

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

**Actes et documents
de la Vingt-deuxième session**

**Proceedings
of the Twenty-Second Session**

Tome I

Jugements

Judgments

Cahier 2 Rapports des Groupes de travail

Book 2 Working Group Reports

Actes et documents de la Vingt-deuxième session
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Actes et documents de la Vingt-deuxième session 18 juin au 2 juillet 2019

Proceedings of the Twenty-Second Session 18 June to 2 July 2019

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Avis au lecteur

La présente publication est la première d'une série de deux tomes intitulés *Actes et documents de la Vingt-deuxième session*. Cette série contient l'ensemble des procès-verbaux et documents de travail ayant trait à la Vingt-deuxième session de la HCCH, ainsi que les documents afférents aux réunions préparatoires de la Commission spéciale et aux études préliminaires menées par le Bureau Permanent. Sa forme et son contenu ont été définis dans un souci de mettre à la disposition de toutes les personnes intéressées – juges, universitaires, avocats, particuliers, administrations nationales – les travaux qui ont conduit à l'adoption de la *Convention du 2 juillet 2019 sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale*, en vue de permettre au lecteur de mieux comprendre le texte et les débats qui ont déterminé les solutions consacrées dans la Convention.

Ce premier tome, divisé en cinq cahiers, rassemble les documents directement liés au texte final de la Convention HCCH Jugements de 2019, dont le Rapport explicatif élaboré par les Professeurs Francisco Garcimartín et Geneviève Saumier.

Le tome II, consacré aux matières diverses, renferme des informations générales telles que la composition des délégations et les procès-verbaux des séances d'ouverture et de clôture. La suite est consacrée au texte intégral de l'Acte final de la Vingt-deuxième session, ainsi qu'aux propositions de travail et procès-verbaux de la Commission II sur les affaires générales et la politique. Tous les documents afférents aux réunions annuelles du CAGP, qui se sont tenues entre les Vingt et unième et Vingt-deuxième sessions, ne sont pas inclus dans le tome II mais sont disponibles sur le site web de la HCCH (<www.hcch.net>).

La HCCH est une organisation bilingue, l'anglais et le français étant ses langues officielles au moment de la tenue de la Vingt-deuxième session. Par conséquent, les documents contenus dans les *Actes et documents* sont reproduits, dans la mesure du possible, dans les deux langues. Conformément à la pratique de la HCCH, les interventions formulées par les délégués lors de la Vingt-deuxième session ont été rendues en français ou en anglais selon la langue dans laquelle l'intervention a été prononcée.

Les travaux d'édition afférents à la publication des *Actes et documents* ont été assurés par Mmes Hélène Guérin, Lydie De Loof, Sandrine Brard et Anna Koelewijn.

Notice to the reader

This publication is the first in a series of two Tomes entitled *Proceedings of the Twenty-Second Session*. This series contains all the minutes and working documents of the Twenty-Second Session of the HCCH as well as relevant documents from the preparatory Special Commission meetings and the preliminary studies carried out by the Permanent Bureau. Its form and its content have been determined by the concern to render accessible to all interested persons – including judges, academics, lawyers, private individuals, and national administrations – the working materials which led to the *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, with the aim of enhancing the reader's comprehension of the text and the thinking that determined which solutions were to be embodied in the Convention.

This first Tome, which is divided into five books, encompasses the documents directly related to the final text of the HCCH 2019 Judgments Convention, including the Explanatory Report drawn up by Professor Francisco Garcimartín and Professor Geneviève Saumier.

Tome II concerning Miscellaneous matters includes general information such as the membership of the delegations and the minutes of the Opening and Closing Sessions. The complete text of the Final Act of the Twenty-Second Session appears thereafter. It also contains the documents relating to the Twenty-Second Session's Commission on General Affairs and Policy. All documents related to the annual CGAP meetings that were held between the Twenty-First and Twenty-Second Sessions are not included in Tome II but are available on the HCCH website (<www.hcch.net>).

The HCCH is a bilingual organisation with both English and French being its official languages at the time of the Twenty-Second Session. Thus, the documents included in the *Proceedings* are reproduced to the extent possible in both languages. In accordance with the practice of the HCCH, the remarks made by delegates during the Twenty-Second Session have been rendered in French or in English depending on the language in which the intervention was made.

Editing of the *Proceedings* was carried out by Ms Helene Guerin, Mrs Lydie De Loof, Mrs Sandrine Brard and Mrs Anna Koelewijn.

La collection complète des *Actes et documents de la Vingt-deuxième session (2019)* se présente comme suit :

Tome I – Jugements (cinq cahiers)

Tome II – Matières diverses

Le présent Cahier présente les rapports des Groupes de travail qui ont été établis en vue d'examiner en détail certaines questions faisant l'objet de dispositions de la Convention HCCH Jugements de 2019. Les Groupes de travail ont également été chargés de discuter de l'exclusion éventuelle de certaines matières du texte de la Convention.

Les *Actes et documents de la Vingt-deuxième session* sont uniquement disponibles en format électronique.

Les publications de la HCCH peuvent être consultées sur le site web (<www.hcch.net>). Le Bureau Permanent peut être contacté à l'adresse suivante : Churchillplein 6b, 2517 JW La Haye, Pays-Bas (courrier électronique : secretariat@hcch.net).

Le Secrétaire général
de la HCCH,

C. BERNASCONI

Le Président de la
Vingt-deuxième session,

P. VLAS

The complete collection of the *Proceedings of the Twenty-Second Session (2019)* is as follows:

Tome I – Judgments (five books)

Tome II – Miscellaneous matters

This Book features the reports of the Working Groups that were assembled to examine in detail certain matters that were the subject of provisions of the HCCH 2019 Judgments Convention. The Working Groups were also charged with discussing the possible exclusion of specific matters from the text of the Convention.

The *Proceedings of the Twenty-Second Session* are only available in electronic format.

Publications of the HCCH can be consulted on the website (<www.hcch.net>). The Permanent Bureau can be contacted at Churchillplein 6b, 2517 JW The Hague, The Netherlands (e-mail: secretariat@hcch.net).

The Secretary General
of the HCCH,

C. BERNASCONI

The President of the
Twenty-Second Session,

P. VLAS

Rapports des
Groupes de travail

Working Group Reports

Rapport du Groupe de travail informel IV – Déclarations relatives aux jugements concernant des gouvernements

ÉTABLI PAR LE PROFESSEUR PAUL BEAUMONT,
PRÉSIDENT DU GROUPE DE TRAVAIL INFORMEL IV,
AVEC L'ASSISTANCE DU BUREAU PERMANENT

Document préliminaire No 5 d'avril 2019

TEXTE PROVENANT DU GROUPE DE TRAVAIL INFORMEL IV

Article 20 (Déclarations relatives aux jugements concernant des gouvernements) du projet de Convention¹

A *Trois options pour les paragraphes 1 et 2 sont proposées pour examen*

Option 1 :

1 *Inchangé*

2 Une déclaration faite en vertu du paragraphe premier ne s'étend pas aux activités civiles ou commerciales d'une entreprise publique.

Option 2 :

1 *Inchangé*

2 (a) Sans préjudice de l'article 2(5), une déclaration faite en vertu du paragraphe premier ne peut s'étendre aux activités civiles ou commerciales d'une entité distincte.

(b) Au paragraphe 2(a), l'expression « entité distincte » désigne une entité qui, selon le cas,

- (i) est distincte des organes exécutifs du gouvernement de l'État ;
- (ii) est en mesure d'intenter une poursuite ou de faire l'objet de poursuites ; et
- (iii) se livre à des activités civiles ou commerciales dans un but lucratif.

Option 3 :

1 Un État peut déclarer qu'il n'appliquera pas la présente Convention aux jugements issus de procédures auxquelles est partie :

- (a) cet État ou une personne physique agissant au nom de celui-ci ; ou
- (b) une des agences gouvernementales de cet État ou toute personne physique agissant au nom de celle-ci ; ou
- (c) une entité dotée d'une personnalité juridique indépendante ou une personne physique agissant au nom de cette entité, lorsqu'elle exerce une autorité souveraine.

Cette déclaration n'est pas plus étendue que nécessaire et l'exclusion du champ d'application y est définie de façon claire et précise.

2 *Supprimé*

B *Texte proposé pour remplacer le paragraphe 3 actuel*

3 Un État requis peut refuser la reconnaissance ou l'exécution d'un jugement rendu par un État qui a fait une déclaration en vertu du paragraphe premier si le jugement est issu d'une procédure à laquelle est partie l'État qui a fait la déclaration ou l'État requis, ou une de leurs agences gouvernementales ou une personne agissant au nom de l'un d'eux, dans les limites prévues par la déclaration.

C *Suggestions pour le projet de Rapport explicatif²*

- En ce qui concerne le paragraphe 59, il est suggéré d'inclure « mais elle mentionne expressément qu'elle inclut » dans la première phrase. Le nouveau libellé serait le suivant :

« Cette exclusion couvre les jugements relatifs aux activités de forces armées en tant que telles mais elle mentionne expressément qu'elle inclut les activités de leur personnel 'dans l'exercice de ses fonctions officielles'. »

La raison qui sous-tend cette proposition de modification est d'éviter toute confusion : le recours aux sous-alinéas (i) et (ii) semble suggérer qu'il y a deux points, alors qu'en vertu de l'article 2(1)(n), il n'y en a qu'un seul – les activités des forces armées (les activités de leur personnel dans l'exercice de ses fonctions officielles sont incluses dans ce point).

- En ce qui concerne le paragraphe 385, il est suggéré de remplacer « plusieurs » dans la deuxième phrase par « quelques » afin que les références dans le paragraphe soient cohérentes.
- En ce qui concerne le paragraphe 60, il est suggéré de préciser davantage les raisons pour lesquelles les activités de maintien de l'ordre sont exclues en renvoyant aux idées énoncées aux paragraphes 58 et 59 sur les forces armées.
- Supprimer la note de bas de page 265 (ou au moins les deux premières phrases de cette note) et reformuler le texte actuel du paragraphe 388 pour tenir compte de celle qui parmi les options présentées ci-dessus sera adoptée.

¹ Pour faciliter la discussion, ci-après le terme « projet de Convention » désigne le projet de Convention de 2018 sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, qui est publié comme Doc. trav. No 262 REV, Projet de Convention révisé proposé par le Comité de rédaction arrêté au 28 mai 2018, voir Cahier 3, p. 318, du présent tome.

² « Convention sur les jugements : Rapport explicatif préliminaire révisé », établi par Francisco Garcimartín et Geneviève Saumier, Doc. prél. No 1 de décembre 2018 à l'attention de la Vingt-deuxième session sur la reconnaissance et l'exécution des jugements étrangers (du 18 juin au 2 juillet 2019), voir Cahier 1, p. 10, du présent tome.

Report of informal working group IV – Declarations with respect to judgments pertaining to governments

DRAWN UP BY PROFESSOR PAUL BEAUMONT,
CHAIR OF INFORMAL WORKING GROUP IV, WITH THE
ASSISTANCE OF THE PERMANENT BUREAU

Preliminary Document No 5 of April 2019

TEXT DERIVED FROM INFORMAL WORKING GROUP IV

*Article 20 (Declarations with respect to judgments pertain-
ing to governments) of the draft Convention¹*

A *Three options for paragraphs 1 and 2 are put forward
for consideration*

Option 1:

1 *Unchanged*

2 A declaration pursuant to paragraph 1 shall not extend to civil or commercial activities of an enterprise owned by a State.

Option 2:

1 *Unchanged*

2 (a) Without prejudice to Article 2(5), a declaration pursuant to paragraph 1 shall not extend to civil or commercial activities of a separate entity.

(b) In paragraph 2(a), “a separate entity” means an entity which –

(i) is distinct from the executive organs of the government of the State;

(ii) is capable of suing or being sued; and

(iii) engages in civil or commercial activities for profit.

Option 3:

1 A State may declare that it shall not apply this Convention to judgments arising from proceedings to which any of the following is a party –

(a) that State, or a natural person acting on behalf of that State;

(b) a government agency of that State, or a natural person acting on behalf of such a government agency; or

(c) an entity with an independent legal personality, or a natural person acting on behalf of such an entity, when engaged in the exercise of sovereign authority.

The declaration shall be no broader than necessary and the exclusion from scope shall be clearly and precisely defined.

2 *Deleted*

B *Suggested text replacing current paragraph 3*

3 A requested State may refuse recognition or enforcement of a judgment from a State that made a declaration pursuant to paragraph 1 if the judgment arose from proceedings to which either the State that made the declaration or the requested State, one of their government agencies or a person acting on behalf of either is a party, to the same extent as specified in the declaration.

C *Polite suggestions for the draft Explanatory Report²*

– Regarding paragraph 59, suggest including “but it specifically mentions that it includes” in the first sentence. So it would read:

“The exclusion covers judgments related to the activities of armed forces as such, but it specifically mentions that it includes the activities of their personnel ‘in the exercise of their official duties’.”

The reason for suggesting this change is to avoid any confusion: using (i) and (ii) seems to suggest that there are two points, whereas under Article 2(1)(n), there is only one point – activities of armed forces (the activities of their personnel in the exercise of their official duties are included in this point).

– Regarding paragraph 385, suggest replacing “several” in the second sentence with “some” so that the references in the paragraph are consistent.

– Regarding paragraph 60, suggest elaborating more the rationale for the exclusion of law enforcement activities by cross-referring to the ideas in paragraphs 58 and 59 on armed forces.

– Delete footnote 265 (or at least the first two sentences thereof) and redraft the current text of paragraph 388 to work with whichever of the new options presented above is adopted.

¹ For ease of discussion, hereinafter the term “draft Convention” is used to refer to the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, which is published as Work. Doc. No 262 REV, Revised draft Convention submitted by the Drafting Committee as of 28 May 2018, see Book 3, p. 318, of this tome.

² “Judgments Convention: Revised Draft Explanatory Report”, drawn up by Francisco Garcimartin and Geneviève Saumier, Prel. Doc. No 1 of December 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), see Book 1, p. 11, of this tome.

- En raison des modifications apportées au paragraphe 3 du projet de Convention, il convient de reformuler le paragraphe 391 afin de tenir compte du nouveau libellé et du manque de parallélisme entre les articles 19 et 20. Il convient de tenir compte de la proposition suivante, y compris de la suppression de la note de bas de page 266 :

« 391 **Réciprocité.** L'article 20(3) établit la réciprocité pour les déclarations en vertu de l'article 20(1). Lorsqu'une déclaration est faite en vertu de l'article 20(1), un autre État contractant peut refuser la reconnaissance ou l'exécution d'un jugement issu de procédures auxquelles est partie : (i) l'État déclarant ; ou (ii) l'État requis ; ou (iii) une agence gouvernementale de l'État déclarant ou de l'État requis ; ou (iv) une personne agissant au nom de l'État déclarant ou de l'État requis ; ou (v) une personne agissant au nom d'une agence gouvernementale de l'État déclarant ou de l'État requis. La portée de ce refus de reconnaissance et d'exécution devrait refléter l'étendue de la déclaration. Il n'y aura pas de changement dans l'analyse, quelle que soit la partie qui l'emporte dans la procédure à l'origine du jugement en question ; et une déclaration faite en vertu de cette disposition n'empêche pas la reconnaissance ou l'exécution du jugement en vertu de la Convention ou du droit interne (voir, *supra*, art. 16). »

Notes du président du Groupe de travail informel

Le Groupe de travail informel a examiné les points soulevés par les co-Rapporteurs dans le projet révisé de Rapport explicatif concernant le mandat du Groupe de travail. En ce qui concerne le paragraphe 59, le Groupe est satisfait des exemples actuels fournis dans le projet révisé de Rapport explicatif. En ce qui concerne la note de bas de page 265, la question posée par les co-Rapporteurs a suscité de nombreuses discussions au sein du Groupe. Celui-ci a examiné les moyens permettant d'éviter toute contradiction apparente entre les paragraphes 1 et 2 du projet de Convention. Une délégation a proposé de supprimer le paragraphe 2, mais le président a conclu, sur la base des discussions tenues au sein du Groupe, que la proposition n'avait pas recueilli de soutien.

Par conséquent, le Groupe a tenté de reformuler le paragraphe 2 du projet de Convention et la méthode qui a bénéficié d'un large soutien est l'option 1. Afin d'essayer de parvenir à un consensus, le Groupe a rédigé les options 2 et 3. Toutefois, à ce stade, aucune option n'a pu faire l'objet d'un consensus au sein du Groupe. Une analyse technique plus poussée est nécessaire pour les options 2 et 3. Il a été admis que l'option 1 continuait de recueillir un large soutien au sein du Groupe.

Le Groupe de travail informel a estimé que la disposition relative à la réciprocité devrait être clarifiée afin d'en élargir les effets de manière à couvrir les jugements concernant un État déclarant. Le Groupe est parvenu à un accord sur une proposition de texte visant à remplacer l'actuel paragraphe 3 du projet de Convention.

Le Groupe de travail informel a également examiné les dispositions pertinentes du projet révisé de Rapport explicatif qui n'ont pas été portées à son attention par les co-Rapporteurs et a proposé un certain nombre de suggestions à l'attention de ces derniers ainsi qu'à la Séance plénière pour examen.

- Due to the changes in paragraph 3 of the draft Convention, please redraft paragraph 391 to reflect the new wording and the lack of parallelism between Articles 19 and 20. Please take account of the following draft, including the deletion of footnote 266:

“391 **Reciprocity.** Article 20(3) establishes reciprocity for declarations made under Article 20(1). When a declaration is made under Article 20(1), another Contracting State may refuse recognition or enforcement of a judgment arising from proceedings to which one or more of the following is a party: (i) the declaring State; or (ii) the requested State; or (iii) a government agency of the declaring State or the requested State; or (iv) a person acting on behalf of the declaring State or the requested State; or (v) a person acting on behalf of a government agency of the declaring State or the requested State. The scope of that refusal of recognition and enforcement should reflect the extent of the declaration. There will be no change in the analysis regardless of which party wins in the proceedings from which the judgment in question is rendered; and a declaration made under this provision does not prevent the recognition or enforcement of the judgment under the Convention or under national law (see *supra* Art. 16).”

Notes from the chair of the informal working group

The informal working group considered the points raised by the *co-Rapporteurs* in the revised draft Explanatory Report (ER) relating to the working group’s remit. Relating to paragraph 59, the group is happy with the current examples provided in the ER. In relation to footnote 265, the question asked by the *co-Rapporteurs* prompted considerable discussion in the group. The group considered ways of avoiding any apparent contradictions between paragraphs 1 and 2 of the draft Convention. One delegation proposed to delete paragraph 2, but the chair concluded on the basis of the discussion in the group that the proposal did not gather support.

Therefore, attempts were made to redraft paragraph 2 of the draft Convention, and the method that obtained broad support in the group was Option 1. In order to try to achieve consensus in the group, Options 2 and 3 were drafted. However, at this stage no single option achieved consensus in the group. Further technical analysis is needed for Options 2 and 3. It was recognised that Option 1 continued to command broad support in the group.

The informal working group considered that the reciprocity provision should be clarified to broaden the effects of reciprocity so as to cover judgments concerning a declaring State. The group was able to agree on one suggested text to replace the existing paragraph 3 of the draft Convention.

The informal working group also discussed the relevant provisions in the ER not drawn to our attention by the *co-Rapporteurs* and offered a number of suggestions to the *co-Rapporteurs* and the Plenary Session for consideration.

Rapport du Groupe de travail informel V – Exclusion éventuelle des entraves à la concurrence

ÉTABLI PAR LE PROFESSEUR TANJA DOMEJ,
PRÉSIDENT DU GROUPE DE TRAVAIL INFORMEL V,
AVEC L'ASSISTANCE DU BUREAU PERMANENT

Document préliminaire No 6 d'avril 2019

I REMARQUES LIMINAIRES

1 Le Groupe de travail informel a examiné les préoccupations politiques soulevées par certaines délégations en ce qui concerne la circulation des jugements portant sur des entraves à la concurrence. Pour ce qui est du fonctionnement du projet de Convention, de l'éventuelle inclusion des entraves à la concurrence et des conséquences de leur exclusion, la discussion a été facilitée par une Note¹ (Doc. pré-l. No 2 de décembre 2018) rédigée par Mme Cara North avec l'aide du Bureau Permanent. Le présent Rapport résume les discussions du Groupe de travail informel selon le point de vue de son président. Le Groupe de travail informel n'est pas parvenu à un consensus sur une proposition de rédaction à soumettre à la Session diplomatique.

2 Les participants à la discussion semblent s'attendre à ce que, dans l'ensemble, l'inclusion des entraves à la concurrence favoriserait l'action privée (*private enforcement*) dans ce domaine et encouragerait les demandeurs (y compris les autorités publiques agissant au nom de personnes privées) à tenter davantage de poursuites. Toutefois, il a également été noté que cela dépendrait des circonstances spécifiques de la situation et qu'une obligation de reconnaître les jugements portant sur des entraves à la concurrence pourrait également empêcher l'État de résidence de rendre un éventuel jugement en faveur du demandeur ayant précédemment présenté une demande rejetée dans un for accepté par le projet de Convention.

3 Des points de vue divergents ont été exprimés au sein du Groupe de travail sur la question de savoir s'il serait souhaitable d'autoriser la circulation de jugements portant sur des entraves à la concurrence dans le cadre du projet de Convention et de promouvoir ainsi l'action privée dans ce domaine ou si cela pourrait, au moins dans certaines situations, conduire à des résultats inappropriés. Des positions divergentes ont également été adoptées sur la question de savoir si la promotion de l'application du droit de la concurrence dans les contextes transfrontières couverts par le projet de Convention serait économiquement bénéfique.

4 Il est possible de regrouper comme suit les préoccupations soulevées et abordées : 1) la cohérence avec la *Convention du 30 juin 2005 sur les accords d'élection de for* (ci-après la « Convention Élection de for de 2005 »), 2) la forte implication de l'intérêt public dans les affaires portant

¹ « Éventuelle exclusion du champ d'application de la Convention des entraves à la concurrence, tel qu'il en ressort de l'article 2(1)(p) du projet de Convention de 2018 », Note établie par Cara North, Consultante auprès de la Conférence de La Haye de droit international privé, avec l'aide du Bureau Permanent, Doc. pré-l. No 2 de décembre 2018 à l'attention de la Vingt-deuxième session sur la reconnaissance et l'exécution des jugements étrangers (du 18 juin au 2 juillet 2019), voir Cahier 1, p. 126, du présent tome.

sur des entraves à la concurrence et 3) la portée extraterritoriale potentielle des recours dans le domaine du droit de la concurrence. Sur ces questions, des points de vue divergents ont été exprimés par les membres du Groupe de travail informel.

II PRÉOCCUPATIONS SOULEVÉES ET ABORDÉES

A Cohérence avec la Convention Élection de for de 2005

5 L'article 2(2)(h) de la Convention Élection de for de 2005 exclut les entraves à la concurrence du champ d'application de cette Convention. Certains participants au Groupe de travail informel se sont prononcés en faveur de l'adoption d'une approche similaire dans le présent projet de Convention. Il a été suggéré qu'une exclusion serait d'autant plus souhaitable pour le projet de Convention puisqu'elle permet un choix unilatéral du for, alors que la compétence en vertu de la Convention de 2005 est fondée sur un accord entre les parties. D'autres membres du Groupe de travail informel n'étaient pas convaincus qu'un choix unilatéral entre les fors acceptés par le projet de Convention serait problématique dans les affaires portant sur des entraves à la concurrence. Il a été souligné qu'il existe des différences importantes entre le fonctionnement de la Convention de 2005 et celui du projet de Convention qui pourraient justifier la distanciation par rapport à la première Convention à cet égard. La Convention de 2005 contient des règles sur la compétence directe et oblige le tribunal qui n'a pas été élu de décliner sa compétence, ce qui pourrait être considéré comme indésirable dans les affaires où l'intérêt public est potentiellement impliqué.

B Implication de l'intérêt public

6 Le Groupe de travail informel est d'avis que l'exclusion proposée ne s'appliquerait qu'aux situations découlant d'une action privée du droit de la concurrence. En tout état de cause, l'action publique (*public enforcement*) ne relèverait pas du champ d'application de la future Convention étant donné que cette dernière ne s'appliquera qu'aux matières civiles ou commerciales. Il n'est donc pas nécessaire de prévoir une exclusion pour empêcher la circulation des actes découlant de l'action publique.

7 Néanmoins, certains membres du Groupe de travail informel ont estimé que même en ce qui concerne les demandes privées fondées sur le droit de la concurrence, qu'elles émanent d'organismes publics ou de personnes privées, l'intérêt public demeure très présent. Il a été avancé qu'il pourrait être difficile (voire inapproprié) d'établir une distinction entre l'action publique et l'action privée, en particulier, mais pas seulement, en ce qui concerne les affaires portées par les autorités publiques. En outre, les participants ont exprimé leur inquiétude quant au fait que les organismes publics pourraient s'employer plus activement à engager des poursuites si les jugements pertinents pouvaient circuler dans le cadre de la Convention. Les points de vue divergent au sein du Groupe de travail informel quant à la question de savoir si cela serait un résultat souhaitable ou non.

8 Certains participants ont estimé que l'inclusion du droit de la concurrence pourrait entraîner un recours extensif à l'exception d'ordre public. Il a en outre été soumis au Groupe de travail informel que les jugements ne devraient pas circuler en vertu du projet de Convention dans les situations où une « perte purement économique » est transformée en

Report of informal working group V – Possible exclusion of anti-trust (competition) matters

DRAWN UP BY PROFESSOR TANJA DOMEJ, CHAIR
OF INFORMAL WORKING GROUP V, WITH THE
ASSISTANCE OF THE PERMANENT BUREAU

Preliminary Document No 6 of April 2019

I PRELIMINARY REMARKS

1 The informal working group (IWG) discussed policy concerns raised by some delegations with respect to the circulation of judgments in anti-trust (competition) matters. As concerns the operation of the draft Convention, if it were to include such matters, and the consequences of excluding them, the discussion was assisted by a Note¹ (Prel. Doc. No 2 of December 2018) drawn up by Ms Cara North with the assistance of the Permanent Bureau. This Report summarises the discussions in the IWG from the perspective of the chair of the IWG. The IWG did not reach consensus on a drafting proposal to be submitted to the Diplomatic Session.

2 There seems to be a common expectation of participants to the discussion that, overall, including anti-trust (competition) matters would promote private enforcement in this field and encourage plaintiffs (including public authorities acting on behalf of private persons) to bring more actions. However, it was also noted that this would depend on the specific situation and that a duty to recognise judgments in anti-trust (competition) matters could also lead to the result that the receiving State would be hindered from giving an otherwise possible judgment in favour of a plaintiff who previously brought an unsuccessful claim in a forum accepted by the draft Convention.

3 Diverging views were expressed in the IWG as to whether allowing judgments on anti-trust (competition) matters to circulate under the draft Convention and thereby promoting the private enforcement of anti-trust (competition) law would be desirable or whether it could, at least in some situations, lead to inappropriate outcomes. Different positions were also taken as to whether promoting the enforcement of anti-trust (competition) law in the cross-border settings covered by the draft Convention would be economically beneficial.

4 The concerns brought forward and discussed can be grouped as follows: 1) consistency with the *Convention of 30 June 2005 on Choice of Court Agreements* (the “2005 Choice of Court Convention”), 2) the strong involvement of

¹ “The possible exclusion of anti-trust matters from the Convention as reflected in Article 2(1)(p) of the 2018 draft Convention”, drawn up by Cara North, Consultant to the Hague Conference on Private International Law, with the assistance of the Permanent Bureau, Prel. Doc. No 2 of December 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), see Book 1, p. 127, of this tome.

the public interest in anti-trust (competition) law cases and 3) the potential extraterritorial reach of anti-trust (competition) law remedies. With respect to all these issues, diverging views were taken by members of the IWG.

II CONCERNS RAISED AND DISCUSSED

A *Consistency with the 2005 Choice of Court Convention*

5 Article 2(2)(h) of the 2005 Choice of Court Convention excludes anti-trust (competition) matters from the scope of that Convention. Several participants in the IWG favoured adopting a parallel approach in the draft Convention. It was suggested that an exclusion would be all the more desirable for the draft Convention, as it allows a unilateral selection of forum, while jurisdiction under the 2005 Convention is based on an agreement of the parties. Other members of the IWG were not convinced that a unilateral selection between the fora accepted by the draft Convention would be problematic in anti-trust cases. It was pointed out that there are significant differences in the operation of the 2005 Convention and the draft Convention that would justify departing from the former in this respect. The 2005 Convention contains rules on direct jurisdiction and obliges the court not chosen to decline jurisdiction, which might be considered as undesirable in matters where the public interest is potentially involved.

B *Involvement of the public interest*

6 It was the common understanding in the IWG that the proposed exclusion would only be relevant for situations of private enforcement of anti-trust (competition) law. Public enforcement would be outside the scope of the future Convention in any case, as the Convention will only apply to civil or commercial matters. Therefore, it is not required to provide for an exclusion to prevent the circulation of acts of public enforcement.

7 Nevertheless, some members of the IWG took the view that even with respect to private claims based on anti-trust (competition) law, be they brought by public bodies or by private persons, there is a strong element of public interest involved. It was argued that it might be difficult (or maybe even inappropriate) to distinguish between public and private enforcement, especially but not only with respect to cases brought by public authorities. Furthermore, the apprehension was expressed that public bodies could become more active in bringing cases if the relevant judgments could circulate under the Convention. Views differed in the IWG as to whether this would be a desirable or an undesirable outcome.

8 Some participants considered that including anti-trust (competition) law might lead to extensive use of the public policy exception. It was furthermore submitted to the IWG that judgments should not circulate under the draft Convention in situations where “pure economic loss” is turned into

« perte juridiquement significative » sur la base d'une politique économique particulière. D'autres participants ont estimé que le recours à l'exception d'ordre public serait un moyen approprié de traiter les cas où l'exécution d'un jugement spécifique dans une affaire portant sur des entraves à la concurrence serait inacceptable pour l'État requis.

C Portée extraterritoriale potentielle

9 Il a été fait valoir au Groupe de travail que les règles de concurrence sont propres à chaque État et territoire et que le fait de permettre aux jugements en la matière de circuler dans le cadre du projet de Convention pourrait avoir un effet d'entraînement, même dans les cas où le droit de la concurrence serait appliqué de manière strictement territoriale. D'autres participants ont estimé qu'il s'agissait d'une question de droit international privé qui ne serait pas spécifique aux entraves à la concurrence. Le Groupe de travail informel a en outre évoqué la préoccupation de certains participants selon laquelle percer le voile social pourrait contribuer à l'application extraterritoriale du droit de la concurrence. Il a toutefois été convenu d'un commun accord que le projet de Convention ne créerait pas une base pour le perçage du voile juridictionnel.

10 Par ailleurs, certains ont craint que l'inclusion des entraves à la concurrence dans le champ d'application du projet de Convention n'encourage une « course à la réglementation la plus sévère » lors du choix du for, ce qui pourrait avoir des conséquences préjudiciables, notamment pour les petits États spécialisés dans certaines industries. Il a été avancé que l'attrait des affaires relevant du droit de la concurrence, où les montants en cause ont tendance à être élevés, inciterait les avocats à poursuivre de telles demandes de manière agressive. D'autres participants ont indiqué qu'ils ne considéraient pas comme problématique la possibilité d'un *forum shopping* dans ce domaine et ont estimé qu'une telle possibilité pourrait être considérée comme potentiellement bénéfique pour l'application du droit de la concurrence. Il a également été souligné que les possibilités de *forum shopping* seraient plutôt limitées du point de vue du projet de Convention, compte tenu de l'éventail limité de forums qui seraient disponibles dans de tels cas.

III PORTÉE DE L'EXCLUSION (LE CAS ÉCHÉANT)

11 Le Groupe de travail informel a examiné s'il était possible de réduire la portée de l'exclusion (si celle-ci était adoptée). Certaines suggestions préliminaires de rédaction à cet égard ont été discutées à titre provisoire. Toutefois, à ce stade, le Groupe de travail informel n'est pas en mesure de proposer de modifications au libellé de l'exclusion éventuelle figurant entre crochets à l'article 2(1)(p) du projet de Convention.

12 Il a été question de savoir s'il serait souhaitable que l'application de l'article 8(2) du projet de Convention compromette la circulation des jugements relatifs à des litiges contractuels lorsqu'une question relative au droit de la concurrence se pose à titre préliminaire. Toutefois, certains membres du Groupe de travail informel ont exprimé des préoccupations au sujet de la limitation de l'exclusion aux cas de responsabilité délictuelle, tandis que d'autres ont estimé que la circulation serait en effet particulièrement souhaitable pour les jugements délictuels. Les membres du Groupe de travail informel qui se sont opposés à cette exclusion ont indiqué que les préoccupations exprimées par les auteurs de celle-ci pourraient être suffisamment prises

en compte par une déclaration conformément à l'article 19 du projet de Convention.

13 D'autres possibilités permettant de limiter l'exclusion discutées à titre préliminaire au sein du Groupe de travail informel concernent les types de recours. En particulier, il a été suggéré d'étudier la possibilité de parvenir à un compromis en excluant de la circulation les mesures non pécuniaires en matière d'entraves à la concurrence, mais en permettant la circulation des jugements pécuniaires dans ce domaine. Une autre suggestion provisoirement discutée concernait le montant des dommages et intérêts qui devraient être exécutés en vertu du projet de Convention. À cet égard, cependant, une réflexion plus approfondie serait utile pour déterminer s'il serait nécessaire de fixer une limite au-delà des possibilités déjà prévues à l'article 10 du projet de Convention.

“legally meaningful loss” on the basis of a particular economic policy. Other participants thought that using the public policy exception would be an appropriate way of dealing with cases where implementing a specific judgment in an anti-trust (competition) case would be unacceptable for the requested State.

C *Potential extraterritorial reach*

9 It was put forward in the IWG that anti-trust (competition) rules are jurisdiction-specific and that allowing judgments in such matters to circulate under the draft Convention might lead to a “spill-over” effect even in cases where anti-trust (competition) law was purportedly applied in a strictly territorial manner. Other participants took the view that this is an issue of private international law that would not be specific for anti-trust (competition) matters. The IWG furthermore discussed a concern that piercing of the corporate veil could contribute to extraterritorial application of anti-trust (competition) law. A common understanding was reached, however, that the draft Convention would not create a basis for jurisdictional veil-piercing.

10 An apprehension was furthermore expressed that including anti-trust (competition) matters in the scope of the draft Convention would encourage a “race to the severest regulation” when selecting the forum and that this could lead to detrimental results particularly for smaller States specialising in certain industries. It was argued that the attractiveness of anti-trust (competition) law cases, where values in dispute tend to be high, would incentivise lawyers to pursue such claims aggressively. Other participants indicated that they did not consider the possibility of forum shopping in this field as problematic and thought that such a possibility might be regarded as potentially beneficial for the enforcement of anti-trust (competition) law. It was also pointed out that the possibilities of forum shopping would be rather limited from the perspective of the draft Convention, considering the limited range of fora that would be available in such cases.

III SCOPE OF EXCLUSION (IF ANY)

11 The IWG explored whether there could be a possibility to narrow down the exclusion (if it were adopted). Some preliminary drafting suggestions in this respect have been tentatively discussed. However, at this stage, the IWG is not in a position to propose changes to the drafting of the possible exclusion contained in square brackets in Article 2(1)(p) of the draft Convention.

12 It was called into question whether it would be desirable that the circulation of judgments on contractual disputes where an issue of anti-trust (competition) law arose as a preliminary question would be jeopardised as a result of the operation of Article 8(2) of the draft Convention. However, some members of the IWG expressed concerns about limiting the exclusion to tort cases, while others considered that circulation would indeed be particularly desirable for tort judgments. Those members of the IWG who opposed the exclusion indicated that the concerns expressed by the propo-

nents of the exclusion could be sufficiently addressed by a declaration according to Article 19 of the draft Convention.

13 Other possibilities of limiting the exclusion preliminarily discussed in the IWG relate to the types of remedies. In particular, it has been suggested to explore whether a compromise could be reached by excluding non-monetary remedies in anti-trust (competition) matters from circulation but allowing money judgments in such matters to circulate. Another suggestion tentatively discussed concerned the amount of money damages that would have to be enforced under the draft Convention. In this respect, however, further reflection would be necessary as to whether there would be a need for a limit beyond the possibilities already provided for in Article 10 of the draft Convention.

Rapport du Groupe de travail informel II – Tribunaux communs

ÉTABLI PAR LE PROFESSEUR MARCELO DE NARDI,
PRÉSIDENT DU GROUPE DE TRAVAIL INFORMEL II,
AVEC L'ASSISTANCE DU BUREAU PERMANENT

Document préliminaire No 8 d'avril 2019

Texte tiré des discussions du Groupe de travail informel II

1 Il conviendra d'ajuster la proposition suivante avant de l'introduire dans le texte général afin qu'elle s'adapte au système de la future Convention¹, notamment la référence à l'article 19 visée au paragraphe 7 en cas d'adoption d'un système de dérogations (*opt-in/opt-out*) ou quant aux délais en matière de déclarations prévus aux paragraphes 6 et 7. La présente proposition traduit le résultat des discussions, mais n'implique pas pour autant l'existence d'un consensus concernant les questions politiques sous-jacentes évoquées dans les *Notes du président faisant suite à la réunion informelle tenue dans la RAS de Hong Kong*. Le texte a évolué, partant d'une discussion plus technique tendant à régler le problème limité à l'éventuelle introduction de dispositions dans le projet de Convention.

Article 4 *Dispositions générales*

[...]

[5 Aux fins du paragraphe premier, un jugement rendu par un tribunal commun à deux ou plusieurs États est réputé l'avoir été par le tribunal d'un État contractant si cet État a désigné ce tribunal commun dans une déclaration à cet effet, et si l'une des conditions suivantes est remplie :

- (a) tous les membres du tribunal commun sont des États contractants pour lesquels ce tribunal exerce les fonctions judiciaires relatives à la matière concernée ;
- (b) le jugement est susceptible d'être reconnu ou exécuté conformément aux alinéas (a), (b), (d), (g), (h), (i), (j) et (k)(ii) du paragraphe 1 de l'article 5[, l'article 5(3),] ou conformément à l'article 6, et ces exigences d'admissibilité sont remplies dans l'État contractant pour lequel ce tribunal exerce les fonctions judiciaires relatives à la matière concernée ; ou
- (c) le jugement a été rendu par un tribunal commun qui remplit uniquement les fonctions d'une juridiction d'appel dans le cadre d'une procédure introduite, en première instance, dans un État contractant.

¹ Ci-après, le terme « projet de Convention » désigne le projet de Convention de 2018 sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, qui est publié comme Doc. trav. No 262 REV, Projet de Convention révisé proposé par le Comité de rédaction arrêté au 28 mai 2018, voir Cahier 3, p. 318, du présent tome.

6 La déclaration détermine laquelle des catégories visées au paragraphe 5 s'applique au tribunal commun et présente :

- (a) la date d'entrée en vigueur et l'éventuelle date d'expiration des attributions juridictionnelles du tribunal commun eu égard à chaque État contractant relevant de celui-ci ;
- (b) une description des compétences du tribunal commun eu égard à chaque État contractant relevant de celui-ci, en particulier l'objet de cette compétence et l'étendue de ses fonctions, y compris s'il est compétent ou non en première instance :
 - (i) le nom, le lieu et les coordonnées pertinentes du tribunal commun ;
 - (ii) une copie des instruments juridiques qui ont créé le tribunal commun et une liste des Parties à ces instruments juridiques ;
 - (iii) les compétences et les fonctions du tribunal commun ;
 - (iv) la capacité ou non du tribunal commun de reconnaître et d'exécuter des jugements au titre de la Convention et, dans l'affirmative, de quelle manière ; et
 - (v) toute autre information nécessaire.

Tout changement concernant les membres ou la compétence du tribunal commun fera l'objet d'une nouvelle déclaration.

[7 Un État contractant peut déclarer qu'il ne reconnaîtra ou n'exécutera pas les jugements rendus par un tribunal commun qui fait l'objet d'une déclaration en vertu du paragraphe 5 pour les matières couvertes par cette déclaration. Cette déclaration de non-reconnaissance ou de non-exécution des jugements rendus par un tribunal commun est soumise aux dispositions du paragraphe 2 de l'article 19.]

OU

[7 La déclaration visée au paragraphe 5 n'aura d'effet qu'entre l'État contractant l'ayant faite et les autres États contractants ayant déclaré l'accepter.]]

Notes du président faisant suite à la réunion informelle tenue dans la RAS de Hong Kong

2 Certains experts ont relevé l'incertitude du statut de la Cour de justice de l'Union européenne (CJUE) ; sera-t-elle considérée comme un tribunal commun ou comme un tribunal d'un État contractant à la future Convention ? Sur ce point, un expert de l'UE, qui avait participé aux négociations de la Convention Élection de for de 2005, a rappelé que la modification du Statut de la HCCH, notamment, pour autoriser des Organisations régionales d'intégration économique (ORIE) à devenir Membres de l'Organisation et les négociations relatives à la Convention Élection de for de 2005 se sont déroulées au cours de la même Session diplomatique en 2005. Selon cet expert, il résulte de cette Session diplomatique que la CJUE est un tribunal d'une ORIE (en l'occurrence, l'UE) mentionné dans le Rapport explicatif portant sur la Convention. Lors de cette réunion, un cer-

Report of informal working group II – Common courts

DRAWN UP BY PROFESSOR MARCELO DE NARDI,
CHAIR OF INFORMAL WORKING GROUP II, WITH
THE ASSISTANCE OF THE PERMANENT BUREAU

Preliminary Document No 8 of April 2019

Text derived from the informal working group II discussion

1 The following proposal should be further adjusted before addition to the general text to fit the system of the future Convention,¹ for instance with regard to the reference to Article 19 in paragraph 7, if an opt-in/opt-out system were to be adopted, or with regard to the timeframe for the declarations envisaged under paragraphs 6 and 7. This proposal reflects the outcome of the discussions, but does not signify consensus on the policy matters underlying the issue referred to under *Notes from the chair out of the Hong Kong SAR informal gathering*. The text has evolved from a more technical discussion trying to solve the problem as confined to the potential inclusion of provisions within the draft Convention.

Article 4 *General provisions*

[...]

[5 For purposes of paragraph 1, a judgment given by a court common to two or more States shall be deemed to be a judgment given by a court of a Contracting State if the Contracting State has identified the common court in a declaration to that effect, and one of the following conditions are met –

- (a) all members of the common court are Contracting States whose judicial functions in relation to the relevant matter are exercised by the common court;
- (b) the judgment is eligible for recognition and enforcement under sub-paragraphs (a), (b), (d), (g), (h), (i), (j) and (k)(ii) of paragraph 1 of Article 5[, Article 5(3),] or under Article 6, and those eligibility requirements are met in a Contracting State whose judicial functions in relation to the relevant matter are exercised by the common court; or
- (c) the judgment was given by a common court with appellate functions only, and the proceedings at first instance were instituted in a Contracting State.

¹ Hereinafter, the term “draft Convention” is used to refer to the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, which is published as Work. Doc. No 262 REV, Revised draft Convention submitted by the Drafting Committee as of 28 May 2018, see Book 3, p. 318, of this tome.

6 The declaration shall identify which of the categories provided for in paragraph 5 is applicable to the common court, and shall contain:

- (a) the date of entry into force and the date of eventual ceasing of the common court’s jurisdictional power in relation to every Contracting State party to that court;
- (b) a description of the common court competence in relation to every Contracting State party to that court, in particular the subject matters of that competence and the extent of its functions, including whether it has first instance jurisdiction:
 - (i) name, location and relevant contact information of the common court;
 - (ii) a copy of the legal instruments that establish the common court and a list of Parties to those legal instruments;
 - (iii) jurisdiction and function of the common court;
 - (iv) whether and how the common court could recognise and enforce judgments under the Convention; and
 - (v) other necessary information.

Any change to the membership or competence of the common court shall be subject to a new declaration.

[7 A Contracting State may declare that it shall not recognise or enforce judgments of a common court that is the object of a declaration under paragraph 5 in respect of any of the matters covered by that declaration. Such declaration for not recognising or enforcing a common court’s judgment is subject to provisions from paragraph 2 of Article 19.]

OR

[7 The declaration referred to in paragraph 5 shall have effect only between the Contracting State that made the declaration and other Contracting States that have declared their acceptance of the declaration.]]

Notes from the chair out of the Hong Kong SAR informal gathering

2 Uncertainty of the nature of the Court of Justice of the European Union (CJEU) as a common court or a court of a Contracting State to the future Convention was raised by some experts. In response, an EU expert, who attended the negotiation of the 2005 Choice of Court Convention, recalled that the amendments of the HCCH’s Statute, *i.e.*, allowing for Regional Economic Integration Organisations (REIO) to be Members of the Organisation, and the negotiation of the 2005 Choice of Court Convention took place in the same Diplomatic Session in 2005. According to the expert, the outcome of that Diplomatic Session was that the CJEU is a court of the REIO (here, the EU), which is recorded in the Explanatory Report of the Convention. A number of

tain nombre de questions et de préoccupations concernant la CJUE ont été abordées, notamment les problèmes du « profiteur » et de la réciprocité. Certains experts restent perplexes quant au statut de la CJUE.

3 Un autre thème abordé a été celui de la réciprocité, avec généralement trois points envisagés : i) la position de l'État qui relève d'un tribunal commun, qui s'attendra généralement à ce que ses jugements soient reconnus et exécutés à l'étranger au titre de la Convention ; ii) la position des autres États contractants à la Convention qui ne relèvent d'aucun tribunal commun, qui souhaiteront savoir comment leurs jugements seront reconnus et exécutés par l'État qui relève du tribunal commun ou par le tribunal commun lui-même ; et iii) si, lorsqu'un État contractant n'accepte pas les jugements d'un tribunal commun d'un autre État contractant, le mécanisme de réciprocité devrait permettre à ce dernier de refuser les jugements rendus, sur une matière analogue, par le premier État contractant.

4 Afin de répondre aux préoccupations en matière d'incertitudes et d'assurer la transparence, les experts présents sont convenus d'établir une Liste d'informations à fournir par tout État auteur d'une déclaration concernant son tribunal commun. Cette Liste est présentée dans le projet de proposition ci-dessus. Dans le même esprit que cette Liste d'informations, le Bureau Permanent (BP) propose de compiler des informations complémentaires concernant les tribunaux communs existants évoqués dans le Rapport explicatif préliminaire.

5 Certains experts ont jugé qu'il serait bon de distinguer, aux fins de traitement par la Convention, les tribunaux communs existants et futurs, bien que ce point de vue n'ait pas été partagé par tout le monde. Ces discussions ont clairement fait ressortir les incertitudes liées aux tribunaux communs, phénomène en perpétuelle évolution, comme sujet de préoccupation. Il a été jugé nécessaire de recueillir des informations plus détaillées sur les tribunaux communs qui seront établis à l'avenir ; ces informations revêtiront une importance capitale pour le traitement de ces tribunaux dans le cadre de la Convention, étant entendu que les incertitudes y afférentes sont plus importantes que celles relatives aux tribunaux communs existants au moment des négociations, que le BP et les délégations ont pu examiner au moyen de divers documents. Malgré les analyses disponibles, d'autres experts ont fait état de la nécessité d'obtenir également des informations complémentaires concernant les tribunaux communs existants.

6 Certains experts ont exprimé leurs inquiétudes quant aux « droits et obligations » qui incombent aux États qui ne relèvent d'aucun tribunal commun existant ou futur. Il pourrait en résulter un déséquilibre pour ces États ; ces derniers estiment supporter des obligations supplémentaires (notamment étudier et analyser ces tribunaux, et reconnaître ou exécuter leurs jugements) sans bénéficier de droits réciproques de la part de ces tribunaux. Ils estiment que le mécanisme d'acceptation (*opt-in*) pourrait s'avérer important et indispensable pour ces États, en ce qu'il leur permettrait d'accepter ou non les obligations et même les droits qui découlent des traités établissant des tribunaux communs, conformément à la *Convention de Vienne sur le droit des traités*. D'autres experts considèrent que les droits réciproques procèdent du respect, par les États contractants à la Convention qui disposent d'un tribunal commun, de leurs obligations conventionnelles quant à la reconnaissance et l'exécution de jugements provenant d'autres États contractants.

7 Concernant le mécanisme de refus (*opt-out*), il a été mis en exergue que des études supplémentaires sont nécessaires quant au délai applicable aux deux déclarations (la déclaration de transparence concernant l'art. 4(5) et (6) et la déclaration de refus), en cas d'adoption d'un mécanisme de refus, en particulier eu égard à la chronologie de ces deux déclarations. Certains experts ont proposé d'accorder une période plus longue pour la prise d'effet de la déclaration de transparence concernant l'article 4(5) et (6) que pour celle de la déclaration de refus.

8 D'autres options ont été mises en avant. Certains experts ont proposé d'adopter une disposition spécifique à la Juridiction unifiée du brevet (JUB) et à la Cour de justice Benelux ainsi que de rechercher des solutions pour d'autres tribunaux communs en vue de la Session diplomatique, en cas de besoin. Certains experts ont également proposé que la Convention n'aborde pas la question des futurs tribunaux communs, considérant que cela pourrait susciter des conditions plus propices à l'adoption du projet de Convention lors de la Session diplomatique. Certains experts ont indiqué qu'en cas de besoin, la Session diplomatique pourrait statuer sur les travaux futurs consacrés aux tribunaux communs qui seront établis à l'avenir. Certains experts ont jugé qu'il serait opportun d'examiner de manière distincte la position du Conseil privé (*Privy Council*) lors des travaux de la Session diplomatique, compte tenu des caractéristiques spécifiques de ce tribunal.

