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RAPPORT DE LA COMMISSION SPECIALE SUR LES AFFAIRES GENERALES ET LA POLITIQUE DE LA CONFERENCE DES 31 MARS ET 1 AVRIL 2005

établi par le Bureau Permanent

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REPORT OF THE SPECIAL COMMISSION ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE OF 31 MARCH / 1 APRIL 2005

drawn up by the Permanent Bureau

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RAPPORT DE LA COMMISSION SPECIALE
SUR LES AFFAIRES GENERALES ET LA POLITIQUE DE LA CONFERENCE
DES 31 MARS ET 1 AVRIL 2005

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REPORT OF THE SPECIAL COMMISSION
ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE
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AGENDA
SPECIAL COMMISSION MEETING
GENERAL AFFAIRS AND POLICY OF THE CONFERENCE

(31 March-1 April 2005)

I. Development of the Organisation, the Conventions and their implementation

1. Admission of the European Community to the Hague Conference on Private International Law

   Report of the Secretary General and Draft Recommendation submitted by the Permanent Bureau (Prel. Doc. Nos 20, 21A and B).

II. Topics listed in the Final Act of the Nineteenth Session

A. Conventions currently under Preparation

2. International Recovery of Child Support and Other Forms of Family Maintenance (see Final Act, under C.1)

   Progress report on the development of a new international instrument on the International Recovery of Child Support and other forms of Family Maintenance (Prel. Doc. No 25).

3. Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters – state of the work (see Final Act, under C.2). Preparation of the XXth Session (14-30 June 2005)

   The Hague Project on Judgments: Report by the Secretariat on the progress made since the meeting of the Special Commission of April 2004 on General Affairs and Policy of the Conference (Prel. Doc. No 24).

B. Convention adopted by the Nineteenth Session

4. Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (see Final Act, under A)

   The Secretariat will offer oral remarks.

C. Monitoring, assistance and support of Conventions

5. *Apostille*, Service Abroad and the Taking of Evidence (see Final Act, under C.4 a) and b))

   *The Secretariat will offer oral remarks (*see also *Prel. Doc. No 30).*

6. Protection of Children (see Final Act, under C.4 c))

   Report on the activities in relation to the Conventions of 1980, 1993 and 1996 (Prel. Doc. Nos 26 and 29), and in particular:

   (a) progress in relation to the Guide to Good Practice under the 1980 Convention;

(b) *preparations for the next meeting of the Special Commission to review the practical operation of the 1993 Convention;*
(c) *programme concerning implementation of the 1993 Convention;*
(d) *preparations for the next meeting of the Special Commission to review the practical operation of the 1980 Convention combined with a possible meeting on the implementation of the 1996 Convention;*
(e) *participation by States requiring financial assistance;*
(f) *judicial conferences, the Judges' Newsletter;*
(g) *direct judicial communications;*
(h) *INCADAT and INCASTAT.*

III. Future work (see Final Act, under C.3)

7. Priority topic:

(a) *Questions of private international law raised by the information society, including electronic commerce.*

International Conference on the Legal Aspects of an E-Commerce Transaction – 26 and 27 October 2004 (Prel. Doc. No 23)

8. Non-priority topics:

(b) *conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage;*
(c) *jurisdiction, and recognition and enforcement of decisions in matters of succession upon death;*
(d) *jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples;*
(e) *law applicable to unfair competition;*
(f) *assessment and analysis of trans-national legal issues relating to indirectly held securities and security interests, taking into account in particular the work undertaken by other international organisations.*

The Secretariat will offer oral remarks.

IV. Organisation of the work of the Conference (see Final Act, under B)

9. The Strategic Plan (see Final Act, under B.2)

Report on progress by the Secretariat (Prel. Doc. No 22).

10. Proposed Budget for Financial Year LI *(1 July 2005 – 30 June 2006)*

Proposed Budget for Financial Year LI (1 July 2005 – 30 June 2006) and Explanatory Notes (Prel. Doc. No 27).

11. Supplementary Budget for Financial Year LI *(1 July 2005 – 30 June 2006)*

Proposed Supplementary Budget for Financial Year LI (1 July 2005 – 30 June 2006) and Explanatory Notes (Prel. Doc. No 28).

V. Co-operation with other International Organisations

12. Co-operation with UNCITRAL and UNIDROIT

The Secretariat will offer oral remarks.

13. Co-operation with other international organisations

The Secretariat will offer oral remarks.

VI. New topics

14. Under this heading there will be a discussion of any new topics, which may be suggested by the Governments, the international organisations or the Permanent Bureau (see also topics informally suggested by interested stakeholders, *Strategic Plan*, No [305], (p. 23)).

REPORTS OF MEETING / RAPPORTS DE SEANCE

REPORT OF MEETING No 1

Special Commission on General Affairs and Policy of the Conference (31 March to 1 April 2005)

Distribution: by mail

MEETING OF THURSDAY 31 MARCH 2005 – MORNING SESSION

The meeting opened at 10.09 a.m. by Mr Struycken (President of the Netherlands Standing Government Committee on Private International Law).

Mr Struycken welcomed participants to the Special Commission.

He expressed his regret at the deaths during the last year of certain friends of the Hague Conference: Professor Günther Beitzke, a former delegate of Germany; Mr Kees van Boeschoten, a former delegate of the Netherlands who had chaired the negotiations on the Trusts Convention; Ms Isabel de Magalhaes Collaço, a former delegate of Portugal; Mr Georges Droz, former Secretary General of the Hague Conference; and Mr Allan Philip, who had chaired the negotiations of the Hague Project on Judgments.

Mr Struycken reminded participants that to ensure better governance of the Conference, the Special Commission on General Affairs and Policy has for several years met annually. He drew participants' attention to the main issue at hand, the proposed amendments to the Statute to accommodate the Membership of Regional Economic Integration Organisations (REIOs) to the Conference.

Mr Struycken proposed that Ms Jametti Greiner (Switzerland) preside over the Special Commission. This proposal was unanimously accepted.

The Chair thanked the Special Commission for its confidence in her, and proposed that discussion should begin in line with the agenda. This proposal was accepted.

DEVELOPMENT OF THE ORGANISATION, THE CONVENTIONS AND THEIR IMPLEMENTATION

Admission of the European Community to the Hague Conference on Private International

The Secretary General highlighted that the *pièce de résistance* of this meeting was undoubtedly the admission of the European Community to the Hague Conference. He drew participants' attention to Preliminary Document No 20 "Note on the Admission of the European Community to the Hague Conference on Private International Law", Preliminary Document No 21A "Draft Recommendation to the Twentieth Session of the Hague Conference on Private International Law on the Admission of the European Community to the Hague Conference on Private International Law", and Preliminary Document No 21B "Draft Recommendation to the Twentieth Session of the Hague Conference on Private International Law on the Admission of the European Community to the Hague Conference on Private International Law - Explanatory Notes".

The Secretary General reminded participants that the European Community had requested to become a Member of the Hague Conference in December 2002. The request was considered by this Special Commission in its meetings of 2003 and 2004, and following its wishes a broadly composed Informal Advisory Group was established under the chairmanship of H.E. Ms Xue Hanqin (Ambassador of the People's Republic of China). Thanks to the contribution of the Informal Advisory Group and consultation with the Member States and the European Community, the aforementioned Preliminary Documents, drawn up by the Permanent Bureau, contain mature proposals.

The Secretary General explained that the proposals seek to normalise a situation that has arisen due to the fact that Member States of the European Community have transferred to the Community part of their powers to legislate in the field of private international law, with both internal and external effect. As a result, the European Community has gained certain competences, which the Member States have transferred, and other competences are shared between the Community and its Member States. If the Community were to remain an observer in the Conference, there would be a lack of equilibrium. These proposals seek to restore this equilibrium.

The Secretary General drew participants' attention to the fact that the Special Commission had agreed that the Statute needs to be amended to permit the admission of REIOs, and certain other secondary amendments had been proposed to reflect current practice, but not to reform the Statute beyond what had already become practice. The Secretary General invited participants to consider how best to proceed.

The Chair proposed commencing discussions with the suggested amendments to the Statute, which are necessary to allow accession by REIOs, particularly regarding the European Community.

An expert from Japan drew the attention of the participants to the proposal of the delegation of Japan, Working Document No 1.

The Chair thanked the Expert from Japan for having provided this Working Document.

Article 2(2)

An expert from Canada stated as a general comment that she was not in a position to acquiesce to the suggested provisions and would participate in a preliminary manner.

No further comments were made.

The Chair underlined that the Article was provisionally accepted as no comments were made.

