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**DISCUSSION DOCUMENT ON SUGGESTED STEPS FURTHER TO THE
SPECIAL COMMISSION MEETING IN FEBRUARY 2017**

drawn up by the Permanent Bureau in consultation with the Chair of the Special Commission

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**DOCUMENT DE RÉFLEXION À PROPOS DES ÉTAPES ULTÉRIEURES
À LA RÉUNION DE LA COMMISSION SPÉCIALE DE FÉVRIER 2017**

établi par le Bureau Permanent en consultation avec le Président de la Commission spéciale

*Preliminary Document No 3 of December 2016 for the attention of the Special Commission
of February 2017 on the Recognition and Enforcement of Foreign Judgments*

*Document préliminaire No 3 de décembre 2016 à l'attention de la Commission spéciale
de février 2017 sur la reconnaissance et l'exécution des jugements étrangers*

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1. Introduction

1. At its February 2017 meeting, the Special Commission on the Recognition and Enforcement of Foreign Judgments will attempt to complete a first comprehensive text of a preliminary draft Convention. Depending on the outcome of the discussions and progress made during that meeting, the Special Commission may also wish to discuss the nature and timing of the “next steps” towards the successful conclusion of the Convention. The purpose of this paper is to facilitate this discussion and to enable the Special Commission to develop recommendations in this respect, which will then be submitted to the Council on General Affairs and Policy (the Council) for approval at its March 2017 meeting.

2. The discussion and assessment of the “next steps” should include:

- (i) identifying any remaining *substantive and any other issues*;
- (ii) submitting a proposal for the *timing* of the remaining steps and work, possibly including the holding of the Diplomatic Session;
- (iii) defining the nature of preparatory work in the lead up to the Diplomatic Session.

2. Substantive and any other open issues

3. The Special Commission already identified a number of topics for discussion at the February 2017 meeting. They are summarised in the annexed table. If the Special Commission cannot (conclusively) address all these issues during its February 2017 meeting, or if new questions come to light, the chart will be updated accordingly at the end of the meeting. The decision on the timing of the next steps, including the holding of the Diplomatic Session will (largely) depend on the scope and nature of any open substantive or technical subject matter at the end of the February 2017 meeting.

4. It is for the Special Commission to inform Council when it is of the view that it can be discharged of its mandate “to prepare a draft Convention”.¹ Council will then discuss the matter and decide accordingly. One may recall that when the Special Commission in charge of developing the Choice of Court Convention met for the second and final time in April 2004, it approved the preliminary draft Convention, and concluded that “there was still work to be done and that a number of questions remained open.”² Similarly, at the final meeting of the Special Commission on Child Support (in May 2007), the Special Commission authorised the Drafting Committee to make changes to the preliminary draft Convention based on “decisions and comments expressed during the Special Commission”, being “confident that a compromise could be found during the Diplomatic Session”.³ If necessary, the Special Commission on the Judgments project may wish to include similar text in its report to Council on the February 2017 meeting.

5. Another important aspect to consider when determining whether and when to call for a Diplomatic Session is the availability of the draft Explanatory Report on the preliminary draft Convention. This draft Explanatory Report is a very important document for delegations as a number of matters relating to the draft Convention will have to be explained and clarified, especially considering that the composition of delegations may change over time. In addition, the draft Explanatory Report should be available in both English and French well in advance of the Diplomatic Session to allow delegations to study it carefully and, where necessary, raise any questions or submit comments they may have during the Diplomatic Session. After tentative consultations with the Co-Rapporteurs, it appears that the draft Explanatory Report reflecting the outcome of the February 2017 meeting could be circulated to delegations in the course of October 2017.

¹ Conclusions & Recommendations adopted by the Council on general affairs and policy of the Conference (15-17 March 2016), C&R No 12, (hereinafter, “C&R of Council 2016”).

² Minutes of the Special Commission of April 2004 No 10, in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, p. 481.

³ Minutes No 12, *Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance (8-16 May 2007)*, to be published in the Proceedings of the 21st Session, on file with the Permanent Bureau, p. 4.

3. The time-line for further work following the February 2017 Special Commission meeting, including the holding of the Diplomatic Session

6. Should the Special Commission, at the end of its February 2017 meeting, reach the conclusion that the preliminary draft Convention cannot usefully be completed without another meeting of the Special Commission, the next available period for the convening of such a meeting would be November 2017. In light of the Permanent Bureau's overall work programme and timing of other meetings, an earlier date does not seem realistic. The Permanent Bureau has made the necessary budgetary and logistic arrangements to convene a 5-day meeting in November 2017 if necessary. On the other hand, should the Special Commission conclude in February 2017 that the text is (quasi-) ready for the Diplomatic Session, careful consideration will have to be given to the possible timing of such Diplomatic Session.