Remarques formulées après les dernières discussions

9 Les dernières discussions du Groupe de travail informel II se sont déroulées par courriels entre le 11 et le 15 avril 2019. Quelques remarques supplémentaires sont ressorties de ces échanges. Un expert a proposé que les discussions concernant le statut de la CJUE soient traduites dans le Rapport explicatif et que les États intéressés puissent se mettre d'accord sur une formulation qui serait ensuite présentée aux co-Rapporteurs. Quant à la suggestion susmentionnée d'une disposition spéciale portant sur la JUB et la Cour de justice Benelux, ce même expert a suggéré que cette disposition relève de la section de la future Convention consacrée à la propriété intellectuelle (que les États peuvent refuser ou à laquelle ils peuvent déroger), à condition que la propriété intellectuelle ne soit pas exclue de la future Convention.

Documents connexes

- Document préliminaire No 1 de décembre 2018 – Convention sur les jugements : Rapport explicatif préliminaire révisé²
- Document de travail No 254 de mai 2018 – Rapport du Groupe de travail informel V concernant les tribunaux communs (art. 21)³

² Établi par Francisco Garcimartín et Geneviève Saumier, Doc. prélim. No 1 de décembre 2018 à l'attention de la Vingt-deuxième session sur la reconnaissance et l'exécution des jugements étrangers (du 18 juin au 2 juillet 2019), voir Cahier 1, p. 10, du présent tome.

³ Doc. trav. No 254, Rapport du Groupe de travail informel 5 sur les tribunaux communs (art. 21), distribué (en anglais uniquement) en mai 2018, Commission spéciale sur la reconnaissance et l'exécution des jugements étrangers (du 24 au 29 mai 2018), voir Cahier 3, p. 294, du présent tome.

questions and concerns about the CJEU, including the free-rider problem and the reciprocity problem were discussed at this gathering. Some experts remain uncertain about the nature of the CJEU.

3 Another theme of the discussions was the reciprocity issue, with generally three points being considered: i) the position of the State party to a common court, which would expect its judgments to be recognised and enforced abroad under the Convention; ii) the position of other Contracting States to the Convention who are not party to a common court, which would require to know how their judgments would be recognised and enforced by the State which participates in the common court or by the common court itself; and iii) whether, if a Contracting State does not accept judgments from a common court of another Contracting State, the reciprocity mechanism would be to allow the refusal of judgments on the same subject matter from the first Contracting State in the Contracting State to the common court.

4 To address the uncertainty concerns and to provide transparency, the experts at the gathering agreed to establish a List of Information to be produced by the State making a declaration regarding its common court. The List is reflected in the draft proposal above. The Permanent Bureau (PB) is available to compile further information on existing common courts that are currently mentioned in the draft Explanatory Report, in line with the List of Information.

5 Some experts saw merits in distinguishing between the positions of existing and future common courts in their treatment in the Convention, although this view was not universally accepted. Uncertainty about common courts, as an evolving phenomenon, was a clear theme emerging during the discussions. It was considered that more detailed information on common courts established in the future would be required, and would indeed be critical for their treatment under the Convention since they present more uncertainties than those existing at the time of negotiation which have been analysed by the PB and the delegations through various papers. In spite of the available analyses, other experts recognised the need to obtain additional information concerning the existing common courts as well.

6 Some experts expressed concerns on the “obligations and rights” of States which do not participate in both existing and future common courts. Imbalance could be created for those States, because in their view, they bear extra obligations (including studying and analysing these courts, and to recognise or enforce common court judgments), while not having reciprocal rights from these courts. They expressed the view that the “opt-in” mechanism could be important and necessary for those States to decide whether to accept the obligations and even rights arising from the common court treaties, in line with the *Vienna Convention on the Law of Treaties*. Other experts expressed the view that reciprocal rights are provided by the Contracting States to the Convention that have common courts by complying with their Convention obligations to recognise and enforce judgments coming from other Contracting States.

7 Regarding the “opt-out” mechanism, it was pointed out that further study needs to be given to the timeframe for the two declarations (the transparency declaration concerning Art. 4(5) and (6) and the opt-out declaration) if an “opt-out” mechanism is to be adopted, in particular regarding the sequencing of the two declarations. Some experts suggested giving a longer period for a transparency declaration concerning Article 4(5) and (6) to take effect than for an opt-out declaration to take effect.

8 Other options were put forward. Some experts proposed making a special provision for the Unified Patent Court (UPC) and the Benelux Court of Justice, as well as finding a solution for additional common courts for the Diplomatic Session, if the need arises. It was also suggested by some experts that provision for future common courts could be left out of the Convention. A view was expressed that doing so might be more conducive to the adoption of the draft Convention in the Diplomatic Session. Some experts suggested that, if need be, the Diplomatic Session may decide on future work regarding common courts which are established in the future. Some experts found it appropriate that separate consideration of the position of the Privy Council could be given during the work of the Diplomatic Session, in light of the special features of that court.

Remarks after the last round of discussion

9 The last round of discussions within IWGII took place via email exchanges between 11 and 15 April 2019. A few additional remarks emerged from these exchanges. One expert suggested that the discussion on the nature of the CJEU be reflected in the Explanatory Report and that drafting of the specific text could be agreed by interested States and subsequently proposed to the *co-Rapporteurs*. Concerning the above-mentioned suggestion for a special provision for the UPC and the Benelux Court of Justice, the same expert proposed that such a special provision could be part of the intellectual property (IP) section of the future Convention (which States can derogate from or not opt in to), if IP would not be excluded from the future Convention.

Related documents

- Preliminary Document No 1 of December 2018 – Judgments Convention: Revised Draft Explanatory Report²
- Working Document No 254 of May 2018 – Report of informal working group V on common courts (Art. 21)³

² Drawn up by Francisco Garcimartin and Geneviève Saumier, Prel. Doc. No 1 of December 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), see Book 1, p. 11, of this tome.

³ Work. Doc. No 254, Report of informal working group 5 on common courts (Art. 21), distributed in May 2018, Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 May 2018), see Book 3, p. 294, of this tome.

- Document préliminaire No 9 d’octobre 2017 – Note concernant les « tribunaux communs » visés à l’article 22 du projet de Convention de février 2017⁴
- Document préliminaire No 7 d’avril 2019 – Note concernant les « tribunaux communs » visés à l’article 4(5) et 6 du projet de Convention de 2018⁵. Ce document contient une note explicative portant sur la nature et les travaux des tribunaux communs au sein de l’Union européenne (établi par l’Union européenne) en annexe II.

⁴ Établie par le Bureau Permanent, Doc. préél. No 9 d’octobre 2017 à l’attention de la Troisième réunion de la Commission spéciale sur la reconnaissance et l’exécution des jugements étrangers (du 13 au 17 novembre 2017) (voir chemin d’accès indiqué à la note 2).

⁵ Établie par le Bureau Permanent, Doc. préél. No 7 d’avril 2019 à l’attention de la Vingt-deuxième session sur la reconnaissance et l’exécution des jugements étrangers (du 18 juin au 2 juillet 2019), voir Cahier 1, p. 208, du présent tome.

- Preliminary Document No 9 of October 2017 – Note on “common courts” in Article 22 of the February 2017 draft Convention⁴
- Preliminary Document No 7 of April 2019 – Note on “common courts” in Article 4(5) and (6) of the 2018 draft Convention.⁵ This document comprises an explanatory paper on the nature and workings of common courts in the European Union (prepared by the European Union) in Annex II.

⁴ Drawn up by the Permanent Bureau, Prel. Doc. No 9 of October 2017 for the attention of the Third Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (13-17 November 2017) (see path indicated in note 2).

⁵ Drawn up by the Permanent Bureau, Prel. Doc. No 7 of April 2019 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), see Book 1, p. 209, of this tome.

Rapport du Groupe de travail informel III – Rapport avec d’autres instruments internationaux

ÉTABLI PAR LE PROFESSEUR KEISUKE TAKESHITA,
PRÉSIDENT DU GROUPE DE TRAVAIL INFORMEL III,
AVEC L’ASSISTANCE DU BUREAU PERMANENT

Document préliminaire No 9 d’avril 2019

Texte tiré des discussions du Groupe de travail informel III

Il convient de réviser comme suit les paragraphes 1, 2 et 3 de l’article 24 du projet de Convention sur les Jugements (ci-après, le « projet de Convention »)¹ :

1 La présente Convention doit être interprétée de façon qu’elle soit, autant que possible, compatible avec d’autres traités [ou instruments internationaux] en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n’affecte pas l’application par un État contractant d’un traité [ou de tout autre instrument international] conclu avant [l’entrée en vigueur de cette Convention pour cet État contractant] ~~[entre les Parties à cet instrument]~~.

3 La présente Convention n’affecte pas l’application par un État contractant d’un traité [ou de tout autre instrument international] conclu après [l’entrée en vigueur de cette Convention pour cet État contractant], ~~aux fins de en ce qui concerne la~~ reconnaissance ou ~~d]’~~exécution d’un jugement rendu par le tribunal d’un État contractant qui est également Partie à cet instrument. [Aucune disposition de l’autre instrument n’a d’incidence sur les obligations prévues à l’article 6 eu égard aux États contractants qui ne sont pas Parties à cet instrument.]

Note du président du Groupe de travail informel III

1 Le Groupe de travail informel III (ci-après, le « Groupe III ») s’est penché sur les questions relatives aux rapports entre le projet de Convention et d’autres instruments internationaux. Le Groupe III s’est concentré sur les rapports avec d’autres instruments internationaux multilatéraux² de sorte à faciliter les discussions concernant les questions politiques. Un résumé est présenté en annexe au présent Rapport.

2 Sur le fondement de cette analyse, il est proposé de supprimer la formule présentée entre crochets au para-

graphe 2. Les futurs États contractants au projet de Convention pourront appliquer les instruments antérieurs de la même manière qu’ils les appliquent actuellement. Cependant, le Groupe III a également indiqué qu’il conviendrait de discuter de manière plus approfondie de nécessaires restrictions.

3 Quant au paragraphe 3, il est proposé de remplacer les termes « aux fins de reconnaissance ou d’exécution » par « en ce qui concerne la reconnaissance ou l’exécution » de sorte à permettre aux États contractants d’appliquer un autre instrument ultérieur aux fins de refus de la reconnaissance et de l’exécution de jugements rendus par un tribunal d’un État contractant qui est aussi Partie audit instrument. Le Groupe III a également confirmé devoir analyser plus avant la question du parallélisme entre les paragraphes 3 et 4.

4 Selon certains participants, pour distinguer les instruments antérieurs (pour lesquels le para. 2 s’appliquera) des instruments postérieurs (pour lesquels le para. 3 s’appliquera), il conviendrait d’utiliser, au lieu de la date d’entrée en vigueur du projet de Convention pour un État contractant, la date de son adoption. À titre d’exemple, l’on pourrait faire face à un scénario où i) les États A et B sont des États contractants au projet de Convention et également Parties à un instrument bilatéral conclu après l’adoption du projet de Convention (2 juillet 2019) et ii) la conclusion de l’instrument bilatéral survient après l’entrée en vigueur du projet de Convention pour l’État A, mais avant son entrée en vigueur pour l’État B. En cas de conflit réel entre les deux instruments, en application des règles de l’actuel article 24, l’État A traitera l’instrument bilatéral comme le plus récent et appliquera le paragraphe 3, tandis que l’État B le traitera comme le plus ancien et appliquera le paragraphe 2. Compte tenu de l’article 6 du projet de Convention, cela impliquerait que l’État A pourrait être tenu de refuser la reconnaissance et l’exécution de jugements de l’État B qui sont incompatibles avec cet article, tandis que l’État B pourrait être tenu de reconnaître les jugements de l’État A au titre de l’instrument bilatéral, mêmes s’ils sont contraires à l’article 6 du projet de Convention. Afin d’éviter de telles divergences de traitement d’un instrument entre les États contractants, il est proposé de supprimer, aux paragraphes 2 et 3, la formule « l’entrée en vigueur [...] pour cet État contractant » afin de se fonder sur la date de l’adoption du projet de Convention pour distinguer les instruments antérieurs et postérieurs. Cela ne changerait évidemment rien le fait que des obligations ne peuvent découler du projet de Convention qu’une fois qu’il est entré en vigueur pour un État contractant et que des conflits ne sont susceptibles d’intervenir entre deux instruments que si ceux-ci sont en vigueur pour l’État concerné.

¹ Ci-après, le terme « projet de Convention » désigne le projet de Convention de 2018 sur la reconnaissance et l’exécution des jugements étrangers en matière civile ou commerciale, qui est publié comme Doc. trav. No 262 REV, Projet de Convention révisé proposé par le Comité de rédaction arrêté au 28 mai 2018, voir Cahier 3, p. 318, du présent tome.

² Le Groupe ne s’est intéressé à aucun traité bilatéral, l’on peut néanmoins résumer que les conflits structurels susceptibles de survenir entre ces derniers et le projet de Convention seraient les mêmes qu’avec les instruments multilatéraux analysés.

Report of informal working group III – Relationship with other international instruments

DRAWN UP BY PROFESSOR KEISUKE TAKESHITA,
CHAIR OF INFORMAL WORKING GROUP III, WITH
THE ASSISTANCE OF THE PERMANENT BUREAU

Preliminary Document No 9 of April 2019

Text derived from the informal working group III discussions

Paragraphs 1, 2 and 3 of Article 24 of the draft Judgments Convention (hereinafter, “DC”)¹ should be revised as follows:

1 This Convention shall be interpreted so far as possible to be compatible with other treaties [or international instruments] in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention [entered into force for that Contracting State] ~~has between Parties to that instrument.~~

3 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention [entered into force for that Contracting State] ~~for the purposes of obtaining as concerns the~~ recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

Note from the chair of informal working group III

1 Informal working group III (hereinafter, IWGIII) discussed issues concerning the relationship of the DC with other international instruments. IWGIII analysed the relationship with other individual multilateral² international instruments to facilitate the discussions on the policy issues. The summary of the relationship is annexed to this Report.

2 Based on the analysis, it is proposed that the bracketed words in paragraph 2 should be deleted. Future Contracting

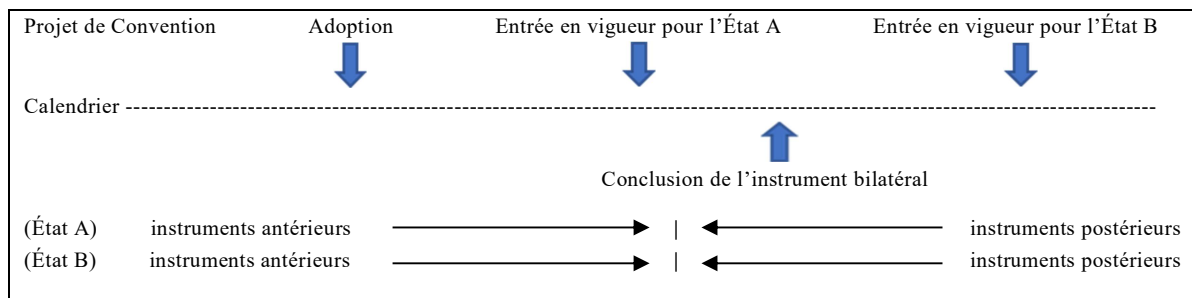
¹ Hereinafter the term DC is used to refer to the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, which is published as Work. Doc. No 262 REV, Revised draft Convention submitted by the Drafting Committee as of 28 May 2018, see Book 3, p. 318, of this tome.

² The group did not discuss any bilateral treaties, but it may be assumed that the structural conflicts which could arise with the DC would be the same as with the multilateral instruments which were analysed.

States of the DC may apply the earlier instruments in the same manner as they apply now. However, it was also noted in IWGIII that the necessity of restrictions should be discussed further.

3 Concerning paragraph 3, it is proposed that the words “for the purposes of obtaining” should be replaced by the words “as concerns the” to allow Contracting States to apply another later instrument also for the purpose of refusing recognition and enforcement of judgments given by a court of a Contracting State that is also a Party to that instrument. IWGIII also confirmed that the issue of parallelism between paragraphs 3 and 4 requires further analysis.

4 Some participants argued that, instead of the entry into force of the DC for a Contracting State, the conclusion of the DC should be used to distinguish the earlier instruments (para. 2 will be applied) from the later ones (para. 3 will be applied). For example, there may be a scenario where i) State A and State B are Contracting States of the DC and also Parties to a bilateral instrument concluded after the conclusion of the DC (2 July 2019) and ii) the conclusion of the bilateral instrument is after the entry into force of the DC for State A but before the entry into force of the DC for State B. According to the rules of the current Article 24, State A would treat the bilateral instrument as the later one and apply paragraph 3 in case of a real conflict with the DC, whereas State B would treat it as the earlier one and apply paragraph 2 in case of a real conflict. In light of Article 6 of the DC, this would mean that State A might have to refuse recognition and enforcement of judgments from State B which are incompatible with Article 6 of the DC while State B might have to recognise judgments from State A under the bilateral instrument even if they are incompatible with Article 6 of the DC. To avoid such discrepancies of the treatment of an instrument between Contracting States, it is proposed that the words “entered into force for that Contracting State” in paragraphs 2 and 3 should be deleted to use the time of the conclusion of the DC as the element to distinguish between earlier and later instruments. This would of course not change the fact that obligations can only be created by the DC as soon as it enters into force for a Contracting State, and conflicts between two instruments can only arise if both are in force for the State concerned.



5 En ce qui concerne la formule « ou de tout autre instrument international » libellée entre crochets aux paragraphes 2 et 3, le Groupe III n'a pas été en mesure d'aboutir à un consensus sur cette question politique. Il a donc décidé d'ajouter ces termes entre crochets au paragraphe 1, ajout nécessaire s'ils sont inclus aux paragraphes 2 et 3. Il est indispensable d'examiner plus avant d'autres options, notamment le mécanisme de déclaration actuellement prévu entre crochets au paragraphe 5.

ANNEXE

Résumé de l'analyse des rapports avec d'autres instruments internationaux

INTRODUCTION

1 Le Groupe III s'est penché sur le rapport entre le projet de Convention et d'autres instruments internationaux, notamment : i) la Convention de 2005¹, ii) la Convention de New York², iii) la Convention de Singapour³, iv) le Règlement Bruxelles I bis⁴, v) la Convention de Lugano⁵ et vi) la Convention de Minsk⁶. Le Groupe III a envisagé les éventuels conflits entre le projet de Convention et ces instruments ; tous ont/auront été conclus avant l'entrée en vigueur du projet de Convention. Par conséquent, l'on présume qu'en cas de conflit, l'article 24(2) s'appliquera au rapport avec ces instruments, à l'exception du Règlement Bruxelles I bis, pour lequel l'article 24(4) s'appliquera. Si l'on supprime la formule « l'entrée en vigueur [...] pour cet État contractant » aux paragraphes 2 et 3 et que la date de l'adoption du projet de Convention devient la date décisive pour distinguer les instruments antérieurs et postérieurs, c'est

le paragraphe 3 qui s'appliquera à la Convention de Singapour, puisqu'elle ne sera ouverte à la signature qu'après le 2 juillet 2019, date de l'adoption du projet de Convention.

2 Le Groupe de travail s'est intéressé au rapport entre le projet de Convention et d'autres instruments et, ce faisant, il a fondé son analyse sur une certaine interprétation établie uniquement aux fins de discussion au sein de celui-ci. Le Groupe tient à mettre en exergue que les discussions ne reflètent en aucun cas l'opinion des États dont sont ressortissants ses membres.

1 Convention de 2005

3 Comme l'indique le Rapport explicatif préliminaire⁷, le Groupe III a également confirmé qu'il n'y a pas de véritable conflit entre le projet de Convention et la Convention de 2005 grâce aux articles 7(1)(d) du projet de Convention et 9(g) de la Convention de 2005. Ainsi, l'article 24 du projet de Convention, à l'exception de son paragraphe 1, ne s'appliquera pas au rapport entre le projet de Convention et la Convention de 2005.

4 Le Groupe III a en outre évoqué un scénario dans lequel i) l'État d'origine et l'État requis sont des États contractants au projet de Convention, ii) l'État requis et l'État A sont Parties à la Convention de 2005, iii) un tribunal de l'État d'origine a rendu un jugement dans un cas particulier et iv) un tribunal de l'État A, choisi par les parties au litige au titre d'une clause exclusive d'élection de for, a aussi rendu un jugement dans la même affaire, incompatible avec le premier. Comme l'indique le paragraphe 423 du Rapport explicatif préliminaire, si le jugement de l'État d'origine a été rendu avant celui de l'État A, il semblerait que l'État requis ne soit tenu d'exécuter aucun des deux jugements en raison des articles 7(1)(d) du projet de Convention et 9(g) de la Convention de 2005. Le Groupe III a confirmé que l'État requis devait pouvoir déterminer, de manière discrétionnaire, si les motifs de refus aboutiraient effectivement au refus de reconnaître ou d'exécuter le jugement, étant entendu que les deux Conventions affirment que l'État requis « peut refuser ». Cependant, il a également été mis en avant qu'au vu de l'objectif des deux Conventions, à savoir promouvoir la reconnaissance et l'exécution des jugements, l'État requis ne serait pas libre de refuser la reconnaissance et l'exécution des deux jugements dans la situation décrite au paragraphe 423 du Rapport explicatif préliminaire. Si l'État requis exerce son pouvoir discrétionnaire et décide

¹ Convention de La Haye sur les accords d'élection de for (adoptée le 30 juin 2005).

² Convention des Nations Unies pour la reconnaissance et l'exécution des sentences arbitrales étrangères (New York, 1958).

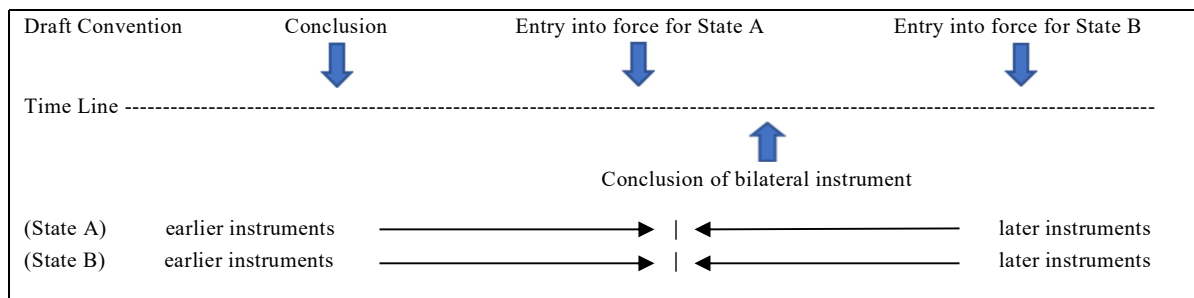
³ Convention des Nations Unies sur les accords de règlement internationaux issus de la médiation. La Convention de Singapour sera adoptée le 7 août 2019, autrement dit, après l'adoption du projet de Convention. Néanmoins, l'adoption de la Convention de Singapour interviendra avant l'entrée en vigueur du projet de Convention pour tout État contractant.

⁴ Règlement (UE) No 1215/2012 du Parlement européen et du Conseil du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (refonte), [2012] JO L 351/1.

⁵ Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (Lugano, 30 octobre 2007), [2007] JO L 339/3.

⁶ Convention relative à l'entraide judiciaire et aux relations judiciaires en matière civile, familiale et pénale (Minsk, 22 janvier 1993, telle qu'amendée le 28 mars 1997). Une traduction en français de la Convention se trouve à l'annexe du Doc. pré-l. No 27 d'avril 2005 à l'intention de la Vingtième session de juin 2005 sur la compétence, la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale, in *Actes et documents de la Vingtième session (2005)*, tome III, *Élection de for*, Anvers – Oxford – Portland, Intersentia, 2010, p. 230 à 270, à la p. 246.

⁷ Voir « Convention sur les jugements : Rapport explicatif préliminaire révisé », établi par Francisco Garcimartin et Geneviève Saumier, Doc. pré-l. No 1 de décembre 2018 à l'attention de la Vingt-deuxième session sur la reconnaissance et l'exécution des jugements étrangers (18 juin – 2 juillet 2019), voir Cahier 1, p. 10, du présent tome.



5 Concerning the bracketed words “or other international instrument” in paragraphs 2 and 3, IWGIII could not reach consensus on the policy of this issue. IWGIII added these words within brackets also in paragraph 1 as they are necessary if they are included in paragraphs 2 and 3. It is necessary to consider further various options including the declaration mechanism currently provided in paragraph 5 within square brackets.

ANNEX

Summary of the analysis of the relationship with other individual instruments

INTRODUCTION

1 In IWGIII, the relationships with other individual international instruments were discussed. The following instruments were analysed: i) the 2005 Convention,¹ ii) the New York Convention,² iii) the Singapore Convention,³ iv) the Brussels Ia Regulation,⁴ v) the Lugano Convention,⁵ and vi) the Minsk Convention.⁶ IWGIII discussed the possible conflicts between the draft Judgments Convention (“DC”) and these instruments. All of them were/would be concluded before the DC enters into force. Therefore, it was assumed that Article 24(2) would be applied to the relationship with other instruments except for the Brussels Ia Regulation, for which Article 24(4) would apply in case of conflict. If the words “entered into force for that Contracting State” are deleted from paragraphs 2 and 3 and the date of conclusion of the DC becomes the decisive date to distinguish between earlier and later instruments, the Singapore

Convention would be dealt with under paragraph 3 as it will be open for signature only after 2 July 2019 which is the date of conclusion of the DC.

2 The working group analysed the relationship with other instruments and in doing so it based its analysis on a certain interpretation that was merely for discussion purposes within IWGIII. The group wishes to highlight that discussions do not represent the views of the States of which participants of IWGIII are nationals.

1 2005 Convention

3 As stated in the draft Explanatory Report (“DER”),⁷ IWGIII also confirmed that there is no true conflict between the DC and the 2005 Convention because of Article 7(1)(d) of the DC and Article 9(g) of the 2005 Convention. Therefore, Article 24 of the DC, except for paragraph 1, will not apply to the relationship of the DC with the 2005 Convention.

4 IWGIII also discussed a scenario where i) the State of origin (“SO”) and the requested State (“RS”) are Contracting States of the DC, ii) the RS and State A are Parties to the 2005 Convention, iii) a court of the SO rendered a judgment for a certain dispute, and iv) a court of State A which was chosen by the parties to the dispute under an exclusive choice of court agreement also rendered an inconsistent judgment for the same dispute. As indicated in paragraph 423 of the DER, if the judgment of the SO was rendered earlier than that of State A, it seems that the RS would not be compelled to enforce either judgment because of Article 7(1)(d) of the DC and Article 9(g) of the 2005 Convention. IWGIII confirmed that it should be left to the discretion of the RS whether the ground for refusal will actually lead to the refusal of recognition or enforcement of a judgment as both Conventions provide that the RS “may refuse”. However, it was also pointed out that in light of the purpose of both Conventions to promote the recognition and enforcement of judgments, the RS would not be free to refuse recognition and enforcement of both judgments in the situation described in paragraph 423 of the DER. If the RS exercises its

¹ The Hague Convention on Choice of Court Agreements (concluded 30 June 2005).

² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

³ United Nations Convention on International Settlement Agreements Resulting from Mediation. The Singapore Convention will be concluded on 7 August 2019, i.e., after the DC will be concluded (2 July 2019). However, the conclusion of the Singapore Convention will still take place before the DC enters into force for any State.

⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.

⁵ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 30 October 2007), [2007] OJ L 339/3.

⁶ The Convention on legal assistance and legal relations in civil, family, and criminal matters (Minsk, 22 January 1993, as amended on 28 March 1997). An English translation of the Convention can be found in the Annex to Prel. Doc. No 27 of April 2005 for the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, pp. 231-271, at p. 247.

⁷ See “Judgments Convention: Revised Draft Explanatory Report”, drawn up by Francisco Garcimartin and Geneviève Saumier, Prel. Doc. No 1 of December 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), see Book 1, p. 11, of this tome.

de refuser la reconnaissance et l'exécution du jugement de l'État d'origine en application de l'article 7(1)(d) du projet de Convention, il ne peut refuser de reconnaître et d'exécuter celui de l'État A en vertu de l'article 9(g) de la Convention de 2005, considérant que le jugement de l'État d'origine ne remplit pas les conditions exigées pour sa reconnaissance dans l'État requis. L'État requis ne peut exercer son pouvoir discrétionnaire et refuser de reconnaître et d'exécuter le jugement de l'État A au titre de l'article 9(g) de la Convention de 2005 qu'à condition que le jugement de l'État d'origine remplisse les conditions fixées aux fins de sa reconnaissance dans l'État requis. Dans un tel scénario, il conviendrait d'appliquer les articles 26(1) de la Convention de 2005 et 24(1) du projet de Convention conformément à l'objectif des deux Conventions, à savoir, promouvoir la reconnaissance et l'exécution des jugements de leurs États contractants.

2 Convention de New York

5 Pour ce qui est du rapport entre la Convention de New York et le projet de Convention, il convient de souligner que ce dernier exclut de son champ d'application toutes matières liées à l'arbitrage et aux sentences arbitrales (art. 2(3) du projet de Convention). Comme l'indique le Rapport explicatif préliminaire⁸, l'État requis peut refuser la reconnaissance et l'exécution d'un jugement prononcé dans un autre État si la procédure dans cet État était contraire à une convention d'arbitrage. Il n'y a donc pas de conflit entre le projet de Convention et la Convention de New York. Après l'entrée en vigueur du projet de Convention pour un État contractant, la Convention de New York s'appliquera de la même manière qu'elle s'applique aujourd'hui.

6 À titre d'exemple, l'on pourrait faire face à un scénario dans lequel i) l'État d'origine et l'État requis sont des États contractants au projet de Convention et l'État requis et l'État A sont Parties à la Convention de New York, ii) deux parties privées à un contrat commercial ont conclu une convention d'arbitrage désignant l'État A comme le siège de l'arbitrage et iii) il existe à la fois une sentence arbitrale fondée sur la convention d'arbitrage et un jugement incompatible rendu par un tribunal de l'État d'origine. Dans ce scénario, l'État requis serait tenu de reconnaître et d'exécuter le jugement de l'État d'origine en application du projet de Convention et de reconnaître et d'exécuter la sentence arbitrale rendue dans l'État A en vertu de la Convention de New York. Néanmoins, l'article 2(3) du projet de Convention permet à l'État requis de se soustraire de son obligation de reconnaître et d'exécuter le jugement au titre du projet de Convention, la sentence arbitrale sera alors reconnue conformément à la Convention de New York. Au surplus, dans l'éventualité où la formule « entre les Parties à cet instrument » libellée entre crochets à l'article 24(2) serait supprimée, cet article ferait également prévaloir la Convention de New York dans le cas où un tribunal estimerait par erreur qu'il y a un conflit entre les deux traités (ou si les délégations décidaient, dans le cadre de la Session diplomatique, qu'une solution fondée sur l'art. 2(3) ne suffit pas).

3 Convention de Singapour

7 Au sujet de la Convention de Singapour, le Groupe III suppose que l'État requis n'a pas d'obligation conventionnelle réciproque à l'égard d'une autre Partie à celle-ci, puisqu'elle s'appliquera dès que l'État requis en deviendra

Partie et qu'un accord de règlement sera présenté dans cet État aux fins de reconnaissance et d'exécution. Dans cette situation, l'État requis n'est tenu d'exécuter les accords de règlement qui relèvent du champ d'application de la Convention de Singapour qu'au titre d'une obligation conventionnelle fondée sur le principe *pacta sunt servanda*.

8 Dans un scénario où l'État d'origine et l'État requis sont des États contractants au projet de Convention et que ce dernier est également Partie à la Convention de Singapour, une partie au litige (le créancier sur jugement) peut demander la reconnaissance et l'exécution d'un jugement de l'État d'origine au titre du projet de Convention et l'autre partie (le débiteur sur jugement) peut s'y opposer au motif qu'il est contraire à l'accord de règlement exécutoire au titre de la Convention de Singapour⁹. Si l'on part du principe que l'article 3(2) de la Convention de Singapour s'applique également à la procédure d'exequatur/d'exécution, celle-ci exigerait que l'État requis permette au débiteur sur jugement d'invoquer l'accord de règlement et de prouver que la question a déjà été réglée. Toutefois, la Convention de Singapour n'oblige pas l'État requis à refuser l'exécution du jugement. La conséquence doit être déterminée en fonction de la loi interne de l'État requis (y compris tout traité en vigueur dans cet État). Par conséquent, l'État requis peut exécuter un jugement au titre du projet de Convention sans violer ses obligations découlant de la Convention de Singapour. Dans le même temps, l'État requis peut également refuser d'exécuter le jugement en vertu de l'article 24(2) du projet de Convention si l'État d'origine est également Partie à la Convention de Singapour. Si l'État d'origine n'est pas Partie à la Convention de Singapour, l'État requis ne peut refuser d'exécuter le jugement, à moins que la formule « entre les Parties à cet instrument » libellée entre crochets ne soit supprimée de l'article 24(2).

4 Règlement Bruxelles I bis

9 Les obligations qui découlent du Règlement Bruxelles I bis (ci-après, le « Règlement ») en matière de reconnaissance et d'exécution des jugements sont les suivantes : i) reconnaître et exécuter un jugement émanant d'un autre État membre de l'UE et ii) refuser de reconnaître et d'exécuter un jugement émanant d'un autre État membre de l'UE si l'un des motifs de refus prévus à la section 3 du chapitre III du Règlement trouve à s'appliquer. L'obligation visée au point i) peut entrer en conflit avec l'obligation internationale au titre du projet de Convention de refuser de reconnaître et d'exécuter un jugement rendu par un État contractant (qui est également un État membre de l'UE). Néanmoins, cette obligation est uniquement prévue à l'article 6 du projet de Convention qui a trait aux chefs de compétence exclusive. La reconnaissance et l'exécution de jugements qui ne sont pas susceptibles d'être reconnus et exécutés au titre du projet de Convention devraient également être refusées en application de l'article 45(1)(e)(ii) du Règlement (qui renvoie aux chefs de compétence exclusive directs équivalents à ceux visés à l'art. 24(1) et (4)). Il n'y a donc pas de conflit entre le projet de Convention et le Règlement sur ce point¹⁰. L'obligation énoncée au point ii) de refuser la reconnaissance et l'exécution d'un jugement d'un autre État membre de l'UE en application du Règle-

⁸ Para. 67 du Rapport explicatif préliminaire.

⁹ Cf. para. 416 à 419 du Rapport explicatif préliminaire.

¹⁰ L'obligation de reconnaître et d'exécuter un jugement d'un État membre de l'UE (État A) peut également entrer en conflit avec l'obligation internationale découlant du projet de Convention de reconnaître et d'exécuter un jugement rendu par un autre État contractant (État d'origine qui peut ou non être un État membre de l'UE) si le premier jugement est contraire au second. Néanmoins, il n'y aurait pas de véritable conflit entre ces deux instruments à cet égard, en raison des art. 7(1)(d) du projet de Convention et 45(1)(d) du Règlement.

discretion to refuse recognition or enforcement of the judgment of the SO under Article 7(1)(d) of the DC, the RS cannot refuse recognition and enforcement of the judgment of State A under Article 9(g) of the 2005 Convention because the judgment of the SO does not meet the conditions necessary for its recognition in the RS. The RS can exercise its discretion to refuse recognition and enforcement of the judgment of State A under Article 9(g) of the 2005 Convention only if the judgment of the SO meets the conditions necessary for its recognition in the RS. For this scenario, Article 26(1) of the 2005 Convention and Article 24(1) of the DC should be applied in accordance with the objective of both Conventions which is to promote the recognition and enforcement of judgments of their Contracting States.

2 *New York Convention*

5 Concerning the relationship with the New York Convention, it should be highlighted that the DC excludes all matters relating to arbitration and arbitral awards from its scope (Art. 2(3) of the DC). As pointed out in the DER,⁸ the RS may refuse the recognition or enforcement of a judgment given in another Contracting State of the DC if the proceedings in the SO were contrary to an arbitration agreement. Hence, there is no conflict between the DC and the New York Convention. After the DC enters into force for a Contracting State, the New York Convention would be applied as it is applied now.

6 For example, there might be a scenario where i) the SO and the RS are Contracting States of the DC, and the RS and State A are Parties to the New York Convention, ii) two private parties to a commercial contract concluded an arbitration agreement identifying State A as the seat of arbitration, and iii) there are both an arbitral award based on the arbitration agreement and a judgment by a court of the SO which is inconsistent with the arbitral award. In this scenario, the RS would be obliged towards the SO to recognise and enforce the judgment under the DC, and towards State A to recognise and enforce the arbitral award under the New York Convention. However, Article 2(3) of the DC allows the RS to avoid its obligation to recognise and enforce the judgment under the DC, and the arbitral award would be recognised and enforced under the New York Convention. In addition, Article 24(2) would also give precedence to the New York Convention if the bracketed words “as between Parties to that instrument” are deleted from the paragraph where a court mistakenly assumes that there is a conflict between the two treaties (or where delegations decide at the Diplomatic Session that a solution based on Art. 2(3) is not sufficient).

3 *Singapore Convention*

7 Under the Singapore Convention, IWGIII assumes that the RS does not have a reciprocal treaty obligation towards another Party to the Singapore Convention because the Convention would apply as soon as the RS is a Party to it and a

⁸ Para. 67 of the DER.

mediated settlement agreement is presented in the RS for recognition and enforcement. In that situation, the RS is only bound by a treaty obligation based on *pacta sunt servanda* to enforce settlement agreements which fall under the scope of application of the Singapore Convention.

8 In a scenario where the SO and the RS are Contracting States to the DC and the RS is a Party to the Singapore Convention, a party to a dispute (judgment creditor) may seek recognition and enforcement of a judgment of the SO under the DC and the other party (judgment debtor) may object to the enforcement on the grounds that it conflicts with a settlement agreement which is enforceable under the Singapore Convention.⁹ If one assumes that Article 3(2) of the Singapore Convention also applies to *exequatur*/enforcement proceedings, the Singapore Convention would require the RS to allow the judgment debtor to invoke the settlement agreement and prove that the matter has already been resolved. However, the Singapore Convention does not oblige the RS to refuse enforcement of the judgment. The consequence is to be determined under the national law of the RS (including any treaties in force in the RS). Therefore, the RS may enforce the judgment under the DC without breaching the obligation under the Singapore Convention. At the same time, the RS may also refuse enforcement of the judgment according to Article 24(2) of the DC if the SO is also a Party to the Singapore Convention. If the SO is not a Party to the Singapore Convention, the RS may not refuse enforcement of the judgment unless the bracketed words “as between Parties to that instrument” in Article 24(2) of the DC are removed.

4 *Brussels Ia Regulation*

9 The obligations under the Brussels Ia Regulation (hereinafter referred to as “the Regulation”) concerning recognition and enforcement of judgments are i) to recognise and enforce a judgment of another EU Member State and ii) to refuse recognition and enforcement of a judgment of another EU Member State if there is a ground for refusal provided in Chapter III, Section 3 of the Regulation. The obligations mentioned under point i) may conflict with the international obligation under the DC to refuse recognition and enforcement of a judgment rendered by a Contracting State (which is also an EU Member State). However, such obligations are provided only in Article 6 of the DC relating to exclusive grounds of jurisdiction. Those judgments which are not eligible for recognition and enforcement under the DC shall also be refused recognition and enforcement according to Article 45(1)(e)(ii) (which refers to the corresponding exclusive direct jurisdiction rules in Art. 24(1) and (4)) of the Regulation. Therefore, there is no conflict between the DC and the Regulation in this respect.¹⁰ The obligations mentioned under point ii) to refuse recognition and enforcement of a judgment of another EU Member State under the Regu-

⁹ Cf. paras 416-419 of the DER.

¹⁰ The obligation to recognise and enforce a judgment by an EU Member State (State A) may also conflict with the international obligation under the DC to recognise and enforce a judgment rendered by another Contracting State (SO, which may or may not be an EU Member State) if the former judgment is irreconcilable with the latter. However, there would be no true conflict between the two instruments in this respect because of Art. 7(1)(d) of the DC and Art. 45(1)(d) of the Regulation.

ment peut entrer en conflit avec l'obligation internationale au titre du projet de Convention de reconnaître et d'exécuter le jugement. L'obligation énoncée au point ii) est prévue à l'article 45 du Règlement. En particulier, de réels conflits sont possibles lorsqu'un jugement en matière de baux ou d'assurance est en jeu.

10 L'article 6(c) du projet de Convention ne s'applique qu'aux jugements portant sur des baux de plus de six mois. Tout jugement concernant un bail de moins de six mois est soumis aux règles générales du projet de Convention et doit être reconnu et exécuté au titre de celui-ci si l'un des chefs de compétence visés à l'article 5(1) trouve à s'appliquer (et qu'aucun des motifs de refus visés à l'art. 7 ne s'applique). Cependant, l'article 24(1) du Règlement s'applique aussi aux jugements portant sur des baux de moins de six mois. En l'occurrence, il y a deux chefs de compétence possibles (le lieu de la propriété louée OU le domicile du défendeur, à condition que le locataire (« L ») soit une personne physique et que L et le propriétaire (« P ») soient domiciliés dans le même État membre de l'UE), qui sont tous les deux des chefs de compétence exclusive. Au titre de l'article 45(1)(e)(ii), un autre État membre de l'UE est tenu de refuser de reconnaître et d'exécuter un jugement lorsqu'il y a violation de l'article 24(1) du Règlement. Ainsi, si les États membres de l'UE étaient tenus d'appliquer a) le Règlement, mais également b) le projet de Convention, un conflit pourrait naître de la situation qui suit. L est domicilié et réside habituellement en France et loue un bien en Belgique. P est domicilié en Allemagne et intente une action en justice contre L en France. Le bail porte sur une durée de moins de six mois. En application du projet de Convention, ce n'est pas l'article 6, mais l'article 5(1)(a) qui s'applique puisque P a intenté une action contre L à l'endroit de la résidence habituelle de ce dernier, en France. La Belgique est tenue de reconnaître et d'exécuter le jugement au titre du projet de Convention. Quant au Règlement, l'article 24 s'applique et la reconnaissance et l'exécution du jugement français doivent être refusées en application de l'article 45(1)(e)(ii) puisqu'il est contraire au chef de compétence exclusive énoncé dans le Règlement. Un réel conflit peut survenir dans une telle situation.

11 En ce qui concerne un jugement en matière d'assurance, la règle fondamentale contenue dans le Règlement tient au fait que la personne assurée doit être poursuivie à l'endroit de son domicile. Si elle est poursuivie ailleurs (sans qu'aucune dérogation visée à la section 3 ne le prévoit), alors l'article 45(1)(e)(i) du Règlement implique que tout État membre de l'UE est tenu de refuser la reconnaissance et l'exécution du jugement à son encontre. Le projet de Convention ne prévoit aucune règle spécifique visant à protéger les personnes assurées et l'article 5(1) s'appliquera au jugement. Si l'un des fondements visés à l'article 5 (par ex., l'art. 5(1)(g)) trouve à s'appliquer, une obligation s'imposera alors à l'État requis membre de l'UE qui sera tenu d'exécuter le jugement en application du projet de Convention, bien que le Règlement l'interdise. Un réel conflit peut alors survenir eu égard aux contrats d'assurance.

12 En outre, le Groupe III a estimé que la survenance d'un conflit entre le Règlement et le projet de Convention en matière de contrats de consommation ou de travail était relativement peu probable ; néanmoins, en fonction de l'interprétation future de ces deux instruments, cela ne doit pas être totalement exclu.

13 L'actuel article 24(4) résoudra de manière exhaustive n'importe quelle difficulté en ce qu'il permet, dans les relations entre les États membres de l'UE, de faire prévaloir le Règlement en ce qui concerne les jugements émanant d'États

membres de l'UE. Le Groupe III a confirmé que l'actuel article 24(4) est en effet nécessaire pour régler les réels conflits entre le projet de Convention et le Règlement.

5 Convention de Lugano

14 Considérant que les règles portant sur la reconnaissance et l'exécution des jugements contenues dans la Convention de Lugano sont semblables à celles du Règlement, la majeure partie de l'analyse susmentionnée vaut aussi pour le rapport entre le projet de Convention et la Convention de Lugano¹¹. En ce qui concerne les jugements en matière de baux ou d'assurance, de réels conflits entre ces deux instruments sont possibles. Quant aux contrats de consommation, un conflit d'obligations internationales est peu probable, mais ne devrait tout de même pas être totalement exclu, en fonction de la future interprétation de ces deux instruments.

15 L'actuel article 24(2) résout n'importe quelle difficulté en ce qu'il permet, dans les rares cas de conflit, de faire prévaloir la Convention de Lugano. Et ce, que la formule « entre les Parties à cet instrument » soit ajoutée ou non ; en effet, la Convention de Lugano ne traite pas de jugements émanant d'États qui ne sont pas Parties à celle-ci. Ainsi, tous les conflits recensés ne concerneraient que des situations dans lesquelles tous les États impliqués sont Parties à la Convention de Lugano.

6 Convention de Minsk

16 L'article 82 de la Convention de Minsk énonce que la « Convention n'affecte pas les dispositions des autres traités internationaux dont les États contractants sont signataires ». On ne sait pas vraiment si la formule « sont signataires » renvoie uniquement aux accords internationaux auxquels les États contractants étaient déjà Parties au moment où ils ont adhéré à la Convention de Minsk ou si cela englobe les accords internationaux qu'ils concluent ou auxquels ils adhèrent *a posteriori*. Dès lors, on ne sait pas si cette disposition donnerait la prévalence au projet de Convention à venir¹². Si tel n'est pas le cas, la Convention de Minsk l'emporterait conformément à l'article 24(2) du projet de Convention dans l'éventualité où un réel conflit surviendrait entre ces deux instruments. Si, en revanche, l'article 82 de la Convention de Minsk s'applique aussi aux accords internationaux conclus postérieurement par les États contractants à la Convention de Minsk, autrement dit, après leur adhésion à cette dernière, aucune des Conventions n'affecterait l'autre. Le tribunal de l'État requis serait en mesure d'appliquer l'une ou l'autre des Conventions et il n'y aurait pas de réel conflit entre elles.

17 Le rapport entre ces deux instruments a été évoqué en partant du principe que la Convention de Minsk n'affecte en rien les accords internationaux, sous réserve que les Parties à celle-ci fussent déjà Parties à ces accords au moment où elles ont adhéré à la Convention de Minsk. Si le projet de Convention et la Convention de Minsk sont en principe compatibles, un scénario de conflit réel est envisageable. Par exemple, si i) l'État d'origine et l'État requis sont Parties à la Convention de Minsk et que l'État d'origine, l'État requis et l'État A sont tous des États contractants au projet de Convention, ii) et que l'État d'origine a

¹¹ Les jugements portant sur les contrats individuels de travail représentent l'exception. Rien dans la Convention de Lugano n'oblige à refuser de reconnaître et d'exécuter un jugement émanant d'un autre État partie à cette Convention rendu en violation des chefs de compétence en matière de contrat individuel de travail.

¹² Doc. pré-l. No 27 d'avril 2005 (*op. cit.* note 6), section V-1.

lation may conflict with the international obligation under the DC to recognise and enforce the judgment. The obligations mentioned under point ii) under the Regulation are provided in Article 45. In particular, real conflicts are possible where a judgment on tenancies or on insurance is at issue.

10 Article 6(c) of the DC only applies to judgments on tenancies of more than six months. A judgment on a tenancy of less than six months is subject to the general rules of the DC, and it must be recognised and enforced under the DC if one of the jurisdictional grounds in Article 5(1) is met (and there is no ground for refusal in Art. 7). However, Article 24(1) of the Regulation also applies to tenancies of less than six months. Here, there are the two alternative jurisdictions (the situs of the property rented, OR the domicile of the defendant, provided that the tenant (“T”) is a natural person and both T and the landlord (“L”) are domiciled in the same EU Member State), both of which are exclusive. Under Article 45(1)(e)(ii), another EU Member State must refuse recognition and enforcement where Article 24(1) of the Regulation has been breached. Therefore, if the EU Member States had to apply a) the Regulation but also b) the DC, a conflict could arise in the following situation. T is domiciled and habitually resident in France, and he/she takes a tenancy of a property in Belgium. L is domiciled in Germany. L sues T in France. The tenancy is for less than six months. Under the DC, not Article 6 but Article 5(1)(a) applies because L has sued T in T’s habitual residence, France. Belgium is obliged to recognise and enforce the judgment under the DC. Under the Regulation, Article 24 applies, and the French judgment must be refused recognition or enforcement according to Article 45(1)(e)(ii) because the judgment conflicts with an exclusive jurisdiction rule under the Regulation. A real conflict may arise in this situation.