Article 2A(1)

A representative of the European Community asked for clarification regarding the meaning of "a meeting where the majority of Member States is present" for the purposes of admitting a REIO. Could such a meeting refer to the Special Commission on General Affairs and Policy, the Diplomatic Sessions or any Special Commission meeting?

The Secretary General explained that this referred both to Special Commission meetings on General Affairs and Policy and to Diplomatic Sessions and asked if further precision was required.

An expert from Austria questioned whether a Special Commission, for example, on international child abduction, should be included in this definition. He therefore favoured further precision.

The Chair suggested that a written amendment to the text should be made in order to clarify that "a meeting where the majority of Member States is present" refers to either the Special Commission on General Affairs and Policy or a Diplomatic Session. With the addition of this clarification there was provisional agreement to Article 2A(1).

Article 2A(2)

A representative of the European Community suggested deleting the text in square brackets. He acknowledged that the text presents no difficulties for the European Community, but could see no political or legal logic for retaining these words. He recognised that there could be budgetary implications if an REIO composed of States, a majority of which are not Members of the Hague Conference, became a Member of the Conference, but he noted that this could be dealt with in Article 8.

An expert from the United States of America agreed with the suggestion to delete the text in square brackets provided that there is a link to Article 8.

An expert from Japan expressed the opinion that the text in square brackets should remain. He cited two reasons, firstly, the financial implications, and secondly, that non-Member States could have a strong influence on the work of the Hague Conference indirectly through the member REIO.

An expert from South Africa supported the deletion of the text.

The Chair reminded the participants that this was likely to be a theoretical problem. The Chair invited further comments.

An expert from Canada preferred to retain both the text and the square brackets.

A representative of the European Community stressed that the worst thing to do is to retain the text as it is, it is essential to move forward. He added that if the Hague Conference wishes to become more open and expansive, especially in Africa, it would be helpful to delete the text to provide more flexibility.

An expert from South Africa supported the comments made by the Representative of the European Community.

The Chair proposed for the time being to retain both the text and the square brackets. Nevertheless, the Chair was confident that a decision could be taken during a second reading.

Article 2A(3)

The Chair underlined that the Article is provisionally accepted as no comments were made.

Article 2A(4)

An expert from the United States of America highlighted the importance of retaining the text in square brackets. He underlined the importance for the States not members of the REIO to be able to hear directly from the Member States of the REIO on questions of their sovereignty.

A representative of the European Community stated that he understood the concerns of the Expert from the United States of America, but he noted that the text in square brackets poses difficulties for the Community. Principally, he felt that the declaration of the change of competence is an internal question and that the Statute of the Hague Conference should not pre-judge and should respect constitutional rules of each REIO. He proposed deleting the reference to both the “Member Organisation” and the “Member States”, while preserving an obligation to notify.

An expert from Japan supported the comments of the Expert from the United States of America. He noted that there could be disagreement between the Member States and the REIO regarding competences. He did not support the proposal of the Expert from the European Commission, as the Statute should indicate who should make the notification. He also suggested that there should be an obligation to make a notification when the composition of the REIO changes.

Experts from the United States of America, Switzerland and a Representative of the European Community supported the proposal of Japan.

An expert from Romania proposed adding the words “and/or” between the words “Member Organisation” and “Member States”.

An expert from Switzerland wished to retain the text within the square brackets.

Experts from Germany and the Netherlands agreed with the proposal from the Representative of the European Community. They noted that it is the REIO who declares the competence in Article 2A(3), and it is therefore logical that the REIO should also notify any changes in the competences.

The Chair noted the various proposals and invited participants to reflect on these further.

Article 2A(5)

A representative of the European Community preferred to delete Article 2A(5) to simplify the text. He also asked the question of the legal effects of this provision.

An expert from Italy supported the European Community proposal to delete Article 2A(5) suggesting that it did not add clarity.

Experts from the United States of America, Japan, Canada and Switzerland stated that this Article is a key provision to clarify questions of competence.

An expert from Egypt proposed placing this Article directly after Article 2A(3) or integrating it into Article 2A(3).

A representative of the European Community noted that there is coherence between Article 2A(5) and Article 2A(3), and that the incoherence arises with Articles 2A(4) and 2A(6).

An expert from Japan noted that Article 2A(5) relates back to both Articles 2A(3) and 2A(4). If there is coherence between Articles 2A(3), 2A(4) and 2A(6), he suggested placing 2A(5) after these Articles.

An expert from the United States of America supported the comments of the Expert from Japan.

An expert from Spain expressed the opinion that Article 2A(3), 2A(4) and 2A(6) are sufficient and therefore Article 2A(5) could be deleted.

An expert from South Africa supported retaining this provision.

The Chair summarised the discussion and suggested that no amendments be made to the text without further reflection.

Article 2A(6)

A representative of the European Community suggested replacing the word ‘any’ to prevent Member States of the Hague Conference from posing abstract questions not linked to the topic. Additionally, he proposed deleting the words in square brackets for the reasons mentioned in Article 2A(4) particularly because it might impose obligations on Member States of the European Community that they cannot respond to. Alternatively he proposed deleting the reference to both the ‘Member Organisation’ and the ‘Member States’.

Experts from the United States of America, Japan and Switzerland favoured retaining the words in square brackets for the same reasons outlined in Article 2A(4).

A representative of the European Community suggested retaining the text in square brackets provided the word ‘and’ could be replaced by the word ‘or’.

An expert from the United States of America stated that this modification would not guarantee that the Member States of the European Community would respond when a question was posed to them.

An expert from Japan added that retaining the words in square brackets might assist other States to understand the status within the European Community of Denmark, Ireland and the United Kingdom.

A representative of the European Community explained the situation regarding these three States, and stated that questions of this nature would not arise during negotiations at the international level. He also suggested an alternative amendment, that European Community Member States could refer questions to the European Community.

An expert from Germany underlined that obligations cannot be imposed by the Statute of the Hague Conference upon Member States of an REIO, which they cannot fulfil due to the internal rules of the REIO.

The Chair summarised the discussion and invited the participants to consider the proposals over lunch.

Article 2A(7)

An expert from the United States of America reaffirmed the principle of non-additionality and added that this principle should extend to participation in meetings. He therefore proposed adding the text ', including participation in meetings' after 'membership rights'.

Some experts did not support this proposal.

An expert from Switzerland expressed concern that this might limit the contributions of experts from the Member States of the European Community.

A representative of the European Community supported these comments and added that it is essential to maintain broad variety of participation during the meetings.

The meeting closed at 1.10 p.m.

REPORT OF MEETING No 2

Special Commission on General Affairs and Policy of the Conference (31 March to 1 April 2005)

Distribution: by mail

MEETING OF THURSDAY 31 MARCH 2005 – AFTERNOON SESSION

The meeting opened at 1.40 p.m. under the Chairmanship of Mrs Jametti Greiner (Switzerland).

The Chair suggested that the participants continue to discuss amendments to the Statute, starting with those related to the admission of the European Community to the Hague Conference.

Article 2A

An expert from the United States of America explained the US proposal to add "including participation in meetings" after "shall exercise membership rights" in Article 2A(7). This addition would clarify that paragraph 7 covers all Hague Conference activities, including speaking during meetings, and that such participation would be on an alternative basis depending on a Member Organisation's or Member State's respective competences. This would ensure that the relevant speaker has the competence to speak for the REIO on the matter in question and that the principle of non-additionality applies to the conduct of meetings.

There was broad debate on this proposal. While some experts agreed that the term "membership rights" needed to be clarified, other experts were of the view that during meetings the Chair could control the level of participation and that open discussion, whether with members of REIOs or not, should be encouraged as a way to gain more information and achieve consensus. It was also suggested that the proposal might in fact reduce membership rights. One expert expressed concern that political considerations might hinder progress in achieving consensus on the technical solutions necessary for the continued establishment of unified private international law.

A representative of the European Community stressed that it would be unfortunate if participation were limited, especially for sovereign Member States.

The Expert from the United States of America agreed that Hague Conference meeting participants should welcome as much technical expertise as possible in their deliberations. He emphasised, however, that if a competence on a particular issue had shifted from Member States to an REIO to which they belong, this must be reflected in the curtailment of their voting rights as well as in their right to participate in debates. Though acknowledging that the proposed language could be redrafted, he affirmed the underlying principle.

The Chair stated that she understood the need to clarify the term "membership rights", while acknowledging the importance of many voices in reaching consensus on technical solutions to technical problems. The Chair observed that managing a discussion becomes crucial when, for example, two solutions have been developed but no consensus has emerged and voting becomes a possibility. She stressed, however, that this would be exceptional for the Hague Conference, which strives to achieve consensual solutions. The Chair suggested that the participants turn to a discussion

of Article 2A(8) in the absence of preliminary agreement on Article 2A(7), noting that there was a close link between the two paragraphs vis-à-vis participation rights.

