue dans un autre État contractant dans la mesure où certains critères de compétence sont remplis. Ce qui importe n'est pas la base réelle sur laquelle l'autorité a exercé sa compétence, mais l'existence d'un des chefs de compétence indirecte (pour une explication de l'absence de règles de compétence directe dans la Convention, voir plus haut la partie IV du présent Rapport).

444 Contrairement aux chapitres sur la coopération administrative[155], l'article 20 emploie l'expression « résidait habituellement ». Dans ce contexte, cette expression renvoie à un ensemble précis de faits pertinents relatifs à la résidence habituelle qui doivent être évalués au cas par cas à la lumière du contexte de la nouvelle Convention. Le critère de la résidence habituelle permet d'établir un lien suffisant entre les personnes concernées et l'État d'origine. Au cours des négociations, plusieurs délégations se sont inquiétées du fait que la jurisprudence très complexe entourant la notion de « résidence habituelle » dans le cadre de la Convention Enlèvement d'enfants de 1980 ne se reporte sur la présente Convention. Néanmoins, tous étaient d'avis que s'agissant de contextes différents, l'approche adoptée quant à l'application de la notion de « résidence habituelle » devait également être différente. En effet, dans la Convention de 1980, la loi du lieu de résidence habituelle de l'enfant détermine si des « droits de garde » existent, rendant la rétention ou le déplacement de l'enfant dans un autre État illicite. En revanche, dans le contexte actuel de la présente Convention, la « résidence habituelle » constitue un critère de rattachement aux fins de la reconnaissance et de l'exécution, dans une Convention dont l'objectif est de faciliter le recouvrement des aliments dans des affaires internationales. D'autre part, il est probable que la plupart des demandes de reconnaissance et d'exécution de décisions alimentaires ne seront pas contestées. Enfin, rien n'indique que l'emploi du terme « résidence habituelle » ait créé une difficulté dans le cadre de la Convention Obligations alimentaires de 1973 (Exécution). Pour une analyse de l'opportunité d'insérer une définition de l'expression « résidence habituelle » dans la Convention, voir plus haut les paragraphes 62 et 63, sous article 3.

445 L'article emploie le terme « instance », qui couvre les instances judiciaires et administratives. De même, l'emploi de ce terme dans la Convention Obligations alimentaires de 1973 (Exécution) n'a posé aucun problème.

Paragraphe premier – Une décision rendue dans un État contractant (« l'État d'origine ») est reconnue et exécutée dans les autres États contractants si :

446 Le paragraphe premier fixe les chefs de compétence de l'État d'origine en vertu desquels une décision judiciaire ou administrative rendue dans cet État sera reconnue et exécutée dans l'État requis. L'obligation de reconnaître et d'exécuter une telle décision est clairement exprimée par l'emploi de l'auxiliaire « être » et non du semi-auxiliaire « pouvoir ».

447 La liste des chefs de compétence prévue dans l'article étant exhaustive, il n'y aura aucune obligation de reconnaître et d'exécuter une décision en vertu de la Convention si aucun des chefs de compétence qui y sont énumérés n'existe.

448 Il faut souligner que la demande de reconnaissance et d'exécution présentée par l'intermédiaire de l'Autorité centrale (le système de coopération administrative) est prévue à l'article 10(1)(a). Voir également les paragraphes 237 à 241 du présent Rapport.

Alinéa (a) – le défendeur résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

449 Le premier chef de compétence indirecte est la résidence habituelle du défendeur dans l'État d'origine. Ce chef de compétence très largement reconnu figure à l'article 7(1) de la Convention Obligations alimentaires de 1973 (Exécution). L'existence du chef de compétence et les éléments factuels qui y conduisent doivent être appréciés à la date de l'introduction de l'instance, en écartant les éventuels changements intervenus par la suite.

Alinéa (b) – le défendeur s'est soumis à la compétence de l'autorité, soit expressément, soit en se défendant sur le fond de l'affaire sans contester la compétence lorsque l'occasion lui en a été offerte pour la première fois ;

450 L'alinéa (b) prévoit la possibilité de se soumettre à la compétence de l'autorité soit expressément, soit en comparaissant sans contester la compétence et en s'expliquant sur le fond de l'affaire. Ce chef de compétence très largement accepté figure à l'article 7(3) de la Convention Obligations alimentaires de 1973 (Exécution). Il faut souligner toutefois que dans la nouvelle Convention, le défendeur ne peut pas contester la compétence à tout moment. Il doit la contester « lorsque l'occasion lui en a été offerte pour la première fois » en vertu du droit interne de l'État d'origine.

451 Il faut remarquer que la soumission du défendeur à la compétence dans cette hypothèse diffère de l'accord sur la compétence prévu à l'alinéa (e).

Alinéa (c) – le créancier résidait habituellement dans l'État d'origine lors de l'introduction de l'instance ;

452 La résidence habituelle du créancier d'aliments est un chef de compétence prévu dans de nombreux instruments régionaux et systèmes internes de recouvrement des aliments, destiné à protéger le créancier en tant que partie plus faible. Ce chef de compétence indirecte largement accepté est également prévu à l'article 7(1) de la Convention Obligations alimentaires de 1973 (Exécution). Cependant, il n'est pas accepté dans certains États, notamment aux États-Unis d'Amérique, en raison d'une obligation constitutionnelle de respect des droits de la défense (« *due process* »), cela parce que la résidence du créancier ne constitue pas à elle seule le lien nécessaire entre l'autorité exerçant la

[155] Voir en particulier l'art. 9 et les commentaires y afférents, para. 228 et s. du présent Rapport.

Rapport explicatif

without going through the Central Authorities in accordance with Art. 9) to the competent authority in the State addressed. It will be for each State to decide whether the competent authority for recognition and enforcement will be an administrative or judicial authority for that purpose.

442 Article 37 (below) identifies clearly the provisions of the Convention that apply to direct requests to competent authorities.

Article 20 Bases for recognition and enforcement

443 The bases for recognition and enforcement are a set of indirect rules of jurisdiction. In other words, recognition is accorded to a decision made in another Contracting State provided that certain jurisdictional requirements are satisfied. It is not the actual basis on which that authority exercised jurisdiction that is relevant. The question is whether one of the indirect bases for jurisdiction in fact existed (for an explanation of why the Convention does not include direct rules of jurisdiction, see above at Part IV of this Report).

444 In contrast with the Chapters on administrative co-operation,[155] the term "habitually resident" is used throughout Article 20. In this context, the term relates to a particular set of facts relevant to habitual residence that must be assessed on a case-by-case basis in the light of the context of the new Convention. The criterion of habitual residence allows for the determination of a sufficient connection between the individuals concerned and the State of origin. During the negotiations several delegations expressed concern that the complex case-law surrounding the definition of "habitual residence" which has developed in the context of the 1980 Hague Child Abduction Convention should not be imported into this Convention. There was general agreement that, because the contexts are different, the approach to the application of the concept of "habitual residence" should also be different. In the 1980 Convention the law of the child's habitual residence determines whether "rights of custody" exist such that a child's removal to or retention in a new jurisdiction is unlawful. On the other hand, in the present context "habitual residence" is a connecting factor for the purpose of recognition and enforcement in a Convention whose purpose is to facilitate the recovery of maintenance in international cases. It has to be added that most applications for recognition and enforcement of maintenance decisions are likely to be uncontested. Finally, there is no evidence that the use of the term "habitual residence" created any difficulty under the 1973 Hague Maintenance Convention (Enforcement). For the discussion as to whether the Convention should contain a definition of "habitual residence", see above at paragraphs 62 and 63 under Article 3.

445 Throughout the Article, the word "proceedings" is used. The term includes both judicial and administrative proceedings. Similarly, no problem has arisen from the use of this term under the 1973 Hague Maintenance Convention (Enforcement).

Paragraph 1 – A decision made in one Contracting State ("the State of origin") shall be recognised and enforced in other Contracting States if –

446 Paragraph 1 sets out the grounds of jurisdiction in a State of origin upon which a judicial or administrative decision made in that State will be recognised and enforced in the State addressed. The obligation to recognise and enforce such a decision is clear from the text as the term "shall" is employed and not "may".

447 The list of grounds included in the Article is a closed list. Therefore, there will be no obligation to recognise and enforce a decision under the Convention if none of the grounds in the list exist.

448 It is to be noted that the application through the Central Authority (the administrative co-operation system) for recognition and enforcement is provided for under Article 10(1)(a), see paragraphs 237 to 241 of this Report.

Sub-paragraph (a) – the respondent was habitually resident in the State of origin at the time proceedings were instituted;

449 The first ground of indirect jurisdiction is the habitual residence of the respondent in the State of origin. This very widely accepted ground of jurisdiction appears in Article 7(1) of the 1973 Hague Maintenance Convention (Enforcement). The existence of the ground of jurisdiction and the factual elements leading to it have to be assessed at the time when proceedings were instituted, without taking into account any possible change thereafter.

Sub-paragraph (b) – the respondent has submitted to the jurisdiction either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;

450 The possibility to expressly submit to the jurisdiction is included in sub-paragraph (b) as well as the possibility of submission to the jurisdiction, if the respondent enters an appearance without contesting the jurisdiction and defending on the merits. This very widely accepted ground of jurisdiction appears in Article 7(3) of the 1973 Hague Maintenance Convention (Enforcement). However, under the new Convention it has to be noted that the respondent does not have the possibility to object to the jurisdiction at any moment. The respondent has to object "at the first available opportunity", in accordance with the internal law of the State of origin.

451 It is to be noted that submission by the respondent to the jurisdiction in this case is different from agreement to the jurisdiction under sub-paragraph (e).

Sub-paragraph (c) – the creditor was habitually resident in the State of origin at the time proceedings were instituted;

452 The habitual residence of the maintenance creditor is a special ground of jurisdiction found in many regional instruments and internal systems of maintenance recovery, set to protect the creditor as a weaker party. This widely accepted ground of indirect jurisdiction is also included in Article 7(1) of the 1973 Hague Maintenance Convention (Enforcement). However, some States, in particular the United States of America, cannot accept this ground of jurisdiction because of the constitutional requirement of "due process". That is because the residence of the creditor alone does not provide any required nexus between the authority

[155] See, in particular, Art. 9 and comments under paras 228 *et seq.* of this Report.

compétence et le débiteur pour l'exécution des décisions ordonnant un transfert monétaire. C'est pour tenir compte de ces États que la possibilité de formuler une réserve au regard de ce chef de compétence est prévue au paragraphe 2 de cet article[156]. Comme pour l'alinéa (a), l'existence de ce chef de compétence et les éléments factuels y conduisant doivent être appréciés à la date de l'introduction de l'instance, en faisant abstraction des changements éventuellement intervenus par la suite. Il est à noter que le terme « créancier » couvre sans aucune ambigüité l'enfant en faveur duquel les aliments ont été ordonnés. C'est pourquoi le texte ne comprend pas de règle particulière pour l'enfant en tant que créancier.

453 Le paragraphe 2 dispose qu'une réserve peut être émise au regard de cet alinéa.

Alinéa (d) – l'enfant pour lequel des aliments ont été accordés résidait habituellement dans l'État d'origine lors de l'introduction de l'instance, à condition que le défendeur ait vécu avec l'enfant dans cet État ou qu'il ait résidé dans cet État et y ait fourni des aliments à l'enfant ;

454 Ce nouveau chef de compétence indirecte proposé par la délégation de la Suisse a recueilli un large soutien lors de la réunion de la Commission spéciale de 2005. La situation est très différente de celle de l'alinéa (c) et paraît acceptable aux pays de droit civil et de *common law*, notamment aux États-Unis d'Amérique pour lesquels ce nouveau chef de compétence créera une passerelle. Ce chef de compétence est assorti de conditions strictes : le défendeur doit avoir vécu avec l'enfant dans l'État où ce dernier résidait habituellement lors de l'introduction de l'instance ou avoir vécu dans cet État et lui avoir versé des aliments. Il représente une situation fréquente dans laquelle le débiteur a vécu dans le même pays que l'enfant, y a versé des aliments et s'est ensuite réinstallé dans un autre pays pour des raisons professionnelles. Cette nouvelle base de reconnaissance suppose un lien entre le débiteur et l'État de résidence habituelle de l'enfant. Pour les États pour lesquels l'alinéa (c) est acceptable (*forum actoris*), ce nouveau chef de compétence n'apporte aucune valeur ajoutée et est superflu. La solution de l'alinéa (d) vise à réduire la nécessité d'appliquer la réserve relativement à l'alinéa (c) en mentionnant les situations dans lesquelles un *forum actoris* serait acceptable pour les États qui y seraient autrement opposés.

Alinéa (e) – la compétence a fait l'objet d'un accord par écrit entre les parties sauf dans un litige portant sur une obligation alimentaire à l'égard d'un enfant ; ou

455 L'accord des parties sur la compétence a été discuté sous l'angle de l'acceptabilité de l'autonomie de la volonté des parties parmi les chefs de compétence en matière d'aliments. Il a été convenu de prévoir cette possibilité à l'exception des différends relatifs aux obligations alimentaires à l'égard des enfants. Si un Protocole à la Convention devait être élaboré relatif aux « personnes vulnérables », il conviendrait de s'interroger sur l'opportunité d'étendre cette règle particulière relative aux enfants aux « personnes vulnérables », comme il est mentionné à l'article 2(3)[157].

456 Il faut souligner que la soumission du défendeur prévue à l'alinéa (b) n'est pas identique à l'accord sur la compétence visé à l'alinéa (e).

457 Le paragraphe 2 dispose qu'une réserve peut être émise au regard de cet alinéa.

Alinéa (f) – la décision a été rendue par une autorité exerçant sa compétence sur une question relative à l'état des personnes ou à la responsabilité parentale, sauf si cette compétence est uniquement fondée sur la nationalité de l'une des parties.

458 L'alinéa (f) prévoit un chef de compétence indirecte lorsqu'il est établi qu'une décision rendue par une autorité exerçant sa compétence sur une question relative à l'état des personnes ou à la responsabilité parentale sera reconnue. La Commission spéciale s'est initialement interrogée sur l'opportunité de prévoir ce chef de compétence. Il semble que la règle pourrait être utile car des décisions relatives aux aliments sont prises dans de nombreuses hypothèses couvertes par l'alinéa (f), par exemple en cas de divorce.

459 Cependant, il a été envisagé de compléter cette formulation afin de réduire les risques de couvrir des hypothèses dans lesquelles l'autorité d'origine aurait exercé une compétence exorbitante sur des questions relatives à l'état des personnes, telle qu'une compétence reposant exclusivement sur la nationalité. Cela explique l'ajout des termes « sauf si cette compétence est uniquement fondée sur la nationalité de l'une des parties »[158] à la fin de la disposition car cela pourrait constituer un chef de compétence exorbitant[159].

460 Le paragraphe 2 dispose qu'une réserve peut être émise au regard de cet alinéa.

Paragraphe 2 – Un État contractant peut faire une réserve portant sur le paragraphe premier (c), (e) ou (f), conformément à l'article 62.

461 Comme on l'a noté aux paragraphes précédents, certains chefs de compétence sont inacceptables pour certains pays. C'est pourquoi le paragraphe 2 prévoit la possibilité d'émettre une réserve, ce qui facilitera l'acceptation de la Convention pour un plus grand nombre d'États. La possibilité de faire une réserve conformément à l'article 62 a été acceptée pour le paragraphe premier (c), (e) et (f).

462 Il convient de souligner que les réserves formulées en application de cet article, conformément à l'article 62(4), n'ont pas d'effet réciproque[160], cela parce que dans la pratique des négociations des Conventions de La Haye, il est possible, comme dans le cas présent, de négocier et d'adopter un système de réserves non réciproques. Cette solution apporte une réponse à la question des conséquences fortuites de l'association de l'article 20(2) et de l'article 62. À titre d'exemple, les États-Unis d'Amérique peuvent faire une réserve sur l'article 20(1)(c) (compétence fondée sur la résidence habituelle du créancier) parce que ce chef de compétence ne répond pas à l'obligation de lien entre le défendeur et le for, imposée pour le respect des droits de la défense (« *due process* »). Cette réserve n'exonérerait pas les autres États contractants de leur obligation de reconnaître une décision rendue aux États-Unis d'Amérique lors-

[156] Voir art. 19(2) et les commentaires au para. 438 du présent Rapport.
[157] Voir para. 55 du présent Rapport.
[158] Voir à cet égard l'art. 8 du Règlement Bruxelles II *bis*.
[159] Une solution différente est prévue à l'art. 8 de la Convention Obligations alimentaires de 1973 (Exécution), qui dispose que « [s]ans préjudice des dispositions de l'article 7, les autorités d'un État contractant qui ont statué sur la réclamation en aliments sont considérées comme compétentes au sens de la Convention si ces aliments sont dus en raison d'un divorce, d'une séparation de corps, d'une annulation ou d'une nullité de mariage intervenu devant une autorité de cet État reconnue comme compétente en cette matière, selon le droit de l'État requis », ce qui signifie que la décision en matière d'aliments n'est reconnue en vertu de la Convention que si le divorce est reconnu en vertu du droit interne de l'État requis.
[160] Voir Doc. prél. No 23/2006 (*op. cit.* note 90).

exercising jurisdiction and the debtor for enforcement of money orders. It is to accommodate these States that the possibility of making a reservation in respect of this ground of jurisdiction has been set out in paragraph 2 of this Article.[156] As with sub-paragraph (a), the existence of this ground of jurisdiction and the factual elements leading to it have to be assessed at the time when the proceedings were instituted, without taking into account any possible change thereafter. It is to be noted that the term "creditor" includes, without any doubt, the child for whom maintenance was ordered. This explains why a special rule for the child as a creditor is not included in the text.

453 The possibility of a reservation in respect of this paragraph is set out in paragraph 2.

Sub-paragraph (d) – the child for whom maintenance was ordered was habitually resident in the State of origin at the time proceedings were instituted, provided that the respondent has lived with the child in that State or has resided in that State and provided support for the child there;

454 This new ground of indirect jurisdiction proposed by the delegation of Switzerland received great support during the 2005 Special Commission meeting. The situation is clearly different from the one in sub-paragraph (c) and it seems acceptable to countries of civil law and common law traditions, in particular the United States of America for which this new ground will create a bridge. This ground sets strict conditions: that the respondent has lived with the child in the State where the child was habitually resident at the time proceedings were instituted or has lived in that State and provided support for the child there. It reflects a frequent situation where the debtor has been living in the same country as the child, paid maintenance and afterwards, for work related reasons, has moved to another country. This new basis for recognition involves a nexus between the debtor and the jurisdiction in which the child has her or his habitual residence. For States for which sub-paragraph (c) is acceptable (*forum actoris*) this additional ground does not give added value and is superfluous. The solution in sub-paragraph (d) aims to limit the need for the application of the reservation in relation with sub-paragraph (c), mentioning the situations where a *forum actoris* would be acceptable for States which would otherwise object to it.

Sub-paragraph (e) – except in disputes relating to maintenance obligations in respect of children, there has been agreement to the jurisdiction in writing by the parties; or

455 The agreement to the jurisdiction by the parties has been discussed taking into account if party autonomy provides an adequate basis for jurisdiction in maintenance. It was agreed to include this possibility with the exception of disputes relating to maintenance obligations in respect of children. If a Protocol to the Convention were to be developed in respect of "vulnerable persons", it might be necessary to examine whether this special rule for children should be extended to "vulnerable persons", as mentioned in Article 2(3).[157]

456 Attention has to be paid to the fact that submission by the respondent in sub-paragraph (b) is not the same as agreement to the jurisdiction in sub-paragraph (e).

457 The possibility of a reservation in respect of this sub-paragraph is set out in paragraph 2.

Sub-paragraph (f) – the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.

458 Sub-paragraph (f) provides for a ground of indirect jurisdiction where it is established that a decision given by an authority exercising jurisdiction on a matter of personal status or on parental responsibility will be recognised. The discussion in the Special Commission first focussed on the need to include this ground of jurisdiction. It seems that the rule could be useful since in many situations covered by sub-paragraph (f), for example in the case of divorce, decisions are taken in relation to maintenance.

459 However, consideration has been given to additional wording to reduce the risk of including cases where the originating authority has exercised an exorbitant jurisdiction on a matter of personal status, for example where jurisdiction has been exercised solely on the basis of nationality. This explains the addition of the terms "unless that jurisdiction was based solely on the nationality of one of the parties",[158] at the end of the provision, as it could constitute an exorbitant ground of jurisdiction.[159]

460 The possibility of a reservation in respect of this sub-paragraph is set out in paragraph 2.

Paragraph 2 – A Contracting State may make a reservation, in accordance with Article 62, in respect of paragraph 1(c), (e) or (f).

461 As noted in the previous paragraphs, some of the grounds of jurisdiction are not acceptable to some countries. This is why the possibility of making a reservation has been set out in paragraph 2. It will facilitate the acceptance of the Convention for more States. The possibility to make a reservation, in accordance with Article 62, is accepted for paragraph 1(c), (e) and (f).

462 It is important to note that reservations under this Article, in accordance with Article 62(4), have no reciprocal effect.[160] That is because according to the practice under Hague Conventions it is possible, as in this case, to negotiate and adopt a system of non-reciprocal reservations. This solution provides an answer to the question concerning the unintended consequences of coupling Article 20(2) and Article 62. For example, the United States of America may make a reservation in relation to Article 20(1)(c) (jurisdiction based on creditor's habitual residence) because this ground of jurisdiction does not meet their due process requirement that there be a nexus between the defendant and the forum. This would not release other Contracting States from the obligation to recognise a decision made in the United States of America when the creditor was in fact

[156] See Art. 19(2), and comments at para. 438 of this Report.
[157] See para. 55 of this Report.
[158] See in this respect Art. 8 of the Brussels IIa Regulation.
[159] A different solution is in Art. 8 of the 1973 Hague Maintenance Convention (Enforcement), which provides that "[w]ithout prejudice to the provisions of Article 7, the authority of a Contracting State which has given judgment on a maintenance claim shall be considered to have jurisdiction for the purposes of this Convention if the maintenance is due by reason of a divorce or a legal separation, or a declaration that a marriage is void or annulled, obtained from an authority of that State recognised as having jurisdiction in that matter, according to the law of the State addressed", which means that the maintenance decision is recognised under the Convention only if divorce is recognised according to the internal law of the State addressed.
[160] See Prel. Doc. No 23/2006 (*op. cit.* note 90).

que le créancier y réside, alors même que le chef de compétence sur lequel se base l'autorité des États-Unis d'Amérique ne figure pas à l'article 20 (par ex. « *tag jurisdiction* », c'est-à-dire la compétence fondée sur la présence temporaire d'une personne sur le territoire d'un État).

Paragraphe 3 – Un État contractant ayant fait une réserve en application du paragraphe 2 doit reconnaître et exécuter une décision si sa législation, dans des circonstances de fait similaires, confère ou aurait conféré compétence à ses autorités pour rendre une telle décision.

463 Le paragraphe 3 prévoit une solution relative à l'effet d'une réserve quant aux chefs de compétence énoncés au paragraphe 2. Cette solution est conforme à l'esprit de la Convention, qui est de reconnaître et d'exécuter le plus grand nombre possible de décisions en matière d'aliments. L'élément fondamental de cet article est l'approche des États-Unis d'Amérique « basée sur les faits »[161], une nouveauté de cette Convention qui fait suite à une proposition de la Communauté européenne. Tout comme la résidence du créancier ne convient pas à certains pays, l'approche « basée sur les faits » est inconnue d'autres États. Or, elle doit être bien comprise si l'on veut qu'elle constitue un chef de compétence utile pour faciliter la reconnaissance et l'exécution des décisions. Dans cette approche, une décision étrangère est reconnue si elle est rendue dans des circonstances de fait qui, *mutatis mutandis*, constitueraient un chef de compétence dans l'État requis. Par conséquent, le chef de compétence directe sur la base duquel le juge d'origine a agi est écarté pour ne considérer que les liens de proximité factuelle. La délégation des États-Unis d'Amérique a indiqué qu'avec cette approche, il est très rare que des décisions étrangères ne soient pas reconnues aux États-Unis d'Amérique.

464 Une proposition de la délégation de la Suisse a été examinée pendant la Commission spéciale. Cette proposition soulevait les deux questions suivantes : 1) la compétence basée sur les faits devrait-elle figurer au paragraphe premier au lieu du paragraphe 3 et 2) lorsque la compétence basée sur les faits est utilisée, les États contractants devraient-ils énumérer dans une déclaration tous les chefs de compétence en sus de ceux énumérés au paragraphe premier et décrire leur mode de fonctionnement. Si l'approche « basée sur les faits » avait figuré au paragraphe premier, tous les États contractants auraient dû faire cette déclaration. Cette proposition s'est heurtée à une certaine résistance en raison de la complexité de son fonctionnement. Par conséquent le paragraphe 3 ne permet d'utiliser l'approche « basée sur les faits » qu'aux États qui font une réserve quant aux chefs de compétence prévus au paragraphe 2.

465 Il est intéressant de noter qu'une règle similaire à l'approche « basée sur les faits » a été adoptée dans certains traités bilatéraux conclus par les États-Unis d'Amérique[162].

Paragraphe 4 – Lorsque la reconnaissance d'une décision n'est pas possible dans un État contractant en raison d'une réserve faite en application du paragraphe 2, cet État prend toutes les mesures appropriées pour qu'une décision soit rendue en faveur du créancier si le débiteur réside habituellement dans cet État. La phrase précédente ne s'applique ni aux demandes directes de reconnaissance et d'exécution prévues à l'article 19(5) ni aux actions alimentaires mentionnées à l'article 2(1)(b).

466 Le paragraphe 4, comme le paragraphe 3, prévoit une autre solution garantissant au créancier le recouvrement des aliments dans le cas des États qui ont fait une réserve, conformément au paragraphe 2, portant sur les chefs de compétence. Lorsque la reconnaissance d'une décision « n'est pas possible [...] en raison d'une réserve », l'État prendra toutes les mesures appropriées pour qu'une décision soit rendue si le débiteur réside habituellement dans l'État qui a fait la réserve[163]. Dans ce cas, comme la disposition ne s'applique pas aux demandes directes, ce sera l'Autorité centrale qui procédera aux demandes nécessaires afin qu'une nouvelle décision soit rendue[164] sans que le créancier ait à introduire une nouvelle demande. Dans les hypothèses où l'approche « basée sur les faits » ne produirait aucun résultat, par exemple dans le cas très difficile d'une compétence exclusivement fondée sur le créancier (c.-à-d. en l'absence de tout autre lien), cette solution de repli augmentera les chances de recouvrement des aliments.

467 Dans le cas d'une demande présentée directement de reconnaissance et d'exécution, le créancier ne peut pas compter sur l'action automatique de l'Autorité centrale pour qu'une décision soit rendue et devra faire une demande en vertu de l'article 10(1)(d) s'il souhaite l'assistance de l'Autorité centrale. Aussi, si une demande présentée directement de reconnaissance et d'exécution est rejetée en raison d'une réserve relative à ce chef de compétence, le demandeur, qui a agi directement, peut soit continuer à agir directement en introduisant une nouvelle procédure auprès de l'autorité compétente afin d'obtenir une nouvelle décision, soit demander l'obtention d'une nouvelle décision auprès de l'Autorité centrale, en vertu de l'article 10.

468 Le mécanisme prévu par cette disposition ne s'applique pas non plus aux créances alimentaires entre époux et ex-époux lorsque la reconnaissance et l'exécution d'une décision portant sur cette créance a été refusée. Cela est dû au fait que dans certains pays, les Autorités centrales ne peuvent pas établir d'aliments entre époux et ex-époux même si la reconnaissance et l'exécution d'obligations alimentaires entre époux ou ex-époux est présentée conjointement à une demande d'aliments destinés à une personne âgée de moins de 21 ans[165].

Paragraphe 5 – Une décision en faveur d'un enfant âgé de moins de 18 ans, qui ne peut être reconnue uniquement en raison d'une réserve portant sur le paragraphe premier (c), (e) ou (f), est acceptée comme établissant l'éligibilité de cet enfant à des aliments dans l'État requis.

469 Le Groupe de travail sur la loi applicable a constaté que la différence d'approche des États qui appliquent en principe la loi de la résidence habituelle du créancier et ceux qui se fondent toujours sur la loi du for risque de produire des résultats inéquitables dans certaines hypothèses[166]. Ce serait par exemple le cas lorsqu'une décision

[161] Voir le Rapport Duncan (*op. cit.* note 9), para. 84 à 88.
[162] Voir annexe 4 du Rapport Duncan (*ibid.*). Voir aussi l'accord du 30 mai 2001 entre les États-Unis d'Amérique et les Pays-Bas, art. VII et VIII, *Netherlands Journal of Private International Law*, vol. XLVIII, 2001, p. 383.

[163] Cette disposition n'est pas en contradiction avec l'art. 18, même si cette situation n'est pas reprise au titre des exceptions de l'art. 18(2), puisque cette disposition concerne le débiteur et restreint uniquement les actions de ce dernier.
[164] Conformément à l'art. 6 de la Convention. Voir commentaires aux para. 105 et s. du présent Rapport.
[165] Voir Procès-verbal No 20, para. 40 à 49.
[166] « Proposition du Groupe de travail sur la loi applicable aux obligations alimentaires », Rapport présenté à la Commission spéciale, Doc. prél. No 14 de mars 2005 à l'intention de la Commission spéciale d'avril 2005 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Vingt et unième session (2007)*, tome II, *Loi applicable* (également accessible à l'adresse <www.hcch.net>), para. 62.

resident there, even though the ground of jurisdiction actually relied on by the authority of the United States of America is not one included in Article 20 (*e.g.*, tag jurisdiction).

Paragraph 3 – A Contracting State making a reservation under paragraph 2 shall recognise and enforce a decision if its law would in similar factual circumstances confer or would have conferred jurisdiction on its authorities to make such a decision.

463 Paragraph 3 provides for a solution with regard to the effect of making a reservation in relation to grounds of jurisdiction set out in paragraph 2. This is in line with the spirit of the Convention, that is, to recognise and enforce as many maintenance decisions as possible. The so-called "fact-based approach" from the United States of America,[161] which is a new development introduced in this Convention, is the essential element of this Article, and is based on a proposal made by the European Community. Just as the residence of the creditor does not sit well with some countries, the "fact-based approach" is unknown to others. In order to be a useful ground to facilitate the recognition and enforcement of decisions it has to be correctly understood. Under this approach, a foreign decision is recognised if made in factual circumstances that would, *mutatis mutandis*, be a basis for jurisdiction in the State addressed. In consequence, the ground of direct jurisdiction on which the judge of origin acted is disregarded and attention is only paid to the links of factual proximity. The delegation of the United States of America indicated that with this approach, very few foreign decisions on maintenance are not recognised in the United States of America.

464 Consideration was given to a proposal from the delegation of Switzerland during the Special Commission that raised the questions: 1) whether fact-based jurisdiction should appear in paragraph 1 instead of paragraph 3; and, 2) wherever the fact-based jurisdiction is used, whether Contracting States should list in a declaration any additional bases of jurisdiction to those listed in paragraph 1 and how they operate. If the "fact-based approach" had appeared in paragraph 1, all Contracting States would have been required to make this declaration. The proposal met some resistance as it would be complex to operate. Therefore, paragraph 3 opens the possibility of using the "fact-based approach" only to States making a reservation in relation to the grounds listed under paragraph 2.

465 It is interesting to note that a rule similar to the "fact-based approach" has been adopted in some bilateral treaties entered into by the United States of America.[162]

Paragraph 4 – A Contracting State shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and if the debtor is habitually resident in that State, take all appropriate measures to establish a decision for the benefit of the creditor. The preceding sentence shall not apply to direct requests for recognition and enforcement under Article 19(5) or to claims for support referred to in Article 2(1)(b).

466 Paragraph 4, like paragraph 3, provides another solution, in the case of States which have made a reservation in relation to grounds of jurisdiction set out in paragraph 2, to ensure the recovery of maintenance by creditors. Where recognition of a decision "is not possible as a result of a reservation", the State shall take all appropriate measures to establish a decision, if the debtor's habitual residence is in the State that made the reservation.[163] In that case, as the provision does not apply to direct requests, it will be the Central Authority which will proceed with the necessary applications in order to establish a new decision,[164] without the need for a new application from the creditor. Where the "fact-based approach" would not produce any result, for example in the very difficult case of pure creditor based jurisdiction (*i.e.*, without any other *nexus*), this fall-back rule will increase the chance of recovery of maintenance.

467 In the case of a direct request for recognition and enforcement the creditor cannot rely on the automatic action of the Central Authority to establish a decision, and will have to make an application under Article 10(1)(d) if she or he wishes the assistance of the Central Authority. Therefore, if a direct request for recognition and enforcement is rejected as a consequence of a reservation to this ground of jurisdiction, the applicant who acted directly may either continue to act directly in instituting new proceedings to establish a new decision before the competent authority, or may apply to the Central Authority under Article 10 for the establishment of a new decision.

468 The mechanism foreseen by this provision does not apply to claims for spousal support either, if recognition and enforcement of a decision on such a claim was refused. That is because in some countries it is not possible for Central Authorities to establish spousal support even where recognition and enforcement of spousal support is sought in combination with a claim for maintenance in respect of a person under the age of 21 years.[165]

Paragraph 5 – A decision in favour of a child under the age of 18 years which cannot be recognised by virtue only of a reservation in respect of paragraph 1(c), (e) or (f) shall be accepted as establishing the eligibility of that child for maintenance in the State addressed.

469 The Working Group on Applicable Law found that the difference in approach between States that apply, in principle, the law of the creditor's habitual residence and those that always rely on the law of the forum is liable to produce, in certain specific cases, unfair results.[166] This is the case in particular when a decision issued in the State of the

[161] See the Duncan Report (*op. cit.* note 9), paras 84-88.
[162] See Annex 4 to the Duncan Report (*ibid.*). See also the agreement between the US and the Netherlands of 30 May 2001, Arts VII and VIII, in the *Netherlands Journal of Private International Law*, Vol. XLVIII, 2001, p. 383.

[163] This provision is not in contradiction with Art. 18, even if this situation is not included under the exceptions of Art. 18(2), as that provision is addressed to the debtor and limits only his or her actions.
[164] In accordance with Art. 6 of the Convention. See comments under paras 105 *et seq.* of this Report.
[165] Minutes No 20, paras 40-49.
[166] "Proposal by the Working Group on the Law Applicable to Maintenance Obligations", Report presented to the Special Commission, Prel. Doc. No 14 of March 2005 for the attention of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance, in Hague Conference on Private International Law, *Proceedings of the Twenty-First Session (2007)*, Tome II, *Applicable law* (also available at <www.hcch.net>), para. 62.

rendue dans l'État de la résidence du créancier ne peut être reconnue dans l'État de la résidence du débiteur du fait de l'absence de compétence indirecte résultant de la réserve au titre de l'article 20(1)(c), (e) ou (f). Dans ce cas, le créancier d'aliments est contraint d'introduire sa demande dans un autre pays que celui où il réside habituellement. Cette solution est acceptable si la loi du for octroie au créancier une protection de niveau équivalent ou supérieur à celle à laquelle il aurait droit selon la loi de sa résidence. En revanche, l'application de la *lex fori* engendre des résultats inéquitables si elle est moins favorable au créancier et, en particulier, si elle considère qu'il n'est pas éligible à une prestation alimentaire, par exemple en raison de son âge. Dans ce cas, le créancier ne peut engager une procédure dans le pays du débiteur. Compte tenu de ces conclusions, il a été convenu d'inclure une règle dans le texte de la Convention afin de prévoir une solution pour les enfants âgés de moins de 18 ans[167].

470 Le terme « éligibilité » a fait l'objet de discussions qui n'ont débouché sur aucune conclusion. Il incombera donc à l'autorité compétente de l'État requis d'interpréter et d'appliquer ce terme conformément à ses lois et procédures internes.

471 Comme il a été dit pour l'article 2(1)[168], le fait que la Convention s'applique aux enfants de moins de 21 ans n'oblige pas les États à modifier leur législation si l'âge limite est de 18 ans. La seule obligation créée par la Convention est de reconnaître et d'exécuter une décision étrangère en faveur d'un enfant de moins de 21 ans. Par conséquent, si la loi de l'État d'origine considère qu'un enfant de moins de 21 ans mais de plus de 18 ans peut prétendre à des aliments, l'État requis serait contraint de prendre toute mesure nécessaire (par ex. permettre un recours) pour qu'une décision soit rendue en faveur de l'enfant. Afin d'éviter de telles situations, l'article 20(5) prévoit une limite d'âge différente.

Paragraphe 6 – Une décision n'est reconnue que si elle produit des effets dans l'État d'origine et n'est exécutée que si elle est exécutoire dans l'État d'origine.

472 Lors de la réunion de la Commission spéciale de 2005, les délégués ont particulièrement veillé à distinguer les conditions qui régissent la reconnaissance d'une décision étrangère de celles qui président à son exécution. Il faut donc bien distinguer la reconnaissance et l'exécution[169].

473 Un consensus se dégage autour d'exigences moindres pour la reconnaissance que pour l'exécution. Pour la reconnaissance, il suffit que la décision produise ses effets dans l'État d'origine (autorité de chose jugée ou *res judicata*), alors que dans le cas de la reconnaissance et de l'exécution, il faut qu'elle y soit exécutoire. Il est possible toutefois de solliciter l'exécution d'une décision qui n'est que provisoirement exécutoire dans l'État d'origine.

474 Le paragraphe 6 remplace et modernise la formulation de l'article 4 de la Convention Obligations alimentaires de 1973 (Exécution) qui pouvait donner lieu à des interprétations divergentes. La Convention de 1973 dispose qu'une décision en matière d'aliments doit être reconnue et déclarée exécutoire si elle ne peut plus faire l'objet d'un recours ordinaire dans l'État d'origine et stipule que « [l]es décisions exécutoires par provision et les mesures provisionnelles sont, quoique susceptibles de recours ordinaire, reconnues ou déclarées exécutoires dans l'État requis si pareilles décisions peuvent y être rendues et exécutées ». En matière d'aliments, où les décisions ne sont jamais définitives puisqu'elles sont susceptibles de modifications liées à des changements de circonstances tels que des fluctuations des taux de change, des variations des revenus du débiteur et l'évolution des besoins du créancier, la formulation de la Convention de 1973 n'était pas idéale.

Article 21 Divisibilité et reconnaissance ou exécution partielle

Paragraphe premier – Si l'État requis ne peut reconnaître ou exécuter la décision pour le tout, il reconnaît ou exécute chaque partie divisible de la décision qui peut être reconnue ou déclarée exécutoire.

475 Alors que l'article 19(2) limite l'application du chapitre V aux éléments de la décision qui traitent des obligations alimentaires, ce paragraphe limite la reconnaissance et l'exécution à des parties divisibles de la décision qui peuvent être reconnues et exécutées dans l'État requis. Cette formulation représente une nette amélioration par rapport à l'article 10 de la Convention Obligations alimentaires de 1973 (Exécution) qui a le même objet. Ainsi, si une décision accorde des aliments à une mère qui est un partenaire enregistré et à son enfant alors que les obligations alimentaires entre partenaires enregistrés n'entrent pas dans le champ d'application de la Convention pour l'État requis, la partie de la décision qui accorde des aliments à la mère ne pourra prétendre à la reconnaissance et à l'exécution. En revanche, il sera possible de reconnaître et d'exécuter la partie de la décision qui concerne l'enfant. « Divisible » signifie que la partie de la décision en question peut être considérée de façon autonome.

Paragraphe 2 – La reconnaissance ou l'exécution partielle d'une décision peut toujours être demandée.

476 La formulation de ce paragraphe est empruntée à l'article 14 de la Convention Obligations alimentaires de 1973 (Exécution). Il est possible, pour diverses raisons, que le créancier préfère modérer la demande de reconnaissance et d'exécution. Ainsi, des considérations fiscales pourraient l'inciter à ne pas solliciter la reconnaissance et l'exécution totale de la décision[170]. Cette règle n'a d'intérêt pratique qu'en l'absence de disposition similaire dans le droit de l'État requis.

Article 22 Motifs de refus de reconnaissance et d'exécution

477 L'un des objectifs de la nouvelle Convention est de permettre la reconnaissance et l'exécution du plus grand nombre possible de décisions en matière d'aliments. La reconnaissance ou l'exécution peut être néanmoins refusée dans les circonstances limitées prévues à l'article 22. L'emploi du terme « ou » à la fin du paragraphe (e)(ii) montre sans aucune ambiguïté que les conditions de refus de la reconnaissance et de l'exécution ne sont pas cumulatives et s'excluent mutuellement. En outre, même si une des conditions est satisfaite, l'autorité compétente requise n'est nullement tenue de refuser la reconnaissance et l'exécution. Les termes « peuvent être » expriment une possibilité et non une obligation, laquelle aurait été exprimée par les termes « doivent être » ou « sont ». Il faut souligner que la recon-

[167] *Ibid*.
[168] Commentaires aux para. 46 et s. du présent Rapport.
[169] Voir para. 429 du présent Rapport.
[170] Rapport Verwilghen (*op. cit.* para. 15), au para. 80.

Rapport explicatif

creditor's residence cannot be recognised in the State of the debtor's residence for lack of indirect jurisdiction resulting from the reservation under Article 20(1)(c), (e) or (f). In such case, the maintenance creditor is compelled to bring his or her claim in a country other than that of his or her own residence. This solution is acceptable if the *lex fori* grants the creditor a standard of protection equivalent to, or higher than, that to which she or he would have been entitled on the basis of the law of her or his own residence. On the other hand, application of the *lex fori* leads to unfair results if it is less favourable for the creditor, and in particular if it considers the creditor to be ineligible for maintenance, for instance by reason of age. In such case, the creditor is unable to institute proceedings in the debtor's country. In the light of these findings, it was agreed to include in the text of the Convention a rule to provide a solution for children under the age of 18 years.[167]

470 The term "eligibility" was the subject of discussions which were inconclusive. It will be for the competent authority of the State addressed to interpret and apply this term in accordance with its internal laws and procedures.

471 As mentioned in relation to Article 2(1),[168] the fact that the Convention applies to children under the age of 21 years does not mean that States are obliged to modify their laws if maintenance is limited to children under the age of 18 years. The only obligation under the Convention will be to recognise and enforce a foreign decision for a child under the age of 21 years. Therefore, if the "eligibility" is accepted according to the law of the State of origin for a child under 21 years but older than 18 years, the result would be to oblige the State addressed to take all appropriate measures (*e.g.*, to permit an action) to establish a decision for the benefit of the child. In order to avoid such situations, Article 20(5) establishes a different age limit.

Paragraph 6 – A decision shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

472 During the discussions in the 2005 Special Commission meeting, special attention was paid to distinguishing the conditions under which a foreign decision is recognised and the conditions under which a foreign decision is enforced. This raises the question of the distinction between recognition and enforcement.[169]

473 Consensus exists as to requiring less for recognition than for enforcement. As for recognition, it is sufficient that the decision has effect in the State of origin (legal force, or *res judicata*), whereas in the case of recognition and enforcement, it is required that the decision be enforceable in the State of origin. However, the possibility of seeking enforcement when the decision in the State of origin is only provisionally enforceable is not excluded.

474 Paragraph 6 is meant to replace and modernise wording to the same effect found in Article 4 of the 1973 Hague Maintenance Convention (Enforcement) which could lead to diverging interpretations. The 1973 Convention provides that the maintenance decision shall be recognised and enforced if it is no longer subject to ordinary forms of review in the State of origin. It went on to provide that "[p]rovisionally enforceable decisions and provisional measures shall, although subject to ordinary forms of review, be recognised or enforced in the State addressed if similar decisions may be rendered and enforced in that State". In the context of maintenance, where decisions are never final since they are subject to modifications in relation to changes of circumstances such as exchange rate fluctuations, differences of earnings of the debtor and changes of needs of the creditor, the wording of the 1973 Convention was not ideal.

Article 21 Severability and partial recognition and enforcement

Paragraph 1 – If the State addressed is unable to recognise or enforce the whole of the decision, it shall recognise or enforce any severable part of the decision which can be so recognised or enforced.

475 Whereas Article 19(2) limits the application of Chapter V to the elements of the decision that deal with maintenance obligations, this paragraph limits the recognition and enforcement to any severable parts of the decision that can be recognised and enforced in the State addressed. This wording is a clear improvement in comparison with Article 10 of the 1973 Hague Maintenance Convention (Enforcement) that is to the same effect. For example, a decision grants maintenance to a mother who is a registered partner and her child. However, if maintenance obligations between registered partners are not within the scope of the Convention for the State addressed, the part of the decision awarding maintenance to the mother will not be entitled to recognition and enforcement. On the other hand, it will still be possible to recognise and enforce the part of the decision concerning the child. "Severable" means that the part of the decision in question is capable of standing alone.

Paragraph 2 – Partial recognition or enforcement of a decision can always be applied for.

476 The wording of this paragraph is borrowed from Article 14 of the 1973 Hague Maintenance Convention (Enforcement). It may be that the creditor, for different reasons, would prefer to tone down the application for recognition and enforcement. For example, fiscal considerations could compel the creditor not to seek full recognition and enforcement of the decision.[170] The rule is only of practical value if a similar provision does not already exist in the law of the State addressed.

Article 22 Grounds for refusing recognition and enforcement

477 One of the objectives of the new Convention is to recognise and enforce as many maintenance decisions as possible. However, recognition or enforcement may be refused in the limited circumstances set out in Article 22. The use of the term "or" at the end of paragraph (e)(ii) shows clearly that the conditions for non-recognition and enforcement are not cumulative but alternative. Furthermore, even if one of the conditions is met, the competent authority addressed is under no obligation to refuse recognition and enforcement. The verb "may" expresses the idea of possibility and not of obligation, which would have been expressed by "must" or "shall". It is to be noted that recog-

[167] *Ibid*.
[168] See comments under paras 46 *et seq.* of this Report.
[169] See para. 429 of this Report.
[170] Verwilghen Report (*op. cit.* para. 15), at para. 80.

naissance et l'exécution des décisions sont rarement refusées aux motifs exposés dans cette disposition.

La reconnaissance et l'exécution de la décision peuvent être refusées si :

Paragraphe (a) – la reconnaissance et l'exécution de la décision sont manifestement incompatibles avec l'ordre public de l'État requis ;

478 Comme dans d'autres Conventions de La Haye, telles que la Convention Obligations alimentaires de 1973 (Exécution), et dans d'autres instruments internationaux, le premier motif de refus de reconnaissance ou d'exécution de décisions relatives à des aliments est leur caractère manifestement contraire à l'ordre public dans l'État où la reconnaissance ou l'exécution est demandée. Dans l'application de cette disposition, l'autorité compétente devra vérifier si la reconnaissance et l'exécution d'une décision spécifique engendrerait un résultat intolérable dans l'État requis. Une simple divergence par rapport au droit interne ne suffit pas pour la mise en œuvre de cette exception. La vérification de la compatibilité d'une décision avec l'ordre public ne doit pas servir de prétexte à une révision générale sur le fond, laquelle est expressément défendue par la Convention (voir art. 28 et para. 548 du présent Rapport). Ce motif de refus de reconnaissance et d'exécution est également prévu à l'article 5 de la Convention de 1973.

479 Quelques délégations ont craint pendant la Commission spéciale un emploi systématique de l'exception d'ordre public pour les questions relatives à l'état des personnes. Ainsi, par exemple, il serait inapproprié qu'un État refuse systématiquement de reconnaître et d'exécuter des décisions d'aliments destinés aux enfants au motif, qu'en vertu de sa loi, un père n'est pas tenu de verser des aliments à un enfant né hors mariage. Dans tous les cas, l'exception d'ordre public devrait être appliquée de façon très restrictive.

Paragraphe (b) – la décision résulte d'une fraude commise dans la procédure ;

480 Ce motif de non-reconnaissance a fait l'objet de discussions prolongées car la signification de la fraude et le lien qu'elle entretient avec d'autres exceptions diffèrent très sensiblement d'un pays à l'autre. Une fraude est une malhonnêteté ou une malversation délibérée. Il pourrait s'agir par exemple d'un plaignant qui signifie ou fait signifier délibérément une décision à une adresse erronée ou d'une partie qui tente de corrompre l'autorité ou dissimule des preuves, etc.[171] Ce motif de refus de reconnaissance et d'exécution est également prévu à l'article 5 de la Convention Obligations alimentaires de 1973 (Exécution).