11 Concerning a judgment on insurance, the basic rule in the Regulation is that the insured person must be sued in his/her domicile. If he/she is sued elsewhere (without a Section 3 derogation permitting it), then Article 45(1)(e)(i) of the Regulation means an EU Member State must refuse recognition and enforcement of the judgment against him/her. There are no special rules in the DC to protect insured persons and Article 5(1) will be applied to the judgment. If an Article 5 ground (e.g., Art. 5(1)(g)) applies, then there will be an obligation on the requested EU Member State to enforce the judgment under the DC even though the Regulation forbids it. A real conflict may thus also arise in relation to insurance contracts.

12 In addition, IWGIII concluded that a conflict between the Regulation and the DC in matters relating to a consumer or employment contract is unlikely but, depending on the future interpretation of both instruments, not to be fully excluded.

13 The current Article 24(4) will comprehensively solve any difficulties as it allows, in the relations between EU Member States, to give precedence to the Regulation as far as judgments from EU Member States are concerned. IWGIII

confirmed that the current Article 24(4) is indeed necessary to deal with those real conflicts between the DC and the Regulation.

5 *Lugano Convention*

14 Because the rules on recognition and enforcement of judgments in the Lugano Convention are similar to those of the Regulation, the main part of the above analysis on the relationship of the DC with the Regulation also applies to the relationship with the Lugano Convention.¹¹ Concerning judgments on tenancies or on insurance, real conflicts between the two instruments would be possible. Concerning consumer contracts, a conflict of international obligations is unlikely but, depending on the future interpretation of both instruments, not to be fully excluded.

15 The current Article 24(2) solves any difficulties as it allows to give precedence to the Lugano Convention in the few cases of conflict. This applies whether or not the words “as between Parties to that instrument” are added because the Lugano Convention does not deal with judgments from States which are not Parties to the Lugano Convention. Therefore, all conflicts identified would only concern situations where all States involved are Parties to the Lugano Convention.

6 *Minsk Convention*

16 Article 82 of the Minsk Convention provides that the Minsk “Convention shall not affect the provisions of other international agreements to which the Contracting State are parties”. It is not clear whether “are parties” only refers to international agreements to which the Contracting States are already Parties at the time they join the Minsk Convention, or also to international agreements they conclude or join subsequently. Therefore, it is unclear whether this provision would also give precedence to the DC yet to be concluded.¹² If it does not, the Minsk Convention would prevail due to Article 24(2) of the DC in case of a real conflict between the two Conventions. If, on the other hand, Article 82 of the Minsk Convention also applies to international agreements which the Contracting Parties to the Minsk Convention join only later, *i.e.*, after joining the Minsk Convention, each Convention would leave the other Convention unaffected. The court of the RS would be able to apply either one of the Conventions, and there would be no real conflict between them.

17 The relationship was discussed on the assumption that the Minsk Convention only leaves international agreements unaffected if the Parties to the Minsk Convention were already Parties at the time they joined the Minsk Convention. Although the DC and the Minsk Convention are usually compatible, a scenario of a real conflict is possible. For example, if i) the SO and the RS are Parties to the Minsk Convention and the SO, the RS and State A are Contracting States of the DC, ii) and the SO rendered a judgment on long-

¹¹ Judgments relating to individual contracts of employment constitute the exception. There is no obligation under the Lugano Convention to refuse recognition and enforcement of a judgment from another Lugano State which was given in violation of the jurisdiction rules in matters relating to individual contracts of employment.

¹² Prel. Doc. No 27 of April 2005 (*op. cit.* note 6), section V-1.

rendu un jugement concernant un bail immobilier à long terme eu égard à un immeuble situé dans l'État A, l'État requis pourrait être tenu de reconnaître et d'exécuter le jugement au titre de la Convention de Minsk, tandis que l'article 6(c) du projet de Convention exige au contraire qu'il refuse considérant que l'État A dispose d'une compétence exclusive en la matière en vertu du droit interne. Dans le cadre de ce scénario, l'argument suivant a été exprimé : l'État requis peut appliquer la Convention de Minsk, à condition que la formule « entre les Parties à cet instrument » visée à l'article 24(2) soit supprimée. En cas de maintien de la formule entre crochets, l'État requis serait tenu de refuser la reconnaissance et l'exécution du jugement en application du projet de Convention étant entendu que l'État A est visé par le jugement, mais n'est pas Partie à la Convention de Minsk. Ainsi, l'application de la Convention de Minsk n'interviendrait pas, en l'espèce, entre des Parties à celle-ci. En cas de suppression de la formule entre crochets, la Convention de Minsk l'emporterait ; on peut néanmoins raisonnablement penser que l'État d'origine ne peut s'attendre à ce que l'État requis reconnaisse et exécute son jugement au titre de ladite Convention, considérant l'adhésion des trois parties concernées en l'espèce (État d'origine, État requis et État A) au projet de Convention.

OBSERVATIONS FINALES

18 Cette analyse a permis de mettre en lumière de réels conflits entre le projet de Convention et d'autres instruments. Par conséquent, le Groupe III a jugé que l'article 24(2) et (4) était nécessaire pour résoudre ces conflits. Il est également parvenu à un consensus concernant la suppression de la formule présentée entre crochets à l'article 24(2) : « entre les Parties à cet instrument ». Cette suppression permet de faire prévaloir les instruments antérieurs, en particulier, la Convention de New York. Cela facilitera les choses pour les États qui souhaitent devenir des États contractants au projet de Convention. Le Groupe III n'a, pour l'heure, recensé aucun problème sérieux susceptible de découler de la suppression proposée, bien qu'il convienne d'étudier plus avant la nécessité de restrictions quant à l'application d'instruments antérieurs.

term tenancy of immovable property situated in State A, it may be necessary for the RS to recognise and enforce the judgment under the Minsk Convention, whereas Article 6(c) of the DC requires the RS to refuse recognition and enforcement because State A has exclusive jurisdiction on the matter under its national law. For this scenario, the following argument was voiced: the RS may apply the Minsk Convention if the bracketed words “as between Parties to that instrument” in Article 24(2) are deleted. If the bracketed words are maintained, it would be necessary for the RS to refuse recognition and enforcement of the judgment under the DC because State A is concerned by the judgment but it is not a Party to the Minsk Convention and, as a result, the application of the Minsk Convention would not be regarded as between Parties to the Minsk Convention in this case. If the bracketed words are deleted, the Minsk Convention would have precedence, although it seems reasonable to think that the SO cannot expect the RS to recognise and enforce its judgment under the Minsk Convention because of the conclusion of the DC between all three States involved here (SO, RS and State A).

FINAL REMARKS

18 Through the analysis, some real conflicts between the DC and other individual instruments were acknowledged. Therefore, IWGIII concluded that Article 24(2) and (4) is necessary to resolve those conflicts. IWGIII also reached consensus on the deletion of the bracketed words “as between Parties to that instrument” in Article 24(2). This deletion gives precedence to earlier instruments, in particular the New York Convention, and would make it easier for States to become Contracting States of the DC. IWGIII did not identify any serious problems which might be caused by the suggested deletion at this point, though the necessity of restrictions for the application of earlier international instruments should be discussed further.

Rapport du Groupe de travail informel III – Rapport avec d’autres instruments internationaux

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Texte tiré des discussions du Groupe de travail informel III

Il convient de réviser comme suit les paragraphes 1, 2 et 3 de l’article 24 du projet de Convention sur les Jugements (ci-après, le « projet de Convention »)¹ :

1 La présente Convention doit être interprétée de façon qu’elle soit, autant que possible, compatible avec d’autres traités [ou instruments internationaux] en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n’affecte pas l’application par un État contractant d’un traité [ou de tout autre instrument international] conclu avant [l’entrée en vigueur de cette Convention pour cet État contractant] ~~[entre les Parties à cet instrument]~~.

3 La présente Convention n’affecte pas l’application par un État contractant d’un traité [ou de tout autre instrument international] conclu après [l’entrée en vigueur de cette Convention pour cet État contractant], ~~aux fins de en ce qui concerne la~~ reconnaissance ou ~~d]’~~exécution d’un jugement rendu par le tribunal d’un État contractant qui est également Partie à cet instrument. [Aucune disposition de l’autre instrument n’a d’incidence sur les obligations prévues à l’article 6 eu égard aux États contractants qui ne sont pas Parties à cet instrument.]

Note du président du Groupe de travail informel III

1 Le Groupe de travail informel III (ci-après, le « Groupe III ») s’est penché sur les questions relatives aux rapports entre le projet de Convention et d’autres instruments internationaux. Le Groupe III s’est concentré sur les rapports avec d’autres instruments internationaux multilatéraux² de sorte à faciliter les discussions concernant les questions politiques. Un résumé est présenté en annexe au présent Rapport.

2 Sur le fondement de cette analyse, il est proposé de supprimer la formule présentée entre crochets au para-

graphe 2. Les futurs États contractants au projet de Convention pourront appliquer les instruments antérieurs de la même manière qu’ils les appliquent actuellement. Cependant, le Groupe III a également indiqué qu’il conviendrait de discuter de manière plus approfondie de nécessaires restrictions.

3 Quant au paragraphe 3, il est proposé de remplacer les termes « aux fins de reconnaissance ou d’exécution » par « en ce qui concerne la reconnaissance ou l’exécution » de sorte à permettre aux États contractants d’appliquer un autre instrument ultérieur aux fins de la reconnaissance et de l’exécution de jugements rendus par un tribunal d’un État contractant qui est aussi Partie audit instrument. Le Groupe III a également confirmé devoir analyser plus avant la question du parallélisme entre les paragraphes 3 et 4.

4 Selon certains participants, pour distinguer les instruments antérieurs (pour lesquels le para. 2 s’appliquera) des instruments postérieurs (pour lesquels le para. 3 s’appliquera), il conviendrait d’utiliser, au lieu de la date d’entrée en vigueur du projet de Convention pour un État contractant, la date de son adoption. À titre d’exemple, l’on pourrait faire face à un scénario où i) les États A et B sont des États contractants au projet de Convention et également Parties à un instrument bilatéral conclu après l’adoption du projet de Convention (2 juillet 2019) et ii) la conclusion de l’instrument bilatéral survient après l’entrée en vigueur du projet de Convention pour l’État A, mais avant son entrée en vigueur pour l’État B. En cas de conflit réel entre les deux instruments, en application des règles de l’actuel article 24, l’État A traitera l’instrument bilatéral comme le plus récent et appliquera le paragraphe 3, tandis que l’État B le traitera comme le plus ancien et appliquera le paragraphe 2. Compte tenu de l’article 6 du projet de Convention, cela impliquerait que l’État A pourrait être tenu de refuser la reconnaissance et l’exécution de jugements de l’État B qui sont incompatibles avec cet article, tandis que l’État B pourrait être tenu de reconnaître les jugements de l’État A au titre de l’instrument bilatéral, mêmes s’ils sont contraires à l’article 6 du projet de Convention. Afin d’éviter de telles divergences de traitement d’un instrument entre les États contractants, il est proposé de supprimer, aux paragraphes 2 et 3, la formule « l’entrée en vigueur [...] pour cet État contractant » afin de se fonder sur la date de l’adoption du projet de Convention pour distinguer les instruments antérieurs et postérieurs. Cela ne changerait évidemment rien le fait que des obligations ne peuvent découler du projet de Convention qu’une fois qu’il est entré en vigueur pour un État contractant et que des conflits ne sont susceptibles d’intervenir entre deux instruments que si ceux-ci sont en vigueur pour l’État concerné.

¹ Ci-après, le terme « projet de Convention » désigne le projet de Convention de 2018 sur la reconnaissance et l’exécution des jugements étrangers en matière civile ou commerciale, qui est publié comme Doc. trav. No 262 REV, Projet de Convention révisé proposé par le Comité de rédaction arrêté au 28 mai 2018, voir Cahier 3, p. 318, du présent tome.

² Le Groupe ne s’est intéressé à aucun traité bilatéral, l’on peut néanmoins résumer que les conflits structurels susceptibles de survenir entre ces derniers et le projet de Convention seraient les mêmes qu’avec les instruments multilatéraux analysés.

Report of informal working group III – Relationship with other international instruments

DRAWN UP BY PROFESSOR KEISUKE TAKESHITA,
CHAIR OF INFORMAL WORKING GROUP III, WITH
THE ASSISTANCE OF THE PERMANENT BUREAU

Preliminary Document No 9 REV of June 2019

*Text derived from the informal working group III discus-
sions*

Paragraphs 1, 2 and 3 of Article 24 of the draft Judgments Convention (hereinafter, “DC”)¹ should be revised as follows:

1 This Convention shall be interpreted so far as possible to be compatible with other treaties [or international instruments] in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention [entered into force for that Contracting State] ~~has between Parties to that instrument~~.

3 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention [entered into force for that Contracting State] ~~for the purposes of obtaining as concerns the~~ recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

Note from the chair of informal working group III

1 Informal working group III (hereinafter, IWGIII) discussed issues concerning the relationship of the DC with other international instruments. IWGIII analysed the relationship with other individual multilateral² international instruments to facilitate the discussions on the policy issues. The summary of the relationship is annexed to this Report.

2 Based on the analysis, it is proposed that the bracketed words in paragraph 2 should be deleted. Future Contracting

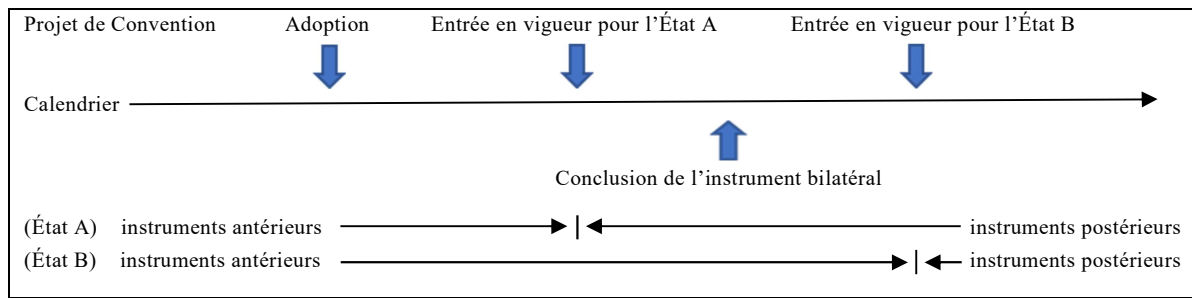
States of the DC may apply the earlier instruments in the same manner as they apply now. However, it was also noted in IWGIII that the necessity of restrictions should be discussed further.

3 Concerning paragraph 3, it is proposed that the words “for the purposes of obtaining” should be replaced by the words “as concerns the” to allow Contracting States to apply another later instrument also for the purpose of refusing recognition and enforcement of judgments given by a court of a Contracting State that is also a Party to that instrument. IWGIII also confirmed that the issue of parallelism between paragraphs 3 and 4 requires further analysis.

4 Some participants argued that, instead of the entry into force of the DC for a Contracting State, the conclusion of the DC should be used to distinguish the earlier instruments (para. 2 will be applied) from the later ones (para. 3 will be applied). For example, there may be a scenario where i) State A and State B are Contracting States of the DC and also Parties to a bilateral instrument concluded after the conclusion of the DC (2 July 2019) and ii) the conclusion of the bilateral instrument is after the entry into force of the DC for State A but before the entry into force of the DC for State B. According to the rules of the current Article 24, State A would treat the bilateral instrument as the later one and apply paragraph 3 in case of a real conflict with the DC, whereas State B would treat it as the earlier one and apply paragraph 2 in case of a real conflict. In light of Article 6 of the DC, this would mean that State A might have to refuse recognition and enforcement of judgments from State B which are incompatible with Article 6 of the DC while State B might have to recognise judgments from State A under the bilateral instrument even if they are incompatible with Article 6 of the DC. To avoid such discrepancies of the treatment of an instrument between Contracting States, it is proposed that the words “entered into force for that Contracting State” in paragraphs 2 and 3 should be deleted to use the time of the conclusion of the DC as the element to distinguish between earlier and later instruments. This would of course not change the fact that obligations can only be created by the DC as soon as it enters into force for a Contracting State, and conflicts between two instruments can only arise if both are in force for the State concerned.

¹ Hereinafter the term DC is used to refer to the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, which is published as Work. Doc. No 262 REV, Revised draft Convention submitted by the Drafting Committee as of 28 May 2018, see Book 3, p. 318, of this tome.

² The group did not discuss any bilateral treaties, but it may be assumed that the structural conflicts which could arise with the DC would be the same as with the multilateral instruments which were analysed.



5 En ce qui concerne la formule « ou de tout autre instrument international » libellée entre crochets aux paragraphes 2 et 3, le Groupe III n'a pas été en mesure d'aboutir à un consensus sur cette question politique. Il a donc décidé d'ajouter ces termes entre crochets au paragraphe 1, ajout nécessaire s'ils sont inclus aux paragraphes 2 et 3. Il est indispensable d'examiner plus avant d'autres options, notamment le mécanisme de déclaration actuellement prévu entre crochets au paragraphe 5.

ANNEXE

Résumé de l'analyse des rapports avec d'autres instruments internationaux

INTRODUCTION

1 Le Groupe III s'est penché sur le rapport entre le projet de Convention et d'autres instruments internationaux, notamment : i) la Convention de 2005¹, ii) la Convention de New York², iii) la Convention de Singapour³, iv) le Règlement Bruxelles I bis⁴, v) la Convention de Lugano⁵ et vi) la Convention de Minsk⁶. Le Groupe III a envisagé les éventuels conflits entre le projet de Convention et ces instruments ; tous ont/auront été conclus avant l'entrée en vigueur du projet de Convention. Par conséquent, l'on présume qu'en cas de conflit, l'article 24(2) s'appliquera au rapport avec ces instruments, à l'exception du Règlement Bruxelles I bis, pour lequel l'article 24(4) s'appliquera. Si l'on supprime la formule « l'entrée en vigueur [...] pour cet État contractant » aux paragraphes 2 et 3 et que la date de l'adoption du projet de Convention devient la date décisive pour distinguer les instruments antérieurs et postérieurs, c'est le paragraphe 3 qui s'appliquera à la Convention de Singa-

pour, puisqu'elle ne sera ouverte à la signature qu'après le 2 juillet 2019, date de l'adoption du projet de Convention.

2 Le Groupe de travail s'est intéressé au rapport entre le projet de Convention et d'autres instruments et, ce faisant, il a fondé son analyse sur une certaine interprétation établie uniquement aux fins de discussion au sein de celui-ci. Le Groupe tient à mettre en exergue que les discussions ne reflètent en aucun cas l'opinion des États dont sont ressortissants ses membres.

1 Convention de 2005

3 Comme l'indique le Rapport explicatif préliminaire⁷, le Groupe III a également confirmé qu'il n'y a pas de véritable conflit entre le projet de Convention et la Convention de 2005 grâce aux articles 7(1)(d) du projet de Convention et 9(g) de la Convention de 2005. Ainsi, l'article 24 du projet de Convention, à l'exception de son paragraphe 1, ne s'appliquera pas au rapport entre le projet de Convention et la Convention de 2005.

4 Le Groupe III a en outre évoqué un scénario dans lequel i) l'État d'origine et l'État requis sont des États contractants au projet de Convention, ii) l'État requis et l'État A sont Parties à la Convention de 2005, iii) un tribunal de l'État d'origine a rendu un jugement dans un cas particulier et iv) un tribunal de l'État A, choisi par les parties au litige au titre d'une clause exclusive d'élection de for, a aussi rendu un jugement dans la même affaire, incompatible avec le premier. Comme l'indique le paragraphe 423 du Rapport explicatif préliminaire, si le jugement de l'État d'origine a été rendu avant celui de l'État A, il semblerait que l'État requis ne soit tenu d'exécuter aucun des deux jugements en raison des articles 7(1)(d) du projet de Convention et 9(g) de la Convention de 2005. Le Groupe III a confirmé que l'État requis devait pouvoir déterminer, de manière discrétionnaire, si les motifs de refus aboutiraient effectivement au refus de reconnaître ou d'exécuter le jugement, étant entendu que les deux Conventions affirment que l'État requis « peut refuser ». Cependant, il a également été mis en avant qu'au vu de l'objectif des deux Conventions, à savoir promouvoir la reconnaissance et l'exécution des jugements, l'État requis ne serait pas libre de refuser la reconnaissance et l'exécution des deux jugements dans la situation décrite au paragraphe 423 du Rapport explicatif préliminaire. Si l'État requis exerce son pouvoir discrétionnaire et décide de refuser la reconnaissance et l'exécution du jugement de

¹ Convention de La Haye sur les accords d'élection de for (adoptée le 30 juin 2005).

² Convention des Nations Unies pour la reconnaissance et l'exécution des sentences arbitrales étrangères (New York, 1958).

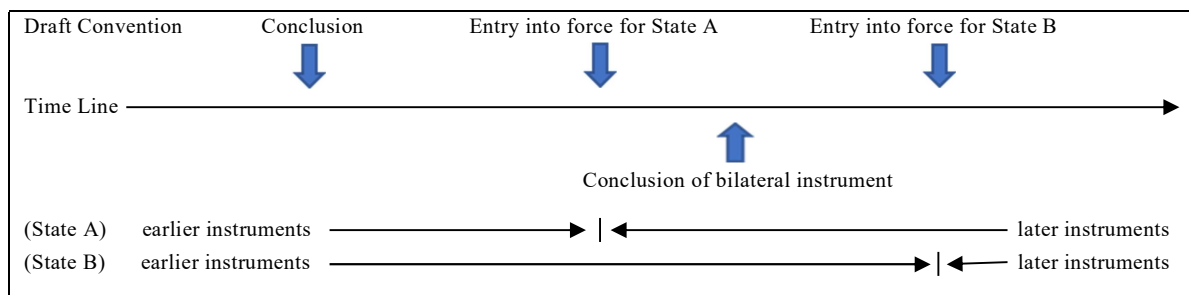
³ Convention des Nations Unies sur les accords de règlement internationaux issus de la médiation. La Convention de Singapour sera adoptée le 7 août 2019, autrement dit, après l'adoption du projet de Convention. Néanmoins, l'adoption de la Convention de Singapour interviendra avant l'entrée en vigueur du projet de Convention pour tout État contractant.

⁴ Règlement (UE) No 1215/2012 du Parlement européen et du Conseil du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (refonte), [2012] JO L 351/1.

⁵ Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (Lugano, 30 octobre 2007), [2007] JO L 339/3.

⁶ Convention relative à l'entraide judiciaire et aux relations judiciaires en matière civile, familiale et pénale (Minsk, 22 janvier 1993, telle qu'amendée le 28 mars 1997). Une traduction en français de la Convention se trouve à l'annexe du Doc. pré-l. No 27 d'avril 2005 à l'intention de la Vingtième session de juin 2005 sur la compétence, la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale, in *Actes et documents de la Vingtième session (2005)*, tome III, *Élection de for*, Anvers – Oxford – Portland, Intersentia, 2010, p. 230 à 270, à la p. 246.

⁷ Voir « Convention sur les jugements : Rapport explicatif préliminaire révisé », établi par Francisco Garcimartin et Geneviève Saumier, Doc. pré-l. No 1 de décembre 2018 à l'attention de la Vingt-deuxième session sur la reconnaissance et l'exécution des jugements étrangers (18 juin – 2 juillet 2019), voir Cahier 1, p. 10, du présent tome.



5 Concerning the bracketed words “or other international instrument” in paragraphs 2 and 3, IWGIII could not reach consensus on the policy of this issue. IWGIII added these words within brackets also in paragraph 1 as they are necessary if they are included in paragraphs 2 and 3. It is necessary to consider further various options including the declaration mechanism currently provided in paragraph 5 within square brackets.

ANNEX

Summary of the analysis of the relationship with other individual instruments

INTRODUCTION

1 In IWGIII, the relationships with other individual international instruments were discussed. The following instruments were analysed: i) the 2005 Convention,¹ ii) the New York Convention,² iii) the Singapore Convention,³ iv) the Brussels Ia Regulation,⁴ v) the Lugano Convention,⁵ and vi) the Minsk Convention.⁶ IWGIII discussed the possible conflicts between the draft Judgments Convention (“DC”) and these instruments. All of them were/would be concluded before the DC enters into force. Therefore, it was assumed that Article 24(2) would be applied to the relationship with other instruments except for the Brussels Ia Regulation, for which Article 24(4) would apply in case of conflict. If the words “entered into force for that Contracting State” are deleted from paragraphs 2 and 3 and the date of conclusion of the DC becomes the decisive date to distinguish between earlier and later instruments, the Singapore Convention would be dealt with under paragraph 3 as it

will be open for signature only after 2 July 2019 which is the date of conclusion of the DC.

2 The working group analysed the relationship with other instruments and in doing so it based its analysis on a certain interpretation that was merely for discussion purposes within IWGIII. The group wishes to highlight that discussions do not represent the views of the States of which participants of IWGIII are nationals.

1 2005 Convention

3 As stated in the draft Explanatory Report (“DER”),⁷ IWGIII also confirmed that there is no true conflict between the DC and the 2005 Convention because of Article 7(1)(d) of the DC and Article 9(g) of the 2005 Convention. Therefore, Article 24 of the DC, except for paragraph 1, will not apply to the relationship of the DC with the 2005 Convention.

4 IWGIII also discussed a scenario where i) the State of origin (“SO”) and the requested State (“RS”) are Contracting States of the DC, ii) the RS and State A are Parties to the 2005 Convention, iii) a court of the SO rendered a judgment for a certain dispute, and iv) a court of State A which was chosen by the parties to the dispute under an exclusive choice of court agreement also rendered an inconsistent judgment for the same dispute. As indicated in paragraph 423 of the DER, if the judgment of the SO was rendered earlier than that of State A, it seems that the RS would not be compelled to enforce either judgment because of Article 7(1)(d) of the DC and Article 9(g) of the 2005 Convention. IWGIII confirmed that it should be left to the discretion of the RS whether the ground for refusal will actually lead to the refusal of recognition or enforcement of a judgment as both Conventions provide that the RS “may refuse”. However, it was also pointed out that in light of the purpose of both Conventions to promote the recognition and enforcement of judgments, the RS would not be free to refuse recognition and enforcement of both judgments in the situation described in paragraph 423 of the DER. If the RS exercises its discretion to refuse recognition or enforcement of the judgment

¹ The Hague Convention on Choice of Court Agreements (concluded 30 June 2005).

² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

³ United Nations Convention on International Settlement Agreements Resulting from Mediation. The Singapore Convention will be concluded on 7 August 2019, i.e., after the DC will be concluded (2 July 2019). However, the conclusion of the Singapore Convention will still take place before the DC enters into force for any State.

⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.

⁵ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 30 October 2007), [2007] OJ L 339/3.

⁶ The Convention on legal assistance and legal relations in civil, family, and criminal matters (Minsk, 22 January 1993, as amended on 28 March 1997). An English translation of the Convention can be found in the Annex to Prel. Doc. No 27 of April 2005 for the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, pp. 231-271, at p. 247.

⁷ See “Judgments Convention: Revised Draft Explanatory Report”, drawn up by Francisco Garcimartin and Geneviève Saumier, Prel. Doc. No 1 of December 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), see Book 1, p. 11, of this tome.

l'État d'origine en application de l'article 7(1)(d) du projet de Convention, il ne peut refuser de reconnaître et d'exécuter celui de l'État A en vertu de l'article 9(g) de la Convention de 2005, considérant que le jugement de l'État d'origine ne remplit pas les conditions exigées pour sa reconnaissance dans l'État requis. L'État requis ne peut exercer son pouvoir discrétionnaire et refuser de reconnaître et d'exécuter le jugement de l'État A au titre de l'article 9(g) de la Convention de 2005 qu'à condition que le jugement de l'État d'origine remplisse les conditions fixées aux fins de sa reconnaissance dans l'État requis. Dans un tel scénario, il conviendrait d'appliquer les articles 26(1) de la Convention de 2005 et 24(1) du projet de Convention conformément à l'objectif des deux Conventions, à savoir, promouvoir la reconnaissance et l'exécution des jugements de leurs États contractants.

2 Convention de New York

5 Pour ce qui est du rapport entre la Convention de New York et le projet de Convention, il convient de souligner que ce dernier exclut de son champ d'application toutes matières liées à l'arbitrage et aux sentences arbitrales (art. 2(3) du projet de Convention). Comme l'indique le Rapport explicatif préliminaire⁸, l'État requis peut refuser la reconnaissance et l'exécution d'un jugement prononcé dans un autre État si la procédure dans cet État était contraire à une convention d'arbitrage. Il n'y a donc pas de conflit entre le projet de Convention et la Convention de New York. Après l'entrée en vigueur du projet de Convention pour un État contractant, la Convention de New York s'appliquera de la même manière qu'elle s'applique aujourd'hui.

6 À titre d'exemple, l'on pourrait faire face à un scénario dans lequel i) l'État d'origine et l'État requis sont des États contractants au projet de Convention et l'État requis et l'État A sont Parties à la Convention de New York, ii) deux parties privées à un contrat commercial ont conclu une convention d'arbitrage désignant l'État A comme le siège de l'arbitrage et iii) il existe à la fois une sentence arbitrale fondée sur la convention d'arbitrage et un jugement incompatible rendu par un tribunal de l'État d'origine. Dans ce scénario, l'État requis serait tenu de reconnaître et d'exécuter le jugement de l'État d'origine en application du projet de Convention et de reconnaître et d'exécuter la sentence arbitrale rendue dans l'État A en vertu de la Convention de New York. Néanmoins, l'article 2(3) du projet de Convention permet à l'État requis de se soustraire de son obligation de reconnaître et d'exécuter le jugement au titre du projet de Convention, la sentence arbitrale sera alors reconnue conformément à la Convention de New York. Au surplus, dans l'éventualité où la formule « entre les Parties à cet instrument » libellée entre crochets à l'article 24(2) serait supprimée, cet article ferait également prévaloir la Convention de New York dans le cas où un tribunal estimerait par erreur qu'il y a un conflit entre les deux traités (ou si les délégations décidaient, dans le cadre de la Session diplomatique, qu'une solution fondée sur l'art. 2(3) ne suffit pas).

3 Convention de Singapour

7 Au sujet de la Convention de Singapour, le Groupe III suppose que l'État requis n'a pas d'obligation conventionnelle réciproque à l'égard d'une autre Partie à celle-ci, puisqu'elle s'appliquera dès que l'État requis en deviendra Partie et qu'un accord de règlement sera présenté dans cet

⁸ Para. 67 du Rapport explicatif préliminaire.

État aux fins de reconnaissance et d'exécution. Dans cette situation, l'État requis n'est tenu d'exécuter les accords de règlement qui relèvent du champ d'application de la Convention de Singapour qu'au titre d'une obligation conventionnelle fondée sur le principe *pacta sunt servanda*.

8 Dans un scénario où l'État d'origine et l'État requis sont des États contractants au projet de Convention et que ce dernier est également Partie à la Convention de Singapour, une partie au litige (le créancier sur jugement) peut demander la reconnaissance et l'exécution d'un jugement de l'État d'origine au titre du projet de Convention et l'autre partie (le débiteur sur jugement) peut s'y opposer au motif qu'il est contraire à l'accord de règlement exécutoire au titre de la Convention de Singapour⁹. Si l'on part du principe que l'article 3(2) de la Convention de Singapour s'applique également à la procédure d'exequatur/d'exécution, celle-ci exigerait que l'État requis permette au débiteur sur jugement d'invoquer l'accord de règlement et de prouver que la question a déjà été réglée. Toutefois, la Convention de Singapour n'oblige pas l'État requis à refuser l'exécution du jugement. La conséquence doit être déterminée en fonction de la loi interne de l'État requis (y compris tout traité en vigueur dans cet État). Par conséquent, l'État requis peut exécuter un jugement au titre du projet de Convention sans violer ses obligations découlant de la Convention de Singapour. Dans le même temps, l'État requis peut également refuser d'exécuter le jugement en vertu de l'article 24(2) du projet de Convention si l'État d'origine est également Partie à la Convention de Singapour. Si l'État d'origine n'est pas Partie à la Convention de Singapour, l'État requis ne peut refuser d'exécuter le jugement, à moins que la formule « entre les Parties à cet instrument » libellée entre crochets ne soit supprimée de l'article 24(2).

4 Règlement Bruxelles I bis

9 Les obligations qui découlent du Règlement Bruxelles I bis (ci-après, le « Règlement ») en matière de reconnaissance et d'exécution des jugements sont les suivantes : i) reconnaître et exécuter un jugement émanant d'un autre État membre de l'UE et ii) refuser de reconnaître et d'exécuter un jugement émanant d'un autre État membre de l'UE si l'un des motifs de refus prévus à la section 3 du chapitre III du Règlement trouve à s'appliquer. L'obligation visée au point i) peut entrer en conflit avec l'obligation internationale au titre du projet de Convention de refuser de reconnaître et d'exécuter un jugement rendu par un État contractant (qui est également un État membre de l'UE). Néanmoins, cette obligation est uniquement prévue à l'article 6 du projet de Convention qui a trait aux chefs de compétence exclusive. La reconnaissance et l'exécution de jugements qui ne sont pas susceptibles d'être reconnus et exécutés au titre du projet de Convention devraient également être refusées en application de l'article 45(1)(e)(ii) du Règlement (qui renvoie aux chefs de compétence exclusive directs équivalents à ceux visés à l'art. 24(1) et (4)). Il n'y a donc pas de conflit entre le projet de Convention et le Règlement sur ce point¹⁰. L'obligation énoncée au point ii) de refuser la reconnaissance et l'exécution d'un jugement d'un autre État membre de l'UE en application du Règlement peut entrer en conflit avec l'obligation internationale

⁹ Cf. para. 416 à 419 du Rapport explicatif préliminaire.

¹⁰ L'obligation de reconnaître et d'exécuter un jugement d'un État membre de l'UE (État A) peut également entrer en conflit avec l'obligation internationale découlant du projet de Convention de reconnaître et d'exécuter un jugement rendu par un autre État contractant (État d'origine qui peut ou non être un État membre de l'UE) si le premier jugement est contraire au second. Néanmoins, il n'y aurait pas de véritable conflit entre ces deux instruments à cet égard, en raison des art. 7(1)(d) du projet de Convention et 45(1)(d) du Règlement.

ment of the SO under Article 7(1)(d) of the DC, the RS cannot refuse recognition and enforcement of the judgment of State A under Article 9(g) of the 2005 Convention because the judgment of the SO does not meet the conditions necessary for its recognition in the RS. The RS can exercise its discretion to refuse recognition and enforcement of the judgment of State A under Article 9(g) of the 2005 Convention only if the judgment of the SO meets the conditions necessary for its recognition in the RS. For this scenario, Article 26(1) of the 2005 Convention and Article 24(1) of the DC should be applied in accordance with the objective of both Conventions which is to promote the recognition and enforcement of judgments of their Contracting States.

2 *New York Convention*

5 Concerning the relationship with the New York Convention, it should be highlighted that the DC excludes all matters relating to arbitration and arbitral awards from its scope (Art. 2(3) of the DC). As pointed out in the DER,⁸ the RS may refuse the recognition or enforcement of a judgment given in another Contracting State of the DC if the proceedings in the SO were contrary to an arbitration agreement. Hence, there is no conflict between the DC and the New York Convention. After the DC enters into force for a Contracting State, the New York Convention would be applied as it is applied now.

6 For example, there might be a scenario where i) the SO and the RS are Contracting States of the DC, and the RS and State A are Parties to the New York Convention, ii) two private parties to a commercial contract concluded an arbitration agreement identifying State A as the seat of arbitration, and iii) there are both an arbitral award based on the arbitration agreement and a judgment by a court of the SO which is inconsistent with the arbitral award. In this scenario, the RS would be obliged towards the SO to recognise and enforce the judgment under the DC, and towards State A to recognise and enforce the arbitral award under the New York Convention. However, Article 2(3) of the DC allows the RS to avoid its obligation to recognise and enforce the judgment under the DC, and the arbitral award would be recognised and enforced under the New York Convention. In addition, Article 24(2) would also give precedence to the New York Convention if the bracketed words “as between Parties to that instrument” are deleted from the paragraph where a court mistakenly assumes that there is a conflict between the two treaties (or where delegations decide at the Diplomatic Session that a solution based on Art. 2(3) is not sufficient).

3 *Singapore Convention*

7 Under the Singapore Convention, IWGIII assumes that the RS does not have a reciprocal treaty obligation towards another Party to the Singapore Convention because the Convention would apply as soon as the RS is a Party to it and a mediated settlement agreement is presented in the RS for

⁸ Para. 67 of the DER.

recognition and enforcement. In that situation, the RS is only bound by a treaty obligation based on *pacta sunt servanda* to enforce settlement agreements which fall under the scope of application of the Singapore Convention.

8 In a scenario where the SO and the RS are Contracting States to the DC and the RS is a Party to the Singapore Convention, a party to a dispute (judgment creditor) may seek recognition and enforcement of a judgment of the SO under the DC and the other party (judgment debtor) may object to the enforcement on the grounds that it conflicts with a settlement agreement which is enforceable under the Singapore Convention.⁹ If one assumes that Article 3(2) of the Singapore Convention also applies to *exequatur*/enforcement proceedings, the Singapore Convention would require the RS to allow the judgment debtor to invoke the settlement agreement and prove that the matter has already been resolved. However, the Singapore Convention does not oblige the RS to refuse enforcement of the judgment. The consequence is to be determined under the national law of the RS (including any treaties in force in the RS). Therefore, the RS may enforce the judgment under the DC without breaching the obligation under the Singapore Convention. At the same time, the RS may also refuse enforcement of the judgment according to Article 24(2) of the DC if the SO is also a Party to the Singapore Convention. If the SO is not a Party to the Singapore Convention, the RS may not refuse enforcement of the judgment unless the bracketed words “as between Parties to that instrument” in Article 24(2) of the DC are removed.

4 *Brussels Ia Regulation*

9 The obligations under the Brussels Ia Regulation (hereinafter referred to as “the Regulation”) concerning recognition and enforcement of judgments are i) to recognise and enforce a judgment of another EU Member State and ii) to refuse recognition and enforcement of a judgment of another EU Member State if there is a ground for refusal provided in Chapter III, Section 3 of the Regulation. The obligations mentioned under point i) may conflict with the international obligation under the DC to refuse recognition and enforcement of a judgment rendered by a Contracting State (which is also an EU Member State). However, such obligations are provided only in Article 6 of the DC relating to exclusive grounds of jurisdiction. Those judgments which are not eligible for recognition and enforcement under the DC shall also be refused recognition and enforcement according to Article 45(1)(e)(ii) (which refers to the corresponding exclusive direct jurisdiction rules in Art. 24(1) and (4)) of the Regulation. Therefore, there is no conflict between the DC and the Regulation in this respect.¹⁰ The obligations mentioned under point ii) to refuse recognition and enforcement of a judgment of another EU Member State under the Regulation may conflict with the international obligation under

⁹ Cf. paras 416-419 of the DER.

¹⁰ The obligation to recognise and enforce a judgment by an EU Member State (State A) may also conflict with the international obligation under the DC to recognise and enforce a judgment rendered by another Contracting State (SO, which may or may not be an EU Member State) if the former judgment is irreconcilable with the latter. However, there would be no true conflict between the two instruments in this respect because of Art. 7(1)(d) of the DC and Art. 45(1)(d) of the Regulation.

au titre du projet de Convention de reconnaître et d'exécuter le jugement. L'obligation énoncée au point ii) est prévue à l'article 45 du Règlement. En particulier, de réels conflits sont possibles lorsqu'un jugement en matière de baux ou d'assurance est en jeu.

10 L'article 6(c) du projet de Convention ne s'applique qu'aux jugements portant sur des baux de plus de six mois. Tout jugement concernant un bail de moins de six mois est soumis aux règles générales du projet de Convention et doit être reconnu et exécuté au titre de celui-ci si l'un des chefs de compétence visés à l'article 5(1) trouve à s'appliquer (et qu'aucun des motifs de refus visés à l'art. 7 ne s'applique). Cependant, l'article 24(1) du Règlement s'applique aussi aux jugements portant sur des baux de moins de six mois. En l'occurrence, il y a deux chefs de compétence possibles (le lieu de la propriété louée OU le domicile du défendeur, à condition que le locataire (« L ») soit une personne physique et que L et le propriétaire (« P ») soient domiciliés dans le même État membre de l'UE), qui sont tous les deux des chefs de compétence exclusive. Au titre de l'article 45(1)(e)(ii), un autre État membre de l'UE est tenu de refuser de reconnaître et d'exécuter un jugement lorsqu'il y a violation de l'article 24(1) du Règlement. Ainsi, si les États membres de l'UE étaient tenus d'appliquer a) le Règlement, mais également b) le projet de Convention, un conflit pourrait naître de la situation qui suit. L est domicilié et réside habituellement en France et loue un bien en Belgique. P est domicilié en Allemagne et intente une action en justice contre L en France. Le bail porte sur une durée de moins de six mois. En application du projet de Convention, ce n'est pas l'article 6, mais l'article 5(1)(a) qui s'applique puisque P a intenté une action contre L à l'endroit de la résidence habituelle de ce dernier, en France. La Belgique est tenue de reconnaître et d'exécuter le jugement au titre du projet de Convention. Quant au Règlement, l'article 24 s'applique et la reconnaissance et l'exécution du jugement français doivent être refusées en application de l'article 45(1)(e)(ii) puisqu'il est contraire au chef de compétence exclusive énoncé dans le Règlement. Un réel conflit peut survenir dans une telle situation.

11 En ce qui concerne un jugement en matière d'assurance, la règle fondamentale contenue dans le Règlement tient au fait que la personne assurée doit être poursuivie à l'endroit de son domicile. Si elle est poursuivie ailleurs (sans qu'aucune dérogation visée à la section 3 ne le prévoit), alors l'article 45(1)(e)(i) du Règlement implique que tout État membre de l'UE est tenu de refuser la reconnaissance et l'exécution du jugement à son encontre. Le projet de Convention ne prévoit aucune règle spécifique visant à protéger les personnes assurées et l'article 5(1) s'appliquera au jugement. Si l'un des fondements visés à l'article 5 (par ex., l'art. 5(1)(g)) trouve à s'appliquer, une obligation s'imposera alors à l'État requis membre de l'UE qui sera tenu d'exécuter le jugement en application du projet de Convention, bien que le Règlement l'interdise. Un réel conflit peut alors survenir eu égard aux contrats d'assurance.

12 En outre, le Groupe III a estimé que la survenance d'un conflit entre le Règlement et le projet de Convention en matière de contrats de consommation ou de travail était relativement peu probable ; néanmoins, en fonction de l'interprétation future de ces deux instruments, cela ne doit pas être totalement exclu.

13 L'actuel article 24(4) résoudra de manière exhaustive n'importe quelle difficulté en ce qu'il permet, dans les relations entre les États membres de l'UE, de faire prévaloir le Règlement en ce qui concerne les jugements émanant d'États membres de l'UE. Le Groupe III a confirmé que l'ac-

turel article 24(4) est en effet nécessaire pour régler les réels conflits entre le projet de Convention et le Règlement.

5 Convention de Lugano

14 Considérant que les règles portant sur la reconnaissance et l'exécution des jugements contenues dans la Convention de Lugano sont semblables à celles du Règlement, la majeure partie de l'analyse susmentionnée vaut aussi pour le rapport entre le projet de Convention et la Convention de Lugano¹¹. En ce qui concerne les jugements en matière de baux ou d'assurance, de réels conflits entre ces deux instruments sont possibles. Quant aux contrats de consommation, un conflit d'obligations internationales est peu probable, mais ne devrait tout de même pas être totalement exclu, en fonction de la future interprétation de ces deux instruments.

15 L'actuel article 24(2) résout n'importe quelle difficulté en ce qu'il permet, dans les rares cas de conflit, de faire prévaloir la Convention de Lugano. Et ce, que la formule « entre les Parties à cet instrument » soit ajoutée ou non ; en effet, la Convention de Lugano ne traite pas de jugements émanant d'États qui ne sont pas Parties à celle-ci. Ainsi, tous les conflits recensés ne concerneraient que des situations dans lesquelles tous les États impliqués sont Parties à la Convention de Lugano.

6 Convention de Minsk

16 L'article 82 de la Convention de Minsk énonce que la « Convention n'affecte pas les dispositions des autres traités internationaux dont les États contractants sont signataires ». On ne sait pas vraiment si la formule « sont signataires » renvoie uniquement aux accords internationaux auxquels les États contractants étaient déjà Parties au moment où ils ont adhéré à la Convention de Minsk ou si cela englobe les accords internationaux qu'ils concluent ou auxquels ils adhèrent *a posteriori*. Dès lors, on ne sait pas si cette disposition donnerait la prévalence au projet de Convention à venir¹². Si tel n'est pas le cas, la Convention de Minsk l'emporterait conformément à l'article 24(2) du projet de Convention dans l'éventualité où un réel conflit surviendrait entre ces deux instruments. Si, en revanche, l'article 82 de la Convention de Minsk s'applique aussi aux accords internationaux conclus postérieurement par les États contractants à la Convention de Minsk, autrement dit, après leur adhésion à cette dernière, aucune des Conventions n'affecterait l'autre. Le tribunal de l'État requis serait en mesure d'appliquer l'une ou l'autre des Conventions et il n'y aurait pas de réel conflit entre elles.

17 Le rapport entre ces deux instruments a été évoqué en partant du principe que la Convention de Minsk n'affecte en rien les accords internationaux, sous réserve que les Parties à celle-ci fussent déjà Parties à ces accords au moment où elles ont adhéré à la Convention de Minsk. Si le projet de Convention et la Convention de Minsk sont en principe compatibles, un scénario de conflit réel est envisageable. Par exemple, si i) l'État d'origine et l'État requis sont Parties à la Convention de Minsk et que l'État d'origine, l'État requis et l'État A sont tous des États contractants au projet de Convention, ii) et que l'État d'origine a rendu un jugement concernant un bail immobilier à long

¹¹ Les jugements portant sur les contrats individuels de travail représentent l'exception. Rien dans la Convention de Lugano n'oblige à refuser de reconnaître et d'exécuter un jugement émanant d'un autre État partie à cette Convention rendu en violation des chefs de compétence en matière de contrat individuel de travail.

¹² Doc. pré-l. No 27 d'avril 2005 (*op. cit.* note 6), section V-1.

the DC to recognise and enforce the judgment. The obligations mentioned under point ii) under the Regulation are provided in Article 45. In particular, real conflicts are possible where a judgment on tenancies or on insurance is at issue.

10 Article 6(c) of the DC only applies to judgments on tenancies of more than six months. A judgment on a tenancy of less than six months is subject to the general rules of the DC, and it must be recognised and enforced under the DC if one of the jurisdictional grounds in Article 5(1) is met (and there is no ground for refusal in Art. 7). However, Article 24(1) of the Regulation also applies to tenancies of less than six months. Here, there are the two alternative jurisdictions (the situs of the property rented, OR the domicile of the defendant, provided that the tenant (“T”) is a natural person and both T and the landlord (“L”) are domiciled in the same EU Member State), both of which are exclusive. Under Article 45(1)(e)(ii), another EU Member State must refuse recognition and enforcement where Article 24(1) of the Regulation has been breached. Therefore, if the EU Member States had to apply a) the Regulation but also b) the DC, a conflict could arise in the following situation. T is domiciled and habitually resident in France, and he/she takes a tenancy of a property in Belgium. L is domiciled in Germany. L sues T in France. The tenancy is for less than six months. Under the DC, not Article 6 but Article 5(1)(a) applies because L has sued T in T’s habitual residence, France. Belgium is obliged to recognise and enforce the judgment under the DC. Under the Regulation, Article 24 applies, and the French judgment must be refused recognition or enforcement according to Article 45(1)(e)(ii) because the judgment conflicts with an exclusive jurisdiction rule under the Regulation. A real conflict may arise in this situation.

11 Concerning a judgment on insurance, the basic rule in the Regulation is that the insured person must be sued in his/her domicile. If he/she is sued elsewhere (without a Section 3 derogation permitting it), then Article 45(1)(e)(i) of the Regulation means an EU Member State must refuse recognition and enforcement of the judgment against him/her. There are no special rules in the DC to protect insured persons and Article 5(1) will be applied to the judgment. If an Article 5 ground (e.g., Art. 5(1)(g)) applies, then there will be an obligation on the requested EU Member State to enforce the judgment under the DC even though the Regulation forbids it. A real conflict may thus also arise in relation to insurance contracts.

12 In addition, IWGIII concluded that a conflict between the Regulation and the DC in matters relating to a consumer or employment contract is unlikely but, depending on the future interpretation of both instruments, not to be fully excluded.

13 The current Article 24(4) will comprehensively solve any difficulties as it allows, in the relations between EU Member States, to give precedence to the Regulation as far as judgments from EU Member States are concerned. IWGIII confirmed that the current Article 24(4) is indeed necessary

to deal with those real conflicts between the DC and the Regulation.

5 *Lugano Convention*

14 Because the rules on recognition and enforcement of judgments in the Lugano Convention are similar to those of the Regulation, the main part of the above analysis on the relationship of the DC with the Regulation also applies to the relationship with the Lugano Convention.¹¹ Concerning judgments on tenancies or on insurance, real conflicts between the two instruments would be possible. Concerning consumer contracts, a conflict of international obligations is unlikely but, depending on the future interpretation of both instruments, not to be fully excluded.

15 The current Article 24(2) solves any difficulties as it allows to give precedence to the Lugano Convention in the few cases of conflict. This applies whether or not the words “as between Parties to that instrument” are added because the Lugano Convention does not deal with judgments from States which are not Parties to the Lugano Convention. Therefore, all conflicts identified would only concern situations where all States involved are Parties to the Lugano Convention.