A representative of the European Community responded to an expert's query regarding the status of a vote by the European Community, noting that it votes globally in one direction: yes, no, or abstain. He added that the language in square brackets should be deleted for inaccuracy, and explained that a vote by the European Community in a Hague Conference meeting would bind its Member States, whether they were present during the vote or not.

There was considerable debate on this paragraph. One expert questioned the legitimacy of granting a seeming proxy vote to an REIO on behalf of its absent Member States when, traditionally, votes at Hague Conference meetings can only be cast by those present. Another expert added that questions about the European Community's competence in various matters would involve the Hague Conference and have a direct impact on voting. Though one expert observed that there appeared to be some inconsistency in requiring Member States to be present at a meeting to which they could not contribute when the REIO has competence on the matter, another expert observed that voting rights were surely distinguishable from the right to speak.

A representative of the European Community explained that, under public international and European law, the European Community does not vote by proxy but, rather, as a supranational entity which binds its Member States with its vote.

The Chair closed discussion on this paragraph for the moment by noting that its use would be exceptional but that it is fundamental in those situations where consensus cannot be achieved.

Article 4

Regarding Article 4(1), the Chair noted that the change of "two" to "four" simply regularises the number of Secretaries.

In response to an expert's intervention, the Secretary General noted that the number is adapted to the current situation and that there is a mechanism in Article 4(3) for increasing the number of Secretaries in future.

To emphasise the Dutch government's responsibility with regard to the principle of diversity of geographic representation in the Hague Conference, an expert from South Africa proposed amending Article 4(1) by replacing the last sentence with: "The Government of the Netherlands shall respect the principle of diversity of geographic representation". In addition, he proposed amending the first sentence in Article 4(2) to read: "The Secretary General and the Secretaries must possess appropriate legal knowledge, including expertise, and practical experience" and deleting the second clause.

There was some debate on these proposed changes. Though some experts favoured maintaining the text proposed by the Permanent Bureau, others supported South Africa's proposals in principle and one floated the possibility of including a reference to gender.

The Secretary General suggested that the text should remain as it was, emphasising that the Hague Conference's overriding concern was quality but that it would also act in the spirit suggested by the Expert from South Africa, including making the organisation more representative of the world's regions.

Article 6

The Chair noted that there were minor changes to Article 6, and these were accepted by the participants.

Article 8

A representative of the European Community observed that a contribution by an REIO to the Hague Conference's budget would have symbolic value as well as cover additional costs to the organisation. Accordingly, he suggested that Article 8(2) should read: "A Member Organisation shall not be required to contribute to the annual budget of the Conference, but shall pay a sum to be determined by the Conference in agreement with the Member Organisation, to cover additional administrative costs arising out of its membership".

The Secretary General responded to an expert's query regarding the determination of the sum to be paid by an REIO by observing that it would be the subject of consultations with the REIO and then a vote by the Council of Diplomatic Representatives.

In response to interventions by experts from the United States and Japan, which focussed on concerns about a lack of agreement on payment and the case of REIOs with no Member States in the Hague Conference, it was agreed that Article 8(2) would read: "A Member Organisation shall not be required to contribute in addition to its Member States to the annual budget of the Conference, but shall pay a sum to be determined by the Conference in consultation with the Member Organisation, to cover additional administrative costs arising out of its membership".

The Chair noted that there were no objections to the proposed changes, but suggested that "in addition to its Member States" and a related change to Article 8(1) remain in square brackets until such time as questions involving Article 2A(2) were resolved.

Article 9(2)

The Chair noted that there were no objections to the suggested changes to Article 9(2).

The Secretary General observed that ultimate changes to Article 8(1) would have to be reflected in Article 9(2).

Article 12

Noting that those amendments not directly related to the question of admission of the European Community would be discussed at a later stage, the Chair observed that there were no objections by the participants to the proposed change in Article 12.

Article 13

An expert asked for clarification on the meaning of the term "Members" proposed as a change under Article 13.

The Secretary General indicated that a definition of this term can be found in suggested Article 2A(1).

An expert suggested that the term "Member" should be replaced by "Conference" to avoid any ambiguity.

Amendments aimed at reflecting existing practice

Articles 3, 4(1) and (3), 5, 7, 8(1) and 11

The Chair invited the participants to discuss the proposed amendments that aim to reflect existing practice. She noted that there were no objections to the proposed amendments in respect of Articles 3, 4(1) and (3), 5, 7, 8(1) and 11 (for the French text only).

An expert from the Netherlands announced that the Government of the Netherlands would pay for expenses associated with extraordinary sessions, as well as those for ordinary ones. He therefore suggested deleting Article 10(2).

The Secretary General expressed his deep gratitude to the Government of the Netherlands for its offer. He suggested that the amendment be reflected adequately in the Statute with the deletion of the existing distinction between ordinary and extraordinary sessions.

Article 12

An expert from Japan presented Working Document No 1, which included a proposal by the Japanese delegation to amend Article 12 in order to avoid potential abusive use of the 2/3 majority rule.

Several experts indicated that they understood the concerns of the Japanese delegation with regard to the 2/3 rule.

Furthermore, experts from a few States observed that Article 12 raises important difficulties in respect of public international law and their respective constitutions. They indicated that problems related to internal processes for treaty amendment are complex, and require discussions and extensive review. An expert suggested that a group of experts be established for this purpose.

However, several participants did not approve of the Japanese delegation's proposal as it effectively provides for the right of veto of all amendments involving new obligations, thereby restricting the current flexibility enjoyed by the Hague Conference. An observer noted furthermore that the adoption of such a veto system would prevent the adoption of certain amendments. On the other hand, the FAO and UNESCO constitutions, cited as examples by the Japanese delegation, lead to a different result: these constitutions do not prevent the adoption of such amendments under the 2/3 rule but allow, for example, concerned States to oppose these amendments so that for **them**, the amendment would not enter into force. According to the observer, a more restrictive system would not be justified in the case of the Hague Conference. Certain experts did not consider the term "new obligations" to be precise enough, although the Japanese expert had indicated that it included financial or other obligations.

An expert believed that this proposed amendment undermined the amendments relating to the admission of the European Community. It would be contrary to the Statute by prejudging a special procedure that must be respected, while the current Statute is in line with Article 41 of the Vienna Convention, as confirmed by a letter from the Depository. Several experts nevertheless expressed their reservations concerning these comments.

It was noted by an observer moreover that, with respect to the current amendments, those that would be adopted under the 2/3 majority rule would conform to Article 12, even if the internal consultation process of a State had yet to be completed. This would not exclude assisting a State with internal difficulties. He noted that this question must be distinguished from the question of entry into force of the adopted amendments. The entry into force may in principle occur immediately, *i.e.*, when there is a 2/3 majority, but it may be regulated otherwise if a State encounters a constitutional problem.

In this context, several experts felt that, in light of the need to have wider discussions on these questions, it would not be appropriate to proceed on these amendment procedures.

The Chair invited the First Secretary (Mr Bernasconi) to make an intervention, under Agenda item II.3.B, on the *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*.

CONVENTION ADOPTED BY THE NINETEENTH SESSION

Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary

The First Secretary (Mr Bernasconi) underlined the importance of the issuing of the Explanatory Report. He took the opportunity to thank the three *Rapporteurs* for their very important and useful work. He emphasised the quality of the Report, which is both clear and complete and includes numerous examples illustrating the examples provided. The Report explains all of the very technical questions addressed in the Convention. While preparing the Report, numerous external consultations

were conducted with groups of practitioners and experts so that the Report would effectively respond to the needs of the practice. This particular way of proceeding on the project essentially aimed to ensure that those working with the Report would find all the explanations they need, in substance as well as with the degree of clarity and certainty they are looking for. Mr Bernasconi added that because of the need to make the Report available on a wide scale and to provide authoritative explanations about the Convention, it was finally decided to make the Report available on the Hague Conference's website in the two official languages, English and French. The paper publication is expected later this year. Mr Bernasconi indicated moreover that the Permanent Bureau attended a large number of colloquia and seminars to promote the Convention over the course of last year. He mentioned in particular an ISSA meeting which regrouped the largest players in the world on this matter, a meeting organised by BIS (the Bank for International Settlements), and another at the initiative of Canada and organised by APEC (Asia Pacific Economic Cooperation). During these meetings, the reactions were very positive in favour of the Securities Convention.

