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HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

RAPPORT DE LA REUNION D'EXPERTS DU 21 AVRIL 2005 POUR DONNER SUITE A LA RECOMMANDATION B 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 EXPERTS' MEETING OF 21 APRIL 2005 TO FOLLOW UP ON RECOMMENDATION B 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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à l'intention de la Vingtième session – juin 2005

Preliminary Document No 32C of May 2005
for the attention of the Twentieth Session – June 2005

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RAPPORT DE LA REUNION D'EXPERTS DU 21 AVRIL 2005
POUR DONNER SUITE A LA RECOMMANDATION B
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 EXPERTS' MEETING OF 21 APRIL 2005
TO FOLLOW UP ON RECOMMENDATION B
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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* (en anglais seulement / in English only)

LETTRE DE CONVOCATION / LETTER OF CONVOCATION

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CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

The Secretary General

L.c. ON No 13(05)

THE HAGUE, 5 April 2005

Dear Madam / Sir,

Following the meeting of the Special Commission on General Affairs and Policy of the Conference, which met on 31 March and 1 April 2005, I have the honour to bring the following matter to your attention.

One of the main topics discussed by the Special Commission concerned the admission of the European Community to the Conference. The Special Commission made substantial progress on this question, but considered that a limited number of issues remain to be resolved. These issues relate in part to substance – in particular some of the proposed amendments to the present Statute – and in part to procedure – in particular the way of implementing Article 12 of the Statute in the present case.

./. At the close of its deliberations the Special Commission adopted the attached Recommendations.

Recommendation A is addressed to the Twentieth Diplomatic Session (14-30 June 2005).

– It invites the Session to consider and finalise proposed amendments to the Statute (Recommendation 1) and
– to finalise an English version of the amended Statute equally authentic to the original French text (Recommendation 2);
– It proposes a procedure for a vote on the proposed amendments in accordance with Article 12 of the Statute (Recommendation 3);
– It invites the Session to adopt certain amendments of the Rules of Procedure (Recommendation 4) and
– to take note of assurances to be given by the European Community on the occasion of the deposit of its acceptance of the Statute (Recommendation 5); and finally,
– It invites Member States to cast their vote on the admission of the Community, subject of course to the adoption of the amendments of the Statute (Recommendation 6).

2/..

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Recommendation B aims at furthering rapid agreement on any outstanding issues relating to the aforementioned Recommendations 3 and 6. The Special Commission considered it as very urgent that Member States agree on the way to proceed in accordance with Article 12 once the Session has finalised the amendments of the Statute. Therefore it decided that a meeting of experts should be held at short notice to discuss the outstanding issues on Recommendations 3 and 6. The meeting could also examine a proposal tabled by the Government of Japan and aimed at modifying Article 12. It should be noted that the Expert of Japan made it clear that this proposal seeks to amend Article 12 with a view to *future* amendments; in other words, this proposal does not aim at applying to the amendments presently proposed.

I have the honour to invite Member States to a meeting of experts, which will take place on Thursday 21 April 2005 at the Permanent Bureau, Scheveningseweg 6, The Hague, the Netherlands. (Please note that, if necessary, a larger meeting room will be made available in the neighbourhood of the Permanent Bureau.) Mrs Jametti Greiner of Switzerland has kindly accepted to chair this meeting. The working languages will be the official languages of the Conference, English and French, but it will not be possible to provide simultaneous interpretation for the meeting. The meeting will start at 9.30 am and it is envisaged to end at 6.00 pm.

With a view to the practical organisation of the meeting, the Permanent Bureau would be obliged if you would be so kind as to let it know, ***before 15 April 2005***, whether your Government will be represented at this meeting and, if so, to inform it of the name, function and address of the expert(s) designated.

An invitation will also be sent to the European Community.

I avail myself of this opportunity to renew to you, Madam, Sir, assurances of my highest consideration and esteem.

(signed) Hans van Loon

./. Enclosure mentioned.

To the National Organs of the Member States
Copy for information to the Embassies

Copy to the participants in the April 2005 Special Commission meeting on General Affairs and Policy (by e-mail only)

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Liste des participants
List of participants

avril / April 2005

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HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

Réunion d'Experts
relative à l'admission de la Communauté européenne

*** * ***

Experts Meeting
concerning the admission of the European Community

21 avril - 2005 - 21 April

Liste définitive des participants
Final list of participants

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RAPPORT DE SEANCE (AVEC UNE TRADUCTION EN FRANÇAIS DES CONCLUSIONS DE LA PRESIDENTE) / REPORT OF MEETING (INCLUDING THE CONCLUSIONS OF THE CHAIR)

Réunion d'Experts concernant l'admission de la Communauté européenne, jeudi 21 avril 2005 / Experts' Meeting Concerning the Admission of the European Community, Thursday 21 April 2005

Les interventions sont reproduites dans leur langue originale à l'exception des conclusions de la Présidente en p. 39-40, qui sont traduites en français en p. 40-41. / The interventions appear in the language in which they were made with the exception of the conclusions of the Chair on pp. 39-40 which have been translated into French on pp. 40-41.

La réunion est ouverte à 9 h 35 sous la présidence de Mme Jametti Greiner (Suisse). / The meeting was opened at 9.35 a.m. under the chairmanship of Mrs Jametti Greiner (Switzerland).

The Chair reminded the experts that they had received a letter from the Secretary General announcing that this is a meeting of a special kind, open to experts from all Member States. Mrs Jametti Greiner also reminded experts that she had been asked to chair this meeting and hoped that this was acceptable to the experts.

[Les experts expriment leur accord. / The experts expressed their agreement.]

The Chair continued by directing the experts to Recommendations 3 and 6 prepared during the last meeting on General Affairs and Policy. She also invited experts to consider Article 12 on the procedure for making amendments to the Statute. The Chair proposed that experts begin with considering the interpretation of Article 12 and try to find some compromise formulations, then to turn to Recommendations 3 and 6, and later to discuss the Japanese proposal to amend Article 12.

The Secretary General welcomed everyone and thanked the experts for attending. He underlined that the meeting had been convened following the Special Commission on General Affairs and Policy where a lot of progress was made concerning amendments to the Statute. He noted that the Conclusions of the Special Commission on General Affairs and Policy, found in Recommendation 1, were not for discussion today. Today discussion should concentrate on matters of procedure. The Secretary General directed experts' attention to Recommendation 3 – particularly the last paragraph between the brackets.

The Secretary General reminded experts that they had the benefit of the letter from the Depositary, which explains the procedure for amending the Statute, according to the existing Article 12. It would be possible to have consultation in writing and then to proceed to a *procès-verbal* once a two-thirds majority had passed the amendments.

The Secretary General noted that there is also a close link to Recommendation 6. There is, however, some concern, as this does not implement Article 2(A), paragraph 1, so some work is also necessary on this point. The Secretary General suggested that subsequently experts could turn to the proposal from Japan to revise Article 12, but he highlighted that this is a proposal for future amendments not for the present situation.

The Chair opened the floor for discussions on how to apply Article 12 after finalisation of the text of the amendments to the Statute, thus leaving aside for the moment the Japanese / United States proposal.[1]

An expert from Portugal offered Portugal's interpretation of Article 12. According to Portugal's reading of the text, in order for the amendment to bind all Member States it should be adopted by two-thirds of Member States and then consent to be bound would be needed from all the Member States. Portugal's position is based on two reasons: international law reasons and internal law reasons. The Statute of HCCH is a multilateral treaty and in order for it to be modified there should be adoption of an amended text and

[1] For the detailed discussion on this proposal see *infra* page 21 [Note by the Permanent Bureau]. / Pour le détail des discussions relatives à cette proposition, voir *infra* page 21 [Note du Bureau Permanent].

consent to be bound, normally by two-thirds of Member States present and voting, according to the amendment clauses for multilateral treaties. Normally if a State does not give consent it is not bound by the amendment.

This treaty is special as it gave life to a new subject of international law – HCCH. Therefore the treaty has some specific criteria. First, regarding modification of the treaty, it does not make sense in such an instrument for some States to be bound and some States not to be bound. We cannot have two different Statutes. Normally an instrument has a clear and strict built in amendment clause. The classic example is Article 180 of the United Nations Statute where firstly a text of amendments must be adopted by two thirds of the Member States present and voting, then two thirds of the Member States express their consent to be bound, and then when it enters into force it binds all Member States. This is so because there is a strict and clear clause speaking on this, stating that all Member States will be bound once the amendments enters into force.

When a State enters the United Nations the State is already aware that this is the procedure. There are other similar examples, some of which are in the paper which has been distributed today by the Permanent Bureau. Analysing all these clauses there are some characteristics in common, they all speak of adoption of the text and that this should be the treaty-making power. Turning to the question of what happens to a State which does not give its consent to be bound, the International Civil Aviation Organisation says that a State which does not give its consent must retreat from the Organisation. Again authorisation for this procedure is clearly expressed.

Turning to the situation of HCCH, the expert from Portugal acknowledged that he had received the letter from the Director of Treaties at the Netherlands Ministry of Foreign Affairs. The expert suggested that the idea that an organisation could by itself modify its Statute was a theory known as the Constitutional Theory, popular in the 1950s and 1960s. This theory drew a comparison between a constitution of a State and a constitution of an international organisation and concluded that as a State can modify its constitution so can an international organisation. In the opinion of the expert from Portugal, this theory is no longer accepted, nor present in international organisations. Article 12 does not give a clear and strict clause about adoption, consent to be bound and what happens if consent is not given. From Portugal's point of view, for a State to be bound by something that it did not consent to then this must be clear. The expert from Portugal suggested that the proposal from Japan reflects this concern.

The expert from Portugal then discussed internal law and stated that Portugal has strict and mandatory constitutional procedures that must be followed in order for Portugal to be bound by such amendments. These procedures are not only present in the constitutional order of Portugal but in other States also. Portugal sees the Statute of HCCH as a constitutional instrument which cannot be modified by HCCH. In the opinion of Portugal, Article 12 speaks of adoption by a two-thirds majority and then unanimity is required by all States to be bound.

<u>The Chair</u> thanked Portugal for providing a broad analysis of the problems around Article 12 and acknowledged that experts are aware of the Portuguese attitude which is one of the reasons why Recommendation 3 contains brackets.

The Chair stated that she would like to give some structure to discussions to seek to find a way to make Article 12 work. She noted that the Special Commission on General Affairs and Policy in April 2004 unanimously accepted the idea to welcome the European Community as a member of HCCH, this is not the problem, but the question of how to do this and how to satisfy needs on an internal basis is the issue before us. The Chair proposed that discussion could concentrate on this aspect first to present Article 12 in a way that allows States to go through their internal proceedings. There are some words which are needed to balance the adoption on one side, and the entry into force on the other.