481 Une certaine confusion est apparue lors des débats de la Commission spéciale autour de la notion de fraude et de ce qui la distingue de l'ordre public. Les deux concepts diffèrent. Les cas de fraude illustrés plus haut ne sont pas nécessairement couverts par l'exception d'ordre public. Le concept de fraude présuppose la présence d'un élément subjectif de déclaration dolosive ou de manœuvres frauduleuses, et non une simple erreur ou négligence de la part de la partie qui sollicite la reconnaissance et l'exécution. Il faut souligner que ce paragraphe ne vise que la fraude dans le cadre de la procédure, ce qui diffère de l'exception de fraude à la loi dans les questions de choix de la loi.

482 La récente Convention Élection de for de 2005 prévoit, parmi les motifs de refus de reconnaissance et d'exécution, l'hypothèse dans laquelle « le jugement résulte d'une fraude relative à la procédure » (art. 9(d))[172].

Paragraphe (c) – un litige entre les mêmes parties et ayant le même objet est pendant devant une autorité de l'État requis, première saisie ;

483 Ce motif de refus de reconnaissance et d'exécution est prévu à l'article 5 de la Convention Obligations alimentaires de 1973 (Exécution). Dans une certaine mesure, il intègre à la Convention le concept de litispendance à la date de reconnaissance et d'exécution, généralement prévue au titre des règles de compétence directe. Toutefois, il ne s'agit pas *stricto sensu* de litispendance car la disposition ne couvre que les procédures ayant le même « objet ». Les particularités des aliments sont à souligner. En matière d'aliments, la « cause de l'action » est toujours la même (c.-à-d., les aliments), la seule différence étant de savoir si la demande vise à obtenir des aliments ou à les modifier ou, si l'action est introduite par le débiteur, à faire déclarer inexistante une obligation alimentaire. La situation se distingue donc de celles qui se posent dans d'autres matières civiles ou commerciales, où des causes d'action véritablement différentes peuvent se poser.

484 La Convention ne comprend aucune règle indiquant quand une procédure est pendante dans un État. Il faudra se référer pour cela au droit interne de l'État requis.

Paragraphe (d) – la décision est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque la dernière décision remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis ;

485 L'incompatibilité de décisions est un autre motif de refus de reconnaissance et d'exécution d'une décision étrangère. La décision doit être rendue entre les mêmes parties et pour le même objet. Ce motif de refus de reconnaissance et d'exécution est également prévu à l'article 5 de la Convention Obligations alimentaires de 1973 (Exécution). Lorsque la décision a été rendue dans l'État requis, aucune condition supplémentaire n'est nécessaire et ce cas de figure doit être rattaché au paragraphe (c). Lorsque la décision a été rendue dans un État autre que l'État requis, cette décision doit remplir les conditions de reconnaissance et d'exécution de l'État requis. La Convention est muette sur la date à laquelle la décision a été rendue dans cet État tiers. La question a été débattue lors de la Session diplomatique[173] et il a été conclu qu'il n'était pas approprié d'introduire un facteur temporel dans le paragraphe (d). Aussi, cette question est laissée à l'appréciation du juge ou de l'autorité qui décidera, au cas par cas, laquelle de ces décisions incompatibles est prioritaire.

Paragraphe (e) – dans les cas où le défendeur n'a ni comparu, ni été représenté dans les procédures dans l'État d'origine :

486 Le paragraphe (e) s'inspire d'une proposition faite dans le Document de travail No 70[174], dont l'application aux alinéas (i) et (ii) a été jugée acceptable à l'issue des discussions en Séance plénière[175]. En réalité, la difficulté résidait dans la nécessité de rédiger une disposition qui couvre

[171] Voir art. 10(1)(d) (Demandes disponibles) et les commentaires aux para. 253 et s. du présent Rapport.

[172] Rapport explicatif de T. Hartley et M. Dogauchi (*op. cit.* note 46), para. 189.
[173] Voir Procès-verbal No 10, para. 47 et 55.
[174] Proposition des délégations du Canada, de la Chine, d'Haïti, d'Israël, du Japon, de la Fédération de Russie et de la Suisse.
[175] Voir Procès-verbal No 20, para. 50 à 69.

nition and enforcement of decisions are rarely refused on the basis of the grounds set out in this provision.

Recognition and enforcement of a decision may be refused if –

Paragraph (a) – recognition and enforcement of the decision is manifestly incompatible with the public policy ("*ordre public*") of the State addressed;

478 As in other Hague Conventions, such as the 1973 Hague Maintenance Convention (Enforcement) and other international instruments, the first ground of non-recognition or non-enforcement of decisions relating to maintenance is the fact that it is manifestly contrary to public policy (*ordre public*) in the State in which recognition or enforcement is sought. In its application of this provision, the competent authority should verify whether the recognition and enforcement of a specific decision would lead to an intolerable result in the State addressed. A discrepancy of any kind with the internal law is not sufficient to use this exception. Verifying whether a decision is contrary to public policy should not serve as a pretext for embarking on a general review on the merits, something which is expressly forbidden under the Convention (see Art. 28 and para. 548 of this Report). The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Convention.

479 Some delegations expressed their concerns during the Special Commission regarding the possible systematic use of the public policy exception in relation to issues of personal status. It would, for example, be inappropriate for a State systematically to refuse to recognise and enforce child support orders on the basis that, under its law, a father has no obligation to maintain a child born out of wedlock. The public policy exception should in any case have only a very limited application.

Paragraph (b) – the decision was obtained by fraud in connection with a matter of procedure;

480 This ground for non-recognition was the subject of lengthy discussions since it appears that there are important differences among the different States as to the meaning of fraud and as to its relation with other exceptions. Fraud is deliberate dishonesty or deliberate wrongdoing. Examples would be where the plaintiff deliberately serves the writ, or causes it to be served on the wrong address, or where the party seeks to corrupt the authority or conceals evidence, etc.[171] The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement).

481 Discussions in the Special Commission revealed some confusion as to what is fraud and how it is different from *ordre public*. The two concepts are different. Cases of fraud are not necessarily covered by the public policy exception as shown in the above examples. The concept of fraud presupposes the presence of a subjective element of wilful misrepresentation or fraudulent machinations, not simply a mistake or negligence, on the part of the party seeking recognition and enforcement. It is important to note that in this paragraph reference is made only to fraud in connection with a matter of procedure which is different from the exception of "*fraude à la loi*" in choice of law questions.

482 The recent 2005 Hague Choice of Court Convention includes as a ground for the refusal of recognition and enforcement the case where "the judgment was obtained by fraud in connection with a matter of procedure" (Art. 9(d)).[172]

Paragraph (c) – proceedings between the same parties and having the same purpose are pending before an authority of the State addressed and those proceedings were the first to be instituted;

483 The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement). This ground to some extent integrates in the Convention the concept of *lis pendens* at the time of recognition and enforcement, where it is usually provided under the direct jurisdiction rules. However, it is not strictly *lis pendens* as the provision only covers proceedings for the same "purpose". The particularities of maintenance should be underlined. In maintenance the "cause of action" is always the same (i.e., maintenance), the only differences being whether the request is for maintenance, or for its modification or, if the action is introduced by the debtor, for a declaration about the nonexistence of an obligation to pay maintenance. This is a different situation by comparison with other civil and commercial matters where really different causes of action can arise.

484 The Convention does not include any rule indicating when proceedings are pending in a State. One will have to refer to the internal law of the State addressed on this matter.

Paragraph (d) – the decision is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed;

485 The case of conflicting decisions is another ground for not recognising or enforcing a foreign decision. The decision has to be rendered between the same parties and for the same purpose. The same ground for refusing recognition and enforcement is found in Article 5 of the 1973 Hague Maintenance Convention (Enforcement). For the case where the decision has been given in the State addressed, no other condition is needed and it is connected with paragraph (c). Where the decision has been rendered in a different State than the State addressed, it is necessary for this decision to fulfil the conditions to be recognised or enforced in the State addressed. Nothing is said in the Convention about the date on which the decision has been given in this third State. The question was discussed during the Diplomatic Session[173] and the conclusion was that it was not convenient to have a time factor determined in paragraph (d). It would be left to the wisdom of the judge or the authority to decide in each individual case which of the incompatible decisions has priority.

Paragraph (e) – in a case where the respondent has neither appeared nor was represented in proceedings in the State of origin –

486 Paragraph (e) is drawn from a proposal made in Working Document No 70[174] that was considered acceptable for application to both sub-paragraphs (i) and (ii) as a result of discussions in Plenary.[175] In fact, the problem was to draft the provision in a way that made it applicable to both judi-

[171] See Art. 10(1)(d) (Available applications) and comments under paras 253 *et seq.* of this Report.

[172] Explanatory Report, T. Hartley and M. Dogauchi (*op. cit.* note 46), para. 189.
[173] Minutes No 10, paras 47 and 55.
[174] Proposal of the delegations of Canada, China, Haiti, Israel, Japan, Russian Federation and Switzerland.
[175] Minutes No 20, paras 50-69.

à la fois les systèmes judiciaires et les systèmes administratifs. Dans ces derniers, le bien-fondé d'une action est initialement examiné en l'absence du défendeur. Le paragraphe (e) traite également du cas où le défendeur n'était pas représenté dans les procédures dans l'État d'origine.

Alinéa (i) – lorsque la loi de l'État d'origine prévoit un avis de la procédure, le défendeur n'a pas été dûment avisé de la procédure et n'a pas eu l'opportunité de se faire entendre ; ou

487 L'alinéa (i) vise les systèmes judiciaires voire les systèmes administratifs où le défendeur est entendu devant l'autorité. L'expression « dûment avisé » signifie qu'il suffit que le défendeur ait été avisé d'une façon qui lui permette de réagir, mais il n'est pas nécessaire que la procédure lui ait été dûment signifiée ou notifiée.

Alinéa (ii) – lorsque la loi de l'État d'origine ne prévoit pas un avis de la procédure, le défendeur n'a pas été dûment avisé de la décision et n'a pas eu la possibilité de la contester ou de former un appel en fait et en droit ; ou

488 L'alinéa (ii) est adapté aux systèmes administratifs dans lesquels les décisions sont rendues non contradictoirement et les droits de la défense sont respectés en permettant au défendeur de contester la décision en fait et en droit après le prononcé de la décision. Tel est le cas des systèmes administratifs tels que ceux de l'Australie et de la Norvège.

Paragraphe (f) – la décision a été rendue en violation de l'article 18.

489 L'article 18 impose aux États contractants de ne pas se déclarer compétents en violation de l'article 18. Le non-respect de cette règle peut aboutir à la non-reconnaissance d'une décision rendue en violation de cette règle[176].

Article 23 Procédure pour une demande de reconnaissance et d'exécution

490 Cet article règle certains aspects de la procédure à suivre pour la reconnaissance et l'exécution d'une décision étrangère lorsque la reconnaissance ou la reconnaissance et l'exécution sont demandées. L'objectif est d'établir une procédure simplifiée, rapide et économique. La nouvelle procédure est conçue pour éviter la complexité et les coûts de nombreuses procédures internationales existantes – qui sont à l'origine de leur sérieuse sous-utilisation. L'objectif est ambitieux et plus difficile à réaliser au niveau international qu'aux niveaux régionaux où l'élaboration de systèmes simplifiés pose moins de problèmes[177]. Néanmoins, l'élaboration d'une procédure rationnalisée et partiellement harmonisée au niveau international est apparue comme une nécessité si l'on voulait donner un réel effet aux droits alimentaires des créanciers moyens à l'échelle internationale. D'autres États sont en revanche resté préoccupés quant à une interférence indue avec les lois et procédures internes. C'est la raison pour laquelle, lors de la Session diplomatique, il a été décidé d'ajouter une procédure alternative à l'article 24[178]. Les articles 23 et 24 doivent être rapprochés de l'article 52 (Règle de l'efficacité maximale) de façon qu'un État puisse adopter des procédures simplifiées et plus rapides, à condition que celles-ci soient compatibles avec la protection accordée aux parties par les articles 23 et 24 (voir art. 52(2)).

491 Les caractéristiques importantes de la procédure de l'article 23 sont les suivantes :

a) une procédure simple et rapide d'enregistrement d'une décision étrangère aux fins d'exécution (ou de déclaration de force exécutoire), qui exclut toute objection des parties et n'autorise que des contrôles d'office limités (voir ci-dessous, l'étude du para. 4), et

b) la charge de soulever des objections à l'enregistrement (ou à la déclaration) pèse sur le débiteur, dont le droit de contester ou de faire appel est limité à la fois au plan des délais et des motifs.

492 Dans l'hypothèse courante d'une demande de reconnaissance et d'exécution transmise par les Autorités centrales en vertu du chapitre III, le point de départ de cet article est que la demande a été traitée par l'Autorité centrale requise en vertu de l'article 12[179] et n'a pas été rejetée. La demande sera accompagnée des documents énumérés à l'article 25. Cet article précise les mesures qui doivent ensuite être prises par les autorités de l'État requis et les voies ouvertes au demandeur et au défendeur.

493 L'expression « procédure pour une demande de reconnaissance et d'exécution » couvre toutes les possibilités existant dans les différents États : enregistrement aux fins d'exécution, déclaration de force exécutoire, exequatur, etc.

494 Une distinction est faite entre l'hypothèse dans laquelle la demande a été présentée par l'intermédiaire des Autorités centrales (para. 2) et celle où elle a été présentée directement à une autorité compétente (para. 3). Voir aussi l'article 37.

Paragraphe premier – Sous réserve des dispositions de la Convention, les procédures de reconnaissance et d'exécution sont régies par la loi de l'État requis.

495 Cet article ne doit pas être confondu avec l'article 32, qui vise les mesures d'exécution, c'est-à-dire l'exécution *stricto sensu* et non la procédure intermédiaire à laquelle une décision étrangère est soumise avant d'être exécutée en vertu du droit interne.

Paragraphe 2 – Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire des Autorités centrales conformément au chapitre III, l'Autorité centrale requise doit promptement :

Alinéa (a) – transmettre la demande à l'autorité compétente qui doit sans retard déclarer la décision exécutoire ou procéder à son enregistrement aux fins d'exécution ; ou

Alinéa (b) – si elle est l'autorité compétente, prendre elle-même ces mesures.

496 Les paragraphes 2 et 3 régissent la procédure de reconnaissance et d'exécution. Ils sont rédigés avec flexibilité pour être compatibles avec les différentes procédures d'exequatur, mais ils imposent en même temps une action rapide.

176 Voir para. 419 du présent Rapport.

177 Voir par ex. les régimes de Bruxelles / Lugano, de l'UIFSA et le régime canadien.

178 Sur l'équilibre de ces deux articles, adoptés le 21 novembre 2007 seulement, voir Procès-verbal No 22, para. 24 à 49. Sur l'origine de ces textes, voir Doc. trav. No 62, présentant une proposition de compromis élaborée par un groupe de travail informel de délégations. Ce groupe informel était composé des délégations du Canada, de la Chine, de la Communauté européenne, des États-Unis d'Amérique, du Japon, de la Fédération de Russie et de la Suisse.

179 Voir les remarques relatives à l'art. 12.

Rapport explicatif

cial and administrative systems. In the latter system, the merits of a matter are initially considered in the absence of a defendant. Paragraph (e) also deals with the situation where the respondent was not represented in proceedings in the State of origin.

Sub-paragraph (i) – when the law of the State of origin provides for notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or

487 Sub-paragraph (i) is geared towards judicial systems or even administrative systems where the defendant is heard before the authority. The term "proper notice" signifies that it is sufficient that the defendant be notified in a way to provide an opportunity to react, but it is not necessary for the defendant to have been duly served.

Sub-paragraph (ii) – when the law of the State of origin does not provide for notice of the proceedings, the respondent did not have proper notice of the decision and an opportunity to challenge or appeal it on fact and law; or

488 Sub-paragraph (ii) is adapted to administrative systems where decisions are rendered *ex parte* and due process is respected by allowing the defendant to challenge the decision on fact and law after the decision is rendered. This is the case in administrative systems such as in Australia and Norway.

Paragraph (f) – the decision was made in violation of Article 18.

489 Article 18 contains an obligation for Contracting States not to take jurisdiction in violation of Article 18. Non-compliance with this rule may result in the non-recognition of a decision made in violation of that rule.[176]

Article 23 Procedure on an application for recognition and enforcement

490 This Article governs certain aspects of the procedure to be followed for recognition and enforcement of a foreign decision when either recognition or recognition and enforcement are requested. The objective is to establish a procedure which is simplified, speedy and low cost. The new procedure is designed to overcome the complexity and costs associated with many procedures in international cases – which have resulted in their serious under-use. The objective is an ambitious one, and one which is more difficult to achieve at the international level than at regional levels where the development of simplified systems is easier.[177] Nevertheless, the development of a streamlined and partially harmonised procedure at the international level was seen as a necessity if the maintenance rights of average creditors are to be given real effect at the international level. By contrast, certain States maintained concerns about undue interference with domestic laws and procedures and this is the reason for the addition, in the course of the Diplomatic Session, of the alternative procedure in Article 24.[178] Articles 23 and 24 have to be read jointly with Article 52 (Most effective rule) in the sense that a State may adopt simplified, more expeditious procedures, provided that these are compatible with the protection given to the parties under Articles 23 and 24 (see Art. 52(2)).

491 Important features of the Article 23 procedure are:

a) a rapid and simple procedure for the registration of a foreign decision for enforcement (or for a declaration of its enforceability) excluding submissions from the parties and allowing only limited *ex officio* review (see below under para. 4), and

b) the onus of raising objections to the registration (or declaration) is placed on the debtor whose right to challenge or appeal is limited both in time and as to the grounds.

492 In the usual case of an application for recognition and enforcement made through the Central Authorities under Chapter III, the starting point for this Article is that the application has been processed, and not rejected, by the requested Central Authority under Article 12.[179] The application will be accompanied by the documents specified in Article 25. This Article specifies which actions are then to be performed by the authorities of the State addressed, and the courses of action open to the applicant and the respondent.

493 The phrase "procedure on an application for recognition and enforcement" includes all the possibilities existing in the different States: registration for enforcement, declaration of enforceability, *exequatur*, etc.

494 A distinction is made between the case where the application has been made through Central Authorities (para. 2) and the case where it has been made directly to a competent authority (para. 3). See also Article 37.

Paragraph 1 – Subject to the provisions of the Convention, the procedures for recognition and enforcement shall be governed by the law of the State addressed.

495 This Article is not to be confused with Article 32, which refers to enforcement measures, which means enforcement *stricto sensu* and not the intermediate procedure to which a foreign decision is submitted before being enforced under internal law.

Paragraph 2 – Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

Sub-paragraph (a) – refer the application to the competent authority which shall without delay declare the decision enforceable or register the decision for enforcement; or

Sub-paragraph (b) – if it is the competent authority take such steps itself.

496 Paragraphs 2 and 3 govern the process of recognition and enforcement. They are drafted flexibly to accommodate different procedures of *exequatur*, but at the same time they require prompt action.

[176] See para. 419 of this Report.
[177] See, for example, Brussels / Lugano, UIFSA and Canadian regimes.
[178] For further explanation of the two Articles, adopted finally on 21 November 2007, see Minutes No 22, paras 24-49. For the origin, see Work. Doc. No 62, containing a compromise proposal by an informal working group of delegations. The informal group was composed of delegations from Canada, China, the European Community, Japan, the Russian Federation, Switzerland and the United States of America.
[179] See comments on Art. 12.

497 Pour les affaires dans lesquelles la demande est transmise par l'Autorité centrale de l'État d'origine, le paragraphe 2 évoque deux possibilités, qui sont fonction des particularités des États. Dans certains États, l'Autorité centrale de l'État requis peut déterminer si la décision peut être enregistrée aux fins d'exécution ou déclarée exécutoire. Dans d'autres, l'Autorité centrale ne peut prendre cette décision ; dans ce cas, elle doit promptement transmettre la demande à l'autorité compétente de l'État requis. Dans les deux cas, les autorités responsables doivent agir « promptement » ou « sans retard » pour enregistrer la décision ou la déclarer exécutoire.

Paragraphe 3 – Lorsque la demande est présentée directement à l'autorité compétente dans l'État requis en vertu de l'article 19(5), cette autorité déclare sans retard la décision exécutoire ou procède à son enregistrement aux fins d'exécution.

498 L'autorité de l'État requis doit rendre sa décision « sans retard », un terme qui n'équivaut pas à « dès l'achèvement des formalités prévues à l'article 53 » de l'article 41 du Règlement Bruxelles I. La raison en est qu'il n'a pas été jugé réaliste d'introduire une telle règle dans une Convention mondiale, tout comme il n'a pas été jugé opportun de fixer un délai. L'objectif de l'expression « sans retard » est d'amener l'autorité de l'État requis à statuer dès que possible sur la demande, de la même façon que l'expression « avec célérité » est employé dans d'autres Conventions[180]. Toutefois, c'est le droit interne de l'État requis qui détermine l'effet pratique de cette expression.

499 « Sans retard » aux paragraphes 2(a) et 3 et « promptement » au paragraphe 2 ont le même sens.

Paragraphe 4 – Une déclaration ou un enregistrement ne peut être refusé que pour le motif prévu à l'article 22(a). À ce stade, ni le demandeur ni le défendeur ne sont autorisés à présenter d'objection.

500 Ce paragraphe énonce le seul motif pour lequel l'autorité compétente de l'État requis peut procéder à un contrôle d'office de la demande de reconnaissance et d'exécution, à savoir l'incompatibilité avec l'ordre public de l'État requis, comme indiqué à l'article 22(a).

501 Au stade de l'enregistrement ou de la déclaration, ni le demandeur ni le défendeur n'ont la possibilité de présenter des arguments. Cela parce que la procédure doit être aussi rapide et aussi simple que possible, et il est probable que dans la grande majorité des affaires, aucun argument ne serait présenté.

502 Il est à noter qu'au moment du contrôle d'office, s'il y a des doutes sérieux quant à l'intégrité ou à l'authenticité d'un document, l'autorité compétente peut en demander une copie intégrale certifiée (voir plus loin, les para. 510 et 511 et 538 à 540).

Paragraphe 5 – La déclaration ou l'enregistrement fait en application des paragraphes 2 et 3, ou leur refus en vertu du paragraphe 4, est notifié promptement au demandeur et au défendeur qui peuvent le contester ou former un appel, en fait et en droit.

503 La déclaration de force exécutoire ou l'enregistrement effectué en vertu du paragraphe 2 ou 3 sera notifié « promptement » au demandeur et au défendeur. L'emploi de l'expression « promptement » répond aux intérêts et difficultés soulevés aux paragraphes 2 et 3 et son objet est d'exprimer l'idée que la notification doit être effectuée dès que possible.

504 La règle du paragraphe 5 autorise le demandeur et le défendeur à contester la décision relative à l'enregistrement ou la déclaration ou à faire appel de celle-ci. Cependant, les seuls motifs d'appel sont ceux qui sont énoncés au paragraphe 7 ou 8 ci-dessous. Cette limitation des motifs d'appel doit être considérée à la lumière du contrôle (excepté dans le cas des demandes « présentées directement ») qui a été exercé par les Autorités centrales dans le traitement de la demande et à la lumière des limites exposées aux articles 27 et 28. L'utilisation des termes « contestation » et « appel » vise à refléter une distinction importante entre systèmes judiciaires et administratifs. Ces deux expressions poursuivent le même objectif, à savoir offrir la possibilité de s'opposer à la décision initialement adoptée. Dans les systèmes administratifs, cela implique la possibilité de « contester » la décision[181], alors que dans les systèmes judiciaires, cela implique la possibilité de « former un appel » à l'encontre d'une décision.

505 Le droit de contester ou de faire appel « en fait et en droit » signifie que la contestation ou l'appel peut porter sur les faits, le droit, ou sur les faits et le droit. Il ne s'agit pas d'une révision au fond ou une nouvelle détermination des faits, interdites par les articles 27 et 28. Les seuls motifs de contestation ou d'appel autorisés sont énoncés au paragraphe 7 ou, dans le cas du défendeur, également au paragraphe 8.

506 Au stade de la contestation ou de l'appel, la procédure est contradictoire. C'est ce qui dans les pays de *common law* est appelé « *adversarial* », ce qui signifie que les deux parties ont la possibilité d'être entendues. Il faut préciser que « *adversarial* » ou « contradictoire » ne doit en aucun cas être confondu avec « contentieux ». Dans certains États de droit civil, le terme « contradictoire » signifie « contentieux » et « contradictoire », alors que ce n'est pas le cas dans d'autres États. Il en ressort que bien que la procédure doive toujours être contradictoire, le fait qu'elle soit ou non également contentieuse dépend du droit interne du for qui détermine d'autres questions de procédure (*lex fori regit processum*).

Paragraphe 6 – La contestation ou l'appel est formé dans les 30 jours qui suivent la notification en vertu du paragraphe 5. Si l'auteur de la contestation ou de l'appel ne réside pas dans l'État contractant où la déclaration ou l'enregistrement a été fait ou refusé, la contestation ou l'appel est formé dans les 60 jours qui suivent la notification.

507 Une importante amélioration apportée par cette Convention est l'instauration d'un délai de contestation ou d'appel de la déclaration de force exécutoire ou d'enregistrement aux fins d'exécution par les parties. Cela répond à l'objectif de la Convention qui est de donner effet dès que possible à une décision relative à des aliments. Tout délai indu doit être évité et un délai long pour une telle contestation ou un tel appel peut nuire au créancier d'aliments.

508 Étant donné que la grande majorité des demandes de reconnaissance et d'exécution seront accueillies, il est logique que le délai d'appel soit bref, 30 jours à compter de

[180] Art. 14 de la Convention Élection de for de 2005.

[181] La contestation d'une décision peut inclure tant le fait de déférer la décision en deuxième instance que le réexamen de la décision par l'autorité qui l'a rendue.

497 For the cases where the application is made through the Central Authority in the State of origin, paragraph 2 makes reference to the two different possibilities according to the particularities of the States. It is possible that in some States it is the Central Authority of the State addressed which determines if the decision may be registered for enforcement or declared enforceable. In other States, it may not be possible for the Central Authority to make this determination and, in those cases, the Central Authority must promptly refer the application to the competent authority in the State addressed. In both cases, the responsible authorities must act "promptly" or "without delay" in registering or declaring enforceable the decision.

Paragraph 3 – Where the request is made directly to a competent authority in the State addressed in accordance with Article 19(5), that authority shall without delay declare the decision enforceable or register the decision for enforcement.

498 The authority of the State addressed must give its decision "without delay", a term which is not equivalent to "immediately on completion of the formalities in Article 53" as in Article 41 of the Brussels I Regulation. The reason is that it was not considered realistic to introduce such a rule in a worldwide Convention, just as it was not considered advisable to set a time limit. The aim of the term "without delay" is to lead the authority in the State addressed to decide on the application as soon as possible, in the same way that the term "expeditiously" is used in other Conventions.[180] But it is the internal law of the State addressed which determines the practical effect of this expression.

499 "Without delay" in paragraphs 2(a) and 3 and "promptly" in paragraph 2 have the same meaning.

Paragraph 4 – A declaration or registration may be refused only on the ground set out in Article 22(a). At this stage neither the applicant nor the respondent is entitled to make any submissions.

500 This paragraph specifies the only ground upon which the relevant authority in the State addressed may review *ex officio* the application for recognition and enforcement, namely incompatibility with the public policy of the State addressed as specified in Article 22(a).

501 At the stage of registration or declaration, neither the applicant nor the respondent have any possibility to make submissions. The reason for this is that the procedure has to be as fast and as simple as possible and, probably, in the great majority of cases, no further submissions would be made.

502 It is to be noted that at the time of the *ex officio* review, if there are serious questions concerning the integrity or authenticity of a document, the competent authority may ask for the complete certified copy of the document. See below, paragraphs 510 and 511, and 538 to 540.

Paragraph 5 – The applicant and the respondent shall be promptly notified of the declaration or registration, made under paragraphs 2 and 3, or the refusal thereof in accordance with paragraph 4, and may bring a challenge or appeal on fact and on a point of law.

503 The declaration of enforceability or the registration made according to paragraph 2 or 3 will be "promptly" notified both to the applicant and to the respondent. The use of the term "promptly" responds to the same interest and difficulties seen in paragraphs 2 and 3 and seeks to express the idea that the notification has to be made as soon as possible.

504 The rule in paragraph 5 allows the applicant and the respondent to challenge or to appeal against the decision for or against registration or a declaration. But the only grounds for the appeal are those cited in paragraph 7 or 8 below. This limitation on the possible grounds of appeal should be seen in the light of the control (save in the case of "direct" requests) which has been exercised by the Central Authorities in processing the application, and in the light of the standard limitations set out in Articles 27 and 28. The terms "challenge" and "appeal" are used with the objective of recognising an important distinction between judicial and administrative systems. The objective of both terms is the same, to allow the possibility to oppose the decision first adopted. In administrative systems this means the possibility to "challenge" the decision.[181] In a judicial system it means the possibility to "appeal" against the decision.

505 The right to challenge or appeal "on fact and on a point of law" means that the challenge or appeal may be on fact, on a point of law, or on fact and on a point of law. It is not a review of the merits or a new finding of facts, prohibited by Articles 27 and 28. The challenge or appeal may only be on grounds set out in paragraph 7 or, in the case of the respondent, also in paragraph 8.

506 At the stage of challenge or appeal, the procedure is adversarial. It is what in France or in other countries of civil law is known as "*contradictoire*", which means that both parties have the opportunity to be heard. It should be made clear that "adversarial" or "*contradictoire*" must not, under any circumstances, be equated with "contentious". In some States of civil law tradition the term "*contradictoire*" means contentious as well as adversarial, whereas this is not the case in other States. Hence, although the procedure must always be adversarial, whether or not it is also contentious will depend on internal law of the forum which also determines other matters of procedure (*lex fori regit processum*).

Paragraph 6 – A challenge or an appeal is to be lodged within 30 days of notification under paragraph 5. If the contesting party is not resident in the Contracting State in which the declaration or registration was made or refused, the challenge or appeal shall be lodged within 60 days of notification.

507 An important improvement in this Convention is the establishment of a time limit in which the parties may lodge a challenge or an appeal against the declaration of enforceability or registration for enforcement. This follows the Convention objective of making the decision on maintenance effective as soon as possible. Any undue delay has to be avoided and a long delay for such a challenge or appeal may be damaging for the maintenance creditor.

508 Since the great majority of applications for recognition and enforcement will be successful, it is logical that the time allowed for appeal should be brief, 30 days from

[180] Art. 14 of the 2005 Hague Choice of Court Convention.

[181] Challenge of a decision may include both bringing the decision before a second instance as well as a review of the decision by the authority which made the decision.

la date de notification de la décision[182]. Si la partie qui conteste réside dans un autre État contractant que celui dans lequel la décision autorisant la reconnaissance et l'exécution a été rendue, le délai d'appel est porté à 60 jours. Il n'y a aucune obligation de résidence habituelle car ce n'est qu'une question de contestation. Le délai est le même pour les deux parties, demandeur et défendeur. Cependant, la Convention n'empêche pas le demandeur d'introduire une nouvelle demande.

Paragraphe 7 – La contestation ou l'appel ne peut être fondé que sur :

Alinéa (a) – les motifs de refus de reconnaissance et d'exécution prévus à l'article 22 ;

Alinéa (b) – les bases de reconnaissance et d'exécution prévues à l'article 20 ;

Alinéa (c) – l'authenticité ou l'intégrité d'un document transmis conformément à l'article 25(1)(a), (b) ou (d) ou (3)(b).

509 En raison des objectifs de la Convention et des limites posées au droit de contestation ou d'appel par le paragraphe 6, les seuls motifs de contestation ou d'appel sont ceux qui sont énoncés au paragraphe 7. Ce sont : à l'alinéa (a), les motifs de refus de reconnaissance et d'exécution prévus à l'article 22 et, à l'alinéa (b), les bases de reconnaissance et d'exécution prévues à l'article 20. Enfin, un autre motif de contestation ou d'appel renvoie à l'authenticité et à l'intégrité de certains documents.

510 Ce dernier motif s'est avéré nécessaire dès lors qu'il a été convenu de ne pas exiger la fourniture d'originaux ou de copies certifiées conformes de certains des documents énumérés à l'article 25[183], dans la première phase de la demande. Cela ne signifie pas pour autant que tout document doit être accepté en vertu de la Convention. Le système établi à l'article 25 de la Convention garantira, dans un premier temps, une transmission rapide entre les Autorités centrales (quel que soit le support utilisé) des demandes et des documents annexés, tout en reconnaissant qu'il pourra parfois s'avérer nécessaire (souvent à des fins probatoires) de fournir une copie complète certifiée conforme par l'autorité compétente de certains documents (art. 25(3))[184], à un stade ultérieur. Les motifs de contestation ou d'appel prévus à l'article 23(7)(c) font office de mesure de protection contre, notamment, des documents dont l'origine peut être contestée (authenticité) ou des documents qui ont été altérés et dont, par exemple, le texte a été tronqué ou supprimé (intégrité). Il est entendu que si une copie certifiée conforme du document est transmise dès le départ, comme prévu à l'article 25(3)(a), le document ne devrait pas donner lieu à contestation ou appel sur le fondement de l'article 23(7)(c).

511 Les documents couverts par l'article 23(7)(c) sont le texte complet de la décision (art. 25(1)(a)) ou si l'État en question l'a précisé, un résumé ou un extrait de la décision (art. 25(3)(b)), le document établissant que la décision est exécutoire dans l'État d'origine (art. 25(1)(b)) et enfin, si nécessaire, un document établissant le montant des arrérages (art. 25(1)(d)).

Paragraphe 8 – La contestation ou l'appel formé par le défendeur peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution concernent les paiements échus.

512 Le paragraphe 8 ajoute un motif de contestation ou d'appel qui n'est au profit du seul défendeur. Si celui-ci s'est acquitté de sa dette, c'est une raison claire d'opposition à la reconnaissance et à l'exécution, dans la mesure où la décision concerne la dette acquittée. Ce motif est différent de celui énoncé au paragraphe 7(c) en rapport avec l'article 25(1)(d), où la contestation ou l'appel peut être fondé sur l'authenticité ou l'intégrité du document établissant le montant des arrérages.

Paragraphe 9 – La décision sur la contestation ou l'appel est promptement notifiée au demandeur et au défendeur.

513 Le demandeur et le défendeur doivent non seulement se voir notifier la déclaration ou l'enregistrement ou le refus de déclaration ou d'enregistrement, mais aussi la décision résultant de la contestation ou de l'appel afin de décider s'ils veulent accepter la décision ou envisager un nouvel appel en vertu du paragraphe 10 si cela est possible. La notification peut être effectuée directement ou par l'intermédiaire de l'Autorité centrale. La Convention ne précise pas les méthodes de notification à employer.

Paragraphe 10 – Un appel subséquent, s'il est permis par la loi de l'État requis, ne peut avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

514 Le paragraphe 10 règle la question de la formation éventuelle d'un autre appel par le demandeur ou par le défendeur. Le texte n'accepte les appels subséquents que s'ils sont autorisés par la loi de l'État requis, reflétant ainsi la règle générale établie à l'article 23(1). Une attention particulière devrait être portée aux possibilités d'abus des procédures d'appel. En fait, donner de multiples possibilités de contester une décision pourrait nuire à l'efficacité de l'application de la Convention car cela saperait la confiance mutuelle des États dans l'application de la Convention. En outre, les coûts et délais que peuvent impliquer des appels subséquents peuvent freiner les demandes. Afin d'éviter des conséquences malheureuses, l'interdiction de l'interruption ou de la suspension d'exécution lorsqu'un appel subséquent est pendant a été introduite, tout en admettant qu'il existe parfois des circonstances exceptionnelles qui peuvent justifier une interruption ou suspension d'exécution.

Paragraphe 11 – L'autorité compétente doit agir rapidement pour rendre une décision en matière de reconnaissance et d'exécution, y compris en appel.

515 L'objectif d'une procédure rapide est souligné par la règle énoncée au paragraphe 11, qui dispose que l'autorité compétente doit agir « rapidement ». Cette règle doit être rapprochée de celle de l'article 52(1)(b) (Règle de l'efficacité maximale), qui permet à un État contractant d'introduire des procédures simplifiées ou accélérées, unilatéralement ou dans le cadre d'un accord international entre l'État requérant et l'État requis.

[182] Les délais indiqués dans ce paragraphe ont été suggérés par l'*International Association of Women Judges* lors de la Commission spéciale.
[183] Il est important de souligner qu'en vertu de l'art. 25(3)(a), un État contractant peut préciser conformément à l'art. 57 qu'une copie complète de la décision certifiée conforme par l'autorité compétente de l'État d'origine doit accompagner la demande.
[184] À cet égard, les demandes d'aliments ressemblent en de nombreux points à des créances incontestées.

the date of notification of the decision.[182] If the contesting party is resident in a Contracting State other than that in which the decision authorising recognition and enforcement was given, the time for appealing is longer, 60 days. No habitual residence is required as it is only a question of challenge. The time limit is the same for both parties, applicant and respondent. However, the Convention does not prevent the applicant from introducing a new application.

Paragraph 7 – A challenge or appeal may be founded only on the following –

Sub-paragraph (a) – the grounds for refusing recognition and enforcement set out in Article 22;

Sub-paragraph (b) – the bases for recognition and enforcement under Article 20;

Sub-paragraph (c) – the authenticity or integrity of any document transmitted in accordance with Article 25(1)(a), (b) or (d) or (3)(b).

509 The aims of the Convention and the limitations on the right to challenge or appeal in paragraph 6 result in the only grounds for challenge or appeal being those set out in paragraph 7. These are: in sub-paragraph (a), the grounds for refusing recognition and enforcement set out in Article 22, and in sub-paragraph (b), the bases for recognition and enforcement under Article 20. Finally, another ground for challenge or appeal refers to the authenticity and integrity of certain documents.

510 This last ground is necessary since it was agreed to do away with the requirement, at the first stage of the application, to provide for originals or certified copies[183] of certain documents listed under Article 25. But this does not mean that any document has to be accepted under the Convention. The system put in place under Article 25 of the Convention will ensure at a first stage the swift transmission (whatever the medium employed) of applications, including accompanying documents, between Central Authorities, while recognising the need for sometimes making available at a later stage, usually for evidence purposes, a complete copy certified by the competent authority of certain documents (Art. 25(3)).[184] The ground for challenge or appeal under Article 23(7)(c) serves as a safeguard against, for example, documents the origin of which may be disputed (authenticity) or documents that may have been tampered with, for example, the text of which could have been truncated or deleted (integrity). It is to be understood that if a certified copy of the document is transmitted at the first stage, as specified under Article 25(3)(a), it should not be challenged or appealed under Article 23(7)(c).

511 The documents covered by Article 23(7)(c) are the complete text of the decision (Art. 25(1)(a)) or, if the State in question has so specified, the abstract or extract of the decision (Art. 25(3)(b)), the document stating that the decision is enforceable in the State of origin (Art. 25(1)(b)) and, finally, where necessary, the document showing the amount of any arrears (Art. 25(1)(d)).

Paragraph 8 – A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

512 Paragraph 8 adds a ground of challenge or appeal only available to the respondent. If the respondent has discharged the debt, this is a clear reason for opposing recognition and enforcement in so far as the decision concerns that past debt. This ground is different from the one established in paragraph 7(c) in relation to Article 25(1)(d), where the challenge or appeal may be based on the authenticity or integrity of the document showing the amount of any arrears.

Paragraph 9 – The applicant and the respondent shall be promptly notified of the decision following the challenge or the appeal.

513 As well as the applicant and the respondent having to be notified of the declaration or registration or the refusal thereof, they must also be promptly notified of the decision on the appeal or the challenge in order to decide whether to accept the decision or consider further appeal under paragraph 10 where this is possible. The notification may be effected directly or through the Central Authority. The Convention does not specify the methods of notification to be used.

Paragraph 10 – A further appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

514 Paragraph 10 addresses the question of any possible further appeal by the applicant or respondent. The text only accepts further appeal if it is permitted by the law of the State addressed, which in effect reflects the general rule set out in Article 23(1). Consideration should be given to the potential for abuse of appeal procedures. In fact, the possibility of multiple opportunities to challenge a decision could undermine the efficiency of the application of the Convention. This would have a negative effect on the mutual confidence of States in the application of the Convention. Further, the costs and delays that may be involved in further appeals may inhibit applications. In order to avoid these unfortunate consequences, a prohibition on stay or suspension of enforcement while a further appeal is pending has been introduced, although at the same time it is accepted that there may sometimes exist exceptional circumstances in which a stay or suspension of enforcement may be justified.

Paragraph 11 – In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

515 The objective of achieving a rapid procedure is further underlined by the rule in paragraph 11, establishing that the competent authority shall act "expeditiously". This rule should be read in conjunction with the rule in Article 52(1)(b) (Most effective rule). The rule in Article 52(1)(b) allows a Contracting State to introduce simpler or more expeditious procedures unilaterally or under an international agreement between the requesting State and the State addressed.

[182] The time periods in this paragraph were suggested by the International Association of Women Judges during the Special Commission.
[183] It is important to note that under Art. 25(3)(a) a Contracting State may specify in accordance with Art. 57 that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application.
[184] In that respect, maintenance claims share many features of uncontested claims.

Article 24 Procédure alternative pour une demande de reconnaissance et d'exécution

516 L'article 24 prévoit une procédure alternative en matière de reconnaissance et d'exécution. Alors que la procédure prévue à l'article 23 était soutenue par une grande majorité des délégués, certaines délégations ont estimé qu'elle ne prenait pas suffisamment en compte certains systèmes qui utilisent en réalité une procédure en une seule phase, n'impliquant pas d'enregistrement ou de déclaration de force exécutoire séparée, mais seulement une demande unique adressée au tribunal en vue de l'exécution d'une décision étrangère. L'article 24 a été rédigé de manière à satisfaire à de tels systèmes[185]. Il a été envisagé que les États contractants utiliseront pour la plupart la procédure prévue à l'article 23, mais que lorsque ceci s'avère impossible, la procédure de l'article 24 pourra être choisie par voie de déclaration. La procédure de l'article 24 contient des éléments reflétant ceux de l'article 23 destinés à garantir la célérité de la procédure, à limiter les possibilités de contrôle d'office (bien qu'elles le soient moins que dans l'art. 23) et à faire peser sur le débiteur la charge de soulever certains moyens de défense.

Paragraphe premier – Nonobstant l'article 23(2) à (11), un État peut déclarer, conformément à l'article 63, qu'il appliquera la procédure de reconnaissance et d'exécution prévue par le présent article.

517 Le principe général selon lequel les procédures de reconnaissance et d'exécution doivent, sous réserve des dispositions de la Convention, être régies par la loi de l'État requis, s'applique également à la procédure mise en place à l'article 24. La déclaration faite en application de l'article 24 ne peut pas porter atteinte à ce principe, énoncé à l'article 23(1). En outre, comme c'est le cas pour toutes les autres déclarations (art. 63(1)), une déclaration faite par un État en vertu de l'article 24 peut être modifiée ou retirée à tout moment. Cela pourrait notamment être le cas si la situation dans cet État change et qu'il devienne désormais possible d'accepter la procédure de l'article 23.

Paragraphe 2 – Lorsqu'une demande de reconnaissance et d'exécution d'une décision a été présentée par l'intermédiaire d'une Autorité centrale conformément au chapitre III, l'Autorité centrale requise doit promptement :

Alinéa (a) – transmettre la demande à l'autorité compétente qui prend une décision sur la demande de reconnaissance et d'exécution ; ou

Alinéa (b) – si elle est l'autorité compétente, prendre elle-même une telle décision.

518 Le paragraphe 2 de l'article 24 est l'équivalent du paragraphe 2 de l'article 23 avec de légères modifications afin de tenir compte des différents contextes.

Paragraphe 3 – Une décision de reconnaissance et d'exécution est rendue par l'autorité compétente après que le défendeur s'est vu dûment et promptement notifier la procédure et que chacune des parties a eu une opportunité adéquate d'être entendue.

519 Dans la procédure en deux phases prévue à l'article 23, ni le demandeur, ni le défendeur ne sont autorisés à présenter des arguments lors de la première phase. Ce principe ne peut pas être appliqué dans une procédure ne comportant qu'une seule phase, dans laquelle les droits de la défense doivent être garantis. D'où l'exigence de notification et le droit d'être entendu.

Paragraphe 4 – L'autorité compétente peut contrôler d'office les motifs de refus de reconnaissance et d'exécution prévus à l'article 22(a), (c) et (d). Elle peut contrôler tous les motifs prévus aux articles 20, 22 et 23(7)(c) s'ils sont soulevés par le défendeur ou si un doute relatif à ces motifs existe au vu des documents soumis conformément à l'article 25.

520 Dans la procédure en deux phases prévue à l'article 23, le contrôle d'office est autorisé lors de la première phase de la procédure mais seulement pour un motif d'ordre public. D'autres motifs limités de contestation ou d'appel peuvent être soulevés par le défendeur au cours de la seconde phase. Dans la procédure en une phase de l'article 24, une approche différente est adoptée et les motifs de contrôle sont répartis en deux groupes.

521 Premièrement, sont visés certains motifs qui peuvent être contrôlés d'office par l'autorité compétente. Il s'agit de l'ordre public, d'une procédure pendante devant une autorité de l'État requis ou de l'existence d'une décision incompatible (art. 22(a), (c) et (d)).

522 D'autres motifs, dont la liste est plus longue, peuvent être contrôlés par l'autorité compétente dans chacun des deux cas suivants : a) si le motif est soulevé par le défendeur ou, b) si un doute relatif à ces motifs émane des documents soumis conformément à l'article 25. Dans ce dernier cas, le doute doit exister « au vu » du document, ce qui signifie qu'il doit paraître évident, à la vue du contenu du document, qu'un motif de révision peut exister.

Paragraphe 5 – Un refus de reconnaissance et d'exécution peut aussi être fondé sur le paiement de la dette dans la mesure où la reconnaissance et l'exécution concernent les paiements échus.

523 Cette règle correspond au paragraphe 8 de l'article 23[186], à la différence que dans le paragraphe 5, elle apparaît comme un motif de refus de reconnaissance et d'exécution, sans préciser si ce motif doit être soulevé par le défendeur, ou si l'autorité compétente peut le soulever d'office.

Paragraphe 6 – Un appel subséquent, s'il est permis par la loi de l'État requis, ne doit pas avoir pour effet de suspendre l'exécution de la décision, sauf circonstances exceptionnelles.

524 Le texte de ce paragraphe reprend la formulation de l'article 23(10). Voir les commentaires au paragraphe 514.

Paragraphe 7 – L'autorité compétente doit agir rapidement pour rendre une décision en matière de reconnaissance et d'exécution, y compris en appel.

525 Le texte de ce paragraphe reprend la formulation de l'article 23(11). Voir les commentaires au paragraphe 515.

[185] Voir *supra*, note 178.

[186] Voir les commentaires relatifs à l'art. 23(8), au para. 512 du présent Rapport.

Rapport explicatif

Article 24 Alternative procedure on an application for recognition and enforcement

516 Article 24 presents an alternative procedure for recognition and enforcement. While the procedure in Article 23 was supported by the great majority of delegates, certain delegations were of the view that it did not take sufficient account of certain systems which currently employ a single-stage procedure, not involving a separate registration or declaration of enforceability, but rather a single application to the court for enforcement of a foreign decision. Article 24 was drafted to accommodate such systems.[185] It was envisaged that Contracting States would for the most part use the procedure set out in Article 23, but that where this is not possible the procedure in Article 24 could be opted for by declaration. The Article 24 procedure contains elements, reflecting Article 23, designed to ensure that the procedure is expeditious, that the possibilities for *ex officio* review are limited (though less so than in Art. 23) and that the burden of raising certain defences will fall on the debtor.