Due to numerous ongoing internal consultations, the signing ceremony for the Convention did not take place at the end of last year as planned. Notably, in Europe, the European Central Bank had been invited to explain its position in a position paper to be issued before the end of March. It is hoped that this position paper will be useful in discussions among the Member States of the European Community in light of the upcoming signature of the Convention in conformity with a 2003 draft decision by the European Commission. Mr Bernasconi indicated that the Permanent Bureau sincerely hoped that a final decision to sign the Convention would be taken quickly. He expressed some concern about additional potential delays in the signing and ratification process, hoping that the first signatures would come before the end of the year. He recalled in this respect the Recommendation of the G-30 for the adoption of the Securities Convention as quickly as possible. The Permanent Bureau had moreover been invited to join the Committee monitoring the implementation of the Recommendations on legal issues.

Several experts intervened to congratulate Mr Bernasconi and the *Rapporteurs* for the excellent work that they had accomplished. They emphasised the very high quality of the final Explanatory Report despite some delay in its preparation. They added that they had received very positive signals from banking institutions, law firms and other practitioners with regard to this Convention.

An expert from the United States of America expressed his country's strong interest in the Securities Convention and indicated that the necessary measures were underway to ensure signature of the Convention soon. He hoped that other delegations would be guided accordingly and jointly sign the Convention with the United States.

An expert from Switzerland indicated that preparatory work had been done by his government with the aim of signing and ratifying the Convention in the near future. This work was undertaken in conjunction with the updating of their domestic law on the holding of securities.

An expert from Canada indicated that work would start studying the draft Securities Convention in that State next summer.

A representative of the European Community (Commission) explained that the signature and ratification procedure for the Securities Convention takes place in two steps: (i) the decision to sign must be approved by the Council of Ministers and (ii) the ratification must be approved by the Council and Parliament. Modifications must be moreover incorporated into existing Community legislation. He indicated that the draft decision to sign the Convention by the European Commission is, however, in the course of being negotiated with the Council. The position paper by the European Central Bank (ECB) dated 18 March 2005 is playing a role in these considerations.

A representative of the European Community (Council) wished to recall the importance that the Securities Convention has for the European Union. The commentary prepared by the ECB would be analysed and the Council would work with the aim of a Council decision in favour of a signature to the Convention as soon as possible, which the Council would still like to do jointly with the United States and other States, as the case may be.

The meeting closed at 6.25 p.m.

REPORT OF MEETING No 3

Special Commission on General Affairs and Policy of the Conference (31 March to 1 April 2005)

Distribution: by mail

MEETING OF FRIDAY 1 APRIL 2005 – MORNING SESSION

The meeting opened at 9.24 a.m. under the Chairmanship of Mrs Jametti Greiner (Switzerland).

TOPICS LISTED IN THE FINAL ACT OF THE NINETEENTH SESSION

CONVENTIONS UNDER PREPARATION

International Recovery of Child Support and Other Forms of Family Maintenance

The Chair drew participants' attention to the "Progress Report on the Development of a New International Instrument on the International Recovery of Child Support and Other Forms of Family Maintenance", Preliminary Document No 25, and invited the Deputy Secretary General to take the floor.

The Deputy Secretary General outlined the progress on this project since the Special Commission meeting of May 2003. A second meeting of the Special Commission followed in June 2004 and the third meeting of the Special Commission will take place next week. In order to respect the mandate of inclusiveness, it is important to encourage the participation of as many States as possible. Thirteen non-Member States attended the meeting in June 2004 and six states were supported through a fund, established thanks to the generosity of China, Denmark, Luxembourg and Sweden. Additionally, thanks to the contributions, particularly of the United States of America and Spain, it has been possible to provide Spanish interpretation and translation of documents into Spanish.

The Deputy Secretary General informed participants that an extensive working draft Convention with seven chapters has been elaborated. He highlighted three principal chapters: administrative co-operation, applications, and recognition and enforcement. The Deputy Secretary General underlined that there are some major issues which have not yet been fully addressed and stated that a fourth meeting of the Special Commission might be needed at the beginning of 2006. He expressed the hope that a Diplomatic Session could take place at the end of 2006.

The Deputy Secretary General noted that the Working Group on International Administrative Co-operation, co-convened by Hungary, the United States of America, Costa Rica and Australia, has facilitated the development of co-operation. The majority of their work has proceeded through conference calls, facilitated and funded by the United States Office of Child Support Enforcement. The Deputy Secretary General noted that this Group has helped to maintain momentum between meetings of the Special Commission and has laid a foundation of co-operation between Central Authorities. For these reasons the Deputy Secretary General suggested that this Group should continue in some form after the conclusion of the Convention.

The Deputy Secretary General noted that the mandate requires the work to be forward looking in order to take into account potential changes in information technology.

The First Secretary (Mr Lortie) drew participants' attention to the fact that the working draft Convention envisages that it is important to take advantage of recent advances in technology and to create a flexible and efficient system. Mr Lortie explained that information technology could also facilitate the use of compulsory forms.

Experts thanked the Permanent Bureau for the progress made on this project. Some experts expressed hesitation regarding the proposal to continue formally with the Working Group on International Administrative Co-operation after the conclusion of the Convention, for reasons of transparency, budgetary implications and a preference for an informal approach. An expert from the United States of America stated that some formal measures of administrative co-operation would be desirable after the conclusion of the Convention.

An expert from the United States of America declared that some formal measures for administrative co-operation would be welcome after the conclusion of the Convention.

A representative of the European Community thanked the Permanent Bureau and announced a joint conference hosted by the European Commission and the Hague Conference, dealing with this important subject, which will provisionally take place between 1-3 December 2005.

The Chair took note of the gratitude expressed to the Permanent Bureau and the hesitations and reservations regarding the proposal to establish a permanent formal body on international administrative co-operation after the conclusion of the Convention.

The Deputy Secretary General thanked the participants for their very helpful comments. He clarified that there is no formal proposal to create a body on international administrative co-operation; it is merely an idea for further discussion. It would not replace Special Commission meetings but could tackle problems arising between these meetings.

Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial matters –state of the work. Preparation for the XXth Session (14-30 June 2005)

The First Secretary (Ms Schulz) referred participants to "The Hague Project on Judgments: Progress made since the Meeting of the Special Commission on General Affairs and Policy of the Conference of April 2004", Preliminary Document No 24, which contains in its appendix, the preliminary draft Convention. She expressed appreciation for the valuable Explanatory Report prepared by Trevor Hartley and Masato Dogauchi.

Ms Schulz informed participants that an informal preparatory meeting of the members of the Drafting Committee had taken place in Brussels in early February 2005 to discuss how to proceed following the unfortunate death of the chairman of the Special Commission, Mr Allan Philip. Some members of the Drafting Committee where unable to attend and where therefore represented by others, in order to guarantee inclusiveness. Additionally, Thierry Hoscheit from Luxembourg had been invited with a view to enhancing participation of French-speakers, and Jiang Danming from the Patent Office of China, who had attended the Hearing of the European Commission on the preliminary draft Convention, had equally participated.

Ms Schulz suggested that the Drafting Committee assisted by those others who attended the Brussels meeting, if they so wished, could meet to make preparations for the Diplomatic Session, which has been convened for 14–30 June 2005.

Several experts thanked the Permanent Bureau for their work on this project and expressed appreciation for the Explanatory Report.

Experts agreed that the Drafting Committee, assisted by those others who had attended the Brussels meeting, should meet at the Permanent Bureau from 18-20 April 2005 with a view to preparing for the Diplomatic Session, including preparing alternate language for the different policy options.

MONITORING, ASSISTANCE AND SUPPORT OF CONVENTIONS

Apostille, Service Abroad and Evidence

The Chair drew participants' attention to the International Forum on E-Notarization and E-Apostilles (30 and 31 May 2005), Preliminary Document 30 and invited the First Secretary (Mr Bernasconi) to take the floor.

The First Secretary (Mr Bernasconi) introduced a new member of the Permanent Bureau, Mayela Celis, a Mexican lawyer with considerable experience in the field of International judicial co-operation and who now works as a Legal Officer for the Apostille, Service and Evidence Conventions. He also expressed appreciation to Laurence Thébault for her very valuable work over the last two years. Before her departure in June she will finalise the publication of the handbook on the *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, and will prepare a new handbook on the *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*.