A representative from the European Community (Commission) stated that while the experts could have a legal discussion on the interpretation of Article 12, there are some different opinions. The interpretation from the Depositary is different to that of Portugal. If we proceed this way how would we decide on a correct interpretation – by a majority or by what? The representative suggested that experts might think about how to overcome the problem of interpretation and give comfort to those States who have a strict interpretation so that they are able to agree before the Statute enters into force. These differences can be overcome without a legal fight on the meaning of Article 12. Instead time should be provided to enable everyone to be in a position to say yes before the amendments enter into force. It may be helpful to decide on a minimum period of time during which votes should be cast. Even if the two-thirds majority is reached within this time period, nothing will happen. This may give States a comfortable time in which they are able to say yes. Then a longer period of time could be given between gaining the two-thirds majority and the entry into force of the Statute so that States can still say yes before the Statute enters into force.

The Chair summarised this proposal stating that, presuming a solution is reached in June on a finished text, a two-step procedure could follow. Firstly, a period of time within which the votes can be cast, and secondly, a longer period of time before the entry into force.

The Chair proposed that discussion of the problem of States that did not give their consent be left aside for the moment.

An expert from Portugal stated that his general remarks were to outline the problems in Portugal. The expert expressed his gratitude that these difficulties have been taken into account. He stated that Portugal is of course willing to work to find a practical solution.

An expert from Canada stated that it is clear from the discussion during the first part of the Special Commission on General Affairs and Policy, and the discussion so far today, that the views of the Depositary do not reflect the views of all the Member States. To make progress it is important to be practical, we must address our concerns and find a practical way of resolving questions. Article 12 needs to be elaborated a little to address some of the legal concerns. Canada is in agreement with a process which is in several stages. Perhaps adopting a text in June, then a period where States can vote on amendments and indicate their consents, and then a subsequent period for these amendments to enter into force.

The expert from Canada added that the question of States which do not agree to the amendments is difficult and agreed that this could be set aside for now.

The Chair acknowledged that Canada could agree to the proposed two-stage process.

An expert from New Zealand stated that New Zealand is concerned with Article 12 and thinks that a much more comprehensive Article would be better. New Zealand would like to see some process included in the Article. In New Zealand there is a treaty process that one would need to go through, so New Zealand supports the proposal for giving time periods, which might not need to be too long. The expert stated that the suggestion from her capital for such a time period is 12 months.

The Chair asked the expert from New Zealand to define this 12-month period.

An expert from New Zealand answered that it would depend upon the initial period. Her instructions are to suggest 12 months after the text is approved, however she understood that some amendments are quite minor and some are not, and therefore there may be a need for some differences.

The Secretary General clarified that the 12-month period would therefore run from June.

Un expert de la Belgique indique partager l'opinion de M. Tenreiro. La Belgique est prête à accepter l'application de l'article 12 mais se demande comment cela pourrait être mis en oeuvre en droit interne. Dans les années 50, lors de l'adoption du Statut de la HCCH, la Belgique n'avait pas eu à soumettre le texte au Parlement belge. Aujourd'hui la situation est différente et l'amendement de l'article 12 devra suivre la procédure parlementaire. Néanmoins, il indique que cela peut avoir lieu après l'entrée en vigueur des amendements. Concernant les modifications ultérieures du Statut, il souhaiterait que l'article 12 soit rédigé de telle manière que des modifications puissent être approuvées sans que le Parlement ne soit consulté. Pour cela il remarque que l'article 12 doit être plus détaillé qu'il ne l'est actuellement. Il conviendrait de prévoir une procédure apportant certaines garanties afin que la loi d'approbation belge puisse indiquer qu'à l'avenir le Statut pourra être modifié selon la procédure prévue à l'article 12 sans que ne soit nécessaire une autre approbation du parlement.

The Chair recognised the support from the expert from Belgium for the two-step approach.

The Secretary General offered to summarise in English the intervention from the expert from Belgium. He stated that at the time that Belgium accepted the Statute of HCCH no parliamentary approval was needed, now such approval is needed. The expert from Belgium would therefore like to see an amendment to Article 12 to allow Belgium in the future to be able to proceed without parliamentary approval.

An expert from South Africa noted that South Africa places great importance on this process of amending the Statute, and he noted that legal opinion in South Africa is being sought. At this point South Africa would need approval from parliament and therefore supports and understands that there are two issues with which we are dealing. In principle all States have agreed to the admission of the European Community and also other REIOs. This means that now the issue is how to deal with the Statute itself. In the opinion of South Africa when the amendments are finalised, if South Africa does not consent South Africa may either withdraw or the European Community may decide not to become a member. On this point he strongly supported the proposal by Japan and supported the two-stage process stated earlier to allow constitutional structures to come on board with this process.

An expert from the United States stated that in the United States the procedure is a little different as any amendments to the Statute do not need to be admitted to Congress and therefore the United States can be flexible. He noted that experts need to focus on a pragmatic approach because we can debate legal theory, but what we need is a solution that works for all of our States. The expert noted that the comments made about the two-step process seem to make sense as a possible solution to the problems. He also supported the suggestion of a 12-month time period proposed by New Zealand. The expert suggested that the division of this time period should be discussed. The 12-month period might be the total length of time but how to divide this between the two stages would benefit from further discussion.

An expert from the United Kingdom stated that like the United States it is not necessary in the United Kingdom to take amendments to the Statute to parliament. However, he stated that he was very conscious of States that do have to go through this process and agreed that it is important to find a pragmatic solution to ensure enough time to those States which need time. He agreed that a 12-month period seemed in principle to be a reasonable amount of time and expressed no strong views on how to divide this time. He noted that it is important that as much time as possible is given in order to seek to have a consensus based solution. He added that if, in June, the amendments are adopted by consensus then it takes away concerns about States which are not in favour of these amendments, though he noted that in his opinion Article 12 is clear that such States would not be bound.

The expert suggested that a longer period of time for voting could mean that not only the two-thirds majority was achieved but that every State could come on board. He suggested that all Member States think that the most important thing is that every Member State is on board with the new Statute. He underlined that States have already agreed to allow REIOs, in particular the European Community, into HCCH and that other amendments are supposed to be non-controversial. He noted that other amendments should not be a divisive issue if we work by consensus and give enough time. In a year after June we hope all Member States will be on board and then perhaps in the future we may look at how to amend Article 12.

An expert from Austria asked for clarification over whether this group is seeking an interpretation of Article 12 or whether we would ask this of the Diplomatic Session in June. He also hesitated as to whether setting time periods would be the best approach.

The Chair stated that today experts are dealing with how to manage this amendment and then hopefully we will also have the two-step procedure to get the things going to take to the Diplomatic Session. However, she noted that this is not a consensus on how to interpret Article 12.

The Chair added that, as a matter of principle, Switzerland shares the view of the Dutch government. She noted that if Switzerland had to adopt the HCCH Statute today it would have to go to parliament and then have to a referendum in all the cantons, however, on this amendment Switzerland is in the same position as the United States and the United Kingdom.

The Chair noted that there has been no opposition to the two-step process. She proceeded to summarise the discussions. Most experts think that we need to work with time periods. There has been an idea of having a total period of 12 months. One expert has stated that we should not work with time periods to get the two-thirds majority but that we should wait until the two-thirds majority is reached and then fix the time period for the entry into force. Some experts have also suggested that where the break in the time period comes is not important as long as we ensure as many States as possible come in, and therefore it would not be wise to make the first period too short. The Chair suggested that we might think in terms of two periods of six months which would mean June – December 2005 for the first period, and January to June 2006 for the second. Of course this cannot work if by 31 December 2005 there is not a two-thirds majority. However, all States want to see the European Community as a member of HCCH, we do have consensus on this. The Chair expressed her confidence that presuming a text is finalised in June there should be sufficient opportunity to have a two-thirds majority, and also a good chance that we may have more States and maybe even unanimity, by December 2005.

An expert from Canada noted that the expert from Austria had raised an important issue. On the one hand we need to know when the amendments will enter into force, but there is a difficulty if we say that we have a compulsory timeframe, as under what authority do we make this time frame binding on the States? If it is not binding then we have an open process. If there is consensus in June then there will be no problem, but if States do not cast their vote in the six month period then what do we do? Do we assume a non-voting State has not consented?

The Chair suggested that the two time periods might have two different natures. The first period on the vote for the amendments cannot be mandatory so that after the six-month period the States can no longer vote, it is more of a recommendation that this is preferred. It would give some indication of where we are at: whether we have the two-thirds majority? Unanimity? Problems? We need to be flexible to get a pragmatic solution.

An expert from the Russian Federation noted that Russia understands that amendments need to be adopted by a two-thirds majority of the Member States. He noted that South

Africa had mentioned that the Statute is not clear on when these amendments would then enter into force. The expert suggested that it would be wise to indicate a time after the two-thirds majority has been reached to allow for parliamentary approval, and in his opinion a six-month period should be reasonable. On the question of voting closure he noted that normally adoption takes place at a Diplomatic Session but that this is not the case here. He thought that it should be reiterated that it should be specifically stated that the voting is limited in time, once the time is over the amendments are presumed to be passed. The expert expressed the belief that the necessity to use this limitation would not arise.

The expert drew attention to Article 1 of the Statute of HCCH which states its purpose if to work towards the unification of private international law. He noted that it is for this goal that Member States have joined this organisation and why new States and REIOs might consider joining. He questioned whether it might not be appropriate to also include other international organisations which do not fit the definition of REIOs and specifically mentioned the Eurasian Economic Community. He suggested broadening the wording beyond REIOs.

A representative from the European Community (Commission) addressed the expert from the Russian Federation and stated that the European Community is conscious of this demand but that this is not the meeting for discussing this. He suggested that the point be kept in mind for the meeting in June.

Turning to the issue of time periods he suggested that it would not be suitable to make a closed date. He expressed his hope that everyone would give agreement to the change to the Statute today, but there can always be problems and therefore he suggested that we should not have a rule that a decision must be reached at a certain date. For this reason he suggested avoiding having an imperative date and instead suggested some wording for Recommendation 3.

The representative suggested that the words “within a specified period” at the end of the first paragraph could be replaced by “within a period of X months”. He further suggested that experts should decide upon this “X” month period today.

He suggested an addition to paragraph 2 after the word “received,” he suggested the addition of the words “but not earlier than X months following the end of the XXth Session”.

He suggested that the word “That” be deleted from the beginning of the sentence in the brackets in paragraph 3 and that the words “a specified date” could be replaced by “the first day of the X month”.

He explained that then if the two-thirds majority has not been reached it is clear that the period goes on until “X” months after the two-thirds majority is reached.

An expert from the Netherlands fully supported the suggestion from the representative of the European Community and agreed that this approach was the most pragmatic. With regard to Article 12 he stated that the views of the Netherlands are on paper and that the Netherlands sticks to these views. The Netherlands has tried to do its best to see what was intended in the *travaux preparatoires* when the Statute was drafted. The expert expressed his hope that the letter from the Netherlands was of some help and looked forward to discussions on this later in the day.