6 *Minsk Convention*

16 Article 82 of the Minsk Convention provides that the Minsk “Convention shall not affect the provisions of other international agreements to which the Contracting State are parties”. It is not clear whether “are parties” only refers to international agreements to which the Contracting States are already Parties at the time they join the Minsk Convention, or also to international agreements they conclude or join subsequently. Therefore, it is unclear whether this provision would also give precedence to the DC yet to be concluded.¹² If it does not, the Minsk Convention would prevail due to Article 24(2) of the DC in case of a real conflict between the two Conventions. If, on the other hand, Article 82 of the Minsk Convention also applies to international agreements which the Contracting Parties to the Minsk Convention join only later, *i.e.*, after joining the Minsk Convention, each Convention would leave the other Convention unaffected. The court of the RS would be able to apply either one of the Conventions, and there would be no real conflict between them.

17 The relationship was discussed on the assumption that the Minsk Convention only leaves international agreements unaffected if the Parties to the Minsk Convention were already Parties at the time they joined the Minsk Convention. Although the DC and the Minsk Convention are usually compatible, a scenario of a real conflict is possible. For example, if i) the SO and the RS are Parties to the Minsk Convention and the SO, the RS and State A are Contracting States of the DC, ii) and the SO rendered a judgment on long-

¹¹ Judgments relating to individual contracts of employment constitute the exception. There is no obligation under the Lugano Convention to refuse recognition and enforcement of a judgment from another Lugano State which was given in violation of the jurisdiction rules in matters relating to individual contracts of employment.

¹² Prel. Doc. No 27 of April 2005 (*op. cit.* note 6), section V-1.

terme eu égard à un immeuble situé dans l'État A, l'État requis pourrait être tenu de reconnaître et d'exécuter le jugement au titre de la Convention de Minsk, tandis que l'article 6(c) du projet de Convention exige au contraire qu'il refuse considérant que l'État A dispose d'une compétence exclusive en la matière en vertu du droit interne. Dans le cadre de ce scénario, l'argument suivant a été exprimé : l'État requis peut appliquer la Convention de Minsk, à condition que la formule « entre les Parties à cet instrument » visée à l'article 24(2) soit supprimée. En cas de maintien de la formule entre crochets, l'État requis serait tenu de refuser la reconnaissance et l'exécution du jugement en application du projet de Convention étant entendu que l'État A est visé par le jugement, mais n'est pas Partie à la Convention de Minsk. Ainsi, l'application de la Convention de Minsk n'interviendrait pas, en l'espèce, entre des Parties à celle-ci. En cas de suppression de la formule entre crochets, la Convention de Minsk l'emporterait ; on peut néanmoins raisonnablement penser que l'État d'origine ne peut s'attendre à ce que l'État requis reconnaisse et exécute son jugement au titre de ladite Convention, considérant l'adhésion des trois parties concernées en l'espèce (État d'origine, État requis et État A) au projet de Convention.

OBSERVATIONS FINALES

18 Cette analyse a permis de mettre en lumière de réels conflits entre le projet de Convention et d'autres instruments. Par conséquent, le Groupe III a jugé que l'article 24(2) et (4) était nécessaire pour résoudre ces conflits. Il est également parvenu à un consensus concernant la suppression de la formule présentée entre crochets à l'article 24(2) : « entre les Parties à cet instrument ». Cette suppression permet de faire prévaloir les instruments antérieurs, en particulier, la Convention de New York. Cela facilitera les choses pour les États qui souhaitent devenir des États contractants au projet de Convention. Le Groupe III n'a, pour l'heure, recensé aucun problème sérieux susceptible de découler de la suppression proposée, bien qu'il convienne d'étudier plus avant la nécessité de restrictions quant à l'application d'instruments antérieurs.

term tenancy of immovable property situated in State A, it may be necessary for the RS to recognise and enforce the judgment under the Minsk Convention, whereas Article 6(c) of the DC requires the RS to refuse recognition and enforcement because State A has exclusive jurisdiction on the matter under its national law. For this scenario, the following argument was voiced: the RS may apply the Minsk Convention if the bracketed words “as between Parties to that instrument” in Article 24(2) are deleted. If the bracketed words are maintained, it would be necessary for the RS to refuse recognition and enforcement of the judgment under the DC because State A is concerned by the judgment but it is not a Party to the Minsk Convention and, as a result, the application of the Minsk Convention would not be regarded as between Parties to the Minsk Convention in this case. If the bracketed words are deleted, the Minsk Convention would have precedence, although it seems reasonable to think that the SO cannot expect the RS to recognise and enforce its judgment under the Minsk Convention because of the conclusion of the DC between all three States involved here (SO, RS and State A).

FINAL REMARKS

18 Through the analysis, some real conflicts between the DC and other individual instruments were acknowledged. Therefore, IWGIII concluded that Article 24(2) and (4) is necessary to resolve those conflicts. IWGIII also reached consensus on the deletion of the bracketed words “as between Parties to that instrument” in Article 24(2). This deletion gives precedence to earlier instruments, in particular the New York Convention, and would make it easier for States to become Contracting States of the DC. IWGIII did not identify any serious problems which might be caused by the suggested deletion at this point, though the necessity of restrictions for the application of earlier international instruments should be discussed further.

Rapport du Groupe de travail informel III – Rapport avec d’autres instruments internationaux

ÉTABLI PAR LE PROFESSEUR KEISUKE TAKESHITA,
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Texte tiré des discussions du Groupe de travail informel III

Il convient de réviser comme suit les paragraphes 1, 2 et 3 de l’article 24 du projet de Convention sur les Jugements (ci-après, le « projet de Convention »)¹ :

1 La présente Convention doit être interprétée de façon qu’elle soit, autant que possible, compatible avec d’autres traités [ou instruments internationaux] en vigueur pour les États contractants, conclus avant ou après cette Convention.

2 La présente Convention n’affecte pas l’application par un État contractant d’un traité [ou de tout autre instrument international] conclu avant [l’entrée en vigueur de cette Convention pour cet État contractant] ~~[entre les Parties à cet instrument]~~.

3 La présente Convention n’affecte pas l’application par un État contractant d’un traité [ou de tout autre instrument international] conclu après [l’entrée en vigueur de cette Convention pour cet État contractant], ~~aux fins de en ce qui concerne la~~ reconnaissance ou ~~d]’~~exécution d’un jugement rendu par le tribunal d’un État contractant qui est également Partie à cet instrument. [Aucune disposition de l’autre instrument n’a d’incidence sur les obligations prévues à l’article 6 eu égard aux États contractants qui ne sont pas Parties à cet instrument.]

Note du président du Groupe de travail informel III

1 Le Groupe de travail informel III (ci-après, le « Groupe III ») s’est penché sur les questions relatives aux rapports entre le projet de Convention et d’autres instruments internationaux. Le Groupe III s’est concentré sur les rapports avec d’autres instruments internationaux multilatéraux² de sorte à faciliter les discussions concernant les questions politiques. Un résumé est présenté en annexe au présent Rapport.

2 Sur le fondement de cette analyse, il est proposé de supprimer la formule présentée entre crochets au paragraphe 2. Les futurs États contractants au projet de Convention pourront appliquer les instruments antérieurs de la

¹ Ci-après, le terme « projet de Convention » désigne le projet de Convention de 2018 sur la reconnaissance et l’exécution des jugements étrangers en matière civile ou commerciale, qui est publié comme Doc. trav. No 262 REV, Projet de Convention révisé proposé par le Comité de rédaction arrêté le 28 mai 2018, voir Cahier 3, p. 318, du présent tome.

² Le Groupe ne s’est intéressé à aucun traité bilatéral, l’on peut néanmoins présumer que les conflits structurels susceptibles de survenir entre ces derniers et le projet de Convention seraient les mêmes qu’avec les instruments multilatéraux analysés.

même manière qu’ils les appliquent actuellement. Cependant, le Groupe III a également indiqué qu’il conviendrait de discuter de manière plus approfondie de nécessaires restrictions.

3 Quant au paragraphe 3, il est proposé de remplacer les termes « aux fins de reconnaissance ou d’exécution » par « en ce qui concerne la reconnaissance ou l’exécution » de sorte à permettre aux États contractants d’appliquer un autre instrument ultérieur aux fins de refus de la reconnaissance et de l’exécution de jugements rendus par un tribunal d’un État contractant qui est aussi Partie audit instrument. Le Groupe III a également confirmé devoir analyser plus avant la question du parallélisme entre les paragraphes 3 et 4.

4 Selon certains participants, pour distinguer les instruments antérieurs (pour lesquels le para. 2 s’appliquera) des instruments postérieurs (pour lesquels le para. 3 s’appliquera), il conviendrait d’utiliser, au lieu de la date d’entrée en vigueur du projet de Convention pour un État contractant, la date de son adoption. À titre d’exemple, l’on pourrait faire face à un scénario où i) les États A et B sont des États contractants au projet de Convention et également Parties à un instrument bilatéral conclu après l’adoption du projet de Convention (2 juillet 2019) et ii) la conclusion de l’instrument bilatéral survient après l’entrée en vigueur du projet de Convention pour l’État A, mais avant son entrée en vigueur pour l’État B. En cas de conflit réel entre les deux instruments, en application des règles de l’actuel article 24, l’État A traitera l’instrument bilatéral comme le plus récent et appliquera le paragraphe 3, tandis que l’État B le traitera comme le plus ancien et appliquera le paragraphe 2. Compte tenu de l’article 6 du projet de Convention, cela impliquerait que l’État A pourrait être tenu de refuser la reconnaissance et l’exécution de jugements de l’État B qui sont incompatibles avec cet article, tandis que l’État B pourrait être tenu de reconnaître les jugements de l’État A au titre de l’instrument bilatéral, mêmes s’ils sont contraires à l’article 6 du projet de Convention. Afin d’éviter de telles divergences de traitement d’un instrument entre les États contractants, il est proposé de supprimer, aux paragraphes 2 et 3, la formule « l’entrée en vigueur [...] pour cet État contractant » afin de se fonder sur la date de l’adoption du projet de Convention pour distinguer les instruments antérieurs et postérieurs. Cela ne changerait évidemment en rien le fait que des obligations ne peuvent découler du projet de Convention qu’une fois qu’il est entré en vigueur pour un État contractant et que des conflits ne sont susceptibles d’intervenir entre deux instruments que si ceux-ci sont en vigueur pour l’État concerné.

Report of informal working group III – Relationship with other international instruments

DRAWN UP BY PROFESSOR KEISUKE TAKESHITA,
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THE ASSISTANCE OF THE PERMANENT BUREAU

Preliminary Document No 9 REV REV of June 2019

Text derived from the informal working group III discussions

Paragraphs 1, 2 and 3 of Article 24 of the draft Judgments Convention (hereinafter, “DC”)¹ should be revised as follows:

1 This Convention shall be interpreted so far as possible to be compatible with other treaties [or international instruments] in force for Contracting States, whether concluded before or after this Convention.

2 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention [entered into force for that Contracting State] ~~[as between Parties to that instrument].~~

3 This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention [entered into force for that Contracting State] ~~for the purposes of obtaining as concerns the~~ recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

Note from the chair of informal working group III

1 Informal working group III (hereinafter, IWGIII) discussed issues concerning the relationship of the DC with other international instruments. IWGIII analysed the relationship with other individual multilateral² international instruments to facilitate the discussions on the policy issues. The summary of the relationship is annexed to this Report.

2 Based on the analysis, it is proposed that the bracketed words in paragraph 2 should be deleted. Future Contracting States of the DC may apply the earlier instruments in the

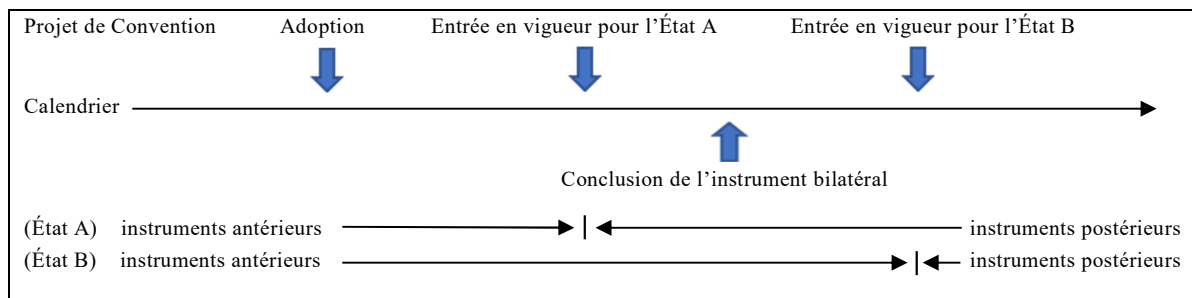
same manner as they apply now. However, it was also noted in IWGIII that the necessity of restrictions should be discussed further.

3 Concerning paragraph 3, it is proposed that the words “for the purposes of obtaining” should be replaced by the words “as concerns the” to allow Contracting States to apply another later instrument also for the purpose of refusing recognition and enforcement of judgments given by a court of a Contracting State that is also a Party to that instrument. IWGIII also confirmed that the issue of parallelism between paragraphs 3 and 4 requires further analysis.

4 Some participants argued that, instead of the entry into force of the DC for a Contracting State, the conclusion of the DC should be used to distinguish the earlier instruments (para. 2 will be applied) from the later ones (para. 3 will be applied). For example, there may be a scenario where i) State A and State B are Contracting States of the DC and also Parties to a bilateral instrument concluded after the conclusion of the DC (2 July 2019) and ii) the conclusion of the bilateral instrument is after the entry into force of the DC for State A but before the entry into force of the DC for State B. According to the rules of the current Article 24, State A would treat the bilateral instrument as the later one and apply paragraph 3 in case of a real conflict with the DC, whereas State B would treat it as the earlier one and apply paragraph 2 in case of a real conflict. In light of Article 6 of the DC, this would mean that State A might have to refuse recognition and enforcement of judgments from State B which are incompatible with Article 6 of the DC while State B might have to recognise judgments from State A under the bilateral instrument even if they are incompatible with Article 6 of the DC. To avoid such discrepancies of the treatment of an instrument between Contracting States, it is proposed that the words “entered into force for that Contracting State” in paragraphs 2 and 3 should be deleted to use the time of the conclusion of the DC as the element to distinguish between earlier and later instruments. This would of course not change the fact that obligations can only be created by the DC as soon as it enters into force for a Contracting State, and conflicts between two instruments can only arise if both are in force for the State concerned.

¹ Hereinafter the term DC is used to refer to the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, which is published as Work. Doc. No 262 REV, Revised draft Convention submitted by the Drafting Committee as of 28 May 2018, see Book 3, p. 318, of this tome.

² The group did not discuss any bilateral treaties, but it may be assumed that the structural conflicts which could arise with the DC would be the same as with the multilateral instruments which were analysed.



5 En ce qui concerne la formule « ou de tout autre instrument international » libellée entre crochets aux paragraphes 2 et 3, le Groupe III n'a pas été en mesure d'aboutir à un consensus sur cette question politique. Il a donc décidé d'ajouter ces termes entre crochets au paragraphe 1, ajout nécessaire s'ils sont inclus aux paragraphes 2 et 3. Il est indispensable d'examiner plus avant d'autres options, notamment le mécanisme de déclaration actuellement prévu entre crochets au paragraphe 5.

ANNEXE

Résumé de l'analyse des rapports avec d'autres instruments internationaux

INTRODUCTION

1 Le Groupe III s'est penché sur le rapport entre le projet de Convention et d'autres instruments internationaux, notamment : i) la Convention de 2005¹, ii) la Convention de New York², iii) la Convention de Singapour³, iv) le Règlement Bruxelles I bis⁴, v) la Convention de Lugano⁵ et vi) la Convention de Minsk⁶. Le Groupe III a envisagé les éventuels conflits entre le projet de Convention et ces instruments ; tous ont/auront été conclus avant l'entrée en vigueur du projet de Convention. Par conséquent, l'on présume qu'en cas de conflit, l'article 24(2) s'appliquera au rapport avec ces instruments, à l'exception du Règlement Bruxelles I bis, pour lequel l'article 24(4) s'appliquera. Si l'on supprime la formule « l'entrée en vigueur [...] pour cet État contractant » aux paragraphes 2 et 3 et que la date de l'adoption du projet de Convention devient la date décisive pour distinguer les instruments antérieurs et postérieurs, c'est

le paragraphe 3 qui s'appliquera à la Convention de Singapour, puisqu'elle ne sera ouverte à la signature qu'après le 2 juillet 2019, date de l'adoption du projet de Convention.

2 Le Groupe de travail s'est intéressé au rapport entre le projet de Convention et d'autres instruments et, ce faisant, il a fondé son analyse sur une certaine interprétation établie uniquement aux fins de discussion au sein de celui-ci. Le Groupe tient à mettre en exergue que les discussions ne reflètent en aucun cas l'opinion des États dont sont ressortissants ses membres.

1 Convention de 2005

3 Comme l'indique le Rapport explicatif préliminaire⁷, le Groupe III a également confirmé qu'il n'y a pas de véritable conflit entre le projet de Convention et la Convention de 2005 grâce aux articles 7(1)(d) du projet de Convention et 9(g) de la Convention de 2005. Ainsi, l'article 24 du projet de Convention, à l'exception de son paragraphe 1, ne s'appliquera pas au rapport entre le projet de Convention et la Convention de 2005.

4 Le Groupe III a en outre évoqué un scénario dans lequel i) l'État d'origine et l'État requis sont des États contractants au projet de Convention, ii) l'État requis et l'État A sont Parties à la Convention de 2005, iii) un tribunal de l'État d'origine a rendu un jugement dans un cas particulier et iv) un tribunal de l'État A, choisi par les parties au litige au titre d'une clause exclusive d'élection de for, a aussi rendu un jugement dans la même affaire, incompatible avec le premier. Comme l'indique le paragraphe 423 du Rapport explicatif préliminaire, si le jugement de l'État d'origine a été rendu avant celui de l'État A, il semblerait que l'État requis ne soit tenu d'exécuter aucun des deux jugements en raison des articles 7(1)(d) du projet de Convention et 9(g) de la Convention de 2005. Le Groupe III a confirmé que l'État requis devait pouvoir déterminer, de manière discrétionnaire, si les motifs de refus aboutiraient effectivement au refus de reconnaître ou d'exécuter le jugement, étant entendu que les deux Conventions affirment que l'État requis « peut refuser ». Cependant, il a également été mis en avant qu'au vu de l'objectif des deux Conventions, à savoir promouvoir la reconnaissance et l'exécution des jugements, l'État requis ne serait pas libre de refuser la reconnaissance et l'exécution des deux jugements dans la situation décrite au paragraphe 423 du Rapport explicatif préliminaire. Si

¹ Convention de La Haye sur les accords d'élection de for (adoptée le 30 juin 2005).

² Convention des Nations Unies pour la reconnaissance et l'exécution des sentences arbitrales étrangères (New York, 1958).

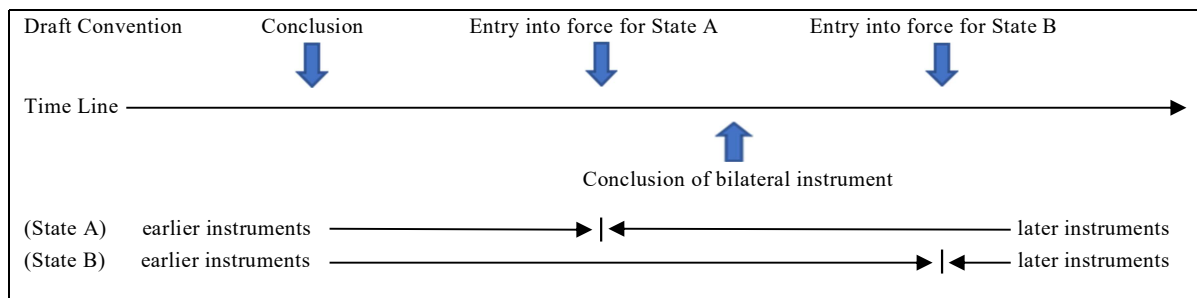
³ Convention des Nations Unies sur les accords de règlement internationaux issus de la médiation. La Convention de Singapour sera adoptée le 7 août 2019, autrement dit, après l'adoption du projet de Convention. Néanmoins, l'adoption de la Convention de Singapour interviendra avant l'entrée en vigueur du projet de Convention pour tout État contractant.

⁴ Règlement (UE) No 1215/2012 du Parlement européen et du Conseil du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (refonte), [2012] JO L 351/1.

⁵ Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale (Lugano, 30 octobre 2007), [2007] JO L 339/3.

⁶ Convention relative à l'entraide judiciaire et aux relations judiciaires en matière civile, familiale et pénale (Minsk, 22 janvier 1993, telle qu'amendée le 28 mars 1997). Une traduction en français de la Convention se trouve à l'annexe du Doc. pré-l. No 27 d'avril 2005 à l'intention de la Vingtième session de juin 2005 sur la compétence, la reconnaissance et l'exécution des jugements étrangers en matière civile et commerciale, in *Actes et documents de la Vingtième session (2005)*, tome III, *Élection de for*, Anvers – Oxford – Portland, Intersentia, 2010, p. 230 à 270, à la p. 246.

⁷ Voir « Convention sur les jugements : Rapport explicatif préliminaire révisé », établi par Francisco Garcimartin et Geneviève Saumier, Doc. pré-l. No 1 de décembre 2018 à l'attention de la Vingt-deuxième session sur la reconnaissance et l'exécution des jugements étrangers (du 18 juin au 2 juillet 2019), voir Cahier 1, p. 10, du présent tome.



5 Concerning the bracketed words “or other international instrument” in paragraphs 2 and 3, IWGIII could not reach consensus on the policy of this issue. IWGIII added these words within brackets also in paragraph 1 as they are necessary if they are included in paragraphs 2 and 3. It is necessary to consider further various options including the declaration mechanism currently provided in paragraph 5 within square brackets.

ANNEX

Summary of the analysis of the relationship with other individual instruments

INTRODUCTION

1 In IWGIII, the relationships with other individual international instruments were discussed. The following instruments were analysed: i) the 2005 Convention,¹ ii) the New York Convention,² iii) the Singapore Convention,³ iv) the Brussels Ia Regulation,⁴ v) the Lugano Convention,⁵ and vi) the Minsk Convention.⁶ IWGIII discussed the possible conflicts between the draft Judgments Convention (“DC”) and these instruments. All of them were/would be concluded before the DC enters into force. Therefore, it was assumed that Article 24(2) would be applied to the relationship with other instruments except for the Brussels Ia Regulation, for which Article 24(4) would apply in case of conflict. If the words “entered into force for that Contracting State” are deleted from paragraphs 2 and 3 and the date of conclusion of the DC becomes the decisive date to distinguish between earlier and later instruments, the Singapore

Convention would be dealt with under paragraph 3 as it will be open for signature only after 2 July 2019 which is the date of conclusion of the DC.

2 The working group analysed the relationship with other instruments and in doing so it based its analysis on a certain interpretation that was merely for discussion purposes within IWGIII. The group wishes to highlight that discussions do not represent the views of the States of which participants of IWGIII are nationals.

1 2005 Convention

3 As stated in the draft Explanatory Report (“DER”),⁷ IWGIII also confirmed that there is no true conflict between the DC and the 2005 Convention because of Article 7(1)(d) of the DC and Article 9(g) of the 2005 Convention. Therefore, Article 24 of the DC, except for paragraph 1, will not apply to the relationship of the DC with the 2005 Convention.

4 IWGIII also discussed a scenario where i) the State of origin (“SO”) and the requested State (“RS”) are Contracting States of the DC, ii) the RS and State A are Parties to the 2005 Convention, iii) a court of the SO rendered a judgment for a certain dispute, and iv) a court of State A which was chosen by the parties to the dispute under an exclusive choice of court agreement also rendered an inconsistent judgment for the same dispute. As indicated in paragraph 423 of the DER, if the judgment of the SO was rendered earlier than that of State A, it seems that the RS would not be compelled to enforce either judgment because of Article 7(1)(d) of the DC and Article 9(g) of the 2005 Convention. IWGIII confirmed that it should be left to the discretion of the RS whether the ground for refusal will actually lead to the refusal of recognition or enforcement of a judgment as both Conventions provide that the RS “may refuse”. However, it was also pointed out that in light of the purpose of both Conventions to promote the recognition and enforcement of judgments, the RS would not be free to refuse recognition and enforcement of both judgments in the situation described in paragraph 423 of the DER. If the RS exercises its

¹ The Hague Convention on Choice of Court Agreements (concluded 30 June 2005).

² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

³ United Nations Convention on International Settlement Agreements Resulting from Mediation. The Singapore Convention will be concluded on 7 August 2019, i.e., after the DC will be concluded (2 July 2019). However, the conclusion of the Singapore Convention will still take place before the DC enters into force for any State.

⁴ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.

⁵ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano, 30 October 2007), [2007] OJ L 339/3.

⁶ The Convention on legal assistance and legal relations in civil, family, and criminal matters (Minsk, 22 January 1993, as amended on 28 March 1997). An English translation of the Convention can be found in the Annex to Prel. Doc. No 27 of April 2005 for the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, pp. 231-271, at p. 247.

⁷ See “Judgments Convention: Revised Draft Explanatory Report”, drawn up by Francisco Garcimartin and Geneviève Saumier. Prel. Doc. No 1 of December 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June – 2 July 2019), see Book 1, p. 11, of this tome.

l'État requis exerce son pouvoir discrétionnaire et décide de refuser la reconnaissance et l'exécution du jugement de l'État d'origine en application de l'article 7(1)(d) du projet de Convention, il ne peut refuser de reconnaître et d'exécuter celui de l'État A en vertu de l'article 9(g) de la Convention de 2005, considérant que le jugement de l'État d'origine ne remplit pas les conditions exigées pour sa reconnaissance dans l'État requis. L'État requis ne peut exercer son pouvoir discrétionnaire et refuser de reconnaître et d'exécuter le jugement de l'État A au titre de l'article 9(g) de la Convention de 2005 qu'à condition que le jugement de l'État d'origine remplisse les conditions fixées aux fins de sa reconnaissance dans l'État requis. Dans un tel scénario, il conviendrait d'appliquer les articles 26(1) de la Convention de 2005 et 24(1) du projet de Convention conformément à l'objectif des deux Conventions, à savoir, promouvoir la reconnaissance et l'exécution des jugements de leurs États contractants.

2 Convention de New York

5 Pour ce qui est du rapport entre la Convention de New York et le projet de Convention, il convient de souligner que ce dernier exclut de son champ d'application toutes matières liées à l'arbitrage et aux sentences arbitrales (art. 2(3) du projet de Convention). Comme l'indique le Rapport explicatif préliminaire⁸, l'État requis peut refuser la reconnaissance et l'exécution d'un jugement prononcé dans un autre État si la procédure dans cet État était contraire à une convention d'arbitrage. Il n'y a donc pas de conflit entre le projet de Convention et la Convention de New York. Après l'entrée en vigueur du projet de Convention pour un État contractant, la Convention de New York s'appliquera de la même manière qu'elle s'applique aujourd'hui.

6 À titre d'exemple, l'on pourrait faire face à un scénario dans lequel i) l'État d'origine et l'État requis sont des États contractants au projet de Convention et l'État requis et l'État A sont Parties à la Convention de New York, ii) deux parties privées à un contrat commercial ont conclu une convention d'arbitrage désignant l'État A comme le siège de l'arbitrage et iii) il existe à la fois une sentence arbitrale fondée sur la convention d'arbitrage et un jugement incompatible rendu par un tribunal de l'État d'origine. Dans ce scénario, l'État requis serait tenu de reconnaître et d'exécuter le jugement de l'État d'origine en application du projet de Convention et de reconnaître et d'exécuter la sentence arbitrale rendue dans l'État A en vertu de la Convention de New York. Néanmoins, l'article 2(3) du projet de Convention permet à l'État requis de se soustraire de son obligation de reconnaître et d'exécuter le jugement au titre du projet de Convention, la sentence arbitrale sera alors reconnue conformément à la Convention de New York. Au surplus, dans l'éventualité où la formule « entre les Parties à cet instrument » libellée entre crochets à l'article 24(2) serait supprimée, cet article ferait également prévaloir la Convention de New York dans le cas où un tribunal estimerait par erreur qu'il y a un conflit entre les deux traités (ou si les délégations décidaient, dans le cadre de la Session diplomatique, qu'une solution fondée sur l'art. 2(3) ne suffit pas).

3 Convention de Singapour

7 Au sujet de la Convention de Singapour, le Groupe III suppose que l'État requis n'a pas d'obligation conventionnelle réciproque à l'égard d'une autre Partie à celle-ci,

⁸ Para. 67 du Rapport explicatif préliminaire.

puisqu'elle s'appliquera dès que l'État requis en deviendra Partie et qu'un accord de règlement sera présenté dans cet État aux fins de reconnaissance et d'exécution. Dans cette situation, l'État requis n'est tenu d'exécuter les accords de règlement qui relèvent du champ d'application de la Convention de Singapour qu'au titre d'une obligation conventionnelle fondée sur le principe *pacta sunt servanda*.

8 Dans un scénario où l'État d'origine et l'État requis sont des États contractants au projet de Convention et que ce dernier est également Partie à la Convention de Singapour, une partie au litige (le créancier sur jugement) peut demander la reconnaissance et l'exécution d'un jugement de l'État d'origine au titre du projet de Convention et l'autre partie (le débiteur sur jugement) peut s'y opposer au motif qu'il est contraire à l'accord de règlement exécutoire au titre de la Convention de Singapour⁹. Si l'on part du principe que l'article 3(2) de la Convention de Singapour s'applique également à la procédure d'exequatur/d'exécution, celle-ci exigerait que l'État requis permette au débiteur sur jugement d'invoquer l'accord de règlement et de prouver que la question a déjà été réglée. Toutefois, la Convention de Singapour n'oblige pas l'État requis à refuser l'exécution du jugement. La conséquence doit être déterminée en fonction de la loi interne de l'État requis (y compris tout traité en vigueur dans cet État). Par conséquent, l'État requis peut exécuter un jugement au titre du projet de Convention sans violer ses obligations découlant de la Convention de Singapour. Dans le même temps, l'État requis peut également refuser d'exécuter le jugement en vertu de l'article 24(2) du projet de Convention si l'État d'origine est également Partie à la Convention de Singapour. Si l'État d'origine n'est pas Partie à la Convention de Singapour, l'État requis ne peut refuser d'exécuter le jugement « moins que la formule « entre les Parties à cet instrument » libellée entre crochets ne soit supprimée de l'article 24(2).

4 Règlement Bruxelles I bis

9 Les obligations qui découlent du Règlement Bruxelles I bis (ci-après, le « Règlement ») en matière de reconnaissance et d'exécution des jugements sont les suivantes : i) reconnaître et exécuter un jugement émanant d'un autre État membre de l'UE et ii) refuser de reconnaître et d'exécuter un jugement émanant d'un autre État membre de l'UE si l'un des motifs de refus prévus à la section 3 du chapitre III du Règlement trouve à s'appliquer. L'obligation visée au point i) peut entrer en conflit avec l'obligation internationale au titre du projet de Convention de refuser de reconnaître et d'exécuter un jugement rendu par un État contractant (qui est également un État membre de l'UE). Néanmoins, cette obligation est uniquement prévue à l'article 6 du projet de Convention qui a trait aux chefs de compétence exclusive. La reconnaissance et l'exécution de jugements qui ne sont pas susceptibles d'être reconnus et exécutés au titre du projet de Convention devraient également être refusées en application de l'article 45(1)(e)(ii) du Règlement (qui renvoie aux chefs de compétence exclusive directs équivalents à ceux visés à l'art. 24(1) et (4)). Il n'y a donc pas de conflit entre le projet de Convention et le Règlement sur ce point¹⁰. L'obligation énoncée au point ii) de refuser la reconnaissance et l'exécution d'un jugement

⁹ Cf. para. 416 à 419 du Rapport explicatif préliminaire.

¹⁰ L'obligation de reconnaître et d'exécuter un jugement d'un État membre de l'UE (État A) peut également entrer en conflit avec l'obligation internationale découlant du projet de Convention de reconnaître et d'exécuter un jugement rendu par un autre État contractant (État d'origine qui peut ou non être un État membre de l'UE) si le premier jugement est contraire au second. Néanmoins, il n'y aurait pas de véritable conflit entre ces deux instruments à cet égard, en raison des art. 7(1)(d) du projet de Convention et 45(1)(d) du Règlement.

discretion to refuse recognition or enforcement of the judgment of the SO under Article 7(1)(d) of the DC, the RS cannot refuse recognition and enforcement of the judgment of State A under Article 9(g) of the 2005 Convention because the judgment of the SO does not meet the conditions necessary for its recognition in the RS. The RS can exercise its discretion to refuse recognition and enforcement of the judgment of State A under Article 9(g) of the 2005 Convention only if the judgment of the SO meets the conditions necessary for its recognition in the RS. For this scenario, Article 26(1) of the 2005 Convention and Article 24(1) of the DC should be applied in accordance with the objective of both Conventions which is to promote the recognition and enforcement of judgments of their Contracting States.

2 New York Convention

5 Concerning the relationship with the New York Convention, it should be highlighted that the DC excludes all matters relating to arbitration and arbitral awards from its scope (Art. 2(3) of the DC). As pointed out in the DER,⁸ the RS may refuse the recognition or enforcement of a judgment given in another Contracting State of the DC if the proceedings in the SO were contrary to an arbitration agreement. Hence, there is no conflict between the DC and the New York Convention. After the DC enters into force for a Contracting State, the New York Convention would be applied as it is applied now.

6 For example, there might be a scenario where i) the SO and the RS are Contracting States of the DC, and the RS and State A are Parties to the New York Convention, ii) two private parties to a commercial contract concluded an arbitration agreement identifying State A as the seat of arbitration, and iii) there are both an arbitral award based on the arbitration agreement and a judgment by a court of the SO which is inconsistent with the arbitral award. In this scenario, the RS would be obliged towards the SO to recognise and enforce the judgment under the DC, and towards State A to recognise and enforce the arbitral award under the New York Convention. However, Article 2(3) of the DC allows the RS to avoid its obligation to recognise and enforce the judgment under the DC, and the arbitral award would be recognised and enforced under the New York Convention. In addition, Article 24(2) would also give precedence to the New York Convention if the bracketed words “as between Parties to that instrument” are deleted from the paragraph where a court mistakenly assumes that there is a conflict between the two treaties (or where delegations decide at the Diplomatic Session that a solution based on Art. 2(3) is not sufficient).

3 Singapore Convention

7 Under the Singapore Convention, IWGIII assumes that the RS does not have a reciprocal treaty obligation towards another Party to the Singapore Convention because the Con-

vention would apply as soon as the RS is a Party to it and a mediated settlement agreement is presented in the RS for recognition and enforcement. In that situation, the RS is only bound by a treaty obligation based on *pacta sunt servanda* to enforce settlement agreements which fall under the scope of application of the Singapore Convention.

8 In a scenario where the SO and the RS are Contracting States to the DC and the RS is a Party to the Singapore Convention, a party to a dispute (judgment creditor) may seek recognition and enforcement of a judgment of the SO under the DC and the other party (judgment debtor) may object to the enforcement on the grounds that it conflicts with a settlement agreement which is enforceable under the Singapore Convention.⁹ If one assumes that Article 3(2) of the Singapore Convention also applies to *exequatur*/enforcement proceedings, the Singapore Convention would require the RS to allow the judgment debtor to invoke the settlement agreement and prove that the matter has already been resolved. However, the Singapore Convention does not oblige the RS to refuse enforcement of the judgment. The consequence is to be determined under the national law of the RS (including any treaties in force in the RS). Therefore, the RS may enforce the judgment under the DC without breaching the obligation under the Singapore Convention. At the same time, the RS may also refuse enforcement of the judgment according to Article 24(2) of the DC if the SO is also a Party to the Singapore Convention. If the SO is not a Party to the Singapore Convention, the RS may not refuse enforcement of the judgment unless the bracketed words “as between Parties to that instrument” in Article 24(2) of the DC are removed.

4 Brussels Ia Regulation

9 The obligations under the Brussels Ia Regulation (hereinafter referred to as “the Regulation”) concerning recognition and enforcement of judgments are i) to recognise and enforce a judgment of another EU Member State and ii) to refuse recognition and enforcement of a judgment of another EU Member State if there is a ground for refusal provided in Chapter III, Section 3 of the Regulation. The obligations mentioned under point i) may conflict with the international obligation under the DC to refuse recognition and enforcement of a judgment rendered by a Contracting State (which is also an EU Member State). However, such obligations are provided only in Article 6 of the DC relating to exclusive grounds of jurisdiction. Those judgments which are not eligible for recognition and enforcement under the DC shall also be refused recognition and enforcement according to Article 45(1)(e)(ii) (which refers to the corresponding exclusive direct jurisdiction rules in Art. 24(1) and (4)) of the Regulation. Therefore, there is no conflict between the DC and the Regulation in this respect.¹⁰ The obligations mentioned under point ii) to refuse recognition and enforcement

⁸ Para. 67 of the DER.

⁹ Cf. paras 416-419 of the DER.

¹⁰ The obligation to recognise and enforce a judgment by an EU Member State (State A) may also conflict with the international obligation under the DC to recognise and enforce a judgment rendered by another Contracting State (SO, which may or may not be an EU Member State) if the former judgment is irreconcilable with the latter. However, there would be no true conflict between the two instruments in this respect because of Art. 7(1)(d) of the DC and Art. 45(1)(d) of the Regulation.

d'un autre État membre de l'UE en application du Règlement peut entrer en conflit avec l'obligation internationale au titre du projet de Convention de reconnaître et d'exécuter le jugement. L'obligation énoncée au point ii) est prévue à l'article 45 du Règlement. En particulier, de réels conflits sont possibles lorsqu'un jugement en matière de baux ou d'assurance est en jeu.

10 L'article 6(c) du projet de Convention ne s'applique qu'aux jugements portant sur des baux de plus de six mois. Tout jugement concernant un bail de moins de six mois est soumis aux règles générales du projet de Convention et doit être reconnu et exécuté au titre de celui-ci si l'un des chefs de compétence visés à l'article 5(1) trouve à s'appliquer (et qu'aucun des motifs de refus visés à l'art. 7 ne s'applique). Cependant, l'article 24(1) du Règlement s'applique aussi aux jugements portant sur des baux de moins de six mois. En l'occurrence, il y a deux chefs de compétence possibles (le lieu de la propriété louée OU le domicile du défendeur, à condition que le locataire (« L ») soit une personne physique et que L et le propriétaire (« P ») soient domiciliés dans le même État membre de l'UE), qui sont tous les deux des chefs de compétence exclusive. Au titre de l'article 45(1)(e)(ii), un autre État membre de l'UE est tenu de refuser de reconnaître et d'exécuter un jugement lorsqu'il y a violation de l'article 24(1) du Règlement. Ainsi, si les États membres de l'UE étaient tenus d'appliquer a) le Règlement, mais également b) le projet de Convention, un conflit pourrait naître de la situation qui suit. L est domicilié et réside habituellement en France et loue un bien en Belgique. P est domicilié en Allemagne et intente une action en justice contre L en France. Le bail porte sur une durée de moins de six mois. En application du projet de Convention, ce n'est pas l'article 6, mais l'article 5(1)(a) qui s'applique puisque P a intenté une action contre L à l'endroit de la résidence habituelle de ce dernier, en France. La Belgique est tenue de reconnaître et d'exécuter le jugement au titre du projet de Convention. Quant au Règlement, l'article 24 s'applique et la reconnaissance et l'exécution du jugement français doivent être refusées en application de l'article 45(1)(e)(ii) puisqu'il est contraire au chef de compétence exclusive énoncé dans le Règlement. Un réel conflit peut survenir dans une telle situation.

11 En ce qui concerne un jugement en matière d'assurance, la règle fondamentale contenue dans le Règlement tient au fait que la personne assurée doit être poursuivie à l'endroit de son domicile. Si elle est poursuivie ailleurs (sans qu'aucune dérogation visée à la section 3 ne le prévoie), alors l'article 45(1)(e)(i) du Règlement implique que tout État membre de l'UE est tenu de refuser la reconnaissance et l'exécution du jugement à son encontre. Le projet de Convention ne prévoit aucune règle spécifique visant à protéger les personnes assurées et l'article 5(1) s'appliquera au jugement. Si l'un des fondements visés à l'article 5 (par ex. l'art. 5(1)(g)) trouve à s'appliquer, une obligation s'imposera alors à l'État requis membre de l'UE qui sera tenu d'exécuter le jugement en application du projet de Convention, bien que le Règlement l'interdise. Un réel conflit peut alors survenir eu égard aux contrats d'assurance.

12 En outre, le Groupe III a estimé que la survenance d'un conflit entre le Règlement et le projet de Convention en matière de contrats de consommation ou de travail était relativement peu probable ; néanmoins, en fonction de l'interprétation future de ces deux instruments, cela ne doit pas être totalement exclu.

13 L'actuel article 24(4) résoudra de manière exhaustive n'importe quelle difficulté en ce qu'il permet, dans les relations entre les États membres de l'UE, de faire prévaloir

le Règlement en ce qui concerne les jugements émanant d'États membres de l'UE. Le Groupe III a confirmé que l'actuel article 24(4) est en effet nécessaire pour régler les réels conflits entre le projet de Convention et le Règlement.

5 Convention de Lugano

14 Considérant que les règles portant sur la reconnaissance et l'exécution des jugements contenues dans la Convention de Lugano sont semblables à celles du Règlement, la majeure partie de l'analyse susmentionnée vaut aussi pour le rapport entre le projet de Convention et la Convention de Lugano¹¹. En ce qui concerne les jugements en matière de baux ou d'assurance, de réels conflits entre ces deux instruments sont possibles. Quant aux contrats de consommation, un conflit d'obligations internationales est peu probable, mais ne devrait tout de même pas être totalement exclu, en fonction de la future interprétation de ces deux instruments.

15 L'actuel article 24(2) résout n'importe quelle difficulté en ce qu'il permet, dans les rares cas de conflit, de faire prévaloir la Convention de Lugano. Et ce, que la formule « entre les Parties à cet instrument » soit ajoutée ou non ; en effet, la Convention de Lugano ne traite pas de jugements émanant d'États qui ne sont pas Parties à celle-ci. Ainsi, tous les conflits recensés ne concerneraient que des situations dans lesquelles tous les États impliqués sont Parties à la Convention de Lugano.

6 Convention de Minsk

16 L'article 82 de la Convention de Minsk énonce que la « Convention n'affecte pas les dispositions des autres traités internationaux dont les États contractants sont signataires ». On ne sait pas vraiment si la formule « sont signataires » renvoie uniquement aux accords internationaux auxquels les États contractants étaient déjà Parties au moment où ils ont adhéré à la Convention de Minsk ou si cela englobe les accords internationaux qu'ils concluent ou auxquels ils adhèrent *a posteriori*. Dès lors, on ne sait pas si cette disposition donnerait la prévalence au projet de Convention à venir¹². Si tel n'est pas le cas, la Convention de Minsk l'emporterait conformément à l'article 24(2) du projet de Convention dans l'éventualité où un réel conflit surviendrait entre ces deux instruments. Si, en revanche, l'article 82 de la Convention de Minsk s'applique aussi aux accords internationaux conclus postérieurement par les États contractants à la Convention de Minsk, autrement dit, après leur adhésion à cette dernière, aucune des Conventions n'affecterait l'autre. Le tribunal de l'État requis serait en mesure d'appliquer l'une ou l'autre des Conventions et il n'y aurait pas de réel conflit entre elles.

17 Le rapport entre ces deux instruments a été évoqué en partant du principe que la Convention de Minsk n'affecte en rien les accords internationaux, sous réserve que les Parties à celle-ci fussent déjà Parties à ces accords au moment où elles ont adhéré à la Convention de Minsk. Si le projet de Convention et la Convention de Minsk sont en principe compatibles, un scénario de conflit réel est envisageable. Par exemple, si i) l'État d'origine et l'État requis sont Parties à la Convention de Minsk et que l'État d'ori-

¹¹ Les jugements portant sur les contrats individuels de travail représentent l'exception. Rien dans la Convention de Lugano n'oblige à refuser de reconnaître et d'exécuter un jugement émanant d'un autre État partie à cette Convention rendu en violation des chefs de compétence en matière de contrat individuel de travail.

¹² Doc. pré-l. No 27 d'avril 2005 (*op. cit.* note 6), section V-1.

of a judgment of another EU Member State under the Regulation may conflict with the international obligation under the DC to recognise and enforce the judgment. The obligations mentioned under point ii) under the Regulation are provided in Article 45. In particular, real conflicts are possible where a judgment on tenancies or on insurance is at issue.

10 Article 6(c) of the DC only applies to judgments on tenancies of more than six months. A judgment on a tenancy of less than six months is subject to the general rules of the DC, and it must be recognised and enforced under the DC if one of the jurisdictional grounds in Article 5(1) is met (and there is no ground for refusal in Art. 7). However, Article 24(1) of the Regulation also applies to tenancies of less than six months. Here, there are the two alternative jurisdictions (the situs of the property rented, OR the domicile of the defendant, provided that the tenant (“T”) is a natural person and both T and the landlord (“L”) are domiciled in the same EU Member State), both of which are exclusive. Under Article 45(1)(e)(ii), another EU Member State must refuse recognition and enforcement where Article 24(1) of the Regulation has been breached. Therefore, if the EU Member States had to apply a) the Regulation but also b) the DC, a conflict could arise in the following situation. T is domiciled and habitually resident in France, and he/she takes a tenancy of a property in Belgium. L is domiciled in Germany. L sues T in France. The tenancy is for less than six months. Under the DC, not Article 6 but Article 5(1)(a) applies because L has sued T in T’s habitual residence, France. Belgium is obliged to recognise and enforce the judgment under the DC. Under the Regulation, Article 24 applies, and the French judgment must be refused recognition or enforcement according to Article 45(1)(e)(ii) because the judgment conflicts with an exclusive jurisdiction rule under the Regulation. A real conflict may arise in this situation.

11 Concerning a judgment on insurance, the basic rule in the Regulation is that the insured person must be sued in his/her domicile. If he/she is sued elsewhere (without a Section 3 derogation permitting it), then Article 45(1)(e)(i) of the Regulation means an EU Member State must refuse recognition and enforcement of the judgment against him/her. There are no special rules in the DC to protect insured persons and Article 5(1) will be applied to the judgment. If an Article 5 ground (e.g., Art. 5(1)(g)) applies, then there will be an obligation on the requested EU Member State to enforce the judgment under the DC even though the Regulation forbids it. A real conflict may thus also arise in relation to insurance contracts.

12 In addition, IWGIII concluded that a conflict between the Regulation and the DC in matters relating to a consumer or employment contract is unlikely but, depending on the future interpretation of both instruments, not to be fully excluded.

13 The current Article 24(4) will comprehensively solve any difficulties as it allows, in the relations between EU Member States, to give precedence to the Regulation as far

as judgments from EU Member States are concerned. IWGIII confirmed that the current Article 24(4) is indeed necessary to deal with those real conflicts between the DC and the Regulation.

5 Lugano Convention

14 Because the rules on recognition and enforcement of judgments in the Lugano Convention are similar to those of the Regulation, the main part of the above analysis on the relationship of the DC with the Regulation also applies to the relationship with the Lugano Convention.¹¹ Concerning judgments on tenancies or on insurance, real conflicts between the two instruments would be possible. Concerning consumer contracts, a conflict of international obligations is unlikely but, depending on the future interpretation of both instruments, not to be fully excluded.

15 The current Article 24(2) solves any difficulties as it allows to give precedence to the Lugano Convention in the few cases of conflict. This applies whether or not the words “as between Parties to that instrument” are added because the Lugano Convention does not deal with judgments from States which are not Parties to the Lugano Convention. Therefore, all conflicts identified would only concern situations where all States involved are Parties to the Lugano Convention.

6 Minsk Convention

16 Article 82 of the Minsk Convention provides that the Minsk “Convention shall not affect the provisions of other international agreements to which the Contracting State are parties”. It is not clear whether “are parties” only refers to international agreements to which the Contracting States are already Parties at the time they join the Minsk Convention, or also to international agreements they conclude or join subsequently. Therefore, it is unclear whether this provision would also give precedence to the DC yet to be concluded.¹² If it does not, the Minsk Convention would prevail due to Article 24(2) of the DC in case of a real conflict between the two Conventions. If, on the other hand, Article 82 of the Minsk Convention also applies to international agreements which the Contracting Parties to the Minsk Convention join only later, i.e., after joining the Minsk Convention, each Convention would leave the other Convention unaffected. The court of the RS would be able to apply either one of the Conventions, and there would be no real conflict between them.

17 The relationship was discussed on the assumption that the Minsk Convention only leaves international agreements unaffected if the Parties to the Minsk Convention were already Parties at the time they joined the Minsk Convention. Although the DC and the Minsk Convention are usually compatible, a scenario of a real conflict is possible. For example, if i) the SO and the RS are Parties to the Minsk

¹¹ Judgments relating to individual contracts of employment constitute the exception. There is no obligation under the Lugano Convention to refuse recognition and enforcement of a judgment from another Lugano State which was given in violation of the jurisdiction rules in matters relating to individual contracts of employment.

