

EXPLANATORY REPORT *
**ON THE CONVENTION ON PROTECTION OF CHILDREN
AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION**

drawn up by G. Parra-Aranguren

INTRODUCTION

A *Preparatory work*

1 The subject of international co-operation in respect of intercountry adoption was submitted on 19 January 1988 by the Permanent Bureau of the Hague Conference on private international law to the Special Commission on general affairs and policy of the Conference. On this occasion the Secretary General, taking into account the formal proposal made by Italy,¹ introduced Preliminary Document No 9, prepared by the Permanent Bureau, stressing among other things that there were two possible strategies open, either a limited convention to be elaborated within the Conference only, or an instrument in the preparation of which also non-Member States having direct interest in the matter would be invited.²

2 All participants agreed that international adoption was posing at present very serious problems of a kind or degree different from those existing when the *Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions* (hereinafter referred to as "the 1965 Hague Adoption Convention") was drawn up, and after discussing the matter at length, a broad consensus appeared in favour of retaining the topic. Nevertheless, *"the experts realized that any attempt undertaken by the Conference to ameliorate the existing international situation would meet certain difficulties due to the delicate character of the subject. Indeed, some experts had doubts as to whether the Hague Conference was the appropriate forum to deal with this matter; questions were also raised with respect to the best approach to the subject, and concerning the financing and organizing of the work, because it was felt that any new work by the Conference on adoption without the participation of those countries of origin which were not at present Members of the Conference, would be of little use. It would, therefore, be necessary to find a way of inviting these countries to co-operate with the Conference."*³

3 Although the topic was retained with priority, the Special Commission on general affairs and policy of the Conference made the following Recommendations to the Sixteenth Session:

* Abbreviations used in this Report:

- draft: preliminary draft Convention adopted by the Special Commission;
- Report of the Special Commission: Report by G. Parra-Aranguren on the preliminary draft Convention;
- CRC: the United Nations Convention of 20 November 1989 on the Rights of the Child.

¹ "Future work — Proposal of the Government of Italy", Prel. Doc. No 13 of January 1988 (for the attention of the Special Commission of January 1988), in *Hague Conference on private international law, Proceedings of the Sixteenth Session (1988)*, Tome I, *Miscellaneous Matters*, The Hague 1991, p. 189.

² Hans van Loon, "Note on the desirability of preparing a new Convention on international co-operation in respect of intercountry adoption", Prel. Doc. No 9 of December 1987 (for the attention of the Special Commission of January 1988), *ibid.*, pp. 165-185.

³ "Conclusions of the Special Commission of January 1988", drawn up by the Permanent Bureau, Prel. Doc. No 14 of April 1988 (for the attention of the Sixteenth Session), *ibid.*, pp. 195-202 (p. 199).

(a) *the agenda of the Seventeenth Session should include two subjects, one concerning family law and one in the field of contracts or torts;*

(b) *the Sixteenth Session could make a choice out of two of the following three subjects:*

— *intercountry adoption, on the condition that the non-Member States concerned express to the Permanent Bureau a willingness to participate in this work;*

— *law applicable to agreements on licensing of technology and on transfer of know-how, it being understood that the Permanent Bureau will make contact with the World Intellectual Property Organization (WIPO) concerning the modes of possible co-operation;*

— *law applicable to certain aspects of unfair competition, to be specified on the basis of a further supplementary report to be submitted to the Sixteenth Session by the Permanent Bureau.*⁴

4 The Sixteenth Session of the Conference was informed by the Secretary General about the positive results of his contacts with (a) other inter-governmental and non-governmental organizations with a view to co-ordinating international work on intercountry adoption; (b) high ranking officials of non-Member States to determine the possible interest of their Governments in co-operating with the Conference; and (c) private organizations and individuals active in the field of international child protection and intercountry adoption as well as with scholars interested in the field, with a view to establishing channels for informal co-ordination, information and support for any future work by the Conference on the topic of intercountry adoption. This initial reaction made the Secretary General confident that a considerable number of countries of origin would accept a formal invitation on the part of the Hague Conference to participate in the negotiation of a new convention on intercountry adoption.⁵

5 The First Commission of the Sixteenth Session discussed the matter on 10 October 1988 and all participants spoke in favour of the project.⁶ Immediately thereafter, on the morning of the next day and without any further discussion, the Plenary Session decided "*to include in the Agenda of the Seventeenth Session the preparation of a convention on adoption of children coming from abroad*" and to instruct the Secretary General "*to undertake the preliminary work and to convene a Special Commission for this purpose*". The Plenary Session also considered "*to be indispensable the participation in this Special Commission of non-Member States from which many of these children come*" and therefore requested "*that the Secretary General make his best efforts to obtain their participation in this work as ad hoc Members*".⁷

6 The reasons for including the subject of intercountry adoption with priority in the Agenda of the Seventeenth Session of the Conference were summarized by the Permanent Bureau as follows:

(i) *a dramatic increase in international adoptions which had occurred in many countries since the late 1960s to such an extent that intercountry adoption had become a worldwide phenomenon involving migration of children over long geographical distances and from one society and culture*

⁴ *Ibid.*, p. 302.