An expert from Mexico stated that in principle he agreed with the proposal. He suggested that a possible solution would be to create an artificial distinction between voting and entry into force. After a two-thirds majority has been reached then amendments would enter into force for all States. He felt that this would accommodate those who need more time. First we would seek the two-thirds majority then we would tick off the list States as they inform us that they have made their legislative arrangements.

An expert from South Africa shared the view that consensus should be sought on every Article to try to be inclusive. He noted that it would assist everyone if we all agreed the final text. He noted that in terms of the time frames, he supported the proposal of New Zealand to have a period of 12 months. However, he stated that in South Africa parliament opens at the end of January and closes in June, therefore to have a six month period for voting between June and December would not be helpful for South Africa as it would not be able to vote by the end of December.

An expert from Finland added her support to the two-stage approach.

An expert from China thanked the Chair and the Permanent Bureau for this meeting. He expressed the support in principle of the Chinese Government to the admission of the European Community to HCCH.

He commented that this meeting is a meeting of experts, as expressed in the invitation letter from the Secretary General and therefore he proposed that the title of the provisional list of experts should be changed so as not to read the "Special Commission on General Affairs and Policy".

The Secretary General agreed that this was quite right, and that the final version would have the correct title.

An expert from China considered the approaches to facilitate the practical admission of the European Community and stressed that consensus is very important. He noted that according to international law if there is not consensus some States may think that they do not need to be bound and do not need to accept the European Community as a member, which would make things very difficult in practice.

The expert stated that in China parliamentary approval would not be needed but that for the benefit of those States with constitutional difficulties regarding amending the Statute, giving sufficient time is very important. He encouraged States to act quickly and stated that China is flexible and would welcome a period of six or 12 months.

The Chair reiterated that experts who attended the Special Commission Meeting on General Affairs and Policy know that today's meeting is not a meeting of the Special Commission on General Affairs and Policy. This group is in a position to change the recommendations made by the Special Commission; all it could do is to prepare the work to propose an easier way to deal with the subject for the Diplomatic Session in June.

The Chair proposed that discussion should focus on the idea of the time frame of 12 months, working on the presumption that the text will be agreed in June.

An expert from Spain stated that he was not comfortable with the fact that he had come with one idea, which he was willing to sacrifice if it proved difficult, but he thought it was easier and more coherent to consider Article 12 as being coherent with treaty law. He expressed the opinion that it might ease the whole process if we could go to the Diplomatic Session in June with a proposal for a two-stage process from the Secretary General stating that the amendments will be passed by a two-thirds majority and then that the amendments will enter into force the next day. The expert acknowledged that the meeting is now discussing something different but felt it was very important to mention this point. He noted that Article 12 is flexible and that experts should find something which is clear from a juridical perspective. He suggested experts should work on the proposals as suggested.

The Chair agreed with the expert from Spain and stated that she was also unhappy with the situation. However, we have to find a way out of this situation. She acknowledged that the expert from Spain's interpretation of Article 12 is the clearest and most simple but stated that we have to find solutions and many experts have clearly stated that they have problems with this interpretation. We are having to go through this construction of

the two-stage process, which is maybe not very clear from a juridical perspective but at least it helps us to get to where we need to be.

The Chair suggested returning to the proposal for a 12-month period. As a starting point she suggested taking a six-month period until the end of 2005 for the votes and then a further six-month period before the entry into force. She noted that this suggestion would be difficult from some States notably South Africa as its parliament will not be able to sit during that period. However, she expressed the hope that this period would be enough to attain the two-thirds majority, and then perhaps we can have something like a theoretical consensus from South Africa. This would mean we could finish the process by June 2006. If there are difficulties and the two-thirds majority is not reached by the end of December or there are concerns arising, then this can be addressed at the Special Commission on General Affairs and Policy in the Spring of 2006. The Chair asked for comments on whether this might be an appropriate course of action.

An expert from Austria requested some clarification on what would happen to States which have not connected in this time? Would the second six months run after the vote of that particular State or would it run from the end of December?

The Chair clarified that the end of the year is not a closed date and consent could certainly be given afterwards. In that case the entry into force would be still at the end of June even if the consent was only given in the early part of 2006. She stressed that it is important to have a clear date for the entry into force. She suggested that experts put to one side the question of what happens if a State is not willing to consent.

The Secretary General expressed the view that there seems to be agreement that if the two-thirds majority is not achieved by the end of December 2005 then this period will run on, and the six months will run from the date when the two-thirds majority is achieved. If by the time of the Special Commission on General Affairs and Policy the majority has still not been achieved we would have to make further considerations.

An expert from South Africa reminded experts that States want to amend the Statute to allow the admission of the European Community. He stated that in Africa at the moment, only South Africa, Morocco and Egypt are Member States of HCCH. He stated that when South Africa participates at meetings it always consults with other African States and that before coming to this meeting a draft text had been given to the Southern African Development Community (SADC) to get their views. When we joined HCCH we did so without their agreements, however now we would want them to be on board. The expert questioned what we would lose if we did not wait for the full 12-month period. He noted that it is not only the view of South Africa, but also the whole African Continent that if we have consensus earlier we should not jeopardise this by waiting for the full 12 months.

An expert from Canada noted the difficulty in accommodating everyone's views. She acknowledged the importance of including other States who may want to join in, and stated that if the first stage is too short then we put this at risk. On the other hand, she noted that we do not want to extend the whole process any longer than is absolutely necessary. She suggested making the first period 8 months in order to accommodate more States, which would make the second period 4 months. She felt that Canada would be able to accommodate these time periods and asked if this would be a problem for other States.

An expert from Portugal wondered why we could not just have one period of 12 months running from the Diplomatic Session in June, without needing to split it into stages.

The Chair stated that she thought the idea was that the vote-casting question was open ended.

The Secretary General noted that a desire had been expressed to have a clear date for the entry into force of the amendments.

The Chair stated that the question would then be in which time period States are casting their votes.

An expert from Portugal stated that the adoption of the amendments should be done in June on a consensual basis, then the next period is the consensus to be bound by casting the vote. He stated that we need a two-thirds majority and we are talking about in which time period this should be reached but noted that this would not be binding, it would merely be a recommendation. He added that perhaps a period longer than six months would be helpful to have all the States on board. The experts suggested that a split of six months and six months would be reasonable.

The Chair reminded experts that eight months and four months had been suggested and asked if this could be envisaged?

An expert from New Zealand stated that particularly this year this would be perhaps too short as New Zealand has elections in September. She suggested splitting the time into nine months and then three months.

An expert from South Africa supported this suggestion.

A representative from the European Community (Commission) noted that a nine-month period followed by three months for the entry into force would provide a good occasion to celebrate at the next Special Commission on General Affairs and Policy. He suggested the Secretary General would then be able to draw up the *procès-verbal* to distribute at that meeting and stated that this would be a good compromise.

An expert from Portugal stated that Portugal could agree to a nine month and three month period and suggested that it could be recommended that the amendments enter into force in June 2006 if two-thirds majority have expressed their consent to be bound. He felt that this would be a simpler procedure without having to split the time.

An expert from the Netherlands noted that this meeting is just making a recommendation which does not even need to be written. It is an understanding which could be made known to all that we would like to receive votes by the end of 2005. Some States will have a difficulty with this but it is not a legally binding recommendation so this is not a problem.

An expert from Canada reminded experts that we have identified that inclusiveness and consensus on this amending process is important and we have agreed that it is not a binding time period. If we were to agree that the *procès-verbal* could be sent out as soon as a two-thirds majority is reached then we are defeating our object of seeking consensus. She expressed the view that the time period is to agree the earliest date that the Secretary General could send out the *procès-verbal*. This could be three months from the date of the *procès-verbal* assuming it is sent out on 31 March 2006. To say this is not binding but it is helpful for us to outline this process.

An expert from the United Kingdom wished to echo that it is important that we use the full nine months. Hopefully then we could come to the next Special Commission on General Affairs and Policy and have something to celebrate, and hopefully there would be unanimity. A recommendation like this may not be legally binding but if we agree by consensus then there is a moral guideline that we should seek to work within. It is not unimportant to have time frames if these are agreed and we should be confident that people would respect these.

An expert from Spain agreed with the United Kingdom that it would be good to have some time frame.

An expert from Argentina asked for a clear procedure to be written down in order to be able to communicate it to authorities in States, even though it is not binding.

The Chair recognised that there seemed to be consensus for a nine month and a three months period and that therefore the suggestion of “X” months from the representative from the European Community could now be defined.

An expert from Portugal stated that all States want the European Community to become a member of HCCH as soon as possible and he wished to support the suggestion from Argentina. He noted that Article 13 provides for some revisions of the Statute by Regulations and suggested that this could be a good way to write down and distribute this procedure.

The Chair sought clarification from the expert from Portugal as to whether he was referring to changes in the future.

An expert from Portugal replied that if Argentina would like a formal paper now, then this might be a good manner to produce such a paper.

The Secretary General noted that there is consensus on the table that the recommendation on how to act now, on the basis of the current Article 12 should appear on paper. The question of a possible amendment to Article 12 had been put aside for the time being.

A representative from the European Community (Commission) stated that there are two issues. Firstly, that we wish to reach consensus at the Diplomatic Session in June. Secondly, that the Permanent Bureau, on the basis of what was decided at the Special Commission, should draft a recommendation to the Diplomatic Session proposing that they adopt the draft text. This would say that the annex text is submitted for approval and that votes should be communicated within nine months etc. At the meeting we could therefore concentrate on the substance of the Statute not any more on the process, unless of course there are still things to be changed.

An expert from Argentina suggested that it might be interesting to have a reflection on the two-step debate, as this has certain ramifications. We could suggest a decision to deal first with the European Community accession and then later decide upon modification of Article 12. She noted that clear reflection on this in the minutes of this meeting was needed.

The Secretary General reassured experts that there will be a verbatim report of today’s meeting and a conclusion which comes close to what the European Community had suggested.

An expert from Argentina clarified that we have a two-stage process. Firstly how to deal with the accession of the European Community, and secondly when to deal with Article 12 and the modification to the Statute. The expert wanted to clarify that this should be clearly reflected in the minutes of the meeting.

The Chair asked experts if they could agree to a period of nine months and then three months for the acceptance of the European Community.

[Aucune objection n’est exprimée. / There were no objections.]

The Chair then drew attention to the question of what would happen to a Member State which would not be in a position to accept the amendments in the nine months? She hoped that this was a theoretical issue and suggested that experts should not waste time on this aspect today. She proposed leaving this for the Special Commission on General Affairs and Policy if the situation arises.

Un expert du Canada note qu'en terme de processus concernant l'article 12, il serait prudent d'ajouter au Statut une question qui permettrait à la Conférence de résoudre ces difficultés.