¹² Prel. Doc. No 27 of April 2005 (*op. cit.* note 6), section V-1.

gine, l'État requis et l'État A sont tous des États contractants au projet de Convention, ii) et que l'État d'origine a rendu un jugement concernant un bail immobilier à long terme eu égard à un immeuble situé dans l'État A, l'État requis pourrait être tenu de reconnaître et d'exécuter le jugement au titre de la Convention de Minsk, tandis que l'article 6(c) du projet de Convention exige au contraire qu'il refuse considérant que l'État A dispose d'une compétence exclusive en la matière en vertu du droit interne. Dans le cadre de ce scénario, l'argument suivant a été exprimé : l'État requis peut appliquer la Convention de Minsk, à condition que la formule « entre les Parties à cet instrument » visée à l'article 24(2) soit supprimée. En cas de maintien de la formule entre crochets, l'État requis serait tenu de refuser la reconnaissance et l'exécution du jugement en application du projet de Convention étant entendu que l'État A est visé par le jugement, mais n'est pas Partie à la Convention de Minsk. Ainsi, l'application de la Convention de Minsk n'interviendrait pas, en l'espèce, entre des Parties à celle-ci. En cas de suppression de la formule entre crochets, la Convention de Minsk l'emporterait ; on peut néanmoins raisonnablement penser que l'État d'origine ne peut s'attendre à ce que l'État requis reconnaisse et exécute son jugement au titre de ladite Convention, considérant l'adhésion des trois parties concernées en l'espèce (État d'origine, État requis et État A) au projet de Convention.

OBSERVATIONS FINALES

18 Cette analyse a permis de mettre en lumière de réels conflits entre le projet de Convention et d'autres instruments. Par conséquent, le Groupe III a jugé que l'article 24(2) et (4) était nécessaire pour résoudre ces conflits. Il est également parvenu à un consensus concernant la suppression de la formule présentée entre crochets à l'article 24(2) : « entre les Parties à cet instrument ». Cette suppression permet de faire prévaloir les instruments antérieurs, en particulier, la Convention de New York. Cela facilitera les choses pour les États qui souhaitent devenir des États contractants au projet de Convention. Le Groupe III n'a, pour l'heure, recensé aucun problème sérieux susceptible de découler de la suppression proposée, bien qu'il convienne d'étudier plus avant la nécessité de restrictions quant à l'application d'instruments antérieurs.

Convention and the SO, the RS and State A are Contracting States of the DC, ii) and the SO rendered a judgment on long-term tenancy of immovable property situated in State A, it may be necessary for the RS to recognise and enforce the judgment under the Minsk Convention, whereas Article 6(c) of the DC requires the RS to refuse recognition and enforcement because State A has exclusive jurisdiction on the matter under its national law. For this scenario, the following argument was voiced: the RS may apply the Minsk Convention if the bracketed words “as between Parties to that instrument” in Article 24(2) are deleted. If the bracketed words are maintained, it would be necessary for the RS to refuse recognition and enforcement of the judgment under the DC because State A is concerned by the judgment but it is not a Party to the Minsk Convention and, as a result, the application of the Minsk Convention would not be regarded as between Parties to the Minsk Convention in this case. If the bracketed words are deleted, the Minsk Convention would have precedence, although it seems reasonable to think that the SO cannot expect the RS to recognise and enforce its judgment under the Minsk Convention because of the conclusion of the DC between all three States involved here (SO, RS and State A).

FINAL REMARKS

18 Through the analysis, some real conflicts between the DC and other individual instruments were acknowledged. Therefore, IWGIII concluded that Article 24(2) and (4) is necessary to resolve those conflicts. IWGIII also reached consensus on the deletion of the bracketed words “as between Parties to that instrument” in Article 24(2). This deletion gives precedence to earlier instruments, in particular the New York Convention, and would make it easier for States to become Contracting States of the DC. IWGIII did not identify any serious problems which might be caused by the suggested deletion at this point, though the necessity of restrictions for the application of earlier international instruments should be discussed further.

Rapport du Groupe de travail informel I – Droits de propriété intellectuelle

ÉTABLI PAR LE PROFESSEUR TIONG MIN YEO,
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AVEC L'ASSISTANCE DU BUREAU PERMANENT

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1 Les discussions qui ont eu lieu dans le cadre du Groupe de travail informel I (ci-après, le « Groupe I ») consacré aux droits de propriété intellectuelle ont porté sur A) les décisions des autorités compétentes en matière de validité des droits de propriété intellectuelle et B) la propriété intellectuelle de manière générale. Les discussions concernant le point B ont été assez restreintes, mais une certaine volonté de les poursuivre en est ressortie.

A Autorités compétentes

2 Si nombre de participants se sont montrés enclins à poursuivre les discussions sur ce point, le compromis visant à reconnaître les décisions des autorités compétentes sur la validité des droits de propriété intellectuelle au titre du projet de Convention¹ a reçu un soutien limité. En cas d'adoption de ce compromis, certains membres ont proposé les précisions suivantes : a) que la définition des autorités compétentes soit limitée aux offices de propriété intellectuelle ; b) que les décisions portent sur des droits de propriété intellectuelle susceptibles de faire l'objet d'un enregistrement ou exigeant un enregistrement ; c) que les droits de propriété intellectuelle relèvent de la compétence territoriale de l'autorité compétente ; d) que la décision de l'autorité compétente découle d'une procédure judiciaire ou quasi judiciaire contradictoire. Il a été indiqué que ces précisions pouvaient répondre à certaines préoccupations, notamment celles d'entreprises et de parties prenantes.

Note du président du Groupe de travail informel

3 Les membres se sont penchés sur le fonctionnement des autorités compétentes dans un certain nombre de ressorts juridiques, en fonction des réponses de ces derniers à des questions préparées par le Groupe I avec l'aide du Bureau Permanent (voir annexe I – « Synthèse », annexe II – « Résumé des réponses reçues » et annexe III – « Synopsis des réponses »). Le dilemme relevé lors de la réunion de la Commission spéciale de mai 2018 a laissé les membres perplexes. En effet, d'un côté, le projet de Convention a été négocié sur la base de son application aux décisions de justice en matière civile ou commerciale, à l'exclusion des décisions administratives, mais d'un autre côté, dans certains États, les autorités compétentes disposent d'une compétence exclusive sur certaines matières relevant de la propriété intellectuelle, sur lesquelles des tribunaux statuent généralement dans d'autres États. Néanmoins, un certain

¹ Ci-après, le terme « projet de Convention » désigne le projet de Convention de 2018 sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale, qui est publié comme Doc. trav. No 262 REV, Projet de Convention révisé proposé par le Comité de rédaction arrêté au 28 mai 2018, voir Cahier 3, p. 318, du présent tome.

soutien a été exprimé (tout comme une certaine réticence) à l'égard d'un éventuel compromis fondé sur les précisions susmentionnées.

4 La précision proposée au point a) découle de la considération selon laquelle il pourrait y avoir des institutions autres qu'un office de propriété intellectuelle (responsable au premier chef de l'enregistrement des droits de propriété intellectuelle sur le territoire), par exemple des organismes commerciaux susceptibles d'être habilités à imposer des mesures administratives en cas de violation des droits de propriété intellectuelle. Les précisions proposées aux points b) et c) parlent d'elles-mêmes et découlent de l'idée selon laquelle l'étendue de la reconnaissance devrait se limiter aux droits de propriété intellectuelle susceptibles de faire l'objet d'un enregistrement et relevant de la compétence territoriale de l'autorité compétente. Il a également été suggéré de limiter la reconnaissance aux droits fondés sur l'*Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce* (ADPIC) qui exigent un enregistrement. La précision proposée au point d) distingue les fonctions administratives des fonctions judiciaires ou quasi judiciaires de l'autorité compétente. À titre d'exemple, l'octroi initial des droits relève des fonctions administratives dans l'intégralité des ressorts juridiques, à l'exception d'un seul. De même, dans certains États qui reconnaissent une telle procédure, une décision relative à une objection préalable de tiers à l'octroi d'un droit est de nature administrative et aura un impact sur la décision ultime de l'autorité compétente d'octroyer (ou non) ledit droit.

5 Deux autres sujets, impliquant potentiellement la question de l'égalité de traitement des jugements portant sur les droits de propriété intellectuelle, ont été abordés : 1) la reconnaissance doit-elle être restreinte à la question de la validité du droit ou est-elle susceptible d'englober des questions incidentes (comme cela peut être le cas d'un jugement entre deux parties) ? Et 2) les condamnations aux frais et dépens émanant d'autorités compétentes en matière de détermination de la validité des droits de propriété intellectuelle doivent-elles être exécutoires au titre du projet de Convention ? Concernant la première question, la proposition visant à limiter la reconnaissance aux questions relatives à la validité et à exclure toutes questions incidentes a été soutenue. Néanmoins, une préoccupation a été exprimée à cet égard ; certains ressorts juridiques risquent d'être traités de manière différenciée en raison du fonctionnement de la Convention, lorsque les autorités compétentes sont chargées de rendre des décisions portant tant sur les atteintes aux droits de propriété intellectuelle que sur la validité de ces derniers.

B Propriété intellectuelle de manière générale

6 En ce qui concerne la propriété intellectuelle de manière générale, les opinions restent divisées quant à savoir s'il convient de l'inclure dans la Convention. Les experts s'inquiètent du fait que le traitement actuel de la propriété intellectuelle dans le projet de Convention n'est pas complet, en ce qu'il porte sur la validité et la contrefaçon de droits de propriété intellectuelle, mais pas sur leur caractère exécutoire. Il a également été suggéré qu'en cas d'inclusion de la propriété intellectuelle, la référence à « la propriété intellectuelle et [aux] matières analogues » visée à l'article 2(1)(m) ne définit pas de manière suffisamment claire l'objet de l'exclusion. Il pourrait donc être préférable d'inclure une liste plus précise des types de droits que cette disposition vise à couvrir.

Report of informal working group I – Intellectual property rights

DRAWN UP BY PROFESSOR TIONG MIN YEO,
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THE ASSISTANCE OF THE PERMANENT BUREAU

Preliminary Document No 10 of April 2019

1 Discussions at the informal working group I (IWGI) on intellectual property rights (IP) were directed to A) decisions of competent authorities on the validity of IP rights, and then to B) IP generally. Discussion on B had been somewhat limited but there was some openness for these discussions to continue.

A *Competent authorities*

2 There was limited support for a compromise position to recognise the decisions of competent authorities on the validity of IP rights under the draft Convention,¹ though many remain open to further discussion. Some members proposed the following qualifications if such a compromise were adopted: a) that the meaning of competent authorities be confined to IP offices; b) that the decisions are on registrable IP rights, or IP rights which are required to be registered; c) that the IP rights are within the territorial competence of the competent authority; d) that the decision of the competent authority results from judicial or quasi-judicial, adversarial proceedings. It was expressed that these qualifications could address certain concerns, including some business and stakeholder concerns.

Notes from the chair of the informal working group

3 Members reviewed the workings of competent authorities in a number of jurisdictions based on their answers to survey questions prepared by the informal working group with the aid of the Permanent Bureau (see Annex I – “Executive summary”, Annex II – “Summary of responses received” and Annex III – “Synopsis of responses”). Members remained troubled by the dilemma noted in the May 2018 Special Commission meeting that, on the one hand the draft Convention has been negotiated from the start on the basis of judicial decisions in civil or commercial matters to the exclusion of administrative decisions, but on the other hand in some jurisdictions competent authorities have exclusive jurisdiction over some IP matters that are normally decided by courts of law in other countries. Nevertheless,

¹ Hereinafter the term “draft Convention” is used to refer to the 2018 draft Convention on the recognition and enforcement of foreign judgments in civil or commercial matters, which is published as Work. Doc. No 262 REV, Revised draft Convention submitted by the Drafting Committee as of 28 May 2018, see Book 3, p. 318, of this tome.

there was some support (but also some reluctance) to consider a possible compromise position based on the qualifications above.

4 Proposed qualification a) arises from the consideration that there may be institutions beyond that of an IP office (which has the primary responsibility for the registration of IP rights within its territory), e.g., trade agencies which may be empowered to impose administrative measures for violations of IP rights. Proposed qualifications b) and c) are self-explanatory and arise from the concern that the scope of recognition should be confined to registrable IP rights within the territorial competence of the competent authority. A further suggestion was made that it should be confined to rights based on the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS) which are required to be registered. Proposed qualification d) addresses the line between administrative and judicial/quasi-judicial functions of a competent authority. For example, the initial grant is regarded as an administrative function in all but one of the surveyed jurisdictions. Similarly, in some States which allow such a procedure, a decision on pre-grant opposition by third parties is regarded as administrative and would be reflected in the ultimate decision of the competent authority to grant the right (or not).

5 Two further issues were discussed which potentially involve the question of parity of treatment with judgments on IP rights: 1) whether recognition should be confined to the question of the validity of the right, or may include collateral issues (as might be the case in a judgment between two parties); and 2) whether related costs orders of such competent authorities in determination of validity of IP rights should be enforceable under the draft Convention. Regarding the former, there was support for the view that the recognition should be confined to the issue of validity only, to the exclusion of collateral issues. However, a concern was also expressed that some jurisdictions would be disparately treated under operation of the Convention, as competent authorities are responsible for issuing infringement determinations in addition to validity determinations.

B *IP generally*

6 In respect of IP generally, views remain divided on whether IP should be included in the Convention. A concern was expressed that the current treatment of IP in the draft Convention was incomplete in dealing with validity and infringement but not enforceability of IP rights. There was also a suggestion that, if IP is excluded, the reference in Article 2(1)(m) to “intellectual property and analogous matters” does not define the subject matter of exclusion clearly enough, and that it might be preferable to include a clearer list of the types of rights that are to be covered by this provision.

7 En partant du postulat de l'inclusion de la propriété intellectuelle, au moins un membre du Groupe I a proposé d'apporter les propositions suivantes aux dispositions relatives aux droits de propriété intellectuelle :

Article 5

Fondements de la reconnaissance ou de l'exécution

[...]

- 3 (a) ~~Le paragraphe premier ne s'applique pas à un jugement portant sur un droit de propriété intellectuelle ou analogue. Un tel jugement est susceptible d'être reconnu ou exécuté si l'une des exigences suivantes est satisfaite :~~
- (b) ~~Un le jugement portant sur la contrefaçon, dans l'État d'origine, d'un droit de propriété intellectuelle nécessitant délivrance, octroi ou enregistrement est susceptible d'être reconnu et exécuté s'il et a été rendu par un tribunal de l'État dans lequel la délivrance, l'octroi ou l'enregistrement du droit en question a été sollicité, effectué, ou est réputé avoir été sollicité ou effectué conformément aux dispositions d'un instrument international ou régional, sauf. Toutefois, un tel jugement n'est pas susceptible d'être reconnu et exécuté si le défendeur n'a pas agi dans [cet État/l'État d'origine] aux fins d'initier ou de poursuivre la contrefaçon ou que son activité ne peut raisonnablement être considérée comme ayant spécifiquement visé cet État.]~~
- (c) ~~Un le jugement portant sur la contrefaçon, dans l'État d'origine, d'un droit d'auteur ou droit voisin, d'une marque non enregistrée ou d'un dessin ou modèle industriel non enregistré, et est susceptible d'être reconnu et exécuté s'il a été rendu par un tribunal de l'État pour lequel la protection était revendiquée, sauf. Toutefois, un tel jugement n'est pas susceptible d'être reconnu et exécuté si le défendeur n'a pas agi dans [cet État/l'État d'origine] aux fins d'initier ou de poursuivre la contrefaçon ou que son activité ne peut raisonnablement être considérée comme ayant spécifiquement visé cet État.]~~
- (d) ~~Un le jugement portant sur la validité, ou l'existence ou la titularité, dans l'État d'origine, d'un droit d'auteur ou droit voisin, d'une marque non enregistrée ou d'un dessin ou modèle industriel non enregistré, et est susceptible d'être reconnu s'il a été rendu par un tribunal de l'État pour lequel la protection était revendiquée.]~~

Article 6

Fondements exclusifs de la reconnaissance ou de l'exécution

Nonobstant l'article 5 :

- (a) un jugement portant sur ~~[l'enregistrement ou]~~ la validité d'un droit de propriété intellectuelle nécessitant délivrance, octroi ou enregistrement n'est reconnu ou exécuté que si l'État d'origine est celui dans lequel la délivrance, l'octroi ou l'enregistrement a été sollicité, effectué, ou est réputé avoir été sollicité ou effectué conformément aux dispositions d'un instrument international ou régional ;

[...]

Article 8

Décisions relatives aux questions préliminaires

1—Une décision rendue à titre préalable sur une matière à laquelle la présente Convention ne s'applique pas, ou une décision rendue à titre préalable sur une matière visée à l'article 6 par un ~~autre~~ tribunal d'un État contractant autre que celui désigné dans cette disposition, n'est pas reconnue ou exécutée en vertu de la présente Convention.

Article 8a

Jugements fondés sur une décision relative aux questions préliminaires

2] La reconnaissance ou l'exécution d'un jugement peut être refusée si, et dans la mesure où, le jugement est fondé sur une décision relative à une matière à laquelle la présente Convention ne s'applique pas, ou sur une décision relative à une matière visée à l'article 6(b) et (c) qui a été rendue par un ~~autre~~ tribunal d'un État contractant autre que celui désigné dans ~~cette~~ disposition ces alinéas.

~~3—Toutefois, dans le cas d'une décision relative à la validité d'un droit visé à l'article 6(a), 2] La reconnaissance ou l'exécution d'un jugement ne peut être différée, ou refusée en vertu du paragraphe précédent, si, et dans la mesure où, le jugement est fondé sur une décision relative à la validité d'un droit visé à l'article 6(a) et a été rendu par un tribunal d'un État contractant autre que celui désigné dans cette disposition, que si :~~

- (a) cette décision est incompatible avec un jugement ou une décision rendu(e) sur ce point par l'autorité compétente de l'État mentionné à l'article 6(a) ; ou
- (b) une procédure relative à la validité de ce droit est pendante dans cet État.

Le refus en vertu de l'alinéa (b) n'empêche pas une demande ultérieure de reconnaissance ou d'exécution du jugement.

Article 11

Mesures non pécuniaires en matière de propriété intellectuelle

~~En matière de Un jugement portant sur la contrefaçon d'un droit propriété intellectuelle, un jugement portant sur une contrefaçon n'est [reconnu ou] exécuté que dans la mesure où il a statué sur des impose une condamnations pécuniaire, y compris une condamnation pécuniaire découlant d'une injonction ordonnant ou interdisant un certain comportement dans l'État d'origines liées au préjudice subi dans l'État d'origine.~~

Note du président du Groupe de travail informel :

Ces modifications ont été proposées par les membres principalement aux fins de :

- 1) Article 5(3) :
- a) préciser que les jugements portant sur la contrefaçon seront susceptibles d'être reconnus et exécutés, tandis que les jugements portant sur la va-

7 On the assumption that IP should be included, at least one member suggested the following amendments to the provisions on IP rights for consideration:

Article 5
Bases for recognition and enforcement

[...]

3 (a) Paragraph 1 does not apply to a judgment ~~that ruled~~ on an intellectual property right or an analogous right. ~~Such a judgment is eligible for recognition and enforcement if one of the following requirements is met –~~

(b) ~~A the judgment ruled~~ on an infringement in the State of origin of an intellectual property right required to be granted or registered is eligible for recognition and enforcement if and it was given by a court in the State in which the grant or registration of the right concerned has been applied for, has taken place or, under the terms of an international or regional instrument, is deemed to have been applied for or to have taken place, ~~unless~~. However, such a judgment is not eligible for recognition and enforcement if the defendant has not acted in [that State/the State of origin] to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State~~};~~.

(c) ~~A the judgment ruled~~ on an infringement in the State of origin of a copyright or related right, an unregistered trademark or ~~an~~ unregistered industrial design, ~~and is eligible for recognition and enforcement if~~ it was given by a court in the State for which protection was claimed~~}; unless~~. However, such a judgment is not eligible for recognition and enforcement if the defendant has not acted in [that State/the State of origin] to initiate or further the infringement, or their activity cannot reasonably be seen as having been targeted at that State~~};~~.

(d) ~~A the judgment ruled~~ on the validity~~}; or~~ subsistence ~~or ownership~~ in the State of origin of a copyright or related right, an unregistered trademark or ~~an~~ unregistered industrial design is eligible for recognition if, and it was given by a court in the State for which protection was claimed~~};~~.

Article 6
Exclusive bases for recognition and enforcement

Notwithstanding Article 5 –

(a) a judgment that ruled on the ~~registration or~~ validity of an intellectual property right required to be granted or registered shall be recognised and enforced if and only if the State of origin is the State in which grant or registration [was/has been] applied for, has taken place, or, under the terms of an international or regional instrument, is deemed to have been applied for or to have taken place;

[...]

Article 8
Rulings on preliminary questions

~~1~~—A ruling on a preliminary question shall not be recognised or enforced under this Convention if the ruling is on a matter to which this Convention does not apply or on a matter referred to in Article 6 on which a court of a Contracting State other than the ~~court~~ State referred to in that Article ruled.

Article 8a
Judgments based on rulings on preliminary questions

~~2~~1—Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter to which this Convention does not apply, or on a matter referred to in Article 6, sub-paragraphs (b) and (c), on which a court of a Contracting State other than the ~~court~~ State referred to in ~~that Article~~ those sub-paragraphs ruled.

~~3~~—~~However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph (a),~~
2—Recognition or enforcement of a judgment may be postponed, or refused ~~under the preceding paragraph, if~~ and to the extent that the judgment was based on a ruling on the validity of a right referred to in Article 6, sub-paragraph (a), and was given by a court of a Contracting State other than the State referred to in Article 6, sub-paragraph (a), only where –

- (a) that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, sub-paragraph (a); or
- (b) proceedings concerning the validity of that right are pending in that State.

A refusal under sub-paragraph (b) does not prevent a subsequent application for recognition or enforcement of the judgment.

Article 11
~~Non-monetary~~ Remedies in intellectual property matters

~~In~~ A judgment on an infringement of an intellectual property matters, a judgment ruling on an infringement right shall be [recognised and] enforced only to the extent that it ~~rules on~~ imposes a monetary remedy, including a monetary remedy deriving from an injunction that orders or prohibits behaviour in the State of origin in relation to harm suffered in the State of origin.

Notes from the chair of the informal working group:

These amendments were suggested by the members concerned principally with the aim of:

- 1) Article 5(3):
 - a) clarifying that judgments on infringement will be eligible for recognition and enforcement, where-

licité et sur l'existence seront uniquement susceptibles d'être reconnus ;

- b) retirer le terme « titularité » de l'article 5(3)(d) en ce qu'il pourrait s'avérer problématique ;
- c) apporter des clarifications au moyen d'autres modifications du texte.

2) Article 6(a) :

- a) supprimer le terme « enregistrement » de l'article 6(a) en ce qu'il semble soit redondant (déjà couvert par le terme « validité »), soit problématique (s'il y a une différence entre « enregistrement » et « validité », à quoi le terme « enregistrement » fait-il référence ?) ;
- b) préciser que l'article 6(a) s'appliquera également dans les cas où l'enregistrement d'un droit de propriété intellectuelle a été refusé dans un État dans lequel il était sollicité.

3) Article 8 (proposition d'articles 8 et 8a) :

- a) simplifier le texte.

4) Article 11 :

- a) ajouter les condamnations pécuniaires « découlant d'une injonction ordonnant ou interdisant un certain comportement dans l'État d'origine », de sorte que les jugements qui imposent de telles condamnations soient susceptibles d'être reconnus et exécutés au titre du projet de Convention.

D'un autre côté, des inquiétudes ont également été mises en lumière :

- a) quant à savoir s'il était bien nécessaire de remplacer « cet État » par « l'État d'origine » à l'article 5(3)(b) et (c), considérant que le critère du présent projet se fonde sur la survenance de la contrefaçon dans l'État d'origine ;
- b) la « titularité » ne devrait pas être exclue de l'article 5(3)(d), il pourrait s'agir d'une question pratique et de telles décisions devraient être susceptibles d'être reconnues et exécutées au même titre que les jugements portant sur l'existence ;
- c) il conviendrait de conserver le terme « enregistrement » à l'article 6(a) afin d'éviter d'exclure par inadvertance du champ d'application de la Convention un jugement lorsqu'il porte sur une question de validité qui est intrinsèquement liée à la question de l'enregistrement ;
- d) quant à savoir si la division de l'article 8 en deux parties distinctes complique inutilement le texte et soulève des questions concernant la relation entre ces deux parties ;
- e) dans le cas d'un État où des tribunaux distincts statuent, de manière non concomitante, sur la validité et la contrefaçon, la nouvelle formulation proposée de l'article 8 pourrait avoir pour conséquence involontaire que l'existence d'une procédure en validité pendante dans l'État d'origine ne déclenche pas le droit de l'État requis de refuser ou de reporter la reconnais-

sance ou l'exécution d'un jugement portant sur la contrefaçon rendu dans le même État ;

- f) l'ajout des condamnations pécuniaires découlant d'injonctions en vertu de l'article 11 pourrait créer des complications et soulever des problèmes fondamentaux quant au champ d'application (quant à savoir si certaines de ces décisions sont susceptibles d'être de nature civile ou commerciale) et à la structure (quant à savoir s'il s'agit de décisions sur le fond rendues par l'État d'origine ou d'ordonnances d'exécution relevant de la compétence du tribunal de l'État requis) de la Convention ;
- g) quant à savoir si la Convention doit exclure les ordonnances non pécuniaires ;
- h) quant à savoir s'il convient de supprimer les termes « liées au préjudice subi dans l'État d'origine » de l'article 11 ;
- i) quant à savoir si le recours au participe passé « visé » est suffisamment clair et si le bout de phrase suivant « ou que son activité ne peut raisonnablement être considérée comme ayant spécifiquement visé cet État » à l'article 5(3)(b) et (c) du texte proposé est nécessaire.

ANNEXE I

Synthèse

INTRODUCTION

1 En juillet 2018, le Bureau Permanent de la Conférence de La Haye de droit international privé, en consultation avec le président du Groupe de travail informel I consacré aux droits de propriété intellectuelle (ci-après, le « Groupe I »), le professeur Tiong Min Yeo (Singapour), a distribué aux membres du Groupe I un Questionnaire révisé concernant le rôle des autorités compétentes en matière de détermination de la validité des droits de propriété intellectuelle. Le Questionnaire révisé visait à faciliter les discussions au sein du Groupe I, en préparation de la Session diplomatique sur la reconnaissance et l'exécution des jugements étrangers en matière civile ou commerciale qui se tiendra à la mi-2019. Le présent document présente brièvement les réponses reçues par le Bureau Permanent au 30 octobre 2018.

2 Le président du Groupe I et le Bureau Permanent tiennent à remercier tous les membres qui ont présenté une réponse au Questionnaire pour les efforts et l'énergie affectés à la préparation de ces réponses. Au total, des informations ont été recueillies quant aux lois et pratiques de 29 États (Allemagne, Australie, Canada, Chypre, Costa Rica, Croatie, États-Unis d'Amérique, Finlande, France, Hongrie, Irlande, Israël, Italie, Japon, Lituanie, Malte, Norvège, Pays-Bas, Pérou, Pologne, Portugal, République de Corée, République populaire de Chine, République tchèque, Roumanie, Royaume-Uni, Singapour, Slovaquie, Suisse)² et de trois institutions spécialisées qui exercent le rôle d'autorité compétente (Office Benelux de la Propriété intellectuelle (OBPI)³,

² Veuillez noter que l'Association internationale pour les marques a eu l'obligation de fournir au Groupe I des informations concernant les lois et pratiques de quatre États (Allemagne, Australie, États-Unis et République populaire de Chine) et d'une institution (Office Benelux de la Propriété intellectuelle (OBPI)).

³ Les lois et pratiques de l'OBPI sont également mentionnées dans les réponses des Pays-Bas.

- as judgments on validity and subsistence will be eligible only for recognition;
- b) removing “ownership” from Article 5(3)(d) as it may be problematic;
 - c) clarifications by other textual changes.
- 2) Article 6(a):
- a) deleting “registration” from Article 6(a) as it appears either redundant (completely covered by “validity”) or problematic (if the terms “registration” and “validity” differ, what does “registration” refer to?);
 - b) clarifying that Article 6(a) will also apply in cases in which the registration of an IP right was refused in the State in which it was applied for.
- 3) Article 8 (proposed Arts 8 and 8a):
- a) to simplify the text.
- 4) Article 11:
- a) adding monetary remedies “deriving from an injunction that orders or prohibits behaviour in the State of origin”, so that judgments that impose such remedies will be eligible for recognition and enforcement under the draft Convention.

On the other hand, concerns were also expressed:

- a) regarding whether it was necessary to modify “that State” to “the State of origin” in Article 5(3)(b) and (c) since the filter in the current draft works on the basis of the infringement taking place in the State of origin;
- b) that “ownership” should not be excluded from Article 5(3)(d) because it may arise as a practical issue and such decisions should be eligible for recognition and enforcement in the same way as judgments on subsistence;
- c) that “registration” should be retained in Article 6(a) to prevent the inadvertent exclusion of a judgment from the scope of the Convention when it determines a question of validity that is intrinsically connected to the issue of registration;
- d) regarding whether splitting Article 8 into different parts unduly complicates the text and raises questions about the relationship between Article 8 and Article 8(a);
- e) that the proposed redraft of Article 8 may have the inadvertent consequence that, in the case of a bifurcated system where a State has different courts deciding validity and infringement, the existence of pending validity proceedings in the State of origin does not trigger the right of the requested State to refuse or

postpone the recognition or enforcement of an infringement judgment from the same State;

- f) that the addition of monetary remedies deriving from injunctions under Article 11 creates complications and raises fundamental issues about the scope (whether some of these orders may be civil and commercial) and structure (whether these are orders on the merits decided by the court of the State of origin or enforcement orders to be decided by the court of the requested State) of the Convention;
- g) regarding whether the Convention should exclude non-monetary orders at all.
- h) regarding whether “in relation to harm suffered in the State of origin” of Article 11 should be deleted;
- i) regarding whether “targeted at” is clear enough and whether “or their activity cannot reasonably be seen as having been targeted at that State” in Article 5(3)(b) and (c) of the proposed text is necessary.

ANNEX I

Executive summary

INTRODUCTION

1 In July 2018 the Permanent Bureau of the Hague Conference on Private International Law, in consultation with the chair of informal working group I on intellectual property (IWGI), Professor Tiong Min Yeo (Singapore), issued a revised Questionnaire to members of IWGI on the role of competent authorities in determining the validity of intellectual property rights (IP rights). The revised Questionnaire aims to facilitate the discussions at IWGI, in preparation for the Diplomatic Session on the recognition and enforcement of foreign judgments in civil or commercial matters, to be held in mid-2019. This document briefly summarises the responses received by the Permanent Bureau by 30 October 2018.

2 The chair of the IWGI and the Permanent Bureau are very grateful to all members who submitted responses to the Questionnaire and for the time and effort they put into preparing their responses. In total, the laws and practices of 29 jurisdictions (Australia, Canada, the People’s Republic of China, Costa Rica, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Republic of Korea, Lithuania, Malta, the Netherlands, Norway, Peru, Poland, Portugal, Romania, Singapore, Slovenia, Switzerland, the United Kingdom and the United States of America)² and three specialised institutions that exercise the role of competent authorities (the Benelux Office for Intellectual Property (BOIP)³, the Euro-

² Please note that the International Trademark Association kindly shared with IWGI the laws and practice of four jurisdictions (Australia, the People’s Republic of China, Germany and the United States) and one institution (Benelux Office for Intellectual Property (BOIP)).

³ The law and practice of the BOIP are also contained in the responses submitted by the Netherlands.

Office européen des brevets (OEB) et Office de l'Union européenne pour la propriété intellectuelle (EUIPO)).

3 La présente Synthèse suit la structure du Questionnaire et vise à résumer et, le cas échéant, présenter des observations eu égard aux réponses des différents ressorts juridiques. Tous les efforts ont été mis en œuvre de sorte à résumer rigoureusement les réponses reçues. Toutefois, si tout contributeur estime que sa réponse n'est pas fidèlement traduite ci-après, tout commentaire est le bienvenu à cet égard.

4 Cette Synthèse sera suivie d'un Résumé des réponses reçues (annexe II) et d'un Synopsis (annexe III) (seule la Synthèse est disponible en français).

SYNTHÈSE

1 Quel est le rôle des autorités compétentes dans votre ressort juridique ?

- a À l'exception de huit ressorts juridiques, ce sont les autorités compétentes qui statuent sur la validité des droits de propriété intellectuelle.
- b À l'exception d'un ressort juridique et dans des cas limités dans trois autres, les autorités compétentes ne statuent pas sur la contrefaçon de droits de propriété intellectuelle.
- c À l'exception de deux ressorts juridiques, les autorités compétentes n'enjoignent pas à l'auteur de l'atteinte de mettre un terme à son comportement.
- d À l'exception de deux ressorts juridiques, les autorités compétentes n'imposent aucune amende à l'auteur de l'atteinte.
- e À l'exception de trois ressorts juridiques, les autorités compétentes n'enjoignent pas à l'auteur de l'atteinte de divulguer des informations. Une réponse indique que cela dépend du contexte et de ce que l'on entend par « divulguer des informations ».
- f À l'exception de deux ressorts juridiques, les autorités compétentes n'ordonnent aucune enquête. Une réponse indique que cela dépend du contexte et de ce que l'on entend par « enquête ».
- g À l'exception de deux ressorts juridiques, les autorités compétentes n'ordonnent pas la destruction de biens.
- h À l'exception d'un ressort juridique et au titre d'exceptions dans un autre, les autorités compétentes n'ordonnent pas le paiement de dommages-intérêts en cas d'atteinte.
- i Environ la moitié des réponses affirme que les autorités compétentes peuvent condamner aux frais et dépens dans le cadre des actions intentées devant elles. L'autre moitié a déclaré que ce n'était pas le cas.
- j Onze ressorts juridiques indiquent que les autorités compétentes peuvent rendre d'autres types de décisions.

2 Quelles sont les caractéristiques des autorités compétentes dans votre ressort juridique et quelles sont les procédures devant elles ?

a Les hypothèses suivantes sont-elles valables :

- i Oui. Toutes les réponses confirment que les pouvoirs conférés aux autorités compétentes reposent sur des bases légales exhaustives.
 - ii À l'exception de cinq ressorts juridiques, les autorités compétentes exercent leurs fonctions quasi judiciaires conformément à un ensemble pré-déterminé de règles de procédure.
 - iii Quant à savoir si ces dernières ressemblent aux règles de procédure judiciaire, l'on peut distinguer trois types de réponses. Sept ressorts juridiques ont rejeté cette hypothèse. Une réponse précise que les règles de procédure applicables aux autorités compétentes ne relèvent clairement ni de la procédure administrative ni de la procédure civile en ce qu'elles rassemblent des éléments procéduraux appartenant aux deux. La grande majorité des ressorts juridiques indique que les règles applicables aux autorités compétentes sont semblables aux règles de procédure judiciaire.
 - iv Toutes les réponses confirment que les décisions des autorités compétentes peuvent faire l'objet d'un appel ou d'un contrôle juridictionnel.
 - v À l'exception de six ressorts juridiques et dans des circonstances particulières dans un autre, tous confirment que les décisions des autorités compétentes ont la même portée juridique que les jugements rendus par les tribunaux sur le territoire de l'autorité compétente.
 - vi Six ressorts juridiques précisent que leurs autorités compétentes ne statuent pas sur la validité ou la contrefaçon de droits de propriété intellectuelle. À l'exception d'un ressort juridique qui affirme que son autorité compétente peut être tenue de statuer sur des *droits de propriété intellectuelle étrangers* dans des cas particuliers, tous rapportent que leurs autorités compétentes statuent uniquement sur la *validité* des droits de propriété intellectuelle sur leur propre territoire. Un seul ressort juridique et une exception particulière évoquée dans un autre cas précisent que leurs autorités compétentes statuent sur la *contrefaçon* de droits de propriété intellectuelle sur leur propre territoire.
- b Dans quelle mesure un tribunal est-il impliqué dans la procédure d'appel/de contrôle juridictionnel :
- i À l'exception de trois ressorts juridiques, les autres affirment que lorsqu'un tribunal est impliqué dans la procédure d'appel/de contrôle juridictionnel, il statue quant au fond.
 - ii Quant à savoir, « Lorsque le tribunal n'est pas d'accord avec la décision de l'autorité, s'il peut substituer sa propre décision ou renvoyer l'affaire à l'autorité pour réexamen ? », l'on peut distinguer trois types de réponses : le tribunal substitue sa propre décision ; le tribunal renvoie l'affaire à l'autorité pour réexamen ; ou il a la

pean Patent Office (EPO) and the European Union Intellectual Property Office (EUIPO)) have been collected.

3 This summary follows the structure of the Questionnaire, and seeks to briefly summarise and, where appropriate, comment upon the answers of the responding jurisdictions. Whilst every effort has been made to accurately summarise the responses received, should any contributor consider their response to have been inaccurately reflected below, this input will be welcomed.

4 The Executive summary will be followed by a Summary of responses received (Annex II), together with a Synopsis (Annex III).

EXECUTIVE SUMMARY

1 What do competent authorities in your jurisdiction do?

- a Except for 8 responses, the validity of IP is decided by the competent authorities.
- b Except for 1 response and in limited cases in another 3 responses, competent authorities do not decide on the infringement of IP rights.
- c Except for 2 responses, competent authorities do not order the infringer to stop activities.
- d Except for 2 responses, competent authorities do not impose fines on the infringer.
- e Except for 3 responses, competent authorities do not order the infringer to disclose information. 1 response states that the answer depends on the context and on what “disclose information” means.
- f Except for 2 responses, competent authorities do not order for inspection. 1 response states that the answer depends on the context and on what “inspection” means.
- g Except for 2 responses, competent authorities do not order for destruction of property.
- h Except for 1 response and the existence of exceptions in another response, competent authorities do not order payment for infringement.
- i Approximately half of the responses state that competent authorities can order payment of costs of proceedings for the actions initiated before them. The other half of responses state that they cannot.
- j 11 responses indicate that competent authorities can give other types of orders.

2 What are the characteristics of competent authorities in your jurisdiction and the procedures before them?

a Are these valid assumptions:

- i Yes. All responses confirm that the powers vested in the competent authorities stem from a sufficiently exhaustive legal basis.
- ii Except for 5 responses, the competent authorities exercise their quasi-judicial function in accordance with a predetermined set of procedure rules.
- iii Regarding the question of whether their procedural rules are similar to judicial procedural rules, 3 types of answers can be summarised. 7 responses indicate “No” to this assumption. 1 response indicates that the procedural rules of the authorities cannot be clearly assigned to either the administrative law procedure or the civil court procedure, as they contain procedural elements of both. The vast majority of responses state that their rules for competent authorities are similar to judicial procedural rules.
- iv All responses confirm that the decisions of competent authorities are subject to appeal and/or judicial review.
- v Except for 6 responses and particular circumstances in 1 response, the other responses confirm that the decisions of competent authorities have the same legal effect as court judgments within the territory of the competent authority.
- vi 6 responses confirm that their competent authorities do not decide on the validity or infringement of IP rights. Except for 1 response stating that its competent authority may be required to make determinations relating to *foreign IP* in particular cases, all other competent authorities do decide on the *validity* of IP rights strictly within their own territory. Only 1 response and particular exceptions stated in another response mention that their competent authorities decide on the *infringement* of IP rights strictly within their own territory.

b To the extent that a court of law is involved in the appeal/judicial review process:

- i Except for 3 responses, the other responses confirm that when a court of law is involved in the appeal/judicial review process, the court does enter the merits of the decision.
- ii Regarding the question, “If the court disagrees with the decision of the authority, does the court substitute its own decision or remit the case to the authority for rehearing?”, 3 types of answers can be summarised: the court substitutes its own decision; the court remits the case to the authority

possibilité de faire les deux. Les réponses sont distribuées de manière relativement équitable entre les trois. Un ressort juridique indique en outre que dans certains cas, ses tribunaux peuvent réviser la décision de l'autorité compétente, non pas pour établir s'ils l'approuvent ou non, mais plutôt pour déterminer si celle-ci est raisonnable.

- c *Lorsqu'une partie intente une action en justice contre une autre sollicitant des dommages-intérêts ou une injonction en raison de la contrefaçon (ou en prévision d'une contrefaçon dans le cas d'une injonction) d'un droit de propriété intellectuelle, et que l'invalidité dudit droit est soulevée comme moyen de défense, quel est le rôle de l'autorité compétente ?*

Sur les huit ressorts juridiques ayant répondu à cette question, l'autorité compétente concernée ne joue aucun rôle direct dans de tels cas.

- i Dans toutes les réponses, le **tribunal** peut statuer de sa propre initiative sur les litiges en matière de *contrefaçon*. Dans trois ressorts juridiques et eu égard à des types particuliers de droits de propriété intellectuelle dans deux autres ressorts juridiques, les tribunaux ne sont pas compétents pour statuer sur la *validité* des droits de propriété intellectuelle, étant entendu que les autorités compétentes disposent d'une compétence exclusive à cet égard. Veuillez noter que dans les ressorts juridiques dans lesquels les tribunaux peuvent statuer de leur propre chef sur les questions de validité, plusieurs points ont été mis en avant quant à l'effet de telles décisions.

- ii Quant à savoir si « la question de la validité ou de la contrefaçon d'un droit de propriété intellectuelle est exclusivement déterminée par l'**autorité compétente** (la procédure d'appel/de contrôle juridictionnel relève de sa compétence) », à l'exception de deux ressorts juridiques dans lesquels les décisions portant sur la *contrefaçon* de droits de propriété intellectuelle sont exécutoires à la fois au moyen de procédures administrative et judiciaire, tous les autres indiquent que les autorités compétentes ne sont pas compétentes pour statuer sur la contrefaçon de droits de propriété intellectuelle.

Cinq ressorts juridiques, dont un eu égard à certains types de droits de propriété intellectuelle, affirment que leurs autorités compétentes sont les seules à connaître des questions de *validité*.

3 **Afin d'aider le Groupe de travail à comprendre, dans le contexte des décisions des autorités compétentes, la distinction entre les matières administrative d'un côté, et civile et commerciale de l'autre :**

- a *Si, après le refus par l'autorité compétente d'une demande d'une partie aux fins d'obtention d'un droit de propriété intellectuelle, cette partie interjette appel conformément à la procédure de l'autorité compétente, il en résulte une décision administrative, qui ne relève pas de la matière civile et commerciale. Cette hypothèse est-elle vraie dans votre ressort juridique ?*

Neuf ressorts juridiques ont estimé que cette hypothèse n'était pas correcte.

- b *Si, après publication d'une demande d'obtention d'un droit de propriété intellectuelle, un tiers présente des observations en application de la loi susceptible d'être (ou non) prise en considération par l'autorité compétente au moment où elle statue sur la demande, la décision de l'autorité compétente octroyant le droit de propriété intellectuelle relève de la matière administrative, et non de la matière civile et commerciale. Cette hypothèse est-elle vraie dans votre ressort juridique ?*

À l'exception d'un ressort juridique, tous sont en accord avec cette hypothèse.

- c *Est-il possible pour un tiers de contester la demande avant l'octroi du droit ? Dans l'affirmative, dans votre ressort juridique, s'agit-il d'une procédure administrative ou civile et commerciale ?*

Sept ressorts juridiques et quatre autres eu égard à certains types de droits de propriété intellectuelle indiquent qu'il n'y a aucune autre possibilité qu'un tiers conteste la demande avant l'octroi du droit.

Deux ressorts juridiques, l'un de manière générale et l'autre eu égard à certains aspects des droits de propriété intellectuelle, indiquent qu'il s'agit de procédures civiles et commerciales.

Les autres précisent qu'il est possible pour un tiers de contester la demande avant l'octroi du droit, et ce, dans le cadre d'une procédure administrative. Deux ressorts juridiques affirment que ces procédures ne sont pertinentes qu'eu égard aux marques.

- d *Lorsqu'un tiers tient à contester la décision de l'autorité compétente d'octroyer le droit de propriété intellectuelle a posteriori, devant quelle institution (par ex., l'autorité compétente, un organe d'appel ou un tribunal) ce recours s'exerce-t-il ? Dans votre ressort juridique, la décision qui en découle relève-t-elle de la matière administrative ou civile et commerciale ?*

L'on peut résumer quatre pratiques distinctes.

La première (10 ressorts juridiques) tend à autoriser les recours auprès de l'autorité compétente concernée ; la procédure est alors administrative.

La deuxième (huit ressorts juridiques, dont un quant à un type particulier de droits de propriété intellectuelle) tend à autoriser toute partie intéressée à contester la décision de l'autorité compétente, soit devant cette dernière, auquel cas, il s'agit d'une procédure administrative, soit devant un tribunal, auquel cas, il s'agit d'une procédure civile ou commerciale.

La troisième (dix ressorts juridiques, dont trois concernant des droits de propriété intellectuelle spécifiques) tend à autoriser un tel recours uniquement auprès d'un tribunal ; il s'agit donc d'une procédure civile ou commerciale.

La quatrième (trois ressorts juridiques) tend à considérer qu'il s'agit d'une procédure civile ou commerciale, peu importe que le recours soit porté devant l'autorité compétente ou un tribunal.

Un ressort juridique indique ne pas réellement savoir comment qualifier une telle procédure.

ty for rehearing; or the court has both options. The responses are fairly evenly distributed between the 3. 1 response further states that in some cases, its court may review a decision, not to determine if the court agrees/disagrees with the decision of the competent authority, but rather to determine if the decision of the competent authority is reasonable.

- c *When one party sues another party in a court of law claiming for damages or an injunction in respect of the infringement (or anticipated infringement in the case of an injunction) of an IP right, and invalidity of the IP right is raised as a defense, what role does the relevant competent authority play?*

In the 8 responses received on this question, the relevant competent authorities do not play a direct role in such cases.

- i In all responses, **the court** can decide *infringement* disputes on its own. In 3 responses and specific types of IP rights in another 2 responses, their courts cannot rule on the *validity* of IP rights, as competent authorities have exclusive competence on validity issues. Please note that in the responses in which the court can decide the validity question on its own, several points are highlighted regarding their effects.

- ii As to the question, “Is the question of validity and/or infringement of the intellectual property right determined exclusively by the **competent authority** (subject to any appeal/review within its procedural framework)?”, except 2 responses in which *infringement* of IP rights are enforceable through both administrative and court processes, competent authorities of all other responses do not have the competence to decide infringement of IP rights.

4 responses and certain types of IP rights in 1 other response state that their competent authorities exclusively decide on the *validity* issue.

3 To help the working group understand the distinction between administrative and civil and commercial matters in the context of the decisions of competent authorities:

- a *If, after a party’s application for an IP right is refused by the competent authority, the party appeals according to the procedure of the competent authority, the outcome is an administrative decision and not a civil and commercial matter. Is this assumption correct in your jurisdiction?*

9 responses consider this assumption to be incorrect.

- b *If, after an application for an IP right is published, a third party files observations in accordance with the law which may (or may not) be considered by the competent authority in deciding on the application, the decision of the competent authority on the grant of IP right is an administrative and not a civil and commercial matter. Is this assumption correct in your jurisdiction?*

Except for 1 response, all other responses agree with this assumption.

- c *Are there avenues for a third party to challenge the application before the grant? If so, are these proceedings regarded as administrative or civil and commercial in your jurisdiction?*

7 responses and certain types of IP rights in 4 other responses state that there are no other avenues for a third party to challenge the application before the grant.

1 response and certain aspects of IP rights in 1 other response state that such challenges are civil/commercial proceedings.

The rest of the responses state that there are avenues for a third party to challenge the application before the grant, and such proceedings are considered administrative. 2 responses state that such proceedings are only relevant with regard to trademarks.

- d *If a third party wants to challenge the decision of the competent authority after it has granted an IP right, in what forum (e.g., the competent authority, an appeal body, or the court) would this challenge take place? Would the outcome of this challenge be regarded as a civil and commercial or administrative matter in your jurisdiction?*

4 different types of practice can be summarised.

The first type (10 responses) allows challenges to be brought before the respective competent authorities, and they are thus regarded as administrative matters.

The second type (7 responses and 1 specific type of IP right in another response) allows any interested party to challenge the decision of the competent authority either before the competent authority, in which case it is regarded as an administrative matter, or before the court, in which case it is regarded as a civil and/or commercial matter.

The third type (7 responses and specific IP rights in another 3 responses) only allows challenges to be brought before the court and are therefore regarded as civil and/or commercial proceedings.

The fourth type (3 responses) considers the challenges to be civil and/or commercial matters, regardless of whether the challenges are brought before the competent authorities or the court.

1 response states that it is unclear how it should be regarded.

4 Avez-vous des informations supplémentaires concernant les autorités compétentes de votre ressort juridique susceptibles de s'avérer pertinentes et utiles dans le cadre des discussions du Groupe de travail ?

Six ressorts juridiques ont fourni des informations supplémentaires.

4 Any other information about the competent authorities in your jurisdiction that may be relevant and useful for the discussion of the working group?

6 responses provide other information.