Paragraph 1 – Notwithstanding Article 23(2) to (11), a State may declare, in accordance with Article 63, that it will apply the procedure for recognition and enforcement set out in this Article.

517 The general principle that procedures for recognition and enforcement shall, subject to the provisions of the Convention, be governed by the law of the State addressed, applies equally to the procedure set out in Article 24. The declaration under Article 24 cannot affect this principle, which is set out in Article 23(1). As with all other declarations (Art. 63(1)), a declaration made by a State under Article 24 may be modified or withdrawn at any time, which might be the case if circumstances change in that State and it becomes possible to accept the procedure in Article 23.

Paragraph 2 – Where an application for recognition and enforcement of a decision has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly either –

Sub-paragraph (a) – refer the application to the competent authority which shall decide on the application for recognition and enforcement; or

Sub-paragraph (b) – if it is the competent authority, take such a decision itself.

518 Article 24(2) is the equivalent of Article 23(2) with minor modifications to fit the different context.

Paragraph 3 – A decision on recognition and enforcement shall be given by the competent authority after the respondent has been duly and promptly notified of the proceedings and both parties have been given an adequate opportunity to be heard.

519 In the two-stage procedure set out in Article 23 neither the applicant nor the respondent is entitled to make submissions at the first stage. This principle cannot apply in a one-stage procedure in which the rights of defence should be assured. Hence the requirements relating to notice and the right to be heard.

Paragraph 4 – The competent authority may review the grounds for refusing recognition and enforcement set out in Article 22(a), (c) and (d) of its own motion. It may review any grounds listed in Articles 20, 22 and 23(7)(c) if raised by the respondent or if concerns relating to those grounds arise from the face of the documents submitted in accordance with Article 25.

520 In the two-stage procedure set out in Article 23 *ex officio* review is allowed at the first stage but only on the basis of public policy. Further limited bases for challenge or appeal may be raised by the respondent at the second stage. Within the single-stage procedure set out in Article 24 a different approach is adopted. The grounds for review are divided into two groups.

521 First, there are the grounds that the competent authority may review of its own motion (*i.e.*, *ex officio*). These are public policy, proceedings pending before an authority of the State addressed or the existence of an incompatible decision (Art. 22(a), (c) and (d)).

522 Second, there is the longer list of grounds which the competent authority may review in either of the following circumstances: a) if the ground is raised by the respondent or, b) if doubts relating to these grounds arise from the documents submitted in accordance with Article 25. In this second case the concern must arise "from the face" of the document, which means that it must be evident from the contents of the document that a ground for review may exist.

Paragraph 5 – A refusal of recognition and enforcement may also be founded on the fulfilment of the debt to the extent that the recognition and enforcement relates to payments that fell due in the past.

523 This rule corresponds to paragraph 8 of Article 23,[186] with the difference that in paragraph 5 it appears as a ground for refusing recognition and enforcement, without specifying whether it must be raised by the respondent, or whether the competent authority may raise it of its own motion.

Paragraph 6 – Any appeal, if permitted by the law of the State addressed, shall not have the effect of staying the enforcement of the decision unless there are exceptional circumstances.

524 The text of the paragraph follows that of Article 23(10). See comments in paragraph 514.

Paragraph 7 – In taking any decision on recognition and enforcement, including any appeal, the competent authority shall act expeditiously.

525 The text of the paragraph follows that of Article 23(11). See comments in paragraph 515.

[185] See *supra*, note 178.

[186] See comments on Art. 23(8), under para. 512 of this Report.

Article 25 Documents

526 Cet article dispose que la demande de reconnaissance et d'exécution visée à l'article 23 doit être accompagnée des documents énumérés. Le paragraphe 3 de cette disposition introduit une certaine souplesse en autorisant les États contractants qui préféreraient recevoir un résumé ou un extrait de la décision au lieu du texte complet à le préciser.

Paragraphe premier – Une demande de reconnaissance et d'exécution en application de l'article 23 ou de l'article 24 est accompagnée des documents suivants :

527 Le paragraphe premier présente la solution classique qui impose à une partie sollicitant la reconnaissance et l'exécution d'une décision de produire certains documents. Les documents indiqués aux alinéas (a) et (b) doivent être produits dans tous les cas, alors que les documents énumérés aux alinéas (c), (d), (e) et (f) ne sont à produire que si les circonstances l'exigent.

528 La certification des documents qui accompagnent une demande de reconnaissance et d'exécution n'est pas obligatoire lorsqu'ils sont initialement transmis par une Autorité centrale ou produits pour la première fois directement par un demandeur conformément à l'article 37. En ce qui concerne l'article 12(2), l'objectif de la nouvelle rédaction de l'article 25 est de garantir dans un premier temps une transmission rapide et économique (quel que soit le mode de transmission employé) des demandes et des documents qui les accompagnent tout en reconnaissant qu'une copie complète certifiée conforme par l'autorité compétente de l'État d'origine de tout document spécifié à l'article 25(1)(a), (b) et (d) devra parfois être transmise ultérieurement. Aux termes de l'article 25, ce n'est qu'en cas de contestation ou d'appel en vertu de l'article 23(7)(c) fondé sur l'authenticité ou l'intégrité du document ou à la demande de l'autorité compétente de l'État requis qu'il faudra produire une copie complète du document concerné, certifiée conforme par l'autorité compétente de l'État d'origine (para. 2). Cependant, des États peuvent préciser, conformément à l'article 25(3), qu'ils préféreraient recevoir une copie complète et certifiée conforme de la décision, en toutes circonstances (voir ci-dessous para. 542).

529 À ce propos, on notera que le Groupe de travail chargé des formulaires a élaboré des formulaires pour la plupart des documents exigés par cet article[187]. Ces formulaires comportent le plus possible de cases à cocher et limitent au maximum le recours à la saisie de texte libre, généralement limitée aux numéros, adresses et noms, ce qui réduit les besoins de traduction. Suivant de très près la terminologie de la Convention, les formulaires existent en anglais, en français et en espagnol, et pourraient être traduits dans toute autre langue. Ainsi, un formulaire rempli en français serait essentiellement lisible en espagnol sans qu'il soit nécessaire de le traduire.

Alinéa (a) – le texte complet de la décision ;

530 Le terme « texte complet » signifie le jugement tout entier et non le seul dispositif. Il faut souligner que cette règle impose simplement de produire la « décision » en matière d'aliments, et non une « copie » ou l'« original ». Par conséquent, il sera possible et facile de produire la version électronique d'une décision, d'autant que la production d'une copie certifiée conforme de la décision ne sera pas systématiquement exigée par l'État requis. Comme il a été dit plus haut, en cas de contestation de l'authenticité ou de l'intégrité de la décision, une copie complète certifiée conforme sera produite, soit par l'Autorité centrale de l'État requérant dans le cas d'une demande en vertu du chapitre III, soit par le demandeur lorsque la demande de reconnaissance et d'exécution est adressée directement à l'autorité compétente de l'État requis.

531 Sur l'exigence d'une copie complète certifiée conforme de la décision, voir le paragraphe 3(a) et les commentaires au paragraphe 542.

Alinéa (b) – un document établissant que la décision est exécutoire dans l'État d'origine et, si la décision émane d'une autorité administrative, un document établissant que les conditions prévues à l'article 19(3) sont remplies à moins que cet État n'ait précisé, conformément à l'article 57, que les décisions de ses autorités administratives remplissent dans tous les cas ces conditions ;

532 Pour remplir les critères imposés par cet article, un document établissant que la décision est exécutoire dans l'État d'origine doit être produit systématiquement.

533 Étant donné qu'une décision émanant d'une autorité administrative peut être également reconnue et exécutée en vertu de la Convention, il paraît nécessaire de rappeler que les obligations de l'article 19(3) doivent être remplies. La dernière partie de l'alinéa (b) permet à un État de préciser que les décisions de ses autorités administratives remplissent toujours ces conditions. Cela fait écho à une proposition[188] visant à éviter une présentation de ce document au cas par cas si, dans un esprit de confiance et de compréhension, certains États contractants fournissent une telle précision. Il s'agit d'une précision faite par l'État requérant alors que les précisions visées au paragraphe 3 sont fournies par l'État requis. Néanmoins, dans les deux cas, ces précisions doivent être fournies au Bureau Permanent de la Conférence de La Haye de droit international privé conformément à l'article 57(1)(e).

Alinéa (c) – si le défendeur n'a ni comparu, ni été représenté dans les procédures dans l'État d'origine, un document ou des documents attestant, selon le cas, que le défendeur a été dûment avisé de la procédure et a eu l'opportunité de se faire entendre ou qu'il a été dûment avisé de la décision et a eu la possibilité de la contester ou de former un appel, en fait et en droit ;

534 L'alinéa (c) reproduit les conditions énoncées à l'article 22(e). Il est important de produire ce document car son absence pourrait conduire au refus de la reconnaissance et de l'exécution en application de l'article 22.

Alinéa (d) – si nécessaire, un document établissant le montant des arrérages et indiquant la date à laquelle le calcul a été effectué ;

535 Les arrérages étant couverts par la Convention (art. 6(2)(e) et art. 19(1)), une règle particulière a été prévue pour la production d'un document afin de faciliter leur recouvrement. Il sera important d'indiquer la date à laquelle le montant a été calculé afin de tenir compte des paiements ultérieurs éventuellement effectués par le débiteur dans la détermination du montant dû.

[187] Voir Doc. prél. No 31-B/2007 (*op. cit.* note 96).

[188] Proposition faite par l'Australie, voir Doc. prél. No 36/2007 (*op. cit.* note 91) ; voir également le Procès-verbal No 5, para. 58.

Rapport explicatif

Article 25 Documents

526 According to this Article, the application for recognition and enforcement under Article 23 has to be accompanied by the documents enumerated therein. A certain degree of flexibility has been introduced in this Article, by allowing Contracting States that would prefer to receive an abstract or extract of the decision in lieu of a complete text of the decision to specify it in accordance with paragraph 3 of this Article.

Paragraph 1 – An application for recognition and enforcement under Article 23 or Article 24 shall be accompanied by the following –

527 Paragraph 1 contains the classical solution according to which a party seeking recognition and enforcement has to produce some documents. In all circumstances the documents listed in sub-paragraphs (a) and (b) have to be produced. However, the documents in sub-paragraphs (c), (d), (e) and (f) have to be produced only if necessary, depending on the circumstances.

528 The documents accompanying an application for recognition and enforcement do not need to be certified when initially transmitted by a Central Authority or produced for the first time directly by an applicant in accordance with Article 37. As for Article 12(2), the aim of the new wording of Article 25 is to ensure in a first stage the swift and low cost transmission (whatever the medium employed) of applications, including accompanying documents, while recognising the need for sometimes making available at a later stage a complete copy certified by the competent authority in the State of origin of any document specified under Article 25(1)(a), (b) and (d). Under Article 25, it is only upon a challenge or appeal under Article 23(7)(c) founded on the authenticity or integrity of the document or upon request by the competent authority in the State addressed that a complete copy of the document concerned, certified by the competent authority in the State of origin, is required (para. 2). However, it would be possible for some States to specify in accordance with Article 25(3) that they would prefer to receive a complete certified copy of the decision at all times (see para. 542 below).

529 It is relevant to note that the Forms Working Group has developed forms for most of the documents that are required under this Article.[187] The forms in question use tick boxes as much as possible and open text as little as possible, usually limited to numbers, addresses and names, thus limiting the need for translation. These forms, which follow very closely the terminology of the Convention, are available in English, French and Spanish templates and could be translated into any other language. As a consequence, a form which has been completed in French could for the most part be read in Spanish without the need for translation.

Sub-paragraph (a) – a complete text of the decision;

530 "Complete text" refers to the whole judgment and not just to the final order (*dispositif*). It has to be underlined that this rule simply requires the production of the maintenance "decision", not a "copy", nor the "original". Therefore, it will be possible and easy to produce the electronic version of a decision. That will be the case especially since production of a certified copy of the decision will not be systematically required by the State addressed. As mentioned above, if the authenticity or integrity of the decision is challenged a complete certified copy of the decision will be provided by either the Central Authority of the requesting State, in the case of an application under Chapter III, or by the applicant where the application for recognition and enforcement is made directly to the competent authority of the State addressed.

531 For the requirement of a complete copy of the decision certified, see paragraph 3(a) and comments in paragraph 542.

Sub-paragraph (b) – a document stating that the decision is enforceable in the State of origin and, in the case of a decision by an administrative authority, a document stating that the requirements of Article 19(3) are met unless that State has specified in accordance with Article 57 that decisions of its administrative authorities always meet those requirements;

532 To fulfil the requirements of this Article, a document stating that the decision is enforceable in the State of origin has to be produced in all cases.

533 Taking into account that a decision of an administrative authority can also be recognised and enforced under the Convention, it seems necessary to recall that the requirements of Article 19(3) have to be fulfilled. The last part of sub-paragraph (b) allows a State to specify that the decisions of its administrative authorities always meet those requirements. It responds to a proposal[188] to avoid a case-by-case presentation of this document if, with a spirit of trust and understanding, some Contracting States make such a specification. It is a specification made by the requesting State, while specifications in paragraph 3 are specifications made by the State addressed. In both cases, they are specifications made to the Permanent Bureau of the Hague Conference on Private International Law according to Article 57(1)(e).

Sub-paragraph (c) – if the respondent did not appear and was not represented in the proceedings in the State of origin, a document or documents attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard, or that the respondent had proper notice of the decision and the opportunity to challenge or appeal it on fact and law;

534 Sub-paragraph (c) reproduces the requirements of Article 22(e). It is important to produce this document since the absence of this document may lead to non-recognition and enforcement under Article 22.

Sub-paragraph (d) – where necessary, a document showing the amount of any arrears and the date such amount was calculated;

535 As the Convention covers arrears (Art. 6(2)(e) and Art. 19(1)) a special rule has been set out for the production of a document to facilitate the recovery of arrears. It will be important to indicate the date at which the amount has been calculated in order to account for any subsequent payments made by the debtor in determining the current amount which may be owed.

[187] See Prel. Doc. No 31-B/2007 (*op. cit.* note 96).

[188] Proposal made by Australia in Prel. Doc. No 36/2007 (*op. cit.* note 91), and see Minutes No 5, para. 58.

Alinéa (e) – si nécessaire, dans le cas d'une décision prévoyant une indexation automatique, un document contenant les informations qui sont utiles à la réalisation des calculs appropriés ;

536 Compte tenu de la règle de l'article 19(1)[189], une formalité particulière est nécessaire lorsque la décision prévoit une indexation automatique. Comme le calcul des ajustements au titre de l'indexation peut être assez difficile, toute information communiquée par l'Autorité centrale de l'État requérant pourrait être utile aux autorités de l'État requis. Il ne serait pas indispensable d'envoyer un document officiel. Un document informel tel qu'un courrier électronique ou une télécopie suffirait.

Alinéa (f) – si nécessaire, un document établissant dans quelle mesure le demandeur a bénéficié de l'assistance juridique gratuite dans l'État d'origine.

537 Si le demandeur a bénéficié d'assistance juridique dans l'État d'origine, il sera nécessaire de produire la documentation appropriée pour que le même droit lui soit reconnu dans l'État requis. Cette exigence documentaire donnera effet à la règle énoncée à l'article 17(b), qui est la seule situation à laquelle elle sera applicable. Toutes les autres situations seront couvertes par les articles 14, 15 et 16.

Paragraphe 2 – Dans le cas d'une contestation ou d'un appel fondé sur un motif visé à l'article 23(7)(c) ou à la requête de l'autorité compétente dans l'État requis, une copie complète du document en question, certifiée conforme par l'autorité compétente dans l'État d'origine, est promptement fournie :

Alinéa (a) – par l'Autorité centrale de l'État requérant, lorsque la demande a été présentée conformément au chapitre III ;

Alinéa (b) – par le demandeur, lorsque la demande a été présentée directement à l'autorité compétente de l'État requis.

538 Le paragraphe 2 exige la production d'une copie intégrale certifiée de tout document visé à l'article 25(1)(a), (b) ou (d) en cas de doute sur son authenticité ou son intégrité. L'Autorité centrale doit fournir une copie dans deux cas : a) en cas de contestation ou d'appel par le défendeur en vertu de l'article 23 lorsque la demande a été présentée en vertu du chapitre III ; b) à la demande d'une autorité compétente à tout moment, y compris au stade du contrôle d'office. Dans le cas des requêtes présentées directement en vertu de l'article 37, c'est au demandeur qu'il revient de produire la copie.

539 L'objectif est d'établir l'authenticité des documents conformément à la loi de l'État dans lequel la décision a été rendue. Le texte de cette règle ne vise qu'une « copie complète du document en question », une simplification par rapport à une rédaction antérieure, qui employait les termes plus stricts d'« original » ou de « copie certifiée conforme ».

540 Lors de la réunion de la Commission spéciale pendant laquelle cet article a été abordé, la question du responsable de la certification, l'autorité d'origine ou une autre autorité compétente, a été soulevée. Les experts ont estimé que lorsque la demande est présentée par l'intermédiaire de l'Autorité centrale, il n'était pas nécessaire de désigner expressément le responsable de la certification aux termes de l'alinéa (a). Des difficultés peuvent toutefois se poser s'il s'agit d'une requête directe : le demandeur devra déterminer quelles sont les autorités compétentes pour certifier les documents requis ou contestés.

Paragraphe 3 – Un État contractant peut préciser, conformément à l'article 57 :

541 Le paragraphe 3 comprend trois précisions différentes que les États contractants peuvent fournir au Bureau Permanent de la Conférence de La Haye de droit international privé, conformément à l'article 57. Ces précisions, contrairement aux déclarations prévues à l'article 63, n'ont pas à être communiquées au dépositaire. Il s'agit de précisions fournies par les États sur leur rôle en tant qu'État requis. Voir l'article 57(1)(e). Ces précisions peuvent être également présentées dans le Profil de chaque État[190].

Alinéa (a) – qu'une copie complète de la décision certifiée conforme par l'autorité compétente de l'État d'origine doit accompagner la demande ;

542 En général, seul « le texte complet de la décision » est exigé (para. 1er(a)), cependant compte tenu des inquiétudes exprimées par certains États[191], les États ont la possibilité d'exiger, dans toutes les affaires, la fourniture d'une copie complète de la décision certifiée conforme par l'autorité compétente.

Alinéa (b) – les circonstances dans lesquelles il accepte, au lieu du texte complet de la décision, un résumé ou un extrait de la décision établi par l'autorité compétente de l'État d'origine, qui peut être présenté au moyen du formulaire recommandé et publié par la Conférence de La Haye de droit international privé ; ou

543 La volonté de simplifier et rendre plus économique la procédure de reconnaissance et d'exécution a été évoquée à de nombreuses reprises, ce qui a conduit à l'idée que la production, non du texte complet de la décision, mais d'un résumé ou d'un extrait de la décision, pourrait suffire. Cette solution ne peut cependant être imposée à tous. Ce système présente l'avantage de permettre d'importantes économies de traduction des documents[192]. La solution proposée[193] consiste à inviter les États qui le souhaitent à accepter un résumé ou un extrait de la décision étrangère. Il convient de souligner que le Groupe de travail chargé des formulaires a élaboré un formulaire modèle de résumé de décision[194]. Cette solution présente des avantages considérables, quand, par exemple, seuls quelques paragraphes d'un long jugement de divorce sont consacrés aux aliments. Enfin, l'emploi de formulaires garantirait que toutes les informations nécessaires sont effectivement indiquées.

544 Un « résumé » est un condensé de la décision tandis qu'un « extrait » signifie une partie d'une décision reproduite littéralement. Un État contractant pourrait préciser qu'il accepte l'un ou l'autre ou les deux.

Alinéa (c) – qu'il n'exige pas de document établissant que les conditions prévues à l'article 19(3) sont remplies.

545 Voir le paragraphe 533, sous le paragraphe premier (b) de cet article.

[189] Voir *supra*, art. 19(1) au para. 430 et s. du présent Rapport. Cette disposition a été proposée par les États-Unis d'Amérique dans le Doc. prél. No 23/2006 (*op. cit.* note 90), para. 5.

[190] Voir art. 57(2).
[191] Voir Procès-verbal No 5, para. 55 à 92.
[192] Voir *infra*, art. 41 et 42.
[193] Solution suggérée par l'*International Association of Women Judges* pendant la Commission spéciale.
[194] Voir Doc. prél. No 31-B/2007 (*op. cit.* note 96), annexe A.

Sub-paragraph (e) – where necessary, in the case of a decision providing for automatic adjustment by indexation, a document providing the information necessary to make the appropriate calculations;

536 Taking into account the rule in Article 19(1)[189] a special formal requirement is needed for cases where the decision provides for automatic adjustment by indexation. As the calculation of indexation adjustments may be rather difficult, any information provided by the Central Authority of the requesting State could assist the authorities of the State addressed. It would not be necessary to send a formal document. Any informal document, such as an e-mail or a fax, may suffice.

Sub-paragraph (f) – where necessary, documentation showing the extent to which the applicant received free legal assistance in the State of origin.

537 If the applicant received legal assistance in the State of origin, she / he will need to produce the appropriate documentation in order to have the same right in the State addressed. This documentation requirement will give effect to the rule set out in Article 17(b) which is the only situation to which it will be applicable. All other situations will be covered by Articles 14, 15 and 16.

Paragraph 2 – Upon a challenge or appeal under Article 23(7)(c) or upon request by the competent authority in the State addressed, a complete copy of the document concerned, certified by the competent authority in the State of origin, shall be provided promptly –

Sub-paragraph (a) – by the Central Authority of the requesting State, where the application has been made in accordance with Chapter III;

Sub-paragraph (b) – by the applicant, where the request has been made directly to a competent authority of the State addressed.

538 Paragraph 2 requires the provision of a complete certified copy of any document referred to in Article 25(1)(a), (b) or (d) in certain cases where its authenticity or integrity is in question. The Central Authority is responsible for providing the copy in two cases: a) where there has been a challenge or appeal by the defendant under Article 23 and the application has been brought under Chapter III; and b) upon the request of a competent authority at any time, including at the stage of *ex officio* review. In the case of direct requests under Article 37, it is the applicant who must produce the copy.

539 The object is to establish the authenticity of the documents in accordance with the law of the State in which the decision was given. The text of this rule refers only to a "complete copy of the document concerned", simplifying previous drafting in which the more strict terms "original" or "true copy" were used.

540 During the Special Commission meeting which discussed this provision, the question arose whether the certification should be by the originating authority or by another competent authority. It was felt that if the application is processed through the Central Authority, it was not necessary to expressly designate who will be responsible for the certification under sub-paragraph (a). However, if the request is a direct one, some difficulties may arise. The applicant will have to ascertain which are the competent authorities to certify the requested or challenged documents.

Paragraph 3 – A Contracting State may specify in accordance with Article 57 –

541 Paragraph 3 includes three different possible specifications to be made by the Contracting States to the Permanent Bureau of the Hague Conference on Private International Law in accordance with Article 57. These specifications, unlike the declarations under Article 63, do not have to be communicated to the depositary. They are specifications made by States in relation to their role as State addressed. See Article 57(1)(e). The specifications might also be included in each State's Country Profile.[190]

Sub-paragraph (a) – that a complete copy of the decision certified by the competent authority in the State of origin must accompany the application;

542 In general, only "a complete text of the decision" is required (para. 1(a)), but as a result of the concerns expressed by some States,[191] the possibility now exists for States to require in all cases the production of a complete copy of the decision certified by the competent authority.

Sub-paragraph (b) – circumstances in which it will accept, in lieu of a complete text of the decision, an abstract or extract of the decision drawn up by the competent authority of the State of origin, which may be made in the form recommended and published by the Hague Conference on Private International Law; or

543 The wish to simplify and make more cost-efficient the procedure for recognition and enforcement was discussed on many occasions. This led to the idea that it might only be necessary to produce an abstract or extract of the decision instead of the complete text of the decision. However, this is a solution that cannot be imposed on everybody. An argument in favour of this solution is that it will result in serious savings with regard to the translation of documents.[192] The proposed solution[193] consists in inviting States, if they so wish, to accept an abstract or extract of the foreign decision. It is to be noted that the Forms Working Group has developed a model form of an abstract.[194] The solution has great advantages, where, for example, in a long judgment with regard to a divorce, only a few paragraphs are devoted to support. Another advantage results from the use of standard forms that would guarantee the inclusion of all the necessary data.

544 An "abstract" means a summary or résumé of the decision, whereas "extract" means a verbatim excerpt from the decision. A specification could provide that a Contracting State could accept one or the other or both.

Sub-paragraph (c) – that it does not require a document stating that the requirements of Article 19(3) are met.

545 See paragraph 533 under paragraph 1(b) of this Article.

[189] See *supra*, Art. 19(1) at paras 430 *et seq.* of this Report. This provision was proposed by the United States of America in Prel. Doc. No 23/2006 (*op. cit.* note 90), para. 5.

[190] See Art. 57(2).
[191] Minutes No 5, paras 55-92.
[192] See *infra*, Arts 41 and 42.
[193] This solution was proposed by the International Association of Women Judges during the Special Commission.
[194] See Prel. Doc. No 31-B/2007 (*op. cit.* note 96), Annex A.

Article 26 Procédure relative à une demande de reconnaissance

Ce chapitre s'applique *mutatis mutandis* à une demande de reconnaissance d'une décision, à l'exception de l'exigence du caractère exécutoire qui est remplacée par l'exigence selon laquelle la décision produit ses effets dans l'État d'origine.

546 Habituellement, une demande sollicite à la fois la reconnaissance et l'exécution, cette hypothèse étant réglée par l'article 23. Cependant, il peut aussi arriver que le demandeur ne sollicite que la reconnaissance, même si c'est inhabituel dans les affaires d'aliments. Dans ce cas, l'article 26 prévoit l'application *mutatis mutandis* du chapitre V. L'expression « *mutatis mutandis* » engendre quelques incertitudes. Il est clair que l'obligation que la décision soit exécutoire (art. 23(2)) est remplacée par l'obligation que la décision « produise ses effets » dans l'État d'origine. Au-delà, des incertitudes découlent de la difficulté à traduire l'expression latine « *mutatis mutandis* » en termes simples. Elle signifie changer les dispositions qui peuvent et doivent être modifiées, en tenant compte de la différence entre la reconnaissance et l'exécution. Elle suppose aussi d'apporter les modifications nécessaires à l'intelligibilité. Plus simplement, la disposition s'applique, avec les modifications nécessaires.

Article 27 Constatations de fait

L'autorité compétente de l'État requis est liée par les constatations de fait sur lesquelles l'autorité de l'État d'origine a fondé sa compétence.

547 Ce qui était une disposition inédite (art. 9) de la Convention Obligations alimentaires de 1973 (Exécution) au regard de la reconnaissance et de l'exécution est désormais classique. Le tribunal requis doit accepter les constatations de fait de la juridiction d'origine. Plus précisément, l'autorité de l'État requis est liée par les constatations de fait sur lesquelles l'autorité d'origine a fondé sa compétence. Dans ce contexte, le terme « compétence » s'entend de la compétence en vertu de la Convention. Si, par exemple, l'autorité de l'État d'origine décide, sur la base des faits qui lui sont présentés, que le créancier résidait habituellement sur son territoire, l'autorité de l'État requis ne pourra pas réviser les faits sur lesquels l'autorité d'origine a fondé sa décision. Il va sans dire que l'autorité de l'État requis n'aura pas à tenir compte des constatations de fait résultant d'une fraude. Il n'est pas rare que les autorités judiciaires ou administratives n'indiquent pas les faits sur lesquels se fonde leur compétence. Même si cette observation peut limiter la portée pratique de la règle, elle ne suffit pas à la condamner en principe. Cette règle figure dans d'autres Conventions[195]. Une indication de la part des autorités compétentes des faits sur lesquels est fondée leur compétence constituerait une bonne pratique pour l'avenir.

Article 28 Interdiction de la révision au fond

L'autorité compétente de l'État requis ne procède à aucune révision au fond de la décision.

548 L'interdiction de réviser une décision au fond est une autre disposition classique des Conventions sur la reconnaissance et l'exécution des décisions[196]. En son absence, les jugements étrangers pourraient, dans certains pays, être révisés par le tribunal requis comme s'il s'agissait d'une cour d'appel connaissant d'un appel de la décision du tribunal d'origine. Cette interdiction s'entend sans préjudice du contrôle nécessaire pour appliquer les dispositions de ce chapitre (chapitre V), même si cela n'est pas expressément déclaré[197]. Elle concerne la reconnaissance et l'exécution en vertu des articles 20 et suivants et s'appliquerait aussi à une procédure relative à une demande de reconnaissance en vertu de l'article 26. Elle s'étend à la fois aux systèmes fondés sur l'enregistrement et aux systèmes reposant sur des déclarations de force exécutoire (voir l'art. 23(3)).

Article 29 Présence physique de l'enfant ou du demandeur non exigée

La présence physique de l'enfant ou du demandeur n'est pas exigée lors de procédures introduites en vertu du présent chapitre dans l'État requis.

549 Cette disposition est conforme à la pratique de nombreux États. Exiger la présence de l'enfant ou du demandeur serait contraire aux objectifs de la Convention, à savoir instaurer un système de recouvrement des aliments rapide, efficace et accessible. Cette disposition s'appliquerait pour les requêtes de reconnaissance et d'exécution présentées soit directement à une autorité compétente dans l'État requis, soit par l'intermédiaire des Autorités centrales en application de l'article 10.

550 Cette disposition est conforme à la Convention de New York de 1956, qui n'impose pas la présence du demandeur d'aliments car l'institution intermédiaire aurait reçu suffisamment d'informations, conformément à son l'article 3, pour reconnaître une décision ou prononcer un jugement en matière d'aliments ou confirmer une ordonnance provisoire telle celles qui existent dans le système d'exécution réciproque des ordonnances alimentaires[198]. La Convention de New York permet au demandeur, sans être présent dans l'État requis, de solliciter l'assistance de l'institution intermédiaire pour que celle-ci prenne toutes mesures propres à assurer le recouvrement des aliments, notamment transiger, intenter et poursuivre une action et exécuter tout acte judiciaire pour le paiement des aliments.

Article 30 Conventions en matière d'aliments

551 L'article 30 est le résultat de longues discussions relatives à l'inclusion dans le champ d'application de la Convention des actes authentiques et accords privés[199]. Les actes authentiques sont inconnus dans certains pays[200], tandis que d'autres ne sont pas familiers des accords privés, bien connus dans d'autres systèmes, où ils sont considérés sous certaines conditions comme des décisions[201]. Le texte

[195] Art. 28(2) des Conventions de Bruxelles et de Lugano.
[196] Art. 27 de la Convention Protection des enfants de 1996 et art. 26 de la Convention Protection des adultes de 2000.
[197] Contrairement à l'art. 27 de la Convention Protection des enfants de 1996 et à l'art. 26 de la Convention Protection des adultes de 2000.
[198] REMO (*Reciprocal Enforcement of Maintenance Orders*), voir abréviations et références au para. 15 du présent Rapport.
[199] Les « transactions » étaient couvertes par la Convention Obligations alimentaires de 1973 (Exécution) ; voir son art. 21.
[200] Les instruments européens couvrent les actes authentiques alors qu'ils sont inconnus dans certains États membres de l'Union européenne. Voir l'art. 50 des Conventions de Bruxelles et de Lugano, l'art. 57 du Règlement Bruxelles I et le Règlement TEE qui comporte une définition de l'acte authentique à l'art. 4(3). Voir également l'arrêt du 17 juin 1999 de la Cour de justice des Communautés européennes, Affaire C-260/97, *Unibank A/S* c. *Flemming G. Christensen*, Recueil de jurisprudence 1999.
[201] Les accords privés sont utilisés dans des États comme le Canada.

Article 26 Procedure on an application for recognition

This Chapter shall apply *mutatis mutandis* to an application for recognition of a decision, save that the requirement of enforceability is replaced by the requirement that the decision has effect in the State of origin.

546 Usually an application is for both recognition and enforcement, which is the subject matter of Article 23. But it is also possible that the applicant asks only for recognition, although this is unusual in matters of maintenance. In this case, Article 26 provides for the application *mutatis mutandis* of Chapter V. The use of the expression "*mutatis mutandis*" creates some uncertainty. It is clear that the requirement that the decision be enforceable (Art. 23(2)) is replaced by a requirement that the decision "has effect" in the State of origin. Beyond this, uncertainty arises from the difficulty of translating in simple terms the Latin expression "*mutatis mutandis*". It means changing those provisions which can be and need to be changed, taking into account the differences between recognition and enforcement. It implies also making changes which are necessary to make sense. Put simply, the provision applies, with the necessary changes.

Article 27 Findings of fact

Any competent authority of the State addressed shall be bound by the findings of fact on which the authority of the State of origin based its jurisdiction.

547 What was a novel provision (Art. 9) in the 1973 Hague Maintenance Convention (Enforcement) in relation to recognition and enforcement is now a common provision. The court addressed has to accept findings of fact made by the court of origin. More specifically, the authority of the State addressed is bound by the findings of fact on which the authority of origin has based its jurisdiction. In that context, the term "jurisdiction" means jurisdiction under the Convention. If, for example, the authority of the State of origin decides, on the basis of the facts presented to it, that the creditor was habitually resident in that State, the authority of the State addressed will not be able to review the facts upon which that decision was based. It speaks for itself that the authority of the State addressed will not have to take into account findings of facts resulting from fraud. There are a number of occasions where judicial or administrative authorities do not indicate the facts upon which jurisdiction is based. Even if this observation may limit the practical reach of the rule, it is not sufficient to condemn its principle. This rule is encountered in other Conventions.[195] An indication by competent authorities of the facts upon which jurisdiction is based could constitute in the future a good practice.

Article 28 No review of the merits

There shall be no review by any competent authority of the State addressed of the merits of a decision.

548 The prohibition of a review of the merits of a decision is also a standard provision in Conventions on recognition and enforcement of decisions.[196] Without it, foreign judgments might in some countries be reviewed by the court addressed as if it were an appellate court hearing an appeal from the court of origin. It is without prejudice to the review, necessary to apply the provisions of this Chapter (Chapter V), although this is not expressly stated.[197] This prohibition concerns recognition and enforcement under Articles 20 and following and would also apply to a procedure on an application for recognition under Article 26. This prohibition extends both to registration systems and to systems based on declarations of enforceability (see Art. 23(3)).

Article 29 Physical presence of the child or the applicant not required

The physical presence of the child or the applicant shall not be required in any proceedings in the State addressed under this Chapter.

549 This provision reflects the practice of many States. Requiring the presence of the child or the applicant would be contradictory to the objectives that are sought by the Convention with respect to providing a swift, efficient and accessible system of recovery of maintenance. This provision would apply in both the situations where the request for recognition and enforcement is made directly to a competent authority of the State addressed or through an application under Article 10 to be processed through Central Authorities.

550 This provision is in line with the 1956 New York Convention where the presence of the applicant for recovery of maintenance is not necessary as the receiving agency would have received sufficient information as required under Article 3 of that Convention to proceed with either the recognition of a decision or the establishment of a maintenance order or the confirmation of a provisional order such as one under the REMO[198] system, as the case may be. Under the New York Convention it is possible for the applicant, without being present in the State addressed, to seek the assistance of the receiving agency in order to take all appropriate steps for the recovery of maintenance including the settlement of the claim, institution and prosecution of an action and the execution of any other judicial act for the payment of maintenance.

Article 30 Maintenance arrangements

551 Article 30 is the result of long discussions on the inclusion of authentic instruments and private agreements in the scope of the Convention.[199] For some countries, authentic instruments are unknown.[200] On the other hand, some countries are not familiar with private agreements, which are well known in other systems where they are treated under certain conditions as decisions.[201] The present text

[195] Art. 28(2) of the Brussels and Lugano Conventions.
[196] Art. 27 of the 1996 Hague Child Protection Convention and Art. 26 of the 2000 Hague Adults Convention.
[197] As it is in Art. 27 of the 1996 Hague Child Protection Convention and Art. 26 of the 2000 Hague Adults Convention.
[198] Reciprocal Enforcement of Maintenance Orders, see abbreviations and references under para. 15 of this Report.
[199] "Settlements" were included in the 1973 Hague Maintenance Convention (Enforcement) (see Art. 21).
[200] In the European instruments, authentic instruments are included, although they are not known in some Member States of the European Union, see Art. 50 of the Brussels and Lugano Conventions and Art. 57 of the Brussels I Regulation and also the EEO Regulation where a definition of authentic instrument is included in Art. 4(3). See also the judgment of the European Court of Justice of 17 June 1999, Case C-260/97, *Unibank A/S v. Flemming G. Christensen*, European Court Reports (ECR), 1999.
[201] Private agreements are used in countries such as Canada.

dans sa forme actuelle a recueilli un grand consensus lors de la réunion de la Session diplomatique de novembre 2007[202].

552 L'inclusion de ces instruments présente des avantages considérables compte tenu de la tendance croissante, dans de nombreux États, à promouvoir les règlements amiables et à éviter les procédures contentieuses. À la lumière de ce mouvement en faveur des modes alternatifs de résolution des différends, il s'avère essentiel de disposer d'un mécanisme qui traite de la reconnaissance et de l'exécution des accords privés et actes authentiques qui découleraient de ces systèmes de résolution des différends. L'absence de l'article 30 aurait été regrettable pour la Convention et en aurait limité son utilité.

553 Pour résoudre la question, la Convention recourt aux termes « conventions en matière d'aliments », définis à l'article 3(e), et inclut à l'article 30 des règles de reconnaissance et d'exécution de ces conventions. Cependant, les États contractants peuvent émettre une réserve à cet égard.

Paragraphe premier – Une convention en matière d'aliments conclue dans un État contractant doit pouvoir être reconnue et exécutée comme une décision en application de ce chapitre si elle est exécutoire comme une décision dans l'État d'origine.

554 Le paragraphe premier pose le principe général de l'éligibilité des conventions en matière d'aliments à la reconnaissance et à l'exécution, la principale condition étant qu'elles soient exécutoires au même titre qu'une décision dans l'État d'origine. Il s'ensuit que si, comme dans certains pays, un accord est exécutoire comme un contrat et non comme une décision, il n'entre pas dans le champ d'application de ce chapitre.

Paragraphe 2 – Aux fins de l'article 10(1)(a) et (b) et (2)(a), le terme « décision » comprend une convention en matière d'aliments.

555 Ce paragraphe garantit que l'obligation de mettre à disposition des demandes pour la reconnaissance et l'exécution, ou pour l'exécution, dans le chapitre III (Demandes par l'intermédiaire des Autorités centrales), s'applique non seulement aux « décisions » mais également aux « conventions en matière d'aliments ».

Paragraphe 3 – La demande de reconnaissance et d'exécution d'une convention en matière d'aliments est accompagnée des documents suivants :

556 Les conventions en matière d'aliments étant exclues des paragraphes premier et 3 de l'article 25, le paragraphe 3 de l'article 30 énumère les documents qui doivent accompagner une demande de reconnaissance et d'exécution d'une convention en matière d'aliments.

Alinéa (a) – le texte complet de la convention en matière d'aliments ; et

557 L'alinéa (a) impose de produire le texte complet de la convention en matière d'aliments. Pour les mêmes raisons que celles exposées pour l'article 25, il n'est pas nécessaire que la copie soit certifiée conforme par l'autorité compétente de l'État dans lequel elle a été établie (l'État d'origine).

Alinéa (b) – un document établissant que la convention en matière d'aliments est exécutoire comme une décision dans l'État d'origine.

558 L'alinéa (b) exige un document émanant de l'autorité compétente de l'État d'origine établissant que la convention en matière d'aliments en question est exécutoire comme une décision dans cet État au sens de l'article 19. Il faut souligner que ce qui importe pour la Convention n'est pas qu'une certaine forme de convention soit exécutoire en application de la loi de l'État d'origine, mais que la convention en question remplisse la condition nécessaire pour être exécutoire comme une décision dans l'État d'origine.

Paragraphe 4 – La reconnaissance et l'exécution d'une convention en matière d'aliments peuvent être refusées si :

Alinéa (a) – la reconnaissance et l'exécution sont manifestement incompatibles avec l'ordre public de l'État requis ;

Alinéa (b) – la convention en matière d'aliments a été obtenue par fraude ou a fait l'objet de falsification ;

Alinéa (c) – la convention en matière d'aliments est incompatible avec une décision rendue entre les mêmes parties et ayant le même objet, soit dans l'État requis, soit dans un autre État lorsque cette dernière décision remplit les conditions nécessaires à sa reconnaissance et à son exécution dans l'État requis.

559 La procédure de reconnaissance et d'exécution d'une convention en matière d'aliments sera relativement simple et rapide. Les motifs de refus de l'article 22 ne s'appliquent pas tous. En fait, le paragraphe 4 ne prévoit que trois motifs. Le premier (al. (a)) est l'incompatibilité avec l'ordre public de l'État requis, équivalent au paragraphe (a) de l'article 22. Le deuxième (al. (b)) est la fraude, en principe équivalent au paragraphe (b) de l'article 22, mais, compte tenu des particularités des conventions en matière d'aliments, le motif de refus est le fait que la convention « a été obtenue par fraude ou a fait l'objet de falsification ». Enfin, l'alinéa (c) adopte le principe « d'incompatibilité » qui est exprimé en termes similaires au paragraphe (d) de l'article 22. Comme à l'article 22, les trois motifs « peuvent » être invoqués pour refuser la reconnaissance et l'exécution.

Paragraphe 5 – Les dispositions de ce chapitre, à l'exception des articles 20, 22, 23(7) et 25(1) et (3), s'appliquent *mutatis mutandis* à la reconnaissance et à l'exécution d'une convention en matière d'aliments, toutefois :

560 Toutes les dispositions du chapitre V ne s'appliquent pas à la reconnaissance et à l'exécution des conventions en matière d'aliments. C'est la raison pour laquelle les articles 20, 22, 23(7) et 25(1) et (3) sont exclus du paragraphe 5. Les autres dispositions du chapitre « s'appliquent » *mutatis mutandis*[203] sous réserve des alinéas (a), (b) et (c).

Alinéa (a) – une déclaration ou un enregistrement fait conformément à l'article 23(2) et (3) ne peut être refusé que pour le motif prévu au paragraphe 4(a) ;

561 Si la procédure admise pour la reconnaissance et l'exécution est celle visée à l'article 23, le seul motif de refus possible à ce stade est celui fondé sur l'ordre public, conformément à l'article 30(4)(a). La solution adoptée con-

[202] Proposition des délégations du Canada et de la Communauté européenne dans le Doc. trav. No 59 ; voir également Procès-verbal No 17, para. 31 et s.

[203] Sur cette expression, voir les commentaires relatifs à l'art. 26, para. 546 du présent Rapport.

Rapport explicatif

achieved a high degree of consensus at the Diplomatic Session of November 2007.[202]

552 Great advantages come from the inclusion of these instruments, as there is a growing tendency to promote amicable solutions and to avoid contentious procedures in several States. In view of the movement towards alternative methods of dispute resolution, it is important to have a mechanism that provides for the recognition and enforcement of private agreements and authentic instruments which may result from these dispute resolution systems. The absence of Article 30 would have been a great loss for the Convention and would have limited its usefulness.

553 The solution in the Convention is to use the term "maintenance arrangement", as defined in Article 3(e), including in Article 30 the rules under which such an arrangement is to be recognised and enforced. The possibility of a reservation is available to the Contracting States.

Paragraph 1 – A maintenance arrangement made in a Contracting State shall be entitled to recognition and enforcement as a decision under this Chapter provided that it is enforceable as a decision in the State of origin.

554 Paragraph 1 includes the general statement that maintenance arrangements are entitled to recognition and enforcement. The principal condition is that such an authentic instrument or private agreement be enforceable as a decision in the State of origin. It follows that if, as is the case in some countries, an agreement is enforceable as a contract rather than a decision, it will not fall within the scope of this Chapter.

Paragraph 2 – For the purpose of Article 10(1)(a) and (b) and (2)(a), the term "decision" includes a maintenance arrangement.

555 This paragraph ensures that the obligation to make available applications for recognition and enforcement, or for enforcement, within Chapter III (Applications through Central Authorities) applies not only to "decisions", but also to "maintenance arrangements".

Paragraph 3 – An application for recognition and enforcement of a maintenance arrangement shall be accompanied by the following –

556 Paragraphs 1 and 3 of Article 25 do not apply to maintenance arrangements. This is why paragraph 3 enumerates the required documents to accompany an application for recognition and enforcement of a maintenance arrangement.

Sub-paragraph (a) – a complete text of the maintenance arrangement; and

557 In sub-paragraph (a) it is required that a complete text of the maintenance arrangement be produced. For the same reasons as stated in relation to Article 25, it is not required that the copy be "certified as true" by the competent authority of the State in which it was made (the State of origin).

Sub-paragraph (b) – a document stating that the particular maintenance arrangement is enforceable as a decision in the State of origin.

558 In sub-paragraph (b) a document is required from the competent authority in the State of origin stating that the particular maintenance arrangement is enforceable as a decision in that State, in the sense of Article 19. It has to be underlined that what is important for the Convention is not that a certain form of arrangement is enforceable according to the law of the State of origin, but that the arrangement in the concrete case meets the requirement of enforceability as a decision in the State of origin.

Paragraph 4 – Recognition and enforcement of a maintenance arrangement may be refused if –

Sub-paragraph (a) – the recognition and enforcement is manifestly incompatible with the public policy of the State addressed;

Sub-paragraph (b) – the maintenance arrangement was obtained by fraud or falsification;

Sub-paragraph (c) – the maintenance arrangement is incompatible with a decision rendered between the same parties and having the same purpose, either in the State addressed or in another State, provided that this latter decision fulfils the conditions necessary for its recognition and enforcement in the State addressed.

559 The procedure for the recognition and enforcement of a maintenance arrangement will be relatively simple and quick. Not all the grounds of refusal in Article 22 apply. In fact, only three grounds for refusal are included in paragraph 4. The first (sub-para. (a)) is incompatibility with the public policy (*ordre public*) of the State addressed, equivalent to paragraph (a) in Article 22. The second (sub-para. (b)) is fraud, in principle equivalent to paragraph (b) of Article 22, but, taking into account the particularities of maintenance arrangements, the ground for the refusal is the fact that the arrangement "was obtained by fraud or falsification". Finally, sub-paragraph (c) adopts the "incompatibility" principle which is expressed in similar terms to paragraph (d) of Article 22. As in Article 22, the three grounds "may" be used to refuse recognition and enforcement.

Paragraph 5 – The provisions of this Chapter, with the exception of Articles 20, 22, 23(7) and 25(1) and (3), shall apply *mutatis mutandis* to the recognition and enforcement of a maintenance arrangement save that –

560 Not all the provisions in Chapter V should be applied to the recognition and enforcement of maintenance arrangements. This is why, in paragraph 5, Articles 20, 22, 23(7) and 25(1) and (3) are excluded. The rest of the Chapter "shall" be applicable *mutatis mutandis*,[203] subject to sub-paragraphs (a), (b) and (c).

Sub-paragraph (a) – a declaration or registration in accordance with Article 23(2) and (3) may be refused only on the ground set out in paragraph 4(a);

561 If the accepted procedure for recognition and enforcement is the one established in Article 23, the only ground for refusal at the first stage will be public policy, according to Article 30(4)(a). With this solution, a narrow basis for *ex*

[202] Proposal of the delegations of Canada and the European Community made in Work. Doc. No 59, see also Minutes No 17, paras 31 *et seq*.

[203] On this expression, see comments on Art. 26 at para. 546 of this Report.

fère un cadre restrictif au contrôle d'office puisque seul un refus fondé sur des raisons d'ordre public est permis. La possibilité de fonder un refus sur l'une quelconque des raisons visées au paragraphe 4 a été rejetée.