The Chair agreed that there is a problem concerning future amendments, but stated that we would not find a solution now in case we do not have problems.

The Secretary General reminded experts that the drafters of the Statute delegated agreements to a two-thirds majority which would bind the other States. This was in conformity with international treaty law and the *Vienna Convention on the Law of Treaties*, and it was the authentic interpretation of Article 12.

The Chair noted that therefore there is an assumption that we would invite that State to quit, but now is not the moment to talk about it. Before returning to Article 12 the Chair stated that she would like to look at Recommendation 6, which is linked to the question concerning amendment of the Statute and the acceptance of the European Community as a member of HCCH. She asked experts if they saw any specific problems, taking into account the nine months process, that this vote could also include the acceptance of the European Community.

An expert from Canada explained that the Canadian difficulty with this proposition is perhaps considered by some as a technical legal solution. She noted that there is no Statute that permits the European Community to join. Until the amended Statute enters into force, States are not in a position to vote on the admission at the same time.

An expert from Spain stated that he did not like the idea that there was some kind of link. He agreed that States cannot vote on something until the Statute is amended.

An expert from South Africa agreed that it is better if the European Community could follow the procedure laid down for any other REIO.

An expert from Mexico expressed a similar legal / technical problem in Mexico, and stated he would be happy to find a way out, maybe through a two-stage procedure.

An expert from the Netherlands stated that the procedure for admitting a REIO is laid down in proposed Article 2A, which says a REIO is admitted by a majority of the votes case. If we have nine months then hopefully we would have consensus, then although the amendment would not have entered into force, we would be anticipating the entry into force.

An expert from Austria stated that under Article 2A accession is decided upon by the majority of the Member States so we do not need all States to cast votes, those States which do not have these internal problems like Mexico and Canada could cast their votes first.

The Secretary General noted that on reflection Recommendation 6 is not satisfactory. He agreed with the Netherlands that there is no choice but to follow the procedure which will be the procedure once the Statute is amended. At the extreme we would have to wait until 30 June 2006 before we can convene a meeting to vote on the European Community. He noted that this should not be a problem as this has been discussed over and over. The question is if we could take a conditional decision in April 2006 if we know that it is likely that the entry into force will be 30 June 2006. He stated that he saw some reservations, but that legally speaking this should not be a problem.

A representative from the European Community (Commission) stated that he was not convinced that consent could not be given in a conditional way as this happens daily in the Community. There have been occasions in the European Community when some acts were adopted based on a treaty that was not in force that we were sure would enter into force. Here it is not so hard. It is strange that in fact you should go to a meeting to decide by a simple majority of Member States present much less than the two-thirds which are required to change the Statute. It would seem strange that we cannot accept in a provisional way by a two-thirds majority through this written procedure.

He stated that it might still be possible to say yes to the amendments to the Statute and yes to entry into force of the accession of the European Community. Maybe we should reflect on this. If not, another possibility would be to try to make a vote when the Statute has been adopted but not yet in force. He expressed the opinion that we should still allow ourselves some flexibility.

An expert from the Netherlands stated that he favoured a lot of flexibility, and that it was important to stick to the idea of consensus. He suggested a preference to alter Recommendation 6 to separate the two processes, amending the Statute and the admission of the European Community.

The Chair recognised that there was no support to retain Recommendation 6 as it was. She suggested that as a starting point we could consider splitting these two procedures.

She noted that Article 2A from the moment it enters into force is the starting point. Maybe we can envisage a conditional agreement before the Statute is amended. She recognised that there were also some views expressed that this would not be good for some. She questioned if the three-month period would help. She noted that an advantage would be that Ambassadors could be sent and it could be a formality, this would be the most simple and most clean way to do it. She opened the floor for comments.

An expert from the United Kingdom stated that three months are not gained, as the entry of the EC cannot occur before the changes to the Statute. It makes no difference at all it is just about whether we have a meeting of Ambassadors here or not. He stated that he could see no reason to behave in a way that could be construed as illegal, despite any precedents of this type in the European Community. There is no reason to do this.

The Chair asked representatives of the European Community if they were capable of preparing their acceptance of the Statute within three months.

A representative from the European Community (Commission) was confident that they could be ready as they do not have just three months but will ask the Council earlier on the condition that the amendments are made, this means that anything can be done earlier.

He stated that he would like to have included in the draft conclusions of the Diplomatic Session that a Special Commission with the purpose of voting or deciding on the demand of the European Community would be convened in the months following the entry into force of the Statute. It would be easy to convoke a meeting like this one where the Ambassadors can come. It would be good to write down that there will be this meeting.

An expert from Canada stated that she was entirely comfortable with the proposition to wait till the amendments were in force before voting on the European Community. She added that it would be reasonable for the Secretary General to convene a meeting straight afterwards to do this. She thought it would be for the Special Commission on General Affairs and Policy of 2006 to make the decision that this meeting be convened. It is not for the meeting in June to make this decision.

An expert from the United States agreed with the previous speakers on this issue for the reasons put forward by the United Kingdom. He stressed that there is no need to create any legal ambiguity. At the same time he was open and supportive to the idea of having a vote scheduled soon thereafter and of using diplomatic representatives already in The Hague seemed sensible.

The Chair noted that there was almost consensus on the idea to wait until the amended Statute has entered into force and then to apply a fast track procedure for a meeting of the Special Commission on General Affairs and Policy in order to accept the membership of the European Community and to keep in mind that this Special Commission on General

Affairs and Policy may be composed of diplomatic representatives here in The Hague for convenience.

The Chair noted that there had also been a proposal from the European Community that the Secretary General put in writing that this Special Commission will be called. We have also heard another speaker say that we might wait and let the Special Commission on General Affairs and Policy put this forward in Spring 2006.

A representative from the European Community (Commission) expressed his preference for putting this forward in June 2005 but noted that if necessary it could be said at the Special Commission in 2006.

An expert from Canada noted that it is not for the Commission in June to say that the Special Commission on General Affairs and Policy will make a decision. The amendments will not exist at that time nor the certainty that they have been voted in so it seems unusual for us to bind ourselves.

An expert from the United Kingdom agreed with the European Community that we could have an agreement now that if the amendments are carried then we would have an agreement committing us to a meeting shortly afterwards, maybe within a month, etc. This is not taking a vote on something. The procedure will of course fall away if the amendments have not been made. He questioned the usefulness of having another decision again in April 2006.

An expert from Spain stated that we are working on the presumption that it will take place. If we make this reference it will be more complete and it will be a clearer picture. It will take the meaning that nothing is definite but it gives us a structure.

The Chair stated that she would have had big difficulties with following Recommendation 6 for legal reasons but that she has no problems with following the proposal of the European Community.

An expert from Mexico asked if this would be included as part of Recommendation 6?

The Chair stated that they would have to reflect on this. It needs to be put clearly for the Diplomatic Session in June. They must wait for the amended Statute to come into force. How the recommendation is phrased or the idea of seeing a new Special Commission on General Affairs and Policy coming quickly afterwards could be communicated to the Diplomatic Session.

An expert from New Zealand asked for clarification as to whether this was something experts would be given today or whether the language would come between now and June.

The Chair stated that something could be drafted during the lunch break.

The Chair proposed that discussions return to the idea of what happens to a State that does not accept the amended Statute. She noted there has been a very quick exchange of views on this around the table. Only very few have given their views on this point.

An expert from the United Kingdom stated that he thought the Chair had ruled that it would be better to discuss this issue next April and that there was consensus to do this. He expressed that it is a hypothetical point and did not think it needed to be considered now.

An expert from Portugal noted that it is a hypothetical case so he did not think that it needed to be discussed at this meeting.

The Chair agreed with these points and turned to Article 12.

An expert from Portugal referred to the Japanese proposal. He stated that it is clear on the adoption, the entry into force and the consent. He noted that to adopt new obligations unanimity would be needed. He stated that in principle Portugal could agree with this proposal to divide the situation where there are new obligations and where there are no obligations to the State.

The text of the amendment would be adopted by two-thirds of Member States present and voting, then the entry into force would need unanimity by all Member States if new obligations would be imposed upon a State, but only by two-thirds of States if no new obligations were at stake. In this latter case it would still bind every State.

An expert from Japan stated that Japan is collaborating with the United States and probably at the beginning of the afternoon would distribute our joint proposal, which has some amendments. He suggested therefore to adjourn this meeting and wait for the proposal.

An expert from South Africa asked if the new proposal could be circulated before lunch so that experts could study it in the break.

An expert from Japan stated that it could be distributed in 5 to 10 minutes.

[Après distribution de la proposition, la réunion est suspendue pour le déjeuner. / The meeting was adjourned for lunch once the proposal was distributed.]

The Chair proposed working through the draft text from the Permanent Bureau paragraph by paragraph.

An expert from New Zealand noted a drafting comment on the English version of paragraph 4 stating that the comma after the word “Member States” should be deleted.

An expert from Portugal suggested substituting the word “adopted” in paragraph 4 for “accepted”. That would mean States have already done their internal procedures and have consented to be bound. It would imply more than only the consent to their agreements to the text but also their agreement to be bound. In the Vienna Convention the word “adoption” refers to the text not the agreement to be bound.

The Secretary General asked if the language of the treaty could be used and suggested the word “approved”.

An expert from Portugal agreed.

The Chair noted that therefore the French version would read “*approuvés*”.

An expert from Canada noted that the tone of the earlier paragraphs was less certain, and that paragraph 6 said that the “experts agreed”. She stated that in effect this meeting has no authority to make a change, and therefore wanted to soften or nuance the language a little. She suggested, “the experts felt that …”.

The Deputy Secretary General offered the word, “suggested”.

An expert from Canada offered; “in the light of legal difficulties the experts suggested”.

The Chair wondered whether it was necessary to reflect the discussion or whether it could start with “With regard to Recommendation 6 concerning … the experts suggested the following;”.

An expert from the United Kingdom agreed that it must be clear that this is in place of the existing recommendation 6. He stated that he was not unhappy with the word

"suggested" but stressed that it was necessary to keep clear that this is instead of Recommendation 6.

The Chair suggested keeping the words "instead of".

The Deputy Secretary General suggested "with regard to Recommendation 6 the experts suggested that the following would follow more closely the amended procedures".

A representative from the European Community (Commission) suggested replacing Recommendation 6 and adding "the following".

The Chair stated that she preferred to keep the reference to Recommendation 6.

An expert from the United Kingdom suggested **"**Instead of Recommendation 6 the experts suggested….".

An expert from Canada agreed with this proposal as it kept the idea that this was to replace Recommendation 6.

The Chair summarised that the "instead" would be retained and that "suggested" would take the place of "agreed".

An expert from South Africa stated that this was a meeting of experts which may not meet again. Therefore whatever this group suggests may not be the understanding of the Special Commission. He proposed that the second paragraph instead of saying "it was understood" could say "it was considered".