⁵ "Report of the Secretary General on the question of intercountry adoption of children", Prel. Doc. No 17 of September 1988 (for the attention of the Sixteenth Session), *ibid.*, pp. 219-221.

⁶ "Commission I — Sixteenth Session — General Affairs", Minutes No 1, *ibid.*, pp. 238-245.

⁷ "Sixteenth Session — Plenary Session — Minutes No 5", *ibid.*, pp. 271-272 and 234; and "Final Act", 20 October 1988, under B 1, *ibid.*, pp. 34-35.

to another very different environment;

(ii) serious and complex human problems, partly already known but aggravated as a result of these new developments, partly new ones, with among other things manifold complex legal aspects; and

(iii) insufficient existing domestic and international legal instruments, and the need for a multilateral approach.⁸

7 The insufficiency of the international legal instruments to meet the present problems caused by intercountry adoptions was acknowledged in a "Memorandum" prepared by the Permanent Bureau in November 1989, and the following requirements were mentioned:

(a) a need for the establishment of legally binding standards which should be observed in connection with intercountry adoption (in what circumstances is such adoption appropriate; what law should govern the consents and consultations other than those with respect to the adopters?);

(b) a need for a system of supervision in order to ensure that these standards are observed (what can be done to prevent intercountry adoptions from occurring which are not in the interest of the child; how can children be protected from being adopted through fraud, duress or for monetary reward; should measures of control be imposed upon agencies active in the field of intercountry adoption, both in the countries where the children are born and in those to which they will travel?);

(c) a need for the establishment of channels of communications between authorities in countries of origin of children and those where they live after adoption (it would be conceivable, for example, to create by multilateral treaty a system of Central Authorities which could communicate with one another concerning the protection of children involved in intercountry adoption); and there is, finally,

(d) a need for co-operation between the countries of origin and of destination (an effective working relationship, based on mutual respect and on the observance of high professional and ethical standards, would help to promote confidence between such countries, it being reminded that such forms of co-operation already exist between certain countries with results which are satisfactory to both sides).⁹

8 The principle that non-Member States may participate in the work of the Conference had been accepted by the Fourteenth Session (1980);¹⁰ and it was considered that it should be followed in dealing with intercountry adoption because of the clear practical need for a multilateral instrument which would not, or not only, be a convention unifying private international law rules. As a matter of fact, it was felt that actual protection of children required the definition of certain substantive principles and the establishment of a legal framework of co-operation between authorities in the States of origin and in the receiving States.

⁸ J.H.A. van Loon, "Report on intercountry adoption", Prel. Doc. No 1 of April 1990, pp. 6-7; cf. *Proceedings of the Sixteenth Session (1988)*, Tome I, *op. cit.*, pp. 181-185.

⁹ "Memorandum concerning the preparation of a new Convention on international co-operation and protection of children in respect of intercountry adoption", drawn up by the Permanent Bureau, November 1989, pp. 1-2.

¹⁰ *Hague Conference on private international law, Actes et documents de la Quatorzième session (1980)*, The Hague, 1982, Final Act, D 1, Tome I-II, p. I-63.

B Three meetings of the Special Commission

9 The first meeting of the Special Commission on intercountry adoption took place from 11 to 21 June 1990 and was chaired by Mr T.B. Smith QC (Canada), Mr J. Pirrung (Germany) and Mr Mengesha Haile (Ethiopia) acting as first and second Vice-Chairmen, respectively. Mr G. Parra-Aranguren (Venezuela) was appointed Reporter and Mrs L. Balanon (Philippines) Consultant Reporter. There were represented thirty-one Member States, eighteen non-Member States, ten international organizations, three intergovernmental and seven non-governmental, specialized in children's matters.¹¹ The participants considered the "Report on intercountry adoption"¹² exceptionally well prepared by the First Secretary at the Permanent Bureau, Mr J.H.A. van Loon, and nineteen other documents that subsequently were consolidated as "Preliminary Document No 2", providing observations on specific questions and factual and legal information on the subject. The conclusions reached were drawn up by the Permanent Bureau and distributed as "Preliminary Document No 3" in August 1990.¹³