Alinéa (b) – une contestation ou un appel en vertu de l'article 23(6) ne peut être fondé que sur :

> **Alinéa (i) – les motifs de refus de reconnaissance et d'exécution prévus au paragraphe 4 ;**
>
> **Alinéa (ii) – l'authenticité ou l'intégrité d'un document transmis conformément au paragraphe 3 ;**

562 L'alinéa (b) confirme que la procédure de contestation ou d'appel visée à l'article 23(6) s'applique également aux conventions en matière d'aliments, et les motifs d'appel sont tous les motifs de refus de reconnaissance ou d'exécution énoncés à l'article 30(4). De même, l'authenticité ou l'intégrité des documents transmis conformément à l'article 30(3) constituent un motif de contestation ou d'appel en vertu de l'article 23(6).

Alinéa (c) – en ce qui concerne la procédure prévue à l'article 24(4), l'autorité compétente peut contrôler d'office le motif de refus de reconnaissance et d'exécution spécifié au paragraphe 4(a) de cet article. Elle peut contrôler l'ensemble des bases de reconnaissance et d'exécution prévues au paragraphe 4, ainsi que l'authenticité ou l'intégrité de tout document transmis conformément au paragraphe 3 si cela est soulevé par le défendeur ou si un doute relatif à ces motifs existe au vu de ces documents.

563 Cette règle s'avère nécessaire lorsqu'un État contractant a déclaré qu'il appliquerait la procédure de reconnaissance et d'exécution prévue à l'article 24. À l'égard de ces États, l'alinéa (c) remplace les alinéas (a) et (b). L'alinéa (c), dont la structure est semblable à celle de l'article 24(4), énonce les circonstances dans lesquelles l'autorité compétente peut, d'office ou à la demande du défendeur, contrôler la convention en matière d'aliments.

Paragraphe 6 – La procédure de reconnaissance et d'exécution d'une convention en matière d'aliments est suspendue si une contestation portant sur la convention est pendante devant une autorité compétente d'un État contractant.

564 Par définition, une convention en matière d'aliments n'aura pas été homologuée par une autorité judiciaire ou administrative dans l'État d'origine (si tel était le cas, elle constituerait une « décision » aux fins du chapitre V ; voir art. 19). Le paragraphe 6 introduit une règle permettant de suspendre la procédure de reconnaissance et d'exécution lorsqu'une procédure concernant la validité de la convention en matière d'aliments est en cours « devant une autorité compétente ». La localisation de l'autorité compétente n'est pas précisée.

Paragraphe 7 – Un État peut déclarer conformément à l'article 63 que les demandes de reconnaissance et d'exécution des conventions en matière d'aliments ne peuvent être présentées que par l'intermédiaire des Autorités centrales.

565 Le paragraphe 7 autorise un État contractant à déclarer qu'il n'autorisera pas les demandes directes (au sens de l'art. 37) de reconnaissance et d'exécution des conventions en matière d'aliments. L'effet d'une telle déclaration est que toutes les demandes devront être présentées par l'intermédiaire des Autorités centrales. Certains États sont d'avis que ce processus de sélection constitue une protection supplémentaire nécessaire dans le cas des conventions en matière d'aliments. Cette déclaration doit être notifiée au dépositaire, conformément à l'article 63.

Paragraphe 8 – Un État contractant pourra, conformément à l'article 62, se réserver le droit de ne pas reconnaître et exécuter les conventions en matière d'aliments.

566 L'inclusion obligatoire des conventions en matière d'aliments dans le champ d'application de la Convention n'a pas fait l'unanimité auprès des délégations. Deux options ont donc été envisagées. La première offrait la possibilité aux États d'émettre une réserve à l'égard des conventions en matière d'aliments. La seconde consistait à laisser ces instruments de côté tout en permettant aux États de faire une déclaration les comprenant (*opt-in declaration*). Finalement, la première option a été retenue. Par conséquent, les conventions en matière d'aliments tombent dans le champ d'application de la Convention à l'égard de tous les États qui n'ont pas fait de réserve conformément à l'article 62.

Article 31 Décisions résultant de l'effet combiné d'ordonnances provisoires et de confirmation

Lorsqu'une décision résulte de l'effet combiné d'une ordonnance provisoire rendue dans un État et d'une ordonnance rendue par l'autorité d'un autre État qui confirme cette ordonnance provisoire (« État de confirmation ») :

Paragraphe (a) – chacun de ces États est considéré, aux fins du présent chapitre, comme étant un État d'origine ;

Paragraphe (b) – les conditions prévues à l'article 22(e) sont remplies si le défendeur a été dûment avisé de la procédure dans l'État de confirmation et a eu la possibilité de contester la confirmation de l'ordonnance provisoire ;

Paragraphe (c) – la condition prévue à l'article 20(6) relative au caractère exécutoire de la décision dans l'État d'origine est remplie si la décision est exécutoire dans l'État de confirmation ; et

Paragraphe (d) – l'article 18 ne fait pas obstacle à ce qu'une procédure en vue de la modification d'une décision soit initiée dans l'un ou l'autre des États.

567 L'esprit de l'article 31 est d'instituer une règle cohérente lorsqu'une décision est produite par l'effet combiné d'une ordonnance provisoire et d'une ordonnance confirmant celle-ci. Les ordonnances provisoires des États du Commonwealth constituent un cas particulier car leur origine n'a pas toujours été parfaitement claire. En pratique, les ordonnances provisoires sont habituellement rendues dans l'État du créancier mais restent sans effet jusqu'à leur confirmation (avec ou sans modification) par l'État requis – habituellement l'État du débiteur. L'article 31 reflète la proposition présentée par le Secrétariat du Commonwealth[204] visant à mettre fin à la confusion relative aux ordonnances provisoires. L'article s'intitulait initialement « Mécanismes du Commonwealth pour l'exécution réciproque des obligations alimentaires », mécanisme désigné par l'acronyme

[204] Doc. trav. No 81.

officio review has been adopted, which would permit refusal only for reasons of public policy. The possibility of permitting refusal for any of the reasons specified in paragraph 4 was rejected.

Sub-paragraph (b) – a challenge or appeal as referred to in Article 23(6) may be founded only on the following –

> **Sub-paragraph (i) – the grounds for refusing recognition and enforcement set out in paragraph 4;**
>
> **Sub-paragraph (ii) – the authenticity or integrity of any document transmitted in accordance with paragraph 3;**

562 Sub-paragraph (b) confirms that the procedure for challenge or appeal in Article 23(6) also applies in the case of maintenance arrangements, and the grounds for appeal are all those that appear in Article 30(4) as grounds for non-recognition or non-enforcement. Equally, the authenticity or integrity of the documents transmitted according to Article 30(3) will serve as a basis for a challenge or appeal under Article 23(6).

Sub-paragraph (c) – as regards the procedure under Article 24(4), the competent authority may review of its own motion the ground for refusing recognition and enforcement set out in paragraph 4(a) of this Article. It may review all grounds listed in paragraph 4 of this Article and the authenticity or integrity of any document transmitted in accordance with paragraph 3 if raised by the respondent or if concerns relating to those grounds arise from the face of those documents.

563 This rule is necessary if a Contracting State has declared that it will apply the procedure for recognition and enforcement set out in Article 24. For these States sub-paragraph (c) replaces sub-paragraphs (a) and (b). Sub-paragraph (c), with the same structure as Article 24(4), sets out the circumstances in which the competent authority may of its own motion, or if raised by the respondent, review the maintenance arrangement.

Paragraph 6 – Proceedings for recognition and enforcement of a maintenance arrangement shall be suspended if a challenge concerning the arrangement is pending before a competent authority of a Contracting State.

564 By definition, a maintenance arrangement will not have been approved by a judicial or administrative authority in the State of origin (if that were the case it would constitute a "decision" for the purpose of Chapter V) (see Art. 19). In paragraph 6 a rule is introduced to give the opportunity to suspend proceedings for recognition and enforcement if proceedings concerning the validity of the maintenance arrangement are pending "before a competent authority". The location of the competent authority is not specified.

Paragraph 7 – A State may declare, in accordance with Article 63, that applications for recognition and enforcement of a maintenance arrangement shall only be made through Central Authorities.

565 Paragraph 7 allows a Contracting State to declare that it will not permit direct requests (in the sense of Art. 37) for the recognition and enforcement of maintenance arrangements. The effect of such a declaration is that all applications would have to be processed through Central Authorities. Some States are of the view that this filtering process constitutes a necessary additional safeguard in the case of maintenance arrangements. This declaration has to be made to the depositary, according to Article 63.

Paragraph 8 – A Contracting State may, in accordance with Article 62, reserve the right not to recognise and enforce a maintenance arrangement.

566 The mandatory inclusion of maintenance arrangements in the scope of the Convention was not acceptable for all delegations. Two options were discussed. The first was the possibility for States to make a reservation in respect of maintenance arrangements, the second, to leave out these instruments and to allow States to make an opt-in declaration. Finally, the first option was accepted. The result is, in consequence, that maintenance arrangements are in the scope of the Convention for all States that do not make a reservation in accordance with Article 62.

Article 31 Decisions produced by the combined effect of provisional and confirmation orders

Where a decision is produced by the combined effect of a provisional order made in one State and an order by an authority in another State ("the confirming State") confirming the provisional order –

Paragraph (a) – each of those States shall be deemed for the purposes of this Chapter to be a State of origin;

Paragraph (b) – the requirements of Article 22(e) shall be met if the respondent had proper notice of the proceedings in the confirming State and an opportunity to oppose the confirmation of the provisional order;

Paragraph (c) – the requirement of Article 20(6) that a decision be enforceable in the State of origin shall be met if the decision is enforceable in the confirming State; and

Paragraph (d) – Article 18 shall not prevent proceedings for the modification of the decision being commenced in either State.

567 Article 31 is designed to introduce a consistent rule to apply where a decision is produced by the combined effect of a provisional order and an order confirming the provisional order. A particular situation in which it has not always been clear in the past where the order is made concerns provisional orders of the Commonwealth jurisdictions. The common practice has been that provisional orders are usually made in the creditor's jurisdiction, but have no force and effect until confirmed (with or without modification) by the State addressed, usually the debtor's jurisdiction. Article 31 gives effect to a proposal made by the Commonwealth Secretariat,[204] to resolve the confusion about provisional orders. Originally, the title was "Commonwealth arrangements for the reciprocal enforcement of maintenance obligations", known as REMO arrangements,

[204] Work. Doc. No 81.

REMO, mais son titre a été modifié lorsqu'on a réalisé que ces arrangements s'appliquent parfois à d'autres États que les États membres du Commonwealth.

568 Un exemple a été donné au cours des discussions en Séance plénière afin d'illustrer le fonctionnement de cette disposition. Une femme vit en Jamaïque et son mari, qui vit en Angleterre, a cessé de lui verser des aliments. Elle se rend devant son tribunal local où elle présente sa demande. Au vu de ses prétentions, le tribunal jamaïcain rend une ordonnance provisoire. L'ordonnance ne produit pas d'effets à ce stade de la procédure mais sera transmise au tribunal local en Angleterre. Là, le mari pourra faire entendre ses propres arguments et une décision de confirmation ou modification de la décision jamaïcaine sera alors rendue. L'audience est en réalité divisée et il est possible que l'affaire soit renvoyée devant le tribunal jamaïcain et ainsi de suite. Le résultat final découlera donc du travail combiné des deux tribunaux. Si la Jamaïque n'est pas Partie à la Convention alors que le Royaume-Uni l'est, le fait que le Royaume-Uni soit Partie à la Convention permettrait d'exécuter la décision dans un autre État contractant. On notera aussi que dans cette hypothèse, la Jamaïque n'étant pas Partie à la Convention, elle ne disposerait pas d'Autorité centrale.

569 Le paragraphe (d) a été introduit afin de régler une difficulté supplémentaire[205]. Les dispositions de l'article 18 relatives aux restrictions à l'introduction de procédures sont difficilement adaptables lorsqu'une décision est produite par deux États. Dans l'exemple présenté au paragraphe précédent, la femme conserve sa résidence habituelle en Jamaïque et le mari veut initier une action pour modifier la décision. Aux termes de l'article 18(1), cette action du débiteur n'est possible qu'en Jamaïque, mais la Jamaïque n'est pas Partie à la Convention et cette action ne serait pas possible en Angleterre. Le paragraphe (d) garantit que l'article 18 n'empêche pas l'introduction d'une procédure de modification dans l'un ou l'autre des États concernés par le système réciproque, car les deux États sont considérés comme « l'État d'origine » aux fins de ce chapitre de la Convention. Dans cet exemple, l'effet du paragraphe (d) serait que le mari pourrait initier une action en modification en Angleterre. Si la femme avait résidé habituellement en Australie, État partie à la Convention, le mari aurait eu la possibilité d'initier l'action en modification de la décision, soit en Australie, soit en Angleterre. Le terme « initiée » a été préféré à « introduite », en raison du fait que les procédures pour modification d'une décision peuvent être initiées devant le tribunal saisi au cours de la seconde phase de la procédure d'obtention de la décision.

CHAPITRE VI – EXÉCUTION PAR L'ÉTAT REQUIS

570 Dès lors qu'une décision est reconnue et déclarée exécutoire dans l'État requis, des mesures doivent être prises pour l'exécuter effectivement et recouvrer les aliments. On sait que les meilleures procédures internationales de reconnaissance et d'exécution peuvent être tenues en échec par des mesures d'exécution internes inefficaces. C'est pourquoi, pour la première fois dans l'histoire des Conventions de La Haye, cette Convention contient un chapitre entièrement consacré à l'exécution par l'État requis. Le chapitre VI s'applique aux demandes présentées par l'intermédiaire des Autorités centrales comme aux demandes directes.

Article 32 Exécution en vertu du droit interne

Paragraphe premier – Sous réserve des dispositions du présent chapitre, les mesures d'exécution ont lieu conformément à la loi de l'État requis.

571 La règle générale est que les mesures d'exécution de la décision étrangère sont régies par la loi de l'État requis. Cet article vise les mesures d'exécution, ce qui signifie l'exécution *stricto sensu* et non la procédure intermédiaire à laquelle une décision étrangère est soumise avant d'être effectivement exécutée, à laquelle l'article 23 est consacré[206].

Paragraphe 2 – L'exécution doit être rapide.

572 Conformément à d'autres parties de la Convention, ce paragraphe stipule que l'exécution doit être « rapide », c'est-à-dire qu'elle doit être aussi prompte que possible. Les chapitres V et VI sont ainsi liés, au sens où la rapidité est essentielle à toutes les étapes de la procédure d'exécution et entre elles.

Paragraphe 3 – En ce qui concerne les demandes présentées par l'intermédiaire des Autorités centrales, lorsqu'une décision a été déclarée exécutoire ou enregistrée pour exécution en application du chapitre V, l'exécution a lieu sans qu'aucune autre action du demandeur ne soit nécessaire.

573 Le paragraphe 3 vise à garantir que l'ensemble de la procédure applicable à une demande de reconnaissance et d'exécution, y compris l'exequatur et l'exécution en vertu du droit interne, soit traité comme un *continuum*, qui ne requiert pas d'autres demandes à d'autres étapes. La règle au paragraphe 3 favorise non seulement une conclusion rapide, mais elle protège aussi le créancier d'une charge supplémentaire superflue aux étapes finales de la procédure. Cette règle ne s'applique que lorsque la demande a été présentée par l'intermédiaire des Autorités centrales, car dans le cas d'une demande présentée directement, aucune autorité publique (telle que l'Autorité centrale) n'est impliquée pour superviser au nom du demandeur la procédure et garantir sa continuité. Dans de tels cas, une nouvelle demande d'exécution faisant suite à une déclaration de force exécutoire de la décision peut tout à fait être nécessaire, selon les exigences procédurales de l'État requis.

Paragraphe 4 – Il est donné effet à toute règle relative à la durée de l'obligation alimentaire applicable dans l'État d'origine de la décision.

574 Dans certaines hypothèses, la loi applicable ne sera pas nécessairement la loi de l'État requis. C'est par exemple le cas avec les exceptions figurant aux paragraphes 4 et 5. Il en est ainsi car il est nécessaire d'insérer dans ce chapitre des dispositions contraignantes sur la loi applicable, bien que la Convention ne comporte pas un régime général obligatoire sur la loi applicable.

575 La première exception à l'application de la loi de l'État requis est liée à la durée de l'obligation alimentaire. Ce problème se pose au moment de l'exécution et ne peut être résolu par la loi de l'État requis, mais par la loi de l'État d'origine. La formulation « toute règle […] applicable dans l'État d'origine » est volontairement vague, afin de couvrir les lois internes de l'État d'origine ainsi que ses règles de droit international privé.

[205] Voir Doc. trav. No 9 des délégations de l'Australie, du Canada et de la Nouvelle-Zélande et de l'Observateur du Secrétariat du Commonwealth ainsi que les discussions dans le Procès-verbal No 11.

[206] Voir *supra*, para. 490 et s. du présent Rapport.

but it was changed after realising that these arrangements sometimes apply to States other than Member States of the Commonwealth.

568 During the discussion in Plenary, an example was given which illustrates the operation of this provision. A wife is living in Jamaica and her husband in England stops sending maintenance payments. She goes to her local court and presents a claim there. On the basis of her submissions the Jamaican court makes a provisional order. This decree has no effect at that stage of proceedings, but will be sent to the local court in England where the husband's side of the argument is heard and a decision would then be made to confirm or modify the Jamaican order. There is in fact a divided hearing, and it is possible that the case may be referred back to the court in Jamaica, and so on. The final outcome is thus the result of the combined work of the two courts. If Jamaica were not a Party to the Convention but the United Kingdom were, the decision could be enforced in another Contracting State because the United Kingdom was Party to the Convention. It should also be noted that in this case, Jamaica would not have a Central Authority as it is not a Party to the Convention.

569 Paragraph (d) has been introduced to deal with an additional problem.[205] The provisions of Article 18, concerning restrictions on bringing proceedings, are not easily accommodated where a decision is produced by two States. In the example given in the previous paragraph, the wife continues having her habitual residence in Jamaica and the husband wants to initiate proceedings to modify the decision. According to Article 18(1), this action of the debtor is only possible in Jamaica, but Jamaica is not a Party to the Convention and this action would not be possible in England. Paragraph (d) ensures that Article 18 does not prevent the commencement of proceedings for modification in either of the States involved in the reciprocal system, as both States are considered as the "State of origin" for the purposes of this Chapter of the Convention. In this example, the effect of paragraph (d) would be that the husband could commence the proceedings for modification in England. If the habitual residence of the wife had been in Australia, State Party to the Convention, the husband would have had the possibility to commence proceedings for the modification of the decision either in Australia or in England. The term "commenced" was preferred to "brought", since proceedings for modification could be commenced in the court addressed in the second stage of the proceedings for establishment.

CHAPTER VI – ENFORCEMENT BY THE STATE ADDRESSED

570 Once a decision has been recognised and declared enforceable in the State addressed, measures have to be adopted in order actually to enforce the decision and effectively recover the maintenance. It is recognised that the best international procedures for recognition and enforcement may be frustrated if, in the end, internal measures of enforcement are ineffective. This is why this Convention, for the first time in the history of Hague Conventions, contains a separate chapter on enforcement by the State addressed. Chapter VI applies to applications through Central Authorities as well as to direct requests.

[205] See Work. Doc. No 9 of the delegations of Australia, Canada and New Zealand and of the Observer for the Commonwealth Secretariat and discussion in Minutes No 11.

Article 32 Enforcement under internal law

Paragraph 1 – Subject to the provisions of this Chapter, enforcement shall take place in accordance with the law of the State addressed.

571 The general rule is that the law of the State addressed determines the measures to enforce the foreign decision. This Article refers to the enforcement measures, which means the enforcement *stricto sensu* and not the intermediate procedure to which a foreign decision is submitted before being actually enforced, to which Article 23 is devoted.[206]

Paragraph 2 – Enforcement shall be prompt.

572 In line with other parts of the Convention, this paragraph stipulates that enforcement has to be as quick as possible, or "prompt". This creates a link between Chapters V and VI in the sense that at every stage, as well as between stages, in the enforcement process speed is essential.

Paragraph 3 – In the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement under Chapter V, enforcement shall proceed without the need for further action by the applicant.

573 Paragraph 3 is designed to ensure that the whole of the procedure on an application for recognition and enforcement, including *exequatur* and enforcement under internal law, is treated as a continuum, not requiring further applications at different stages. As well as contributing to a speedy conclusion, the rule in paragraph 3 prevents unnecessary additional burdens being placed on the creditor at the final stages of the procedure. This rule only applies where the application has been made through Central Authorities, because in the case of a direct request there is no public authority (such as the Central Authority) involved on behalf of the applicant to oversee the proceedings and guarantee their continuation. In such cases a new request for enforcement, following a declaration of enforceability of a decision, may very well be necessary, depending on the procedural requirements of the State addressed.

Paragraph 4 – Effect shall be given to any rules applicable in the State of origin of the decision relating to the duration of the maintenance obligation.

574 In some cases the applicable law will not necessarily be the law of the State addressed. This is the case with the exceptions included in paragraphs 4 and 5. The reason is that it was necessary to include in this Chapter some mandatory provisions on applicable law, although the Convention does not include a mandatory general regime on applicable law.

575 The first exception to the application of the law of the State addressed relates to the duration of the maintenance obligation. It is a problem that appears at the moment of enforcement and that cannot be solved by the law of the State addressed, but by the law of the State of origin of the decision. The wording "any rules applicable in the State of origin" is purposely vague, in order to include internal laws of the State of origin as well as its rules of private international law.

[206] See *supra*, paras 490 *et seq.* of this Report.

576 La règle de l'article 32(4) ne s'applique dans un État contractant donné qu'aux affaires qui, pour cet État, entrent dans le champ d'application de la Convention tel que défini à l'article 2. L'article 32(4) ne peut être interprété comme étendant les obligations d'un État contractant au-delà de celles qui lui incombent en vertu de l'article 2. L'exemple suivant illustrera cette remarque. L'État A a ratifié la Convention et conformément à l'article 2(2), a réservé aux personnes de moins de 18 ans l'application des dispositions de la Convention relatives aux aliments destinés aux enfants. L'État B a ratifié la Convention mais n'a pas fait cette réserve, et a préféré accepter le principe général de l'application des obligations alimentaires à l'égard des enfants jusqu'à l'âge de 21 ans. Une décision en matière d'aliments a été rendue dans l'État B en faveur d'un enfant qui, à l'époque de la décision, était âgé de 17 ans. La décision a été exécutée dans l'État A à l'encontre du père qui y réside, et la question se pose de savoir si les autorités de l'État A seront ou non obligées de poursuivre l'exécution lorsque l'enfant aura 18 ans révolus. La réponse est non, parce que pour l'État A, ce serait aller au-delà du périmètre des obligations qu'il a acceptées. La règle de l'article 32(4), qui, il est vrai, semble suggérer, si on la lit littéralement, une issue contraire, doit être lue à la lumière et sous réserve des dispositions relatives au champ d'application de l'article 2.

577 Les situations sur lesquelles l'article 32(4) peut avoir une incidence sont celles qui, pour les deux États concernés, entrent dans le champ d'application de la Convention, lorsque la durée exacte de l'obligation n'est pas définie par le champ d'application. Exemple : l'État A autorise des aliments entre époux et ex-époux pour une durée illimitée à la suite d'un divorce. L'État B limite le versement d'aliments entre époux et ex-époux à une période de cinq ans suivant le divorce. Une décision est rendue dans l'État A et doit être exécutée dans l'État B. En vertu de l'article 32(4), les autorités de l'État B seraient obligées de poursuivre l'exécution de la décision au-delà des cinq ans parce que le droit de l'État d'origine de la décision ne prévoit pas de délai de prescription.

Paragraphe 5 – Le délai de prescription relatif à l'exécution des arrérages est déterminé par la loi, de l'État d'origine de la décision ou de l'État requis, qui prévoit le délai le plus long.

578 La deuxième exception possible à l'application de la loi de l'État requis est liée au délai de prescription applicable à l'exécution des arrérages. Dans ce cas, la loi applicable sera, entre la loi de l'État d'origine de la décision et la loi de l'État requis, celle qui prévoit le délai le plus long. La règle est clairement favorable au créancier.

579 Cette règle ne s'applique qu'aux arrérages et non aux aliments rétroactifs. Seuls les arrérages seraient pris en considération au stade de l'exécution, car les éventuels aliments rétroactifs seront déjà inclus dans la décision. Sur la distinction entre arrérages et aliments rétroactifs, voir l'article 19(1)[207].

Article 33 Non-discrimination

Dans les affaires relevant de la Convention, l'État requis prévoit des mesures d'exécution au moins équivalentes à celles qui sont applicables aux affaires internes.

580 Le sens général de cette règle est que les méthodes d'exécution applicables aux décisions internes doivent aussi s'appliquer aux décisions étrangères dès lors que ces dernières peuvent être exécutées dans l'État requis. L'expression « au moins » suggère que l'État requis peut opérer une discrimination positive en faveur des décisions étrangères en leur appliquant un éventail de méthodes d'exécution plus large que celui qui s'applique aux décisions internes. Il est peu probable que ce cas soit fréquent, mais la nature particulière des demandes internationales d'aliments peut parfois requérir l'application de techniques d'exécution spéciales.

581 Cet article précise que la règle ne s'applique qu'aux affaires relevant de la Convention.

Article 34 Mesures d'exécution

Paragraphe premier – Les États contractants doivent rendre disponibles dans leur droit interne des mesures efficaces afin d'exécuter les décisions en application de la Convention.

582 Compte tenu des objectifs de la Convention, les États contractants doivent veiller au recouvrement efficace des aliments et, à cette fin, prévoir des mesures d'exécution efficaces. La philosophie qui sous-tend cette disposition consiste à rendre disponibles les mesures les plus efficaces sans aucune restriction. L'État requis met à disposition les mesures et c'est à la loi interne de déterminer précisément quelles mesures sont autorisées, à qui il appartient d'appliquer les différentes mesures d'exécution et dans quel ordre.

Paragraphe 2 – De telles mesures peuvent comporter :

Alinéa (a) – la saisie des salaires ;

Alinéa (b) – les saisies-arrêts sur comptes bancaires et autres sources ;

Alinéa (c) – les déductions sur les prestations de sécurité sociale ;

Alinéa (d) – le gage sur les biens ou leur vente forcée ;

Alinéa (e) – la saisie des remboursements d'impôt ;

Alinéa (f) – la retenue ou saisie des pensions de retraite ;

Alinéa (g) – le signalement aux organismes de crédit ;

Alinéa (h) – le refus de délivrance, la suspension ou le retrait de divers permis (le permis de conduire par exemple) ;

Alinéa (i) – le recours à la médiation, à la conciliation et à d'autres modes alternatifs de résolution des différends afin de favoriser une exécution volontaire.

583 La liste du paragraphe 2 est indicative et non exhaustive. Elle décrit le type de mesures qu'un État contractant peut envisager en exécution de son obligation générale de mettre à disposition des mesures efficaces. Dans certains cas, l'objectif visé est le paiement effectif (saisie sur salaire par ex.), mais dans d'autres, il s'agit d'exercer des pressions sur le débiteur et de l'inciter ainsi indirectement à payer (suspension du permis de conduire par ex.). La médiation, la conciliation et autres mesures similaires peuvent

[207] Voir *supra*, para. 430 et s. du présent Rapport.

Rapport explicatif

576 The rule in Article 32(4) only applies in a particular Contracting State to a case which, for that State, falls within the scope of the Convention under Article 2. Article 32(4) cannot be read as extending the obligations of a particular Contracting State beyond those which fall on that State by virtue of Article 2. The following example will illustrate this point. State A has ratified the Convention and by virtue of Article 2(2), has reserved the application of the Convention's child support provisions to persons below 18 years of age. State B has ratified the Convention, but has made no such reservation, preferring to accept the Convention's general principle that child support obligations apply to children up to the age of 21 years. A child support decision has been made in State B in favour of a child who at the time of the decision is 17 years old. The order has been enforced in State A against a father living there, and the question arises whether the authorities in State A will or will not be obliged to continue enforcement after the child attains the age of 18 years. The answer is negative, because for State A this would go beyond the scope of the obligations it has accepted. The rule in Article 32(4), which admittedly appears on a literal reading to suggest a contrary outcome, must be read in the light of and subject to the scope provisions of Article 2.

577 The situations which may be affected by Article 32(4) are ones which, for the two States concerned, fall within the scope of the Convention, but where the exact duration of a maintenance obligation is not defined by scope. The following is an example: State A permits spousal support for an indefinite duration following divorce. State B limits spousal support to a period of five years following divorce. An order is made in State A and is to be enforced in State B. By virtue of Article 32(4) the authorities in State B would be obliged to continue enforcing the order beyond five years because there is no limitation under the law of the State of origin of the decision.

Paragraph 5 – Any limitation on the period for which arrears may be enforced shall be determined either by the law of the State of origin of the decision or by the law of the State addressed, whichever provides for the longer limitation period.

578 The second possible exception to the application of the law of the State addressed relates to the period for which arrears may be enforced. In this case, the applicable law will be alternatively the law of the State of origin of the decision or the law of the State addressed, whichever provides for a longer period. The rule clearly favours the creditor.

579 The limitation rule only applies to arrears and not to retroactive maintenance. At the enforcement stage only arrears would be taken into consideration since any retroactive maintenance would already be included in the decision. As to the distinction between arrears and retroactive maintenance, see Article 19(1).[207]

Article 33 Non-discrimination

The State addressed shall provide at least the same range of enforcement methods for cases under the Convention as are available in domestic cases.

580 The general meaning of this rule is that the enforcement methods applied to foreign decisions, once they are entitled to be enforced in the State addressed, cannot be less than those which apply to internal decisions. The use of the expression "at least" suggests that the State addressed may discriminate positively in favour of foreign decisions by applying to them a broader range of enforcement methods than apply to internal decisions. This is unlikely to be a common occurrence. However, the peculiar characteristic of international maintenance claims may sometimes require the application of special techniques of enforcement.

581 This Article specifies that the rule applies only for cases under the Convention.

Article 34 Enforcement measures

Paragraph 1 – Contracting States shall make available in internal law effective measures to enforce decisions under this Convention.

582 Taking into account the objects of the Convention, the Contracting States have to ensure the effective recovery of maintenance and, to that end, to make available effective measures to enforce the decisions. The philosophy behind this provision is to make available the most effective measures, without any kind of limitation. The State addressed makes the measures available, and it is for internal law to determine precisely which measures are authorised and whose responsibility it is to activate different enforcement measures and in what order.

Paragraph 2 – Such measures may include –

Sub-paragraph (a) – wage withholding;

Sub-paragraph (b) – garnishment from bank accounts and other sources;

Sub-paragraph (c) – deductions from social security payments;

Sub-paragraph (d) – lien on or forced sale of property;

Sub-paragraph (e) – tax refund withholding;

Sub-paragraph (f) – withholding or attachment of pension benefits;

Sub-paragraph (g) – credit bureau reporting;

Sub-paragraph (h) – denial, suspension or revocation of various licenses (for example, driving licenses);

Sub-paragraph (i) – the use of mediation, conciliation or similar processes to bring about voluntary compliance.

583 The list in paragraph 2 is illustrative and not exhaustive. It describes the kind of measures which a Contracting State may consider in fulfilment of its general obligations to make effective measures available. In some cases the direct objective is to make the payment effective (*e.g.*, wage withholding), but in other cases there are measures which seek to put pressure on the debtor and, indirectly, induce her or him to pay (*e.g.*, the suspension of the driving license). Mediation, conciliation or other similar measures,

[207] See *supra*, paras 430 *et seq.* of this Report.

aider à garantir l'objectif de l'article 34, en encourageant le paiement volontaire des obligations alimentaires. Bien qu'il ne s'agisse pas de mesures d'exécution à proprement parler, elles encouragent le paiement volontaire. À cette fin, l'Autorité centrale pourrait rechercher une solution amiable après une reconnaissance ou une déclaration de force exécutoire mais avant l'exécution effective.

Article 35 Transferts de fonds

Paragraphe premier – Les États contractants sont encouragés à promouvoir, y compris au moyen d'accords internationaux, l'utilisation des moyens disponibles les moins coûteux et les plus efficaces pour effectuer les transferts de fonds destinés à être versés à titre d'aliments.

584 Si l'objectif de la Convention est de faciliter le recouvrement des aliments, faciliter le transfert de fonds répond évidemment à cet objectif. Cela a l'effet pédagogique d'encourager les États contractants à faciliter ce transfert afin de réellement exécuter la décision relative aux aliments et de veiller à ce que le créancier reçoive les fonds aussi vite que possible et sans coûts supplémentaires excessifs, tels les frais bancaires. À cette fin, voir le document de Philippe Lortie, qui mentionne la loi type de la CNUDCI sur les virements internationaux et donne des exemples de communication électronique[208].

Paragraphe 2 – Un État contractant dont la loi impose des restrictions aux transferts de fonds accorde la priorité la plus élevée aux transferts de fonds destinés à être versés en vertu de la présente Convention.

585 Le paragraphe 2 reproduit en totalité l'article 22 de la Convention Obligations alimentaires de 1973 (Exécution), qui suit lui-même la formulation de la Convention de New York de 1956, avec quelques modifications mineures de forme pour l'adapter au contexte. Il n'y a pas de sanction directe si cette priorité n'est pas accordée, mais l'article a une portée morale[209]. Cette règle a été introduite dans les années 50 pour résoudre les problèmes nés du fait que des États avaient instauré des restrictions aux transferts de fonds afin de protéger leur monnaie. Cette règle a gagné en importance ces dernières années, car de nombreux États ont adopté des lois pour contrôler les mouvements internationaux de fonds en vue de stopper le financement des activités terroristes. Il pourrait être nécessaire d'assouplir ces règles dans certains États pour faciliter les transferts de fonds relatifs aux obligations alimentaires.

CHAPITRE VII – ORGANISMES PUBLICS

586 Ce chapitre trouve son origine dans le chapitre IV (art. 18 à 20) de la Convention Obligations alimentaires de 1973 (Exécution). Mais, après plus de 30 ans, les dispositions ont été modernisées. Il faut aussi tenir compte du fait qu'en 1973, une autre Convention de La Haye sur la loi applicable aux obligations alimentaires a été adoptée et qu'elle contient des dispositions sur la loi applicable en ce qui concerne les organismes publics (en particulier, les art. 9 et 19(3)).

587 Bien que la responsabilité principale en matière d'aliments incombe au débiteur, les organismes publics peuvent être appelés à fournir des aliments, soit à titre temporaire, soit définitivement, à la place du débiteur. Les systèmes sont très différents d'un pays à l'autre. Ainsi, dans certains pays, l'organisme public ne paie qu'en cas d'échec d'une tentative antérieure d'obtenir du débiteur qu'il verse des aliments. Dans d'autres systèmes en revanche, l'organisme public verse des aliments et s'efforce ensuite de résoudre le problème avec le débiteur.

Article 36 Organismes publics en qualité de demandeur

Paragraphe premier – Aux fins d'une demande de reconnaissance et d'exécution en application de l'article 10(1)(a) et (b) et des affaires couvertes par l'article 20(4), le terme « créancier » comprend un organisme public agissant à la place d'une personne à laquelle des aliments sont dus ou un organisme auquel est dû le remboursement de prestations fournies à titre d'aliments.

588 En intégrant les organismes publics dans la notion de « créancier », l'article 36 vise à couvrir les demandes d'aliments présentées par de tels organismes. En principe, l'article 36 couvre les affaires d'aliments destinés aux enfants, à titre obligatoire. Les demandes relatives à d'autres relations de familles seront donc traitées sur une base réciproque et ne seront possibles qu'entre deux pays qui auront fait la déclaration requise visant les mêmes catégories d'obligations alimentaires et les organismes publics de l'article 2(3).

589 L'article 36 pose quelques limites aux hypothèses dans lesquelles les demandes peuvent être présentées par les organismes publics.

590 La première limite posée au paragraphe premier concerne la nature de la demande. Un organisme public ne peut être considéré comme créancier que dans le cadre d'une demande de reconnaissance et d'exécution fondée sur l'article 10(1)(a) ou d'une demande d'exécution fondée sur l'article 10(1)(b). Cette disposition semble donc interdire à un organisme public de présenter une demande initiale d'aliments fondée sur la Convention. Il existe cependant un cas particulier dans lequel un organisme public peut présenter une demande initiale d'aliments. Il s'agit de l'hypothèse envisagée à l'article 20(4). Si la demande d'un organisme public aux fins de reconnaissance et d'exécution d'une décision n'est pas possible en raison d'une réserve faite en application de l'article 20(2), et si le débiteur a sa résidence habituelle dans l'État requis, alors cet État doit prendre toutes les mesures appropriées pour qu'une décision soit rendue en faveur du créancier, cela même si la demande a été introduite par un organisme public.

591 La seconde limite posée au paragraphe premier est que l'organisme public doit, soit a) agir à la place d'une personne à laquelle des aliments sont dus (le créancier), soit b) solliciter lui-même le remboursement de prestations déjà fournies à une personne à titre d'aliments. Il est apparu évident après quelques discussions que les organismes publics auraient rarement – voire jamais – besoin d'obtenir ou de modifier une décision dans un État requis. Au contraire, il paraissait toujours préférable, lorsque l'organisme public obtient de telles décisions dans son propre pays, d'en demander ensuite la reconnaissance et l'exécution dans l'État requis. C'est pourquoi, la Session diplomatique n'a pas ressenti le besoin d'étendre tous les types de demandes aux organismes publics.

[208] Doc. prél. No 9/2004 (*op. cit.* note 76) et annexe, en particulier les para. 20 et s. relatifs à la loi type de la CNUDCI sur les virements internationaux et les para. 47 et s. pour les exemples de communications électroniques.

[209] Voir le Rapport Verwilghen (*op. cit.* para. 15), para. 100 :
« Bien qu'il n'y ait aucune sanction directe prévue en cas de violation de la règle, l'engagement international formel d'accorder la priorité la plus élevée aux transferts de fonds destinés à être versés comme aliments est de poids. »

Rapport explicatif

by encouraging voluntary payment of maintenance obligations, may help to secure the objective of Article 34. Strictly speaking, they are not measures of enforcement, but they encourage voluntary payment. To this end, the Central Authority could seek an amicable solution after recognition and a declaration of enforceability, but before actual enforcement.

Article 35 Transfer of funds

Paragraph 1 – Contracting States are encouraged to promote, including by means of international agreements, the use of the most cost-effective and efficient methods available to transfer funds payable as maintenance.

584 If the objective of the Convention is to make the recovery of maintenance easier, then it is consistent with this objective to facilitate the transfer of funds. It has a pedagogical effect to induce Contracting States to facilitate this transfer in order to really enforce the decision on maintenance and to ensure that the funds are received by the creditor as quickly as possible, and without excessive additional costs such as bank fees. To that end, see the document of Philippe Lortie with reference to the Model Law of UNCITRAL on Credit Transfers and examples of electronic communications.[208]

Paragraph 2 – A Contracting State, under whose law the transfer of funds is restricted, shall accord the highest priority to the transfer of funds payable under this Convention.

585 Paragraph 2 reproduces in full Article 22 of the 1973 Hague Maintenance Convention (Enforcement), which follows the wording of the 1956 New York Convention, with minor changes of form to adapt it to the context. There is no direct sanction if this priority is not accorded, but the article has a moral weight.[209] In the 1950s this rule was introduced to provide a solution in relation to States which had established transfer restrictions aimed at protecting their currency. In recent years, this rule has gained importance as laws have been adopted in many States to control the cross-border movement of funds with a view to stop the funding of terrorist activities. In some States, it could be necessary to relax these rules in order to facilitate the transfer of funds relating to maintenance obligations.

CHAPTER VII – PUBLIC BODIES

586 The origin of this Chapter is Chapter IV (Arts 18 to 20) of the 1973 Hague Maintenance Convention (Enforcement). But after more than 30 years, the provisions have been modernised. Attention also has to be paid to the fact that, in 1973, another Hague Convention on the law applicable to maintenance obligations was adopted and it contains provisions on the applicable law in relation to public bodies (in particular, Arts 9 and 19(3)).

587 Although the principal responsibility for maintenance rests with the debtor, public bodies may be called upon to provide maintenance, either temporarily or definitively, in place of the debtor. Systems around the world differ largely from one to another. So, in some countries, the public body will only pay if a previous attempt has been made to obtain maintenance from the debtor, and the attempt has failed. On the contrary, in other systems, the public body pays maintenance and tries to solve the question with the debtor afterwards.

Article 36 Public bodies as applicants

Paragraph 1 – For the purposes of applications for recognition and enforcement under Article 10(1)(a) and (b) and cases covered by Article 20(4), "creditor" includes a public body acting in place of an individual to whom maintenance is owed or one to which reimbursement is owed for benefits provided in place of maintenance.

588 Article 36 is intended to cover claims for maintenance by a public body, by including such body in the concept of "creditor". In principle, it covers child support cases on a mandatory basis. Claims concerning other family relationships would be dealt with on a reciprocal basis, and would only be possible between two countries which have made the necessary declaration in relation to the same categories of maintenance obligations and to public bodies in Article 2(3).

589 Article 36 places some limits on the situations in which the claims may be made by public bodies.

590 The first limitation in paragraph 1 is on the nature of the application. In principle, only in an application for recognition and enforcement under Article 10(1)(a) or an application for enforcement under Article 10(1)(b) may a public body be regarded as a creditor. This provision therefore appears to exclude a public body from making an application under the Convention to establish a decision. However, there is one special case where a public body may apply for establishment of a decision. This is where the situation envisaged in Article 20(4) arises. If the application of a public body for recognition and enforcement of a decision is not possible as a result of a reservation made under Article 20(2), and if the debtor is habitually resident in the State addressed, that State must take all appropriate measures to establish a decision for the benefit of the creditor, even though the application has been brought by a public body.

591 The second limitation in paragraph 1 is that the public body must be either: i) acting in place of the individual to whom the maintenance is owed (the creditor), or ii) itself seeking reimbursement for benefits already provided to a person in place of maintenance. After some discussion, it was evident that public bodies would rarely, if ever, need to establish or modify a decision in a requested State. Rather, it would always be preferable if the public body obtained such decisions in its own country, to be followed by recognition and enforcement in the requested State. Therefore, the Diplomatic Session saw no need to extend to public bodies the full range of applications.

[208] Prel. Doc. No 9/2004 (*op. cit.* note 76) and Annex, especially paras 20 *et seq.* for the Model Law of UNCITRAL on Credit Transfers and paras 47 *et seq.* for examples of electronic communications.

[209] Verwilghen Report (*op. cit.* para. 15), para. 100:
"Although it is not possible to establish a direct sanction in case of violation of this rule, the formal international agreement to accord the highest priority to transfers of funds payable as maintenance is of some weight."

Paragraphe 2 – Le droit d'un organisme public d'agir à la place d'une personne à laquelle des aliments sont dus ou de demander le remboursement de la prestation fournie au créancier à titre d'aliments est soumis à la loi qui régit l'organisme.

592 Aux termes de ce paragraphe, la loi qui régit l'organisme gouvernera le droit de celui-ci d'agir à la place d'une personne à laquelle des aliments sont dus ou de demander le remboursement des prestations payées à une personne à titre d'aliments. Mais il doit être clair que la loi applicable aux obligations alimentaires s'appliquera aussi à l'existence de l'obligation alimentaire et à l'étendue de cette obligation.

Paragraphe 3 – Un organisme public peut demander la reconnaissance ou l'exécution :

593 Le paragraphe 3 envisage deux hypothèses dans lesquelles un organisme public peut demander la reconnaissance ou l'exécution d'une décision portant sur les aliments. Aucune référence n'est faite à la loi applicable, ce qui permet d'appliquer le droit matériel interne, la règle autonome de conflit de lois ou la règle de conflit de lois prévue dans une convention internationale (à titre d'exemple, les États parties à la Convention Obligations alimentaires de 1973 (Loi applicable) ou au Protocole à cette Convention sur la loi applicable aux obligations alimentaires appliqueront les règles de cette Convention ou de ce Protocole).

594 On notera que la rédaction de l'article 18 de la Convention Obligations alimentaires de 1973 (Exécution) est plus ouverte. Dans la nouvelle Convention, il est dit que l'organisme public demande le remboursement des prestations payées « à titre » d'aliments, tandis que la Convention de 1973 n'évoque que « le remboursement de prestations fournies au créancier d'aliments »[210]. La nouvelle Convention est plus précise et plus restrictive, car elle précise que la demande de remboursement se limite aux prestations qui ont été versées « à titre » d'aliments. C'est une décision de principe de la nouvelle Convention de ne pas aller aussi loin que la Convention de 1973.

Alinéa (a) – d'une décision rendue contre un débiteur à la demande d'un organisme public qui poursuit le paiement de prestations fournies à titre d'aliments ;

595 L'alinéa (a) envisage l'hypothèse dans laquelle l'organisme public était demandeur (et le débiteur vraisemblablement défendeur dans la plupart des cas, si ce n'est tous) à la procédure qui a donné lieu à une décision à l'encontre du débiteur. Sous réserve que la loi qui régit l'organisme public l'autorise, celui-ci peut faire une demande de reconnaissance et d'exécution de cette décision dans un autre État contractant sur le fondement de l'article 10(1)(a) de la Convention.

Alinéa (b) – d'une décision rendue entre un créancier et un débiteur, à concurrence des prestations fournies au créancier à titre d'aliments.

596 Dans l'hypothèse envisagée à l'alinéa (b), la décision a été rendue entre le créancier et le débiteur d'aliments. L'intervention de l'organisme public se limite à demander la reconnaissance et l'exécution de la décision, mais seulement dans la limite des prestations déjà versées au créancier à titre d'aliments.

597 L'alinéa (b) a pour effet d'interdire à un organisme public d'agir pour un créancier ou en son nom à la seule fin d'obtenir la reconnaissance et l'exécution d'une décision. L'organisme public ne peut agir que lorsque des prestations ont été versées au créancier à titre d'aliments. Cela ne devrait pas engendrer d'injustice dans la majorité des cas car le créancier demandera habituellement lui-même la reconnaissance et l'exécution.

Paragraphe 4 – L'organisme public qui invoque la reconnaissance ou qui sollicite l'exécution d'une décision produit, sur demande, tout document de nature à établir son droit en application du paragraphe 2 et le paiement des prestations au créancier.

598 Sans préjudice des exigences de l'article 25, ce paragraphe établit qu'il faut prouver que les conditions des paragraphes 2 et 3 sont remplies. La preuve ne sera fournie que « sur demande » et peut consister en « tout document » permettant d'établir le droit de l'organisme public d'agir à la place de la personne ou de demander le remboursement, ou visant à prouver que les prestations ont été versées au créancier d'aliments.

CHAPITRE VIII – DISPOSITIONS GÉNÉRALES

599 Le chapitre consacré aux dispositions générales contient toutes les dispositions générales applicables aux chapitres précédents, qu'il s'agisse de coopération, de modification, de reconnaissance et d'exécution ou d'organismes publics. Le chapitre règle les questions des demandes présentées directement aux autorités compétentes, de la protection des renseignements à caractère personnel, de la confidentialité et du respect de la vie privée, de l'exemption de légalisation, de la représentation – tant en ce qui concerne la coopération administrative que les demandes directement présentées à une autorité compétente, du recouvrement des frais, ainsi que des exigences linguistiques et de traduction. Il comprend aussi des dispositions relatives à l'interprétation uniforme et à l'interprétation du traité dans les systèmes juridiques non unifiés ainsi que des dispositions réglant l'articulation de la Convention avec d'autres instruments applicables aux aliments. À cet égard, il règle les relations avec les Conventions de La Haye antérieures consacrées à la même matière, l'application des règles les plus efficaces prévues par d'autres instruments, la possibilité pour les États contractants de continuer à utiliser les dispositifs existants et à devenir Parties à de futurs traités, et de conclure des accords complémentaires dans le cadre de la Convention afin d'améliorer son application entre eux. Une disposition concernant l'examen du fonctionnement pratique de la Convention, régulièrement intégrée aux Conventions de La Haye depuis 1993, est également insérée dans ce chapitre, ainsi que la procédure applicable à la modification des formulaires, qui repose sur la convocation de réunions de la Commission spéciale pour examiner le fonctionnement de la Convention. Enfin, le chapitre comprend des dispositions transitoires et une disposition énumérant toutes les informations relatives aux lois, procédures et services qui doivent être transmises au Bureau Permanent au titre des différents articles de la Convention au moment du dépôt par les États contractants de leur instrument de ratification ou d'adhésion.