ANNEX II

Summary of responses received/Résumé des réponses reçues (en anglais uniquement)

1 What do competent authorities in your jurisdiction do?

a Decide on the validity of IP rights?

1 Except in Canada, Cyprus, France, Malta, the Netherlands, Portugal, Romania and Slovenia, validity of IP rights are decided by the respective national IP offices. This is also the case in Australia and Norway, however competent authorities do not decide on the validity of copyright. The three institutions decide on the validity of IP rights that fall under their competence.

2 As highlighted in the response of the Netherlands, on request of a third party, the Dutch Patent Office is required to give advice on the validity of a patent granted under the Dutch Patent Act; only the district court of The Hague may revoke a patent.

3 Please note that Portugal will soon change its laws to empower the Portuguese Industrial Property Office to decide on validity concerning trademarks and design registrations. Likewise, the Slovenian Intellectual Property Office will be competent to determine validity of trademarks by 2023.

b Decide whether an IP right has been infringed?

4 Except in Peru, Portugal (limited to administrative infringement cases (penalties)) and the UK (in certain limited circumstances) where the competent authorities decide on infringement issues, the competent authorities of other jurisdictions and the institutions do not decide on the infringement of IP rights. As stated in some contributions, it is the courts that rule on infringement of IP rights.

5 Singapore however provides one exception, “the proprietor of a patent and any other person may, by agreement, refer the issue of whether the patent has been infringed to the competent authority (*i.e.*, the Registrar). In such a case (but not otherwise), the Registrar may, if he rules that the patent has been infringed, award damages in respect of the infringement and/or grant a declaration that the patent is valid and has been infringed. Another related exception concerns declarations as to non-infringement, for which proceedings can (provided certain requirements are met) be commenced before the Registrar.”

6 Please note that although in the USA, the United States International Trade Commission (USITC) and the United States Customs and Border Protection (USCBP) have the authority to determine certain cases of infringement through the exercise of their duties, this may not be relevant for the purpose of the Questionnaire, since the reference to “competent authorities” should be read as referring to national IP offices.

c Order the infringer to stop activities?

7 Except in Peru and Portugal, no other national IP offices or the institutions order the infringer to stop activities. As stated in some contributions, it is the courts that order the infringer to stop activities.

8 Please note that although in the USA, the USITC is authorised to issue exclusion orders (directing the USCBP to exclude articles from entry into the country) and cease and desist orders (directing the respondent in the USITC investigation to cease its unfair acts, including selling infringing imported articles), this may not be relevant for the purpose of the Questionnaire, since the reference to “competent authorities” should be read as referring to national IP offices.

d Impose fines on the infringer?

9 Except in Peru and Portugal, no other national IP offices or the institutions impose fines on the infringer. As stated in some contributions, it is the courts that impose fines on the infringer.

10 In the USA, the Patent Trial and Appeal Board (PTAB) does have authority to impose fines that may be applicable against an accused infringer for misconduct. Such fines may include compensatory expenses, including attorney fees if either the petitioner (potentially an accused infringer) or the patent holder engages in misconduct before the tribunal.

e Order the infringer to disclose information?

11 Peru, the UK and the USA mention that their competent authorities order the infringer to disclose information, usually as a result of a request from a party to proceedings before the competent authority. In Singapore this may also be the case depending on the context and on what “disclose information” means.

12 Competent authorities of all other jurisdictions and the institutions do not have such functions. As stated in some contributions, it is the courts that order the infringer to disclose information.

f Order for inspection?

13 Japan states that the Japanese Patent Act allows the Patent Office to order the preservation of evidence, such as an order to submit documents. Similarly, in Peru, it is possible to order inspections to verify the real reach of an IP infringement.

14 In the USA, the USITC has authority to inspect records relating to the importation, sale or transfer of any infringing goods and enforce subpoenas issued by an Administrative Law Judge during a USITC investigation. Customs officials also have authority to inspect a wide range of items at any time in the USA, within the customs waters of the USA or abroad. However, this may not be relevant for the purpose of the Questionnaire, since the reference to “competent authorities” should be read as referring to national IP offices.

15 Singapore indicates that the answer to this question depends on the context and on what “inspection” means.

16 The competent authorities of all other jurisdictions and the institutions do not have such functions. As stated in some responses, it is the courts that make such orders.

g Order for destruction of property?

17 Except in Peru and Portugal, no other national IP offices or the institutions order for destruction of property. As stated in some responses, it is the courts that make such orders.

18 Please note that although in the USA, the USCBP may order for destruction of forfeited infringing merchandise, this may not be relevant for the purpose of the Questionnaire, since the reference to “competent authorities” should be read as referring to national IP offices.

h Order payment for infringement (e.g., compensation, account of profits, royalties)?

19 Except in the UK, no national IP offices or the institutions order payment for infringement. As stated in some responses, it is the courts that make such orders.

20 While stating that its national IP office does not order payment for infringement, Singapore mentions the existence of exceptions, by referring to the exceptional circumstances mentioned in Question 1(b) (see para. 5 *supra*).

i Order payment of costs of proceedings?

21 Laws and practices are divided in this respect. Half of the responses (Croatia, Germany, Hungary, Israel, Italy, Japan, Korea, Norway, Peru, Poland, Singapore, Switzerland, UK, the USA, EPO and EUIPO) confirm that competent authorities can order payment of costs of proceedings for the actions initiated before them; only the extent and type of such payments varies between these responses.

j Any other types of orders?

22 In the 11 responses which indicate yes, the competent authorities can decide:

- to order the cross-examination of any affiant or declarant on an affidavit or statutory declaration that has been filed with the competent authority and is being relied on as evidence in certain administrative procedures (Canada);
- in cases of abuse of the exclusive rights under a patent, to order the grant of a license of the patent or to revoke the patent. In case this is not appropriate, the competent authority may make an order on the costs of the application to determine if there was an abuse of the exclusive rights under a patent (Canada);
- requests for declaration of non-infringement (Hungary);
- requests for compulsory licenses for public health reasons (Hungary);
- requests for interpretation of patent specifications on request of a court or other authorities (Hungary and Korea);
- IP rights (trademarks) validity upon third parties’ opposition, including awarding of costs of opposition proceedings (Italy);
- lapse of an IP right due to lack of proper renewal (Italy);
- IP restoration requests and/or further processing (Italy and Korea);

- to grant/cancel *recordal* of petitions (change of ownership, decisions of courts, pledge, security, etc.) (Italy);
- the granting and amount of compulsory licenses (Italy and Israel);
- to grant ordinary license of a patent right (Korea);
- to revoke the contested denial of grant and grant a patent right (Korea);
- to order the closing of the business establishments of the infringers (Peru);
- amendment of a patent (Singapore and the USA);
- orders for witnesses to attend hearings (Australia and the UK);
- to require a disclaimer, or other restriction of the registration in response to request by a party in a trademark or patent related proceeding (the USA);
- to decide claims of “service invention” by an employee and order compensation against an employer (Israel);
- to hear final administrative appeals of refusals to register copyrights, by the Copyright Office Review Board (the USA).

2 What are the characteristics of competent authorities in your jurisdiction and the procedures before them?

a Are these valid assumptions:

- i The powers vested in the competent authorities stem from a sufficiently exhaustive legal basis?

23 All jurisdictions and institutions confirm that the powers vested onto the competent authorities stem from a sufficiently exhaustive legal basis.

- ii They exercise a quasi-judicial function in accordance with a predetermined set of procedural rules?

24 Except China, Costa Rica, Croatia, Malta and Slovenia, the competent authorities of other jurisdictions and the institutions exercise their quasi-judicial function in accordance with a predetermined set of procedural rules.

- iii Their procedural rules are similar to judicial procedural rules?

25 Three types of answers can be summarised. Seven responses (China, Costa Rica, Czech Republic, France, Malta, the Netherlands and BOIP) indicate “No” to this assumption. Germany indicates that the procedural rules of the German Patent and Trade Mark Office (DPMA) cannot be clearly assigned to either the administrative law procedure or the civil court procedure, as it contains procedural elements of both. The vast majority of the responses state that their rules for competent authorities are similar to judicial procedural rules, such as conducting oral proceedings, applying principles of natural justice, right to a defence or due process.

- iv Their decisions are subject to appeal and/or judicial review?

26 All responses confirm that the decisions of competent authorities are subject to appeal and/or judicial review.

- v Their decisions have the same legal effect as court judgments within the territory of the competent authority?

27 Except in Canada, Costa Rica, France, Germany (in particular cases), Korea, Malta and Poland, all other jurisdictions and the institutions confirm that the decisions of competent authorities have the same legal effect as court judgments within the territory of the competent authority. In particular, France highlights that administrative decisions only have the same legal effect with regard to the registration/granting/continuance of the IP right concerned. This is similar in Canada.

28 In all other jurisdictions and the institutions this is a valid assumption. Japan highlights that the Japanese Patent Office has an exclusive right to decide the validity of patent rights. The UK mentions one exception, *i.e.*, where the decisions have no precedent value, so do not bind the courts or future decisions of the competent authority.

- vi They decide on validity of IP rights (and infringements) strictly within their own territory?

29 Australia (in relation to copyrights), France, Malta, the Netherlands, Romania and Slovenia state that their respective competent authorities do not decide on these matters. In the Netherlands, advice of the Netherlands Patent Office is mandatory if the court case concerns the validity of a patent granted under the Dutch Patent Act.

30 The competent authorities of other jurisdictions and the institutions do decide on the *validity* of IP rights strictly within their own territory. Among them, only Peru's and Singapore's (exceptions mentioned in para. 5 *supra*) competent authorities decide on the *infringement* of IP rights strictly within their own territory. In Canada, the competent authority may be required to make determinations relating to *foreign IP*. For example, assessment of priority requires an assessment of foreign IP applications. It should be mentioned that the Hungarian IP Office also decides on *lack of infringement* within its own territory.

b *To the extent that a court of law is involved in the appeal/judicial review process:*

- i Does the court enter the merits of the decision?

31 Except in Cyprus, the Czech Republic and Poland, all other jurisdictions and the institutions confirmed that when a court of law is involved in the appeal/judicial review process, the court does enter the merits of the decision. In this respect, Ireland and Israel highlight that their courts are not bound by a decision of the competent authorities, but due regard will be taken of the decision made by them. Norway explains that their court will normally only examine whether the decision was correct on the factual basis on which it was handed down. In Peru, a decision on the merits precludes a later lawsuit on the same cause of action.

- ii If the court disagrees with the decision of the authority, does the court substitute its own decision or remit the case to the authority for rehearing?

32 Three types of practices can be summarised. The courts of one group of jurisdictions (Costa Rica, Hungary (except in certain cases), Lithuania, Malta, the Netherlands (in most cases), Peru, Singapore (except in one case), Switzerland and the USA) will substitute their own decisions. The courts of another group of jurisdictions (China, Cyprus, Czech Republic, Finland, France, Japan, Korea and Norway) will remit the case to the authority for rehearing. The courts of the third group (Australia (depending on the nature of appeal), Canada, Croatia, Germany (in appeal proceedings), Ireland, Israel, Italy, Portugal, Romania, Slovenia, the UK, EPO and EUIPO) have both options. Canada notes that in some cases, the court may review a decision, not to determine if the court agrees/disagrees with the decision of the competent authority, but rather to determine if the decision of the competent authority is reasonable.

c *When one party sues another party in a court of law claiming for damages or an injunction in respect of the infringement (or anticipated infringement in the case of an injunction) of an IP right, and invalidity of the IP right is raised as a defence, what role does the relevant competent authority play?*

33 In the eight responses received (Costa Rica, Cyprus, Germany, Italy, Romania, Singapore, Slovenia and EPO), it was mentioned that the relevant competent authorities do not play a direct role in such cases.

- i Does **the court** decide the validity and infringement on its own?

34 In all responses, it was confirmed that the court can decide *infringement* disputes on its own. As to the *validity* issue, the answers are divided. Five responses (China, Croatia (except for industrial designs), Czech Republic, Germany (in patent cases, different from trademark cases) and Peru) state that their courts cannot rule on the validity of IP rights, as their competent authorities have exclusive competence on validity issues.

35 In the responses in which the court can decide the *validity* question on its own, several points need to be highlighted. Korea notes that its court cannot deny the validity of a patent right on its own but can find its abuse. The court's finding of an abuse of a patent right binds the parties to the litigation only. Furthermore, Japan highlights that its court decisions on validity (raised as a defence) can only have effect between parties. Hungary raises a similar point in utility model infringement cases, where a court decision on the validity of utility model right only has "*inter partes*" effect. Norway notes that the court can decide on validity if that ground is invoked by the infringer in a counterclaim in infringement proceedings. This is also the practice in Portugal at present, however in the near future, the Portuguese IP office will also have that competence. Similarly, in Israel if the validity issue of registered IP right is raised as a defence, the court will either determine it or refer the case to the competent authority. The Netherlands states that the advice of the Netherlands Patent Office on the validity of a patent granted under the Dutch Patent Act is mandatory when revocation is claimed.

- ii Is the question of validity and/or infringement of the intellectual property right determined exclusively by the **competent authority** (subject to any appeal/review within its procedural framework)?

36 Except in Peru and the USA, where *infringement* of IP rights are enforceable through both administrative and court

processes, the competent authorities of all other jurisdictions do not have the competence to decide *infringement* of IP rights, it is the courts that exclusively decide on such issues.

37 Regarding the question of *validity*, the competent authorities of China, Croatia (except industrial designs), Czech Republic, Japan and Peru exclusively decide on the validity issue. Portugal notes that whilst this matter currently falls exclusively within the competence of the industrial property court, in the near future, the Portuguese office will have the exclusive competence to decide on validity of trademarks and design registrations (except for counterclaims where they have shared competence).

3 To help the working group understand the distinction between administrative and civil and commercial matters in the context of the decisions of competent authorities:

a *If, after a party's application for an IP right is refused by the competent authority, the party appeals according to the procedure of the competent authority, the outcome is an administrative decision and not a civil and commercial matter. Is this assumption correct in your jurisdiction?*

38 Nine responses (France, Ireland, Italy, Malta, Portugal, Romania, Singapore, Slovenia and BOIP) consider this assumption incorrect. Slovenia further explains that it is not possible to appeal an administrative decision by the competent authority, however it is possible to initiate an administrative dispute which would result in a court judgment on the legality of the competent authority's decision.

39 In the responses which consider this assumption correct, the UK clarifies that if the party appeals a final decision of the competent authority, the appeal goes to the court and the judgment on appeal is a fully binding judicial decision. The USA and Romania (in some situations) similarly highlight that once the internal administrative appeals have been exhausted, an appeal from a final decision of the competent authority would go to the court, resulting in a judicial decision. Australia and Israel have similar responses in this regard.

b *If, after an application for an IP right is published, a third party files observations in accordance with the law which may (or may not) be considered by the competent authority in deciding on the application, the decision of the competent authority on the grant of IP right is an administrative and not a civil and commercial matter. Is this assumption correct in your jurisdiction?*

40 Except for Singapore, all other responses consider this assumption correct.

c *Are there avenues for a third party to challenge the application before the grant? If so, are these proceedings regarded as administrative or civil and commercial in your jurisdiction?*

41 In Germany (trademark and designs only), Italy (except trademark), Korea, Lithuania, Malta, the Netherlands, Norway, Singapore (certain types of IP), Switzerland, the USA (copyright only) and the EPO, there are no other avenues for a third party to challenge the application before the grant. In Lithuania, this will be possible in respect to trademarks from 2019 and will then be regarded as an administrative proceeding.

42 In Singapore, although it depends on the type of IP there are avenues for a third party to challenge the application before the grant; such proceedings would be considered civil/commercial proceedings. Similarly, in the UK, only ownership or inventorship of patents and designs may be challenged, and such challenges are viewed as civil litigation, not an administrative matter.

43 For the rest, there are avenues for a third party to challenge the application before the grant, and such proceedings are considered administrative. It should be noted that in Cyprus and Slovenia, these proceedings are only relevant with regard to trademarks.

d *If a third party wants to challenge the decision of the competent authority after it has granted an IP right, in what forum (e.g., the competent authority, an appeal body, or the court) would this challenge take place? Would the outcome of this challenge be regarded as a civil and commercial or administrative matter in your jurisdiction?*

44 Four different types of practice can be summarised. The first type, with a slight majority (China, Costa Rica, Croatia, Czech Republic, Hungary, Japan, Korea, Peru, Poland and the EPO), allows challenges to be brought before the respective competent authorities, and they are thus regarded as administrative matters.

45 The second type (Australia, Germany, Israel, the Netherlands (cancellation of trademark), Norway, Portugal, the USA and EUIPO) allows any interested party to challenge the decision of the competent authority either before the competent authority, in which case it is regarded as an administrative matter, or before the court, in which case it is regarded as a civil and/or commercial matter.

46 The third type (Cyprus, Ireland, Italy, Lithuania (patents), Malta, the Netherlands (validity of a patent), Romania, Slovenia, Switzerland (except two specific types of claims) and the BOIP) only allows challenges to be brought before the court, and are therefore regarded as civil and/or commercial proceedings. In Lithuania, with respect to trademarks and designs, a third party may file an opposition to the competent authority within three months of the publication of the registration (administrative matter), following which, a third party may file a claim directly before the court (civil matter). From 2019, the administrative procedure will become compulsory.

47 The fourth type (France, Singapore and the UK) considers the challenges to be civil and/or commercial matters, regardless of whether the challenges are brought before the competent authorities or the court. In Singapore, depending on the type of IP rights in question, they can be challenged either before the competent authority or before the court, whilst in France, the competent authorities and the court hear different types of claims.

48 In Canada, third parties have a limited ability to directly challenge the decision of the competent authority to register a trademark or industrial design or grant a patent. However, judicial proceedings may be commenced that can result in the invalidation of registered industrial designs or registered trademarks or granted patents. It is unclear how such a decision would be regarded given that it would not be an appeal of a decision of the competent authority but it would be seeking to invalidate the rights registered/granted as a result of the competent authority's administrative processes.

4 Any other information about the competent authorities in your jurisdiction that may be relevant and useful for the discussion of the working group?

49 *Australia* states that the competent authority accepts and examines applications for IP rights, in addition to granting IP rights and determining oppositions and certain other actions in respect of IP rights. Appeals of decisions of the competent authority lie with the Federal Court of Australia and the Federal Circuit Court.

50 There is no registration system for copyright in Australia. Copyright protection is free and granted automatically from the time an original work or other subject matter has been created. The Department of Communications and the Arts manages Australian copyright legislation and policy but has no authority to grant or register a copyright. The court decides on the validity and infringement of copyright and penalties for infringement can include an injunction, either damages or an account of profit and criminal penalties including fines for related offences.

51 *Italy* states that the decisions of the Board of Appeal adjudicating the competent authorities' administrative acts are "definitive and not subject to appeals". They can be subject to judicial review just before the supreme court for civil and commercial matters (*Corte di Cassazione*) and just for three types of claims: error in the application of law; error in process; revocation of the judgment for fraud, false exhibits, etc.

52 It also notes that there are three other competent authorities issuing IP rights valid in multiple states, *i.e.*, EUIPO (EU trademarks/designs), EPO (European Patents), WIPO (international trademarks/designs) which follow rather different administrative rules.

53 *Lithuania* allows decisions of the competent authority responsible for registering trademarks, designs and granting patents for inventions, to be appealed in court. Where the decision is appealed by the applicant, the competent authority is a defendant in the proceedings and where it is appealed by a third party, the owner of the registered IP right is the defendant and the competent authority is a third party in the proceedings.

54 *Peru* explains that the Inventions and New Technologies Directorate as well as the Directorate of Distinctive Signs of *Indecopi* are national competent authorities to resolve actions related to registrations filed in *Indecopi* (related to patents, utility models, industrial designs, traditional knowledge and new varieties as well as trademarks, commercial names, slogans and appellations of origin), also through a specific Commission integrated by external renowned professionals; both resolve opposition, infringement and nullity IP rights.

55 The Specialized Chamber of Intellectual Property of *Indecopi* is the second administrative instance. The legal basis, mainly, is Andean Community Decision 486: Common Intellectual Property Regime.

56 *Romania* highlights that the above answers have been based on the current law in respect of trademarks, however there is currently a draft law in the process of public debate which will grant the State Office for Inventions and Trademarks the competence to annul trademarks in the framework of an administrative proceeding.

57 The UK provides a reminder that IP rights are territorial in scope. Further, particularly with regards to trade

marks, validity depends on earlier rights within the relevant territory and the perception of the marks by average consumers. This means that language is important for word marks. The net result is that an IP right may be valid in one territory and invalid in another. This is the norm for trademarks. Therefore, recognition of decisions on validity and infringement by the courts of one territory have limited or no bearing if those same questions arise again but in a different territory.

Synopsis of responses/Synopsis des réponses (*en anglais uniquement*)

1 What do competent authorities in your jurisdiction do?

<p>Canada: In the Canadian jurisdiction, the “competent authority” is the Canadian Intellectual Property Office (CIPO).</p> <p>Cyprus: Please note that in Cyprus the Department Registrar of Companies and Official Receiver (DRCOR) which is under the Ministry of Energy, Commerce, Industry and Tourism does not deal with infringements. Customs, Police and the Court deal with infringement procedures. Copyright is not registered in Cyprus. In Cyprus, copyright is automatic and requires no registration. The Copyright Law 59/76 protects Cypriot nationals for their works which are published anywhere in the world and the nationals of foreign countries for their works which are published in Cyprus.</p> <p>Ireland: Note: The Controller of patents, designs and trademarks is the competent authority in Ireland with statutory functions under the Patents Act, 1992 (as amended), the Trade Marks Act, 1996 (as amended), the Industrial Designs Act, 2001, the Copyright and Related Rights Act, 2000, the various Statutory Rules and Regulations made under these Acts, and the European Communities (Supplementary Protection Certificate) Regulations. Decisions under these Acts, Rules and Regulations rest with the Controller in his statutory capacity, subject to certain rights of appeal to the High Court.</p> <p>Netherlands: Note: The answers below relate to patents granted on the basis of the Dutch Patent Act and to trademarks and designs covered by the Benelux Convention on Intellectual Property. With regard to Dutch patents the Netherlands Patent Office is the competent authority; with regard to Benelux trademarks and designs the Benelux Office for Intellectual Property (BOIP) is the competent authority.</p>	
<p><i>a Decide on the validity of IP rights?</i></p>	
<p>Australia: Yes. However, competent authorities do not decide on the validity of copyrights in Australia.</p> <p>China (including the INTA submission): Yes</p> <p>Costa Rica: Yes</p> <p>Croatia: Yes</p> <p>Czech Republic: Yes</p> <p>Finland: According to Section 19 of the Act on Utility Model Rights (800/1991), a request that a registration be declared invalid shall be made to the Registration Authority (<i>i.e.</i>, the Finnish Patent and Registration Office). A reform of the trademark act is currently being prepared in Finland. A new trademark act includes the necessary legislative changes for the implementation of the EU’s trademark directive (EU) 2015/2436. The proposal for a new trademark act is expected to be given to the Parliament in October 2018. It will introduce a new administrative procedure for the revocation or declaration of invalidity of a trademark, which is based on the trademark directive. In this procedure, a request for the revocation or for the declaration of invalidity can be made to the Registration Authority.</p> <p>Germany (including the INTA submission): The German Patent and Trade Mark Office (DPMA) primarily decides on the grant/registration of patents, utility models, trademarks and designs. Nevertheless, the DPMA can take decisions on the validity of IP rights, <i>e.g.</i>, in opposition proceedings against the decisions on the grant/registration of a patent (<i>cf.</i> section 59 Patent Act), in opposition proceedings against a registered trademark based on relative grounds (<i>cf.</i> sections 42 <i>et seq.</i> Trade Mark Act) or in invalidity proceedings based on absolute or relative grounds against a registered design (<i>cf.</i> sections 33 <i>et seq.</i> Design Act). These decisions can become final and non-contestable, if they are not appealed before the courts.</p>	<p>Canada: No. CIPO conducts a substantive examination of applications for industrial designs, trademarks and patents to determine if the application meets the legislative requirements. If the application does meet the legislative requirements, CIPO will register an industrial design and trademark or grant a patent, as appropriate. As a result of registration/grant, certain rights are given to the owner of the industrial design, trademark and patent. CIPO also has administrative procedures that may result in a registered trademark no longer being registered (in cases of non-use) or result in voiding a granted patent (<i>e.g.</i>, after conducting a re-examination).</p> <p>Cyprus: No. DRCOR deals only with the registration of trademarks and patents.</p> <p>France: No</p> <p>Malta: The Intellectual Property Office (IPO) in Malta receives, processes and registers applications for the registration of trademarks and designs and for the granting of patents.</p> <p>Netherlands: The Netherlands Patent Office does not decide on the validity of patents. The Dutch patent is an unexamined patent. It is always automatically granted after a search and a written opinion of the examiner, irrespective of the documents found and the opinion of the examiner on patentability of the invention as claimed. On request of a third party, the Dutch Patent Office is required to give advice on the validity of a patent granted under the Dutch Patent Act; only the district court of The Hague may revoke a patent.</p> <p>Portugal: Not at the present moment but in the near future the industrial property law will empower the Portuguese Industrial Property Office to decide on validity concerning trademarks and design registrations.</p> <p>Romania: No, only the courts.</p>

In case they are appealed, the German Federal Patent Court (FPC – *Bundespatentgericht*) in 1st instance and the German Federal Court of Justice (FCJ – *Bundesgerichtshof*) in 2nd instance will take the final and non-contestable decisions on the validity of IP rights.

Hungary: Yes (in revocation proceedings that may only be initiated at the IP Office [Hungarian Intellectual Property Office – HIPO]).

Ireland: Yes, in all areas of IP.

Israel: Yes

Italy: Yes, only at the application stage.

Japan: Yes. The validity of IP rights (patents, designs, trademarks and utility models) are decided in trials for invalidation at the Japan Patent Office (JPO).

The following answers for this questionnaire are mainly focused on patent rights (Patent Act (Act No. 121 of April 13, 1959) can be found at <www.japaneselawtranslation.go.jp>).

Korea: Yes

Lithuania: Yes

Norway: Yes, and on revocation for trademarks due to lack of use, or the mark having become generic or misleading after grant (not the validity of copyright, which is not a registered right).

Peru: Yes, it is possible for the national administrative authority (*Indecopi*) to decide on validity of IP rights.

Poland: Yes, in field of the task of the Polish Patent Office is deciding on granting patents and supplementary protection rights for inventions, rights of protection for utility models and trademarks, as well as the rights of registration of industrial designs, geographical indications for non-agricultural products and topographies of integrated circuits. The Polish Patent Office decides also on the subject of the invalidity of the IP rights.

Singapore: Yes

Switzerland: Yes: The Swiss Federal Institute of Intellectual Property decides in the following cases on the validity of IP rights:

- Opposition against a patent on the grounds that the subject-matter of the patent is not patentable
- Opposition against a trade mark on the grounds that it is similar to an earlier trade mark and intended for the same or similar goods or services such that a likelihood of confusion results
- Request for cancellation of a trade mark on the grounds of non-use

United Kingdom: Yes

USA (including the INTA submission): Yes, e.g., before the U.S. Patent and Trademark Office’s (USPTO) Patent Trial and Appeal Board (PTAB) or the Trademark Trial and Appeal Board (TTAB).

BOIP (including the INTA submission): It is competent to decide on the claim for cancellation of trademarks (Benelux trademarks) on absolute and relative grounds. BOIP has no such competence in the field of designs.

Slovenia: The Slovenian Intellectual Property Office (SIPO) decides on the grant of patents and supplementary protection certificate and on the registration of trademarks, designs, geographical indications for non-agricultural products and topographies of integrated circuits. SIPO also issues authorisations for collective management of copyright and related rights and supervises the work of collective management organisations. SIPO only decides on the granting or registration of industrial property rights and does not decide on revocation or validity after the grant/registration of rights. However, in the case of patents SIPO issues additional declaratory decisions on the scope of patent protection, after the grant of (non-examined) patents, which is a Slovenian specific in the proceeding for grant of patents. The court is competent for deciding on actions for revocation or nullity of IP rights. However, SIPO will become competent authority for deciding on revocation of validity of trademarks by 2023 (in accordance with Directive (EU) 2015/2436 of the European Parliament and of the Council). SIPO also issues authorisations for collective management of copyright and related rights and supervises the work of collective management organisations.

<p>EPO: The patent grant procedure before the EPO comprises three steps. The first stage starts with the filing of the European patent application and ends with the publication of the application (together with the search report and a preliminary opinion on the patentability), usually 18 months after the date of filing. The second phase involves the substantive examination (if requested) with the eventual granting of a European patent for the 38 EPC Contracting States. The third phase of the procedure may involve opposition before the EPO opposition division or appeal proceedings before the Boards of Appeal.</p> <p>The opposition may be qualified as centralised procedure for revocation of the complete bundle of patents with a retroactive effect. An opposition may be filed by any person interested within nine months after grant. Once the nine-month deadline to file the opposition has expired it is no longer possible for the EPO to revoke a patent on the basis of a request from a third party. A person seeking a patent's revocation will thus have to file a revocation action before the national court or competent authority in the Contracting State where the European patent has taken effect.</p> <p>The responsible EPO opposition division may revoke the patent, maintain the patent in amended form (partial revocation) or maintain the patent in its entirety. Such decision of the EPO opposition division may be appealed to the Boards of Appeal which render a final decision on the issue. Consequently, if the Boards of Appeal render a decision to revoke the patent, it is not possible to appeal this decision to any national or international court.</p> <p>The EPO and its Boards of Appeal decide on the validity of patents in opposition and appeal proceedings. The EPO is not entitled to evaluate the validity of other existing IP rights, such as utility models, designs, copyright or trademarks.</p> <p>EUIPO: Yes</p>	
<p><i>b Decide whether an IP right has been infringed?</i></p>	
<p>Peru: Yes, it is possible for the national administrative authority (<i>Indecopi</i>) to decide on infringement of IP rights.</p> <p>Portugal: Yes, but only when the Portuguese Industrial Property Office take decisions on administrative infringement cases (penalties).</p> <p>United Kingdom: Yes, but only in certain limited circumstances.</p> <p>USA: Yes, <i>e.g.</i>, before the U.S. International Trade Commission (USITC). Under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), the USITC conducts investigations into allegations of certain unfair practices in import trade. Section 337 declares the infringement of certain statutory intellectual property rights and other forms of unfair competition in import trade to be unlawful practices. Section 337 specifically declares the infringement of the following statutory rights to be unlawful import practices: a U.S. patent or a U.S. copyright registered under title 17 of the U.S. Code, a registered trademark, a mask work registered under chapter 9 of title 17 of the U.S. Code, or a boat hull design protected under chapter 13 of title 17 of the U.S. Code. 19 U.S.C. § 1337(a)(1)(B)-(E). In cases involving infringement of these intellectual property rights, there is no injury requirement. Note that validity decisions can arise in proceedings before the USITC. Infringement determinations require the existence of a "valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17" or articles covered by the claims of a</p>	<p>Australia: No</p> <p>Canada: No</p> <p>China (including the INTA submission): No</p> <p>Costa Rica: No, the infringement can only be assessed at the judicial level, not at the administrative level as clarified by opinion C-34-2007 of the Attorney General's Office.</p> <p>Croatia: No</p> <p>Czech Republic: No. Decisions concerning the IPR infringements fall into a competence of the courts (civil judicial proceedings) which proceed on the bases of Act No 99/1963, Code of civil procedure, as amended. According to Act No. 221/2006 Coll., on Enforcement of Industrial Property Rights and on the Amendment of Industrial Property Protection Acts, as amended, the Municipal Court in Prague: a) shall decide as the court of the first instance disputes on claims resulting from the industrial property, on claims resulting from endangering of and infringement upon the industrial property rights and on claims to surrender of the unjust enrichment acquired to the prejudice of the beneficiary of the industrial property rights, and on claims under Part One hereof, b) shall decide as the court of the first instance in the Czech Republic on matters relating to Community trademarks under Article 92 of Council Regulation (EC) No 40/1994 of 20 December 1993 on Community trade mark,</p>

process patent that is “valid and enforceable” in the United States. 19 U.S.C. § 1337(a)(1)(B)(i), (ii). See also 19 U.S.C. § 1337(a)(1)(C) (valid and enforceable trademark registered under Trademark Act of 1946), § 1337(a)(1)(D) (mask work registered under chapter 9 of title 17), § 1337(a)(1)(E) (exclusive rights in a design protected under chapter 13 of title 17). Respondents in a § 337 case are entitled to present “all legal and equitable defenses” which may include challenging the validity of the IP Right. 19 U.S.C. § 1337(c).
 Yes, e.g., by U.S. Customs and Border Protection (USCBP) to prevent entry of suspected trademark and copyright infringing merchandise.
 USCBP is vested with the authority to exclude from entry, detain and/or seize, and forfeit, violative-trademarked merchandise. In this regard, USCBP recognizes three levels of infringement in its enforcement of trademarks: counterfeit marks; copying or simulating marks; and restricted gray market goods (i.e., parallel imports).
 USCBP is vested with the authority to detain and/or seize, and forfeit, piratical copies of protected copyrighted works. For USCBP purposes, “piratical copies” are identical or substantially similar copies of registered copyrighted works which are produced and imported without authorization of the copyright owner.

c) shall decide as the court of the first instance in the Czech Republic on matters relating to Community (industrial) designs pursuant to Council Regulation (EC) No 6/2002, d) shall review final administrative decisions of the Industrial Property Office under a special legal regulation (administrative judicial proceedings).

Finland: No

France: No

Germany (including the INTA submission): No, in Germany the civil courts decide on the infringement of an IP right (e.g., section 143 Patent Act, section 140 Trade Mark Act, section 52 Design Act).

Explanatory note: With regard to patent, utility model, trademark and design proceedings the court jurisdiction in Germany is split (bifurcation). The *validity* of these rights is subject to judicial review of the FPC (1st instance) and of the FCJ (2nd instance). The *infringement* of these rights and accompanying legal questions (e.g., for disclosure of information, cease and desist orders or damage claims) are subject to judicial review of the civil courts with the FCJ as court of last instance.

Hungary: No. The court is competent to decide whether an IP right has been infringed.

Ireland: Neither the Irish Patents Office (IPO) nor the Controller has a function in determining the infringement of IP rights. These are civil proceedings dealt with by the Irish Courts.

Israel: No

Italy: No

Japan: No

Korea: No

Lithuania: No

Malta: The national IPO does not have the power to decide on the infringement of IP rights.

Netherlands: The Netherlands Patent Office does not decide on the infringement of patents. It may advise on infringement in court proceedings.

Norway: No

Poland: No, it’s the competency of the common courts.

Romania: No, only the courts.

Singapore: Generally no; this is typically an issue for the courts.

One exception to the above is that the proprietor of a patent and any other person may, by agreement, refer the issue of whether the patent has been infringed to the competent authority (i.e., the Registrar). In such a case (but not otherwise), the Registrar may, if he rules that the patent has been infringed, award damages in respect of the infringement and/or grant a declaration that the patent is valid and has been infringed. Another related exception concerns declarations as to non-infringement, for which proceedings can (provided certain requirements are met) be commenced before the Registrar.

	<p>Slovenia: No. The court is competent to decide whether an IP right has been infringed.</p> <p>Switzerland: No</p> <p>BOIP (including the INTA submission): It decides on opposition filed against new applications for trademarks. Strictly speaking, this is not a competence relating to infringement.</p> <p>EPO: The EPO and the Boards of Appeal have no competence to deal with patent or any other IP related infringement actions, or actions for damages and compensation. Such actions are exclusively dealt with before the competent courts on the basis of the applicable jurisdiction laws.</p> <p>EUIPO: No</p>
<p><i>c Order the infringer to stop activities?</i></p>	
<p>Peru: Yes, the national administrative authority (<i>Indecopi</i>) may order for injunctions.</p> <p>Portugal: It can happen but only when the Portuguese Industrial Property Office takes decisions on administrative infringement cases (penalties).</p> <p>USA: Yes, e.g., the U.S. International Trade Commission (USITC). The USITC is authorized to issue two types of remedial orders: exclusion orders and cease and desist orders. An exclusion order directs the U.S. Customs and Border Protection to exclude articles from entry into the United States. A cease and desist order directs a respondent in the USITC investigation to cease its unfair acts, including selling infringing imported articles out of U.S. inventory.</p>	<p>Australia: No</p> <p>Canada: No</p> <p>China (including the INTA submission): No</p> <p>Costa Rica: No. Even though the law provides that the competent authority could apply these measures, the legal opinion C-34-2007 of the Attorney General's Office has questioned the competence of applying preliminary injunctions at an administrative level, thus the order to stop an infringer from performing an activity can only be done at by a judicial authority, not by an administrative authority.</p> <p>Croatia: No</p> <p>Czech Republic: No</p> <p>Finland: No</p> <p>France: No</p> <p>Germany (including the INTA submission): No, in Germany the civil courts decide on the order to stop activities that infringe an IP right (e.g., section 139 para. 1 Patent Act, sections 14 para. 2-5, 15 para. 2-4 Trade Mark Act, section 42 para. 1 Design Act).</p> <p>Hungary: No. The court is competent to order the infringer to stop activities.</p> <p>Ireland: The Controller/IPO has no function in this area. Orders for delivery or destruction/disposal/erasure are matters for the Court.</p> <p>Israel: N/A</p> <p>Italy: No</p> <p>Japan: No</p> <p>Korea: No</p> <p>Lithuania: No</p> <p>Malta: The national IPO does not have the power to order the infringer to stop activities.</p> <p>Netherlands: The Netherlands Patent Office is not competent to impose the orders. With regard to patent rights such orders fall under the exclusive competence of the district court of The Hague.</p>

	<p>Norway: No</p> <p>Poland: No, it's the competency of the common courts,</p> <p>Romania: No, only the courts,</p> <p>Singapore: No</p> <p>Slovenia: No</p> <p>Switzerland: No</p> <p>United Kingdom: No</p> <p>BOIP (including the INTA submission): It is not competent to impose the orders. These orders can only be imposed by a court.</p> <p>EPO: As mentioned above, the EPO and the Boards of Appeal have no competence to deal with patent or any other IP related infringement actions, or actions for damages and compensation. Such actions are exclusively dealt with before the competent courts on the basis of the applicable jurisdiction laws.</p> <p>EUIPO: No</p>
<p><i>d</i> <i>Impose fines on the infringer?</i></p>	
<p>Peru: Yes, it is possible for the national administrative authority (<i>Indecopi</i>) to impose fines up to approximately USD 188,636.</p> <p>Portugal: It can happen but only when the Portuguese Industrial Property Office takes decisions on administrative infringement cases (penalties).</p>	<p>Australia: No</p> <p>Canada: No</p> <p>China (including the INTA submission): No</p> <p>Costa Rica: No, only a judicial authority can impose fines; as explained before, the legal opinion C-34-2007 of the Attorney General's Office has clarified that this cannot longer be done at the administrative level.</p> <p>Croatia: No</p> <p>Czech Republic: No</p> <p>Finland: No</p> <p>France: No</p> <p>Germany (including the INTA submission): No, in Germany the criminal courts decide on fines for infringement (<i>e.g.</i>, section 142 Patent Act, sections 143 <i>et seq.</i> Trade Mark Act, section 51 Design Act).</p> <p>Hungary: No. The court is competent to impose fines (<i>i.e.</i>, damages or disgorgement of profits) on the infringer.</p> <p>Ireland: The Controller/IPO has no function in this area. The Court can impose fines for fraudulent use of a registered design or a registered trade mark if there is no authorised use for specified acts or actions by way of a licence and the acts or actions constitute an infringement. Also in relation to criminal copyright infringement proceedings, offences can be proceeded with summarily or on indictment and the court can impose fines or a term of imprisonment on summary conviction or indictment.</p> <p>Israel: N/A</p> <p>Italy: No</p> <p>Japan: No</p>

	<p>Korea: No</p> <p>Lithuania: No</p> <p>Malta: The national IPO does not have the power to impose fines on the infringer.</p> <p>Netherlands: The Netherlands Patent Office is not competent to impose the orders. With regard to patent rights such orders fall under the exclusive competence of the district court of The Hague.</p> <p>Norway: No</p> <p>Poland: No, it's the competency of the common courts.</p> <p>Romania: No, only the courts.</p> <p>Singapore: No</p> <p>Slovenia: No</p> <p>Switzerland: No</p> <p>United Kingdom: No</p> <p>USA (including the INTA submission): No. Neither of the USPTO's administrative appeal boards has the authority to impose fines as a remedial measure. However, the PTAB does have authority to impose fines that may be applicable against an accused infringer for misconduct. Such fines may include compensatory expenses, including attorney fees if either the petitioner (potentially an accused infringer) or the patent holder engages in misconduct before the tribunal. 37 CFR 41.128(b)(6). The TTAB has no authority to impose monetary penalties or fines. TTAB Manual of Procedure § 411.05.</p> <p>The USITC may impose civil penalties for violation of a USITC cease and desist order. A USITC cease and desist order directs a respondent in the USITC investigation to cease its unfair acts, including selling infringing imported articles out of U.S. inventory. See 19 U.S.C. § 1337(f)(2).</p> <p>The USCBP may impose civil penalties under 19 CFR § 133.27. In addition to any other penalty or remedy authorized by law, CBP may impose a civil fine under 19 U.S.C. § 1526(f) on any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that bears a counterfeit mark resulting in a seizure of the merchandise under 19 U.S.C. § 1526(e).</p> <p>BOIP (including the INTA submission): It is not competent to impose the orders. These orders can only be imposed by a court.</p> <p>EPO: As mentioned above, the EPO and the Boards of Appeal have no competence to deal with patent or any other IP related infringement actions, or actions for damages and compensation. Such actions are exclusively dealt with before the competent courts on the basis of the applicable jurisdiction laws.</p> <p>EUIPO: No</p>
<p><i>e</i> Order the infringer to disclose information?</p>	
<p>Peru: Yes, it is possible for the national administrative authority (<i>Indecopi</i>) to demand of the defendant the disclosure of information, including commercial data. However, whenever the defendant requests for the confidentiality of trade secrets, the authority must guarantee that.</p>	<p>Australia: No</p> <p>Canada: No</p>

<p>Singapore: The answer to this question would depend on the context and on what “disclose information” means.</p> <p>United Kingdom: Yes, occasionally.</p> <p>USA (including the INTA submission): Yes – in response to a request by the other party as part of discovery in trademark or patent related proceedings before the competent authority.</p> <p><i>E.g.</i>, in an <i>inter partes</i> review an alleged infringer may be subject to a limited discovery order before the Patent Trial and Appeal Board. 37 CFR 42.51 (stating the PTAB has authority to order discovery); 35 U.S.C. § 316 (a). Similarly, the TTAB permits the use of various disclosures and discovery devices for litigants in <i>inter partes</i> proceedings. 37 C.F.R. § 2.120(a)(1).</p> <p><i>E.g.</i>, during a USITC investigation, when an investigation is before an Administrative Law Judge (ALJ), the ALJ can issue a subpoena. The procedures involved in the issuance of subpoenas at the USITC differ from the current practice of most courts. The USITC Rule concerning subpoenas, including motions to quash, is found at Rule 210.32, 19 C.F.R. § 210.32. An application for issuance of a subpoena, as well as the requested subpoena itself, must be submitted to the ALJ. Subpoenas are enforced, if necessary, by the Commission in federal court.</p> <p>USITC regulations provide for several methods of discovery. 19 CFR § 210.27(a). The parties to an investigation may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; and requests for admissions.</p>	<p>China (including the INTA submission): No</p> <p>Costa Rica: No, an administrative authority cannot request an infringer to disclose information, this can only be done by a judicial authority.</p> <p>Croatia: No</p> <p>Czech Republic: No</p> <p>Finland: No</p> <p>France: No</p> <p>Germany (including the INTA submission): No, in Germany the civil courts decide on the order to disclose information (<i>e.g.</i>, section 140b Patent Act, section 19 Trade Mark Act, section 46 Design Act).</p> <p>Hungary: No. The court is competent to order the infringer to disclose information.</p> <p>Ireland: The Controller/IPO has no function in this area. In patents cases the Court can make an order for discovery in certain circumstances. Information disclosure orders can also be brought under the European Communities (Enforcement of Intellectual Property Rights) Regulations 2006 which transpose the Enforcement Directive into Irish law. The Enforcement Regulations provide for the making of an order to disclose certain stated information on infringing activities, including:</p> <ul style="list-style-type: none"> (a) the names and addresses of: <ul style="list-style-type: none"> (i) each producer, manufacturer, distributor or supplier of the infringing goods or services, (ii) any person who previously possessed the infringing goods, and services, (iii) the intended wholesaler and retailer of the infringing goods or; (b) information relating to: <ul style="list-style-type: none"> (i) the quantities or amount of infringing goods or services provided, produced, manufactured, delivered, received or ordered, and (ii) the price paid for the infringing goods or infringing services in question. <p>Israel: N/A</p> <p>Italy: No</p> <p>Japan: No</p> <p>Korea: No</p> <p>Lithuania: No</p> <p>Malta: The national IPO does not have the power to order the infringer to disclose information.</p> <p>Netherlands: The Netherlands Patent Office is not competent to impose the orders. With regard to patent rights such orders fall under the exclusive competence of the district court of The Hague.</p> <p>Norway: No</p> <p>Poland: No, it’s the competency of the common courts.</p> <p>Portugal: No</p> <p>Romania: No, only the courts.</p>
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	<p>Slovenia: No</p> <p>Switzerland: No</p> <p>BOIP (including the INTA submission): It is not competent to impose the orders. These orders can only be imposed by a court.</p> <p>EPO: As mentioned above, the EPO and the Boards of Appeal have no competence to deal with patent or any other IP related infringement actions, or actions for damages and compensation. Such actions are exclusively dealt with before the competent courts on the basis of the applicable jurisdiction laws.</p> <p>EUIPO: No</p>
<p><i>f</i> Order for inspection?</p>	
<p>Japan: They may order the preservation of evidence, such as an order to submit documents. See Patent Act §150 (2): Evidence may be preserved for trial or appeal, either at the motion of an interested person prior to the filing of a request for a trial or appeal, or at the motion of a party or an intervenor, or on the judge's own authority once the trial or appeal is pending.</p> <p>Peru: Yes, it is possible to order inspections in order to verify the real reach of an IP infringement.</p> <p>Singapore: The answer to this question would depend on the context and on what "inspection" means.</p> <p>USA: Yes, e.g., the U.S. International Trade Commission has authority to inspect records relating to the importation, sale or transfer of any infringing goods. See, e.g., 19 CFR 210.71. Yes, e.g., during a USITC investigation, when an investigation is before an Administrative Law Judge (ALJ), the ALJ can issue a subpoena. The procedures involved in the issuance of subpoenas at the Commission differ from the current practice of most courts. The Commission Rule concerning subpoenas, including motions to quash, is found at Rule 210.32, 19 C.F.R. § 210.32. An application for issuance of a subpoena, as well as the requested subpoena itself, must be submitted to the ALJ. Subpoenas are enforced, if necessary, by the Commission in federal court. USITC regulations provide for several methods of discovery. 19 CFR § 210.27 General provisions governing discovery. (a) Discovery methods. The parties to an investigation may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; and requests for admissions. Personal (<i>ex officio</i>) inspection authority of U.S. officers of the customs: U.S. officers of the customs may stop, examine, inspect, and search at any time in the United States or within the customs waters of the United States, arriving vessels, cargo, passengers, officers and crew, and their baggage (19 CFR 162.3); letters (19 CFR 162.4); vehicles and aircraft, manifest and other documents or papers (19 CFR 162.5); persons, baggage, and merchandise (19 CFR 162.6); and vehicles, persons, or beasts or any trunk or envelope (19 CFR 162.7). United States Customs officers stationed in a foreign country may exercise such functions and perform such duties (including inspections, examinations, searches, seizures, and arrests), as may be permitted by treaty, other agreement, or law of the country in which they are stationed (19 CFR 162.8).</p>	<p>Australia: No</p> <p>Canada: No</p> <p>China (including the INTA submission): No</p> <p>Costa Rica: No, and inspection can only be ordered at a judicial level.</p> <p>Croatia: No. The State Intellectual Property Office of the Republic of Croatia (SIPO) also has competence to inspect the work of collective management societies and independent management entities in copyright and related rights field. However, it has no competence in the field of enforcement of IP rights in terms of ordering inspection or other measures against the infringers of IP rights. Therefore, in the scope of the question as it was posed, it has to be concluded that SIPO is only competent to decide on the validity of IP rights.</p> <p>Czech Republic: No</p> <p>Finland: No</p> <p>France: No</p> <p>Germany (including the INTA submission): No, in Germany the civil courts decide on the order for inspection (e.g., section 140c Patent Act, section 19a Trade Mark Act, section 46a Design Act).</p> <p>Hungary: No. The court is competent to issue orders for inspection.</p> <p>Ireland: The Controller/IPO has no function in this area. In trade mark, design and copyright infringement cases, the Court has the power to order the seizure of goods, material or articles, make an inventory or prepare other evidence of infringement. Search warrants can be issued to authorise persons including the proprietor to assist the police in collecting any inventory or other evidence. In patent cases, the onus of proving infringement normally lies with the plaintiff. Evidence of infringement must be obtained and must be in a form admissible under the general laws of evidence.</p> <p>Israel: N/A</p> <p>Italy: No</p> <p>Korea: No</p> <p>Lithuania: No</p> <p>Malta: The national IPO does not have the power to order the infringer to issue an order for inspection.</p>

	<p>Netherlands: The Netherlands Patent Office is not competent to impose the orders. With regard to patent rights such orders fall under the exclusive competence of the district court of The Hague.</p> <p>Norway: No</p> <p>Poland: No, the task of the Polish Patent Office is testing applications on inventions, utility models, industrial designs, trademarks, geographical indications for non-agricultural products and topographies of integrated circuits made in order to obtain protection.</p> <p>Portugal: No</p> <p>Romania: No, only the courts or the collective rights management bodies.</p> <p>Slovenia: No</p> <p>Switzerland: No</p> <p>United Kingdom: No</p> <p>BOIP (including the INTA submission): It is not competent to impose the orders. These orders can only be imposed by a court.</p> <p>EPO: As mentioned above, the EPO and the Boards of Appeal have no competence to deal with patent or any other IP related infringement actions, or actions for damages and compensation. Such actions are exclusively dealt with before the competent courts on the basis of the applicable jurisdiction laws.</p> <p>EUIPO: No</p>
<p><i>g Order for destruction of property?</i></p>	
<p>Peru: Yes, it is possible. It is also possible to order for the donation of the infringing goods.</p> <p>Portugal: It can happen but only when the Portuguese Industrial Property Office takes decisions on administrative infringement cases (penalties).</p> <p>USA: USCBP may destroy forfeited infringing merchandise under 19 CFR § 133.52 – Disposition of forfeited merchandise.</p> <p>(a) Trademark (other than counterfeit) or trade name violations. Articles forfeited for violation of the trademark laws, other than articles bearing a counterfeit trademark, shall be disposed of in accordance with the procedures applicable to forfeitures for violation of the Customs laws, after the removal or obliteration of the name, mark, or trademark by reason of which the articles were seized.</p> <p>(b) Copyright violations. Articles forfeited for violation of the copyright laws shall be destroyed.</p> <p>(c) Articles bearing a counterfeit trademark. Merchandise forfeited for violation of the trademark laws shall be destroyed, unless it is determined that the merchandise is not unsafe or a hazard to health and the Commissioner of Customs or his designee has the written consent of the U.S. trademark owner, in which case the Commissioner of Customs or his designee may dispose of the merchandise, after obliteration of the trademark, where feasible, by:</p> <p>(1) delivery to any Federal, state, or local government agency that, in the opinion of the Commissioner or his designee, has established a need for the merchandise; or</p> <p>(2) gift to any charitable institution that, in the opinion of the Commissioner or his designee, has established a need for the merchandise; or</p> <p>(3) sale at public auction, if more</p>	<p>Australia: No</p> <p>Canada: No</p> <p>China (including the INTA submission): No</p> <p>Costa Rica: No, this can only be done at a judicial level, not at the administrative level.</p> <p>Croatia: No</p> <p>Czech Republic: No</p> <p>Finland: No</p> <p>France: No</p> <p>Germany (including the INTA submission): No, in Germany the civil courts decide on the order for destruction of property (e.g., section 140a Patent Act, section 18 Trade Mark Act, section 43 Design Act).</p> <p>Hungary: No. The court is competent to order for destruction of property.</p> <p>Ireland: The IPO has no function in this area. The Court can make orders for delivery and destruction of infringing articles.</p> <p>Israel: N/A</p> <p>Italy: No</p>

<p>than 90 days has passed since the forfeiture and Customs has determined that no need for the merchandise has been established under paragraph (c)(1) or (c)(2) of this section.</p>	<p>Japan: No</p> <p>Korea: No</p> <p>Lithuania: No</p> <p>Malta: The national IPO does not have the power to order the destruction of property.</p> <p>Netherlands: The Netherlands Patent Office is not competent to impose the orders. With regard to patent rights such orders fall under the exclusive competence of the district court of The Hague.</p> <p>Norway: No</p> <p>Poland: No, it's the competency of the common courts.</p> <p>Romania: No, only the courts.</p> <p>Singapore: No</p> <p>Slovenia: No</p> <p>Switzerland: No</p> <p>United Kingdom: No</p> <p>BOIP (including the INTA submission): It is not competent to impose the orders. These orders can only be imposed by a court.</p> <p>EPO: As mentioned above, the EPO and the Boards of Appeal have no competence to deal with patent or any other IP related infringement actions, or actions for damages and compensation. Such actions are exclusively dealt with before the competent courts on the basis of the applicable jurisdiction laws.</p> <p>EUIPO: No</p>
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h Order payment for infringement (e.g., compensation, account of profits, royalties)?