Mr Bernasconi updated participants on the status of the three conventions since the last meeting of this Special Commission. Three new Member States have joined the Apostille Convention: Albania, Iceland and Poland, and five non-Member States: Azerbaijan, the Cook Islands, Ecuador, Honduras and India, totalling 87 Contracting States. Hungary has joined the Service Convention, which now has 52 Contracting States, and Greece, Hungary and Turkey have joined the *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, which now has 43 Contracting States. These figures and the number of requests received by the Permanent Bureau on their practical operation show that, despite their age, these Conventions are still very much alive and often used in practice.

Mr Bernasconi reminded participants that the last meeting of the Special Commission on the practical operation of these Conventions, which met in October / November 2003, adopted 82 recommendations and conclusions. He invited States to look again at these recommendations and to provide the information requested.

Mr Bernasconi informed the Special Commission and noted that the new edition of the handbook, including updates and a practitioner's section, should be published in the next months.

Mr Bernasconi referred to the Evidence Convention and noted that the conclusions of the Special Commission of 2003 invite States, which have made a general, non-particularised reservation pursuant to Article 23 to consider adopting a narrower reservation to prevent blocking the effective operation of the Convention. The following States still apply such a general reservation: Argentina, Australia, Bulgaria, China (Special Administrative Region of Macau), Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Monaco, Poland, Portugal, The Seychelles, South Africa, Spain, Sri Lanka, Turkey, Ukraine and possibly Romania.

Mr Bernasconi informed participants that the Hague Conference has recently launched on its website an Apostille Homepage. He also drew participants' attention to the brochure that had been distributed concerning the First International Forum on e-Notarisation and e-Apostilles, which is being jointly organised by the Hague Conference and the International Union of Latin Notaries. The National Notary Association of the United States of America has agreed to host the forum during its annual conference, which will take place in Las Vegas. The working languages of the forum will be English, French and Spanish. Spanish interpretation will be provided thanks to the International Union of Latin Notaries.

Mr Bernasconi explained that the aim of this forum is threefold: to assess the impact of electronic technologies, to consider their effect on the practical operation of the Apostille Convention, and to evaluate how new technologies can assist the effective application of the Convention. Mr Bernasconi outlined some of the aspects of the provisional programme; he mentioned in particular that the fact that conclusions and recommendations will be adopted, with a view to sketching the framework for the practical operation of the Convention in an electronic environment is extremely helpful to guide the Hague Conference in its future work.

An expert from the United States of America congratulated the Permanent Bureau on its initiative concerning this forum. He informed the participants that the United States of America has developed a prototype of an electronic Apostille and is looking for partner States with whom to test this prototype. In this regard he invited interested States to contact him.

FUTURE WORK

Priority topic:

(a) Questions of private international law raised by the information society, including electronic commerce

The First Secretary (Ms Schulz) drew participants' attention to Preliminary Document No 23 - "International Conference on the Legal Aspects of an E-Commerce Transaction – 26 and 27 October 2004". She mentioned that this conference was co-hosted by the Hague Conference, the International Chamber of Commerce and the Government of the Netherlands, who also subsidised the event. The conference attracted about 120 participants from 29 countries.

Ms Schulz explained that the conference followed the lifecycle of an electronic transaction: the pre-contractual phase, the contractual phase, the performance phase, and the post-contractual phase and dispute resolution. She informed participants that the proceedings of the conference will be published, and she hopes that the publication will be available by September / October 2005.

An expert from the United States of America expressed his appreciation and stated that he is looking forward to the publication.

Non-priority topics:

(b) Conflict of jurisdictions, applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage

The First Secretary (Mr Bernasconi) explained that he has the honour of acting as co-Reporter on a committee of the International Law Association on this subject. He stated that following the work in this manner is an effective way to deal with this topic and suggested retaining it as a non-priority topic for the Hague Conference.

There being no further comments this subject was retained on the agenda as a non-priority topic.

(c) Jurisdiction, and Recognition and Enforcement of Decisions in Matters of Succession upon Death

The Secretary General noted that succession is an important subject. The question of the Law Applicable to the estates of deceased persons is of particular importance, because successions are most often dealt with outside court proceedings. However, the *1989 Convention on the Law Applicable to Succession of the Estates of Deceased Persons* is not yet in force, even though it has been a source of inspiration for several legislations. He indicated that the European Community has begun work in this area and that the Hague Conference is awaiting the result of this work to see if it provides any inspiration for work at the global level.

There being no further comments this subject was retained on the agenda as a non-priority topic.

(d) Jurisdiction, Applicable Law, and Recognition and Enforcement of Judgments in Respect of unmarried couples

The Deputy Secretary General reminded participants that this subject has been on the non-priority agenda for many years. The Permanent Bureau produced a report, which it is currently updating. He noted that developments in domestic law and private international law are kept under review. He underlined the interest of the Hague Conference in developments in other organisations, particularly the *Commission internationale de l'état civil*.

The Secretary General of the *Commission internationale de l'état civil* outlined the work of his organisation in the field of registered partnerships. This work concentrates on the recognition of the effects on civil status of registered partnerships. He stressed that the Hague Conference could play an important role regarding conflict of laws in this area.

Experts from the United States of America, South Africa and Egypt expressed the opinion that work on this subject is not appropriate for the Hague Conference, and that they preferred to see this item removed from the list.

An expert from the United States of America requested that the report of the Permanent Bureau mention the public policy debates on this subject. An expert from Canada mentioned that experts from her State could collaborate in drawing up this report.

Experts from Sweden, Finland, Switzerland, Brazil and Germany highlighted that the subject is of practical importance and they would like to retain the topic on the non-priority agenda.

The Chair noted that opinions on this subject have not evolved. As a compromise position she suggested maintaining the subject on the non-priority agenda.

There being no objections, the topic was retained on the non-priority agenda.

(e) Law applicable to unfair competition

The First Secretary (Mr Bernasconi) noted that the Permanent Bureau follows practical developments in this field in particular the potential impact on unfair competition of questions raised by the Internet.

There being no further comments this subject was retained on the agenda as a non-priority topic.

(f) Assessment and analysis of trans-national legal issues relating to indirectly held securities and security interests, taking into account in particular the work undertaken by other international organisations

The First Secretary (Mr Bernasconi) explained that this topic was added to the agenda to enable the Permanent Bureau to follow the work being undertaken by UNIDROIT on substantive law in relation to securities. The Hague Conference is an observer in an experts group, which has prepared a preliminary draft convention, for examination during diplomatic proceedings in May 2005.

There being no further comments this subject was retained on the agenda as a non-priority topic.

MONITORING, ASSISTANCE AND SUPPORT OF CONVENTIONS (CONTINUATION)

Protection of Children

The Deputy Secretary General drew participants' attention to the "Projects Concerning the Children's Conventions, Maintenance, Adults and Cohabitation – Planning for 2005-2006", Preliminary Document No 29. He informed participants that the work on post-Convention services in this field has intensified considerably in the last year. The transfer of about 400 000 euros from the Supplementary Budget to the Regular Budget has allowed these post-Convention services to be placed on a firmer footing. It has enabled the Permanent Bureau to employ a Principal Legal Officer, Jennifer Degeling, who has a wealth of practical experience having worked at the Central Authority in Australia. The Deputy Secretary General expressed his delight that Jennifer Degeling has joined the team. Additionally, this transfer of funds has secured the positions of the Legal Officers, Marion Ely, Caroline Harnois and Sarah Armstrong, and allowed the Permanent Bureau to engage for one year, a Latin American Liaison Officer, Ignacio Goicoechea.

The Deputy Secretary General began by discussing the preparations for the forthcoming Special Commission on the *Convention of 29 May 1993 on Protection of Children and Co-operation in respect of Intercountry Adoption*, which has been convened for 17–23 September 2005. He mentioned the development of a Guide to Good Practice on implementation of this Convention and informed participants that one day of the Special Commission will be devoted to the issue of accreditation. He noted that it would be desirable to have translation and interpretation into Spanish and to this end financial assistance will be needed.

The Deputy Secretary General reminded participants that there are now 64 Contracting States to this Convention. He highlighted that the Permanent Bureau receives numerous requests from States regarding the implementation of the Convention, and therefore the Permanent Bureau would like to introduce a programme to support effective implementation, which would require funding, as set out in the Supplementary Budget.

The Deputy Secretary General stated that the next meeting of the Special Commission on the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* will take place in Spring 2006. He highlighted some preparations being undertaken including progress on the Guide to Good Practice. He informed participants that a statistical analysis of all cases commenced in 2003 is being prepared as a follow up to the 1999 study to help to track trends. The empirical research is being undertaken by Cardiff University, United Kingdom.