The Chair suggested adding the phrase "should be convened" before "to decide upon the admission".

An expert from New Zealand suggested this paragraph state that it is contingent on the amendments being decided. It should be conditional. She noted that at the moment it says that it was understood that a meeting would be convened after the entry into force.

An expert from the United Kingdom suggested "shortly after the entry into force of the amendment" is sufficient as there would be no meeting without agreement on the amendment.

A representative from the European Community (Commission) noted that it was not good English to link the two phrases. He suggested that it is not correct to "suggest" that it "was considered". He offered the words, "Instead of Recommendation 6 … the experts considered that …".

The Chair asked if this would also meet the concerns of the expert from South Africa and suggested putting the two phrases together, "the experts suggested that a meeting on General Affairs and Policy to decide upon the admission …should be convened shortly after …".

A representative of the European Community (Commission) wondered whether it was clear enough that this was being suggested to the Diplomatic Session who would take this decision. He stated that he would like to see a draft of the conclusions before the meeting, as it would be very helpful. He noted that everyone expects the Diplomatic Session to decide that a Special Commission on General Affairs and Policy should meet shortly after the amendments enter into force, and that therefore this would be a conclusion of the Diplomatic Session.

He added that it might be good to add a time frame rather than to say "shortly". He suggested perhaps one month or two months.

The Chair informed experts that the Ambassadors usually meet in the first week of July to decide on the budget and that this might be just a few days after the Diplomatic Session.

A representative from the European Community (Commission) stated that it was not necessary to insist on this point.

An expert from the United Kingdom stated that if the timetable goes to plan then the idea to use this meeting of the diplomatic representatives would be a good one. However, if it does not go to plan then there might be difficulties if no one was available for the meeting in the summer. He suggested that experts should trust that the Secretary General would ensure that "shortly" meant "shortly".

The Secretary General reminded experts that there is a common strong desire that this should come into force quickly, and the Permanent Bureau would act according to this work.

The Chair asked for any last comments on this paragraph.

An expert from South Africa stated that he failed to understand what this paragraph wanted to convey. He proposed that it be deleted, or, if not, that perhaps a request could be made to the Special Commission to make an assessment.

The Chair suggested that the wording be changed to "it was suggested" not "it was agreed". She stated that the idea behind this paragraph was that if there were some unexpected difficulty so that the two-thirds majority was not reached, the Special Commission on General Affairs and Policy would be invited to take up the discussions again. She explained that it was a stock-taking for the Special Commission on General Affairs and Policy next Spring. She added that instead of saying it in a negative way it was presented in a positive way.

An expert from South Africa thanked the Chair for her clarification and stated that he did not object to the word "suggested". He asked about the basis of the assessment whether it would be for the Permanent Bureau to submit a paper, or whether the assessment might emanate from general debate.

The Chair stated that it might be oral or written from the Secretary General who would explain the position. She noted that it was not be necessary to fix the form that the Secretary General would use to make this announcement.

An expert from the United States noted that the Chair in her summary had not stated the phrase "for admission of the European Community". He suggested this should remain and if this phrase was deleted it should be deleted the first time not this time.

The Chair agreed to keep the text as it stands with respect to these words on the European Community.

A representative from the European Community (Commission) noted that on reflection, the problem that Canada raised was that this meeting could not decide or recommend anything formally. This meeting cannot change Recommendation 6 as this meeting is not the Special Commission, this meeting can suggest. He noted that the text should be drafted as clearly as possible to show that this meeting is suggesting that the Special Commission do certain things. He proposed that the two last paragraphs could be put into one; "Instead of Recommendation 6 … The experts suggested that the XXth Session would decide: that a meeting …; that the next meeting on General Affairs and Policy in Spring 2006 would assess ...".

The Chair expressed some difficulties with this proposal, as the last paragraph was not linked with Recommendation 6 but referred to the whole exercise. She felt it was wise to

keep the two separate but acknowledged that stringent language could be used to ensure that it is clear that this meeting is “suggesting” and that it will be the Diplomatic Session who will make recommendations.

An expert from Canada noted that if the last paragraph is changed to “suggested” the word “would” should be deleted to simply say, “assess”.

An expert from Argentina stressed that the word “application” in the first paragraph was not enough.

The Secretary General attempted to clarify the situation by saying that it was agreed that the issue put on the table by Japan concerned future amendments. The whole discussion so far had been about how to apply the existing Article 12 to the admission of the European Community.

An expert from Argentina agreed but thought “application” was not a good word to explain what had happened with Article 12. She suggested using the word “existing” to clarify what is being dealt with.

An expert from the United Kingdom stated that he had no difficulty with the current language but suggested that to help Argentina if necessary perhaps it could say “to the process of amending the Statute” instead of referring to the “application of Article 12”.

An expert from Spain agreed with the expert from the United Kingdom as he felt that using the term “existing Article” was a bit redundant.

An expert from Argentina asked the expert from the United Kingdom to repeat his proposal.

An expert from the United Kingdom reiterated that he had suggested replacing “application of Article 12” with “process of amending the Statute”.

The Chair suggested “The meeting of experts unanimously agreed that the practical approach to amending the current Statute once the XXth Session has finalised the amendments to the Statute, was both necessary and possible.”

An expert from the United Kingdom questioned why it was necessary to use the word “current”.

The Deputy Secretary General suggested that “amending” was sufficient.

The Chair reiterated “practical approach for amending the Statute”.

An expert from the United Kingdom stated that he had said process “of” not process “for”.

The Chair agreed that this was fine. She stated that she had heard no opposition concerning the suggestions of the European Community to have more elaborate language for amending paragraph 6.

An expert from Canada stated that it should be the Commission that decides if it should decide. She stated that she was content to leave the text as amended at this point.

The Secretary General stated that the Deputy Secretary General had a suggestion that might satisfy everyone.

The Deputy Secretary General suggested adding a sentence to the first paragraph to read, “they made the following suggestions with regard to the decisions to be taken by the XXth Session”.

The Chair asked if concerning paragraph 6 the meeting would like to stick to the wording before the European Community's proposal?

[Aucune autre observation n'est exprimée. / There were no further comments.]

The Chair suggested turning to the Japanese / United States proposal concerning Article 12 and gave the floor to Japan and the United States.

An expert from Japan explained that Japan had submitted a proposal to the Special Commission on General Affairs and Policy. He noted that the main point of the proposal was to protect the abuse of the two-thirds majority rule. The present text of Article 12 says only that two-thirds majority can amend the Statute. He suggested it carried a risk that the amendment inflicted certain obligations upon Member States. He stated that Japan thought this would not be appropriate for future amendments. He noted that this article has a long history. He said that Member States used to be almost identical to the present European Community, but including Japan, and at that time it was not hard to make decisions by a two-thirds majority of these intimate nations. Now HCCH is more global and needs a clearer well thought out amendment provision.

He noted that the first point of the proposal was to avoid abuse of the two-thirds majority power. Secondly, new obligations, which often require parliamentary approval, should be avoided as much as possible. Thirdly, a new proposal added today was to clarify when the amended Statute would come into force. The original Japanese proposal had some support and some disagreement, so Japan had reconsidered the proposal and was pleased that it had been joined by the United States.

He explained that the first paragraph includes the situation where the amendments include no new obligations or are imposed by consensus, so no opposition was met during the negotiation phase. In that case it should be approved by a two-thirds majority as it is now. The entry into force should be qualified as discussed. The idea behind the second paragraph is where there are new obligations for members and there is no consensus so some States are unhappy. In that case, the entry into force is subject to the way suggested. This is along identical lines to the FAO Constitution. There is a possibility that there will be two Statutes for HCCH if this proposal is followed. However, he stated that he hoped the threat of two instruments would deter us from actually having two instruments.

An expert from the United States stated that he did not have much to add to the thorough explanation given by the expert from Japan. As background he stated that they were trying to find language, which was a compromise or blend between amendments decided by two-thirds of the Member States being imposed upon the rest and the concerns that some States would not want this. Looking at the FAO model the proposal means that amendments not accepted by a State do not apply to that State. He noted that he wanted to avoid having different Statutes for different States so it had been written it in a way to avoid this kind of situation. He stated that paragraph 1 is a streamlined approach where there is consensus. The second paragraph is an opt-out for other situations.

The expert from the United States recognised that there were some issues. He acknowledged that "new obligations" was undefined. He stated that this meeting cannot solve this issue but suggested that if there were a debate then that would place us in the second paragraph scenario anyway.

An expert from Portugal welcomed the proposal because as stated before Article 12 needs to be very clear on the procedures for the entry into force of the amendments. He also welcomed the distinction between new obligations and none obligations. He suggested that this distinction could be regulated by Article 13. He also noted that paragraph two opens the way for two different texts or Statutes. He stated that it would not be good to allow a system that binds some members and not others at the same

time. He stated that he would like the different steps on entry into force to be stated even more clearly.

An expert from Spain referred to the previous point and stated that he was not too happy with having this new proposal and particularly the short period of time that they have had to consider it. Prior to this meeting experts were supposed to discuss a previous Japanese proposal on which Spain had some comments. Now there is a new proposal, which Spain will study carefully but it is too soon to comment now. He stated that he felt obliged to say that at this stage consensus on this was not possible. He noted that the Kingdom of Spain would like to reserve its position on this point, though he expressed appreciation for the efforts made.

An expert from Canada expressed gratitude to the delegations of Japan and the United States for this proposal. She stated that it advances discussions quite a bit. She noted that the discussions this morning had shown gaps in Article 12. She felt that this proposal goes quite far and is quite clear. She agreed that it is useful to separate different categories of amendments to the Statute and stated that experts may want to think in more detail of how States indicate their consent. The coming into effect of the amendments is quite clear.

The expert from Canada noted that paragraphs 1 and 2 refer to “Members” and perhaps they intended to use the terminology in the draft proposal for amendment prepared by the Permanent Bureau which refers to “Member States”. If that is the case in the second line of paragraph one it would refer to “Member States” and in the fourth line the first use of “member” would be “Member States” then for the entry into force it would be “Members”. Finally the last mention would be “Member States”. A similar approach should be taken to paragraph 2.

She further noted that amendments to the Statute will make amendments to regulations on procedures at meetings applicable to the Special Commission on General Affairs and Policy so it is important to ensure these amendments prevail over the regulation. Canada is favourably disposed in principle and hopes to continue this discussion with Japan and the United States until June. She stated that Canada would like to see this tabled in June.

The Chair stressed that this proposal is different to what this group has been doing. She noted that there is now a very well prepared text for the Diplomatic Session. The question of Article 12 is not yet ripe and she expressed that she had hoped that this meeting could have an in-depth view of where problems might lie and what would be our suggestions to the Diplomatic Session. This is now not realistic, but she stated that she would like to have a little more feeling of where the problems are to deal with them.