7. Factors to be considered when determining the possible date of a Diplomatic Session include the desire to keep the positive momentum of the discussions and to avoid changes in the composition of delegations due to job rotations or any other reason. Conversely, delegations need enough time to prepare their final positions on any outstanding matter, to consult all relevant stakeholders and to inform a wider audience. There is likely also going to be a desire for consultations and discussions among Members/delegations, both at the regional and global level. It is important to provide enough time for these important processes.

8. As regards the actual date (and duration) of the Diplomatic Session, Article 4(4) of the Statute of the Hague Conference states that "[t]he Netherlands Standing Government Committee, (...), shall, after consultation with the Members of the Conference, determine the date of the Diplomatic Sessions."⁴

9. Against this background, should the Special Commission reach the conclusion in February 2017 that the draft text is ready to be submitted to the Diplomatic Session, it may wish to recommend to Council that preparations start with a view to holding the Diplomatic Session *in 2018*. By way of comparison, for the conclusion of the Choice of Court Convention, fourteen months elapsed between the second and final Special Commission meeting and the Diplomatic Session.⁵ The Special Commission's recommendation would be submitted to Council for approval in March 2017. If Council approves the recommendation, it will include in its Conclusions and Recommendations a tentative date for a Diplomatic Session in 2018. The Permanent Bureau would then liaise with the Netherlands Standing Government Committee to finalise and confirm the exact dates of the Diplomatic Session.

10. On a separate but related note, one may also recall that 2018 will be a very significant year for the Hague Conference as it will be celebrating its 125th anniversary. It would no doubt be most meaningful to hold a Diplomatic Session in the course of this jubilee year.

4. Possible informal meeting(s) in preparation of the Diplomatic Session

11. Even if the Special Commission recommends to Council that no more formal Special Commission meetings are required beyond February 2017, it may still wish to propose organising one or more in-person meetings in order to advance work on outstanding issues. For instance, the Drafting Committee or the Informal Working Groups tasked with specific issues could convene follow-up meetings to further advance any outstanding drafting issues. Also, a State or other delegation may wish to propose to organise an open meeting (*i.e.*, open to all delegations) to further discuss the draft text and effectively prepare the Diplomatic Session. Similar informal meetings were held prior to the Diplomatic Sessions on previous Conventions. For example, in regard to the Choice of Court Convention, an informal meeting was held on 18 December 2004, a preparatory meeting of the Drafting Committee was held from 1 to 2 February 2005 and a final meeting of the Drafting Committee was held from 18 to 20 April 2005, two months before the Diplomatic Session. Such meetings could usefully be held to discuss and fine-tune certain aspects of the draft text in preparation of a Diplomatic Session.

⁴ The Hague Conference Statute, 15 July 1955, as revised in 2007, is available on the Hague Conference website < www.hcch.net > under "Governance" then "Statute".

⁵ The final Special Commission meeting concluded on 27 April 2004, and the Convention was adopted on 29 June 2005. See Minutes of the Special Commission of April 2004 No 24, in *Proceedings of the Twentieth Session*, Tome III, *Choice of Court*, Antwerp – Oxford – Portland, Intersentia, 2010, p. 740.

5. The Experts’ Group on direct grounds of jurisdiction

12. In March 2016, the Council indicated that the Experts’ Group was to be convened to consider matters relating to direct jurisdiction, “... soon after the Special Commission has drawn up a draft Convention”.⁶ This wording suggests that the Experts’ Group should take place *after the last Special Commission meeting but before the Diplomatic Session*.

13. The decision to proceed to convene the next meeting of the Experts’ Group would be for Council and not for the Special Commission. At its March 2017 meeting, Council will be informed about progress made on the draft Convention. The advancement of this mandate will have an impact on the timing of the meeting of the Experts’ Group. At this stage, various options seem possible. The Special Commission may for instance recommend that the efforts continue to be focused on the preparation of a draft Convention for a certain period after February 2017. Alternatively, the Special Commission may report that its mandate is nearing completion. It is, at this stage premature to assess what might be the most likely and appropriate outcome. As such, the Permanent Bureau recommends that delegations consider, and informally discuss these possible avenues, so that eventually Council can take an informed decision on the basis of the Special Commission’s report on the progress it has made, and any recommendations it may make on how best to advance these work streams.