The Deputy Secretary General noted that there are several challenges for the future and that therefore the meeting of the Special Commission may last for two weeks and include a few days discussion on the *Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*. He enumerated certain issues which should be addressed: ensuring safe return when abduction is by the primary carer, transfrontier contact / access, enforcement of return and contact / access orders, and broadening the geographic range of the Convention, especially in States of an Islamic tradition and in Africa.

The Deputy Secretary General drew attention to Preliminary Document No 26 "The Hague Children's Conventions: Some Regional Developments". Firstly, he discussed the Malta Judicial Conference, involving 14 States and organisations including the European Community. This conference was made possible through the co-operation of the Maltese authorities. The objective of this conference was to attempt to find legal solutions to problems raised in relations between certain Hague States and non-Hague States, especially those of an Islamic tradition. This conference produced the Malta Declaration which could form the foundation for a rule of law in this field. He indicated that a second conference is being planned for the end of this year, involving a wider range of States, which have experience in this area.

Secondly, the Deputy Secretary General discussed the Latin American Judges' Seminar, which took place in Mexico, involving 16 Latin American States, the United States of America, Canada and Spain. He particularly underlined the co-operation with relevant national and regional bodies such as the Organization of American States, the United States Department of State, the International Centre for Missing and Exploited Children and international and regional Bar Associations. He also thanked the host State and the University of Monterrey. The Deputy Secretary General indicated that the Hague Conference has developed a one year programme to assist implementation of the recommendations from this Seminar and to this end Ignacio Goicoechea is already working in the region.

Finally, the Deputy Secretary General explored the possibility of further promoting the Hague Conventions in Southern Africa. He stressed the difficult and different problems in this region and underlined the importance of the 1996 Convention for this region. He indicated that discussions are already underway with regard to organising a regional conference and the South African authorities are very supportive. Work would proceed in co-operation with national and regional organisations such as the Southern African Development Community (SADC), and the African Union.

<u>The First Secretary (Mr Lortie)</u> drew participants' attention to Preliminary Document No 28 Supplementary Budget and Explanatory Notes, which appeals for financial assistance to enable certain States to participate at Special Commission meetings.

Mr Lortie announced that the Permanent Bureau will update the Preliminary Report on Practical Mechanisms for Facilitating Direct International Judicial Communications in the context of the Hague Child Abduction Convention. He then discussed developments to the International Child Abduction Database (INCADAT), including the addition of a non-Convention page.

Mr Lortie gave an update on the INCASTAT and iChild projects. Mr Lortie thanked the Canadian Government and the Canadian company WorldReach for their support regarding the development of a case management system, iChild. He underlined that WorldReach will donate the software to

five Central Authorities: New Zealand, Australia, the Netherlands, Ontario and Quebec who will participate in a pilot project to test this software, commencing on 1 October 2005. It is also hoped that the Central Authorities of Germany, Ireland, Switzerland, Sweden Argentina, Peru and South Africa may join this project. Mr Lortie indicated that the Permanent Bureau is also developing a databank for depositing statistics.

Several experts thanked the Permanent Bureau for their work in this area.

Experts from Peru and Argentina thanked the Permanent Bureau for the Latin American Judges' Seminar and the United States of America and Spain for having provided financial support.

An expert from the United States of America expressed his appreciation for the work being done at a regional level, and suggested extending this work to Central Europe, Central Asia and the Far East.

An expert from South Africa expressed his appreciation for the efforts to promote the Hague conventions in Africa. He welcomed the proposal to hold a regional conference in Southern Africa and thanked the Hague Conference for its initiatives in this area.

Several experts welcomed the suggestion to extend the Special Commission on the 1980 Convention in order to include discussion on the 1996 Convention. In this regard experts from Germany and Spain expressed the hope that the European Community States might soon be able to ratify this important Convention. An expert from Bulgaria informed participants that Bulgaria is preparing for ratification of this Convention.

An expert from Spain thanked the Permanent Bureau for its efforts to in using the Spanish language. She stated that Spain is preparing an update of the Spanish edition of the Hague Conventions. This edition will include the Conventions concluded since 1993.

An expert from Austria highlighted the importance of the questionnaire for newly acceding States to the 1980 Convention.

The Deputy Secretary General informed participants that responses to this questionnaire are very important and are available on the website.

The First Secretary (Ms Schulz) added that the Permanent Bureau was also encouraging States which had joined the Convention through signature and ratification, or succession, to respond to the Questionnaire and provide information to other Contracting States. Croatia had done so, and the reply from Bosnia and Herzegovina was under way. Moreover, the Permanent Bureau had also continued its monitoring and training activities in co-operation with the German Foundation for International Legal Co-operation concerning the Child Abduction Convention on the Balkans, namely in Croatia and in Bosnia and Herzegovina. Three seminars had taken place, and Part II of the Guide to Good Practice had been translated into Croatian and Bosnian.

The meeting closed at 1.09 p.m.

REPORT OF MEETING No 4

Special Commission on General Affairs and Policy of the Conference (31 March to 1 April 2005)

Distribution: by mail

MEETING OF FRIDAY 1 APRIL 2005 – AFTERNOON SESSION

The meeting opened at 2.45 p.m. under the Chairmanship of Mrs Jametti Greiner (Switzerland).

ORGANISATION OF THE WORK OF THE CONFERENCE

The Strategic Plan

The First Secretary (Mr Lortie) provided an update on the Strategic Plan for the Hague Conference (Prel. Doc. No 22). He discussed the implementation of the organisation's six strategic directions for the period from April 2004 through March 2005, namely: (i) increasing the global coverage of the Hague Conference, including increasing its membership, global coverage of the Conventions, and visibility, thanks to the new website, officials visits to countries, internships, secondments, celebration of the centennial of the participation of Japan, conference on electronic commerce, teaching at the Hague Academy, accommodating larger meetings; (ii) focusing on the development and review of Conventions, providing unique post-Convention services, legal education and training, and various types of partnerships; (iii) enhancing working methods and reducing costs by providing flexibility in the development process; (iv) increasing communication and co-operation with other international organisations; (v) enhancing the management of internal information, including new databases technologies; and (vi) making the Budget decision-making process more transparent through, for example, the restructuring of the Budget.

The participants thanked Mr Lortie for his very useful oral report. One expert observed that the Strategic Plan gave a sense of what had been accomplished and allowed the Hague Conference to focus and reorganise, enabling as well the restructuring of the Budget and its approval. Another expressed his hesitation to welcome new candidates to the Hague Conference noting that three States have been admitted but still need to accept the Statute.

The Secretary General stressed the importance of encouraging new States to join the Hague Conference and observed that it is not unusual that it takes several years before admitted States accept the Statute. Most governments have limited control over their parliamentary processes needed for ratification of the Statute. Furthermore, the Member States in question have often been participating, meanwhile, in Hague Conference activities. He stated that the Conference would do its utmost for these States to accept the Statute, but that a little patience would remain necessary.

Proposed Budget for Financial Year LI (1 July 2005 – 30 June 2006)

The Secretary General discussed the Budget for the coming financial year, which showed a modest increase only. He emphasised that the draft Budget was presented only in order to make experts aware of the financial parameters within which they should decide on the programme of the Conference. The decisions on the Budget would be taken by the Council of Diplomatic Representatives in July. He drew particular attention to the transfer of items from the Supplementary Budget to the regular Budget. He added that, because there were fewer meetings

during the last financial year than planned, funds for this purpose could be rolled over into the coming year's Budget for more meetings. The Secretary General also discussed the eventual need to convert the current pension system to a pension fund system. He recalled for the participants the Explanatory Note (Prel. Doc. No 27). He noted that consultations had begun, notably, with OECD (Organisation for Economic Co-operation and Development) (Co-ordinated Organisations) on this matter.

An expert from the United States indicated that his Government sought clarification on several aspects of the Budget. He also observed that (i) it was his Government's policy that any surplus should not be rolled over into the following year's Budget but, rather, returned to the Member States on a *pro rata* basis and (ii) his Government feels the coming year's Budget is a good opportunity to exercise in principle zero per cent nominal growth. In addition, he emphasised that any pension reserve must be restricted and that accounting and legal structures must be in place to ensure that such a fund is only used for pensions.

Other experts raised concerns about the health of small pension funds generally and discussed the possibility of joining a larger one. They also asked whether cheaper ICT contractors were available and if the Budget could include in the Budget the previous year's figures for comparison.