An expert from Argentina expressed concern similar to that expressed by Spain. She stated that there is no possibility to reach an agreement now. She stated that probably her capital would like to consider if there is a need to make this amendment. Maybe there is no necessity to amend Article 12. She expressed the view that this had not been made clear.

She further noted that the split produced this morning between the admission of the European Community and the consideration of a possible amendment of Article 12 is not a matter of procedure but a question involving juridical implications. She felt that this reinforced her opinion to avoid unnecessary modification of Article 12. This modification could have serious consequences not just for this meeting but also for other international organisations. This proposal creates a double standard and might disrupt the equality of States in this organisation. She suggested putting this proposal in brackets. She wanted to expressly reserve her position on this. She thanked the experts for their proposal nonetheless and stated that she has no doubt that it will be seriously considered by her capital.

A representative from the European Community (Commission) stated that the aim has been to discuss questions related to amendments to Article 12 and not to finalise something to jointly propose to the Diplomatic Session. He noted that some delegations felt that they should benefit from the opportunity of changing the Statute to clarify the position on changing the Statute. He noted that it was quite clear this morning that the provision was too simple and therefore there were different interpretations.

He added that amending Article 12 is perhaps lower in importance as the next change might not be for 20 years. Nevertheless he noted that in principle two-thirds can currently decide and impose a new Statute on everyone, those who do not want this can leave the organisation. According to Japan and the United States with a small membership this was acceptable, but with many members it might be risky. They do not suggest changing to a different proportion that must decide but that for some special amendments, which are qualified as “new obligations” they must all decide. Now Japan has added something softer to what was proposed during the Special Commission. This new addition carries the idea that it is better to allow changes even if some are left unlinked rather than to allow one State to block something. The proposal still suggests a two-thirds majority is needed if there is consensus, and if not, then only those in the two-thirds majority or more are linked to the amendment. This is in the FAO model. It is a progress and it would be to go backwards to state a preference for unanimity.

He stated that Japan has come with a proposal on new obligations, but has a strict interpretation of what these are. Some States are interpreting these obligations in a broad sense. He stated that he knew Japan had a narrow view as they said they do not need any parliamentary approval. It is important to be aware of this and have something workable for the Diplomatic Session.

He suggested that rather than asking for qualifications of new obligations, it would be better to talk about financial obligations or other important elements. Perhaps the term “substantive, including financial” could be used so that purely procedural matters are omitted. Alternatively it could be turned around to state that amendments of a purely procedural or institutional nature are not considered as new obligations.

An expert from the United Kingdom welcomed the proposal, and emphasised that it is important to try to achieve consensus in June on amendments to Article 12. He recognised that this would not be easy but stated that it is important to try. He stated that he favoured an amendment along these lines, though he was flexible on the text itself. He accepted the point made by the expert from Canada that “members” should be replaced by “Member States”. He stated that the United Kingdom is very committed to paragraph 1 of the proposal which brings an express reference to consensus as a way of taking things forward, into the Statute. He noted that in the package of proposed amendments consensus is not found in the Statute, but only in the Rules of Procedures. The Expert was of the opinion that if HCCH should work by consensus then it is entirely appropriate to put an express reference to consensus in the provision on changing the Statute.

He then discussed paragraph 2 which covers the situation where there is no consensus and States who do not agree would not be not bound by the majority, but would carry on applying the old Statute. He stated that his understanding is that this position should never arise as consensus will always be sought which is, in principle, a strong incentive to work towards consensus. The only protection of consensus in the package of new proposals is in the Rule of Procedure which can be overridden. The United Kingdom thinks it is important to introduce this principle into the amendment process for the Statute itself and to only keep paragraph 2 in extreme cases. He recognised that this is unsatisfactory but suggested that in a sense it is the kind of deterrent that is needed to avoid the abuse of the two-thirds power. It is for this reason that the United Kingdom supports this proposal and hopes that there will be consensus on something like this in June.

The Chair expressed concern firstly on the question of whether changes to Article 12 are necessary, and if so, on what basis given that there is little time. She acknowledged that there have been deep discussions on proceedings as Article 12 is not "fleshed out" enough, it is a very simple Article.

The Chair expressed the opinion that a suggestion has been made and it might be possible to reach the goal on this subject. She noted that at this stage it is hard to envisage another change to the Statute in the near future. She stated that she was anxious to avoid relating these problems to the admission of the European Community. She recognised that the question of the misuse by the two-thirds majority who could impose their decisions on those not in agreement was a heavy consequence but that the proposal might also lead to a misuse by one State, if that State is not in agreement. The proposed Article 12, paragraph 2 in the Japanese / United States proposal foresees a two-stage procedure where the old Statute would remain for this State and the rest of the States would take the new Statute. It may be impossible as it means a small State could block all that the rest want to do.

An expert from New Zealand welcomed this proposal. She stated that from the comments this morning it is clear that many think that Article 12 is not adequate and would want to see more detail in the Article if possible. One option for the meeting in June might be that a process for approval and entry into force is spelled out in Article 12 but a substantive change such as this is left for a longer-term discussion. She expressed the opinion that the procedure is not clear in Article 12 and that she would like to see it addressed. The approach in this proposal to distinguish between two different kinds of situations is quite common and deserves further consideration. She felt that the distinction of "new obligations" was not the only way, but that it could be expressed in terms of the kind of obligations, such as those amendments which are substantive, and those which are more administrative. She underlined that she was open to a discussion of the options. She stated that she appreciated the problem raised by Portugal and the United Kingdom that paragraph 2 could lead to having two Statutes applying. She noted that the bigger HCCH becomes the more of an issue this becomes and stated that she felt it was necessary to have a provision along the lines of paragraph 2.

An expert from Austria stated that he was also open on this issue. He wondered whether it was necessary to amend Article 12. He stated that he was also open to clarifications regarding what constituted the "misuse" which has been raised. He wondered if these were merely ideas or if there were concrete examples. He noted that there is a difference between the question of universality on one side and unity but non-universality on the other. He favoured having more States in HCCH even if this led to different Statutes, though not if too many, but he thought universality was better than unity.

He noted that there is also the question that if approval of every State is demanded, one State could block things if that State's authorities for some reason were not functioning, though they might not intend to block anything.

An expert from the Netherlands noted that Article 12 was not the best example of a provision on amendment to a Statute of international organisation. However, he felt that this did not mean it needed to be changed. He stressed that there have been intensive discussions in the informal advisory group twice and last year in April at the Special Commission on General Affairs and Policy and that there had been consensus to just discuss amendments to the Statute necessary to allow the admission of the European Community, and additionally only amendments to the Statute to reflect where practice has moved further.

He noted that during discussions the Statute was looked at extensively and that many were surprised to see some of the provisions in our Statute. It is indeed full of surprises, it is not "fleshy" and Article 12 is not very substantive. It has the charm of simplicity to put it positively. He noted that he would favour keeping amendments to those necessary

for the admission of the European Community and secondly those where there is consensus that amendments are necessary for reasons of practice.

He referred to the comments of the expert from Austria concerning how to apply Article 12 and its implementation. He noted that he was quite happy with the discussions this morning. He pointed out that if it is possible to deal with such an issue as the admission of the European Community under the current Article12 then perhaps it is not necessary to change too much. He stated that he could not foresee any similar changes of such substance.

An expert from Portugal noted that this process is of course to allow the European Community to become a member of HCCH. As he sees it, it could also provide an opportunity to amend an Article which is not clear. That is why everyone is here. He suggested that experts could also take this opportunity to consider what happens when a State does not give its consent to be bound.

An expert from the United Kingdom agreed with the expert from the Netherlands. He stated that he had had the opportunity to participate in the advisory group and agreed that the group had decided to restrict itself with what was necessary to bring the Statute up to date with current practice.

He stated that he also agreed with the expert from Portugal that this group did not foresee, though it has since become clear, that Article 12 has some issues. States disagree on the consequences of a failure to apply Article 12. The Secretary General is of the opinion that it is clear and binds States, but this is not clear to all States. The Netherlands holds the view that the *travaux préparatoire* are indicative but this is not clear. The *travaux préparatoire* do not suggest the position of what happens to States who do not agree. As a matter of law it is not clear and therefore it is necessary to amend Article 12. He noted that all States are required to be flexible to reach consensus by June. If it is clear in June that there is no consensus then it may be necessary to do something else however he felt at this stage it was important to still seek to arrive at consensus. He stated that the advantage of the new proposal was that it gives an answer, but it is not the answer that the Secretary General sees in the current Article 12.

He stated that he agreed with the reasons stated by Austria that inclusive is more important than unity. He encouraged States to make effort between now and June to try to build consensus starting with the Japanese / United States' proposal, subject to constructive amendments. He added that this was not just a theoretical problem, as States may want to change direction.

The Chair agreed that it is important to try to find something. She also noted that from a practical perspective she would be questioned when she arrived home as to what is a "new obligation". Would this include the admission of the EC? Probably or maybe not, as the principle of non-additionality is clear. She agreed that the proposal was attractive but expressed the greatest concern for its practicability.

An expert from Serbia and Montenegro stated that this proposal underlines the difference between amendments to the present Statute and the question of what is a "new obligation". The main reason for discussion is the admission of the European Community to HCCH and the discussion concerning non-additionality and other such things. He stated that he felt the proposal of Japan and the United States did not clarify that concern exactly. The proposal tried to keep the principle of a two-thirds majority in voting and this he stated that this was a good step for trying to find a principle of unity and universality. However, he noted that all international organisations are kind of international forums where States can discuss in common interest different topics. HCCH as a legislative organisation in a certain field is a specific organisation but with the same goal as an international forum. He stated that the work today concerned changing Article 12, which reminded him of a proverb "a rolling stone gathers no moss". He felt that the proposal was a good effort but at this time he saw no necessity for changing Article 12.

An expert from the European Community (Commission) stated that Article 12 has nothing to do with the admission of the European Community. If there is agreement to change the Statute to admit the European Community it does not mean that there is an obligation to change Article 12. There is merely an invited to change Article 12 but this has nothing to do with the changes being made now. On the one hand, consensus should be sought to change Article 12. If there is no consensus then it should be abandoned for this purpose and could be reopened at an appropriate moment. It is important not to take the decision on welcoming the European Community into HCCH hostage to these discussions on Article 12.

There is a change to Article 12 proposed in the draft by the Permanent Bureau, which is to change "Member" to "Member States" to make clear that any future REIO in the organisation will not be able to vote on changes to the Statute in the future. This is probably the only *necessary* change. Any other change is a plus but if it cannot be agreed it is important to make sure that it does not block the admission of the European Community.

An expert from Portugal stated that in case there would not be a consensus on Article 12, the other issues, mainly the admission of the European Community, should not become a "hostage". As to the definition of the words "new obligations", he proposed to make a regulation under Article 13.