[210] Art. 18.

Rapport explicatif

Paragraph 2 – The right of a public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits provided to the creditor in place of maintenance shall be governed by the law to which the body is subject.

592 According to this paragraph, the law to which the body is subject will govern the right of the public body to act in place of an individual to whom maintenance is owed or to seek reimbursement of benefits paid to an individual in place of maintenance. But it has to be clear that the law applicable to the maintenance obligations will also apply to the existence of the obligation of maintenance and the extent of this obligation.

Paragraph 3 – A public body may seek recognition or claim enforcement of –

593 Paragraph 3 envisages the two possible situations in which a public body may seek recognition or enforcement of a maintenance decision. No reference is made to the applicable law, and as a consequence it is possible to apply the substantive internal law, the autonomous conflict of law rule or the conflict of law rule included in an international Convention (*e.g.*, the States Party to the 1973 Hague Maintenance Convention (Applicable Law) or to the Protocol to this Convention on the law applicable to maintenance obligations will apply the rules included in that Convention or Protocol).

594 Attention has to be paid to the fact that Article 18 in the 1973 Hague Maintenance Convention (Enforcement) was drafted in a broader way. In the current Convention it is said that the public body seeks the reimbursement of the benefits paid "in place of" maintenance, whereas the 1973 Convention only speaks of "reimbursement of benefits provided for a maintenance creditor".[210] The current Convention is more precise and restricting, in specifying that only those benefits which were paid "in place of" maintenance may be sought. It is a practical policy decision in the current Convention not to go so far as the 1973 Convention.

Sub-paragraph (a) – a decision rendered against a debtor on the application of a public body which claims payment of benefits provided in place of maintenance;

595 Sub-paragraph (a) envisages the situation in which the public body was the applicant (and presumably the debtor was in most, if not all, cases the respondent) in the proceedings in which a decision was rendered against the debtor. Provided the law to which the public body is subject permits such an application, the public body may apply under Article 10(1)(a) of the Convention for the recognition and enforcement of this decision in another Contracting State.

Sub-paragraph (b) – a decision rendered between a creditor and debtor to the extent of the benefits provided to the creditor in place of maintenance.

596 In the case of sub-paragraph (b), the decision has been given between a creditor and the maintenance debtor. The intervention of the public body is limited to seeking recognition and enforcement of the decision, but only to the extent of the benefits already provided to the creditor in place of maintenance.

597 The effects of sub-paragraph (b) are that a public body cannot act for or on behalf of a creditor simply to obtain recognition and enforcement of a decision. The public body can only act when benefits have been provided to the creditor in place of maintenance. This should not cause any injustice in the majority of cases as the creditor will usually apply in his or her own name for recognition and enforcement.

Paragraph 4 – The public body seeking recognition or claiming enforcement of a decision shall upon request furnish any document necessary to establish its right under paragraph 2 and that benefits have been provided to the creditor.

598 Without prejudice to the requirements of Article 25, this paragraph establishes the requirement to prove the fulfilment of the conditions of paragraphs 2 and 3. The necessary proof need only be provided "upon request" and may be "any document" which establishes the public body's right to act in place of the individual or seek reimbursement, or to show that the benefits have been provided to the maintenance creditor.

CHAPTER VIII – GENERAL PROVISIONS

599 The Chapter on general provisions contains all provisions applicable to the previous Chapters, whether on co-operation, modification, recognition and enforcement, or public bodies. The Chapter deals with questions of direct requests to competent authorities, protection of personal information, confidentiality and privacy, the exemption of legalisation, issues of representation related to both administrative co-operation and direct requests to a competent authority, questions of cost recovery, and questions in relation to language requirements and translation. The Chapter also includes provisions in relation to uniform interpretation and as to the application and the interpretation of the treaty in relation to non-unified legal systems. Provisions dealing with the co-ordination of the Convention in relation to other instruments that are applicable to maintenance are also included in this Chapter. In this respect it provides for the relationship with older Hague Conventions on the same subject matter, the use of the most efficient rules provided by other instruments, the possibility for Contracting States to continue using existing schemes and to become parties to future treaties and also the possibility to conclude supplementary agreements under the Convention in order to improve the application of the Convention among themselves. A provision concerning the review of the practical operation of the Convention, which has been integrated in Hague Conventions on a regular basis since 1993, is also part of this Chapter as well as the procedure for amendment of forms, which is linked to the convening of Special Commission meetings to review the operation of the Convention. The Chapter also includes transitional provisions. Finally, the Chapter includes a provision listing all the information concerning laws, procedures and services that have to be provided under different articles of the Convention to the Permanent Bureau by the time Contracting States deposit their instrument of ratification or accession.

[210] Art. 18.

Article 37 Demandes présentées directement aux autorités compétentes

Paragraphe premier – La Convention n'exclut pas la possibilité de recourir aux procédures disponibles en vertu du droit interne d'un État contractant autorisant une personne (le demandeur) à saisir directement une autorité compétente de cet État dans une matière régie par la Convention, y compris, sous réserve de l'article 18, en vue de l'obtention ou de la modification d'une décision en matière d'aliments.

600 Comme il a été dit dans les commentaires relatifs à l'article premier, rien dans cet article n'interdit les demandes directes, même si elles n'y sont pas mentionnées (voir les commentaires au para. 38 du présent Rapport).

Paragraphe 2 – Les articles 14(5) et 17(b) et les dispositions des chapitres V, VI, VII et de ce chapitre, à l'exception des articles 40(2), 42, 43(3), 44(3), 45 et 55, s'appliquent aux demandes de reconnaissance et d'exécution présentées directement à une autorité compétente d'un État contractant.

601 La question de savoir quelles dispositions de la Convention devraient s'appliquer dans les cas de demandes présentées directement a fait l'objet de longues discussions lors des réunions de la Commission spéciale et de la Session diplomatique. Le résultat final est reflété à l'article 37(2).

602 Les dispositions portant sur l'accès effectif aux procédures contenues au chapitre III (qui traite des demandes par l'intermédiaire des Autorités centrales) ne s'appliquent pas toutes aux demandes présentées directement. Cependant, les règles particulières énoncées à l'article 14(5) (interdisant d'exiger une caution ou dépôt pour garantir le paiement des frais et dépens) et l'article 17(b) (garantissant au demandeur se trouvant dans l'État requis une assistance juridique au moins équivalente à celle procurée dans l'État d'origine, telle que prévue par la loi de l'État requis dans les mêmes circonstances) s'appliquent aux demandes de reconnaissance et d'exécution présentées directement. Cette règle permet de préserver la situation existante en vertu des articles 15 et 16 de la Convention Obligations alimentaires de 1973 (Exécution). L'article 37 n'oblige pas un État à fournir une assistance juridique gratuite dans le cadre des demandes présentées directement si l'assistance et les services nécessaires sont déjà tous disponibles gratuitement par le biais des demandes entre Autorités centrales[211].

Paragraphe 3 – Aux fins du paragraphe 2, l'article 2(1)(a) s'applique à une décision octroyant des aliments à une personne vulnérable dont l'âge est supérieur à l'âge précisé dans ledit alinéa, lorsqu'une telle décision a été rendue avant que la personne n'ait atteint cet âge et a accordé des aliments au-delà de cet âge en raison de l'altération de ses capacités.

603 Le paragraphe 3 a pour effet d'étendre le champ d'application de la Convention aux obligations alimentaires envers les personnes vulnérables, mais seulement dans des cas très limités. L'extension s'applique en effet seulement :

a) dans l'hypothèse d'une demande de reconnaissance et d'exécution relative à une décision en matière d'aliments en faveur d'un adulte vulnérable, présentée directement ;

b) lorsque la décision initiale a été rendue alors que la personne vulnérable était encore un enfant au sens de l'article 2(1)(a) ; et

c) lorsque la décision initiale a accordé des aliments au-delà de l'enfance en raison de l'altération des capacités.

604 Les États sont bien évidemment libres d'étendre plus largement le champ d'application de la Convention (mais seulement à effet réciproque) aux obligations envers les adultes vulnérables lorsque de telles obligations découlent de l'une des relations visées à l'article 2(3).

Article 38 Protection des données à caractère personnel

Les données à caractère personnel recueillies ou transmises en application de la Convention ne peuvent être utilisées qu'aux fins pour lesquelles elles ont été recueillies ou transmises.

605 La protection des données à caractère personnel est importante, surtout lorsqu'elles sont informatisées. Cette règle est présente dans toutes les Conventions de La Haye modernes[212]. Il faut souligner que ces Conventions utilisent l'expression « données » personnelles et non « renseignements » à caractère personnel, qui est de nos jours la terminologie retenue dans la plupart des lois internes. Néanmoins, dans un souci de cohérence avec les Conventions de La Haye existantes, il a été décidé de conserver l'ancienne terminologie. Les termes « données à caractère personnel », comprennent les données personnelles telles que le nom, la date de naissance, l'adresse et d'autres informations sur les coordonnées.

606 L'insertion de cette disposition dans la Convention instaure une protection minimale entre les États contractants car les lois internes dans ce domaine ne présentent pas forcément toutes le même niveau de protection. Il est important de prévoir des protections relatives au traitement des données à caractère personnel en vertu de la Convention. À défaut, les parties concernées communiqueraient moins d'informations, ce qui pourrait nuire au recouvrement des aliments. La disposition s'appliquera aux Autorités centrales comme aux autorités compétentes, aux organismes publics et à d'autres organismes placés sous la tutelle des autorités compétentes de l'État requérant ou de l'État requis. Comme il a été dit plus haut, elle s'appliquera quel que soit le support ou moyen de communication utilisé. À cet égard, les autorités concernées par la transmission électronique de telles données prendront les mesures appropriées vis-à-vis de leurs prestataires de services en vue de respecter les exigences de la Convention.

Article 39 Confidentialité

Toute autorité traitant de renseignements en assure la confidentialité conformément à la loi de son État.

607 L'article 38 ayant établi la portée des données à caractère personnel couvertes par la disposition, l'article 39 dispose que la confidentialité de ces renseignements sera assurée conformément à la loi de l'État qui traite ces renseignements. Toutefois, dans la mise en œuvre de cette disposition, les États devraient veiller à ce que cette protection de la confidentialité n'aille pas à l'encontre du droit à une dé-

[211] Voir Procès-verbal No 22, para. 92 à 96.

[212] Art. 41 de la Convention Protection des enfants de 1996 ; art. 39 de la Convention Protection des Adultes de 2000. Sur le fond, voir également art. 31 de la Convention Adoption internationale de 1993.

Article 37 Direct requests to competent authorities

Paragraph 1 – The Convention shall not exclude the possibility of recourse to such procedures as may be available under the internal law of a Contracting State allowing a person (an applicant) to seize directly a competent authority of that State in a matter governed by the Convention including, subject to Article 18, for the purpose of having a maintenance decision established or modified.

600 As mentioned in the comments under Article 1, nothing in that Article precludes "direct requests", even though they are not mentioned in Article 1 (see comments in para. 38 of this Report).

Paragraph 2 – Articles 14(5) and 17(b) and the provisions of Chapters V, VI, VII and this Chapter, with the exception of Articles 40(2), 42, 43(3), 44(3), 45 and 55, shall apply in relation to a request for recognition and enforcement made directly to a competent authority in a Contracting State.

601 The question of which provisions of the Convention should be applied in cases of direct requests was the subject of long discussions in the Special Commission and the Diplomatic Session. The final result is in Article 37(2).

602 The provisions on effective access to procedures contained in Chapter III (which concerns applications through Central Authorities) do not as a whole apply to direct requests. Nevertheless, the specific provisions set out in Article 14(5) (prohibiting a requirement for a security bond or deposit to guarantee payment of costs and expenses) and Article 17(b) (guaranteeing for an applicant in the State addressed legal assistance equivalent to that provided in the State of origin, as provided by the law of the State addressed under the same circumstances) do apply to direct requests for recognition and enforcement. This preserves the position under the 1973 Hague Maintenance Convention (Enforcement), Articles 15 and 16. Article 37 does not oblige a State to provide free legal assistance for a direct request where all necessary assistance and services are available cost-free through Central Authority applications.[211]

Paragraph 3 – For the purpose of paragraph 2, Article 2(1)(a) shall apply to a decision granting maintenance to a vulnerable person over the age specified in that sub-paragraph where such decision was rendered before the person reached that age and provided for maintenance beyond that age by reason of the impairment.

603 Paragraph 3 in effect extends the scope of the Convention to maintenance obligations in respect of vulnerable persons, but only in very limited circumstances. The extension applies only:

a) in the case of a direct request for recognition and enforcement of a maintenance decision in favour of a vulnerable person;

b) where the original decision was rendered at a time when the vulnerable person was still a child within the meaning of Article 2(1)(a); and

c) where the original decision provided for maintenance beyond childhood by reason of an impairment.

604 It is of course open to States to extend the scope of the Convention on a much broader basis (but having only reciprocal effect) to obligations in respect of vulnerable persons where such obligations arise from any of the relationships referred to in Article 2(3).

Article 38 Protection of personal data

Personal data gathered or transmitted under the Convention shall be used only for the purposes for which they were gathered or transmitted.

605 The protection of personal data, especially when it is computerised, is an important matter. This rule appears in all the modern Hague Conventions.[212] It is to be noted that in these Conventions, the term "protection of personal data" was used instead of "personal information" which nowadays is the terminology used in most internal laws. However, for the sake of consistency with the existing Hague Conventions it was decided to keep the older terminology. The term "personal data" includes personal data such as: name, date of birth, address, and other contact detail information.

606 The inclusion of this provision in the Convention establishes a minimum safeguard between the Contracting States as internal laws in the area may not all be at the same level of development. It is important to provide safeguards in relation to the treatment of personal data under the Convention. If not, less information will be provided by the parties concerned and the final result could be detrimental to the successful recovery of maintenance. The provision will equally apply to Central Authorities, competent authorities, public bodies or other bodies subject to the supervision of the competent authorities of either the requesting State or requested State. As mentioned above, the provision concerning the treatment of personal data will be applied whatever the medium or means of communications used. In that respect authorities involved with the electronic transmission of such data shall take appropriate measures vis-à-vis their service providers in order to meet the requirements of the Convention.

Article 39 Confidentiality

Any authority processing information shall ensure its confidentiality in accordance with the law of its State.

607 Article 38 having established the scope of the personal data covered by the provision, Article 39 provides that the confidentiality of this information shall be ensured in accordance with the law of the State of the authority processing this information. However, in implementing this provision States should ensure that this protection of confidentiality would not run against the right to a fair defence

[211] See Minutes No 22, paras 92-96.

[212] Art. 41 of the 1996 Hague Child Protection Convention, Art. 39 of the 2000 Hague Adults Convention. In substance, also Art. 31 of the 1993 Hague Intercountry Adoption Convention.

fense équitable du défendeur dans un cas particulier, qu'il s'agisse du créancier ou du débiteur. Cette règle apparaît aussi dans les Conventions de La Haye modernes[213]. Elle nécessitera une surveillance étroite au fil du développement des transmissions électroniques. Cette obligation de confidentialité incombe également à l'autorité qui transmet l'information.

Article 40 Non-divulgation de renseignements

Paragraphe premier – Une autorité ne peut divulguer ou confirmer des renseignements recueillis ou transmis en application de la présente Convention si elle estime que la santé, la sécurité ou la liberté d'une personne pourrait en être compromise.

608 Cet article doit être rapproché de la disposition relative à la confidentialité. Lorsque des informations seront communiquées aux parties à une instance portant sur des aliments en vue de présenter leurs moyens, cette disposition garantira que l'autorité ne divulguera pas au défendeur les renseignements susceptibles d'aider à localiser une partie ou l'enfant si cela risque de mettre quelqu'un en danger. C'est une disposition très utile et importante dont l'objectif est de protéger l'enfant ou toute autre personne contre les dangers pouvant résulter de la transmission ou divulgation des informations à la mauvaise personne.

609 La règle générale du paragraphe premier s'accompagne de deux précisions aux paragraphes 2 et 3. Le paragraphe 2 vise à attirer l'attention des autorités qui reçoivent les renseignements quant à l'évaluation du risque effectuée par l'autorité qui les transmet[214]. Le paragraphe 3 précise que la non-divulgation de renseignements aux tiers ne doit pas empêcher leur communication entre les autorités[215].

Paragraphe 2 – Une décision en ce sens prise par une Autorité centrale doit être prise en compte par une autre Autorité centrale, en particulier dans les cas de violence familiale.

610 Pour fonctionner efficacement, cette disposition exige une pleine coopération et une entière confiance entre les autorités concernées. Il faudra en générale que l'Autorité centrale de l'État requis respecte l'avis de l'Autorité centrale requérante suivant lequel la divulgation d'informations au défendeur pourrait nuire à toute autre partie ou à l'enfant concerné par l'affaire. Ce pourrait être le cas, par exemple, dans une situation de violences familiales où il serait dangereux que le débiteur ait connaissance de l'adresse de l'enfant et du créancier.

611 L'expression « prise en compte »[216] offre toutefois une certaine flexibilité à l'Autorité centrale de l'État requis qui n'est pas liée par l'appréciation faite par l'Autorité centrale dans l'État requérant.

612 Des craintes ont été exprimées quant à la possibilité qu'une Autorité centrale puisse refuser de traiter une demande au motif qu'aucune adresse personnelle ne figure sur la demande. Il a été estimé qu'une Autorité centrale ne devrait pas refuser de traiter une demande pour ce seul motif. À cet égard, un grand nombre de délégations a fermement recommandé d'insérer dans la demande une adresse dite « à l'attention de » de manière à permettre que le demandeur puisse recevoir des rapports d'avancement et d'autres documents. Dans de nombreux États, l'adresse de l'Autorité centrale est utilisée comme adresse « à l'attention » du demandeur. Compte tenu de l'utilité de cette pratique, il conviendrait de ne pas l'exclure. Toutefois, l'Autorité centrale requise pourrait ne pas être en mesure d'engager une procédure d'après une adresse dite « à l'attention de », lorsque le droit interne impose que l'adresse personnelle du demandeur figure dans le dossier en vue de déposer une demande. Dans ce cas, l'Autorité centrale requérante peut choisir de communiquer l'adresse personnelle du demandeur ou d'abandonner la procédure. Lorsque cette information doit être communiquée à l'autorité compétente, elle ne doit pas être divulguée au défendeur par celle-ci si cela risque de mettre une personne en danger.

Paragraphe 3 – Le présent article ne fait pas obstacle au recueil et à la transmission de renseignements entre autorités, dans la mesure nécessaire à l'accomplissement des obligations découlant de la Convention.

613 La disposition contenue au paragraphe 3 autoriserait quand même la transmission de la totalité des renseignements entre autorités, ce qui requiert un niveau élevé de confiance et de coopération dans le traitement de ces informations. Tant l'autorité requérante que l'autorité requise serait en droit de décider de ne pas divulguer des renseignements à caractère personnel sauf pour ce qui est de l'accomplissement de leurs obligations en vertu de la Convention. Il a été souligné lors de la Session diplomatique que cet article ne devait pas être utilisé pour protéger le débiteur de mesures d'exécution.

Article 41 Dispense de légalisation

Aucune légalisation ni formalité similaire ne sera requise dans le contexte de la Convention.

614 Selon une pratique bien établie des Conventions de La Haye, l'article 41 dispose que tous les documents transmis ou remis en vertu de la Convention sont dispensés de légalisation ou de toute formalité analogue, y compris de l'Apostille[217]. Une autre pratique bien établie consiste à dispenser de légalisation ou de toute formalité similaire les documents transmis ou échangés entre des États ou leurs institutions publiques. La Convention Élection de for de 2005 précise, à l'article 18, que « [l]es documents transmis ou délivrés en vertu de la présente Convention sont dispensés de toute légalisation ou de toute formalité analogue, y compris une Apostille », mais cette mention paraît superflue car l'Apostille est une « formalité analogue ».

615 La légalisation est exclue à l'article 17 de la Convention Obligations alimentaires de 1973 (Exécution) et dans des traités bilatéraux. De plus, elle n'est généralement pas exigée par les pays de *common law*.

616 Cet article s'applique également aux demandes présentées directement.

[213] Art. 30 de la Convention Adoption internationale de 1993, art. 42 de la Convention Protection des enfants de 1996 et art. 40 de la Convention Protection des adultes de 2000.
[214] L'évaluation du risque par l'autorité concernée doit être notée sur le Formulaire de transmission obligatoire et sur le Formulaire d'accusé de réception ou les autres formulaires recommandés.
[215] Voir les observations des États-Unis d'Amérique dans le Doc. prél. No 23/2006 (*op. cit.* note 90).
[216] Introduite suite au Doc. trav. No 36 de la délégation de la Communauté européenne ; voir également les Procès-verbaux Nos 19 et 20.
[217] En vertu de la *Convention de La Haye du 5 octobre 1961 supprimant l'exigence de la légalisation des actes publics étrangers*.

by the respondent in a particular case, be it the creditor or the debtor. This rule also appears in modern Hague Conventions.[213] It will need to be closely monitored as electronic transmissions develop. This obligation of confidentiality also rests on the authority transmitting the information.

Article 40 Non-disclosure of information

Paragraph 1 – An authority shall not disclose or confirm information gathered or transmitted in application of this Convention if it determines that to do so could jeopardise the health, safety or liberty of a person.

608 This provision is to be read in conjunction with the provision relating to confidentiality. Where information will be provided to parties to maintenance proceedings in order to produce their defence, this provision will ensure that information that could lead to the location of any party or child may not be disclosed to the respondent by the authority if this could cause danger to a person. It is a very useful and important provision the objective of which is to protect the child or any other person against dangers that can result from the transmission or disclosure of information to the wrong person.

609 The general rule in paragraph 1 is accompanied by two specifications in paragraphs 2 and 3. Paragraph 2 is included to draw the attention of the authorities receiving the information to the assessment of the risk made by the transmitting authority.[214] Paragraph 3 clarifies that the non-disclosure of information in relation to third persons shall not impede the communication of information between the authorities.[215]

Paragraph 2 – A determination to this effect made by one Central Authority shall be taken into account by another Central Authority, in particular in cases of family violence.

610 In order to work effectively, this provision requires the full co-operation and trust necessary between the authorities concerned. The Central Authority of the requested State must, in general, respect the opinion of the requesting Central Authority that if information is disclosed to the respondent it could harm any other party or the child concerned by this case. It could be the case, for example, in a situation of domestic violence where it could be dangerous if the debtor had knowledge of the address of the child and creditor.

611 The words "taken into account"[216] allow a certain flexibility to the Central Authority in the requested State. It is not bound by the determination made by the Central Authorities in the requesting State.

612 Special concerns were expressed as to a Central Authority refusing to process an application on the sole basis that a personal address has not been included in the application. For those cases, it was strongly recommended by a number of delegations to include in the application what is called an "in the care of" address so that the applicant could be reached with progress reports and other documents. In many States, the applicant's "in the care of" address is the address of the Central Authority. This is a useful practice; it would not be wise to exclude it. However, the requested Central Authority might not be able to institute proceedings on the basis of a "care of" address if national law requires the personal address of the applicant to be provided in order to file a claim. In this case, the requesting Central Authority can choose either to provide the personal address or to refrain from pursuing the application. Where this information must be provided to the competent authority it should not be disclosed to the respondent by the authority if this could cause danger to a person.

Paragraph 3 – Nothing in this Article shall impede the gathering and transmitting of information by and between authorities in so far as necessary to carry out the obligations under the Convention.

613 The provision in paragraph 3 would still permit the full and complete transmission of information between authorities, thus requiring a high level of trust and co-operation in the treatment of this information. Both the requesting and the requested authorities would be entitled to make the determination of non-disclosure of personal information, but limited to the fulfilment of their obligations under the Convention. It was underlined during the Diplomatic Session that this Article should not be used to protect debtors from enforcement actions.

Article 41 No legalisation

No legalisation or similar formality may be required in the context of this Convention.

614 According to a well-established practice in the Hague Conventions, Article 41 provides that all documents forwarded or delivered under the Convention must be exempt from legalisation or any analogous formality, including in the latter case the Apostille.[217] It is another well-established practice that documents that are transmitted or exchanged by States or between their governmental institutions are exempt from legalisation or any analogous formality. In the 2005 Hague Choice of Court Convention, the drafting of Article 18 includes this clarification, stating that "[a]ll documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille", but this mention seems superfluous as Apostille is an "analogous formality".

615 Legalisation is excluded in Article 17 of the 1973 Hague Maintenance Convention (Enforcement) and also in bilateral treaties. Moreover, the countries of common law tradition usually exclude legalisation.

616 This Article also applies to direct requests.

[213] Art. 30 of the 1993 Hague Intercountry Adoption Convention, Art. 42 of the 1996 Hague Child Protection Convention and Art. 40 of the 2000 Hague Adults Convention.
[214] The assessment of risk made by the relevant authority must be noted on the mandatory Transmittal Form and the Acknowledgement Form or the other recommended forms.
[215] See the observations of the United States of America in Prel. Doc. No 23/2006 (*op. cit.* note 90).
[216] Introduced as a consequence of Work. Doc. No 36 of the delegation of the European Community, see also Minutes Nos 19 and 20.
[217] Under the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*.

Article 42 Procuration

L'Autorité centrale de l'État requis ne peut exiger une procuration du demandeur que si elle agit en son nom dans des procédures judiciaires ou dans des procédures engagées devant d'autres autorités ou afin de désigner un représentant à ces fins.

617 Cette disposition vise à réduire les formalités susceptibles d'être imposées au demandeur qui sollicite l'assistance de l'Autorité centrale requise. Ce principe est là encore conforme à l'objectif de la Convention, qui est d'instaurer un système rapide et efficace dans lequel seuls les demandes, autorisations et documents indispensables seraient exigés. Il faut souligner que dans la pratique actuelle de la Convention de New York de 1956, les autorités de certains États agissent pour le compte du demandeur sans exigence de documents officiels pour procéder ainsi. Il est espéré que cette pratique perdure.

618 Cet article, dans lequel l'Autorité centrale représente le demandeur devant d'autres autorités, se différencie de l'article 8, qui traite des relations entre le demandeur et l'Autorité centrale.

Article 43 Recouvrement des frais

Paragraphe premier – Le recouvrement de tous frais encourus pour l'application de cette Convention n'a pas priorité sur le recouvrement des aliments.

619 Il importe de distinguer les frais visés dans cet article de ceux visés à l'article 19(1) : les frais de l'article 19(1) sont les frais associés à la décision rendue dans l'État d'origine, tandis que les frais de l'article 43 sont ceux engagés par les autorités dans le cadre du fonctionnement général de la Convention. L'expression « recouvrement de tous frais encourus » se distinguant de celle de « recouvrement des aliments », il semble que cette disposition renvoie uniquement aux demandes à l'encontre du débiteur. À titre d'exemple, l'Autorité centrale qui demande le recouvrement de frais de tests génétiques (en application de l'art. 7 ou de l'art. 10(1)(c)) ne pourra demander le remboursement de ces frais avant que le débiteur ne règle le créancier. S'agissant des demandes présentées directement visées à l'article 37, l'autorité requise peut également recouvrer les frais judiciaires engagés, par exemple, dans la procédure juridique pour localiser les actifs du débiteur. Ces coûts n'étant pas les frais visés à l'article 19(1), leur remboursement pourrait être demandé en vertu de l'article 43.

Paragraphe 2 – Un État peut recouvrer les frais à l'encontre d'une partie perdante.

620 Il découle de l'article 19(1)[218] qu'une décision peut comprendre une fixation des frais ou dépenses engendrés par une procédure judiciaire. L'interprétation qui doit être donnée à cette règle est qu'elle couvre les décisions concernant les frais engendrés par les demandes d'aliments infructueuses. Le paragraphe 2 peut concerner tant les débiteurs que les créanciers (par ex. un créancier dont la demande de modification échoue ou dont la demande initiale d'aliments a échoué du fait que le débiteur a contesté avec succès le lien de parenté). En revanche, cette disposition n'est pas destinée à recouvrer les frais d'un créancier perdant qui a agi de bonne foi (par ex. un créancier dont la pension alimentaire serait inférieure à ce qu'il avait demandé ne devrait pas se voir réclamer le remboursement des frais).

621 Les États étaient divisés quant à l'opportunité d'insérer une exception concernant les personnes exceptionnellement fortunées. La conclusion du Groupe de travail sur l'accès effectif aux procédures, auquel il est fait référence au paragraphe 366 du présent Rapport, est qu'aucun État ne devrait « subventionner » un demandeur fortuné. Toutefois, l'insertion d'une telle exception dans la Convention nécessiterait de définir ce qu'est un « demandeur fortuné » et d'établir un système permettant de « filtrer » les rares affaires impliquant un tel demandeur. Comme il est peu probable qu'un demandeur fortuné utilise la voix de l'Autorité centrale, alors qu'il peut présenter sa demande directement, les bénéfices probables d'un tel système paraissaient disproportionnés par rapport aux inconvénients pouvant en résulter, à savoir la complexité et les coûts éventuels ainsi que le risque de retarder le traitement des demandes dans des affaires impliquant des demandeurs non fortunés. La solution la plus appropriée était donc de permettre de recouvrer les frais à l'encontre d'un demandeur ou défendeur fortuné par le biais de l'article 43.

622 Le Document de travail No 51[219] a apporté des clarifications quant au fonctionnement des dispositions relatives au recouvrement des frais et a indiqué que :

> « [S]i une personne fortunée forme une demande relative à l'établissement ou à la modification d'une décision en matière d'aliments destinés aux enfants par l'intermédiaire de l'Autorité centrale, les frais encourus en raison de la fourniture d'une assistance juridique gratuite devraient pouvoir être recouvrés au moyen d'une décision relative aux frais et rendue après la décision relative aux aliments. Par exemple, lorsqu'une décision portant sur une demande d'aliments destinés à un enfant a été rendue en faveur du demandeur, les frais peuvent être mis à la charge du débiteur, et le risque que le passif des frais affecte le recouvrement des aliments est déjà évité par l'article 40(1) [actuel art. 43(1)]. Lorsqu'un demandeur fortuné ne parvient pas à obtenir la décision recherchée en raison de sa situation financière, l'État auquel il s'est adressé peut recouvrer de façon discrétionnaire à l'encontre du demandeur les frais encourus en raison de la fourniture d'une assistance juridique gratuite.
>
> Le Groupe de travail fut d'avis que cette approche serait conforme à la rédaction de la Convention dans sa forme actuelle. L'article 40(2) [actuel art. 43(2)], en particulier, autorise de façon expresse un système de recouvrement des coûts à l'encontre de la partie qui succombe. De plus, l'article 16(1) [actuel art. 19(1)] prévoit clairement qu'une décision relative aux frais peut être incluse dans une décision (qui inclut une décision de ne pas octroyer d'aliments) relative à des aliments, décision qui serait par la suite reconnue et exécutée en vertu du chapitre V.
>
> Il a été accepté que la Convention ne devrait pas essayer d'harmoniser les procédures relatives au recouvrement des frais, ces procédures différant d'un pays à l'autre constituent une question pour le droit interne. Cependant, il serait important d'attirer l'attention par le biais du Rapport explicatif sur l'importance d'éviter un système de frais qui pénalise un demandeur qui succombe pour une raison qui n'est pas liée au bien-fondé de son affaire. »

[218] Voir commentaires aux para. 430 et s. du présent Rapport.

[219] Proposition du Groupe de travail sur l'art. 14 et l'accès effectif aux procédures.

Article 42 Power of attorney

The Central Authority of the requested State may require a power of attorney from the applicant only if it acts on his or her behalf in judicial proceedings or before other authorities, or in order to designate a representative so to act.

617 The objective of Article 42 is to reduce the formalities that could be imposed on an applicant in order to seek the assistance of the requested Central Authority. This is again in line with the objective of the Convention to set up a swift and efficient system where only the necessary applications, authorisations and documentation would be required. It is to be noted that according to current practice under the 1956 New York Convention authorities of certain States act on behalf of the claimant without the need of having formal documentary requirements to do so and it is hoped that this practice will continue.

618 There is a difference between Article 8, which deals with the relationship between the applicant and the Central Authority, and Article 42, where the Central Authority represents the applicant before other authorities.

Article 43 Recovery of costs

Paragraph 1 – Recovery of any costs incurred in the application of this Convention shall not take precedence over the recovery of maintenance.

619 It is important to distinguish between costs in this Article and costs in Article 19(1). Costs in Article 19(1) are the costs associated with the decision rendered in the State of origin, while costs in Article 43 are any costs incurred in relation to the general operation of the Convention. As the phrase "recovery of any costs incurred" is set against the phrase "recovery of maintenance", it seems that this provision is referring only to claims against the debtor. For example, a Central Authority seeking recovery of costs for genetic testing (under Art. 7 or in accordance with Art. 10(1)(c)) could not claim those costs ahead of the debtor's payments to the creditor. In relation to a direct request referred to in Article 37, it is also possible for the addressed authority to recover legal costs incurred, for example in the legal process to locate the debtor's assets. Those costs, not being costs under Article 19(1), could be claimed under Article 43.

Paragraph 2 – A State may recover costs from an unsuccessful party.

620 As a result of Article 19(1),[218] a decision may include a determination of costs or expenses in relation to judicial proceedings. This rule has to be interpreted as covering orders for costs in unsuccessful maintenance applications. Paragraph 2 would refer to both debtors and creditors (*e.g.*, a creditor in an unsuccessful modification application or an unsuccessful establishment application where a debtor successfully contested parentage). On the other hand, this provision is not intended to be used to recover costs from an unsuccessful creditor who acted in good faith (*e.g.*, a creditor who would recover less maintenance than she / he asked for should not be subject to repaying costs).

621 States were divided on whether or not an "exceptionally wealthy applicant" exception was needed. The Working Group on effective access to procedures, referred to in paragraph 366 of this Report, concluded that no State should subsidise a wealthy applicant. If such an exception were included in the Convention, it would be necessary to define "wealthy applicant" and establish a system for filtering out the rare undeserving cases. As it was unlikely that a wealthy applicant would use the Central Authority route when she / he could make a direct request, any advantages of such a system were far outweighed by the disadvantages, namely the complexity and possible costs involved as well as the danger of delaying the application process for the deserving cases. A better solution was to recover the costs from the wealthy applicant or respondent under Article 43.

622 Working Document No 51[219] clarified how the recovery of costs provisions would work and noted that:

> "[I]f a wealthy person applies for establishment or modification of a child support order through the Central Authority channel, the costs incurred through the provision of free legal assistance should be recoverable by means of an order for costs made following the decision concerning maintenance. For example, where the applicant is successful in her / his child support application the costs may be awarded against the debtor, and any danger that the liability for costs will affect the recovery of maintenance is already avoided by Article 40(1) [now Art. 43(1)]. Where a wealthy applicant fails to obtain the order sought on the basis that her / his financial circumstances do not justify it, the State addressed has the discretion to recover the costs of providing free legal assistance from the applicant.
>
> The Working Group was of the view that this approach would be in conformity with the Convention as presently drafted. In particular, the existing Article 40(2) [now Art. 43(2)] explicitly authorises a system of costs recovery from unsuccessful parties. Moreover, Article 16(1) [now Art. 19(1)] makes clear that an order for costs can be included in a maintenance decision (which includes a decision not to award maintenance), which would then be entitled to recognition and enforcement in other Contracting States under Chapter V.
>
> It was accepted that the Convention should not attempt to harmonise procedures for the recovery of costs, which differ from country to country and are a matter for internal law. However, it would be important to draw attention in the Explanatory Report to the importance of avoiding a system of costs that penalises an applicant whose lack of success has nothing to do with the merits of her case."

[218] See comments under paras 430 *et seq.* of this Report.

[219] Proposal of the Working Group on Art. 14 and effective access to procedures.

Paragraphe 3 – Pour les besoins d'une demande en vertu de l'article 10(1)(b), afin de recouvrer les frais d'une partie qui succombe conformément au paragraphe 2, le terme « créancier » dans l'article 10(1) comprend un État.

623 Le paragraphe 3 a été ajouté afin de préciser qu'un État peut utiliser la voie de l'Autorité centrale pour poursuivre une demande d'exécution d'une ordonnance relative aux frais à l'encontre d'une partie qui succombe.

Paragraphe 4 – Cet article ne déroge pas à l'article 8.

624 Le recouvrement des frais, prévu à l'article 43, ne concerne pas les frais de l'Autorité centrale auxquels il est fait référence à l'article 8(1). De même, les frais découlant des services rendus par l'Autorité centrale ne peuvent pas être mis à la charge du demandeur (art. 8(2)) qui présente une demande en vertu de l'article 10. Voir également les explications fournies à l'article 8 (Frais de l'Autorité centrale).

Article 44 Exigences linguistiques

625 La traduction de documents dans la langue officielle ou dans l'une des langues officielles de l'État requis est un problème pratique qui se pose par rapport à plusieurs chapitres de la Convention, d'où l'insertion de cette règle au chapitre VIII (Dispositions générales). La Commission spéciale de 2004 a adopté une proposition conforme aux dispositions classiques des Conventions de La Haye en matière de traduction de documents. La règle d'usage des Conventions de La Haye consiste à demander la traduction des documents dans la langue officielle de l'État requis. Il peut arriver cependant que l'État requérant ait beaucoup de difficultés à organiser une traduction dans la langue de l'État requis. Dans de telles situations, l'État requérant peut envoyer une traduction des documents en anglais ou en français. Ce sont non seulement les deux langues officielles de la Conférence de La Haye mais surtout, l'anglais et le français sont respectivement les première et deuxième langues les plus parlées et les mieux comprises dans le monde, l'espagnol venant en troisième position[220]. Cependant l'espagnol n'est pas une langue officielle de la Conférence de La Haye, même si une interprétation et une traduction en espagnol ont été assurées tout au long des négociations de la nouvelle Convention. Comme il a été dit dans l'introduction de ce Rapport, c'est la première fois que l'Acte final d'une Session diplomatique[221] dispose que le processus d'élaboration d'un instrument de La Haye devrait intervenir dans la mesure du possible en espagnol.

626 Compte tenu des problèmes et des doutes suscités par le texte dans sa rédaction initiale, le Comité de rédaction a préparé une autre proposition qui a reçu un accueil très favorable et tenait compte des particularités du système de coopération de la Convention. Deux articles sont consacrés à la question, l'article 44, qui vise les obligations en matière de traduction, et l'article 45, qui instaure des règles permettant d'atteindre les objectifs de l'article 44.

Paragraphe premier – Toute demande et tout document s'y rattachant sont rédigés dans la langue originale et accompagnés d'une traduction dans une langue officielle de l'État requis ou dans toute autre langue que l'État requis aura indiqué pouvoir accepter, par une déclaration faite conformément à l'article 63, sauf dispense de traduction de l'autorité compétente de cet État.

627 Ce paragraphe tient compte des difficultés qu'ont certains États à accepter des demandes et les documents afférents dans une autre langue que leur langue officielle, ce qui impose de joindre à la demande et aux documents afférents une traduction dans la langue officielle de l'État requis. L'autorité compétente de l'État requis peut cependant se dispenser d'une traduction. Le paragraphe premier prévoit la possibilité d'indiquer, par une déclaration conformément à l'article 63, les autres langues dans lesquelles les demandes et les documents afférents peuvent être acceptés. Rien n'empêche dans ce paragraphe les autorités de l'État requérant d'établir la demande et d'autres documents pertinents dans la langue officielle de l'État requis si leur droit national le leur permet.

628 Cette règle devrait également s'appliquer aux demandes de reconnaissance et d'exécution présentées directement, sans transiter par les Autorités centrales.

Paragraphe 2 – Tout État contractant qui a plusieurs langues officielles et qui ne peut, pour des raisons de droit interne, accepter pour l'ensemble de son territoire les documents dans l'une de ces langues, doit faire connaître, par une déclaration faite conformément à l'article 63, la langue dans laquelle ceux-ci doivent être rédigés ou traduits en vue de leur présentation dans les parties de son territoire qu'il a déterminées.

629 Une règle est également prévue pour les pays tels la Belgique, le Canada, l'Espagne et la Suisse, où diverses langues ne sont officielles que sur une partie du territoire. Une proposition des délégations de la Belgique et de la Suisse a été soumise lors de la réunion de la Commission spéciale de 2005. Une autre possibilité était de prévoir une règle telle que celle de l'article 25 de la Convention Accès à la justice de 1980 car la situation est très différente d'un pays à l'autre[222]. Cette dernière solution a été introduite au paragraphe 2, qui comprend un système de déclaration conformément à l'article 63 en vertu duquel les États peuvent préciser la ou les langues dans lesquelles ils accepteront la traduction et la partie du territoire à laquelle elle s'applique.

Paragraphe 3 – Sauf si les Autorités centrales en ont convenu autrement, toute autre communication entre elles est adressée dans une langue officielle de l'État requis ou en français ou en anglais. Toutefois, un État contractant peut, en faisant la réserve prévue à l'article 62, s'opposer à l'utilisation soit du français, soit de l'anglais.

630 Les paragraphes premier et 2 visent les exigences linguistiques applicables aux demandes et documents afférents, pour lesquels davantage de formalités sont requises en matière de traduction. Toutefois, la Convention exige aussi des communications régulières, étroites et simples entre les Autorités centrales de l'État requis et de l'État requérant. En principe, les communications s'effectueront

[220] Lors de la réunion de la Commission spéciale de juin 2004, le Chili, l'Argentine et le Mexique ont demandé que l'espagnol fasse partie des langues de la Convention. Pour le Chili, la langue pourrait faire obstacle à l'exercice de l'accès à la justice, qui est un droit de l'homme. L'expression « langues les plus parlées et les mieux comprises » ne signifie pas que ces langues sont les plus parlées au monde, mais qu'elles sont les plus utilisées pour les communications internationales par des individus ayant une autre langue maternelle.

[221] Voir *supra*, note 1.

[222] L'art. 25 de la Convention Accès à la justice de 1980 dispose que :
« Tout État contractant qui a plusieurs langues officielles et qui ne peut, pour des raisons de droit interne, accepter pour l'ensemble de son territoire les documents visés aux articles 7 et 17 d'assistance judiciaire dans l'une de ces langues, doit faire connaître au moyen d'une déclaration la langue dans laquelle ceux-ci doivent être rédigés ou traduits en vue de leur présentation dans les parties de son territoire qu'il a déterminées. »

Paragraph 3 – For the purposes of an application under Article 10(1)(b) to recover costs from an unsuccessful party in accordance with paragraph 2, the term "creditor" in Article 10(1) shall include a State.

623 Paragraph 3 was added to clarify that a State may use the Central Authority route to pursue an application for the enforcement of an order for costs made against an unsuccessful party.

Paragraph 4 – This Article shall be without prejudice to Article 8.

624 The recovery of costs permitted by Article 43 does not include the Central Authority costs referred to in Article 8(1). Likewise, the costs of Central Authority services may not be recovered from an applicant (Art. 8(2)) making an application under Article 10. See also the explanation for Article 8 (Central Authority costs).

Article 44 Language requirements

625 The translation of documents into the official language or one of the official languages in the requested State is a practical problem that arises in relation to several Chapters of the Convention, hence the inclusion of this rule in Chapter VIII (General provisions). During the Special Commission of 2004, a proposal was adopted which was in line with traditional Hague Convention provisions in relation to translation of documents. The traditional rule found in the Hague Conventions is to ask for the translation of the documents into the official language of the requested State. But in some circumstances it may be very difficult for the requesting State to arrange for a translation into the language of the requested State. In these situations it is possible for the requesting State to send the documents translated into either English or French, which happen to be the two official languages of the Hague Conference. But there is another important reason: that is because English and French rank first and second among the most spoken and understood languages in the world, immediately followed by Spanish which ranks third.[220] On the other hand, Spanish is not an official language of the Conference even though, for the entire negotiation of the new Convention, interpretation and translation into Spanish was provided. As mentioned in the introduction of this Report, it is the first time that the Final Act of a Diplomatic Session[221] provides that the development of a Hague instrument should take place as far as possible in Spanish.

626 Taking into account the problems and doubts in relation to the text as initially drafted, the Drafting Committee prepared an alternative proposal that received large support. In this respect the particularities of the co-operation system under the Convention have been taken into account. Two articles are devoted to this question, Article 44, which refers to the requirements of translation, and Article 45, which includes rules to achieve the objectives of Article 44.

Paragraph 1 – Any application and related documents shall be in the original language, and shall be accompanied by a translation into an official language of the requested State or another language which the requested State has indicated, by way of declaration in accordance with Article 63, it will accept, unless the competent authority of that State dispenses with translation.

627 This paragraph takes into account the difficulties that some States have in accepting applications and related documents in a language other than their own official language, establishing the need to accompany the application and related documents with a translation into the official language of the requested State. The competent authority in the requested State has, however, the possibility of dispensing with translation. Paragraph 1 includes the possibility of indicating other languages, by way of a declaration under Article 63, in which applications and related documents may be accepted. Nothing in this paragraph prevents the authorities of the requesting State drawing up the application and other relevant documents in the official language of the requested State, if they are allowed to do so according to their own law.

628 This rule should also apply to direct requests for recognition and enforcement not made through Central Authorities.

Paragraph 2 – A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents in one of those languages shall, by declaration in accordance with Article 63, specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory.

629 A rule is also included for countries, like Belgium, Canada, Spain and Switzerland, where various languages are only official in a part of the territory. A proposal was made by the delegations of Belgium and Switzerland during the 2005 Special Commission meeting. Another possibility was to include a rule like Article 25 of the 1980 Hague Access to Justice Convention because the situation differs to a great extent from one country to the other.[222] This last solution has been introduced in paragraph 2, including a system of declarations in accordance with Article 63 by virtue of which States can specify the language or languages in which they can accept the translation and the part of their territory to which it applies.

Paragraph 3 – Unless otherwise agreed by the Central Authorities, any other communications between such Authorities shall be in an official language of the requested State or in either English or French. However, a Contracting State may, by making a reservation in accordance with Article 62, object to the use of either English or French.

630 Paragraphs 1 and 2 refer to the language requirements for applications and related documents, for which more formalities are required as to the question of translation. But the Convention also requires regular, close and simple communication between the Central Authorities of both the requested State and the requesting State. In principle, the

[220] In the Special Commission meeting of June 2004, Argentina, Chile and Mexico asked for the incorporation of Spanish as a language of the Convention. For Chile, language could be an inconvenience for the exercise of access to justice, which is a human right. The term "most spoken and understood languages" does not mean that they are the most spoken languages in the world, but the languages most used for international communication by people having another language as mother tongue.

[221] See *supra*, note 1.

[222] Art. 25 of the 1980 Hague Access to Justice Convention states:
"A Contracting State which has more than one official language and cannot, for reasons of internal law, accept for the whole of its territory documents referred to in Articles 7 and 17 drawn up in one of those languages shall by declaration specify the language in which such documents or translations thereof shall be drawn up for submission in the specified parts of its territory."

dans une des langues officielles de l'État requis ou bien en anglais ou en français. Il est admis qu'un État contractant puisse faire une réserve excluant le recours à l'anglais ou au français, mais pas aux deux.

631 Rien n'interdit aux Autorités centrales de convenir de l'emploi d'autres langues de communication. Il faut souligner dans ce cas qu'il ne s'agit pas d'un accord des États contractants, mais d'un accord entre les Autorités centrales, qui peut être modifié à tout moment, par exemple si un nouvel interlocuteur au sein de l'Autorité centrale connaît d'autres langues.

Article 45 Moyens et coûts de traduction

Paragraphe premier – Dans le cas de demandes prévues au chapitre III, les Autorités centrales peuvent convenir, dans une affaire particulière ou de façon générale, que la traduction dans la langue officielle de l'État requis sera faite dans l'État requis à partir de la langue originale ou de toute autre langue convenue. S'il n'y a pas d'accord et si l'Autorité centrale requérante ne peut remplir les exigences de l'article 44(1) et (2), la demande et les documents s'y rattachant peuvent être transmis accompagnés d'une traduction en français ou en anglais pour traduction ultérieure dans une langue officielle de l'État requis.