The Secretary General responded to these interventions by noting that written comments would be provided. Regarding the final set of comments, he stated that the ICT contractor the Permanent Bureau had engaged was the best one it could find and that last year's figures were available in the annual Report of the independent auditors. He also stressed that the Hague Conference was indeed looking to join a larger pension fund, perhaps in co-operation with the OECD (Co-ordinated Organisations). Turning to the intervention by the Expert from the United States, the Secretary General noted that rolling surplus meeting funds into the coming year's Budget avoided the need to request an increase in this Budget line. He stressed that the principle of zero per cent nominal growth was well understood and heard, and that the Bureau had made considerable efforts to put these commitments into action.

Proposed Supplementary Budget for Financial Year LI (1 July 2005 – 30 June 2006)

The Secretary General observed that a Supplementary Budget was still necessary to fund items such as travel and accommodation for delegates and experts from developing countries to The Hague, and the translation of Hague Conference documents into other languages than the official languages.

CO-OPERATION WITH OTHER INTERNATIONAL ORGANISATIONS

Co-operation with UNCITRAL and UNIDROIT

The First Secretary (Mr Bernasconi) briefly described the Hague Conference's ongoing co-operation with UNCITRAL and UNIDROIT, including an APEC seminar organised by Canada in Singapore where the three organisations jointly presented their work. He also mentioned co-operation with UNIDROIT on securities and the preparation of a chapter on conflicts of law in the legislative guide on secured transactions for which UNCITRAL had requested in the Conference's participation.

The First Secretary (Mr Lortie) noted that UNCITRAL would be assisting the Hague Conference in relation to transfers of funds and recovery of child support.

The Secretary General discussed the outcomes of a meeting among the heads of the Hague Conference, UNCITRAL and UNIDROIT. In addition to inspiring Preliminary Document No 31, he noted that they discussed current and possible future work as well as other practical measures that could be taken.

The First Secretary (Ms Schulz) described Preliminary Document No 31 – "The Effect of the UNCITRAL Draft Convention on Electronic Communications in International Contracts on the Hague Conventions" – which the Permanent Bureau prepared further to an invitation to comment by UNCITRAL. She noted that the draft Convention permits a law requiring a written contract to be satisfied with an electronic communication, and drew particular attention to Article 19(2) and its potential impact on the Hague Conventions.

The Preliminary Document identified three sets of Hague Conventions, eleven in total, which might be affected by the draft Convention including (i) those which are in force and contain a requirement of a written form which is not supplemented by a provision on an electronic form being its equivalent; (ii) other existing Hague Conventions which have not yet entered into force and which contain a requirement of a written form but no rule on an electronic form; and (iii) Hague instruments which are not yet in force but contain the requirement of a written form as well as a "functional equivalent-rule" for the electronic form. Of these Hague Conventions, it is concluded in the Preliminary Document that some will not be affected by the draft Convention and, of those that are or possibly are, the effect would only be incompatible with the *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*. In this case, the Preliminary Document recommends that UNCITRAL add to the draft Convention's exclusions from its scope "contracts relating to family law and succession" or at least clarify this in the Report. In addition, the suggestion is made that the Hague Securities Convention be excluded from its scope.

Though one expert agreed with the Permanent Bureau's recommendation that contracts regarding family law and succession should be excluded from the scope of the draft Convention, another believed that the draft Convention could be beneficial if matrimonial contracts were entered into for purposes other than personal, family or household purposes. In respect of the Securities Convention, he believed that some securities agreements could indeed be compatible with the draft Convention and that overlaps need not be a cause for concern but, rather, could be beneficial.

The First Secretary (Mr Bernasconi) observed that Article 2(1) *b)* in the draft Convention was so broad, there was no doubt that the Securities Convention was excluded from this draft; this would explain the conclusion in Preliminary Document No 31. He acknowledged, however, that very specific elements of transactions might benefit from the draft Convention.

Co-operation with other international organisations

The Chair noted that there were no interventions under this agenda item.

NEW TOPICS

An expert suggested that it might be useful for the Hague Conference, UNCITRAL and UNIDROIT to take a joint strategic approach and come up with projects and group their expertise on, for example, securities-related issues and a convention on conflicts of laws.

Another expert stressed that this agenda item should be a major one for next year with a focus on proposals for future work, particularly because the Hague Conference appears to be focusing less on new conventions and more on maintaining current ones. As one example, he suggested that there should be more work on a protocol to the Child Abduction Convention.

The Deputy Secretary General agreed that this matter was important and noted, in particular, that there would be an opportunity to take his suggestion on a protocol to the Child Abduction Convention forward at the next Special Commission meeting on the operation of this Convention.

The Secretary General stated that having new topics for discussion as the last agenda item in no way minimised their importance. He added that he supported calls for finding new topics for work.

The Chair suggested that the participants proceed through the recommendations, including the amendments to the Statute. This would be followed by a meeting on 21 April to discuss the most difficult remaining topics, particularly Article 12. She noted that formal approval of the amendments, if not possible at the Diplomatic Session, could come at a later stage.

The Chair suggested that the participants examine the proposed conclusions and recommendations and drew their attention to the incorporated changes.

Conclusions in relation to Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Work. Doc. No 2)

The Chair clarified that the name of "Milos Hatapka" should be deleted from the list of members of the Committee as his name appears later in the text. She also proposed adding after the dates 18 to 20 April 2005: "and possibly at later dates if necessary".

It was decided that the third line of the second paragraph should read as follows: "… and that the Drafting Committee, *chaired by Gottfried Musger,* assisted by …".

In the fourth line of the first paragraph, the phrase "on the preliminary draft Convention" was added after "Explanatory Report".

An expert questioned the reference to "*ad hoc* participants" of the meeting in light of the Hague Conference's traditional procedures. He wished to delete this reference, but for the sake of transparency this proposal was not accepted. In order to ensure the exact correspondence of the English and French texts, the phrase "*plus quelques participants / remplaçants ad hoc*" replaced the ninth line in the first paragraph of the French text.

An expert from Germany drew attention to the fact that, in future, they should reflect on the composition of the Drafting Committee with regard to the geographical representation of its members. Further, based on his proposal, it was decided to add to the end of the second paragraph the following phrase: "The composition of this group is without prejudice to the future composition of the Drafting Committee of the Diplomatic Session.".

The draft conclusions and recommendations included in Working Document No 2 were accepted with the amendments above.

RECOMMENDATIONS RELATED TO THE ADMISSION OF THE EUROPEAN COMMUNITY TO THE HAGUE CONFERENCE (WORK. DOC. NO 3)

Noting in the French text that the letter "A" before "*Considérant qu'un nombre limité de questions* …" should be deleted and inserted before "*Recommande à la Vingtième session*", no objections were raised with regard to the title of the recommendation and its preamble.

An expert from Canada nevertheless considered it premature to transmit a text to the attention of the Diplomatic Session in June 2005 in light of the difficulties presented by Article 12. She recognized that this position was not shared by the majority and indicated that her Government would continue its work on these questions through June, but it was important for her that the position of the Canadian delegation was explained clearly and reflected in the Report of Meeting.

Recommendation 1

Article 2A

The Chair explained that the changes in paragraph 1 expressed the desire to further detail the type of meetings during which the States could decide to admit an REIO. As requested by an expert, she explained that the phrase "meeting concerning General Affairs and Policy" referred to meetings of the Council and of the Diplomatic Session.

Concerning paragraph 2, the participants were divided on the deletion of the phrase initially between brackets which would have required the majority of Member States of an organisation to be Members of the Hague Conference. It was observed that it was preferable to have the least text possible between brackets in order to facilitate the work of the Diplomatic Session. Nevertheless, it was recalled that South Africa, the United States, and the European Community had previously expressed support for the deletion, while Canada and Japan had declared their opposition to this deletion.

An expert from Japan indicated that he could nevertheless accept the solution of deleting the phrase if that was the strong preference of the participants.

On the other hand, an expert from Canada was not ready to revisit her position and desired that this be discussed during the Diplomatic Session in June, at which time Canada would perhaps be ready to present a proposal.

In light of this debate, the Chair concluded the discussion, with regret, by maintaining the phrase "a majority of which are Members of the Conference" between brackets.

Paragraphs 3, 4, 5, 6, 7 and 8 were accepted without objection.

Articles 3, 4, 5, 6 and 7

It was noted that Article 3 must be modified to reflect the position of the delegation of the Netherlands in Article 10. No comments were raised in respect of Articles 3 to 7.

Article 8

Further to a suggestion by a representative of the European Community (Commission), it was agreed that, in Article 8, the changes directly related to Article 2A(2) must be placed between brackets as follows: "[and without prejudice to paragraph 2]" and "apportioned among the Members [Member States]" (paragraph 1); "to contribute [in addition to its Member States]" (paragraph 2).