10 The first meeting of the Special Commission on intercountry adoption also decided that an informal *ad hoc* advisory Committee should assist the Permanent Bureau of the Hague Conference on private international law in drafting into articles the conclusions that might be reached, and appointed as its members: Mr G. Parra-Aranguren (Venezuela), Reporter, and Mrs L. Balanon (Philippines), Consultant Reporter, members *ex officio*; Mrs C.F.G. Sunaryati Hartono (Indonesia), Mr W.R. Duncan (Ireland), Mr M.J.P. Verwilghen (Belgium), Mr J.C. Schultsz (Netherlands) and Mr D. Operti (Uruguay). They met, with the exception of Mrs C.F.G. Sunaryati Hartono (Indonesia), from 5 to 10 November 1990 under the chairmanship of Mr J.C. Schultsz (Netherlands), and prepared Preliminary Document No 4.¹⁴

11 Eleven Spanish-speaking countries participated in the first meeting of the Special Commission on intercountry adoption,¹⁵ and all of their representatives were able to gain a passive understanding of the remarks offered in French or English and to read the texts submitted in the two official languages of the Conference. However, the Secretary General noticed that a significant number of them experienced extreme difficulties in expressing

¹¹ The following Member States were represented: Argentina, Australia, Austria, Belgium, Canada, China, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela and Yugoslavia. The non-Member States that participated were: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Ethiopia, Honduras, India, Indonesia, Madagascar, Mauritius, Peru, Philippines, Romania, Senegal, Sri Lanka, Thailand and Viet Nam. As Observers attended the Special Commission: (a) representatives for inter-governmental organizations: International Institute for the Unification of Private Law (Unidroit), Inter-American Children's Institute (IIN) and Council of Europe; (b) representatives for non-governmental organizations: International Bar Association (IBA), International Social Service (ISS), Inter-American Bar Association (IABA), International Federation Terre des Hommes (FITDH), Defence for Children International (DCI), International Academy of Matrimonial Lawyers (IAML) and Committee for Cooperation within the Nordic Adoption and Parent Organizations (NCA).

¹² J.H.A. van Loon, "Report on intercountry adoption", Prel. Doc. No 1, April 1990.

¹³ "Conclusions of the Special Commission of June 1990 on intercountry adoption", drawn up by the Permanent Bureau, Adoption, Prel. Doc. No 3, August 1990.

¹⁴ "Illustrative Draft Articles for a Convention on the protection of children and on international co-operation in respect of intercountry adoption, drawn up by the Permanent Bureau with the assistance of an *ad hoc* Committee and general comments", Adoption, Prel. Doc. No 4, December 1990.

¹⁵ The Spanish-speaking Member States that attended the meeting were: Argentina, Mexico, Spain, Uruguay and Venezuela, and the non-Members represented were: Colombia, Costa Rica, Ecuador, El Salvador, Honduras and Peru.

themselves actively in French or English, thus creating an "uneasy feeling of frustration in some delegations"; therefore, in his letter of 25 July 1990, he consulted the National Organs of the Member States as to the possibility to permit the Spanish-speaking countries to express themselves in their own language with simultaneous translation into French and English.

12 The result of the consultation was favourable and the decision to facilitate the participation of Spanish-speaking countries was very wise, because the Latin-American States demonstrated an extraordinary interest in the subject. As a matter of fact, during the preparatory work, a seminar was held in Quito, Ecuador, from 2 to 6 April 1991, with participation of Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Peru, Uruguay and Venezuela, as well as a representative of the Permanent Bureau, to examine the problems related to intercountry adoption in the perspective of the convention to be drawn up by the Hague Conference and the Conclusions were transmitted to the Permanent Bureau by the Inter-American Children's Institute.

13 The *second* meeting of the Special Commission on intercountry adoption met from 22 April to 3 May 1991 and was attended by thirty-three Member States and twenty non-Member States, as well as by a substantial number of observers representing governmental and non-governmental organizations specialized in children's matters.¹⁶ The participants examined Preliminary Document No 4 in connection with Preliminary Document No 3. One hundred and twenty-three working documents were distributed and two very helpful reports were also considered, prepared by Defence for Children International, International Federation "Terre des Hommes" and International Social Service.¹⁷ Finally, the second meeting approved the "Draft Articles for a Convention on the protection of children and on international co-operation in respect of intercountry adoption", incorporated in the Final Working Document, distributed at the last working session, but to be reviewed by a Drafting Committee, taking into account the comments and observations made by the States invited to participate. The following experts were appointed members of the Drafting Committee: Mr J. Pirrung (Federal Republic of Germany), first Vice-Chairman of the Special Commission, Chairman *ex officio*; Mr G. Parra-Aranguren (Venezuela), Reporter and member *ex officio*; Mrs L. Balanon (Philippines), Consultant Reporter and member *ex officio*; Mr P. Pfund (United States), Mrs K. Buure-Hägglund (Finland), Mr Zhang Kening (China), Mr I. Fadlallah (Lebanon), Mr D. Operti (Uruguay), Mr W. Duncan (Ireland) and Mr M. Verwilghen (Belgium).