6. Summary – a possible timeline for the Judgments Project

14. In summary, the following timeline is suggested as a basis for further discussion.

February 2017	2017	2018
<p>2nd Special Commission meeting</p> <p>Will attempt to finalise a preliminary draft Convention, focusing on:</p> <ul style="list-style-type: none"> ▪ remaining substantive or technical issues ▪ general and final clauses ▪ articulation with other international, including regional, instruments ▪ preamble 	<p>Further intersessional work</p> <p>Informal meetings on outstanding matters</p> <p>Finalising draft Explanatory Report on draft Convention</p>	<p>Diplomatic Session</p> <p>Finalising text of a new Hague Convention</p>
	<p>Experts’ Group</p> <p>To be convened</p> <p>To discuss feasibility of direct jurisdiction rules in an additional instrument</p> <p>SC may recommend best timing</p>	

⁶ See C&R of the Council 2016), C&R No. 13. The text concluded by the Special Commission is typically called a “preliminary draft Convention” in previous HCCH negotiations. However, the Council framed the Special Commission’s mandate as a “draft Convention”, following terminology in Art 8 of the HCCH Statute.

ANNEX / ANNEXE

Open issues

The items listed below are the items that the Special Commission on the Judgments Project specifically noted, during its first meeting from 1 to 9 June 2016, as requiring further consideration. The list has been drawn from the Aide Memoire of the Chair of the Special Commission and the Minutes of the first meeting of the Special Commission. Additional issues requiring further consideration, such as the proposal of a Preamble, have also been added. In the right-hand column, the Permanent Bureau informs the Special Commission about the outcome of the intersessional activity carried out by the co-Rapporteurs of the draft Explanatory Report, by the intersessional working group on IP matters and by the Permanent Bureau. This and any other intersessional work prepared by the delegations will be made available on the Secure Portal as soon as possible.

Article number	Text/item	Comments or new proposals
Preamble		See proposal by the Permanent Bureau (forthcoming).
Article 1 – Scope	1. <i>This Convention shall apply to the recognition and enforcement of judgments relating to civil or commercial matters.</i>	See the Aide Memoire, para. 26(a). See Prel. Doc. Nr. 4 prepared by the Co-Rapporteurs and the Permanent Bureau
Article 1 or 2(4), 2(5)	Liability of States for acts or omissions in the exercise of State authority	See the Aide Memoire, para. 26(b). See Prel. Doc. Nr. 4, esp. para 42.
Article 2 – Exclusions from scope	Anti-trust / competition matters	See the Aide Memoire, para. 26(c) and Minutes No 9 of the first meeting of the Special Commission, paras 22-44 (further work is needed to clarify which anti-trust/competition matters should appropriately be included within the scope of the draft Convention). See Prel. Doc. Nr. 4, esp. para 41.
Article 3 – Definitions	Definition of the term “recognition”	See the Aide Memoire, para. 26(d). It would be helpful to include an explanation of the concept in the Explanatory Report.
Article 5 – Bases for recognition and enforcement	1. b) the natural person against whom recognition or enforcement is sought had his or her principal place of business in the State of origin at the time that person became a party to the proceedings in the court of origin and the claim on which the judgment is based arose out of the activities of that business;	See the Aide Memoire, para. 26(e).
	1. f) the defendant entered an appearance before the court of origin without contesting	See the Aide Memoire, para. 26(f).

Article number	Text/item	Comments or new proposals
	jurisdiction at the first opportunity to do so, if the defendant would have had an arguable case that there was no jurisdiction or that jurisdiction should not be exercised under the law of the State of origin;	Time permitting, the Permanent Bureau will submit a paper on submission by appearance.
	1. i) the judgment ruled on a contractual obligation secured by a right in rem in immovable property, if the claim was brought together with a claim relating to that right and the immovable property was located in the State of origin;	
	1. k) the judgment ruled on an infringement of a patent, trademark, design, [plant breeders' right,] or other similar right required to be [deposited or] registered and it was given by a court in the State in which the [deposit or] registration of the right concerned has taken place, or is deemed to have taken place under the terms of an international or regional instrument;	See the Aide Memoire, para. 26(h). See the report drawn up by the Permanent Bureau on intersessional work on IP matters (forthcoming – expected late January 2017).
	1. l) the judgment ruled on the validity, [ownership, subsistence] or infringement of copyright or related rights [or other intellectual property rights not required to be [deposited or] registered] and the right arose under the law of the State of origin;	See the Aide Memoire, para. 26(h). See the report drawn up by the Permanent Bureau on intersessional work on IP matters (forthcoming – expected late January 2017).
	1. n) the judgment ruled on a counterclaim – (i) to the extent that it was in favour of the counterclaimant, provided that the counterclaim arose out of the same transaction or occurrence as the claim; (ii) to the extent that it was against the counterclaimant, unless the law of the State of origin required the counterclaim to be filed in order to avoid preclusion.	See the Aide Memoire, para. 26(i). Both policy and drafting aspects of this limb will require further consideration, according to the Special Commission.
	1. o) the judgment revised or overturned a previous judgment that was eligible for recognition and enforcement in accordance with this Convention and was given by a court of the State that gave such previous judgment.	See the Aide Memoire, para. 26(j).