Articles 9 and 10

Paragraph 2 of Article 9 is aligned to paragraph 1 of Article 8

With regard to Article 10, an expert from the Netherlands indicated to the Secretary General that his Government was not at this stage in favour of the proposal to delete the initial distinction between ordinary and extraordinary sessions despite the uniformity of their financing. It was consequently agreed to maintain the distinction and to modify Articles 3 and 10(1) accordingly.

Articles 11, 12, 13, 14 and 15

An expert considered it necessary to determine in Article 13 which organ of the Conference must approve the Regulations. After some debate, it was decided to replace "to the Conference" with "to a Diplomatic Session, the Council of Diplomatic Representatives or the Council on General Affairs and Policy". The suggestion to put this phrase within brackets was not accepted because brackets must be reserved for cases of fundamental disagreement. It was agreed nevertheless to have a mental reservation that a choice must be made on the approving organ.

No difficulties were raised by the other issues (Art. 11, 12, 14 and 15).

Recommendation 2

The Chair suggested replacing the phrase "prepare and adopt" with "finalise".

Recommendation 3

The Chair proposed starting the Recommendation with "That the Secretary General should, subject to finalisation at the XXth Session" and to delete the phrase "subject to their finalisation invite…" after "the proposed amendments". This proposal was accepted by the participants.

An expert from Portugal recalled the position of her delegation, which she had explained previously. She wished to add to the end of the last paragraph of this Recommendation a sentence explaining that it is the Diplomatic Session that decides the date of entry into force of the amendments.

The Chair stated that the draft Recommendation would have the same result. She did not favour Portugal's proposal because it would effectively insert Portugal's own interpretation into the Recommendations.

The Secretary General explained that the first paragraph of the draft Recommendation suggested that the first period would be fixed by the Diplomatic Session. The last paragraph established a link between the date of entry into force of the adopted amendments and the date of the *procès-verbal.* This date of entry into force would be later than the *procès-verbal.*

The Deputy Secretary General explained that the phrase "subject to finalisation" makes it clear that the text must be finalised before the voting begins. He suggested that, in the last paragraph, the meeting could recommend that the Diplomatic Session specify a date for entry into force of the amendments after the date of the *procès-verbal.*

The Portuguese delegation's proposal led to significant debate. Some experts understood Portugal's position and proposed changing the text in order to clarify that the date of entry into force could not be fixed by the meeting nor by the Secretary General. Another expert believed that the Recommendation, in addition to the Secretary General's explanation, was sufficiently clear and had the advantage of allowing for the entry into force of the amendments without this being immediate. This improvement had been inserted in order to respond to the concerns of certain delegations on this point. It was also remarked that, by virtue of Recommendation B, the problems encountered by the Portuguese delegation could be reviewed during the meeting of experts.

Taking into account the insistence of the Portuguese delegation on this matter, it was noted that preliminary consensus could not be attained. It was agreed to put the last paragraph between brackets.

Recommendation 4

The Chair noted that at the end of Article 1A of the Rules of Procedure, the phrase "with the following rules" had been omitted in the English text only.

Recommendation 6

Paragraph 1

The Chair indicated that in the French text, the first paragraph would have to be deleted.

An expert from Spain expressed his reservations about the procedure to be followed for the admission of the European Community and regretted that it would be submitted for adoption subject to the previous amendment of the Statute. He believed that the procedure that the States would have to follow is unwieldy and risks delaying the admission of the European Community. He argued instead for simply using Article 12.

A representative of the European Community also regretted these delays but noted they were accepted in order to permit the resolution of the fundamental problems encountered by certain States that had expressed the impossibility of them voting on these questions during the Diplomatic Session. That is why it was proposed to proceed to a vote on the admission at the same time as a vote on the amendments, precisely because the admission of the European Community was subject to the adoption of the amendments to the Statute.

An expert supported the statements by the Representative of the European Community and indicated that these questions could be resolved.

The Chair confirmed the statements of the expert that Recommendation 6 did not constitute a legal text and could be discussed anew during the 21 April meeting. She noted that the first paragraph would be kept for now, bearing in mind the reservations of several experts.

Paragraph 2

The Chair explained, further to a question from an expert on the expression "group of experts", that this phrase referred to the experts of the present Special Commission in order to continue the discussions and to advance as far as possible on these questions before the Diplomatic Session.

An expert from China requested a change to this paragraph. He regretted that the meeting of this group had been decided so late. He stressed the geographic distance of certain delegations and observed that, taking into account the importance of this meeting, there would necessarily need to be internal discussions. Taking into account these obligations, he preferred for the group to meet a few days before the Diplomatic Session in June.

The Chair understood the difficulties encountered by certain delegations but indicated that the date 21 April 2005 had been chosen due to the fact that a large number of delegations, including those who are geographically distant, would be present in The Hague at that time for a meeting on the draft Judgments Convention from 18 to 20 April. She asked if it would be opportune to consider the possibility of an additional meeting just before the Diplomatic Session. Moreover, she considered it important that the group meeting should be an official meeting, not an informal one, in order to make sure that there would be progress on these issues.

Considerable debate followed concerning the date, 21 April, before the Diplomatic Session or another, and the nature of the discussions, formal or informal, of the group of experts.

The Deputy Secretary General wondered if a Recommendation was necessary if there was a shift towards informal discussions. The Secretary General could very well arrange for an informal meeting of a group of experts without a Recommendation.

An expert from Canada stressed that her delegation preferred the adoption of a Recommendation which highlighted the need to review the issues raised in respect of Recommendations 3 and 6 as well as in Article 12.

The Deputy Secretary General suggested the following language: "invites the Secretary General to make arrangements to enable experts of all Member States wishing to do so to meet in The Hague on 21 April 2005 to discuss issues related to Recommendations 3 and 6, as well the question of possible amendments to Article 12".

An expert from Argentina asked for the deletion of the phrase "wishing to do so". This deletion was accepted.

No other amendments were proposed and the draft conclusions and recommendations were accepted with the amendments above.

The Chair thanked the participants.

The experts expressed their deep gratitude to Mrs Jametti Greiner for the admirable way in which she managed the debates. Taking into account the importance of the issues that had been addressed, the success of this Commission would not have been possible without her high level of contribution.

The meeting closed at 7.20 p.m.

CONCLUSIONS: JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS / CONCLUSIONS: COMPETENCE, RECONNAISSANCE ET EXECUTION DES JUGEMENTS EN MATIERE CIVILE ET COMMERCIALE

CONCLUSIONS ADOPTED
BY THE SPECIAL COMMISSION OF 31 MARCH / 1 APRIL 2005
ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE

Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters

The Special Commission welcomed the preliminary draft Convention on Exclusive Choice of Court Clauses elaborated during the meeting of the Special Commission on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, which was held from 21-27 April 2004. It noted with great appreciation that an Explanatory Report on the preliminary draft Convention has been prepared by the Co-Reporters, Trevor Hartley and Masato Dogauchi, with a view to facilitating consultation. The Special Commission further took note of the fact that a Diplomatic Session has been convened by the host Government which will take place from 14 to 30 June 2005, and welcomed the progress report on preparatory work carried out in preparation of that Session. It noted that an informal meeting of the members of the Drafting Committee, plus some *ad hoc* replacements / attendants, had taken place in Brussels in early February. The following people participated: Paul Beaumont, Alegria Borras, Andreas Bucher, Masato Dogauchi, Trevor Hartley, Jeff Kovar, Gottfried Musger, Kathryn Sabo, Sun Jin and Mario Tenreiro as members of the Drafting Committee. David Goddard, equally a member of the Drafting Committee, was unable to attend. Some members who were unable to attend the meeting in whole or in part were represented by others: Alexander Matveev by Konstantin Kosorukov and Peter Trooboff by Ron Brand. Milos Hatapka also attended the meeting in full, thereby covering the partial absence of Mario Tenreiro. In addition, Thierry Hoscheit from Luxembourg was invited with a view to increasing the participation of French-speaking participants. Jiang Danming from China, who was in Brussels for the Hearing organised by the European Commission, equally participated. The Permanent Bureau was represented by Andrea Schulz and Nicola Timmins.

The Special Commission agreed that the meeting in Brussels had been necessary and useful in order to discuss future work in light of the unexpected death of the Chairman of the Special Commission, Allan Philip, and that the Drafting Committee, chaired by Gottfried Musger, assisted by those others present at the Brussels meeting, should meet at the Permanent Bureau from 18-20 April 2005, and possibly at later dates, if necessary, with a view to preparing language suggestions for some of the issues identified in the preliminary draft Convention and the Explanatory Report. The composition of this group is without prejudice to the future composition of the Drafting Committee of the Diplomatic Session.