The Chair stated that it might not be appropriate to define "new obligations" in a regulation. She thought that instead of defining these words, they could refer to a list of topics such as the aim of HCCH, for which the proposed Article 12(2) would apply. While a solution might be found on this particular issue, she expressed concern with respect to the question of whether an amendment adopted by a two-thirds majority may be binding on all.

An expert from South Africa stated that he had worked on the Japanese and United States proposal during lunch. With respect to the issue of whether Article 12 needed to be changed, he indicated that his State was not a founding State, so they had not had the opportunity to make any reservation at the time of the ratification. He thought that the admission of the European Community was a good opportunity to improve the Statute, in particular Article 12. However, many questions might arise, such as what is a new obligation. The Expert from New Zealand referred to "substantive issues" but he noted that during a meeting at the OPCW they had had huge difficulties in determining the boundary between "substantial issues" and "technical issues". He emphasised that the process to amend the Statute should be inclusive.

An expert from the United States noted that there were different reactions to their proposal to amend Article 12. There was a strong feeling that the Statute could be improved. However, there were difficulties as to the definition of "new obligations". He summed up the suggestions: 1) they could try to find a definition of these words, but it seemed difficult especially in such a short time period. 2) They could include something in a regulation by categorising; to this end, they could look at the FAO Constitution as it had experience with this issue. 3) Instead of using the words "new obligations" as criteria, they could make a distinction between proposed amendments emerged from consensus and those that had not emerged from consensus.

A representative of the European Community (Commission) replied that the deletion of the words "new obligations" would be more restrictive as any kind of these amendments would fall into this regime.

An expert from Mexico thought that these proposals were interesting. As most of the provisions in the Statute referred to the Permanent Bureau, meetings, and only Articles 8 and 2 really concerned substance, he proposed that instead of using the words "new obligations" they could refer to the relevant provisions. He added that in Mexico, the adoption of the HCCH Statute did not have to go through a ratification process.

An expert from the United Kingdom was in favour of looking at the core Articles of the Statute in order to refer to them in Article 12. Although he understood the concern expressed by the representative from the European Community, he stated that the crucial point was consensus and felt that a solution may be found.

An expert from Argentina outlined the substance as well as the political aspects of the Japanese and United States proposal. It has to be considered very seriously and with fairness and transparency.

The Secretary General stated that it was true that if Article 12 were to be drawn up today, a more elaborate text would be the result. He commended the Japanese and the United States for their proposal, which was a laudable effort to improve the current text. However, he noted that there are only six or seven weeks before the Diplomatic Session. The Diplomatic Session was a very important one for which two and a half weeks had been foreseen. It needed to focus on the Exclusive Choice of Court Agreements project and had limited time for the amendments to the Statute. Therefore, he emphasised the importance of using the time well. He did not see how 64 States might easily agree in such a short time on this delicate issue. On 1 April 2005 it had been decided that the XXth Session should finalise the amendments but considering the current discussions, he expressed concern that this would be very difficult.

Un expert du Canada regrette que le débat doive être prolongé sur cette question. She stated that Canada was still thinking that it was premature to adopt amendments in June. If a substantive number of States thought that there were amendments that needed to be changed and that no consensus may be achieved by June, then they should decide to wait in order to finalise these amendments properly; if it were decided that these were not major amendments, then they could give them up in June. She emphasised that Canada would be working hard towards a consensus on the amendments.

An expert from the European Community (Commission) pointed out that this whole process was intended to allow the admission of the European Community. It was only because the drafters of the Statute could not foreseen that a REIO could become a Member of HCCH that they used the words “States” in the Statute. It was the only reason why they had to amend the Statute. Without the European Community issue, they would not have had the idea of amending the Statute. He thought that the technical issue relating to the Statute might be fixed by the June meeting. The most important issue was the one raised by the Japanese and United States proposal. This could be solved by June. However, if they were not able to find a solution by June, this would mean that there were opposite views on it and that they would need more time to find a consensus in this respect. However, he wished to emphasise that this amendment was not connected with the European Community admission.

An expert from New Zealand pointed out the lack of time. She thought that there was a need to discuss Article 12, putting aside the issue of the admission of the European Community. This was a broader issue, which needed more work. She suggested having a decision in June over the substance as to how they would proceed.

An expert from the United Kingdom said that he understood the Secretary General’s concern. The Judgment’s project had to be completed in June. However, they could arrange the timetable in order to discuss the core issues, mainly Articles 2A and 12, in parallel. They might need half a day on them. In case there was no consensus on Article 12, they should try to find a way to adopt the other provisions, putting away Article 12. He thought that they had some flexibility. He stated that very few States had difficulties with the proposal from Japan and the United States except on technical issues like “new obligations” which could be overcome.

An expert from Austria stated that they had substantially improved Article 12 during the meeting. He wished that the Japanese and United States experts would explain the words "new obligations" as well as the notion of "misuse" or "abuse" behind this proposal.

An expert form South Africa agreed that this whole process was opened to accommodate the admission of the European Community, on which there were no objections. They were now looking at the core provisions of the Statute and trying to find a consensus on them. He shared the views of the Secretary General. They had set a timeframe and made very good progress. He pointed out that there was still text in brackets that would need to be discussed due to the general will to reach consensus.

The Chair summed up the discussions. The whole exercise concerning the acceptance of the admission of the European Community had shown that there was a deep discontentment with regard to Article 12. She was quite confident that they would manage to go through the amendments and that they could reach a consensus on them. She thought that they had found a good way to proceed on the adoption, approval and entry into force of the amendments relating to the admission of the European Community and other amendments to the Statute. Most of these amendments were rather technical. Two points might be emphasised: first, as to Article 12, the experts had different views and at least agreed to disagree on the interpretation of Article 12. They had found a solution, which gave the opportunity to go on without agreement on Article 12. Secondly, she stated that it should be noted that changing the Statute is not a daily exercise and that it has survived almost 50 years. In this regard she felt it would be unwise to avoid tackling the main difficulty just because States are in a hurry to proceed towards acceptance of the European Community.

Finally, if they looked at the work of the Special Commission and of today's meeting, she felt that there were not so many difficulties. It would be feasible to put into writing what was said during this meeting. The Permanent Bureau may offer a good proposal before the Diplomatic Session. As to Article 12, it seemed necessary to adopt a more precise wording in order to describe the two-thirds rule. They had to find a way to describe this difficult issue. They said that they could either define "new obligations" in a regulation, but this might be difficult, or stick to core Articles, like Articles 8 and 2; or describe the new obligations. There were not so many other possibilities. Six weeks would be short but not impossible.

She pointed out that the main issue to be discussed during the Diplomatic Session is the Judgment's project. There would have two half days at the end of the first week to discuss the amendments to the Statute. One could however exchange views during the week before. After this first round, they would still have the second week to discuss. Hopefully, one would find a consensus. However, nobody wanted to delay the acceptance of the European Community. Therefore, if the discussions on Article 12 were not successful, they would make a partial review of the Statute. The Diplomatic Session could also decide that there is no sense for reiteration of such a work. She thought that there was a slight chance to find a solution. If it were not the case, they would reflect on this again.

The Chair concluded that the Permanent Bureau would make a proposal as regards the procedures for Article 12. The proposal would be sent out and experts invited to reflect thoroughly on it. They may also consider more carefully the Japanese and United States' proposal. She did not think that another meeting prior to the Diplomatic Session would be a good idea.

An expert from Mexico asked whether suggestions from the Member States were expected. The Chair answered that they would be most welcome.

An expert form the European Community (Commission) congratulated the Chair for her conclusions. He asked on which aspects of Article 12, the Permanent Bureau would make a proposal.

The Chair answered that it would only be on the procedural aspects.

The expert from the European Community (Commission) stated that the European Community would meet with all its Member States next week and that they would discuss these issues together. He said that they were at their disposal to work towards achieving consensus.

An expert from Canada congratulated the Chair on her summary of the proceedings. She also noted that Canada was not convinced that there no was no link between the proposed amendments to Article 12 and the admission of the European Community.

An expert from Austria invited the experts from Japan and the United States to clarify their proposal in a paper.

An expert from the United Kingdom also congratulated the Chair. As regards Article 12, he stated that he was in favour of referring to Articles of the Statute or to main issues instead of trying to define "new obligations". Such a solution would be easier to carry out before the June meeting. He expressed his hope that the admission of the European Community will be accepted in June.

The First Secretary (Philippe Lortie) pointed out that for the FAO, the admission of the European Community was not considered as a new obligation. Although this admission constituted new obligations as regards the European Community, there were no "new obligations" for the FAO Members.

The Secretary General asked for confirmation that the experts from Japan and the United States would work further on their proposal.

The expert from the United States answered that they would be happy to reflect on this issue and that they would welcome suggestions from other experts by the end of next week.

The Secretary General emphasised the importance of consultations and that the Permanent Bureau would be happy to assist experts in this consultations process.

The Chairman of the Netherlands Standing Government Committee on Private International Law thanked the Chair for the excellent way in which she had chaired the experts' meeting, for her ability to achieve a practical approach to the process of amending the Statute, and for her clear summary of the debate on the Japanese / United States proposal.

La réunion est levée à 17h45. / The meeting closed at 5.45 p.m.

Conclusions de la Présidente (traduction du Bureau Permanent)

La Présidente résume la discussion. Tout l'exercice autour de l'admission de la Communauté européenne a fait apparaître un profond mécontentement vis-à-vis de l'article 12. Elle a confiance dans le fait que l'on pourra faire aboutir les amendements et qu'un consensus pourra être recueilli à leur sujet. Elle pense qu'une bonne manière de procéder a été trouvée pour l'adoption, l'approbation et l'entrée en vigueur des amendements relatifs à l'admission de la Communauté européenne et aux autres amendements au Statut. La plupart de ces amendements sont assez techniques. Deux points peuvent être soulignés : tout d'abord, concernant l'article 12, les opinions des experts divergent mais ils se sont tout au moins accordés pour ne pas s'accorder sur l'interprétation de l'article 12. Ils ont trouvé une solution donnant l'occasion de poursuivre en l'absence d'accord sur l'article 12. Modifier le Statut, qui a survécu pendant presque 50 ans, n'est pas un exercice quotidien indique-t-elle, et il faut le noter. Elle estime à cet égard qu'il ne serait pas sage d'éviter la difficulté principale pour l'unique

raison que les Etats sont pressés d'avancer vers l'admission de la Communauté européenne.

Enfin, au vu des travaux de la Commission spéciale et de la réunion de ce jour, elle estime que les difficultés ne sont pas si nombreuses. Il serait possible de mettre par écrit ce qui s'est dit pendant la réunion. Le Bureau Permanent pourrait présenter une bonne proposition à la Session diplomatique. Quant à l'article 12, il paraît nécessaire d'adopter une formulation plus précise afin de décrire la règle des deux-tiers. Il faut trouver un moyen de décrire cette question difficile. L'on pourrait soit définir les « obligations nouvelles » dans une règle, mais cela pourrait être difficile ou s'attacher aux articles centraux, comme les articles 8 et 2 ; ou décrire les nouvelles obligations. Il n'y a pas beaucoup d'autres possibilités. Six semaines constitueraient un délai bref mais pas impossible à tenir.