632 On peut aisément imaginer que dans de nombreuses situations, il soit difficile de trouver dans l'État d'origine un traducteur capable de traduire dans la langue de l'État requis[223], tandis qu'il sera peut-être plus facile, dans ce dernier État, de trouver un traducteur travaillant à partir de toute autre langue étrangère. C'est pourquoi il serait possible de convenir que la traduction sera réalisée dans l'État requis, à partir de la langue d'origine ou de toute autre langue convenue d'un commun accord. Il faut à ce propos faire deux remarques : premièrement, la possibilité d'un tel accord est limitée aux demandes fondées sur le chapitre III, c'est-à-dire aux demandes présentées par l'intermédiaire des Autorités centrales, et deuxièmement, l'accord entre les Autorités centrales est conclu, soit au cas par cas, soit, généralement, sur une base bilatérale.

633 En l'absence d'accord à cet effet toutefois, il faut trouver une solution et c'est pourquoi, dans la deuxième partie du paragraphe premier, une solution est adoptée lorsqu'une traduction dans la langue de l'État requis ne peut être effectuée dans l'État requérant. Le point de départ est une solution classique de la Conférence de La Haye : la demande et les documents afférents peuvent être transmis avec une traduction en anglais ou français, mais un élément nouveau est ajouté : c'est en vue d'une traduction ultérieure dans une langue officielle de l'État requis. Il s'agit d'une nouvelle règle, inconnue dans d'autres Conventions, mais qui semble très utile pour celle-ci.

Paragraphe 2 – Les frais de traduction découlant de l'application du paragraphe premier sont à la charge de l'État requérant, sauf accord contraire des Autorités centrales des États concernés.

634 En complément du paragraphe premier, le paragraphe 2 établit que sauf convention contraire entre les Autorités centrales des États concernés, les frais de traduction sont à la charge de l'État requérant. Il sera ainsi plus facile à l'État requis d'accepter la tâche de traduction. D'autres arrangements pourront être conclus par accord entre les Autorités centrales des États concernés.

Paragraphe 3 – Nonobstant l'article 8, l'Autorité centrale requérante peut mettre à la charge du demandeur les frais de traduction d'une demande et des documents s'y rattachant, sauf si ces coûts peuvent être couverts par son système d'assistance juridique.

635 Le paragraphe 3 précise que l'Autorité centrale n'a pas à couvrir les frais de traduction. Toutefois, l'Autorité centrale requérante peut mettre les frais de traduction à la charge d'un demandeur. Cette règle est nécessaire si l'on tient compte du fait que le principe général énoncé à l'article 8 est que les Autorités centrales ne peuvent mettre aucun frais à la charge d'un demandeur pour les services qu'elles lui rendent.

636 Cependant, ces frais ne doivent pas être mis à la charge du demandeur s'ils peuvent être couverts par un système d'assistance juridique.

Article 46 Systèmes juridiques non unifiés – interprétation

637 La règle s'inspire de l'article 25 de la Convention Élection de for de 2005[224]. Après une trentaine d'années de pratique, ces clauses se classent désormais parmi les caractéristiques classiques des Conventions de La Haye, mais elles sont perfectionnées d'une Convention à l'autre. Leur rédaction est adaptée aux objectifs de chaque Convention. Les articles 46 et 47 règlent les difficultés susceptibles de découler du fait que certains États sont composés de plusieurs unités territoriales, chacune ayant son propre système judiciaire ou juridique. Cette configuration caractérise des États tels que le Canada, la Chine, l'Espagne et le Royaume-Uni, sans considération de l'organisation des différents États. Cette situation peut poser problème parce qu'il faut déterminer pour chaque affaire s'il est fait référence à l'État dans sa globalité ou à l'une de ses unités territoriales. L'article 46 fournit une interprétation des termes compris dans la Convention lorsqu'ils sont appliqués dans des États ayant des systèmes juridiques non unifiés.

Paragraphe premier – Au regard d'un État dans lequel deux ou plusieurs systèmes de droit ou ensembles de règles ayant trait aux questions régies par la présente Convention s'appliquent dans des unités territoriales différentes :

Alinéa (a) – toute référence à la loi ou à la procédure d'un État vise, le cas échéant, la loi ou la procédure en vigueur dans l'unité territoriale considérée ;

Alinéa (b) – toute référence à une décision obtenue, reconnue, reconnue et exécutée, exécutée et modifiée dans cet État vise, le cas échéant, une décision obtenue, reconnue, reconnue et exécutée, exécutée et modifiée dans l'unité territoriale considérée ;

Alinéa (c) – toute référence à une autorité judiciaire ou administrative de cet État vise, le cas échéant, une auto-

[223] Il arrive parfois que la traduction effectuée dans l'État requérant soit incompréhensible.

[224] Voir le Rapport explicatif de T. Hartley et M. Dogauchi (*op. cit.* note 46), aux para. 259 à 265. Termes similaires, mais non identiques, à ceux de l'art. 47 de la Convention Protection des enfants de 1996 et de l'art. 45 de la Convention Protection des adultes de 2000.

communications will take place in one of the official languages of the requested State or either in English or in French. It is accepted that a Contracting State may make a reservation excluding the use of either English or French, but not both.

631 Nothing excludes the possibility for Central Authorities to agree on the use of other languages in which it is possible for them to communicate. It is to be noted in this case that it is not an agreement of the Contracting States, but is an agreement between the Central Authorities that can be changed at any moment. For example, it can change if a new person in the Central Authority has knowledge of other different languages.

Article 45 Means and costs of translation

Paragraph 1 – In the case of applications under Chapter III, the Central Authorities may agree in an individual case or generally that the translation into an official language of the requested State may be made in the requested State from the original language or from any other agreed language. If there is no agreement and it is not possible for the requesting Central Authority to comply with the requirements of Article 44(1) and (2), then the application and related documents may be transmitted with translation into English or French for further translation into an official language of the requested State.

632 It is easy to imagine that in many situations it is difficult to find in the State of origin a translator who can translate into the language of the requested State.[223] But in this latter State it may be easier to find a translator from any other foreign language. This is why it would be possible to agree that the translation will be made in the requested State, from the original language or from any other agreed language. Two elements have to be underlined. First, that the possibility of such an agreement is limited to applications made under Chapter III, that is to say, through Central Authorities. Second, the agreement is between the Central Authorities, on a case-by-case basis or in general on a bilateral basis.

633 But if such an agreement is not reached, a solution has to be found and this is why, in the second part of paragraph 1, a solution is adopted when it is not possible to make the translation for the requesting State into the language of the requested State. The starting point is a traditional Hague Conference solution: the application and related documents may be transmitted with translation into English or French. However, something new has been added: further translation into an official language of the requested State. It is a new rule which is unknown in other Conventions but which seems very useful for this Convention.

Paragraph 2 – The cost of translation arising from the application of paragraph 1 shall be borne by the requesting State unless otherwise agreed by Central Authorities of the States concerned.

634 As a supplement to paragraph 1, paragraph 2 establishes that the cost of the translation will be borne by the requesting State, unless otherwise agreed by the Central Authorities of the States concerned. This way, it is also easier for the requested State to accept the translation task. It will be possible to achieve other arrangements by agreement between the Central Authorities of the States concerned.

Paragraph 3 – Notwithstanding Article 8, the requesting Central Authority may charge an applicant for the costs of translation of an application and related documents, except in so far as those costs may be covered by its system of legal assistance.

635 Paragraph 3 clarifies that the costs of translation do not have to be covered by the Central Authority. However, the requesting Central Authority has the possibility to charge an applicant for the costs of translation. This rule is needed if one takes into account that the general principle, according to Article 8, is that the Central Authorities shall not impose any charge on an applicant for the provision of their services.

636 However, the applicant should not be charged if those costs may be covered by the system of legal assistance.

Article 46 Non-unified legal systems – interpretation

637 The rule is drawn from Article 25 of the 2005 Hague Choice of Court Convention.[224] These clauses for non-unified legal systems are now a regular feature of Hague Conventions after some 30 years of practice by States, but they are perfected from one Convention to another. Their drafting is adapted to the purposes of each Convention. Articles 46 and 47 address the difficulties that may result from the fact that some States are composed of two or more territorial units, each with its own judicial or legal systems. It occurs in the case of States such as Canada, China, Spain and the United Kingdom without regard to the organisation of the different States. This can create a problem because one has to decide in any particular case whether the reference is to the State as a whole or to a particular territorial unit within that State. Article 46 provides interpretations for terms included in the Convention when they are applied in the context of States that have a non-unified legal system.

Paragraph 1 – In relation to a State in which two or more systems of law or sets of rules of law with regard to any matter dealt with in this Convention apply in different territorial units –

Sub-paragraph (a) – any reference to the law or procedure of a State shall be construed as referring, where appropriate, to the law or procedure in force in the relevant territorial unit;

Sub-paragraph (b) – any reference to a decision established, recognised, recognised and enforced, enforced or modified in that State shall be construed as referring, where appropriate, to a decision established, recognised, recognised and enforced, enforced or modified in the relevant territorial unit;

Sub-paragraph (c) – any reference to a judicial or administrative authority in that State shall be construed as

[223] And, sometimes, the translation made in the requesting State is impossible to understand.

[224] See Explanatory Report, T. Hartley and M. Dogauchi (*op. cit.* note 46), paras 259-265. Similar terms, although not identical, to those of Art. 47 of the 1996 Hague Child Protection Convention and Art. 45 of the 2000 Hague Adults Convention.

rité judiciaire ou administrative de l'unité territoriale considérée ;

Alinéa (d) – toute référence aux autorités compétentes, organismes publics ou autres organismes de cet État à l'exception des Autorités centrales vise, le cas échéant, les autorités ou organismes habilités à agir dans l'unité territoriale considérée ;

Alinéa (e) – toute référence à la résidence ou la résidence habituelle dans cet État vise, le cas échéant, la résidence ou la résidence habituelle dans l'unité territoriale considérée ;

Alinéa (f) – toute référence à la localisation des biens dans cet État vise, le cas échéant, la localisation des biens dans l'unité territoriale considérée ;

Alinéa (g) – toute référence à une entente de réciprocité en vigueur dans un État vise, le cas échéant, une entente de réciprocité en vigueur dans l'unité territoriale considérée ;

Alinéa (h) – toute référence à l'assistance juridique gratuite dans cet État vise, le cas échéant, l'assistance juridique gratuite dans l'unité territoriale considérée ;

Alinéa (i) – toute référence à une convention en matière d'aliments conclue dans un État vise, le cas échéant, une convention en matière d'aliments conclue dans l'unité territoriale considérée ;

Alinéa (j) – toute référence au recouvrement des frais par un État vise, le cas échéant, le recouvrement des frais par l'unité territoriale considérée.

638 Le paragraphe premier a été examiné lors des négociations de la Session diplomatique. La liste aspire à être aussi complète que possible et à apporter une réponse à toutes les possibilités envisageables.

639 Le texte règle le problème en disposant que dans de tels cas, la Convention est interprétée comme s'appliquant à l'État au sens international ou, le cas échéant, à l'unité territoriale concernée (« l'unité territoriale considérée » est l'expression employée dans la Convention). Concernant les ententes de réciprocité, voir les commentaires relatifs à l'article 52.

Paragraphe 2 – Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

640 Une Organisation régionale d'intégration économique (ORIE) n'est pas un système juridique non unifié. Par conséquent, ce paragraphe précise que l'article ne s'applique pas à une ORIE, mais uniquement aux États au sens international.

Article 47 Systèmes juridiques non unifiés – règles matérielles

Paragraphe premier – Un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenu d'appliquer la présente Convention aux situations qui impliquent uniquement ces différentes unités territoriales.

641 Il s'agit de la règle classique suivant laquelle les États dont le système juridique n'est pas unifié ne sont pas tenus d'appliquer la Convention à des situations purement internes entre unités territoriales, même si rien ne les empêche de le faire.

Paragraphe 2 – Une autorité compétente dans une unité territoriale d'un État contractant qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent n'est pas tenue de reconnaître ou d'exécuter une décision d'un autre État contractant au seul motif que la décision a été reconnue ou exécutée dans une autre unité territoriale du même État contractant selon la présente Convention.

642 Le paragraphe 2 traite de l'étendue territoriale de la reconnaissance et de l'exécution dans des systèmes juridiques non unifiés tandis que l'article 61 concerne l'application territoriale de la Convention. Ce paragraphe dispose qu'un tribunal d'une unité territoriale d'un État contractant n'est pas tenu de reconnaître ou d'exécuter une décision émanant d'un autre État contractant au seul motif que la décision a été reconnue ou exécutée en vertu de la Convention dans une autre unité territoriale du premier État contractant. Mais rien dans la Convention ne lui interdit de le faire. L'objectif de cette règle est que si, par exemple, une décision étrangère en matière d'aliments est reconnue et exécutée à Macao, cela n'implique pas qu'elle sera reconnue et exécutée à Hong Kong. Les autorités compétentes à Hong Kong doivent décider elles-mêmes si les conditions de reconnaissance ou d'exécution en vertu de la Convention sont réunies sur leur territoire. Cette règle provient de l'article 25 de la Convention Élection de for de 2005.

Paragraphe 3 – Cet article ne s'applique pas à une Organisation régionale d'intégration économique.

643 Une ORIE n'est pas un système juridique non unifié. Par conséquent, ce paragraphe précise que l'article ne s'applique pas à une ORIE, mais uniquement aux États au sens international.

Article 48 Coordination avec les Conventions de La Haye antérieures en matière d'obligations alimentaires

Dans les rapports entre les États contractants, et sous réserve de l'application de l'article 56(2), la présente Convention remplace la *Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires* et la *Convention de La Haye du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants*, dans la mesure où leur champ d'application entre lesdits États coïncide avec celui de la présente Convention.

644 Les articles 48 à 51 règlent les relations de cette Convention avec d'autres instruments internationaux[225].

645 L'article 48 traite des relations de cette Convention avec les deux Conventions de La Haye antérieures sur la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires, la Convention Obligations alimentaires de 1973 (Exécution) et la Convention Obligations ali-

[225] Voir « Coordination entre le projet sur les aliments et d'autres instruments internationaux », document établi par P. Lortie, Premier secrétaire, Doc. prél. No 18 de juin 2006 à l'intention de la Commission spéciale de juin 2006 sur le recouvrement des aliments envers les enfants et d'autres membres de la famille, ci-dessus p. I-328 du présent tome (également accessible à l'adresse <www.hcch.net>).

referring, where appropriate, to a judicial or administrative authority in the relevant territorial unit;

Sub-paragraph (d) – any reference to competent authorities, public bodies, and other bodies of that State, other than Central Authorities, shall be construed as referring, where appropriate, to those authorised to act in the relevant territorial unit;

Sub-paragraph (e) – any reference to residence or habitual residence in that State shall be construed as referring, where appropriate, to residence or habitual residence in the relevant territorial unit;

Sub-paragraph (f) – any reference to location of assets in that State shall be construed as referring, where appropriate, to the location of assets in the relevant territorial unit;

Sub-paragraph (g) – any reference to a reciprocity arrangement in force in a State shall be construed as referring, where appropriate, to a reciprocity arrangement in force in the relevant territorial unit;

Sub-paragraph (h) – any reference to free legal assistance in that State shall be construed as referring, where appropriate, to free legal assistance in the relevant territorial unit;

Sub-paragraph (i) – any reference to a maintenance arrangement made in a State shall be construed as referring, where appropriate, to a maintenance arrangement made in the relevant territorial unit;

Sub-paragraph (j) – any reference to recovery of costs by a State shall be construed as referring, where appropriate, to the recovery of costs by the relevant territorial unit.

638 Paragraph 1 was the object of consideration during the negotiations of the Diplomatic Session. The list aims to be as comprehensive as possible and to provide an answer to all the possibilities that may arise.

639 The text solves the problem by providing that in those cases, the Convention is to be construed as applying either to the State in the international sense or to the relevant territorial unit, whichever is appropriate ("relevant territorial unit" are the words used in the Convention). As to reciprocity arrangements, see the comments on Article 52.

Paragraph 2 – This Article shall not apply to a Regional Economic Integration Organisation.

640 A Regional Economic Integration Organisation (REIO) is not a non-unified legal system. Therefore this paragraph clarifies that the Article does not apply to an REIO, but only to States in the international sense.

Article 47 Non-unified legal systems – substantive rules

Paragraph 1 – A Contracting State with two or more territorial units in which different systems of law apply shall not be bound to apply this Convention to situations which involve solely such different territorial units.

641 This is the traditional rule according to which the States with a non-unified legal system are not obliged to apply the Convention to purely internal situations between territorial units, although nothing prevents them from doing so.

Paragraph 2 – A competent authority in a territorial unit of a Contracting State with two or more territorial units in which different systems of law apply shall not be bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced in another territorial unit of the same Contracting State under this Convention.

642 Paragraph 2 deals with the territorial extent of recognition and enforcement in non-unified legal systems while Article 61 is concerned with the territorial application of the Convention. This paragraph provides that a court in a territorial unit of a Contracting State is not bound to recognise or enforce a decision from another Contracting State solely because the decision has been recognised or enforced under the Convention in another territorial unit of the first Contracting State. But nothing in the Convention prevents it from doing so. The objective of the rule is that, for example, if a foreign maintenance decision is recognised and enforced in Macao, it does not mean that it will be recognised and enforced in Hong Kong. The competent authorities in Hong Kong must decide for themselves whether the conditions for recognition or enforcement under the Convention are met in their jurisdiction. This rule was included in Article 25 of the 2005 Hague Choice of Court Convention.

Paragraph 3 – This Article shall not apply to a Regional Economic Integration Organisation.

643 An REIO is not a non-unified legal system. Therefore this paragraph clarifies that the Article does not apply to an REIO, but only to States in the international sense.

Article 48 Co-ordination with prior Hague Maintenance Conventions

In relations between the Contracting States, this Convention replaces, subject to Article 56(2), the *Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* and the Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children in so far as their scope of application as between such States coincides with the scope of application of this Convention.

644 Articles 48 to 51 concern the relationship between this Convention and other international instruments.[225]

645 Article 48 addresses the relationship between this Convention and the two previous Hague Conventions on recognition and enforcement of decisions concerning maintenance obligations, the 1973 Hague Maintenance Convention (Enforcement) and the 1958 Hague Maintenance Con-

[225] See "Co-ordination between the maintenance project and other international instruments", document drawn up by P. Lortie, First Secretary, Prel. Doc. No 18 of June 2006 for the attention of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance, *supra* p. I-329 of this tome (also available at <www.hcch.net>).

mentaires de 1958. Le principe général est que cette Convention remplace les précédentes, mais compte tenu des limites de son champ d'application[226], le remplacement ne vaut que pour la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires envers les enfants « dans la mesure où leur champ d'application entre lesdits États coïncide avec celui de la présente Convention ». Cette règle s'impose en raison du champ d'application différent des Conventions. La Convention de 1958 se limite en effet à « un enfant légitime, non légitime ou adoptif, non marié et âgé de moins de 21 ans accomplis »[227], tandis que la Convention de 1973 s'applique aux obligations alimentaires découlant « de relations de famille, de parenté, de mariage ou d'alliance, y compris les obligations alimentaires envers un enfant non légitime », bien que des réserves puissent être formulées à l'égard de certains groupes de personnes[228], comme l'ont fait certains États parties à la Convention.

646 Étant donné que la Convention ne comporte pas de règles relatives à la loi applicable aux obligations alimentaires et que celles-ci font l'objet du Protocole, une règle similaire en ce qui concerne la Convention Obligations alimentaires de 1956 et la Convention Obligations alimentaires de 1973 (Loi applicable) figure dans le Protocole[229].

Article 49 Coordination avec la Convention de New York de 1956

Dans les rapports entre les États contractants, la présente Convention remplace la *Convention sur le recouvrement des aliments à l'étranger* du 20 juin 1956, établie par les Nations Unies, dans la mesure où son champ d'application entre lesdits États correspond au champ d'application de la présente Convention.

647 Ce n'est que tardivement au cours de la Session diplomatique que cette règle a été introduite. Comme l'a expliqué le Secrétaire général[230], le Bureau Permanent devait s'assurer du consentement et du soutien préalables du Conseiller juridique (*Legal Advisor*) des Nations Unies afin de proposer que soit insérée dans le texte de la Convention une référence à la Convention de New York de 1956. L'idée sous-jacente de cette règle est que la coordination avec la Convention de New York renforcerait le rôle de la Convention en tant qu'instrument global. Ainsi, dans les hypothèses où le champ d'application de la Convention coïncide avec celui de la Convention de New York, la nouvelle Convention s'appliquerait. Le préambule de la Convention fait également référence à la Convention de New York de 1956.

Article 50 Relations avec les Conventions de La Haye antérieures relatives à la notification d'actes et à l'obtention de preuves

La présente Convention ne déroge pas à la *Convention de La Haye du premier mars 1954 relative à la procédure civile*, ni à la *Convention de La Haye du 15 novembre 1965 relative à la signification et la notification à l'étranger des actes judiciaires et extrajudiciaires en matière civile ou commerciale*, ni à la *Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale*.

648 L'introduction au sein des fonctions des Autorités centrales (art. 6) des fonctions « (c) faciliter la recherche des informations pertinentes relatives aux revenus et, si nécessaire, au patrimoine du débiteur ou du créancier, y compris la localisation des biens », « (g) faciliter l'obtention d'éléments de preuve documentaire ou autre », « (h) fournir une assistance pour établir la filiation lorsque cela est nécessaire pour le recouvrement d'aliments » et « (j) faciliter la signification et la notification des actes » ainsi que l'article 7 ont conduit certains délégués à s'interroger sur le rapport de cette Convention avec les Conventions Notification de 1965 et Obtention des preuves de 1970 (voir aussi l'art. 7 au sujet de ces fonctions). La proposition présentée dans le Document de travail No 15 par la délégation de la Communauté européenne visait à clarifier que la présente Convention ne porte pas atteinte à ces Conventions. Cette idée a recueilli un large consensus. Et pour les mêmes raisons, il a été également convenu d'ajouter à cette disposition une référence à la Convention Procédure civile de 1954.

649 Ces trois Conventions prévoient des règles très détaillées et précises concernant la transmission des actes aux fins de signification ou notification à l'étranger et des méthodes de coopération pour l'obtention des preuves à l'étranger, alors que la présente Convention ne contient aucune règle procédurale à cet égard et prévoit seulement que les Autorités centrales doivent faciliter la notification des actes et l'obtention des preuves. Il est en outre important de souligner que les alinéas (g) et (j) de l'article 6(2) n'utilisent pas les termes « à l'étranger ». Cela parce qu'il est probable que dans la plupart des affaires, il sera demandé à une Autorité centrale de faciliter l'obtention de preuves ou la signification ou notification dans son propre ressort ; une Autorité centrale sera moins souvent sollicitée pour faciliter l'obtention de preuves ou la notification à l'étranger.

650 Au cours de la Session diplomatique, des exemples ont été donnés de l'application possible des Conventions Notification de 1965 et Obtention des preuves de 1970. Ces exemples, qui sont présentés et expliqués dans les commentaires relatifs à l'article 6(2)(g) et (j)[231], montrent que de nombreuses situations couvertes par la présente Convention ne nécessiteront ni la transmission d'actes aux fins de la signification ou notification à l'étranger, ni l'obtention de preuves à l'étranger. Manifestement, il n'est pas nécessaire, dans ces circonstances, de recourir aux Conventions Procédure civile de 1954, Notification de 1965 ou Obtention des preuves de 1970.

651 On notera qu'il est possible de désigner une Autorité centrale en vertu de la nouvelle Convention comme Autorité centrale en vertu de la Convention Notification de 1965 pour recevoir les documents relatifs à des obligations alimentaires[232]. Cette même possibilité est prévue à la Convention Obtention des preuves de 1970[233].

Article 51 Coordination avec les instruments et accords complémentaires

652 Compte tenu des nombreux instruments internationaux traitant de différents aspects du recouvrement des aliments, une règle de coordination des instruments est indispensable. Une clause de ce type a été insérée pour la première fois à l'article 9 de la *Convention de La Haye du 15 avril 1958*

226 Voir art. 2 (Champ d'application) et commentaires aux para. 45 à 59 du présent Rapport.
227 Art. 1er. NB : cette Convention n'a été rédigée qu'en français.
228 Art. 1er et art. 34.
229 Art. 18.
230 Procès-verbal No 12, para. 11, introduisant le Doc. trav. No 38 du Bureau Permanent.
231 Voir para. 164 à 167 et 182 à 185 du présent Rapport.
232 L'Autorité centrale ainsi désignée pourra être soit « l[a] » ou « une » Autorité centrale conformément aux art. 2, 18(3) et 21, soit une « autre » autorité conformément aux art. 18(1) et 21 de la Convention de 1965.
233 L'Autorité centrale ainsi désignée pourra être soit « l »'Autorité centrale ou « une » Autorité centrale conformément à l'art. 2, soit une « autre » autorité conformément aux art. 24 et 25 de la Convention de 1970.

vention. The general principle is that this Convention replaces the former ones, but taking into account the limits of the scope of this Convention,[226] the replacement only takes place for the recognition and enforcement of decisions relating to maintenance obligations towards children "in so far as their scope of application as between such States coincides with the scope of application of this Convention". Such a rule is needed in view of the different scope of the Conventions. The 1958 Convention is limited to an "*enfant légitime, non légitime ou adoptif, non marié et âgé de moins de 21 ans accomplis*",[227] and the 1973 Convention applies to maintenance obligations arising from "a family relationship, parentage, marriage or affinity, including a maintenance obligation towards an infant who is not legitimate", although reservations are possible in relation to certain groups of persons,[228] as some of the States Party to the 1973 Convention have made.

646 As the rules on the law applicable to maintenance obligations are not included in the Convention but are the subject of the Protocol, a similar rule in relation to the 1956 Hague Maintenance Convention and the 1973 Hague Maintenance Convention (Applicable Law) is found in the Protocol.[229]

Article 49 Co-ordination with the 1956 New York Convention

In relations between the Contracting States, this Convention replaces the United Nations *Convention on the Recovery Abroad of Maintenance* of 20 June 1956, in so far as its scope of application as between such States coincides with the scope of application of this Convention.

647 This rule was introduced at a late stage in the Diplomatic Session. As the Secretary General explained,[230] the reason was that the Permanent Bureau had to secure the prior consent and support of the United Nations Legal Advisor in order to be able to propose a reference to the 1956 New York Convention in the text of this Convention. The rationale behind the rule is that co-ordination with the New York Convention would further consolidate the object of this Convention as a truly global one. In a situation where the scope of application of this Convention coincides with that of the New York Convention, the new Convention would apply. A reference to the 1956 New York Convention is also made in the Preamble of the Convention.

Article 50 Relationship with prior Hague Conventions on service of documents and taking of evidence

This Convention does not affect the Hague Convention of 1 March 1954 on civil procedure, the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* and the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*.

648 The introduction among the functions of Central Authorities (Art. 6) of the functions "(c) to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets", "(g) to facilitate the obtaining of documentary or other evidence", "(h) to provide assistance in establishing parentage where necessary for the recovery of maintenance" and "(j) to facilitate service of documents", as well as Article 7, gave rise for some delegates to the issue of the relationship of this Convention with the 1965 Hague Service Convention and with the 1970 Hague Evidence Convention (see also Art. 7 with regard to these functions). The proposal found in Working Document No 15 from the delegation of the European Community was made with a view to clarifying that the new Convention does not affect these Conventions, which idea was accepted by broad consensus. For the same reasons it was also agreed to add to the provision a reference to the 1954 Hague Civil Procedure Convention.

649 The three Conventions all provide for very detailed and specific rules with respect to the transmission of documents for service abroad and methods of co-operation for the taking of evidence abroad, whereas this Convention does not include any procedural rules in this respect but only provides for the Central Authority to facilitate service of documents or the taking of evidence. It is important to note that the term "abroad" is not used in sub-paragraphs (g) and (j) of Article 6(2). This is because a Central Authority will probably, in most cases, be asked to facilitate the taking of evidence or the service of documents within its own jurisdiction; a Central Authority will less frequently be asked to facilitate the taking of evidence or service abroad.

650 During the Diplomatic Session some examples were given of the possible application of the 1965 Hague Service and the 1970 Hague Evidence Conventions. These examples are included and explained in the comments on Article 6(2)(g) and (j).[231] These examples illustrate that there are many situations covered by the present Convention that will neither require the transmission of documents for service abroad nor the taking of evidence abroad. In such circumstances, there is of course no need to have recourse to the 1954 Hague Civil Procedure, the 1965 Hague Service or the 1970 Hague Evidence Conventions.

651 It may be noted that it is possible to designate a Central Authority under the new Convention as Central Authority under the 1965 Hague Service Convention to receive documents relating to maintenance matters.[232] A similar possibility applies in the case of the 1970 Hague Evidence Convention.[233]

Article 51 Co-ordination of instruments and supplementary agreements

652 As there are numerous international instruments which relate to different aspects of the recovery of maintenance obligations, a rule on co-ordination of instruments is necessary. A clause of this kind is included for the first time in Article 9 of the Hague Convention of 15 April 1958 on the

[226] See Art. 2 (Scope) and comments under paras 45-59 of this Report.
[227] Art. 1. Note that this Convention was drawn up in French only.
[228] Art. 1 and Art. 34.
[229] Art. 18.
[230] Minutes No 12, para. 11, introducing Work. Doc. No 38 of the Permanent Bureau.
[231] See paras 164-167 and 182-185 of this Report.
[232] This designation can be done either as "the" or "a" Central Authority under Arts 2, 18(3) and 21(1)(a), or as an "other" authority under Arts 18(1) and 21(1)(a) of the 1965 Convention.
[233] This designation can be done either as "the" or "a" Central Authority under Art. 2, or as an "other" authority under Arts 24 and 25 of the 1970 Convention.

sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels[234], puis dans les Conventions relatives aux aliments[235] et dans toutes les Conventions de La Haye récentes pour lesquelles existait une Convention préalable traitant du même sujet[236].

653 Comme cela a été démontré dans le Document préliminaire No 18 de juin 2006[237], l'article 30 de la *Convention de Vienne du 23 mai 1969 sur le droit des traités* (ci-après la « Convention de Vienne de 1969 ») ne suffit pas à lui seul à coordonner les instruments internationaux existants en matière d'aliments. C'est pourquoi il a été décidé d'insérer dans la Convention une disposition spécifique à la coordination.

Paragraphe premier – La présente Convention ne déroge pas aux instruments internationaux conclus avant la présente Convention auxquels des États contractants sont Parties et qui contiennent des dispositions sur les matières réglées par la présente Convention.

654 Ce paragraphe concerne exclusivement les accords antérieurs. Il est conforme aux clauses habituelles de compatibilité prévues dans de nombreuses Conventions à l'exception du fait que cette disposition couvre également les instruments conclus avant la Convention et qui ne sont pas encore en vigueur. Habituellement, ce type de disposition ne couvre que les instruments en vigueur. Néanmoins, la question de savoir quand un traité a priorité sur un autre soulève des difficultés considérables en droit international – la réponse peut dépendre de savoir quel traité a été conclu le premier ou bien quel traité est entré en vigueur le premier. Les délégués ont donc estimé important d'insérer les termes « conclus avant la présente Convention » afin d'assurer la protection de la Convention révisée de Lugano, conclue le 30 octobre 2007 mais non encore en vigueur au moment de la rédaction. D'autres instruments déjà conclus mais non entrés en vigueur peuvent être également couverts par cette disposition ; ainsi en est-il par exemple de la *Convention d'Ottawa du 10 juin 1996 entre le Canada et la France relative à la reconnaissance et l'exécution de décisions judiciaires en matière civile et commerciale ainsi qu'à l'entraide judiciaire en matière de pensions alimentaires* ou encore de la *Convention de Rome du 6 novembre 1990 entre les États membres des Communautés européennes sur la simplification des procédures relatives au recouvrement des créances alimentaires*. En agissant ainsi, les négociateurs ont accepté de prendre un léger risque.

Paragraphe 2 – Tout État contractant peut conclure avec un ou plusieurs États contractants des accords qui contiennent des dispositions sur les matières réglées par la Convention afin d'améliorer l'application de la Convention entre eux, à condition que de tels accords soient conformes à l'objet et au but de la Convention et n'affectent pas, dans les rapports de ces États avec d'autres États contractants, l'application des dispositions de la Convention. Les États qui auront conclu de tels accords en transmettront une copie au dépositaire de la Convention.

655 Conformément à la tradition des Conventions de La Haye, la possibilité est laissée aux États contractants de conclure des accords en vue d'améliorer l'application de la Convention et de rendre plus efficace et plus rapide le système de reconnaissance et d'exécution des décisions sur les aliments ou de fournir des services plus étendus. Cette règle permet à deux États contractants ou plus de conclure entre eux un accord couvrant les matières régies par la Convention. Les exigences applicables à ce type d'accord sont énoncées à l'article 41 de la Convention de Vienne de 1969, qui dispose que :

> « 1. Deux ou plusieurs parties à un traité multilatéral peuvent conclure un accord ayant pour objet de modifier le traité dans leurs relations mutuelles seulement :
>
> *a*) Si la possibilité d'une telle modification est prévue par le traité [ce qui est le cas ici] ; ou
>
> *b*) Si la modification en question n'est pas interdite par le traité, à condition qu'elle :
>
> i) Ne porte atteinte ni à la jouissance par les autres parties des droits qu'elles tiennent du traité ni à l'exécution de leurs obligations ; et
>
> ii) Ne porte pas sur une disposition à laquelle il ne peut être dérogé sans qu'il y ait incompatibilité avec la réalisation effective de l'objet et du but du traité pris dans son ensemble. »

C'est en fait ce que prévoit la règle de l'article 51.

656 Une copie de l'accord doit être transmise au dépositaire de la Convention.

Paragraphe 3 – Les paragraphes premier et 2 s'appliquent également aux ententes de réciprocité et aux lois uniformes reposant sur l'existence entre les États concernés de liens spéciaux.

657 Ce paragraphe assimile aux accords visés aux paragraphes premier et 2 les lois uniformes et les ententes de réciprocité reposant sur l'existence de liens spéciaux entre les États concernés. Cette disposition est particulièrement intéressante pour les États scandinaves, entre autres.

Paragraphe 4 – La présente Convention n'affecte pas l'application d'instruments d'une Organisation régio-

[234] Cet article a été inséré pour protéger l'Accord nordique ou l'Accord du Benelux (voir Conférence de La Haye de droit international privé, *Actes de la Huitième session, 3 au 24 octobre 1956*, tome I, La Haye, Imprimerie Nationale, 1957, p. 88 à 91).

[235] Voir l'art. 23 de la Convention Obligations alimentaires de 1973 (Exécution) et l'art. 18 de la Convention Obligations alimentaires de 1973 (Loi applicable).

[236] Ces dispositions sont les suivantes : art. 9 de la *Convention de La Haye du 15 avril 1958 sur la loi applicable au transfert de propriété en cas de vente à caractère international d'objets mobiliers corporels*, art. 18 de la *Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs*, art. 12 de la *Convention de La Haye du 15 novembre 1965 concernant la compétence des autorités, la loi applicable et la reconnaissance des décisions en matière d'adoption*, art. 14 de la *Convention de La Haye du 25 novembre 1965 sur les accords d'élection de for*, art. 25 de la Convention Notification de 1965, art. 18 de la *Convention de La Haye du premier juin 1970 sur la reconnaissance des divorces et des séparations de corps*, art. 15 de la *Convention de La Haye du 4 mai 1971 sur la loi applicable en matière d'accidents de la circulation routière*, art. 24, 25 et 26 de la *Convention de La Haye du premier février 1971 sur la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale*, art. 39 de la *Convention de La Haye du 2 octobre 1973 sur l'administration internationale des successions*, art. 15 de la *Convention de La Haye du 2 octobre 1973 sur la loi applicable à la responsabilité du fait des produits*, art. 20 de la *Convention de La Haye du 14 mars 1978 sur la loi applicable aux régimes matrimoniaux*, art. 21 de la *Convention de La Haye du 14 mars 1978 sur la célébration et la reconnaissance de la validité des mariages*, art. 22 de la *Convention de La Haye du 14 mars 1978 sur la loi applicable aux contrats d'intermédiaire et à la représentation*, art. 34 et 36 de la Convention Enlèvement d'enfants de 1980, art. 21 de la Convention Accès à la justice de 1980, art. 25 de la *Convention de La Haye du premier juillet 1985 relative à la loi applicable au trust et à sa reconnaissance*, art. 22 de la *Convention de La Haye du 22 décembre 1986 sur la loi applicable aux contrats de vente internationale de marchandises* (ci-après la « Convention Contrats de vente de 1986 »), art. 23 de la *Convention de La Haye du premier août 1989 sur la loi applicable aux successions à cause de mort*, art. 39 de la Convention Adoption internationale de 1993, art. 52 de la Convention Protection des enfants de 1996, art. 49 de la Convention Protection des adultes de 2000. L'art. 26 de la Convention Élection de for de 2005 a considéré la question en prêtant plus particulièrement attention à la complexité de la matière.

[237] *Op. cit.* (note 225).

law governing transfer of title in international sales of goods,[234] afterwards in the Maintenance Conventions[235] and in all recent Hague Conventions dealing with subjects for which a prior Convention existed.[236]

653 As demonstrated in Preliminary Document No 18 of June 2006,[237] Article 30 of the *Vienna Convention of 23 May 1969 on the Law of Treaties* (hereinafter "1969 Vienna Convention") does not suffice on its own to co-ordinate existing international instruments in the area of maintenance. It was therefore decided to include a specific co-ordination provision in the Convention.

Paragraph 1 – This Convention does not affect any international instrument concluded before this Convention to which Contracting States are Parties and which contains provisions on matters governed by this Convention.

654 This paragraph concerns only prior agreements. It is in line with the usual compatibility clauses found in numerous Conventions, with the exception that this provision would cover instruments concluded before this Convention but that are not yet in force. Usually this kind of provision only covers instruments that are in force. The question of determining when one treaty is prior to another raises considerable difficulties in international law. It may depend on which one was concluded first or which one entered into force first. It was felt very important to include the terms "concluded before this Convention" in order to safeguard the revised Lugano Convention, concluded on 30 October 2007 although not yet in force at the time of writing, even though the provision would cover other concluded instruments not yet in force, such as the *Ottawa Convention of 10 June 1996 between Canada and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Mutual Assistance in Maintenance* and the *Rome Convention of 6 November 1990 between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments*. In so doing, the negotiators accepted to take a small risk.

Paragraph 2 – Any Contracting State may conclude with one or more Contracting States agreements, which contain provisions on matters governed by the Convention, with a view to improving the application of the Convention between or among themselves, provided that such agreements are consistent with the objects and purpose of the Convention and do not affect, in the relationship of such States with other Contracting States, the application of the provisions of the Convention. The States which have concluded such an agreement shall transmit a copy to the depositary of the Convention.

655 As is usual in the Hague Conventions, a possibility is open to Contracting States to conclude agreements improving the application of the Convention, as well as making more expeditious and effective the system for recognition and enforcement of maintenance decisions or for the provision of an advanced level of services. This rule allows two Contracting States or a group of them to conclude among themselves an agreement that covers the same area as the Convention. The requirements for such agreements are found in Article 41 of the 1969 Vienna Convention, which provides that:

> "1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (*a*) the possibility of such a modification is provided for by the treaty [which is the case at point]; or
>
> (*b*) the modification in question is not prohibited by the treaty and:
>
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
>
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

This in effect is what the rule included in Article 51 provides.

656 A copy of the agreement must be transmitted to the depositary of the Convention.

Paragraph 3 – Paragraphs 1 and 2 shall also apply to reciprocity arrangements and to uniform laws based on special ties between the States concerned.

657 This paragraph assimilates uniform laws and reciprocity arrangements based on the existence of special ties among the States concerned to the agreements referred to in paragraphs 1 and 2. This provision is particularly interesting for the Scandinavian States, among others.

Paragraph 4 – This Convention shall not affect the application of instruments of a Regional Economic Inte-

[234] This Article was included to safeguard the Nordic agreement or the Benelux agreement (see Conférence de La Haye de droit international privé, *Actes de la Huitième session, 3 au 24 octobre 1956*, Tome I, The Hague, Imprimerie Nationale, 1957, pp. 88-91).

[235] See Art. 23 of the 1973 Hague Maintenance Convention (Enforcement) and Art. 18 of the 1973 Hague Maintenance Convention (Applicable Law).

[236] The provisions included are: Art. 9 of the Hague Convention of 15 April 1958 on the jurisdiction of the selected forum in the case of international sales of goods, Art. 18 of the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, Art. 12 of the *Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions*, Art. 14 of the *Hague Convention of 25 November 1965 on the Choice of Court*, Art. 25 of the 1965 Hague Service Convention, Art. 18 of the *Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*, Art. 15 of the *Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*, Arts 24, 25 and 26 of the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Art. 39 of the *Hague Convention of 2 October 1973 concerning the International Administration of the Estates of Deceased Persons*, Art. 15 of the *Hague Convention of 2 October 1973 on the Law Applicable to Products Liability*, Art. 20 of the *Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*, Art. 21 of the *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*, Art. 22 of the *Hague Convention of 14 March 1978 on the Law Applicable to Agency*, Arts 34 and 36 of the 1980 Hague Child Abduction Convention, Art. 21 of the 1980 Hague Access to Justice Convention, Art. 25 of the *Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, Art. 22 of the *Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods* (hereinafter "1986 Hague Sales Contracts Convention"), Art. 23 of the *Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*, Art. 39 of the 1993 Hague Intercountry Adoption Convention, Art. 52 of the 1996 Hague Child Protection Convention, Art. 49 of the 2000 Hague Adults Convention. Art. 26 of the 2005 Hague Choice of Court Convention envisaged the question paying special attention to the complexity of the subject matter.

[237] *Op. cit.* (note 225).

nale d'intégration économique partie à la présente Convention, ayant été adoptés après la conclusion de la Convention, en ce qui a trait aux matières régies par la Convention, à condition que de tels instruments n'affectent pas, dans les rapports des États membres de l'Organisation régionale d'intégration économique avec d'autres États contractants, l'application des dispositions de la Convention. En ce qui concerne la reconnaissance ou l'exécution de décisions entre les États membres de l'Organisation régionale d'intégration économique, la Convention n'affecte pas les règles de l'Organisation régionale d'intégration économique, que ces règles aient été adoptées avant ou après la conclusion de la Convention.

658 Le dernier paragraphe de l'article 51 envisage l'hypothèse dans laquelle une ORIE devient Partie à la Convention. Il est possible que les règles juridiques adoptées par l'ORIE soient en conflit avec la Convention. Une règle similaire a été insérée à l'article 26(6) de la Convention Élection de for de 2005[238].

659 La première hypothèse visée a trait au rapport entre la Convention et les instruments adoptés par l'ORIE après la conclusion de la Convention[239], et non au celui entre la Convention et les instruments adoptés avant sa conclusion. Le principe sous-jacent est que lorsqu'une affaire est purement « régionale », c'est-à-dire interne à l'ORIE, la Convention laisse place à l'instrument régional. En revanche, un tel instrument ne peut pas affecter les rapports entre les États membres de l'ORIE et d'autres États contractants.

660 La deuxième hypothèse concerne le rapport entre la Convention et les instruments relatifs à la reconnaissance et à l'exécution de décisions entre États membres. Le paragraphe 4 dispose que la Convention n'affectera pas l'application des règles de l'ORIE relatives à la reconnaissance ou à l'exécution des décisions entre ses États membres comme c'est le cas du Règlement Bruxelles I dont le champ d'application comprend les obligations alimentaires[240]. Il faut souligner qu'aucune disposition ne prévoit que la décision ne pourra pas être reconnue ou exécutée dans une mesure moindre qu'en application de la Convention. La disposition s'applique, que la règle de l'ORIE soit adoptée avant ou après la Convention.

661 Cette règle est particulièrement utile au regard des instruments de la Communauté européenne, en particulier la Convention de Bruxelles, le Règlement Bruxelles I et le Règlement TEE, qui instaurent des systèmes très simples de reconnaissance et d'exécution des décisions en matière d'aliments[241].

Article 52 Règle de l'efficacité maximale

662 L'article 51(2) prévoit que les États contractants peuvent conclure des accords entre eux. Cependant, l'article 52 va plus loin puisqu'il vise non seulement un instrument international, multilatéral ou bilatéral, mais également les ententes de réciprocité en vigueur pour l'État requis. En outre, il prévoit que ces instruments seront applicables si, et seulement si, ils prévoient un système plus favorable que ceux de la Convention pour la reconnaissance et l'exécution des décisions sur les aliments. Il s'agit de l'application de la « règle de l'efficacité maximale ».

Paragraphe premier – La présente Convention ne fait pas obstacle à l'application d'un accord, d'une entente ou d'un instrument international en vigueur entre l'État requérant et l'État requis ou d'une entente de réciprocité en vigueur dans l'État requis qui prévoit :

Alinéa (a) – des bases plus larges pour la reconnaissance des décisions en matière d'aliments, sans préjudice de l'article 22(f) de la Convention ;

Alinéa (b) – des procédures simplifiées et accélérées relatives à une demande de reconnaissance ou de reconnaissance et d'exécution de décisions en matière d'aliments ;

Alinéa (c) – une assistance juridique plus favorable que celle prévue aux articles 14 à 17 ; ou

Alinéa (d) – des procédures permettant à un demandeur dans un État requérant de présenter une demande directement à l'Autorité centrale de l'État requis.

663 Le texte du paragraphe premier émane de propositions présentées dans le Document de travail No 37 par la délégation du Canada et dans le Document de travail No 69 par la délégation des États-Unis d'Amérique. L'objectif de cette disposition est de permettre d'utiliser des procédures plus simples et plus rapides ; cette règle doit être rapprochée des articles 23 et 24[242]. Les provinces et territoires du Canada disposent de leur propre système de reconnaissance et d'exécution des décisions. Ils ont conclu des ententes de réciprocité[243], entre eux, mais également avec les États-Unis d'Amérique, Hong Kong ou encore l'Allemagne, pour ne citer que quelques exemples. Le but de ce paragraphe est donc de conserver et de renforcer cette possibilité. À cette fin, le Canada et les États-Unis d'Amérique ont fait référence aux ententes mises en œuvre entre les États-Unis d'Amérique et les provinces et territoires du Canada avec un effet réciproque.

Paragraphe 2 – La présente Convention ne fait pas obstacle à l'application d'une loi en vigueur dans l'État requis prévoyant des règles plus efficaces telles que mentionnées au paragraphe premier (a) à (c). Cependant, en ce qui concerne les procédures simplifiées et accélérées mentionnées au paragraphe premier (b), elles doivent être compatibles avec la protection offerte aux parties en vertu des articles 23 et 24, en particulier en ce qui a trait aux droits des parties de se voir dûment notifier les procédures et de se voir offrir une opportunité adéquate d'être entendues, et en ce qui a trait aux effets d'une contestation ou d'un appel.

664 La Convention autorise, par ce paragraphe 2, l'application d'autres lois en vigueur dans l'État requis, dès lors qu'elles comprennent des règles plus efficaces, comme mentionné au paragraphe premier (a) à (c). Si rien ne justifie d'interdire l'adoption de telles mesures unilatérales, des garanties doivent néanmoins être maintenues. Aussi est-il indiqué qu'à l'égard des procédures simplifiées et accélérées aux fins de reconnaissance et d'exécution mentionnées au paragraphe premier (b), les garanties offertes aux parties, en vertu des articles 23 et 24 relatifs à la procédure

[238] Voir le Rapport explicatif de T. Hartley et M. Dogauchi (*op. cit.* note 46), en particulier les para. 306 à 311.
[239] Par ex. le Règlement Obligations alimentaires (Règlement (CE) No 4/2009 du Conseil du 18 décembre 2008, voir abréviations et références au para. 15 du présent Rapport).
[240] Ce Règlement sera annulé et remplacé, au sein de la Communauté dans le cadre des aliments, par le nouveau Règlement Obligations alimentaires (voir note précédente).
[241] Cette règle sera pertinente après l'adoption du nouveau Règlement Obligations alimentaires (*id.*).
[242] Il convient de préciser que cette disposition n'entrave pas la protection offerte aux art. 23 et 24.
[243] Art. 46 de la Convention et voir les commentaires y afférents, para. 637 et s. du présent Rapport.

gration Organisation that is a Party to this Convention, adopted after the conclusion of the Convention, on matters governed by the Convention provided that such instruments do not affect, in the relationship of Member States of the Regional Economic Integration Organisation with other Contracting States, the application of the provisions of the Convention. As concerns the recognition or enforcement of decisions as between Member States of the Regional Economic Integration Organisation, the Convention shall not affect the rules of the Regional Economic Integration Organisation, whether adopted before or after the conclusion of the Convention.