<p>United Kingdom: Yes</p>	<p>Australia: No</p> <p>Canada: No</p> <p>China (including the INTA submission): No</p> <p>Costa Rica: No, only a judicial authority can order the payment for infringement, this cannot be done by an administrative authority.</p> <p>Croatia: No</p> <p>Czech Republic: No</p> <p>France: No</p> <p>Finland: No</p> <p>Germany (including the INTA submission): No, in Germany the civil courts decide on the order for payment for infringement (e.g., section 139 para. 2 Patent Act, sections 14 para. 6, 15 para. 5 Trade Mark Act, section 42 para. 2 Design Act).</p> <p>Hungary: No. The court is competent to order payment for infringement.</p> <p>Ireland: The IPO has no function in this area. The Court can award damages and order an account of the profits derived from the infringement.</p>
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	<p>Israel: N/A</p> <p>Italy: No</p> <p>Japan: No</p> <p>Korea: No</p> <p>Lithuania: No</p> <p>Malta: The national IPO does not have the power to order payment for infringement.</p> <p>Netherlands: The Netherlands Patent Office is not competent to impose the orders. With regard to patent rights such orders fall under the exclusive competence of the district court of The Hague.</p> <p>Norway: No</p> <p>Peru: Not at an administrative stage. Only if it is demanded before a court (damages).</p> <p>Poland: No, it's the competency of the common courts.</p> <p>Portugal: No</p> <p>Romania: No, only the courts.</p> <p>Singapore: No, except for the case described in 1(b) above.</p> <p>Slovenia: No</p> <p>Switzerland: No</p> <p>USA (including the INTA submission): No. Neither the PTAB, TTAB, USITC, nor USCBP have authority to order payment for infringement (<i>e.g.</i>, compensation, account of profits, royalties).</p> <p>BOIP (including the INTA submission): It is not competent to impose the orders. These orders can only be imposed by a court.</p> <p>EPO: As mentioned above, the EPO and the Boards of Appeal have no competence to deal with patent or any other IP related infringement actions, or actions for damages and compensation. Such actions are exclusively dealt with before the competent courts on the basis of the applicable jurisdiction laws.</p> <p>EUIPO: No</p>
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i Order payment of costs of proceedings?

<p>Croatia: Yes. When deciding an administrative proceeding involving two opposing parties such as for example opposition, revocation or cancellation cases, SIPO also decides on the costs of proceedings and orders payment of costs of proceedings.</p> <p>Germany (including the INTA submission): Generally no, however in proceedings before the DPMA, payment of costs of proceedings may be ordered for certain services of the DPMA.</p> <p>Hungary: Yes. The IP Office is competent to order payment of costs of proceedings relating to the validity of IP rights and to declarations of non-infringement.</p> <p>Israel: Yes</p>	<p>Australia: The competent authority responsible for the registration of industrial property may order cost payments for administrative considerations of the validity of an IP right. However, competent authorities can never order payment of costs for copyright proceedings.</p> <p>Canada: No</p> <p>China (including the INTA submission): No</p> <p>Costa Rica: No, only a judicial authority can order the payments of costs of proceedings.</p> <p>Czech Republic: No</p> <p>Finland: No</p>
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<p>Italy: Yes</p> <p>Japan: Yes. See Patent Act §170: A final and binding ruling on the amount of costs for a trial or appeal has the same effect as that of an enforceable title of obligation.</p> <p>Korea: Yes</p> <p>Norway: Yes, they may award costs to the successful party in administrative invalidity and revocation actions (but not in opposition cases).</p> <p>Peru: Yes, it is possible for the national administrative authority (<i>Indecopi</i>) to order the unsuccessful party to make a payment of the costs of the proceeding.</p> <p>Poland: Common court is competent in the court proceedings; the Polish Patent Office can be competent to order costs of proceedings on the subject of the proceedings concerning opposition against trade mark applications and litigation proceedings before the Polish Patent Office.</p> <p>Singapore: Yes, subject to certain limits.</p> <p>Switzerland: Yes, for the proceedings mentioned under lit. a.</p> <p>United Kingdom: Yes</p> <p>USA (including the INTA submission): No (however, see below for a specific example of how this could be the end result). <i>E.g.</i>, the Patent Trial and Appeal Board has authority to order compensatory expenses, including attorney fees should a party engage in misconduct before the tribunal. Such fines can be applied against either the petitioner (potentially an accused infringer) or the patent holder. 37 CFR 41.128(b)(6). However, the TTAB has no authority to impose monetary penalties or fines.</p> <p>EPO: The Boards of Appeal also decide on the distribution of costs. Such decisions, when final, would also have to be recognized and enforced.</p> <p>EUIPO: Yes</p>	<p>France: No</p> <p>Ireland: IPO has no function in this area. Ordering the payment of costs is a matter for the Court.</p> <p>Lithuania: No</p> <p>Malta: The national IPO does not have the power to order payment of costs of proceedings.</p> <p>Netherlands: The Netherlands Patent Office is not competent to impose the orders. With regard to patent rights such orders fall under the exclusive competence of the district court of The Hague.</p> <p>Portugal: Not at the moment but in the near future it may happen on validity cases concerning trademarks and design registrations decided by the Portuguese Industrial Property Office.</p> <p>Romania: No, only the courts.</p> <p>Slovenia: Yes, but only in proceedings before SIPO (<i>e.g.</i>, grant or registration of industrial property rights).</p> <p>BOIP (including the INTA submission): It is not competent to impose the orders. These orders can only be imposed by a court.</p>
<p><i>j Any other types of orders?</i></p>	
<p>Australia (separate to Australia's expert response, INTA submitted the following): Summons witnesses usually at the request of a party to proceedings.</p> <p>Canada: The competent authority may order the cross-examination of any affiant or declarant on an affidavit or statutory declaration that has been filed with the competent authority and is being relied on as evidence in certain administrative procedures. On application, the competent authority may also order, in cases of abuse of the exclusive rights under a patent, the grant of a license of the patent or to revoke the patent. In cases where there is an abuse of the exclusive rights under a patent but granting a license of the patent or revoking the patent is not appropriate, the competent authority may make an order on the costs of the application to determine if there was an abuse of the exclusive rights under a patent.</p> <p>Hungary: The competent authority decides on requests for a <i>declaration of non-infringement</i> in patent, utility model and design cases. [Pursuant to Art. 37 of Act XXXIII of 1995 on the Protection of Inventions by Patents (hereinafter: the Patent Act), any person believing that proceedings for patent infringement may be instituted against him</p>	<p>Australia: No</p> <p>China (including the INTA submission): No</p> <p>Croatia: No</p> <p>Cyprus: No</p> <p>Czech Republic: No</p> <p>France: No</p> <p>Lithuania: No</p> <p>Malta: The national IPO is not empowered to issue any order.</p> <p>Norway: No</p> <p>Poland: No</p> <p>Portugal: Not at the moment but in the near future it may happen on validity cases concerning trademarks and design registrations decided by the Portuguese Industrial Property Office.</p>

<p>may, prior to the institution of such proceedings, request a decision ruling that the product or process exploited or to be exploited by him does not infringe a particular patent specified by him. Where a final ruling declaring the lack of infringement has been given, infringement proceedings may not be instituted on the basis of the specified patent in respect of the same product or process. The same rule applies in utility model and design proceedings.]</p> <p>The IP Office is also competent in deciding on <i>requests for compulsory licenses for public health reasons</i> under Regulation (EC) No 816/2006 [see Art. 83/A-83/H of the Patent Act] and in the <i>interpretation of patent specifications</i> on request of a court or other authorities [see Art. 84 of the Patent Act].</p> <p>Israel: The Israel Patent Office (hereinafter: “ILPO”) has jurisdiction to hear the following matters: (1) grant and terms of compulsory licenses for patents; (2) claims to determine whether a service invention or service design is in fact a service invention or a service design; (3) request by an inventor or a designer for indication of inventor’s or designer’s name in the patent/design documents.</p> <p>In addition, the Patent Commissioner is a member of a tribunal that has the authority to decide claims by an employee for service invention compensation against an employer, in certain circumstances.</p> <p>Italy: Decisions on IP right (trademarks) validity upon third parties’ opposition, including awarding of costs of opposition proceeding; decisions on lapse of an IP right due to lack of proper renewal; decisions on IP restoration requests and/or further processing; decisions on granting/cancelling <i>recordal</i> of petitions (change of ownership, decisions of courts, pledge, security, ...); decisions on granting and amount of compulsory licenses (Art. 199 IP code).</p> <p>Moreover, decisions by the Italian PTO can be appealed to the board of appeal, which is independent from the PTO and which in turn can issue decisions either setting aside or upholding the appealed decisions.</p> <p>The board of appeal can: decide on the “granting of IPRs, on the application to inscribe these rights, or whether to impede the recognition of an IP title” (Art. 135 Italian Intellectual Property Code); issue decisions against the IPR registration, issued on the basis of third parties’ oppositions; issue decisions to cancel the registration; issue decisions on (denial of) renewal of registration or on IPRs transcription; issue decisions granting provisional including protective measures against the inactivity of the IP office; issue decisions to request the European Union Court of Justice to give preliminary rulings.</p> <p>Korea: Ruling to confirm the scope of a patent right; ruling to determine the extension in time of a patent right; ruling to grant ordinary license of a patent right; ruling to revoke the contested denial of grant and grant a patent right. The confirmation of the scope of a patent right given by the Intellectual Property Trial and Appeal Board (“IPTAB”) of the Korean Intellectual Property Office (“KIPO”) is a public opinion with an <i>erga omnes</i> effect, but does not bind anybody including the court.</p> <p>Peru: It is possible for the national administrative authority (<i>Indecopi</i>) to order the closing of the business establishments of the infringers and the publication of the administrative decision.</p>	<p>Romania: No</p> <p>Slovenia: No</p> <p>Switzerland: No</p> <p>EUIPO: No</p>
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<p>Singapore: Yes, there can be other types of orders. One example might be an order for the amendment of a patent.</p> <p>United Kingdom: Orders for witnesses to attend hearings for cross-examination.</p> <p>USA (including the INTA submission): The competent authority may require a disclaimer, amendment, or other restriction of the registration in response to request by a party in a trademark or patent related proceeding. The Secretary of Agriculture, as head of the Plant Variety Protection Office, has the ability to declare a plant breeders' right protected variety eligible for public use and to set a rate of remuneration. 7 U.S.C. § 2404. The Copyright Royalty Board (CRB), a three-judge panel appointed by the Librarian of Congress, determines the rates and terms of statutory licenses issued under the 1976 Copyright Act and also determines the distribution of royalties collected from such licenses. The CRB also interprets substantive law concerning provisions of the Copyright Act that are the subject of a proceeding. The Register of Copyrights resolves novel questions on substantive copyright law that are before the CRB. 17 U.S.C. §§ 802 – 805, 1004, 1006, 1007, 1010; 37 C.F.R. ch. III. The Copyright Office Review Board hears final administrative appeals of refusals to register copyrights. The Board consists of the Register of Copyrights and the General Counsel (or their respective designees) and a third individual designated by the Register. Review Board decisions constitute final agency action. 37 C.F.R. § 202.5.</p> <p>EPO: The Boards of Appeal also decide on the distribution of costs. Such decisions, when final, would also have to be recognized and enforced. (<i>as above</i>)</p>	
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2 What are the characteristics of competent authorities in your jurisdiction and the procedures before them?

<p>EPO's opposition division</p> <p>The EPO's opposition division consists of three technically qualified examiners, at least two of them shall not have taken part in the proceedings for grant of the patent to which the opposition relates. An examiner who has taken part in the proceedings for the grant of the European patent may not be the Chairman. Before a decision is taken on the opposition, the opposition division may entrust the examination of the opposition to one of its members. Oral proceedings shall be held before the opposition division itself. If the opposition division considers that the nature of the decision so requires, it shall be enlarged by the addition of a legally qualified examiner who shall not have taken part in the proceedings for grant of the patent. In the event of parity of votes, the vote of the Chairman of the opposition division shall be decisive (Art. 19(2) EPC).</p> <p>Opposition is an <i>inter partes</i> procedure, significant features of which are similar to the traditional revocation proceedings. The notice of opposition sets out the legal and factual framework within which the substantive examination of the opposition has to be conducted. The substantive examination of the opposition depends on the extent to which the patent is opposed in the notice of opposition. Patent claims which are not opposed are not, in principle, subject to any examination in the opposition procedure. It also follows from this basic principle that new grounds of opposition which are not covered by the notice of opposition need not be considered by the Office of its own motion. However, because of Article 114(1) EPC the opposition division may, in exceptional cases and at its discretion, also consider other grounds for opposition which, <i>prima facie</i>, would seem to prejudice the maintenance of the European patent in whole or in part.</p> <p>Boards of Appeal</p> <p>The Boards of Appeal of the EPO are the judiciary of the European Patent Organisation. They are responsible for the examination of appeals from decisions of the different divisions of the EPO. The members of the Boards may not be members of other procedural bodies of the patent examination or opposition procedure (Art. 23(2) EPC). The EPC contains provisions for safeguarding the impartiality of board members (Art. 24 EPC). In their decisions the members of the Boards are not bound by any instructions and shall comply only with the provisions of the EPC (Art. 23(3) EPC). Their decisions are final and therefore subject to no appeal or judicial review.</p> <p>The appeal procedure is a judicial procedure. As such, it is by its very nature less investigative than an administrative procedure. As a consequence the principle of party disposition and party presentation clearly limits the principle of examination by the EPO of its own motion.</p> <p>In the appeal procedure, the discretion to consider new grounds of opposition is, therefore, further restricted: new grounds of opposition may only be considered with the consent of the patent holder. Should a Board of Appeal, however, come to the conclusion during appeal proceedings that the opposition division wrongly exercised its discretion in failing to admit a new ground of opposition, then the Board of Appeal may consider this ground of opposition of its own motion.</p>

a Are these valid assumptions:

i The powers vested in the competent authorities stem from a sufficiently exhaustive legal basis?

Australia: Yes

Canada: Yes, their powers are derived from the relevant intellectual property legislation.

China (including the INTA submission): Valid assumption for competent authorities of China.

Costa Rica: Yes

Croatia: Yes

Cyprus: Yes as far as the competences of DRCOR are concerned.

Czech Republic: Yes. Act No. 2/1969 Coll., on Establishing Ministries and Other Institutions of Central Government of the Czech Republic, as amended and Act No. 14/1993 Coll., on Measures concerning the Industrial Property Protection.

Finland: Yes, the powers stem from the relevant piece of industrial property legislation.

France: Yes

Germany (including the INTA submission): Yes, the powers of the DPMA are contained in the relevant German IP laws, *i.e.*, the Patent Act (*Patentgesetz*), the Trade Mark Act (*Markengesetz*), the Utility Model Act (*Gebrauchsmustergesetz*) and the Design Act (*Designgesetz*) as well as in several accompanying regulations.

Hungary: Yes. Article 115/G of the Patent Act lays down rules concerning the functions and competence of the IP Office and Chapter X of the Patent Act provides for the detailed procedural rules.

Israel: Yes

Ireland: Yes. The Controller of the IPO has statutory functions under the Patents Act 1992 (as amended), the Trade Marks Act 1996 (as amended), the Industrial Designs Act 2001, the various Statutory Rules and Regulations amended under these Acts and the European Communities (Supplementary Protection Certificate) Regulations as well as certain statutory functions under the Copyright and Related Rights Act 2000.

Italy: Yes

Japan: Yes

Korea: Yes

Lithuania: Yes

Malta: Maltese legislation (Copyright Act – Chapter 415; Trademarks Act – Chapter 416; and the Patents and Designs Act – Chapter 417) provides detailed provisions including the powers vested in the IPO in so far as registration of IP rights is concerned.

Netherlands: Yes, the powers vested in the Netherlands Patent Office are based on the Dutch Patent Act and related regulations.

<p>Norway: Yes, their competence is defined by the Acts on the different industrial property rights as well as by the Act on the Industrial Property Office and the Board of Appeal for Industrial Property Rights.</p> <p>Peru: The functions and procedure rules have a legal basis. The Intellectual Property legal frameworks are:</p> <ul style="list-style-type: none"> – Andean Community Decision 486: Common Intellectual Property Regime (2000) – Legislative Decree 1075: Supplementary Provisions for Andean Decision 486 (2008) – Legislative Decree 1309 (2016) – Legislative Decree 1397 (2018) – Supreme Decree 059-2017-PCM (2017) <p>The powers stem from a robust legal basis, established by the Legislative Decree 1033, which sets up the organization and functions of <i>Indecopi</i>.</p> <p>Poland: Yes</p> <p>Portugal: Yes, from the Industrial Property Law.</p> <p>Romania: Yes, there are special acts (laws, government ordinances/decisions, regulations).</p> <p>Singapore: Yes, this is a valid assumption.</p> <p>Slovenia: Yes, the powers of SIPO are determined in the State Administration Act, the Industrial Property Act, the Copyright and Related Rights Act, the Law on Collective Management of Copyright and Related Rights and the Law on the Protection of Topographies of Integrated Circuits.</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes, they stem from statute.</p> <p>USA (including the INTA submission): Yes. Acts of Congress created the aforementioned administrative tribunals in the United States. 35 U.S.C. § 6 establishes the USPTO’s Patent Trial and Appeal Board. 15 U.S.C § 1067 establishes the USPTO Trademark Trial and Appeal Board. 19 U.S.C § 1330 establishes the U.S. International Trade Commission. 6 U.S.C § 211 establishes the U.S. Customs and Border Protection agency. 17 U.S.C § 801 authorizes the appointment of the Copyright Royalty Judges of the Copyright Royalty Board. 37 C.F.R. § 202.5 lays out the procedure for final administrative appeals of refusals to register copyrights before the Copyright Office Review Board.</p> <p>BOIP (including the INTA submission): It has been authorised in the Benelux Convention on Intellectual Property and its Implementing Regulations.</p> <p>EPO: Yes, the EPC and its Implementing Regulations established a single European procedure for the grant of patents, including opposition and appeal proceedings and thus provide for a clear legal basis.</p> <p>EUIPO: Yes: Trade marks (EUTMs): Regulation (EU) 2017/1001 (EUTM Regulation); Commission Delegated Regulation (EU) 2018/625; Commission Implementing Regulation (EU) 2018/626; Designs (RCDs): Council Regulation (EC) No 6/2002 on Community Designs; Commission Implementing Regulation No 2245/2002.</p>	
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ii They exercise a quasi-judicial function in accordance with a predetermined set of procedural rules?

Australia: Yes

Canada: In the context of adversarial proceedings before the competent authority, a predetermined set of procedural rules apply.

Czech Republic: Yes.

There are the dispute proceedings which take place before the Czech IPO. Their aim is to disallow the infringement of the earlier private rights of third parties, prevent the granting of protection for objects, which do not fulfil legal requirements or change such situation if the granting of protection has occurred. In the area of trademarks dispute proceedings can be for oppositions to the registration of the national or international trade mark filed into the trademarks register, for the objections against the registration, for trademark revocation or cancellation. In the area of technical solutions protected by patents and utility models, dispute proceedings can be for cancellation, revocation and declaratory judgement, and in the area of supplementary protection certificates proceedings on cancellation proposals. Dispute procedure has 2 stages (first stage of administrative proceedings and appellate proceedings).

Finland: Yes. In matters described in question 1a the competent authorities function in accordance with a predetermined set of procedural rules that stem from the relevant industrial property legislation or from the administrative procedure act.

France: *Oui, mais uniquement dans la limite des missions dévolues à l'autorité compétente, c'est-à-dire l'enregistrement, la délivrance ou la continuité du titre de propriété intellectuelle concerné.* / Yes, but only within the limits of the missions devoted to the competent authority, namely the registration/granting/continuance of the IP right concerned.

Germany (including the INTA submission): The DPMA acts in accordance with predetermined procedural rules for grant and opposition procedures. Its employees do not exercise quasi-judicial functions. There is no judicial independence of its employees.

Ireland: Yes. This assumption is correct.

Israel: Yes, however the ILPO is not bound by court-based civil procedure and evidence rules.

Italy: Yes

Hungary: Yes [see Chapter X of the Patent Act].

Japan: Yes

Korea: Yes

Lithuania: Yes

Netherlands: Decisions taken by the Netherlands Patent Office are governed by the procedural provisions laid down in the Dutch General Administrative Law Act.

Norway: The Industrial Property Office and the Board of Appeal for Industrial Property Rights are administrative organs, not judicial bodies, however the procedural rules governing their function are predetermined, as

China: No

Costa Rica: No, the administrative competent authorities do not exercise quasi-judicial functions as they cannot impose any sanctions. After the opinion C-34-2007 of the Attorney General's Office, it is not possible to apply at an administrative level the injunction measures, set forth by the Law on Procedures for Enforcement of Intellectual Property Rights; this can only be done by a judicial authority.

Croatia: No

Malta: The IPO exercises an administrative function in terms of domestic law.

Slovenia: No. However, in the case of an opposition based on an earlier right against the registration of the trademark, which is part of the registration proceeding, SIPO decides on possible collision of rights and accordingly on the registration of the trademark.

<p>these rules follow from the Act on the Industrial Property Office and Board of Appeal for Industrial Property Rights, the Acts on the different Industrial Property Rights as well as parts of the general Public Administration Act.</p> <p>Peru: The procedural rules are established into the legal framework mentioned in the previous question. The set of procedural rules is duly established by the Legislative Decree 1075, that approves Complementary Provisions to the Decision 486 of the Commission of the Andean Community.</p> <p>Poland: It exercises quasi-judicial function on the subject of litigation proceedings which are run before the Polish Patent Office.</p> <p>Portugal: Yes, there will be procedural rules clarifying the procedure before the office.</p> <p>Romania: Yes, it is completed with the common civil proceedings rules.</p> <p>Singapore: Yes, this is a valid assumption.</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes</p> <p>USA (including the INTA submission): Yes, administrative tribunals in the United States have written rules of procedure. Rules of the USPTO Patent Trial and Appeal Board are at 37 CFR part 41. Rules of the USPTO Trademark Trial and Appeal Board are at 37 CFR parts 2 and 7. Rules of the U.S. International Trade Commission are at 19 CFR part 210. Rules of the U.S. Customs and Border Protection agency are at 19 CFR parts 133 and 162. Rules of the Copyright Royalty Board are at 17 U.S.C. §§ 803-804 and 37 CFR ch. III. Rules of the Copyright Office Review Board are at 37 C.F.R. § 210.5.</p> <p>BOIP (including the INTA submission): Decisions taken by BOIP are based on the Benelux Convention on Intellectual Property and its Implementing Regulations which describe the largest part of the procedural rules.</p> <p>EPO: Both the opposition division and the Boards of Appeal exercise a quasi-judicial function in relation to a revocation of a European patent, on the basis of procedural rules set out in the EPC and its secondary legislation. The Boards of Appeal have their own procedural rules.</p> <p>EUIPO: Yes, in the sense that, once decisions have become final, their outcome is reflected in the EU trade mark or designs register.</p>	
<p>iii Their procedural rules are similar to judicial procedural rules?</p>	
<p>Australia: Yes. Separate to Australia's expert response, INTA submitted that the competent authority is not bound by formal rules of evidence, as are Courts.</p> <p>Canada: In the context of adversarial proceedings before the competent authority, the procedural rules provide for rules that are somewhat similar to judicial procedural rules.</p>	<p>China: No</p> <p>Costa Rica: No, there are currently no administrative procedures that can be carried out.</p> <p>Czech Republic: The procedural rules based on Act No. 500/2004 Coll., the Administrative Procedure Code, as amended, shall apply in the proceeding before the Czech IPO.</p>

<p>Croatia: No. These are administrative procedure rules. However, some basic features and principles are similar to judicial procedural rules.</p> <p>Finland: Yes, they have similarities, but naturally they are adapted to administrative procedure, <i>e.g.</i>, administrative proceedings are mostly conducted in writing.</p> <p>Germany (including the INTA submission): There is no clear-cut answer to this question. The procedural rules of the DPMA cannot be clearly assigned to either the administrative law procedure or the civil court procedure. It contains procedural elements of both, the administrative law procedure (<i>e.g.</i>, principle of <i>ex officio</i> investigation) and the civil court procedure (<i>e.g.</i>, principle of party disposition).</p> <p>Hungary: Yes</p> <p>Ireland: Yes, in general they are similar, in that the principles of natural justice apply.</p> <p>Israel: Yes, however the ILPO is not bound by court-based civil procedure and evidence rules.</p> <p>Italy: Yes</p> <p>Japan: Yes. For instance, a trial for patent invalidation is conducted through oral proceedings in principle (Patent Act §145 (1)). Some provisions of the Code of Civil Procedure apply <i>mutatis mutandis</i> to procedures of trials.</p> <p>Korea: Yes</p> <p>Lithuania: Yes</p> <p>Norway: Generally, their procedural rules are similar to what applies for other administrative organs, but in some aspects, these rules are similar to judicial procedural rules, for example it is possible to hold oral proceedings.</p> <p>Peru: Administrative proceedings have singular nuances in front of court proceedings, nevertheless, as well as these latter, rights to defence and due process are preserved during the entire administrative proceeding, involving sufficient time to offer proof and to appeal final decisions and precautionary measures.</p> <p>Poland: Yes, on the subject of litigation proceedings which are run before the Polish Patent Office</p> <p>Portugal: Yes, the procedural rules will be similar to judicial rules and will be approved by law.</p> <p>Romania: Yes, in general.</p> <p>Singapore: This assumption is partially valid. Although there are some similarities between the procedural rules, there are many differences as well.</p> <p>Slovenia: SIPO decides in accordance with the Industrial Property Act and the General Administrative Procedure Act. Some general principles, but not all, of the General Administrative Procedure Act are similar to judicial procedural rules.</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes (for example, part 7 of the patents rules are closely similar to the court's civil procedure rules).</p>	<p>France: <i>Non, les règles procédurales sont propres à l'autorité compétente.</i>/No, the procedural rules are specific to the competent authority.</p> <p>Malta: No</p> <p>Netherlands: No, different rules apply for judicial procedures.</p> <p>BOIP (submitted by INTA): No</p>
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<p>USA (including the INTA submission): Yes. The applicable procedural rules are separate from judicial procedural rules, but share similarities in certain areas.</p> <p>EPO: The proceedings before them are governed by generally applicable rules, as well as by their own specific procedural provisions provided for in the EPC (Art. 99ss as regards opposition proceedings and Art. 106ss EPC as regards proceedings before the Boards of Appeal), as well as secondary legislation. The procedure before the Boards of Appeal is further governed by their Rules of Procedure.</p> <p>The common provisions deal with matters which are common to all proceedings before the EPO. They cover general procedural principles, such as the right to be heard and oral proceedings (Art. 113 EPC, Art. 116 EPC), but also procedural related issues, including the filing of observations by third parties and means and taking of evidence (Arts 115 and 117 EPC).</p> <p>EUIPO: Yes, the general principles are similar, e.g., the right to be heard, an obligation to state reasons, possibility of oral proceedings, etc.</p>	
<p>iv Their decisions are subject to appeal and/or judicial review?</p>	
<p>Australia: Yes</p> <p>Canada: Final decisions can be the subject of an appeal and/or judicial review.</p> <p>China (including the INTA submission): Valid assumption for competent authorities of China.</p> <p>Costa Rica: Yes, according to Article 25 of Law 8039, the Administrative Registry Court will hear appeals lodged against the final acts and resolutions issued by the Registry. However, the competent authority cannot issue interim measures. All decisions are also subject to judicial review.</p> <p>Croatia: Yes. As of 26 May 2018 SIPO's decisions cannot be appealed but they are subject to a judicial review. A claim challenging the decision of SIPO is to be submitted to the Administrative Court in Zagreb.</p> <p>Cyprus: If the DRCOR rejects an application for registering a trademark or a patent, the applicant may file a recourse to the Administrative Court.</p> <p>Czech Republic: Yes. The administrative procedure in the Czech Republic is governed by the principle of two-stage proceedings. The participant may file an appeal against the decision of the Czech IPO in the first stage. Remedying proceedings before the Czech IPO are a special administrative procedure governed by the procedural norms of Act No 500/2004 Coll., the Administrative Procedure Code. The President of the Czech IPO decides on the appeal on the basis of a proposal submitted by an expert commission. By an appeal the decision can be challenged in terms of both correctness and legality. In addition to the merits and procedural decisions, an appeal may also challenge the fee decisions issued under the Administrative Fees Act. The final administrative decisions of the Czech IPO shall be reviewed, on the basis of a legal action, by the Municipal Court in Prague in accordance with a special legal regulation Act No. 150/2002 Coll., the Code of Administrative Justice, as amended.</p>	

<p>Finland: Yes</p> <p>France: <i>Oui, la décision de l'autorité compétence peut faire l'objet d'un appel.</i>/Yes, the decision is subject to appeal.</p> <p>Germany (including the INTA submission): Yes. With regard to patents and trademarks an appeal before special divisions of the DPMA is in general possible. Furthermore, the decisions of the DPMA are subject to judicial review of the FPC and the FCJ.</p> <p>Hungary: Yes, the decisions are subject to judicial review.</p> <p>Ireland: Yes, this is a valid assumption. Decisions of the IPO under the various Acts, Rules and Regulations are subject to certain rights of appeal and judicial review to the Irish High Court.</p> <p>Israel: Yes</p> <p>Italy: Yes</p> <p>Japan: Yes. See Patent Act §178. The Tokyo High Court (“Intellectual Property High Court”) has exclusive jurisdiction over any action against a revocation decision or a decision on a trial or appeal, a ruling to dismiss a written request for an opposition to a granted patent, a trial or appeal, etc.</p> <p>Korea: Yes</p> <p>Lithuania: Yes</p> <p>Malta: Yes</p> <p>Netherlands: Yes, decisions taken by the Netherlands Patent Office and BOIP are subject to appeal and judicial review.</p> <p>Norway: Yes. The decisions of the Industrial Property Office may be appealed to the Board of Appeal for Industrial Property rights. If an industrial property right is declared invalid, the decision from the Board of Appeal can be made subject to judicial review before the courts. However, if the right is upheld, the decision cannot be appealed to the courts, but the losing party may instead initiate an invalidity action before the courts.</p> <p>Peru: The Intellectual Property Courtroom is the functional body that resolves as a second and last administrative instance appeal procedures before the directorates of Distinctive Signs, Inventions and New Technologies and Copyright. The decisions are subject to an administrative appeal, which enables a Board of Appeal to issue a second instance decision. Any second instance decision is subject to judicial review, through an administrative-contentious process.</p> <p>Poland: Yes, decisions issued by the Patent Office are subject of the appeal addressed to the administrative court.</p> <p>Portugal: Yes, the law will establish appeal to the industrial property court.</p> <p>Romania: Yes</p>	
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<p>Singapore: Yes, this is a valid assumption.</p> <p>Slovenia: There is no appeal against decisions issued by SIPO, but its decisions are subject to judicial review. Against the decision of SIPO an action in administrative dispute may be filed to the Administrative court in Ljubljana.</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes</p> <p>USA (including the INTA submission): Yes, routes exist for appeal from administrative tribunals in the United States. See, e.g., 35 U.S.C. § 141 (appeal from PTAB to Court of Appeals for the Federal Circuit (CAFC)), 15 U.S.C. § 1071 (appeal from TTAB to courts), 28 U.S.C. 1295 (exclusive CAFC jurisdiction over appeals from the USITC), 28 U.S.C. 1346 (civil cases where United States is a defendant, including appeals from USCBP decisions involving seizure, forfeiture, and destruction of imported infringing goods), 17 U.S.C. § 803(d) (appeal from the Copyright Royalty Board to the United States Court of Appeals for the District of Columbia Circuit), and 5 U.S.C. § 500 <i>et seq.</i> (a copyright registration applicant may appeal the Copyright Office Review Board’s decision to uphold a copyright registration rejection by bringing judicial action against the Register of Copyrights in federal district court under the Administrative Procedure Act). This list is not exhaustive. However, the requirement for standing found in Article III of the U.S. Constitution limits federal court jurisdiction to cases or controversies, a requirement that is met by demonstrating an “injury in fact”. A party need not have Article III standing to appear before an administrative tribunal (e.g., the USPTO’s PTAB), but the constitutional requirement will apply when a party seeks review of any decision rendered by the administrative tribunal in a federal court. Thus, some litigants party to an administrative proceeding may not have an available appellate route. See, e.g., <i>Consumer Watchdog v. Wis. Alumni Research Found.</i>, 753 F.3d 1258 (Fed. Cir. 2014).</p> <p>BOIP (including the INTA submission): Yes, decisions taken by the BOIP are subject to appeal and judicial review.</p> <p>EPO: Decisions of the opposition divisions are subject to an appeal to the Boards of Appeal which render a final decision, the latter not subject to a judicial review. However, if the patent is maintained in its entirety or partly, it would still be possible for any interested person to file a revocation action with the competent national court. However, in contrast to a decision of the opposition division or the Boards of Appeal the jurisdiction is limited to the state where the European patent takes effect.</p> <p>EUIPO: Yes; Board of Appeal (BoA) (administrative review), General Court (GC), and Court of Justice (CJ) (judicial review).</p>	
<p>v Their decisions have the same legal effect as court judgments within the territory of the competent authority?</p>	
<p>Australia: Yes. Depends on what is meant by ‘legal effect’. A decision of the competent authority or of a court can both result in invalidity in Australia.</p> <p>China (including the INTA submission): Valid assumption for competent authorities of China.</p>	<p>Canada: The competent authority’s decisions are not treated like judicial judgments but can effect/establish a registered/granted IP right.</p> <p>Costa Rica: No, their decisions do not have the same legal effect.</p>

<p>Croatia: Yes</p> <p>Czech Republic: Yes</p> <p>Finland: Yes</p> <p>Hungary: Yes, if the decision of the authority becomes final, it has the same legal effect as court judgements.</p> <p>Ireland: Generally, where proceedings can be taken either before the Controller or the Court the decisions in those proceedings have the same legal effect.</p> <p>Israel: Generally, where proceedings can be taken either before the Registrar or the Court, the decisions in those proceedings have the same legal effect (for example, both the registrar and the court have parallel jurisdiction to cancel a patent). There is a difference regarding enforcement of decisions ordering payment of costs.</p> <p>Italy: Yes</p> <p>Japan: Regarding the validity of patent right, JPO has an exclusive right to decide it. Even if the court decided a patent right is invalid, the patent right is deemed to be valid unless it is decided as invalid in the trial of JPO. (I.e., JPO's decisions on invalidity of patent right have binding legal effectiveness as to third parties.)</p> <p>Lithuania: Yes</p> <p>Netherlands: Yes, both decisions by the Netherlands Patent Office and court judgments are binding upon the parties involved. Same reasoning applies for BOIP.</p> <p>Norway: Yes</p> <p>Peru: Their decisions have the same legal effects, but are administrative instance. Once they are firm, the decisions issued by <i>Indecopi</i> have full effect and enforceability.</p> <p>Portugal: Yes, the decisions will have the same legal effect as industrial property court judgments.</p> <p>Romania: Yes</p> <p>Singapore: Yes, this is a valid assumption.</p> <p>Slovenia: Yes, decisions of SIPO have <i>erga omnes</i> effect on the whole territory of the Republic of Slovenia.</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes, except that they have no precedent value, so do not bind the courts or future decisions of the competent authority.</p> <p>USA (including the INTA submission): Yes. While it is not entirely clear what is meant by "legal effect", administrative rulings have binding effects on the parties, and such rulings are appealable to the federal judiciary (see above response to Q.2.a.iv). As an example of a binding effect, parties to a PTAB <i>inter partes</i> review proceeding are estopped from raising invalidity challenges in a court or before the USITC that they raised or reasonably could have raised before the PTAB. 35 U.S.C. § 315(e)(2). However, this is in contrast with patent matters before the USITC, in which no preclusive effect is rendered in patent cases involving the importation of patent infringing merchandise. <i>Tandon Corp. v. United</i></p>	<p>France: <i>Leur décisions sont administratives et n'ont d'effet juridique qu'en ce qui concerne l'enregistrement, la délivrance ou le renouvellement du titre de propriété intellectuelle concerné.</i>/Their decisions are "administrative" decisions, they only have legal effect with regard to the registration/granting/continuance of the IP right concerned.</p> <p>Germany (similar to the INTA submission): Decisions of the DPMA and court judgements have different legal effect in general. However, in some cases they may have the same legal effect, e.g., revocation of a patent (DPMA decision) and declaration of invalidity of a patent (court decision) both have <i>inter omnes</i> effect.</p> <p>Korea: No</p> <p>Malta: No. The IPO is limited to the registration of IP rights and does not deliver decisions in the judicial sphere.</p> <p>Poland: No</p>
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<p><i>States ITC</i>, 831 F.2d 1017, 1019 (Fed. Cir. 1987). The “legal effect” of one matter upon a second matter may be further impacted by the doctrines of <i>res judicata</i> and/or collateral estoppel.</p> <p>BOIP (submitted by INTA): Yes</p> <p>EPO: The decision of the opposition division or the Boards of Appeal take effect on the territory of the 38 EPC Contracting States, <i>i.e.</i>, the patent is revoked by the final decision of one of these two bodies for all of the States for which it was granted.</p> <p>EUIPO: Yes. Furthermore, final decisions of EUIPO fixing the amount of costs shall be enforceable (Art. 110 EUTMR; Art. 71 CDR).</p>	
<p>vi They decide on validity of IP rights (and infringements) strictly within their own territory?</p>	
<p>Australia: Yes, with regard to validity of IP rights (except copyright). The competent authority does not decide on infringements. This is only within the power of the courts. Competent authorities in Australia do not decide on the validity (and infringements) of copyrights, which is a matter for the courts.</p> <p>Canada: With respect to the validity of IP rights, yes but the competent authority may be required to make determinations relating to foreign IP. For example, assessment of priority requires an assessment of foreign IP applications.</p> <p>China (including the INTA submission): Valid assumption for competent authorities of China.</p> <p>Costa Rica: Yes, they do, but they can only decide regarding registration and validity of IP rights within Costa Rican territory.</p> <p>Croatia: Yes</p> <p>Czech Republic: Yes. The decision of the Czech IPO on validity of IPR has a territorial effect.</p> <p>Finland: Yes</p> <p>Germany (including the INTA submission): German IP rights are only protected within the Federal Republic of Germany (principle of territoriality). Therefore, the decisions of the DPMA only relate to the territory of Germany. The DPMA does not take any decision on infringements.</p> <p>Hungary: The IP Office decides only on validity of IP rights as well as on lack of infringement within its own territory (territory of Hungary).</p> <p>Ireland: Yes, the Controller decides on the validity of IP rights strictly within the national territory of Ireland. The Controller does not deal with or make determinations in relation to infringement matters.</p> <p>Israel: Yes, only on validity.</p> <p>Italy: Yes, partly, because Italian IP rights are also enforceable in the State of San Marino (which is another territory) by virtue of special convention.</p> <p>Japan: Yes</p> <p>Korea: Geographical reach of the quasi-judicial power is limited to the territory. But the quasi-judicial deci-</p>	<p>France: <i>Non, elles n'ont pas compétence pour statuer sur ces questions particulières./No.</i> They do not decide on those particular matters.</p> <p>Malta: The IPO does not have the power to decide on IP rights but only to register IP rights.</p> <p>Netherlands: The Netherlands Patent Office does not decide on validity or infringements of patent rights; however, advice of the Netherlands Patent Office is mandatory if the court case concerns the validity of a patent granted under the Dutch Patent Act.</p> <p>Romania: No. Only the courts decide. At national level, they may have the same legal effect as far as concerns the validity, not the infringement of the right.</p> <p>Slovenia: Decisions of SIPO relate only to the territory of the Republic of Slovenia. As stated above SIPO decides only on grant and registration of IP rights and not on infringements or validity of IP rights after the grant or registration (with the exception of declaratory decisions on scope of patent protection).</p>

<p>sions contain no inherent limitation of strict territoriality, but are open to recognition abroad.</p> <p>Lithuania: Yes</p> <p>Norway: Yes, but only on validity, not infringement.</p> <p>Peru: Indeed. <i>Indecopi</i> has the power to decide on both validity and infringement of IP rights. These decisions have a national scope.</p> <p>Poland: Yes, but the Court of the European Trade Marks and Community Designs can be competent on the subject of the European trade marks and Community designs.</p> <p>Portugal: Yes</p> <p>Singapore: Yes, this is a valid assumption. (See also the answer to 1(b) above with regard to infringements.)</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes</p> <p>USA (including the INTA submission): Yes – they decide only on validity of IP rights within their own territory, and not infringements. Administrative tribunals have no authority to rule on foreign IP rights.</p> <p>BOIP (including the INTA submission): Its decisions related to trademark rights are valid in the Benelux territory, with the exception of EU trademarks.</p> <p>EPO: The revocation of a European patent by the opposition division and the Boards of Appeal has effect in all of the States for which the patent was granted.</p> <p>EUIPO: Yes. The EUIPO can decide on invalidity, the EU trade mark/design courts can only decide on invalidity, if it is raised as a defence/counterclaim in invalidity proceedings before a EU trade mark/design court. The EU trade mark/design courts exclusively decide on infringements, EUIPO has no competence in this respect.</p>	
<p><i>b To the extent that a court of law is involved in the appeal/judicial review process:</i></p>	
<p>i Does the court enter the merits of the decision?</p> <p>Australia: Depends on the nature of the appeal. In some circumstances, the court will review the decision-making process.</p> <p>Canada: In certain circumstances, the court may enter the merits of the decision.</p> <p>China (including the INTA submission): Yes</p> <p>Costa Rica: Yes, it does.</p> <p>Croatia: Yes</p> <p>Finland: Yes</p> <p>France: Yes</p> <p>Germany (including the INTA submission): With regard to <i>appeal proceedings</i>, according to the interpretation of section 79 para. 3 Patent Act and section 70 para. 3 Trade Mark Act by the FPC, the court may enter into the merits of the case. The FPC either (1) dismisses the appeal, (2) sets aside the decision and refers the</p>	<p>Cyprus: No</p> <p>Czech Republic: No. The Municipal Court in Prague can only remit the case to the Czech IPO for rehearing. The IPO respects the legal opinion of the judicial decision.</p> <p>Poland: In general, no.</p>

<p>case back to the DPMA or (3) sets aside the decision and takes a decision on the merits of the case on its own.</p> <p>With regard to <i>revocation proceedings</i>, according to section 81 Patent Act the FPC either dismisses the action or it declares the patent partially or totally invalid. In doing so, it will consider the file of the IPO leading to the grant of the right. According to section 55 Trade Mark Act the civil court may enter into the merits of the decision. It either dismisses the action or it declares the trade mark partially or totally invalid.</p> <p>Hungary: Yes</p> <p>Ireland: In appeal/judicial review proceedings, the Court is not bound by a decision of the Controller, but due regard will be taken of the decision made by the Controller.</p> <p>Israel: In an appeal/judicial review proceedings, the Court is not bound by a decision of the ILPO, but as a general rule it will give special weight to the ILPO's decision due to its expertise and will intervene on factual questions or gather new evidence only in special circumstances.</p> <p>Italy: Yes, a court of law is involved in the appeal/review process of the PTO only in connection with decisions of the board of appeal.</p> <p>Japan: Yes</p> <p>Korea: Yes</p> <p>Lithuania: Yes; the court decides the case based on all evidence and arguments of the parties and is not bound by those provided in quasi-judicial proceedings.</p> <p>Malta: Any decision of the IPO in exercise of a discretion vested in him may be appealed before the Court of Appeal (inferior jurisdiction). The court enters into the merits of the decision.</p> <p>Netherlands: Yes</p> <p>Norway: Yes, but in a legal review of an administrative decision the court will normally only examine whether the decision was correct on the factual basis on which it was handed down.</p> <p>Peru: Indeed. A decision on the merits precludes a later lawsuit on the same cause of action.</p> <p>Portugal: Yes, it may happen.</p> <p>Romania: Yes, the decision of the State Office for Inventions and Trademarks.</p> <p>Singapore: Yes</p> <p>Slovenia: Yes</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes</p> <p>USA (including the INTA submission): Yes. The appellate court may review the merits and find that it agrees with the administrative tribunal and affirm the merits of the administrative decision. However, judicial courts also have the authority to find error with the administrative ruling, remand, or enter their own decision on</p>	
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<p>the merits. They may also find that the appeal does not properly lie and may dismiss the appeal.</p> <p>BOIP (submitted by INTA): Yes</p> <p>EPO: Under Article 111(1) EPC, the Boards of Appeal are empowered either to decide on the merits of the case or to remit the case.</p> <p>EUIPO: The General Court reviews the legality of decisions of the BOA of the EUIPO within the meaning of Article 72 EUTMR or Article 61 CDR (lack of competence, infringement of an essential procedural requirement, of the TFEU, of the EUTMR/CDR or of any rule of law relating to their application or misuse of power). The review of legality involves all factual and legal issues that form the basis of the BOA decision. The GC reviews both the accuracy of the facts and their legal characterisation. The CJ is confined in its review of the Decision of the GC to errors of law and/or distortion of facts.</p>	
<p>ii If the court disagrees with the decision of the authority, does the court substitute its own decision or remit the case to the authority for rehearing?</p> <p>Australia: Depends on the nature of the appeal.</p> <p>Canada: On appeal/judicial review of a decision of the competent authority, the court may, depending on the circumstance, either substitute its own decision or remit the case to the competent authority for rehearing. Further, in some cases, the court may review a decision, not to determine if the court agrees/disagrees with the decision of the competent authority, but rather to determine if the decision of the competent authority is reasonable.</p> <p>China (including the INTA submission): If the court disagrees with the decision of the authority, the court remits the case to the authority for rehearing.</p> <p>Costa Rica: The judicial authority can revoke the administrative decision.</p> <p>Croatia: It can do both. It will substitute the decision if the nature of the case in question permits so and there is sufficient information available that provides a reliable basis to do so.</p> <p>Cyprus: The court remits the case to the authority for rehearing.</p> <p>Czech Republic: No. The Municipal Court in Prague can only remit the case to the Czech IPO for rehearing. The IPO respects the legal opinion of the judicial decision.</p> <p>Finland: It remits the case to the authority.</p> <p>France: <i>La cour d'appel n'examine que la légalité de la décision de l'autorité, ce qui signifie qu'elle ne peut que rejeter le recours formé contre la décision ou annuler celle-ci. Par conséquent, la cour d'appel ne peut pas se substituer à l'autorité aux fins d'enregistrement ou de délivrance du titre de propriété intellectuelle concerné.</i>/The Court of appeal exercises only a legality review on the authority's decision, which means that the Court of appeal may only dismiss the application or cancel the authority's decision. Therefore, the Court of appeal may not substitute itself for the authority for registering or granting the IP right concerned.</p> <p>Germany (similar to the INTA submission): See 2.b.i. above.</p> <p>Hungary: If the court disagrees with the decision of the authority, it alters the decision taken in the relevant case and its order shall replace the decision of the authority. The court shall repeal the decision and order the authority to start a new procedure if the decision was taken with the participation of a person who could be objected to on the grounds of exclusion; or substantive rules of procedure were infringed during the procedure before the authority which cannot be remedied by the court. Where a party requests a court decision on a matter which was not the subject of the procedure before the authority, the court shall remand the request to the authority.</p> <p>Ireland: The Court may do both.</p> <p>Israel: Court may do either.</p> <p>Italy: It depends on the case, in principle it can do either of the two.</p> <p>Japan: Yes, the court remits the case to the authority for rehearing.</p> <p>Once the court's decision rescinding a decision on a trial or appeal, or a ruling has become final and binding, the ad-</p>	

ministrative judges must carry out further proceedings and issue a decision on a trial or appeal, or ruling (see Patent Act §181 (2)).