Elle souligne que la question principale à discuter au cours de la Session diplomatique est le Projet relatif aux jugements. Deux jours et demi à la fin de la première semaine seront consacrés à la discussion des amendements au Statut. Les points de vue pourraient toutefois être échangés pendant la semaine précédente. A l'issue de ce premier tour, la deuxième semaine pourrait toujours être utilisée pour discuter. Vraisemblablement, un consensus pourra être trouvé. Personne ne veut toutefois retarder l'admission de la Communauté européenne. Par conséquent, si les discussions relatives à l'article 12 venaient à échouer, une révision partielle du Statut pourrait être effectuée. La Session diplomatique pourrait également décider que la répétition d'un tel travail n'a pas de sens. La Présidente pense qu'il existe une mince chance de trouver une solution. Dans le cas contraire, il faudrait à nouveau réfléchir à cette question.

La Présidente conclut en indiquant que le Bureau Permanent fera une proposition concernant les procédures pour l'article 12. La proposition sera envoyée aux experts, en les invitant à s'y pencher avec attention. Ils pourront également examiner plus attentivement les propositions du Japon et des Etats-Unis d'Amérique. Elle ne pense pas qu'une autre réunion préalable à la Session diplomatique soit une bonne idée.

SUGGESTIONS DE LA RÉUNION D'EXPERTS / SUGGESTIONS MADE BY THE EXPERTS' MEETING

SUGGESTIONS MADE BY THE EXPERTS' MEETING
21 APRIL 2005

The meeting of experts unanimously agreed that a practical approach to the process of amending the Statute, once the XXth Session has finalised the amendments, was both necessary and possible. They made the following suggestions with regard to the decisions to be taken by the XXth Session.

Building on **Recommendation 3** of the Conclusions of the Special Commission on General Affairs and Policy of the Conference of 31 March–1 April 2005, the experts felt that the following procedures would be appropriate:

> Subject to finalisation of the text of the amendments to the Statute by the XXth Session, if possible by consensus, the Secretary General should invite the Member States to cast their votes on the amendments in accordance with Article 12 of the Statute in writing, if possible within a period of nine months following the Session, by notification to the Permanent Bureau.
>
> Once the votes needed to constitute a two-thirds majority have been received, but not before 31 March 2006, the Secretary General will draw up a *procès-verbal* specifying the Member States which have cast their votes and declaring that the amendments have been approved.
>
> The date of the entry into force of the amendments will be the first day of the month following the expiration of three months after the date of the *procès-verbal*.

Instead of **Recommendation 6** concerning the admission of the European Community to the Hague Conference, the experts suggested that a meeting on General Affairs and Policy to decide upon the admission of the European Community in accordance with the amended Statute (Article 2A) should be convened shortly after the entry into force of the amendments.

It was suggested that the next meeting of the Special Commission on General Affairs and Policy in the Spring of 2006 could assess the progress made in respect of the above procedure.

PROPOSITION DU 26 AVRIL 2005 / PROPOSAL OF 26 APRIL 2005

Options for Revised Article 12
26 April 2005

Explanatory comment

The options for amending Article 12 below are an effort to reflect the discussion of the Japan / U.S. proposal during the Meeting of Experts on 21 April 2005, as well as further consultations with Member States and the Permanent Bureau. The effort to revise the original Article 12 was motivated by an effort to clarify the procedures for making amendments, remove ambiguity about the entry into force of amendments, and to avoid a situation where a State was forced to denounce the Statute because an amendment had been adopted over its objection that it could not implement in its national law.

The first option eliminates the distinction in the original proposal made on the basis of "new obligations" in light of concerns about the definition of the term. The second option makes it more difficult to make amendments, but eliminates the possibility of different versions of the Statute applying to different States. It is also possible to reframe these options in terms of authorizing reservations to amendments or requiring consensus for an amendment to come into force, but the proposals below appeared to be the most straightforward way of accomplishing the objectives described above.

Option 1

1. Amendments to the present Statute that are proposed with the consensus support of Member States present at a meeting concerning General Affairs and Policy may be made if they are approved by two-thirds of the Member States. Such amendments shall enter into force for all Members six months after they are approved unless the proposal provides another date.

2. Amendments to the present Statute that are not proposed with the consensus support of Member States present at a meeting concerning General Affairs and Policy, may be made if they are approved by two-thirds of the Member States. Such amendments shall enter into force for each Member approving the amendment six months after their approval by two-thirds of the Member States, unless the proposal provides another date, and thereafter for each remaining Member upon its approval.

Option 2

Amendments to the present Statute may be made if they are proposed with the consensus support of Member States present at a meeting concerning General Affairs and Policy and are approved by two-thirds of the Member States. Such amendments shall enter into force for all Members six months after they are approved unless the proposal provides another date.

PROPOSITION ORIGINALE DE LA DÉLÉGATION DU JAPON (DOC. TRAV. NO 1 DU 31 MARS 2005) / ORIGINAL PROPOSAL BY THE DELEGATION OF JAPAN (WORK. DOC. NO 1 OF 31 MARCH 2005)

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

WORK. DOC. No 1

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

Distribution: 31 March 2005

Proposal of the delegation of Japan

HCCH Statute

Article 12

Amendments to the present Statute may be made if they are approved by two-thirds of the Members. However, if such amendments involve new obligations for Members, they shall be approved without objection of any Member.

Reference

FAO Constitution

Article XX Amendment of Constitution

2. An amendment not involving new obligations for Member Nations or Associate Members shall take effect forthwith, unless the resolution by which it is adopted provides otherwise. Amendments involving new obligations shall take effect for each Member Nation and Associate Member accepting the amendment on acceptance by two-thirds of the Member Nations of the Organization and thereafter for each remaining Member Nation or Associate Member on acceptance by it. As regards an Associate Member, the acceptance of amendments involving new obligations shall be given on its behalf by the Member Nation or authority having responsibility for the international relations of the Associate Member.

UNESCO Constitution

Article XIII Amendments

1. Proposals for amendments to this Constitution shall become effective upon receiving the approval of the General Conference by a two-thirds majority; provided, however, that those amendments which involve fundamental alterations in the aims of the Organization or new obligations for the Member States shall require subsequent acceptance on the part of two-thirds of the Member States before they come into force. The draft texts of proposed amendments shall be communicated by the Director General to the Member States at least six months in advance of their consideration by the General Conference.

HISTORIQUE DE L'ACTUEL ARTICLE 12 : EXTRAIT DES ACTES ET DOCUMENTS DE LA SEPTIEME SESSION, TOME I, 1951, P. 339 / LETTRE DU 26 NOVEMBRE 2004 DE LA DIRECTION DES TRAITES (EN ANGLAIS SEULEMENT)

BACKGROUND TO THE PRESENT ARTICLE 12: EXTRACT FROM ACTES ET DOCUMENTS DE LA SEPTIEME SESSION / PROCEEDINGS OF THE SEVENTH SESSION, TOME I, 1951, P. 339 (TRANSLATION BY THE PERMANENT BUREAU); LETTER OF 26 NOVEMBER 2004 FROM THE DIRECTOR OF TREATIES (IN ENGLISH ONLY)

Extract from *Actes et Documents de la Septième Session / Proceedings of the Seventh Session*, Tome I, 1951, p. 339
(Translation by the Permanent Bureau)

The Chair read out Article 12 (former Article 13):
'Amendments to the present Statute may be made if they are approved by two-thirds of the voting Members.'

Mr Julliot de la Morandière (France) asked whether the modifications could be presented during a Session and during the period between Sessions, and whether in the latter case Member States would be consulted.

The Chair felt it was not necessary to settle this matter in the Statute.

Mr Julliot de la Morandière (France) replied that he understood the Standing Government Committee would be free to consult the Members if a proposal is made to it during the period between Sessions, depending on whether it considers the proposal to be a proper proposal or only a suggestion.

Mr Offerhaus (Netherlands) stated that the practice would be, in the event of doubt, that the Standing Government Committee would adjourn the whole issue to a future Session of the Conference. However, if the issue is one admitted by all States, a vote by written consultation will be held.

Mr Julliot de la Morandière (France) concluded that it is therefore correctly understood that it could be either a vote during a Session or by consultation.

Mr Niboyet (France) suggested changing the expression 'voting Members' to 'Members having expressed an opinion'.

Mr Alten (Norway) proposed removal of the word 'voting' because a modification could be imposed by a minority.

Mr Sauser-Hall (Switzerland) felt that the two-thirds majority should be maintained because a sound majority is needed to modify the Statute.

Mr Dennemark (Sweden) asked if a Member who abstains is considered to be voting.

The Chair replied that in accordance with usual practice in international institutions, abstention is not counted as a vote.

Mr Julliot de la Morandière (France) noted that if a large number of Members abstain, there would be no modification and there would be *statu quo ante* until the next Session.

The Chair proceeded with the vote on the proposal by Mr Alten to remove the word "voting".

The proposal was adopted with fourteen votes (Austria, Belgium, Denmark, France, Finland, Great Britain, Italy, Japan, Luxembourg, Netherlands, Portugal, Norway, Sweden, Switzerland) and one abstention (Germany).

Article 12 is adopted, as follows:

'Amendments to the present Statute may be made if they are approved by two-thirds of the Members.'

Ministerie van
Buitenlandse Zaken

Mr J.H.A. van Loon
Secretary-General of the Hague Conference on
Private International Law
The Hague

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Date	26 November 2004	*Author*	Mr. G. Limburg
Ref.	DJZ/VE-1163/04	*Tel.*	070-3484930
Subject	Statute of the Hague Conference	*Fax*	070-3486000

Dear Mr Van Loon,

Some time ago we discussed the interpretation of Article 12 of the Statute of the Hague Conference on Private International Law. In particular, the question arose as to whether amendment of the Statute would be possible by decision of the Conference under that Article. The opinion of the Netherlands on this point can be summarized as follows.

The amendment procedure laid down in Article 12 of the Statute provides for amending the Statute by a decision of the Organisation to be taken by a two-thirds majority of the Members, without the need for any further procedure or validation of the decision.
From the Acts of the 7th Session it would appear that such was the intention of the drafters. There is no indication to the contrary, neither in the Statute, nor in the official documents of the Netherlands used in the ratification procedure of the Statute.
This means that such a decision addresses and binds all Members of the Organisation, and that the decision should indicate the date of entry into force of the amendment in question. As a consequence, an amendment of the Statute will not require parliamentary approval in the Netherlands.
Similar procedures can be found in other treaties establishing international organisations.

I hope that this information is of use to you.

Yours sincerely,

(G. Limburg)
Director of Treaties