658 The last paragraph in Article 51 deals with the situation where an REIO becomes a Party to the Convention. It is possible that legal norms adopted by the REIO might conflict with the Convention. A similar rule was included in Article 26(6) of the 2005 Hague Choice of Court Convention.[238]

659 The first situation is the relationship of the Convention with instruments adopted by the REIO after the conclusion of the Convention.[239] It is not applicable to instruments adopted before. The underlying principle is that where a case is purely "regional", *i.e.*, within the REIO, the Convention gives way to the regional instrument, but that such instrument cannot affect the relationship of Member States of the REIO with other Contracting States.

660 The second situation is the relationship of the Convention with instruments related to recognition and enforcement of decisions as between Member States. Paragraph 4 also provides that the Convention will not affect the application of the rules of the REIO as concerns the recognition or enforcement of decisions as between Member States. This is the case of the Brussels I Regulation that includes maintenance obligations in its scope of application.[240] It is important to underline that there is no provision that the decision may not be recognised or enforced to a lesser extent than under the Convention. The provision applies irrespective of whether the rule of the REIO is adopted before or after the Convention.

661 Such a rule is especially useful in relation to the European Community instruments, in particular the Brussels Convention, Brussels I Regulation and EEO Regulation, in which very simple systems for recognition and enforcement of maintenance decisions are included.[241]

Article 52 Most effective rule

662 Article 51(2) provides for the possibility of Contracting States to conclude agreements among themselves. But Article 52 goes further because it refers not only to international instruments, multilateral or bilateral, but also to reciprocity arrangements in force for the requested State. Furthermore, it envisages that such instruments will be applicable if and only if they provide a more beneficial system than those provided by the Convention for the recognition and enforcement of maintenance decisions. It is the application of the "most effective rule".

Paragraph 1 – This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or a reciprocity arrangement in force in the requested State that provides for –

Sub-paragraph (a) – broader bases for recognition of maintenance decisions, without prejudice to Article 22(f) of the Convention;

Sub-paragraph (b) – simplified, more expeditious procedures on an application for recognition or recognition and enforcement of maintenance decisions;

Sub-paragraph (c) – more beneficial legal assistance than that provided for under Articles 14 to 17; or

Sub-paragraph (d) – procedures permitting an applicant from a requesting State to make a request directly to the Central Authority of the requested State.

663 The origin of the text of paragraph 1 is in Working Document No 37 from the delegation of Canada and Working Document No 69 from the delegation of the United States of America. The possibility to use simpler or more expeditious procedures is the objective of this Article and it has to be considered jointly with Articles 23 and 24.[242] Provinces and territories in Canada have their own system of recognition and enforcement of decisions. They have concluded among themselves "reciprocity arrangements",[243] but they have also reciprocity arrangements with the United States of America, Hong Kong and Germany, to mention some examples. The aim of this paragraph is to maintain and reinforce this possibility. In this sense, Canada and the United States of America referred to arrangements that were implemented between the United States of America and Canadian provinces and territories and which had a reciprocal effect.

Paragraph 2 – This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1(a) to (c). However, as regards simplified, more expeditious procedures referred to in paragraph 1(b), they must be compatible with the protection offered to the parties under Articles 23 and 24, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal.

664 The Convention allows in paragraph 2 the possibility to apply other laws in force in the requested State if they include more effective rules as referred to in paragraph 1(a) to (c). There is no reason to prohibit the adoption of such unilateral measures, but some guarantees have to be maintained. This is why it is stated that, as to the simplified and more expeditious procedure for recognition and enforcement referred to in paragraph 1(b), the guarantees for the parties provided for in Articles 23 and 24, concerning the

[238] See Explanatory Report, T. Hartley and M. Dogauchi (*op. cit.* note 46), especially paras 306-311.
[239] *E.g.*, the Maintenance Regulation (Council Regulation (EC) No 4/2009 of 18 December 2008, see abbreviations and references under para. 15 of this Report).
[240] This Regulation will be superseded within the Community as regards maintenance by the new Maintenance Regulation (see preceding note).
[241] The rule will be relevant after the adoption of the new Maintenance Regulation (*id.*).
[242] This provision is without prejudice to the safeguards of Arts 23 and 24.
[243] See Art. 46 of the Convention and comments on Art. 46 under paras 637 *et seq.* of this Report.

d'exécution, doivent être respectées. Cette règle est suffisamment souple pour ne pas empêcher la simplification des procédures conformément au droit interne. Cependant, la loi de l'État requis doit être « compatible » avec la protection offerte par la Convention, notamment en ce qui concerne les droits de la défense.

Article 53 Interprétation uniforme

Pour l'interprétation de la présente Convention, il sera tenu compte de son caractère international et de la nécessité de promouvoir l'uniformité de son application.

665 L'article 53 dispose que l'interprétation de la Convention doit tenir compte de son caractère international et de la nécessité de promouvoir son application uniforme. Cette disposition, qui s'adresse aux autorités qui appliquent la Convention au jour le jour, exige qu'elles l'interprètent dans une optique internationale afin de promouvoir l'uniformité de son application. Par conséquent, à chaque fois que c'est raisonnablement possible, les décisions et écrits étrangers pourront être pris en compte. Il faut également garder à l'esprit que les concepts et principes qui ont valeur d'axiome dans un système juridique peuvent être inconnus ou rejetés dans un autre. Les objectifs de la Convention ne peuvent être atteints que si les autorités l'appliquent dans un esprit d'ouverture.

666 Dans la pratique, cela signifie que selon les circonstances de l'affaire et les pays concernés, le fonctionnement de la Convention tient compte de l'objectif de « cohérence », mais le terme « interprétation uniforme » est préféré parce qu'il est employé dans d'autres Conventions – article 16 de la Convention Contrats de vente de 1986, dans laquelle la disposition a été acceptée sans débat[244], article 13 de la Convention Titres de 2006 et article 23 de la Convention Élection de for de 2005.

667 Cet article doit être lu conjointement avec l'article 54 (Examen du fonctionnement pratique de la Convention) parce qu'ils ont tous deux pour objectif l'application appropriée et uniforme de la Convention.

Article 54 Examen du fonctionnement pratique de la Convention

Paragraphe premier – Le Secrétaire général de la Conférence de La Haye de droit international privé convoque périodiquement une Commission spéciale afin d'examiner le fonctionnement pratique de la Convention et d'encourager le développement de bonnes pratiques en vertu de la Convention.

Paragraphe 2 – À cette fin, les États contractants collaborent avec le Bureau Permanent de la Conférence de La Haye de droit international privé afin de recueillir les informations relatives au fonctionnement pratique de la Convention, y compris des statistiques et de la jurisprudence.

668 L'article 54 est consacré au suivi de la Convention[245]. La même règle figure à l'article 42 de la Convention Adoption internationale de 1993, à l'article 56 de la Convention Protection des enfants de 1996 et à l'article 52 de la Convention Protection des adultes de 2000. L'organisation par la Conférence de réunions périodiques pour examiner le fonctionnement pratique de la Convention et, le cas échéant, suggérer des améliorations, ne peut être que bénéfique. Une règle légèrement différente est prévue dans la Convention Élection de for de 2005, dont l'article 24 dispose que le Secrétaire général « prend périodiquement des dispositions » pour l'examen du fonctionnement pratique de la Convention et de l'opportunité d'apporter des modifications. Cette rédaction s'explique par le caractère très différent de cette Convention, qui ne prévoit pas de système de coopération entre Autorités centrales. S'agissant des Conventions Enlèvement d'enfants de 1980 ou Adoption internationale de 1993, les réunions pour examiner le fonctionnement pratique de la Convention se sont avérées essentielles à leur bonne application dans le temps. Comme il a été dit en introduction[246], l'importance des réunions de la Commission spéciale de 1995 et de 1999 sur le fonctionnement des Conventions relatives aux obligations alimentaires a été soulignée comme un point de départ à l'élaboration de cette nouvelle Convention.

669 Par le passé, les Conventions étaient conclues et les États et le Bureau Permanent ne réfléchissaient à leur application qu'ensuite. Aujourd'hui, le suivi des Conventions est l'activité principale du Bureau Permanent. Le Bureau Permanent, en coopération avec les Autorités centrales, les ONG, les universitaires, etc. assure un large éventail d'activités telles que : a) promotion et publication des Conventions, b) aide aux États pour la mise en œuvre initiale des Conventions, c) conseil technique[247], d) promotion d'une interprétation cohérente par le développement d'une base de données de jurisprudence[248] et *La Lettre des juges*, e) formation judiciaire[249], f) amélioration de la pratique administrative grâce à la formation et la publication de guides de bonnes pratiques, g) constitution de réseaux de coopération[250], h) promotion d'une exécution appropriée[251], i) suivi des Conventions, j) développement de systèmes électroniques de gestion de dossiers[252] et autres logiciels à l'appui de Conventions[253].

670 Dans le cas présent, il faut souligner qu'un second paragraphe a été ajouté à l'article 54 pour souligner que les États parties à la Convention sont également parties prenantes du bon fonctionnement de la Convention[254] et qu'ils doivent à cette fin coopérer avec le Bureau Permanent en recueillant des informations, y compris des statistiques et de la jurisprudence. Il n'est pas inutile de le préciser car jusqu'ici, les demandes d'informations adressées par le Bureau Permanent aux États contractants n'ont pas toujours reçu de réponse ou été parfaitement respectées. Ainsi, il est clairement dit qu'il est important de répondre pour faciliter le bon fonctionnement de la Convention.

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[244] Dans le Rapport explicatif de Arthur T. von Mehren sur la Convention Contrats de vente de 1986 (*Actes et documents de la Session extraordinaire d'octobre 1985 (1985), Conférence diplomatique sur la loi applicable aux contrats de vente*, La Haye, Imprimerie Nationale des Pays-Bas, 1987, p. 710 à 756), le para. 157 énonce que :

« L'article 16 s'inspire de l'article 7, paragraphe 1, de la Convention de Vienne de 1969. Le texte de la Commission spéciale a été accepté avec quelques retouches mineures. Cette disposition vise à encourager les tribunaux à tenir compte, pour assurer la plus grande uniformité possible dans l'interprétation et l'application de la Convention, de l'interprétation et de l'application déjà données à celle-ci par les tribunaux d'autres ordres juridiques. Bien entendu, il s'agit d'une simple recommandation. »

[245] En relation avec l'art. 5(a).

[246] Voir *supra*, à la partie I.

[247] Par ex. les Guides de bonnes pratiques en vertu de la Convention Enlèvement d'enfants de 1980.

[248] INCADAT (base de données de la Conférence de La Haye de droit international privé sur l'enlèvement international d'enfants).

[249] Par ex. *La Lettre des juges*.

[250] Bien que certaines délégations aient été favorables à un Comité permanent, il n'a pas été inséré dans la Convention. La coopération entre les Autorités centrales pour le bon fonctionnement de la Convention au-delà des dispositions de cet article n'est possible qu'en vertu de l'art. 5(a) et (b).

[251] Même si c'est difficile, car du ressort du droit interne.

[252] Voir par ex. *iChild* (système électronique de gestion de dossiers de la Conférence de La Haye de droit international privé pour la Convention Enlèvement d'enfants de 1980).

[253] Voir par ex. INCADAT.

[254] Voir art. 5(a) et (b) et les commentaires aux para. 98 à 104 du présent Rapport.

procedure for enforcement, have to be respected. The rule is sufficiently flexible not to prevent the simplification of the procedure in accordance with internal law. However, the law in the requested State has to be "compatible" with the protection offered by the Convention, in particular in relation to the rights of defence.

Article 53 Uniform interpretation

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application.

665 Article 53 states that in the interpretation of the Convention, regard must be had to its international character and to the need to promote uniformity in its application. This provision is meant for authorities applying the Convention on a day-to-day basis. It requires them to interpret it in an international spirit so as to promote uniformity of application. Therefore, where reasonably possible, foreign decisions and writings could be taken into account. It should also be kept in mind that concepts and principles that are regarded as axiomatic in one legal system may be unknown or rejected in another. The objectives of the Convention can be attained only if all the authorities apply it in an open-minded way.

666 In practice, it means that according to the circumstances of the case and the countries involved, the operation of the Convention takes into account "consistency". But the use of the term "uniform interpretation" is preferred because it is seen in other Conventions: Article 16 of the 1986 Hague Sales Contracts Convention, where the provision was accepted without discussion,[244] Article 13 of the 2006 Hague Securities Convention, and Article 23 of the 2005 Hague Choice of Court Convention.

667 This Article has to be read jointly with Article 54 (Review of practical operation of the Convention) because both Articles have the objective of a proper and uniform application of the Convention.

Article 54 Review of practical operation of the Convention

Paragraph 1 – The Secretary General of the Hague Conference on Private International Law shall at regular intervals convene a Special Commission in order to review the practical operation of the Convention and to encourage the development of good practices under the Convention.

Paragraph 2 – For the purpose of such review, Contracting States shall co-operate with the Permanent Bureau of the Hague Conference on Private International Law in the gathering of information, including statistics and case law, concerning the practical operation of the Convention.

668 The monitoring of the Convention is the object of Article 54.[245] The same rule appears in Article 42 of the 1993 Hague Intercountry Adoption Convention, Article 56 of the 1996 Hague Child Protection Convention and Article 52 of the 2000 Hague Adults Convention. There is only benefit to be derived from the organisation by the Conference, at regular intervals, of meetings to examine the practical operation of the Convention and, as appropriate, make suggestions to improve it. A slightly different rule can be found in the recent 2005 Hague Choice of Court Convention, in which Article 24 provides that the Secretary General "shall at regular intervals make arrangements" for the review of the operation of the Convention and of the need to make amendments. It is explained by the different nature of that Convention, in which there is no system of co-operation between Central Authorities. With respect to the 1980 Hague Child Abduction Convention or the 1993 Intercountry Adoption Convention, the meetings to examine the practical operation of the Conventions have proven to be essential for their long-lasting smooth application. As previously mentioned in the Background to this Report,[246] the importance of the 1995 and 1999 Special Commission meetings on the application of the Conventions on maintenance obligations has been underlined as a starting point for the elaboration of this new Convention.

669 In the past, Conventions were concluded and only afterwards did States and the Permanent Bureau give thought to their application. Nowadays, monitoring of the Conventions is the core activity of the Permanent Bureau. The Permanent Bureau, in co-operation with Central Authorities, NGOs, academics, etc., accomplishes a large spectrum of activities, such as: a) promotion and publication of the Conventions; b) help to States in the initial implementation of the Conventions; c) technical advice;[247] d) promotion of consistent interpretation through development of a case law database[248] and *The Judges' Newsletter*; e) judicial training;[249] f) improving administrative practice, by training, publication of guides to good practice; g) building of co-operative networks;[250] h) promoting correct enforcement;[251] i) monitoring of the Conventions; j) developing electronic case management systems[252] and other software in support of Conventions.[253]

670 In this case it has to be underlined that a second paragraph has been added to Article 54 in order to emphasise the fact that the States Parties to the Convention must also be involved in the task of the proper functioning of the Convention[254] and, to that end, they have to co-operate with the Permanent Bureau in the gathering of information, including statistics and case law. It is useful to state this expressly, because up to now the Permanent Bureau has been sending requests for information to the Contracting States under several Conventions that are not always fully complied with or answered by all the Contracting States. In this manner, the importance of answering is made yet clearer in order to make the correct operation of the Convention easier.

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[244] In the Explanatory Report by Arthur T. von Mehren on the 1986 Hague Sales Contracts Convention (*Proceedings of the Extraordinary Session of October 1985 (1985), Diplomatic Conference on the law applicable to sales contracts*, The Hague, Netherlands Government Printing Office, 1987, pp. 711-757), para. 157 states:

"Article 16 draws upon Article 7(1) of the 1969 Vienna Convention. The Special Commission's version was accepted subject to minor drafting changes. The provision is designed to encourage the courts to take into account, with a view to maintaining the maximum feasible degree of uniformity in the Convention's interpretation and application, the interpretation and application already given the Convention by the courts of other legal orders. The provision is, of course, only hortatory."

[245] In relation with Art. 5(a).

[246] See *supra*, under Part I.

[247] *E.g.*, the Guides to Good Practice under the 1980 Hague Child Abduction Convention.

[248] INCADAT (the International Child Abduction Database of the Hague Conference on Private International Law).

[249] *E.g.*, *The Judges' Newsletter*.

[250] Although the idea of having a Standing Committee was supported by some delegations, it has not been included in the Convention. The co-operation between Central Authorities for the correct application of the Convention beyond what is established in this Article is only possible under Art. 5(a) and (b).

[251] Although it is difficult, because it is left to internal law.

[252] See, *e.g.*, iChild (the Electronic Case Management System of the Hague Conference on Private International Law for the 1980 Child Abduction Convention).

[253] See, *e.g.*, INCADAT.

[254] See Art. 5(a) and (b) and comments under paras 98-104 of this Report.

671 Cet article doit être lu conjointement avec l'article 53 (Interprétation uniforme) parce qu'ils ont tous deux pour objectif l'application appropriée et uniforme de la Convention.

Article 55 Amendement des formulaires

Paragraphe premier – Les formulaires annexés à la présente Convention pourront être amendés par décision d'une Commission spéciale qui sera convoquée par le Secrétaire général de la Conférence de La Haye de droit international privé, à laquelle seront invités tous les États contractants et tous les Membres. La proposition d'amender les formulaires devra être portée à l'ordre du jour qui sera joint à la convocation.

Paragraphe 2 – Les amendements seront adoptés par les États contractants présents à la Commission spéciale. Ils entreront en vigueur pour tous les États contractants le premier jour du septième mois après la date à laquelle le dépositaire les aura communiqués à tous les États contractants.

Paragraphe 3 – Au cours du délai prévu au paragraphe 2, tout État contractant pourra notifier par écrit au dépositaire qu'il entend faire une réserve à cet amendement, conformément à l'article 62. L'État qui aura fait une telle réserve sera traité, en ce qui concerne cet amendement, comme s'il n'était pas Partie à la présente Convention jusqu'à ce que la réserve ait été retirée.

672 Ce n'est pas la première fois qu'une Convention de La Haye comporte ou recommande des formulaires pour faciliter son application. Dans le cas présent, le Groupe de travail chargé des formulaires a préparé deux formulaires qui sont annexés à la Convention, ce qui est plus facile pour les intervenants et les utilisateurs que s'ils étaient dans un document séparé. Dans un premier temps toutefois, plusieurs autres formulaires sont examinés et ont valeur de modèles qui ne seront pas nécessairement annexés à la Convention.

673 Le problème posé par la modification des formulaires est qu'elle doit intervenir de manière suffisamment formelle sans pourtant requérir de modification de la Convention comme si ces formulaires faisaient partie intégrante du traité, car cela exigerait toutes les formalités requises pour l'amendement d'un traité. Pour certains États, la question ne pose pas de problème particulier, mais dans d'autres les règles constitutionnelles posent des problèmes. C'est pourquoi l'article 55(1) instaure une procédure de modification des formulaires par décision d'une Commission spéciale convoquée par le Secrétaire général à laquelle seront conviés les États contractants à la Convention et les Membres de la Conférence de La Haye de droit international privé. Ce point sera porté à l'ordre du jour de la réunion.

674 Le paragraphe 2 dispose que la modification du formulaire entrera en vigueur pour tous les États contractants le premier jour du septième mois après que le dépositaire aura communiqué les amendements adoptés par les États contractants présents à la Commission spéciale. Dans ce délai, les États contractants pourront faire une réserve à l'amendement (para. 3) conformément à l'article 62.

675 Cette option s'inspire des articles 5 et 28 de la Convention Accès à la justice de 1980[255].

[255] Ces paragraphes faisaient partie de l'art. 11 (2e option) du Doc. prél. No 13/2005 (*op. cit.* note 98).

Article 56 Dispositions transitoires

676 Le paragraphe premier énonce la règle générale, tandis que les paragraphes 2 et 3 prévoient des règles particulières.

Paragraphe premier – La Convention s'applique dans tous les cas où :

Alinéa (a) – une requête visée à l'article 7 ou une demande prévue au chapitre III a été reçue par l'Autorité centrale de l'État requis après l'entrée en vigueur de la Convention entre l'État requérant et l'État requis ;

Alinéa (b) – une demande de reconnaissance et d'exécution a été présentée directement à une autorité compétente de l'État requis après l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis.

677 En vertu des règles générales du droit des traités[256], la Convention n'aurait pas d'effet rétroactif. Deux situations doivent être envisagées. La première concerne les demandes présentées par l'intermédiaire d'une Autorité centrale, la seconde, les demandes directes.

678 Dans le cas des demandes présentées par l'intermédiaire d'une Autorité centrale, la Convention s'applique si l'Autorité centrale de l'État requis reçoit la demande après l'entrée en vigueur de la Convention entre l'État requérant et l'État requis.

679 Dans le cas des demandes directes, la Convention s'applique si l'autorité compétente de l'État requis reçoit la demande après l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis.

680 Avec cette règle claire et simple, il n'est pas nécessaire de disposer que la Convention s'appliquera quelle que soit la date de la décision, de la modification de la décision, de la conclusion d'un acte authentique ou d'un accord privé ou de l'exigibilité du remboursement d'un organisme public.

Paragraphe 2 – En ce qui concerne la reconnaissance et l'exécution des décisions entre les États contractants à la présente Convention qui sont également parties aux Conventions de La Haye mentionnées à l'article 48, si les conditions pour la reconnaissance et l'exécution prévues par la présente Convention font obstacle à la reconnaissance et à l'exécution d'une décision rendue dans l'État d'origine avant l'entrée en vigueur de la présente Convention dans cet État et qui à défaut aurait été reconnue et exécutée en vertu de la Convention qui était en vigueur lorsque la décision a été rendue, les conditions de cette dernière Convention s'appliquent.

681 Il s'agit d'une règle particulière visant une situation concrète. Bien que cette situation ne devrait pas se rencontrer très souvent, il est possible d'imaginer qu'une décision rendue dans une État partie à la Convention ne soit pas exécutoire dans un autre État contractant alors que cette décision serait exécutoire en vertu de la Convention Obligations alimentaires de 1958 ou de celle de 1973 (Exécu-

[256] Art. 28 de la Convention de Vienne de 1969 :
« À moins qu'une intention différente ne ressorte du traité ou ne soit par ailleurs établie, les dispositions d'un traité ne lient pas une partie en ce qui concerne un acte ou fait antérieur à la date d'entrée en vigueur de ce traité au regard de cette partie ou une situation qui avait cessé d'exister à cette date. »

671 This Article has to be read jointly with Article 53 (Uniform interpretation) because both Articles have the objective of a proper and uniform application of the Convention.

Article 55 Amendment of forms

Paragraph 1 – The forms annexed to this Convention may be amended by a decision of a Special Commission convened by the Secretary General of the Hague Conference on Private International Law to which all Contracting States and all Members shall be invited. Notice of the proposal to amend the forms shall be included in the agenda for the meeting.

Paragraph 2 – Amendments adopted by the Contracting States present at the Special Commission shall come into force for all Contracting States on the first day of the seventh calendar month after the date of their communication by the depositary to all Contracting States.

Paragraph 3 – During the period provided for in paragraph 2 any Contracting State may by notification in writing to the depositary make a reservation, in accordance with Article 62, with respect to the amendment. The State making such reservation shall, until the reservation is withdrawn, be treated as a State not Party to the present Convention with respect to that amendment.

672 It is not the first time that a Hague Convention includes or recommends forms to facilitate the use of the Convention. In this case, the Forms Working Group has prepared two forms that are included as Annexes to the Convention, which is easier for the operators and users of the Convention than to have them in a separate document. However, initially, a number of other forms will be model forms that will not necessarily be attached to the Convention.

673 The problem in relation with the amendment of the forms is that it has to be sufficiently formal, but not entail a formal modification of the Convention with all the requirements for the amendment of a treaty as if the form were an integral part of the treaty. The question is easy for some States but in others the constitutional requirements are complicated. This is why Article 55(1) establishes the procedure for amending the forms through a decision of a Special Commission convened by the Secretary General to which the Contracting States of the Convention and the Members of the Hague Conference on Private International Law will be invited. In the agenda for the meeting, this special point will be included.

674 Paragraph 2 establishes that the amendment of the form will come into force for all Contracting States on the first day of the seventh calendar month after the communication by the depositary of the amendment adopted by the Contracting States present at the Special Commission. During this period, the Contracting States may make a reservation, in accordance with Article 62, with respect to the amendment (para. 3).

675 This option is inspired by Articles 5 and 28 of the 1980 Hague Access to Justice Convention.[255]

[255] These paragraphs formed part of Art. 11 (Option 2) of Prel. Doc. No 13/2005 (*op. cit.* note 98).

Article 56 Transitional provisions

676 The general rule is contained in paragraph 1 and special rules are included in paragraphs 2 and 3.

Paragraph 1 – The Convention shall apply in every case where –

Sub-paragraph (a) – a request pursuant to Article 7 or an application pursuant to Chapter III has been received by the Central Authority of the requested State after the Convention has entered into force between the requesting State and the requested State;

Sub-paragraph (b) – a direct request for recognition and enforcement has been received by the competent authority of the State addressed after the Convention has entered into force between the State of origin and the State addressed.

677 According to the general rules on the law of treaties,[256] the Convention would have no retroactive effect. Two possible situations have to be contemplated. The first one concerns the situation where the application is made through a Central Authority and the second one concerns direct requests.

678 In the case of applications through a Central Authority, the Convention applies if the request has been received by the Central Authority in the requested State after the Convention has entered into force between the two States, *i.e.*, the requesting State and the requested State.

679 In the case of direct requests, the Convention applies if the application is received by the competent authority in the State addressed after the Convention has entered into force between the State of origin and the State addressed.

680 With this clear and simple rule it is not necessary to provide that the Convention shall apply irrespective of the date on which a decision was rendered, a decision was modified, an authentic instrument or private agreement is made or the reimbursement to a public body is owed.

Paragraph 2 – With regard to the recognition and enforcement of decisions between Contracting States to this Convention that are also Parties to either of the Hague Maintenance Conventions mentioned in Article 48, if the conditions for the recognition and enforcement under this Convention prevent the recognition and enforcement of a decision given in the State of origin before the entry into force of this Convention for that State, that would otherwise have been recognised and enforced under the terms of the Convention that was in effect at the time the decision was rendered, the conditions of that Convention shall apply.

681 This is a particular rule for a concrete situation. Although it does not seem that it could happen frequently, it is possible to imagine that a decision given in a State Party to this Convention would not be enforceable in another Contracting State, but that this decision would be enforceable under the 1958 Hague Maintenance Convention or the 1973 Hague Maintenance Convention (Enforcement). In

[256] Art. 28 of the 1969 Vienna Convention:
"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

tion). Dans ce cas, la Convention en vigueur au moment où la décision a été rendue s'applique. Cette règle est conforme à l'objectif poursuivi par la Convention, à savoir assurer un recouvrement international des aliments efficace.

Paragraphe 3 – L'État requis n'est pas tenu, en vertu de la Convention, d'exécuter une décision ou une convention en matière d'aliments pour ce qui concerne les paiements échus avant l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis sauf en ce qui concerne les obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne âgée de moins de 21 ans.

682 Le paragraphe 3 comprend une disposition transitoire pour le cas particulier des paiements échus avant l'entrée en vigueur de la Convention entre l'État d'origine et l'État requis. La solution adoptée est que dans cette hypothèse, l'État requis « n'est pas tenu » d'exécuter la décision pour ce qui concerne les paiements échus avant l'entrée en vigueur de la Convention entre les deux États concernés. Ces paiements échus pourraient cependant être exécutés en vertu du droit interne. Cette disposition ne s'applique pas aux obligations alimentaires découlant d'une relation parent-enfant à l'égard d'une personne âgée de moins de 21 ans.

Article 57 Informations relatives aux lois, procédures et services

683 L'expérience d'autres Conventions de La Haye a montré l'intérêt de l'échange d'informations sur les lois et procédures des différents États contractants. Les États, en particulier ceux qui n'ont pas une tradition de législation de transposition, bénéficieraient de l'obligation de fournir certaines informations de base sur la manière dont la Convention doit être mise en œuvre avant son entrée en vigueur. Cela les obligerait à réfléchir à certains problèmes pratiques à ce moment-là. L'obligation d'information pèserait sur les États, pas sur les Autorités centrales.

Paragraphe premier – Un État contractant, au moment où il dépose son instrument de ratification ou d'adhésion ou fait une déclaration en vertu de l'article 61 de la Convention, fournit au Bureau Permanent de la Conférence de La Haye de droit international privé :

Alinéa (a) – une description de sa législation et de ses procédures applicables en matière d'obligations alimentaires ;

Alinéa (b) – une description des mesures qu'il prendra pour satisfaire à ses obligations en vertu de l'article 6 ;

Alinéa (c) – une description de la manière dont il procurera aux demandeurs un accès effectif aux procédures conformément à l'article 14 ;

Alinéa (d) – une description de ses règles et procédures d'exécution, y compris les limites apportées à l'exécution, en particulier les règles de protection du débiteur et les délais de prescription ;

Alinéa (e) – toute précision à laquelle l'article 25(1)(b) et (3) fait référence.

684 Il est important que les États contractants tiennent à jour les informations sur les lois, procédures et services relatifs aux aliments, une obligation instaurée par l'article 57(3). Une solution souple a été adoptée prévoyant que toutes ces informations seront transmises au Bureau Permanent de la Conférence de La Haye de droit international privé et non au dépositaire. Ces informations seront présentées par le biais du Profil des États.

685 La possibilité offerte aux États contractants d'apporter des précisions relatives aux documents qui accompagnent la demande de reconnaissance et d'exécution a rendu nécessaire l'insertion de la règle figurant à l'alinéa (e). La fourniture de précisions en vertu de l'alinéa (e) doit être distinguée de la tenue à jour des informations du paragraphe 3.

Paragraphe 2 – Les États contractants peuvent, pour satisfaire à leurs obligations découlant du paragraphe premier, utiliser un formulaire de profil des États recommandé et publié par la Conférence de La Haye de droit international privé.

Paragraphe 3 – Les informations sont tenues à jour par les États contractants.

686 Il faut souligner l'importance du Profil des États, qui garantit la mise en œuvre et l'application correctes de la Convention. À long terme, le Profil des États fera gagner beaucoup de temps car il apportera par avance de nombreuses réponses aux Autorités centrales requérantes dans leur activité quotidienne avant d'envoyer les demandes aux Autorités centrales requises, ce qui réduira le nombre de demandes d'informations écrites et de demandes relatives aux informations manquantes dans la demande initiale. Les informations figurant dans le Profil des États peuvent aussi être source de bonnes pratiques.

687 L'utilisation du Profil des États pour satisfaire aux obligations visées au paragraphe premier constitue un moyen souple permettant de tenir à jour les informations requises. Les Profils des États seront disponibles sur le site Internet de la Conférence de La Haye et via le système *iSupport* de gestion des dossiers et de communication. Les États contractants pourront les renseigner ou les modifier en ligne au moyen d'une connexion sécurisée.

CHAPITRE IX – DISPOSITIONS FINALES

688 Ces articles s'inspirent de Conventions antérieures, mais comprennent des modifications répondant aux caractéristiques propres de la Convention ou aux développements récents.

Article 58 Signature, ratification et adhésion

Paragraphe premier – La Convention est ouverte à la signature des États qui étaient Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session et des autres États qui ont participé à cette Session.

689 Le paragraphe premier reprend une solution traditionnelle, ouvrant la Convention à la signature de tous les Membres de la Conférence de La Haye de droit international privé, et des États qui ont participé à la Vingt et unième session en tant qu'observateurs. Les États-Unis d'Amérique ont signé la Convention le jour de son adoption.

that case, the Convention in force at the time the decision was rendered will apply. The objective of the Convention is to ensure effective international recovery of maintenance and this solution is in response to this objective.

Paragraph 3 – The State addressed shall not be bound under this Convention to enforce a decision or a maintenance arrangement, in respect of payments falling due prior to the entry into force of the Convention between the State of origin and the State addressed, except for maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

682 Paragraph 3 includes a transitional provision for the particular case where payments fall due prior to the entry into force of the Convention between the two States – the State of origin and the State addressed. The solution adopted is that, in such cases, the State addressed "shall not be bound" to enforce the decision in so far as it relates to payments falling due before the Convention entered into force between the two States concerned. However, those prior payments could be enforced under internal law. This provision does not apply to maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

Article 57 Provision of information concerning laws, procedures and services

683 The experience with other Hague Conventions has shown the value of an exchange of information on laws and procedures in different Contracting States. The States, and especially those that do not have a tradition of implementing legislation, would benefit from a requirement to provide certain basic information about how the Convention is to be implemented before its entry into force. This would oblige them to think through certain practical issues at that point in time. The information obligation would rest upon States and not on Central Authorities.

Paragraph 1 – A Contracting State, by the time its instrument of ratification or accession is deposited or a declaration is submitted in accordance with Article 61 of the Convention, shall provide the Permanent Bureau of the Hague Conference on Private International Law with –

Sub-paragraph (a) – a description of its laws and procedures concerning maintenance obligations;

Sub-paragraph (b) – a description of the measures it will take to meet the obligations under Article 6;

Sub-paragraph (c) – a description of how it will provide applicants with effective access to procedures, as required under Article 14;

Sub-paragraph (d) – a description of its enforcement rules and procedures, including any limitations on enforcement, in particular debtor protection rules and limitation periods;

Sub-paragraph (e) – any specification referred to in Article 25(1)(b) and (3).

684 It is important that the information concerning laws, procedures and services on maintenance be kept up to date by the Contracting States, an obligation established in Article 57(3). A flexible solution has been adopted. All this information will be sent to the Permanent Bureau of the Hague Conference on Private International Law and not to the depositary. The Country Profile will be used to present this information.

685 The possible specifications of Contracting States in relation to the documentation to accompany an application for recognition and enforcement have made necessary the inclusion of the rule in sub-paragraph (e). Making the specification under sub-paragraph (e) is not the same as keeping the information up to date in accordance with paragraph 3.

Paragraph 2 – Contracting States may, in fulfilling their obligations under paragraph 1, utilise a country profile form recommended and published by the Hague Conference on Private International Law.

Paragraph 3 – Information shall be kept up to date by the Contracting States.

686 It is worth underlining the importance of the Country Profile, as it ensures that the Convention is implemented correctly and that it will be applied properly. In the long term, the Country Profile will save a lot of time as it will provide many answers in advance to requesting Central Authorities in their day-to-day operations before sending applications to requested Central Authorities, therefore reducing the amount of written queries and follow-ups for additional information missing from the initial application. Information found in the Country Profile may also be a source of good practices.

687 The use of the Country Profile to meet the obligations under paragraph 1 provides a flexible means by which to keep the required information up to date. Country Profiles will be accessible on the website of the Hague Conference and via the iSupport case management and communication system. It will be possible for Contracting States to complete or modify Country Profiles on-line through a secured Internet access.

CHAPTER IX – FINAL PROVISIONS

688 These Articles are modelled on previous Conventions, but include modifications arising from the special characteristics of the Convention or recent developments.

Article 58 Signature, ratification and accession

Paragraph 1 – The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Twenty-First Session and by the other States which participated in that Session.

689 The solution adopted in paragraph 1 is a traditional one, opening the Convention to the signature of all the Members of the Hague Conference on Private International Law, and the States which participated in the Twenty-First Session as Observers. The United States of America signed the Convention on the day of its adoption.

Paragraphe 2 – Elle sera ratifiée, acceptée ou approuvée et les instruments de ratification, d'acceptation ou d'approbation seront déposés auprès du Ministère des Affaires étrangères du Royaume des Pays-Bas, dépositaire de la Convention.

690 Suivant la tradition des Conventions de La Haye, la décision de ratifier, d'accepter ou d'approuver la Convention sera prise conformément aux règles internes des États respectifs. Concernant l'entrée en vigueur, voir l'article 60.

Paragraphe 3 – Tout autre État ou Organisation régionale d'intégration économique pourra adhérer à la Convention après son entrée en vigueur en vertu de l'article 60(1).

691 Se conformant au système traditionnel des Conventions de La Haye, tout autre État ou, le cas échéant, toute autre ORIE peut adhérer à la Convention après son entrée en vigueur. En vertu de l'article 60(1), seules deux ratifications, acceptations ou approbations de la Convention sont nécessaires pour que celle-ci entre en vigueur. Il est probable que la Convention entrera en vigueur assez vite et que la possibilité d'adhérer, sous réserve des limites posées au paragraphe 5, soit ouverte assez rapidement.

Paragraphe 4 – L'instrument d'adhésion sera déposé auprès du dépositaire.

692 Comme cela est clairement indiqué au paragraphe 2, le dépositaire de la Convention est le Ministère des Affaires étrangères du Royaume des Pays-Bas.

Paragraphe 5 – L'adhésion n'aura d'effet que dans les rapports entre l'État adhérant et les États contractants qui n'auront pas élevé d'objection à son encontre dans les 12 mois suivant la date de la notification prévue à l'article 65. Une telle objection pourra également être élevée par tout État au moment d'une ratification, acceptation ou approbation de la Convention, postérieure à l'adhésion. Ces objections seront notifiées au dépositaire.

693 Le paragraphe 5 distingue, aux fins de la bilatéralisation, les États membres et les États qui ont pris part à la Session diplomatique, d'une part, et les États tiers, d'autre part. Seuls les États membres de la Conférence et les États qui ont participé à la Session peuvent signer et ratifier, accepter ou approuver la Convention (para. 1er et 2), comme cela est le cas à l'article 43 de la Convention Adoption internationale de 1993. Les États non membres ne peuvent y adhérer qu'après l'entrée en vigueur de la Convention (para. 3 et 4).

694 La solution adoptée s'inspire de l'article 44 de la Convention Adoption internationale de 1993, de l'article 58 de la Convention Protection des enfants de 1996 et de l'article 54 de la Convention Protection des adultes de 2000. Ainsi, l'adhésion n'a d'effets que dans les rapports entre l'État adhérant et les États contractants qui n'ont pas soulevé d'objection à son adhésion dans un certain délai, fixé à 12 mois dans le cas présent. Il s'agit d'un délai plus long que celui de six mois qui avait été proposé lors des négociations.

Article 59 Organisations régionales d'intégration économique

695 L'article 59 énonce les conditions auxquelles une ORIE peut devenir Partie à la Convention. Il y a deux possibilités. La première (objet de l'art. 59(1) et (2)) est celle dans laquelle l'ORIE et ses États membres deviennent tous Parties parce qu'ils partagent la compétence externe sur les matières régies par la Convention (compétence conjointe) ou parce que certaines matières entrent dans le champ de compétence externe de l'ORIE et d'autres dans celui des États membres (ce qui aboutirait à une compétence partagée ou mixte pour la Convention dans son ensemble). La seconde (art. 59(3)) est lorsque l'ORIE seule devient Partie, ce qui pourrait se produire lorsqu'elle a compétence externe exclusive sur les matières régies par la Convention. Dans ce cas, les États membres seraient tenus par la Convention en vertu de l'accord de l'ORIE.

Paragraphe premier – Une Organisation régionale d'intégration économique constituée uniquement d'États souverains et ayant compétence pour certaines ou toutes les matières régies par la présente Convention peut également signer, accepter ou approuver la présente Convention ou y adhérer. En pareil cas, l'Organisation régionale d'intégration économique aura les mêmes droits et obligations qu'un État contractant, dans la mesure où cette Organisation a compétence sur des matières régies par la Convention.

696 L'article 59(1) et (2) s'inspire de l'article 29 de la Convention Élection de for de 2005. Il autorise une ORIE[257] exclusivement constituée d'États souverains à signer, accepter ou approuver la Convention ou à y adhérer[258], mais seulement dans la mesure où elle a compétence sur les matières régies par la Convention. La Communauté européenne, par exemple, a adopté plusieurs instruments juridiques qui traitent des matières couvertes par cette Convention[259]. Elle est par conséquent compétente pour conclure des accords internationaux qui affectent ces instruments. C'est la raison pour laquelle (et parce que la Communauté européenne n'est pas un système juridique non unifié au sens de la Convention[260]) la Convention doit prévoir une disposition qui autorise la Communauté européenne (et toute autre ORIE) à devenir Partie à la Convention en lui conférant les droits et obligations d'un État contractant. Cette clause apparaît pour la première fois dans la Convention Titres de 2006 (art. 18) ainsi que dans la Convention de 2005 (art. 29).

Paragraphe 2 – Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, l'Organisation régionale d'intégration économique notifie au dépositaire, par écrit, les matières régies par la présente Convention pour lesquelles ses États membres ont transféré leur compétence à cette Organisation. L'Organisation notifie aussitôt au dépositaire, par écrit, toute modification intervenue dans la délégation de compétence précisée dans la notification la plus récente faite en vertu du présent paragraphe.

697 Étant donné l'importance de cette question, l'ORIE doit notifier par écrit au dépositaire les matières couvertes par la Convention pour lesquelles « ses États membres ont trans-

[257] Il a été convenu par la Session diplomatique de 2005 que le terme « ORIE » devrait avoir une signification autonome (qui ne dépend de la loi d'aucun État) et qu'il devrait être interprété de manière souple, comme comprenant les organisations régionales et infrarégionales ainsi que les organisations dont le mandat s'étend au-delà des matières économiques.

[258] L'absence du terme « ratifier » est voulue, car seuls des États ratifient des Conventions.

[259] Le Règlement Bruxelles I (Règlement (CE) No 44/2001 du Conseil du 22 décembre 2000), le Règlement TEE (Règlement (CE) No 805/2004 du Parlement européen et du Conseil du 21 avril 2004) et le Règlement Obligations alimentaires (Règlement (CE) No 4/2009 du Conseil du 18 décembre 2008) ; voir abréviations et références au para. 15 du présent Rapport.

[260] En ce sens, voir art. 46 et les commentaires aux para. 637 et s. du présent Rapport.

Paragraph 2 – It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, depositary of the Convention.

690 As is usual with Hague Conventions, the decision whether to ratify, accept or approve the Convention will be made in accordance with the internal rules of the respective States. For the entry into force, see Article 60.

Paragraph 3 – Any other State or Regional Economic Integration Organisation may accede to the Convention after it has entered into force in accordance with Article 60(1).

691 Following the traditional system of the Hague Conventions, any other State or, as the case may be, any other REIO may accede to the Convention after its entry into force. Article 60(1) only requires two ratifications, acceptances or approvals of the Convention for the entry into force. It is foreseeable that the entry into force will take place in a relatively short time and that the possibility to adhere, subject to the limits in paragraph 5, will be open shortly.

Paragraph 4 – The instrument of accession shall be deposited with the depositary.

692 As is made clear by paragraph 2, the depositary of the Convention is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Paragraph 5 – Such accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession in the 12 months after the date of the notification referred to in Article 65. Such an objection may also be raised by States at the time when they ratify, accept or approve the Convention after an accession. Any such objection shall be notified to the depositary.

693 Paragraph 5 makes a distinction for bilateralisation purposes between Member States and States participating in the Diplomatic Session, on the one hand, and third States, on the other hand. Only Member States of the Conference and the States which participated in that Session can sign and ratify, accept or approve the Convention (paras 1 and 2), as in rules drawn from Article 43 of the 1993 Hague Intercountry Adoption Convention, whereas non-Member States can only accede to it after the Convention enters into force (paras 3 and 4).

694 The solution adopted is drawn from Article 44 of the 1993 Hague Intercountry Adoption Convention, Article 58 of the 1996 Hague Child Protection Convention and Article 54 of the 2000 Hague Adults Convention. The accession shall have effect only as regards the relations between the acceding State and those Contracting States which have not raised an objection to its accession within a certain period. In this case, a period of 12 months for the receipt of objections has been adopted, longer than the six-month period which had been proposed during the negotiations.

Article 59 Regional Economic Integration Organisations

695 Article 59 makes provisions for an REIO to become a Party to the Convention. There are two possibilities. The first (object of Art. 59(1) and (2)) is where both the REIO and its Member States become Parties as a consequence of the fact that they enjoy concurrent external competence over the subject matter of the Convention (joint competence), or if some matters fall within the external competence of the REIO and others within that of the Member States (which would result in shared or mixed competence for the Convention as a whole). The second (object of Art. 59(3)) is where the REIO alone becomes a Party, which might occur where it has exclusive external competence over the subject matter of the Convention. In such a case, the Member States would be bound by the Convention by virtue of the agreement of the REIO.

Paragraph 1 – A Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by the Convention.

696 Article 59(1) and (2) is drawn from Article 29 of the 2005 Hague Choice of Court Convention. This Article enables each REIO[257] constituted solely by sovereign States to sign, accept, approve or accede to the Convention,[258] but only to the extent that it has competence over matters covered by the Convention. The European Community, for example, has adopted several legal instruments that deal with matters covered by this Convention.[259] In consequence, the Community has competence to conclude international agreements that affect those instruments. For this reason (and because the European Community is not a non-unified legal system within the meaning of the Convention[260]), it is necessary to include a provision in the Convention permitting the European Community (and any other REIO) to become a Party to the Convention by providing it with the rights and obligations of a Contracting State. This clause appeared for the first time in the 2006 Hague Securities Convention (Art. 18) as well as being included in the 2005 Convention (Art. 29).

Paragraph 2 – The Regional Economic Integration Organisation shall, at the time of signature, acceptance, approval or accession, notify the depositary in writing of the matters governed by this Convention in respect of which competence has been transferred to that Organisation by its Member States. The Organisation shall promptly notify the depositary in writing of any changes to its competence as specified in the most recent notice given under this paragraph.

697 In view of the importance of this matter, the REIO is to notify the depositary in writing specifying the matters covered by the Convention in respect of which "competence has been transferred to that Organisation by its Member

[257] It was agreed by the Diplomatic Session of 2005 that "REIO" should have an autonomous meaning (not dependent on the law of any State) and that it should be interpreted flexibly to include sub-regional and trans-regional organisations as well as organisations whose mandate extends beyond economic matters.
[258] The absence of the term "ratify" is intentional, as only States ratify Conventions.
[259] The Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000), the EEO Regulation (Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004) and the Maintenance Regulation (Council Regulation (EC) No 4/2009 of 18 December 2008); see abbreviations and references under para. 15 of this Report.
[260] In this sense, see Art. 46 and comments under paras 637 *et seq.* of this Report.

féré leur compétence à cette Organisation ». Ainsi, la notification ne devrait être effectuée que lorsque, du fait du transfert de compétences, l'ORIE a compétence exclusive sur les matières spécifiées et les États membres n'ont plus pouvoir indépendant de légiférer en ce qui les concerne. La notification doit être effectuée à la date de la signature ou du dépôt de l'instrument d'acceptation, d'approbation ou d'adhésion. L'ORIE doit notifier « aussitôt » au dépositaire toutes les modifications éventuellement apportées à la délégation de compétences et, le cas échéant, toute nouvelle délégation de compétences. Ces notifications en vertu de l'article 59(2) ne doivent pas être considérées comme des déclarations couvertes par l'article 63 : elles sont obligatoires, alors que les déclarations en vertu de l'article 63 ne le sont pas.

Paragraphe 3 – Au moment de la signature, de l'acceptation, de l'approbation ou de l'adhésion, une Organisation régionale d'intégration économique peut déclarer, conformément à l'article 63, qu'elle a compétence pour toutes les matières régies par la présente Convention et que les États membres qui ont transféré leur compétence à l'Organisation régionale d'intégration économique dans ce domaine seront liés par la présente Convention par l'effet de la signature, de l'acceptation, de l'approbation ou de l'adhésion de l'Organisation.