Korea: The court (Patent Court) remit the case to IPTAB for rehearing.

Lithuania: The court substitutes its own decision.

Malta: The court may substitute the decision of the authority if it disagrees with such decision.

Netherlands: In most cases the court's ruling will be substituted for the decision of the authority. In some patent cases, a review is necessary if the court orders the authority to give a new decision. The latter is not foreseen for appeals against the decisions of BOIP in the field of trademarks.

Norway: The case is remitted to the authority for rehearing.

Peru: When the court has a different judgement on the application of the law or the assessment of the facts, it has the power to reverse the administrative authority's decision.

Poland: No

Portugal: Both situations may happen.

Romania: Yes, both.

Singapore: Typically, the court substitutes its own decision; however, there has been at least one case where, for reasons specific to that case, the court has remitted the case to the authority for rehearing.

Slovenia: The Court can do either, whichever is more appropriate. Usually it remits the case to SIPO with instructions for new consideration and decision.

Switzerland: The court substitutes its own decision.

United Kingdom: The court can do either – whichever it thinks more appropriate. But usually it substitutes its own decision.

USA (including the INTA submission): While the decision of the competent authority is given some deference by the court, the court will substitute its own decision if it disagrees (see below for examples of how this works in practice). Using appeals from the Patent Trial and Appeal Board as an example, the Court of Appeals for the Federal Circuit may do either depending on the particulars of the case. For example, legal questions subject to *de novo* review (*e.g.*, subject matter eligibility, obviousness, written description) often are not remanded. Conversely, the Court of Appeals for the Federal Circuit normally, but not always, remands patent cases if it rejects a claim's construction adopted by the PTAB (*i.e.*, a question of law). Depending on the facts of the case, the Court of Appeals for the Federal Circuit has the authority to enter a claim construction based on the record before it. See, *e.g.*, *Cutsforth, Inc. v. Motivepower, Inc.*, 643 Fed. Appx. 1008 (Fed. Cir. 2016). A similar situation exists for trademarks. It is also of note that different standards of review at the appellate level may be applicable to different factual and/or legal issues.

The Copyright Royalty Board (CRB) appeals process in the Court of Appeals is governed by the Administrative Procedure Act and by the U.S. Copyright Act. If the Court of Appeals modifies or vacates a CRB decision, it may enter its own determination with respect to the amount or distribution of royalty fees, repayment of excess fees, payment of any unpaid fees, and payment of interest pertaining to the fees. The court may also vacate and remand the case back to the CRB. 17 U.S.C. § 803(d)(3); 5 U.S.C. § 706.

BOIP (submitted by INTA): Yes

EPO: See response to question above.

EUIPO: The Court can either annul or alter a decision. If the Court has all the necessary factual and legal information before it, it can substitute the contested BoA decision with its own decision by altering the contested judgement. It can also refer the case back for re-evaluation.

c When one party sues another party in a court of law claiming for damages or an injunction in respect of the infringement (or anticipated infringement in the case of an injunction) of an IP right, and invalidity of the IP right is raised as a defence, what role does the relevant competent authority play?

Costa Rica: The competent authority is not part of the process; however, if the judicial authority declares the nullity of a registration seat, the administrative body must abide by said resolution.

Cyprus: This is a civil action and the DRCOR does not take part/have a role in the litigation.

Germany: The relevant competent authority is not directly involved in these cases.

Italy: No role. The validity issue raised incidentally can be examined by the court of law competent for the infringement proceedings.

<p>Romania: Transmit the documents to register the right.</p> <p>Singapore: In the case described, the Registrar will generally not play any role in the proceedings. In limited instances where validity of a patent is put in issue in court (e.g., as a defence) and the patentee applies to amend the patent specification, the Registrar is entitled to appear and be heard in court.</p> <p>Slovenia: None. However, SIPO will become the competent authority for deciding on revocation and invalidation of trademarks by 2023.</p> <p>EPO: The EPO and its Boards of Appeal have no jurisdiction with regard to infringement proceedings nor to deal with actions for damages or compensation.</p>	
<p>i Does the court decide the validity and infringement on its own?</p>	
<p>Australia: Yes. In some circumstances there is an option for a court to direct re-examination during proceedings. However, a competent authority does not play any role in deciding the validity and infringement of copyrights.</p> <p>Canada: Yes</p> <p>Costa Rica: Yes, the court can decide the validity on its own.</p> <p>Croatia: The court decides on the infringement of all IP titles on its own. As for the validity it can decide on the validity of industrial designs on its own, whereas SIPO is exclusively competent for the question of validity of other industrial property rights.</p> <p>Finland: Yes</p> <p>France: Yes</p> <p>Ireland: Yes, if the proceedings are before the Court, the Court decides the validity and infringement on its own. For example, an application for invalidity of a trade mark can be made either to the Court or the Controller.</p> <p>Israel: For unregistered IP rights, yes, regarding validity and infringement. For registered IP rights, claims for infringement are also heard solely in the court system. To the extent that the defence is based on a claim of invalidity either the court will make that assessment itself, or may refer the case to the Patent Office. However, there are no circumstances where the ILPO and the Court would render parallel decisions on the same issue.</p> <p>Italy: Yes it does, incidentally.</p> <p>Japan: Yes. The court may decide the validity on its own when a party submits a defence on invalidity of the patent right in the infringement proceedings (see Patent Act §104-3). <i>The decision on the validity by the court has effect between parties.</i> Regarding the question of infringement, it is decided only by the court.</p> <p>Lithuania: Yes</p> <p>Malta: The competent authority does not have any <i>locus standi</i> in such proceedings.</p> <p>Netherlands: Yes. However, advice of the Netherlands Patent Office on the validity of a patent granted under the Dutch Patent Act is mandatory when revocation is claimed. The Netherlands Patent Office is required to give advice on infringement of a patent right in court proceedings, if the court so requests.</p>	<p>China (including the INTA submission): No, the court can only decide the question of the infringement of the IP right, not the validity.</p> <p>Czech Republic: The decision of the validity of the IPR is the exclusive competence of the Czech IPO. The court decides the infringement of IPR, there the court decides on its own.</p> <p>Germany (including the INTA submission): The civil court of the infringement proceeding can decide on the infringement. The validity is decided by the DPMA and/or FPC on its own. Regarding trademarks the civil court also decides in case of Section 55 Trade Mark Act on the validity, not as part of the infringement proceeding but in a separate proceeding. However, the civil court of the infringement proceeding may also stay the proceedings until a final decision of the DPMA and/or the FPC or the civil court of the validity proceeding on the validity is taken (bifurcation; see 1.b above). This might occur if, e.g., the defendant of the patent/trademark infringement suit has initiated opposition proceedings before the DPMA or a validity action before the FPC/the civil court. Another example would be that a simultaneous trademark cancellation proceeding has been filed with the DPMA and it is likely that this will lead to the cancellation of the trademark.</p> <p>Hungary: No. As a rule, the competent authority decides on validity of IP rights (at first instance), while the court decides on the infringement. However, a special rule applies to utility model infringement cases. Even though these cases are heard by the court, the defendant may submit an objection to the court challenging the validity of the utility model right in question under certain conditions. If this is the case, the court shall decide on the validity of the utility model right but its decision only has “<i>inter partes</i>” effect. This means that the decision of the court on the validity of the utility model right binds only the parties in the given procedure and it does not result in the invalidity of the utility model right. The decision of the court is also subject to appeal. To have a utility model right cancelled with “<i>erga omnes</i>” effect, the general rule of bifurcation applies: a revocation proceeding shall be initiated before the competent authority.</p> <p>Korea: The court cannot deny the validity of a patent right on its own, but can find its abuse. The court’s finding of an abuse of a patent right binds the parties to the litigation only. The court can also decide infringement on its own.</p> <p>Peru: Validity is only sought by the administrative authorities (<i>Indecopi</i>). Nevertheless, an administrative second instance decision made on invalidity may be subject to appeal before court.</p> <p>Poland: In general, the Patent Office decides on validity of IP rights. On the subject of infringement the case is exam-</p>

<p>Norway: If invalidity is raised in the court proceedings as a counterclaim (invalidity may not be pleaded as a mere defence), the court will decide on its own on both validity and infringement.</p> <p>Portugal: Yes, at present, the court can decide on validity if that ground is invoked by the infringer on a counterclaim in infringement proceedings. In the near future the Portuguese office will also have that competence.</p> <p>Romania: Yes, it is a party in the case for opposability.</p> <p>Singapore: The court is not required under law to refer the issue of validity or infringement to another person or body.</p> <p>Slovenia: Yes</p> <p>Switzerland: Yes</p> <p>United Kingdom: Yes</p> <p>USA (including the INTA submission): Yes on both. However, there is a presumption of validity if the IP right is registered, but this presumption is rebuttable by the court. However, using patent law as an example, if a party files a civil action and the same day or any day thereafter files an administrative challenge, the civil action is automatically stayed. Thus in some instances a court may be required to wait for the determination of the administrative tribunal. 35 U.S.C. § 315. A similar situation exists for trademarks.</p> <p>EUIPO: The EU trade mark/design courts are the only competent bodies to rule on infringement claims. In the context of infringement proceedings the EU trade mark/ design courts may also decide on the validity of an EUTM or RCD, if invalidity has been invoked as a defence or counterclaim in the infringement proceedings. The EU trade mark/design courts may also suspend the infringement proceedings and wait for the outcome of cancellation proceedings, if such cancellation proceedings have been invoked before EUIPO.</p>	<p>ined by the judge in the court, the judge decides whether the infringement occurred.</p> <p>BOIP (submitted by the Netherlands): It does not play such a role.</p> <p>EPO: See response to question IV.b.i.</p>
<p>ii Is the question of validity and/or infringement of the intellectual property right determined exclusively by the competent authority (subject to any appeal/review within its procedural framework)?</p>	
<p>China (including the INTA submission): The question of the validity of the IP right is determined exclusively by the competent authority. If the parties are not satisfied with the decision of the authority, such party may institute legal proceedings in court. As mentioned above, the court can decide the question of the infringement of the IP right.</p> <p>Croatia: SIPO is exclusively competent to decide on the validity of industrial property rights with the exception of industrial design. SIPO is not competent to decide on the question of infringement of intellectual property rights.</p> <p>Czech Republic: The question of validity is in the exclusive competence of the Czech IPO. The question of infringement of IPO is exclusively in a court jurisdiction.</p> <p>Japan: JPO has an exclusive right to decide the invalidity of the patent right (see Q2.a.v.). Once a decision on a trial or appeal to the effect that a patent is to be</p>	<p>Australia: No. Separate to Australia's expert response, INTA submitted that the competent authority does not determine infringement. They may determine questions of validity of intellectual property rights but only in matters before them, not matters before the Courts.</p> <p>Canada: No</p> <p>Costa Rica: No, the question of validity can be determined by the competent authority, however the question of infringement can only be determined by the court within the judicial process; the judicial authority can also make any type of determination that it considers pertinent in relation to the resolution of the process, including receipt of evidence.</p> <p>Finland: No</p> <p>France: No</p> <p>Germany (including the INTA submission): No. The question of infringement is determined exclusively by the deci-</p>

invalidated has become final and binding, the patent right is deemed never to have existed (see Patent Act §125).

The question of infringement of the intellectual property right is determined by the court.

Peru: Validity issues are determined exclusively by the administrative authorities (*Indecopi*). Nevertheless, an administrative second instance decision made on invalidity may be subject to appeal before court.

On the other hand, infringement/violations of IP rights are enforceable through both administrative and court processes.

sion of the civil court. The question of validity is determined by the decision of the DPMA and the courts.

Hungary: As a rule, the competent authority decides on validity of IP rights, and the decision is subject to judicial review. However, infringement cases fall within the competence of the court.

For the only exception to the above, see answer to question 2.c.i.

Ireland: If invalidity proceedings are before the Controller, the Controller will make a determination in relation to invalidity. However, the Controller does not have a role in relation to infringement proceedings and therefore cannot make a determination in the case of those proceedings.

Israel: Infringement actions (both regarding registered and unregistered IP rights) and claims of validity of unregistered IP rights are within the exclusive jurisdiction of the law courts and are not heard by the Patent Office. With regard to actions challenging the validity of a registered right (after it has been registered by the ILPO), there is a degree of parallel jurisdiction as between the law courts and the Patent Office. The legislation provides for rules of procedure in situations of parallel proceedings.

Italy: No, the competent authority is allowed to evaluate validity only at the application stage. The validity principally raised after the application stage and therefore the granting of the IPR is determined exclusively by the court of law competent for the validity of IPR. The validity incidentally raised is determined by the court of law competent for the infringement proceeding.

Korea: No

Lithuania: No

Malta: Such questions are determined either by the court or tribunal established in terms of the IP legislation.

Netherlands: See answer 2.a.vi. In the field of trademarks, the national courts have full competence, so plaintiffs may decide which path to follow.

Norway: No, the court may also decide upon validity, either in a separate invalidity action or upon a counterclaim for invalidity in infringement proceedings.

Poland: In general, the Patent Office decides on validity of IP rights. On the subject of infringement the case is examined by the judge in the court, the judge decides whether the infringement occurred.

Portugal: At present, this matter falls exclusively within the competence of the industrial property court but in the near future the Portuguese office will have the exclusive competence to decide on validity of trademarks and design registrations (except for counterclaims where they have shared competence).

Romania: No

Singapore: Validity is not determined exclusively by the competent authority. Both the court and the competent authority can make determinations of validity in various scenarios.

The position insofar as infringement is concerned has been described broadly in the paragraphs above.

	<p>Slovenia: No</p> <p>Switzerland: No: The Swiss IP Office will not decide on the validity of an IP right once an action is pending before a court of law. As stated under Question 1 above, the Swiss IP Office will never decide whether an IP right has been infringed.</p> <p>United Kingdom: No</p> <p>USA (including the INTA submission): No – the courts can determine both questions of validity and infringement. The competent authority only determines questions of validity and cannot determine questions of infringement.</p> <p>BOIP (submitted by INTA): No</p> <p>EPO: Next to the EPO’s competence to decide on the revocation of a European patent in opposition and appeals proceedings, national courts have jurisdiction to deal with revocation actions. However, in several EPC Contracting States it is only possible to file a revocation action if it is no longer possible to file an opposition/appeal with the EPO.</p> <p>EUIPO: The validity of an EUTM/RCD can either be determined by EUIPO or by an EU trade mark/design court, however, by the latter only in the context of a counterclaim in infringement proceedings. Infringements of EUTMs and RCDs are exclusively determined by EU trademark/design courts, not by EUIPO.</p>
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3 To help the working group understand the distinction between administrative and civil and commercial matters in the context of the decisions of competent authorities:

<p>Australia: We understand that this question focuses on whether a decision given by an IP Office is considered an administrative decision, or a civil or commercial decision of a <i>judicial nature</i>.</p> <p>Ireland: [The IPO understands an administrative decision to include any decision taken by the Irish Patents Office under the various Acts, Rules and Regulations of Irish IP legislation.]</p> <p>USA: At the outset it is noted that the question posed seems to posit that “administrative” matters are mutually exclusive from “civil and commercial” matters. The question seems to conflate the subject matter of an issue (<i>i.e.</i>, civil and commercial) with the characteristics of a tribunal ruling on the issue (<i>i.e.</i>, administrative or not). The United States does not agree with this interpretation and notes, for example, an administrative judgment may pertain to a civil and commercial law matter. Further, the structure of the draft Convention does not support the question’s distinction between the two matters. For example, Article 1 refers to civil or commercial matters, then Article 2 takes out of scope certain things that otherwise are civil or commercial matters – including things that go to the nature of the particular tribunal (see, <i>e.g.</i>, Art. 2(3), excluding from scope arbitration and related proceedings).</p>	
<p><i>a If, after a party’s application for an IP right is refused by the competent authority, the party appeals according to the procedure of the competent authority, the outcome is an administrative decision and not a civil and commercial matter. Is this assumption correct in your jurisdiction?</i></p>	
<p>Australia: Depends on the stage of the process. Appeals from a hearing or opposition decision (which are administrative decisions) can proceed directly to a court, or they might be heard by the Administrative Appeals Tribunal. Please note that hearing or opposition decisions are administrative decisions.</p> <p>Canada: Yes, these decisions are likely to be considered administrative.</p> <p>China (including the INTA submission): Yes</p> <p>Costa Rica: Yes, it is an administrative decision.</p> <p>Croatia: Yes</p> <p>Cyprus: Yes as far as the registration of Trademarks and Patents is concerned.</p>	<p>France: <i>Non. La décision rendue par la cour d’appel relève de la matière civile et commerciale. Toutefois, elle ne concerne que la question de l’enregistrement, de la délivrance ou du renouvellement du titre de propriété intellectuelle concerné.</i>/No. The decision rendered by the Court of appeal is a civil and commercial matter decision. However, this decision only concerns the issue of registration/granting/continuance of the IP right concerned.</p> <p>Ireland: The IPO does not have an internal appeals structure, such as the EUIPO Board of Appeals or the EPO Board of Appeal. Therefore, any appeals from a decision of the Controller must be made to the Court.</p> <p>Italy: No, it is a decision on administrative acts rendered by a specialised court (“<i>commissione dei ricorsi</i>” = board of appeal).</p>

<p>Czech Republic: Yes</p> <p>Finland: Yes</p> <p>Germany (including the INTA submission): The decision of the DPMA on the appeal according to the procedure of the DPMA is an administrative decision.</p> <p>Hungary: Yes, even though the court's decision constitutes the outcome of the appeal, it shall be considered as an administrative decision (and it may alter and replace the administrative decision of the competent authority).</p> <p>Israel: Partially. Where an application for registration is refused, the Applicant can have the decision reviewed in an administrative-quasijudicial proceeding before an adjudicatory functionary in the ILPO. An appeal on this administrative-quasijudicial decision will be filed to the law courts.</p> <p>Japan: Yes</p> <p>Korea: Yes</p> <p>Lithuania: Yes</p> <p>Netherlands: With regard to patents and trademark rights: yes.</p> <p>Norway: Yes</p> <p>Peru: Indeed. The outcome of an appeal on a refusal made by the administrative authority is an administrative decision, made by the Board of Appeal.</p> <p>Poland: Yes</p> <p>Switzerland: Yes</p> <p>United Kingdom: if we assume here that all internal review or "appeal" procedures within the competent authority have been exhausted, and a final decision of the competent authority has been reached, refusing the application for the IP right. In the UK that final decision refusing the application is an administrative one. If the party appeals a final decision of the competent authority, the appeal goes to the court and the judgment on appeal is a fully binding judicial decision.</p> <p>USA: Yes See Note above, we do not agree that administrative decisions cannot rule on civil and commercial matters. However, should a patent or trademark examiner deny or refuse an application, <i>ex parte</i> appeals to the Patent Trial and Appeal Board or the Trademark Trial and Appeal Board of the USPTO are governed by agency rules which in turn are governed by the Administrative Procedure Act (5 U.S.C. §§ 551 <i>et seq.</i>). To the extent that this question is asking about appeals from a final agency decision (<i>i.e.</i>, after internal administrative appeals have been exhausted), in the patent law context, such an appeal may lie to one of two judicial courts – the Court of Appeals for the Federal Circuit, or the Eastern District of Virginia. In either of these judicial courts the proceedings would be governed by rules of civil procedure, but there exist substantial differences between proceedings in the two courts. For example, before the Federal Circuit the merits of the decision to refuse the application are reviewed solely based on the record developed at the USPTO. Conversely, in the Eastern</p>	<p>Malta: No. There is no appeal procedure before the competent authority but such decisions have to be appealed in front of the courts.</p> <p>Portugal: The decision taken by the office is an administrative decision but the appeal procedure within the court is considered a civil procedure.</p> <p>Romania: No, it is a question of civil matter. It is an administrative decision that can be appealed before the civil courts. There are nevertheless situations in which the first appeal is administrative and further the second appeal is lodged before the civil court.</p> <p>Singapore: No, it is considered a civil matter.</p> <p>Slovenia: Against the administrative decision of SIPO there is no appeal, but it is possible to initiate an administrative dispute with an action to the Administrative Court in Ljubljana. The outcome is a court decision (judgment) in the administrative dispute on the legality of SIPO's decision.</p> <p>BOIP (submitted by INTA): There is no internal appeal procedure within the competent authority. Appeal goes directly to the Benelux Court of Justice which renders judicial decisions.</p>
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<p>District of Virginia, the patent applicant may introduce new evidence (see 35 U.S.C. § 145). Similarly, an appeal from a final agency decision in a trademark matter may be taken to either the Court of Appeals for the Federal Circuit (for a decision based upon the record evidence) or to a federal district court (<i>de novo</i> review). 15 U.S.C. § 1071. In either of these judicial courts the proceedings would be governed by rules of civil procedure.</p> <p>EPO: A decision of the EPO can in general be appealed. In case a patent application is rejected the decision by the Boards of Appeal is rendered <i>ex parte</i>. A decision to reject an application for a patent takes immediate effect and would not have to be recognised and enforced by any EPC Contracting State.</p> <p>EUIPO: Yes</p>	
<p><i>b If, after an application for an IP right is published, a third party files observations in accordance with the law which may (or may not) be considered by the competent authority in deciding on the application, the decision of the competent authority on the grant of IP right is an administrative and not a civil and commercial matter. Is this assumption correct in your jurisdiction?</i></p>	
<p>Australia: Yes. Separate to Australia's expert response, INTA submitted that if an application for an IP right is published <i>as accepted</i>, a third party may oppose the registration of the IP right and the opposition will be determined by the competent authority. The decision of the competent authority is an administrative action.</p> <p>Canada: Yes, these decisions are likely to be considered administrative.</p> <p>China (including the INTA submission): Yes</p> <p>Costa Rica: Yes, it is an administrative decision.</p> <p>Croatia: Yes</p> <p>Cyprus: Yes as far as the registration of Trademarks and Patents is concerned.</p> <p>Czech Republic: Yes</p> <p>Finland: Yes</p> <p>France: Yes</p> <p>Germany (including the INTA submission): The decisions of the DPMA on the grant of IP rights are administrative decisions.</p> <p>Hungary: Yes, the competent authority's decision on the application is considered administrative.</p> <p>Ireland: Yes</p> <p>Israel: The decision of the ILPO regarding validity/eligibility is administrative. So is the decision if and how to accommodate third-party observations. As noted above there are administrative-quasijudicial proceedings before an adjudicatory functionary of ILPO.</p> <p>Italy: Yes, it is an administrative act.</p> <p>Japan: Yes</p> <p>Korea: Yes</p> <p>Lithuania: Yes</p>	<p>Singapore: No, it is considered a civil matter.</p> <p>BOIP (submitted by INTA): N/A</p>

<p>Malta: Domestic law does not provide the possibility to file observations. The decision of the IPO to register IP rights is an administrative matter.</p> <p>Netherlands: With regard to patents: yes. In the field of trademarks, no third party observations are foreseen.</p> <p>Norway: Yes</p> <p>Peru: Indeed. The competent authorities which deal with observations to IP applications issue administrative decisions.</p> <p>Poland: Yes</p> <p>Portugal: When a third party files observations during the grant procedure within the office, the final decision following third party observations is an administrative matter. The final decision can later be challenged before the industrial property court.</p> <p>Romania: Yes, it is an administrative-jurisdictional proceeding. It is an administrative decision that can be appealed before the civil courts.</p> <p>Slovenia: Yes. However, third party observation is allowed only in the registration procedure of a trademark.</p> <p>Switzerland: Yes. Under Swiss law, third parties do not have the possibility to file observations (see lit. c below).</p> <p>United Kingdom: Yes</p> <p>USA (including the INTA submission): Yes. See NOTE above. Grant of rights by the USPTO is governed by statutes as well as by internal rules that are in turn governed by the Administrative Procedure Act (5 U.S.C. §§ 551 <i>et seq.</i>). Such third party filings are permissible in accord with 35 U.S.C. § 122 (e) in the patents context and 15 U.S.C. § 1063 in the trademark context for opposition to the registration of a mark. Note: this third party procedure is applicable to patent and trademark applications, and is not applicable to copyright applications.</p> <p>EPO: Following publication of the European patent application under Article 93 EPC, any person may present observations concerning the patentability of the invention (Art. 115 EPC). The observations are communicated to the applicant or proprietor without delay and he may comment on them. Such observations must be filed in writing in English, French or German and must include a statement of the grounds on which they are based. The person filing them may not be a party to the proceedings before the EPO. The EPO does not specifically inform the third party of any further action it takes in response to said observations. However, the outcome of the evaluation by the competent division is indicated in the respective office action from the EPO and will thus be visible to the public. If the observations call into question the patentability of the invention in whole or in part, they must be taken into account in any proceedings pending before a department of the EPO until such proceedings have been terminated. If the observations relate to alleged prior art available other than from a document, this should be taken into account only if the alleged facts are either not disputed by the applicant or proprietor or are established beyond reasonable doubt. The decision of the EPO is of an administrative nature.</p> <p>EUIPO: Yes</p>	
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c Are there avenues for a third party to challenge the application before the grant? If so, are these proceedings regarded as administrative or civil and commercial in your jurisdiction?

Australia: Yes. Administrative.

Separate to Australia's expert response, INTA submitted that there are avenues for a third party to challenge the application before grant (registration) and after acceptance, including, in particular, by opposition proceedings. These are administrative proceedings.

Canada: Yes. Such challenges are likely to be considered administrative.

China (including the INTA submission): Yes. According to Trademark Law of China, when the examination of the trademark application is completed, Trademark Office shall publish its preliminary examination. If a third party wants to challenge the application, such party may file an opposition. The Trademark Office shall hear the facts and grounds submitted by the opposing party as well as the opposed, and make a decision on whether or not to approve the application for registration. Such proceeding is regarded as administrative in China.

Costa Rica: Yes, every time there is a registration of an IP right, the party requesting the registration must publish a public notice in the official newspaper; any interested third party may submit an opposition to the registration before the right is granted. These proceedings are regarded as administrative in our jurisdiction.

Croatia: Yes. These proceedings are regarded as administrative.

Cyprus: Yes. These proceedings are regarded as administrative only with relation to trademarks.

Czech Republic: Yes.

Finland: Yes. *E.g.*, according to Section 17 of the Patent Act, "If a person other than the applicant claims before the Patent Authority that he has proper title to the invention and if the circumstances are held to be uncertain, the Patent Authority may invite such person to institute proceedings before a court of law within a period of time to be laid down, failing which the claim may be disregarded in the further processing of the patent application." – If the proceedings in the court of law would be instituted in this case, they would be regarded as civil and commercial. And according to Section 18 of the Patent Act, "If a person proves to the Patent Authority that he and not the applicant has proper title to the invention, the Patent Authority shall, if such person so requests, transfer the application to him. The transferee shall pay a new application fee. If a request is made for transfer of a patent application, the application shall not be dismissed, rejected or granted until a final decision has been taken on the request." – These proceedings would be regarded as administrative.

France: *Oui. Toute partie intéressée peut soumettre des commentaires, ou s'opposer à l'enregistrement, la délivrance ou au renouvellement du titre de propriété intellectuelle, devant l'autorité compétente. Ces procédures sont régies par le droit procédural propre à l'autorité compétente et sont considérées comme administratives.*
Yes. Any interested party may submit comments, or oppose the registration/grant/continuance of the IP right, before the competent authority. These proceedings are governed by procedural rules specific to the competent authority and are regarded as administrative.

Germany (including the INTA submission): There is a third party observation system regarding patent and utility model applications (*cf.* section 43 para. 3 Patent Act and section 7 para. 3 Utility Model Act). There is no similar regulation in the Trademark Act right now. Nevertheless, third parties might also file observations which are taken into account when taking the decision. These proceedings are not regarded as civil or commercial matters. Concerning designs, there is no proceeding for a third party to challenge the application before registration.

Korea: A third party may not challenge the application before the grant, but may furnish information concerning the patent application.

Lithuania: No, but it will be possible with respect to trademarks from the beginning of 2019, as the opposition procedure will take place before registration of a trademark (according to EU Directive 2015/2436). This procedure will be regarded as an administrative procedure.

Malta: Such proceedings are not possible.

Netherlands: There is no opposition procedure available before the grant of a patent.

Norway: A third party may only file an opposition post-grant. However, a third party may file observations before grant which will be taken into account by the Industrial Property Office, but the third party will then not become party to the proceedings. The proceedings are regarded as administrative.

Singapore: It depends on the type of IP, but in any event they would be considered civil/commercial proceedings.

Switzerland: No: Third parties cannot challenge an application of an IP right before the grant.

EPO: No, there are not. Third parties may challenge the application of a European patent before the grant only by filing observations. On this latter regard please refer above to the answer to question 3.b).

Hungary: Yes. During patent, trademark and geographical indications (GIs) granting procedures, any person may file an observation with the competent authority to the effect that the application or the object of the application does not comply with the requirements prescribed by the relevant IP law. Such observation shall be taken into consideration when the requirement objected to in the observation is examined. The person filing the observation shall not be a party to the granting procedure but shall be notified of the outcome of his/her observation. In case of trademarks and GIs, a notice of opposition to registration of the trademark (and GIs) may be filed on the grounds determined by the law. The opponent shall be a party to the registration procedure within the scope of the opposition. The authority shall take into consideration the opposition when deciding on the registration, and its decision is subject to judicial review. All the proceedings above are regarded as administrative.

Ireland: Yes, the law provides for opposition proceedings, for example trade mark opposition proceedings are administrative proceedings before the Controller.

Israel: Pre-grant opposition procedures are available with respect to patents, appellations of origin and trademarks. The decision by the ILPO is a quasijudicial decision, and an appeal on the decision will be heard by a law court (in addition, third party filings are permissible in the patent and designs context).

Italy: Yes, only for trademarks, opposition is available to third parties and the proceeding is regarded as administrative. Then, if an appeal shall be raised against the decision of the competent authority, it is a specialized court (board of appeal) competent to render a decision upon a civil special proceeding. Then, if an appeal shall be raised against the decision of the board of appeal, it is a court of law (Supreme Court) competent to render a decision upon a civil plain proceeding.

Japan: No. *Cf.* after a patent application or utility model registration has been filed, anyone can provide information about the reason for rejection or for the invalidation, regardless of whether it is before or after the rights are granted or registered (Ordinance for Enforcement of the Patent Act §13-2).

Peru: Indeed. Third parties may challenge IP applications through a pre-grant opposition proceeding, which is sought at an administrative level by *Indecopi*.

Poland: Yes

Portugal: Yes, concerning Portuguese industrial property law an interested third party can always challenge the application before grant and these proceedings before the Portuguese office are considered administrative procedures.

Romania: Yes, there are administrative proceedings. Initially, the appeal is an administrative one, but the administrative decision can be appealed before the civil court.

Slovenia: Third party observation is allowed only in the registration procedure of a trademark. Also, an opposition against the registration of the trademark may be filed by the holder of an earlier right (*e.g.*, earlier trademark). These proceedings are administrative proceedings.

United Kingdom: For trade marks: Yes, there is an opposition process, which is administrative, *i.e.*, quasi-judicial.

<p>For patents and designs: No, not on validity grounds. Only ownership or inventorship may be challenged. These later challenges are viewed as civil litigation, not an administrative matter.</p> <p>USA (including the INTA submission): Yes – administrative. See Note above. In the patent context, a third party may “challenge” the application pre-grant by submitting “any patent, published patent application, or other printed publication of potential relevance to the examination of the application” to the USPTO. 35 U.S.C. § 122(e). In the trademark context, a third party may file an opposition to an application under 15 U.S.C. § 1063. Similarly, an opposition can be filed against the grant of a plant variety protection certificate. These are all administrative proceedings. Note: this third party procedure is applicable to patent and trademark applications, and is not applicable to copyright applications.</p> <p>BOIP (including the INTA submission): There is an opposition procedure against new trademark applications. This is an administrative matter.</p> <p>EUIPO: Available avenues: For EUTMs, submission of third party observations (Art. 45 EUTMR), initiation of opposition proceedings on account of relative grounds for refusal (Art. 8 EUTMR). These proceedings are of an administrative nature. For RCDS, in principle, there are no such pre-grant avenues.</p>	
<p><i>d If a third party wants to challenge the decision of the competent authority after it has granted an IP right, in what forum (e.g., the competent authority, an appeal body, or the court) would this challenge take place? Would the outcome of this challenge be regarded as a civil and commercial or administrative matter in your jurisdiction?</i></p>	
<p>Australia: This depends on the nature of the challenge and the IP right involved, and the forum could include the competent authority, the court or a tribunal. Infringement matters for industrial property rights are determined by the courts. Separate to Australia’s expert response, INTA submitted that if a third party wants to challenge the decision of the competent authority after it has granted (registered) an IP right, they may do so before the competent authority, in limited circumstances, within 12 months of registration. Otherwise, they must take civil proceedings in the Courts. The outcome of the challenge before the competent authority would be regarded as an administrative decision and the outcome of the challenge before the Court would be a binding legal decision in civil proceedings.</p> <p>Canada: Third parties have a limited ability to directly challenge the decision of the competent authority to register a trademark or industrial design or grant a patent. However, judicial proceedings may be commenced that can result in the invalidation of registered industrial designs or registered trademarks or granted patents. It is unclear how such a decision would be regarded given that it would not be an appeal of a decision of the competent authority but it would be seeking to invalidate the rights registered/granted as a result of the competent authority’s administrative processes.</p> <p>China (including the INTA submission): In China, if a third party wants to challenge the decision of the competent authority after it has granted an IP right, such party can request the competent authority to declare the IP right invalid. The decision of this procedure is regarded as an administrative matter.</p> <p>Costa Rica: First, the decision would be challenged before the competent authority, then it would be appealed before the Administrative Registry Court. The decision made is regarded as an administrative matter. Furthermore, once there is a final administrative resolution, the interested party may challenge the decision before a contentious-administrative judicial court¹.</p> <p>Croatia: A third party would challenge the decision after an IP right has been granted by initiating a cancellation procedure before the SIPO. This is regarded to represent an administrative matter.</p> <p>Cyprus: This challenge would take place in court, and the outcome of this challenge would be regarded as civil matter.</p> <p>Czech Republic: The outcome of the challenge will be regarded as an administrative matter. See reply ad 2.a.iv. The outcome of the challenge is regarded as an administrative matter.</p> <p>France: <i>Toute partie intéressée peut interjeter appel contre la décision de l’autorité compétente relative à l’enregistrement, la délivrance ou le renouvellement du titre de propriété intellectuelle concerné. La décision de la cour d’appel relève de la matière civile et commerciale.</i> Any interested party may appeal against the decision of the competent authority as regard the registration/granting/continuance of the IP right concerned. The decision of the court of appeal is a civil and commercial matter.</p>	

¹ This is a special matter in the courts, that deal with process regarding decisions of the public administration.

Toute partie intéressée peut également contester la validité du droit de propriété intellectuelle concerné devant les tribunaux judiciaires. Ces décisions relèvent de la matière civile et commerciale. Any interested party may also invoke the invalidity of the IP right concerned before first instance civil courts. Their decisions are civil and commercial matter decisions.

Germany (including the INTA submission): The challenge may take place before an appeal body of the DPMA and/or the courts depending on the different legal remedies. For the outcome see answer to question 3.a. above.

Hungary: As a rule, a third party not party to the procedure cannot challenge the authority's decision on the grant of an IP right. The only exception to this rule is that the public prosecutor has the right of appeal against a given decision under certain circumstances specified by the Hungarian Trade Mark Act.

A third party's only possibility is to challenge the validity of the IP right, as he/she may institute proceedings for revocation/cancellation of an IP right before the competent authority. The authority shall decide on the revocation/cancellation or limitation of the right or on the refusal of the request. The decision on the validity of an IP right is regarded as an administrative decision and is subject to judicial review.

It is worth mentioning that a special rule applies to utility model infringement cases. Even though these cases are heard by the court, the defendant may submit an objection to the court challenging the validity of the utility model right in question under certain conditions. If this is the case, the court shall decide on the validity of the utility model right but its decision only has "inter partes" effect. This means that the decision of the court on the validity of the utility model right binds only the parties in the given procedure and it does not result in the invalidity of the utility model right. The decision of the court is considered as a civil matter and is subject to appeal.

To have a utility model right cancelled with "erga omnes" effect, the general rule applies: cancellation proceedings shall be instituted before and decided by the competent authority.

Ireland: Appeals against decisions of the Controller are to the court and are therefore civil proceedings before the court.

Israel: Once an IP right is on the registry it can be cancelled from the registry either through an action for cancellation before the ILPO, or, in certain cases the civil law courts have parallel jurisdiction to cancel a registration.

Italy: Third parties can challenge a granted IP right only before court of law under a civil proceeding.

Japan: Patents and Trademarks: The challenge of the decision on granting the right would take place in the competent authority and the outcome is regarded as administrative matter (see Patent Act §113, Trademark Act §43-2).

Designs and Utility models: Any person may file a request for an invalidation trial of design/utility model registration (Design Act §48, Utility Model Act §37). The trial would take place in the competent authority and the outcome is regarded as administrative matter (*cf.* a third party may not file a request for invalidation trial of patent and trademark registration).

Korea: IPTAB of the KIPO. Its decisions are subject to judicial review. Administrative matter.

Lithuania: With respect to trademarks and designs, a third party may file an opposition to the competent authority three months after the publication of the registration, requesting to invalidate the registration (administrative procedure). After that period a third party may file a claim directly to the court (civil procedure).

However, from the beginning of 2019 in the case of registered trademarks the administrative procedure of invalidation/cancellation of a trademark registration will be compulsory (according to EU Directive No 2015/2436).

Concerning patents for inventions, no administrative procedure is available for third parties in the competent authority; they only have an option to bring a case in the civil court.

Malta: Such decisions may be appealed before the court and are civil in nature.

Netherlands: Third parties may challenge the validity of a patent before the court. It is regarded as a civil matter. With regard to patents granted under the Dutch Patent Act, there is no opposition procedure available to third parties at the Netherlands Patent Office. However, when starting the procedure for revocation of a patent granted under the Dutch Patent Act, advice of the Netherlands Patent Office on the grounds for revocation has to be provided to the court. The advice is given by the Office on request of the claimant.

Third parties may claim the cancellation of a trademark registration before the office, this is an administrative matter, or before the court, in a civil procedure.

Norway: For patents and trademarks, a third party may file an opposition with the Industrial Property Office within a certain time limit (9 months for patents, 3 months for trademarks). For patents, trademarks and industrial designs, administrative invalidity actions can be initiated before the Office throughout the term of the IP right. Further, it is possible to initiate an invalidity action before the court. The outcome of an opposition or administrative invalidity case would be regarded as an administrative matter, whereas a court judgment on invalidity would be regarded as a civil and commercial matter.

Peru: If a third party wants to challenge the granting of an IP right, it may file an invalidity action before the *Indecopi* competent authorities. The outcome of this action is an administrative decision which is subject to an administrative appeal, which enables a Board of Appeal to issue a second instance decision. Any second instance decision is subject to judicial review, through an administrative-contentious process.

Poland: Yes, the Patent Office can issue the administrative decision about the invalidity of the right in the litigation proceedings before the Patent Office.

Portugal: After the final decision, a third party interested in challenging the decision can do it before the industrial property office and this is an administrative procedure. The party can also challenge the decision before court or before an arbitration body competent for industrial property matters and both these procedures are considered civil procedures.

Romania: Before the court, it is a question of civil proceedings. The appeal is treated by a civil court (Tribunal). The result of this appeal is a question of a civil matter.

Singapore: Depending on the type of IP and the circumstances leading up to the grant, the challenge might be at the level of the competent authority itself, or it might be to the court. In any event, such a challenge would be considered as a civil/commercial matter.

Slovenia: Once SIPO grants or registers the IP right, an action for nullity (invalidation) of the IP right may be filed to the District Court in Ljubljana. This is a civil proceeding before the court. Once the court decides, SIPO enters the appropriate record in the register of IP rights.

Switzerland: Third parties have to challenge the decision of the Swiss IP Office to grant an IP right in a court of law, resulting in a civil matter. However, in two cases, third parties can challenge the grant of an IP right before the Swiss IP Office:

- A third party can file opposition against a patent on the grounds that the subject-matter of the patent is not patentable. This is considered an administrative matter.
- The owner of an earlier trade mark can file opposition against a recently registered trade mark on the grounds that it is similar to his own trade mark and intended for the same or similar goods or services such that a likelihood of confusion results. This is considered an administrative matter.

United Kingdom: The third party can choose to challenge before the competent authority or before the courts. Either way, it is regarded as civil litigation and not an administrative matter.

USA (including the INTA submission): It could take place in front of the competent authority or the courts. The outcome of the challenge in front of the competent authority would be considered administrative, and the outcome in front of the courts would be considered a civil matter.

See Note above. A third party wishing to challenge a granted patent may do so by challenging the patent in an administrative tribunal (e.g., the USPTO PTAB), or should Article III standing exist (see answer to Q2.a.iv) that party may file for a declaratory judgment that the grant was in error in a judicial court. Additionally, a challenge of invalidity could arise as a counterclaim in an infringement proceeding. The outcome from the administrative tribunal would be the result of an administrative proceeding. The outcome from a judicial court would be governed by rules of civil procedure. The same is true for challenges to registered trademarks. Such actions can be instigated at the TTAB or in a federal court as a declaratory judgment, as part of a civil complaint of infringement or otherwise, or as a counterclaim to infringement.

Similar challenges exist in the plant variety protection context as well. For example, a third party may oppose the grant of a plant breeder's right certificate for up to five years after the certificate issues (as well as during the examination phase). This would be an administrative challenge handled by the Plant Variety Protection Office.

BOIP (submitted by INTA): Challenge is for the Benelux Court of Justice and will be regarded as a civil and commercial (judicial) matter.

EPO: See responses to the above questions as regards opposition and appeal proceedings before the opposition division and Boards of Appeal, respectively.

EUIPO: The validity of registered EUTMs and RCDs is examined:

- either by EUIPO [concerning trade marks in the framework of cancellation proceedings (revocation for non-use (Art. 57 EUTMR)), absolute (Art. 59 EUTMR) or relative (Art. 60 EUTMR) grounds for refusal, concerning RCDs in the framework of Invalidity proceedings (Art. 24 CDR)]. All these proceedings under the EUTMR or CDR are of an administrative nature;
- or by an EU trade mark/design court in the context of a counterclaim in infringement proceedings.

While the outcome of this challenge would be regarded as an administrative matter, if decided by EUIPO, it would be of a civil/commercial nature in case of a decision being taken by an EU trade mark/design court.

4 Any other information about the competent authorities in your jurisdiction that may be relevant and useful for the discussion of the working group?

Australia: IP Australia is the competent authority that administers and registers patents, trade marks, designs and plant breeder's rights in Australia.

There is no registration system for copyright in Australia. Copyright protection is free and granted automatically from the time an original work or other subject matter has been created. The Department of Communications and the Arts manages Australian copyright legislation and policy but has no authority to grant or register a copyright. As per s. 8 of the Copyright Act 1968 (the Act), copyright does not subsist other than by virtue of the Act.

A court of competent jurisdiction decides the validity of a particular copyright or whether a copyright has been infringed. In a civil action for an infringement of copyright, the court may grant an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profit. The court can also impose criminal penalties including a fine for certain offences relating to copyright.

The Copyright Tribunal of Australia is an independent body established under the Act and administered by the Federal Court of Australia. Generally, the Copyright Tribunal has jurisdiction to hear disputes and make an order in respect of statutory and voluntary copyright licensing schemes.

Italy: The decisions of the Board of Appeal adjudicating the competent authorities administrative acts are “definitive and not subject to appeals”. They can be subject to judicial review just before the Supreme Court for civil and commercial matters (*Corte di Cassazione*) and just for

- a) *errores in iudicando*: violation or incorrect application of the law;
- b) *errores in procedendo*: conflict of competence between the competent authorities and the courts competent for civil and commercial matters; nullity of the proceedings or of the decision, due to lack of substance or formal requirements, such as lack of reasons;
- c) revocation of the judgement for fraud, false exhibits, etc.

The above information has been given in connection with the Italian competent authority only, but it shall be noted that in our jurisdiction there are three other competent authorities issuing IP rights valid in multiple states, *i.e.*, EUIPO (EU trademarks/designs), EPO (European Patents), WIPO (international trademarks/designs), which follow rather different administrative rules.

Lithuania: The answers provided concern administrative procedures in the State Patent Bureau of the Republic of Lithuania, which is an authority registering trademarks, designs and granting patents for inventions.

Any administrative decisions of this competent authority are subject to appeal in the court according to civil procedure.

In case the decision of the competent authority is appealed by the applicant in the court, the competent authority is a party (defendant) in the civil court proceedings. In case the decision of the competent authority is appealed by a third party, the competent authority is a third party in the civil court proceedings (defendant being the owner of the registered IP right).

Peru: The Inventions and New Technologies Directorate as well as the Directorate of Distinctive Signs of *Indecopi* are national competent authorities to resolve actions related to registrations filed in *Indecopi* (related to patents, utility models, industrial designs, traditional knowledge and new varieties as well as trademarks, commercial names, slogans and appellations of origin) also through a specific Commission integrated by external renowned professionals; both resolve opposition, infringement and nullity IP rights.

The Specialized Chamber of Intellectual Property of *Indecopi* is the second administrative instance. Our legal basis, mainly, is the Andean Community Decision 486: Common Intellectual Property Regime.

Romania: The above-mentioned answers are formulated taking into account the law in force in matters of trademarks, the Law No 84/1998 concerning trademarks and geographical indications, republished. The State Office for Inventions and Trademarks initiated a draft law on the modification of the Law No 84/1998 concerning trademarks and geographical indications for the transposition of the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (the codified version), published in the *OJ L* 336, 23.12.2015.

According to the Directive (EU) 2015/2436, the national draft law will confer to the State Office for Inventions and Trademarks the competence to annul the trademark, in the framework of an administrative proceedings (Art. 45 from the Directive).

According to Article 54 paragraph 1 of Directive (EU) No 2015/2436, the Member States shall bring into force the laws, regulations and administrative provisions to comply with Article 45 (that include the administrative proceedings of annulment of the trademark before the national offices) by 14 January 2023.

United Kingdom: It is important to keep in mind that IP rights are territorial in scope. Further, particularly with regards to trade marks, validity depends on earlier rights within the relevant territory and the perception of the marks by average consumers. This means that language is important for word marks. The net result is that an IP right may be valid in one territory and invalid in another. This is the norm for trade marks. Therefore, recognition of decisions on validity and infringement by the courts of one territory have limited or no bearing if those same questions arise again but in a different territory.

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