Article number	Text/item	Comments or new proposals
Article 6 – Exclusive bases for recognition and enforcement	a) a judgment that ruled on the registration or validity of patents, trademarks, designs[, plant breeders’ rights,] or other similar rights required to be [deposited or] registered shall be recognised and enforced if and only if the State of origin is the State in which [deposit or] registration has been applied for, has taken place, or is deemed to have been applied for or to have taken place under the terms of an international or regional instrument;	See the Aide Memoire, para. 26(h). See the report drawn up by the Permanent Bureau on intersessional work on IP matters (forthcoming – expected late January 2017).
Article 7 – Refusal of recognition or enforcement	1. c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State [and situations involving infringements of security or sovereignty of that State];	See the Aide Memoire, para. 26(k). See Prel. Doc. Nr 5 prepared by the Co-Rapporteurs and the Permanent Bureau.
	Time limits	See the Aide Memoire, para. 26(l). Further work is needed on the desirability of a provision addressing time limits for seeking enforcement of judgments under the law of the requested State.
Article 8 – Preliminary questions	2. <i>Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment was based on a ruling on a matter excluded under Article 2, paragraph 1 or 3, or on a matter referred to in Article 6 on which a court other than the court referred to in that Article ruled.</i>	See the Aide Memoire, para. 25 signifying that in Article 8(2), which permits recognition or enforcement of a judgment to be refused if, and to the extent that, it was based on a ruling on certain preliminary questions, a reference was added to matters excluded under Article 2(3). The need to review the way in which this point is addressed was noted.
	3. <i>However, in the case of a ruling on the validity of a right referred to in Article 6, paragraph a), recognition or enforcement of a judgment may be refused or postponed under the preceding paragraph only where –</i> a) <i>that ruling is inconsistent with a judgment or a decision of a competent authority on that matter given in the State referred to in Article 6, paragraph a); or</i> b) <i>proceedings concerning the validity of that right are pending in that State.</i>	See the Aide Memoire, para. 26(h). See the report drawn up by the Permanent Bureau on intersessional work on IP matters (forthcoming – expected late January 2017).

Article number	Text/item	Comments or new proposals
	<i>A refusal under sub-paragraph b) does not prevent a subsequent application for recognition or enforcement of the judgment.</i>	
Article 10 – Judicial settlements (<i>transactions judiciaires</i>)	Judicial settlements (<i>transactions judiciaires</i>) which a court of a Contracting State has approved, or which have been concluded before that court in the course of proceedings, and which are enforceable in the same manner as a judgment in the State of origin, shall be enforced under this Convention in the same manner as a judgment [, provided that such settlement is permissible under the law of the requested State].	See Minutes No 11 of the first meeting of the Special Commission, at paras 63-76.
Article 13 – Costs of proceedings	No security, bond or deposit, however described, shall be required from a party who in one Contracting State applies for enforcement of a judgment given in another Contracting State on the sole ground that such party is a foreign national or is not domiciled or resident in the State in which enforcement is sought.	See the Aide Memoire, para. 26(m). See Info. Doc. No 5 of July 2016.
Article 14 – Equivalent effects	<i>A judgment recognised or enforceable under this Convention shall be given the same effect it has in the State of origin. If the judgment provides for relief that is not available under the law of the requested State, that relief shall, to the extent possible, be adapted to relief with effects equivalent to, but not going beyond, its effects under the law of the State of origin.</i>	See the Aide Memoire, para. 26(n).
General and Final Clauses		See the Aide Memoire, para. 26(o). See proposal by the Permanent Bureau (forthcoming – expected December 2016 or early January 2017). See articulation paper prepared by the Permanent Bureau (forthcoming – December 2016 or early January 2017)