698 Le paragraphe 3 s'inspire de l'article 30 de la Convention Élection de for de 2005. Ce paragraphe règle l'hypothèse où seule l'ORIE devient Partie à la Convention en raison de la compétence exclusive de l'ORIE pour les matières régies par la présente Convention. Si ce cas se produit, l'ORIE pourra déclarer que ses États membres sont liés par la Convention[261].

Paragraphe 4 – Aux fins de l'entrée en vigueur de la présente Convention, tout instrument déposé par une Organisation régionale d'intégration économique n'est pas compté, à moins que l'Organisation régionale d'intégration économique ne fasse une déclaration conformément au paragraphe 3.

699 À moins que le paragraphe 3 ne s'applique, tout instrument de signature, d'acceptation, d'approbation ou d'adhésion d'une ORIE ne sera pas compté pour déterminer l'entrée en vigueur conformément à l'article 60.

Paragraphe 5 – Toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, à une Organisation régionale d'intégration économique qui y est Partie. Lorsqu'une déclaration est faite par une Organisation régionale d'intégration économique conformément au paragraphe 3, toute référence à un « État contractant » ou à un « État » dans la présente Convention s'applique également, le cas échéant, aux États membres concernés de l'Organisation.

700 Cette règle précise la référence faite à « État » dans la Convention dans deux hypothèses différentes. Dans la première, dès lors qu'une ORIE est Partie à la Convention, une référence à un État contractant s'applique, « le cas échéant », à cette ORIE. Dans la seconde hypothèse où l'ORIE a déposé une déclaration en application du paragraphe 3, ses États membres sont liés par la Convention qui sera donc appliquée par leurs autorités internes bien que les États membres concernés ne soient pas Parties à la Convention. C'est la raison pour laquelle la référence à « État » dans la Convention doit également être appliquée, « le cas échéant », aux États membres de l'ORIE.

[261] Ce serait le cas par ex. en vertu de l'art. 300(7) du Traité instituant la Communauté européenne.

Article 60 Entrée en vigueur

Paragraphe premier – La Convention entrera en vigueur le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt du deuxième instrument de ratification, d'acceptation ou d'approbation visé par l'article 58.

701 Cet article s'inspire de l'article 19 de la Convention Titres de 2006 et de l'article 31 de la Convention Élection de for de 2005 et facilitera l'entrée en vigueur de la Convention.

Paragraphe 2 – Par la suite, la Convention entrera en vigueur :

Alinéa (a) – pour chaque État ou Organisation régionale d'intégration économique au sens de l'article 59(1) ratifiant, acceptant ou approuvant postérieurement, le premier jour du mois suivant l'expiration d'une période de trois mois après le dépôt de son instrument de ratification, d'acceptation ou d'approbation ;

Alinéa (b) – pour chaque État ou Organisation régionale d'intégration économique mentionné à l'article 58(3), le lendemain de l'expiration de la période durant laquelle des objections peuvent être élevées en vertu de l'article 58(5) ;

702 Comme pour les autres États ou ORIE qui adhèrent à la Convention, compte tenu du délai de 12 mois laissé par l'article 58(5) aux États contractants pour élever une objection, la Convention n'entrera en vigueur pour cet État adhérant qu'à l'expiration de ce délai.

Alinéa (c) – pour les unités territoriales auxquelles la Convention a été étendue conformément à l'article 61, le premier jour du mois suivant l'expiration d'une période de trois mois après la notification visée dans ledit article.

703 À l'égard d'un État ayant un système juridique non unifié, pour lequel il est possible d'étendre l'application de la Convention territoire par territoire, la Convention entrera en vigueur pour le territoire auquel la Convention a été étendue le premier jour du mois suivant l'expiration de trois mois après la notification mentionnée à l'article 61.

Article 61 Déclarations relatives aux systèmes juridiques non unifiés

Paragraphe premier – Un État qui comprend deux ou plusieurs unités territoriales dans lesquelles des systèmes de droit différents s'appliquent aux matières régies par la Convention peut, au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, déclarer, conformément à l'article 63, que la présente Convention s'appliquera à toutes ses unités territoriales ou seulement à l'une ou à plusieurs d'entre elles, et pourra à tout moment modifier cette déclaration en faisant une nouvelle déclaration.

Paragraphe 2 – Toute déclaration est notifiée au dépositaire et indique expressément les unités territoriales auxquelles la Convention s'applique.

Rapport explicatif

States". Thus, the notification should be made only where, as a result of the transfer of competence, the REIO has exclusive competence in relation to the specified matters and Member States no longer have independent authority to legislate concerning them. The notification has to be made at the time of signature or of the deposit of the instrument of acceptance, approval or accession; the REIO must "promptly" notify the depositary of all changes, if any, to the distribution of competence and all new transfers, if any, of competence. These notifications under Article 59(2) are not to be considered as declarations covered by Article 63: notifications under Article 59 are compulsory, whereas declarations under Article 63 are not.

Paragraph 3 – At the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation may declare in accordance with Article 63 that it exercises competence over all the matters governed by this Convention and that the Member States which have transferred competence to the Regional Economic Integration Organisation in respect of the matter in question shall be bound by this Convention by virtue of the signature, acceptance, approval or accession of the Organisation.

698 Paragraph 3 is drawn from Article 30 of the 2005 Hague Choice of Court Convention. This paragraph concerns the case where the REIO alone becomes a Party as a consequence of the exclusive competence of the REIO on the matters governed by this Convention. Where this occurs, the REIO may declare that its Member States are bound by the Convention.[261]

Paragraph 4 – For the purposes of the entry into force of this Convention, any instrument deposited by a Regional Economic Integration Organisation shall not be counted unless the Regional Economic Integration Organisation makes a declaration in accordance with paragraph 3.

699 Unless paragraph 3 applies, any instrument of signature, acceptance, approval or accession by an REIO will not be counted for the purposes of the entry into force in accordance with Article 60.

Paragraph 5 – Any reference to a "Contracting State" or "State" in this Convention shall apply equally to a Regional Economic Integration Organisation that is a Party to it, where appropriate. In the event that a declaration is made by a Regional Economic Integration Organisation in accordance with paragraph 3, any reference to a "Contracting State" or "State" in this Convention shall apply equally to the relevant Member States of the Organisation, where appropriate.

700 This rule clarifies the reference to "State" in the Convention for two different situations. In the first, in any case in which an REIO is a Party to the Convention, a reference to a Contracting State includes "where appropriate" the reference to the REIO. In the second, when an REIO has made the declaration according to paragraph 3, its Member States are bound by the Convention, which will be applied by their internal authorities although the Member States in question are not Party to the Convention. This is why the reference to "State" in the Convention also has to be applied "where appropriate" to the Member States of the REIO.

[261] This would be the case, for example, under Art. 300(7) of the Treaty establishing the European Community.

Article 60 Entry into force

Paragraph 1 – The Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance or approval referred to in Article 58.

701 This Article is drawn from Article 19 of the 2006 Hague Securities Convention and Article 31 of the 2005 Hague Choice of Court Convention, and will facilitate the entry into force of the Convention.

Paragraph 2 – Thereafter the Convention shall enter into force –

Sub-paragraph (a) – for each State or Regional Economic Integration Organisation referred to in Article 59(1) subsequently ratifying, accepting or approving it, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance or approval;

Sub-paragraph (b) – for each State or Regional Economic Integration Organisation referred to in Article 58(3) on the day after the end of the period during which objections may be raised in accordance with Article 58(5);

702 As for other States or REIOs which adhere to the Convention by accession, because it is possible that according to Article 58(5) a Contracting State may raise an objection within a period of 12 months, it follows that the Convention cannot enter into force for the acceding State before the end of this period.

Sub-paragraph (c) – for a territorial unit to which the Convention has been extended in accordance with Article 61, on the first day of the month following the expiration of three months after the notification referred to in that Article.

703 For a State with a non-unified legal system for which it is possible to extend the application of the Convention on a territory-by-territory basis, the Convention will enter into force for the territory to which the Convention has been extended on the first day of the month following the expiration of three months after the notification referred to in Article 61.

Article 61 Declarations with respect to non-unified legal systems

Paragraph 1 – If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention, it may at the time of signature, ratification, acceptance, approval or accession declare in accordance with Article 63 that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Paragraph 2 – Any such declaration shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

Paragraphe 3 – Si un État ne fait pas de déclaration en vertu du présent article, la Convention s'applique à l'ensemble du territoire de cet État.

Paragraphe 4 – Le présent article ne s'applique pas à une Organisation régionale d'intégration économique.

704 Cette règle s'inspire de l'article 28 de la Convention Élection de for de 2005. Elle autorise un État formé de plusieurs unités territoriales, dans lesquelles s'appliquent différents systèmes de droit au regard des matières visées par la Convention, à déclarer que la Convention ne s'appliquera qu'à certaines d'entre elles. À titre d'exemple, le Royaume-Uni pourrait signer et ratifier pour l'Angleterre uniquement et la Chine pourrait signer et ratifier pour Hong Kong uniquement. Une déclaration de ce type peut être modifiée à tout moment, toujours avec notification au dépositaire. Cette disposition est particulièrement importante pour les États dans lesquels la législation nécessaire pour donner effet à la Convention doit être votée par les parlements des différentes unités (par ex. par les parlements provinciaux et territoriaux au Canada). En l'absence de déclaration, la Convention s'applique à l'ensemble du territoire de l'État.

705 Le paragraphe 2 de l'article 47 règle l'étendue territoriale de la reconnaissance et de l'exécution dans les systèmes juridiques non unifiés tandis que l'article 61 concerne l'application territoriale de la Convention.

706 Comme pour les articles 46 et 47[262], cet article ne s'applique pas aux ORIE.

Article 62 Réserves

Paragraphe premier – Tout État contractant pourra, au plus tard au moment de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, ou au moment d'une déclaration faite en vertu de l'article 61, faire une ou plusieurs des réserves prévues aux articles 2(2), 20(2), 30(8), 44(3) et 55(3). Aucune autre réserve ne sera admise.

Paragraphe 2 – Tout État pourra, à tout moment, retirer une réserve qu'il aura faite. Ce retrait sera notifié au dépositaire.

Paragraphe 3 – L'effet de la réserve cessera le premier jour du troisième mois après la notification mentionnée au paragraphe 2.

Paragraphe 4 – Les réserves faites en application de cet article ne sont pas réciproques, à l'exception de la réserve prévue à l'article 2(2).

707 La Convention n'autorise que cinq réserves, prévues aux articles 2(2), 20(2), 30(8), 44(3) et 55(3)[263]. Aucune autre réserve n'est autorisée. Les réserves doivent être formulées au plus tard à la date de ratification, d'acceptation, d'approbation ou d'adhésion et, dans le cas des systèmes juridiques non unifiés, à la date de la déclaration visée à l'article 61(1). La levée d'une réserve est possible à tout moment et doit être notifiée au dépositaire. Elle prend effet le premier jour du troisième mois suivant la notification (para. 2 et 3).

708 Une règle a été introduite au paragraphe 4 de cet article, suivant laquelle ces réserves « ne sont pas réciproques », à l'exception de la réserve prévue à l'article 2(2). L'article 21 de la Convention de Vienne de 1969[264] définit ce qu'on appelle « l'effet réciproque » des réserves, qui se traduit par un réseau de relations bilatérales dans la Convention, en fonction des réserves formulées par les États.

709 Cette question avait été débattue auparavant à la Conférence de La Haye de droit international privé[265] et avait abouti à la conclusion que certaines réserves expressément prévues dans les Conventions de La Haye semblent ne pas se prêter à la réciprocité en raison du fait qu'elles sont négociées[266]. Les règles de la Convention de Vienne de 1969 ne sont pas applicables, même si, ici, une règle spéciale a été insérée dans la Convention.

710 Dans ce contexte, le Comité de rédaction[267] s'est interrogé sur le fait de savoir, à propos de l'article 44(3), si les réserves relatives à l'emploi de l'anglais ou du français doivent produire un effet réciproque et de la même façon, à propos de l'article 20(2), si les réserves possibles relatives à certaines bases de reconnaissance et d'exécution des décisions doivent produire des effets réciproques. Enfin, la réserve possible à l'amendement d'un formulaire en vertu de l'article 55(3) a également été débattue. Le Comité de rédaction a privilégié l'idée, adoptée par la Session diplomatique, qu'il n'y a aucune raison de maintenir l'effet réciproque des réserves dans ces cas. C'est ce que prévoit maintenant expressément le paragraphe 4 ; les réserves en vertu de l'article 62 n'ont pas d'effet réciproque. La seule exception concerne la réserve de l'article 2(2) (voir le para. 50 du présent Rapport).

711 À titre d'exemple de l'effet non réciproque d'une réserve, si l'État A fait une réserve au regard de la reconnaissance des décisions rendues dans l'État de résidence habituelle du créancier alors que l'État B ne fait pas cette réserve, une décision rendue dans l'État A où le créancier a sa résidence habituelle pourra être reconnue et exécutée dans l'État B.

Article 63 Déclarations

Paragraphe premier – Les déclarations visées aux articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) et (2), 59(3) et 61(1) peuvent être faites lors de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'ad-

[262] Voir *supra*, para. 640 et 643 du présent Rapport.

[263] Possibilité prévue par l'art. 19 *b*) de la Convention de Vienne de 1969. Le Projet de directive sur les réserves aux traités provisoirement adopté à ce jour par la Commission du droit international, après avoir défini au point 1.1 une « réserve » comme une « déclaration unilatérale, quel que soit son libellé ou sa désignation, faite par un État ou par une organisation internationale à la signature, à la ratification, à l'acte de confirmation formelle, à l'acceptation ou à l'approbation d'un traité ou à l'adhésion à celui-ci ou quand un État fait une notification de succession à un traité, par laquelle cet État ou cette organisation vise à exclure ou à modifier l'effet juridique de certaines dispositions du traité dans leur application à cet État ou à cette organisation », définit au point 3.1.2 comme des « réserves déterminées » les réserves « expressément envisagées dans le traité à certaines dispositions du traité ou au traité dans son ensemble sous certains aspects particuliers », Commission du droit international, Rapport de la 58e Session (2006), document A/61/10, p. 293 à 361.

[264] L'art. 21 (Effets juridiques des réserves et des objections aux réserves) :
« 1. Une réserve établie à l'égard d'une autre partie conformément aux articles 19, 20 et 23 :
a) modifie pour l'État auteur de la réserve dans ses relations avec cette autre partie les dispositions du traité sur lesquelles porte la réserve, dans la mesure prévue par cette réserve ; et
b) modifie ces dispositions dans la même mesure pour cette autre partie dans ses relations avec l'État auteur de la réserve. »

[265] « Note sur les réserves et les facultés dans les Conventions de La Haye », établie par le Bureau Permanent, Doc. prél. C de juin 1976, *in* Conférence de La Haye de droit international privé, *Actes et documents de la Treizième session (1976)*, tome I, *Matières diverses*, La Haye, Imprimerie Nationale, 1978, p. 102 à 104. Sur la question dans sa globalité, voir l'étude de G.A.L. Droz, « Les réserves et les facultés dans les Conventions de La Haye de droit international privé », *Revue critique de droit international privé*, 1969, p. 381 et s.

[266] Comme l'a déclaré le Secrétaire général lors de la Commission spéciale de juin 2006.

[267] En novembre 2006.

Paragraph 3 – If a State makes no declaration under this Article, the Convention shall extend to all territorial units of that State.

Paragraph 4 – This Article shall not apply to a Regional Economic Integration Organisation.

704 This rule is drawn from Article 28 of the 2005 Hague Choice of Court Convention. It permits a State with two or more territorial units, in which different systems of law are applicable in relation to matters dealt with in the Convention, to declare that the Convention will extend only to some of its territorial units. Thus, for example, the United Kingdom could sign and ratify for England only or China could sign and ratify for Hong Kong only. Such a declaration may be modified at any time, always with notification to the depositary. This provision is particularly important for States in which the legislation necessary to give effect to the Convention would have to be passed by the legislatures of the units (for example, by provincial and territorial legislatures in Canada). If no declaration is made, the Convention applies to the whole State.

705 Paragraph 2 of Article 47 deals with the territorial extent of recognition and enforcement in non-unified legal systems while Article 61 concerns the territorial application of the Convention.

706 As with Articles 46 and 47,[262] this Article does not apply to REIOs.

Article 62 Reservations

Paragraph 1 – Any Contracting State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 61, make one or more of the reservations provided for in Articles 2(2), 20(2), 30(8), 44(3) and 55(3). No other reservation shall be permitted.

Paragraph 2 – Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the depositary.

Paragraph 3 – The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in paragraph 2.

Paragraph 4 – Reservations under this Article shall have no reciprocal effect with the exception of the reservation provided for in Article 2(2).

707 Only five reservations are allowed under the Convention, those provided for in Articles 2(2), 20(2), 30(8), 44(3) and 55(3).[263] No other reservations are permitted. The time at which one or more reservations can be made is no later than the time of ratification, acceptance, approval or accession; in the case of a non-unified legal system, at the time of making a declaration under the terms of Article 61(1). The withdrawal of a reservation is possible at any time and has to be notified to the depositary. The withdrawal will take effect on the first day of the third calendar month after the notification (paras 2 and 3).

708 A rule has been introduced in paragraph 4 of this Article, according to which those reservations "shall have no reciprocal effect" with the exception of the reservation to Article 2(2). As a general rule, Article 21 of the 1969 Vienna Convention[264] establishes what is called the "reciprocal effect" of reservations, which translates into a network of bilateral relations in the Convention, according to the reservations formulated by States.

709 This matter has been discussed previously in the Hague Conference on Private International Law.[265] The conclusion was that certain reservations which are expressly provided for in Hague Conventions appear not to lend themselves to reciprocity as they are negotiated reservations.[266] The rules of the 1969 Vienna Convention are not applicable, whereas in this case a special rule is established in the Convention.

710 In this context, the Drafting Committee[267] discussed, in relation to Article 44(3), whether the reservation as to the use of either English or French has to produce a reciprocal effect and, in the same way, in relation to Article 20(2), the possible reservations on certain bases for recognition and enforcement of decisions on maintenance. Finally, the possible reservation to the amendment of a form, according to Article 55(3), was also discussed. The preferred position of the Drafting Committee, adopted by the Diplomatic Session, was that there is no reason to maintain in such cases the reciprocal effect of reservations. This is now expressly provided for in paragraph 4; reservations under Article 62 do not have a reciprocal effect. The only exception is for Article 2(2) (see para. 50 of this Report).

711 As an example of the non-reciprocal effect of a reservation, if State A makes a reservation in respect of recognition of decisions given in the State of the habitual residence of the creditor, but State B makes no such reservation, a decision given in State A where the creditor has her or his habitual residence will be entitled to be recognised and enforced in State B.

Article 63 Declarations

Paragraph 1 – Declarations referred to in Articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1), may be made upon signature, ratification, acceptance,

[262] See *supra*, paras 640 and 643 of this Report.

[263] Possibility included in Art. 19 (*b*) of the 1969 Vienna Convention. In the Draft Guidelines on reservations to treaties provisionally adopted so far by the International Law Commission, after defining in 1.1 "reservation" as "a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization", guideline 3.1.2 defines as "specified reservations" the reservations "that are expressly envisaged in the treaty to certain provisions of the treaty or to the treaty as a whole with respect to certain specific aspects", International Law Commission, *Report of the 58th Session* (2006), document A/61/10, pp. 293-361.

[264] Art. 21 (Legal effects of reservations):
"1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:
(*a*) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
(*b*) modifies those provisions to the same extent for that other party in its relations with the reserving State."

[265] "Note on reservations and options in the Hague Conventions", drawn up by the Permanent Bureau, Prel Doc. C of June 1976, in Hague Conference on Private International Law, *Actes et documents de la Treizième session (1976)*, Tome I, *Miscellaneous matters*, The Hague, Imprimerie Nationale, 1978, pp. 102-104. On the question as a whole, see the study of G.A.L. Droz, "Les réserves et les facultés dans les Conventions de La Haye de droit international privé", *Revue critique de droit international privé*, 1969, pp. 381 *et seq*.

[266] As stated by the Secretary General in the Special Commission of June 2006.

[267] In November 2006.

hésion ou à tout moment ultérieur et pourront être modifiées ou retirées à tout moment.

Paragraphe 2 – Les déclarations, modifications et retraits sont notifiés au dépositaire.

Paragraphe 3 – Une déclaration faite au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion prendra effet au moment de l'entrée en vigueur de la Convention pour l'État concerné.

Paragraphe 4 – Une déclaration faite ultérieurement, ainsi qu'une modification ou le retrait d'une déclaration, prendra effet le premier jour du mois suivant l'expiration d'une période de trois mois après la date de réception de la notification par le dépositaire.

712 Contrairement aux réserves, les déclarations peuvent être faites non seulement au moment de la signature, de la ratification, de l'acceptation, de l'approbation ou de l'adhésion, mais aussi à tout moment par la suite. Elles peuvent être également modifiées ou retirées à tout moment.

713 C'est une solution souple qui permet aux États parties à la Convention de faire, de modifier ou de retirer une déclaration au gré des circonstances. À titre d'exemple, un État qui, à l'origine, n'applique la Convention qu'aux obligations alimentaires visées à l'article 2(1), peut ultérieurement étendre l'application de la Convention aux obligations alimentaires découlant d'autres relations de famille en faisant une déclaration à cet effet conformément aux articles 2(3) et 63.

Article 64 Dénonciation

Paragraphe premier – Tout État contractant pourra dénoncer la Convention par une notification écrite au dépositaire. La dénonciation pourra se limiter à certaines unités territoriales d'un État à plusieurs unités auxquelles s'applique la Convention.

Paragraphe 2 – La dénonciation prendra effet le premier jour du mois suivant l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsqu'une période plus longue pour la prise d'effet de la dénonciation est spécifiée dans la notification, la dénonciation prendra effet à l'expiration de la période en question après la date de réception de la notification par le dépositaire.

714 Cette règle s'inspire de l'article 58 de la Convention Protection des adultes de 2000 et de l'article 33 de la Convention Élection de for de 2005. L'article 64 dispose qu'un État contractant peut dénoncer la Convention par notification écrite au dépositaire. La dénonciation peut se limiter à certaines unités territoriales d'un système juridique non unifié auquel s'applique la Convention. Elle prend effet le premier jour du mois qui suit l'expiration d'une période de 12 mois après la date de réception de la notification par le dépositaire. Lorsque la notification prévoit une période plus longue pour la prise d'effet de la dénonciation, celle-ci prend effet à l'expiration du délai indiqué, courant à compter de la date de réception de la notification par le dépositaire.

Article 65 Notification

Le dépositaire notifiera aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux Organisations régionales d'intégration économique qui ont signé, ratifié, accepté, approuvé ou adhéré conformément aux articles 58 et 59, les renseignements suivants :

Paragraphe (a) – les signatures, ratifications, acceptations et approbations visées aux articles 58 et 59 ;

Paragraphe (b) – les adhésions et les objections aux adhésions visées aux articles 58(3) et (5) et 59 ;

Paragraphe (c) – la date d'entrée en vigueur de la Convention conformément à l'article 60 ;

Paragraphe (d) – les déclarations prévues aux articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) et (2), 59(3) et 61(1) ;

Paragraphe (e) – les accords prévus à l'article 51(2) ;

Paragraphe (f) – les réserves prévues aux articles 2(2), 20(2), 30(8), 44(3), 55(3) et le retrait des réserves prévu à l'article 62(2) ;

Paragraphe (g) – les dénonciations prévues à l'article 64.

715 L'article 65 impose au dépositaire, le Ministère des Affaires étrangères des Pays-Bas, de notifier aux Membres de la Conférence de La Haye de droit international privé, ainsi qu'aux autres États et aux ORIE qui ont signé, ratifié, accepté, approuvé ou adhéré, divers renseignements relatifs à la Convention, tels que les signatures, les ratifications, l'entrée en vigueur, les réserves, les déclarations et les dénonciations.

En foi de quoi, les soussignés, dûment autorisés, ont signé la présente Convention.

Fait à La Haye, le 23 novembre 2007, en français et en anglais, les deux textes faisant également foi, en un seul exemplaire, qui sera déposé dans les archives du Gouvernement du Royaume des Pays-Bas et dont une copie certifiée conforme sera remise, par la voie diplomatique, à chacun des Membres de la Conférence de La Haye de droit international privé lors de sa Vingt et unième session ainsi qu'à chacun des autres États ayant participé à cette Session.

716 On notera que la rédaction du texte en anglais et en français, les deux textes faisant également foi, permet en cas de besoin une interprétation croisée lorsqu'une des versions du texte n'est pas claire.

approval or accession or at any time thereafter, and may be modified or withdrawn at any time.

Paragraph 2 – Declarations, modifications and withdrawals shall be notified to the depositary.

Paragraph 3 – A declaration made at the time of signature, ratification, acceptance, approval or accession shall take effect simultaneously with the entry into force of this Convention for the State concerned.

Paragraph 4 – A declaration made at a subsequent time, and any modification or withdrawal of a declaration, shall take effect on the first day of the month following the expiration of three months after the date on which the notification is received by the depositary.

712 By contrast with reservations, declarations may be made not only at the time of signature, ratification, acceptance, approval or accession but also at any time thereafter. They may also be modified or withdrawn at any time.

713 This is a flexible solution that allows States Party to the Convention to make, modify or withdraw a declaration according to the circumstances. For example, if a State initially applies the Convention only to the maintenance obligations of Article 2(1), it can later extend the application of the Convention to other maintenance obligations arising from other family relations, by making a declaration in accordance with Articles 2(3) and 63.

Article 64 Denunciation

Paragraph 1 – A Contracting State to the Convention may denounce it by a notification in writing addressed to the depositary. The denunciation may be limited to certain territorial units of a multi-unit State to which the Convention applies.

Paragraph 2 – The denunciation shall take effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

714 This rule is taken from Article 58 of the 2000 Hague Adults Convention and from Article 33 of the 2005 Hague Choice of Court Convention. Article 64 provides that a Contracting State may denounce the Convention by a notification in writing to the depositary. The denunciation may be limited to certain territorial units of a non-unified legal system to which the Convention applies. The denunciation takes effect on the first day of the month following the expiration of 12 months after the date on which the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation shall take effect upon the expiration of such longer period after the date on which the notification is received by the depositary.

Article 65 Notification

The depositary shall notify the Members of the Hague Conference on Private International Law, and other States and Regional Economic Integration Organisations which have signed, ratified, accepted, approved or acceded in accordance with Articles 58 and 59 of the following –

Paragraph (a) – the signatures, ratifications, acceptances and approvals referred to in Articles 58 and 59;

Paragraph (b) – the accessions and objections raised to accessions referred to in Articles 58(3) and (5) and 59;

Paragraph (c) – the date on which the Convention enters into force in accordance with Article 60;

Paragraph (d) – the declarations referred to in Articles 2(3), 11(1)(g), 16(1), 24(1), 30(7), 44(1) and (2), 59(3) and 61(1);

Paragraph (e) – the agreements referred to in Article 51(2);

Paragraph (f) – the reservations referred to in Articles 2(2), 20(2), 30(8), 44(3) and 55(3), and the withdrawals referred to in Article 62(2);

Paragraph (g) – the denunciations referred to in Article 64.

715 Article 65 requires the depositary, the Ministry of Foreign Affairs of the Netherlands, to notify the Members of the Hague Conference on Private International Law, and other States and REIOs which have signed, ratified, accepted, approved or acceded to the Convention of various matters relevant to the Convention, such as signatures, ratifications, entry into force, reservations, declarations and denunciations.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at The Hague, on the 23rd day of November 2007, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the Members of the Hague Conference on Private International Law at the date of its Twenty-First Session and to each of the other States which have participated in that Session.

716 It is important to note that the text, being drawn up in English and French, both texts being equally authentic, allows, where necessary, for cross-interpretation where one version of the text may not be clear.

ANNEXE I

Liste des Documents préliminaires publiés par le Bureau Permanent au cours des négociations menant à la *Convention sur le recouvrement international des aliments destinés aux enfants et à d'autres membres de la famille*

1995

Document préliminaire No 1 de septembre 1995 : Note sur le fonctionnement des Conventions de La Haye relatives aux obligations alimentaires et de la Convention de New York sur le recouvrement des aliments à l'étranger.

1998

Document préliminaire No 1 de novembre 1998 : Questionnaire sur les obligations alimentaires.

1999

Document préliminaire No 2 de janvier 1999 : Note sur l'opportunité de réviser les Conventions de La Haye sur les obligations alimentaires et d'inclure dans un nouvel instrument des dispositions sur la coopération judiciaire et administrative.

Document préliminaire No 3 d'avril 1999 : Extraits des réponses au Questionnaire de novembre 1998 sur les obligations alimentaires (Doc. prél. No 1 de novembre 1998).

Rapport et Conclusions de la Commission spéciale sur les obligations alimentaires d'avril 1999 (décembre 1999).

2002

Document préliminaire No 1 de juin 2002 : Note d'information et Questionnaire concernant un nouvel instrument mondial sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

2003

Document préliminaire No 2 d'avril 2003 : Compilation des réponses au Questionnaire de 2002 concernant un nouvel instrument mondial sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 3 d'avril 2003 : Vers un nouvel instrument mondial sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 4 d'avril 2003 : Filiation et aliments internationaux envers les enfants – Réponses au Questionnaire de 2002 et analyse des différents points.

Document préliminaire No 5 d'octobre 2003 : Rapport relatif à la Première réunion de la Commission spéciale sur le recouvrement international des aliments envers les enfants et autres membres de la famille (5-16 mai 2003).

2004

Document préliminaire No 6 de février 2004 : Questionnaire supplémentaire concernant un nouvel instrument mondial sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 7 d'avril 2004 : Esquisse d'une Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 8 de mai 2004 : Procédures de reconnaissance et d'exécution à l'étranger des décisions concernant les aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 9 de mai 2004 : Transfert de fonds et utilisation des technologies de l'information dans le cadre du recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 10 de mai 2004 : Coûts et frais judiciaires et administratifs, comprenant assistance et aide juridique, en vertu de la nouvelle Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 11 de mai 2004 : Application d'un instrument sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille sans égard au caractère international ou interne de la réclamation d'aliments.

Document préliminaire No 12 de septembre 2004 : Questionnaire relatif à la loi applicable aux obligations alimentaires.

2005

Document préliminaire No 13 de janvier 2005 : Esquisse d'une Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 14 de mars 2005 : Proposition du Groupe de travail sur la loi applicable aux obligations alimentaires.

Document préliminaire No 15 de mars 2005 : Rapport du Groupe de travail sur la coopération administrative de la Commission spéciale d'avril 2005 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 16 d'octobre 2005 : Esquisse d'un projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

2006

Document préliminaire No 17 de mai 2006 : Rapport du Groupe de travail chargé des formulaires de la Commission spéciale sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 18 de juin 2006 : Coordination entre le projet sur les aliments et d'autres instruments internationaux.

Document préliminaire No 19 de juin 2006 : Rapport du Groupe de travail sur la coopération administrative de la Commission spéciale de juin 2006 sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 20 de juin 2006 : Forme des règles en matière de loi applicable et possibles clauses finales.

Rapport explicatif

ANNEX I

List of Preliminary Documents published by the Permanent Bureau during the negotiations leading to the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*

1995

Preliminary Document No 1 of September 1995: Note on the operation of the Hague Conventions relating to maintenance obligations and of the New York Convention on the Recovery Abroad of Maintenance.

1998

Preliminary Document No 1 of November 1998: Questionnaire on Maintenance Obligations.

1999

Preliminary Document No 2 of January 1999: Note on the Desirability of Revising the Hague Conventions on Maintenance Obligations and Including in a New Instrument Rules on Judicial and Administrative Co-operation.

Preliminary Document No 3 of April 1999: Extracts from the Responses to the November 1998 Questionnaire on Maintenance Obligations.

Report on and Conclusions of the Special Commission on Maintenance Obligations of April 1999 (December 1999).

2002

Preliminary Document No 1 of June 2002: Information Note and Questionnaire concerning a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance.

2003

Preliminary Document No 2 of April 2003: 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.

Preliminary Document No 3 of April 2003: Towards a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 4 of April 2003: Parentage and International Child Support – Responses to the 2002 Questionnaire and an Analysis of the Issues.

Preliminary Document No 5 of October 2003: 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).

2004

Preliminary Document No 6 of February 2004: Additional Questionnaire concerning a New Global Instrument on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 7 of April 2004: Working Draft of a Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 8 of May 2004: Procedures for Recognition and Enforcement Abroad of Decisions concerning Child Support and other Forms of Family Maintenance.

Preliminary Document No 9 of May 2004: Transfer of Funds and the Use of Information Technology in relation to the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 10 of May 2004: Administrative and Legal Costs and Expenses under the New Convention on the International Recovery of Child Support and other Forms of Family Maintenance, including Legal Aid and Assistance.

Preliminary Document No 11 of May 2004: Application of an Instrument on the International Recovery of Child Support and other Forms of Family Maintenance Irrespective of the International or Internal Character of the Maintenance Claim.

Preliminary Document No 12 of September 2004: Questionnaire relating to the Law Applicable to Maintenance Obligations.

2005

Preliminary Document No 13 of January 2005: Working Draft of a Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 14 of March 2005: Proposal by the Working Group on the Law Applicable to Maintenance Obligations.

Preliminary Document No 15 of March 2005: Report of the Administrative Co-operation Working Group of the Special Commission of April 2005 on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 16 of October 2005: Tentative Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

2006

Preliminary Document No 17 of May 2006: Report of the Forms Working Group of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 18 of June 2006: Co-ordination between the Maintenance Project and other International Instruments.

Preliminary Document No 19 of June 2006: Report of the Administrative Co-operation Working Group of the Special Commission of June 2006 on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 20 of June 2006: Form of the Rules on Applicable Law and Possible Final Clauses.

Document préliminaire No 21 de juin 2006 : Questions se rapportant à l'esquisse d'un projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 22 de juin 2006 : Rapport du Groupe de travail sur la loi applicable.

Document préliminaire No 23 de juin 2006 : Observations portant sur l'esquisse d'un projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

2007

Document préliminaire No 24 de janvier 2007 : Esquisse relative à la loi applicable.

Document préliminaire No 25 de janvier 2007 : Avant-projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 26 de janvier 2007 : Observations du Comité de rédaction sur le texte de l'avant-projet de Convention.

Document préliminaire No 27 d'avril 2007 : Rapport du Groupe de travail sur la loi applicable.

Document préliminaire No 28 de mai 2007 : Esquisse relative à la loi applicable – Projet de dispositions additionnelles.

Document préliminaire No 29 de juin 2007 : Avant-projet révisé de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

Document préliminaire No 30 de juin 2007 : Avant-projet de Protocole sur la loi applicable aux obligations alimentaires.

Document préliminaire No 31-A de juillet 2007 : Rapport du Groupe de travail chargé des formulaires – Rapport.

Document préliminaire No 31-B de juillet 2007 : Rapport du Groupe de travail chargé des formulaires – Formulaires recommandés.

Document préliminaire No 32 d'octobre 2007 : Avant-projet de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille – Projet de Rapport explicatif*.

Document préliminaire No 33 d'août 2007 : Rapport explicatif sur l'avant-projet de Protocole sur la loi applicable aux obligations alimentaires.

Document préliminaire No 34 d'octobre 2007 : Rapport du Groupe de travail sur la coopération administrative.

Document préliminaire No 35 d'octobre 2007 : Observations sur l'avant-projet révisé de Convention (Doc. prél. No 29) et sur l'avant-projet de Protocole (Doc. prél. No 30).

Document préliminaire No 36 d'octobre 2007 : Liste complète des observations relatives à l'avant-projet révisé de Convention sur le recouvrement international des aliments envers les enfants et d'autres membres de la famille.

* Une version provisoire en anglais uniquement avait été publiée en août 2007 et portait cette date.

ANNEXE II

Liste des réunions de la Commission spéciale et des Comités de la Commission spéciale (Comité de rédaction, Groupe de travail sur la loi applicable, Groupe de travail sur la coopération administrative et Groupe de travail chargé des formulaires)

Réunions de la Commission spéciale

La Commission spéciale s'est réunie à La Haye aux dates suivantes :

– du 5 au 16 mai 2003
– du 7 au 18 juin 2004
– du 4 au 15 avril 2005
– du 19 au 28 juin 2006
– du 8 au 16 mai 2007.

Réunions du Comité de rédaction

Le Comité de rédaction était présidé par Jan Doogue (Nouvelle-Zélande) et composé de Mmes Denise Gervais (Canada), Katja Lenzing (Commission européenne), Namira Negm (Égypte), Mary Helen Carlson (États-Unis d'Amérique), Mária Kurucz (Hongrie), Stefania Bariatti (Italie), María Elena Mansilla y Mejía (Mexique) et Cecilia Fresnado de Aguirre (*Inter-American Children's Initiative*) et de MM. James Ding (Chine), Jin Sun (Chine), Lixiao Tian (Chine), Antoine Buchet (Commission européenne), Miloš Hatapka (Commission européenne), Robert Keith (États-Unis d'Amérique), Jérôme Déroulez (France), Edouard de Leiris (France) et Paul Beaumont (Royaume-Uni). Les co-rapporteurs, Alegría Borrás (Espagne) et Jennifer Degeling (Australie), ainsi que les membres du Bureau Permanent étaient membres de droit du Comité.

Outre les réunions de la Commission spéciale, le Comité de rédaction s'est réuni à La Haye aux dates suivantes :

– du 27 au 30 octobre 2003
– du 12 au 16 janvier 2004
– du 19 au 22 octobre 2004
– du 5 au 9 septembre 2005
– du 11 au 15 février 2006
– du 16 au 18 mai 2007
– le 28 novembre et le 7 décembre 2006 (par conférence téléphonique)
– et pendant la Session diplomatique.

Groupe de travail sur la loi applicable (GTLA)

Le Groupe de travail sur la loi applicable était présidé par Andrea Bonomi (Suisse, Rapporteur) et composé de Mmes Angelika Schlunck (Allemagne), Nádia de Araújo (Brésil), Tracy Morrow (Canada), Patricia Albuquerque Ferreira (Chine), Maria del Carmen Parra Rodriguez (Espagne), Michèle Dubrocard (France), Sarah Khabirpour (Luxembourg), Åse Kristensen (Norvège), Dorothea van Iterson (Pays-Bas), Raquel Correia (Portugal), Marta Zavadilová (République tchèque) et Gloria DeHart (IBA) et de MM. Rolf Wagner (Allemagne), Lixiao Tian (Chine), Antoine Buchet (Commission européenne), Robert Spector (États-Unis d'Amérique), Edouard de Leiris (France), Alberto Malatesta (Italie), Shinichiro Hayakawa (Japon), Michael Hellner (Suède) et David McClean (Secrétariat du Commonwealth). Les co-rapporteurs Alegría Borrás (Espagne) et Jennifer Degeling (Australie), ainsi que les membres du Bureau Permanent étaient membres de droit du GTLA.

Preliminary Document No 21 of June 2006: Issues Arising under the Tentative Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 22 of June 2006: Report of the Working Group on Applicable Law.

Preliminary Document No 23 of June 2006: Comments on the Tentative Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

2007

Preliminary Document No 24 of January 2007: Working Draft on Applicable Law.

Preliminary Document No 25 of January 2007: Preliminary Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 26 of January 2007: Observations of the Drafting Committee on the Text of the Preliminary Draft Convention.

Preliminary Document No 27 of April 2007: Report of the Working Group on Applicable Law.

Preliminary Document No 28 of May 2007: Working Draft on Applicable Law – Draft Additional Provisions.

Preliminary Document No 29 of June 2007: Revised Preliminary Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

Preliminary Document No 30 of June 2007: Preliminary Draft Protocol on the Law Applicable to Maintenance Obligations.

Preliminary Document No 31-A of July 2007: Report of the Forms Working Group – Report.

Preliminary Document No 31-B of July 2007: Report of the Forms Working Group – Recommended Forms.

Preliminary Document No 32 of October 2007: Preliminary Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance – Draft Explanatory Report.*

Preliminary Document No 33 of August 2007: Explanatory Report on the Preliminary Draft Protocol on the Law Applicable to Maintenance Obligations.

Preliminary Document No 34 of October 2007: Report of the Administrative Co-operation Working Group.

Preliminary Document No 35 of October 2007: Comments on the Revised Preliminary Draft Convention (Prel. Doc. No 29) and the Preliminary Draft Protocol (Prel. Doc. No 30).

Preliminary Document No 36 of October 2007: Consolidated List of Comments on the Revised Preliminary Draft Convention on the International Recovery of Child Support and other Forms of Family Maintenance.

* Please note that a provisional version in English only, dated August 2007, was made available that month.

ANNEX II

List of meetings of the Special Commission and Committees of the Special Commission (Drafting Committee, Applicable Law Working Group, Administrative Co-operation Working Group and Forms Working Group)

Special Commission meetings

The Special Commission met at The Hague on the following dates:

– 5 to 16 May 2003
– 7 to 18 June 2004
– 4 to 15 April 2005
– 19 to 28 June 2006
– 8 to 16 May 2007.

Drafting Committee meetings

The Drafting Committee was chaired by Jan Doogue (New Zealand) and was comprised of the following members: Mmes Denise Gervais (Canada), Namira Negm (Egypt), Katja Lenzing (European Commission), Mária Kurucz (Hungary), Stefania Bariatti (Italy), María Elena Mansilla y Mejía (Mexico), Mary Helen Carlson (United States of America) and Cecilia Fresnado de Aguirre (Inter-American Children's Initiative) and Messrs James Ding (China), Jin Sun (China), Lixiao Tian (China), Antoine Buchet (European Commission), Miloš Hatapka (European Commission), Jérôme Déroulez (France), Edouard de Leiris (France), Paul Beaumont (United Kingdom) and Robert Keith (United States of America). The co-*Rapporteurs* Alegría Borrás (Spain) and Jennifer Degeling (Australia) and the members of the Permanent Bureau were *de facto* members of the Committee.

In addition to Special Commission meetings, the Drafting Committee met at The Hague on the following dates:

– 27 to 30 October 2003
– 12 to 16 January 2004
– 19 to 22 October 2004
– 5 to 9 September 2005
– 11 to 15 February 2006
– 16 to 18 May 2007
– 28 November and 7 December 2006 (via conference call)
– and during the Diplomatic Session.

Working Group on Applicable Law (WGAL)

The Working Group on Applicable Law was chaired by Andrea Bonomi (Switzerland, *Rapporteur*) and was comprised of the following members: Mmes Nádia de Araújo (Brazil), Tracy Morrow (Canada), Patricia Albuquerque Ferreira (China), Marta Zavadilová (Czech Republic), Michèle Dubrocard (France), Angelika Schlunck (Germany), Sarah Khabirpour (Luxembourg), Dorothea van Iterson (Netherlands), Åse Kristensen (Norway), Raquel Correia (Portugal), Maria del Carmen Parra Rodriguez (Spain) and Gloria DeHart (IBA) and Messrs Lixiao Tian (China), Antoine Buchet (European Commission), Edouard de Leiris (France), Rolf Wagner (Germany), Alberto Malatesta (Italy), Shinichiro Hayakawa (Japan), Michael Hellner (Sweden), Robert Spector (United States of America) and David McClean (Commonwealth Secretariat). The co-*Rapporteurs* Alegría Borrás (Spain) and Jennifer Degeling (Australia) and the members of the Permanent Bureau were *de facto* members of the WGAL.

Le GTLA s'est réuni à La Haye aux dates suivantes :

– du 27 au 28 mai 2004
– le 15 juin 2004
– du 7 au 8 février 2005
– du 14 au 16 juillet 2005
– du 9 au 11 mars 2006
– du 17 au 18 novembre 2006.

Les discussions ont sinon été conduites par liste de distribution électronique.

Groupe de travail sur la coopération administrative

Le Groupe de travail sur la coopération administrative était conçu comme un groupe de travail et les décisions ont été prises par consensus. Les membres du Bureau Permanent de la Conférence de La Haye ont animé le groupe et Mary Helen Carlson (États-Unis d'Amérique), Mária Kurucz (Hongrie) et Jorge Aguilar Castillo (Costa Rica) l'ont coprésidé.

Le Groupe de travail sur la coopération administrative a tenu plusieurs conférences téléphoniques entre la réunion de la Commission spéciale de 2004 et la Session diplomatique de 2007 et a également communiqué par courriel et listes de distribution.

Groupe de travail chargé des formulaires

Le Groupe de travail chargé des formulaires était coprésidé par Zoe Cameron (Australie) et Shireen Fisher (IAWJ) et composé de Mmes Christina Wicke (Allemagne), Katie Levasseur (Canada, droit civil), Tracy Morrow (Canada, *common law*), Meg Haynes (États-Unis d'Amérique), Hilde Drenth (Pays-Bas), Helena Kasanova (Slovaquie), Anna Svantesson (Suède), Ana-Sabine Boehm (DIJuF), Patricia Whalen (IAWJ), Kay Farley (NCSEA), Jennifer Degeling (Australie, Rapporteur) et Sandrine Alexandre (Bureau Permanent) et de MM. Hans-Michael Veith (Allemagne), Jorge Aguilar Castillo (Costa Rica), Edouard de Leiris (France), Philip Ashmore (Royaume-Uni), William Duncan (Bureau Permanent) et Philippe Lortie (Bureau Permanent).

Le Groupe de travail chargé des formulaires s'est réuni par conférence téléphonique à 23 reprises : 27 janvier, 3, 9, 17 et 23 février, 3 mars, 25 mai, 8 juin, 6 et 20 juillet, 28 septembre, 26 octobre et 23 novembre 2005 ; 24 janvier, 15 mars, 26 avril et 30 août 2006 ; 22 mars, 12 et 26 avril, 31 mai et 5 et 19 juillet 2007. Le Groupe s'est en outre réuni en personne à quatre reprises : 15 avril 2005, 28 juin 2006 et 6, 7 et 13 mai 2007.

The WGAL met at The Hague on the following dates:

– 27 to 28 May 2004
– 15 June 2004
– 7 to 8 February 2005
– 14 to 16 July 2005
– 9 to 11 March 2006
– 17 to 18 November 2006.

Otherwise, the proceedings were conducted by means of an electronic discussion list.

Administrative Co-operation Working Group

The Administrative Co-operation Working Group was structured as a working group, and decisions were reached by consensus. Members of the Permanent Bureau of the Hague Conference served as facilitators, and Mária Kurucz (Hungary), Mary Helen Carlson (United States of America) and Jorge Aguilar Castillo (Costa Rica) were appointed as co-convenors.

The Administrative Co-operation Working Group held conference calls between the 2004 Special Commission and the 2007 Diplomatic Session and also communicated via e-mail and a listserv.

Forms Working Group

The Forms Working Group was co-chaired by Zoe Cameron (Australia) and Shireen Fisher (IAWJ) and was comprised of the following members: Mmes Katie Levasseur (Canada) (civil law), Tracy Morrow (Canada) (common law), Christina Wicke (Germany), Hilde Drenth (Netherlands), Helena Kasanova (Slovakia), Anna Svantesson (Sweden), Meg Haynes (United States of America), Ana-Sabine Boehm (DIJuF), Patricia Whalen (IAWJ), Kay Farley (NCSEA), Sandrine Alexandre (Permanent Bureau) and Jennifer Degeling (Australia, *Rapporteur*) and Messrs Jorge Aguilar Castillo (Costa Rica), Edouard de Leiris (France), Hans-Michael Veith (Germany), Philip Ashmore (United Kingdom), William Duncan (Permanent Bureau) and Philippe Lortie (Permanent Bureau).

The Forms Working Group held conference calls on 23 occasions: 27 January, 3, 9, 17 and 23 February, 3 March, 25 May, 8 June, 6 and 20 July, 28 September, 26 October and 23 November 2005; 24 January, 15 March, 26 April and 30 August 2006; 22 March, 12 and 26 April, 31 May and 5 and 19 July 2007. It met four times in person: 15 April 2005, 28 June 2006 and 6, 7 and 13 May 2007.

Table

Table des matières

Table of contents

Table des matières