14 All members of the Drafting Committee, with the exception of Mrs L. Balanon (Philippines) and Mr I. Fadlallah (Lebanon), met during the first week of September 1991 and prepared a "Tentative draft Convention", preceded by a "Preamble", distributed as Preliminary Document No 6 and accompanied by some "Explanatory Notes" to illustrate the

¹⁶ The Member States that participated were: Argentina, Australia, Austria, Belgium, Canada, Chile, China, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Venezuela. The non-Member States represented were: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Ethiopia, Holy See, Honduras, India, Indonesia, Republic of Korea, Lebanon, Madagascar, Malaysia, Mauritius, Nepal, Peru, Philippines, Sri Lanka, and Thailand. As Observers attended: (a) representatives for inter-governmental organizations: United Nations High Commissioner for Refugees (UNHCR), International Institute for the Unification of Private Law (Unidroit), Commonwealth Secretariat, Inter-American Children's Institute (IIN), Council of Europe and International Commission on Civil Status (CIEC); (b) representatives for non-governmental organizations: International Bar Association (IBA), International Social Service (ISS), International Association of Juvenile and Family Court Magistrates (AIMJF), Inter-American Bar Association (IABA), International Federation Terre des Hommes (FITDH), Defence for Children International (DCI), International Academy of Matrimonial Lawyers (IAML), International Association of Voluntary Adoption Agencies and NGOs (IAVAAN), and Committee for Cooperation within the Nordic Adoption and Parent Organizations (NCA).

¹⁷ "Preliminary Findings of a Joint Investigation on the "Waiting Period" in Intercountry Adoptions" and "Preliminary Findings of a Joint Investigation on Independent Intercountry Adoptions", March 1991.

solutions accepted in the articles, and by certain additional comments made by the Permanent Bureau.¹⁸

15 The *third* meeting of the Special Commission on intercountry adoption met from 3 to 14 February 1992. Represented were thirty-three Member States, twenty-four non-Member States and fifteen international organizations, inter-governmental and non-governmental, specialized in children's matters.¹⁹ The Special Commission examined Preliminary Document No 6, as well as an important number of working documents (up to No 265), but the time was too short to fully complete the text of the preliminary draft Convention. For this reason the Drafting Committee was asked to finalize the text of the preliminary draft Convention.

16 A reduced number of the members of the Drafting Committee (Mr J. Pirrung, Mrs K. Buure-Hägglund, Mr W. Duncan and Mr M. Verwilghen) met on 9 and 10 March 1992 to review the text approved in the third meeting of the Special Commission, refining the linguistic discrepancies between the French and the English versions and carrying out certain decisions for further consideration. Finally, the Drafting Committee ended with the elaboration of the "Preliminary Draft Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption, drawn up by the Special Commission of February 1992", preceded by an "Explanatory Note".

17 Immediately after the third meeting of the Special Commission, the present author prepared his Report on the preliminary draft Convention that was distributed together with the text of the preliminary draft Convention as Preliminary Document No 7 in September 1992 for comments and observations among the Member States, the non-Member States invited to participate and the interested international organizations specialized in children's matters.²⁰ The Report on the preliminary draft Convention will hereinafter be referred to as "the Report of the Special Commission", the preliminary draft Convention also as "the draft".

18 Bolivia, Cyprus, Colombia, Costa Rica, Denmark, El Salvador, Spain, United States of America, Finland, France, Greece, Honduras, Luxembourg, Poland, Romania, Uruguay, Holy See, Sweden, Committee for Co-operation within the Nordic Adoption and Parent Organizations (NCA), Defence for Children International (DCI), International Social Service

¹⁸ "Tentative Draft Convention on International Co-operation and Protection of Children in Respect of Intercountry Adoption (articles drawn up by the Drafting Committee, September 1991) and Explanatory Notes", Adoption, Prel. Doc. No 6, September 1991.

¹⁹ The Member States that participated were: Argentina, Australia, Austria, Belgium, Canada, Chile, China, Czech and Slovak Federal Republic, Denmark, Egypt, Finland, France, Federal Republic of Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Venezuela. The non-Member States represented were: Albania, Bolivia, Brazil, Colombia, Costa Rica, El Salvador, Haiti, Holy See, Honduras, Indonesia, Republic of Korea, Lebanon, Madagascar, Malaysia, Mauritius, Nepal, Panama, Paraguay, Philippines, Russian Federation, Senegal, Sri Lanka, Thailand and Viet Nam. As Observers attended: (a) representatives for inter-governmental organizations: United Nations High Commissioner for Refugees (UNHCR), International Institute for the Unification of Private Law (Unidroit), Inter-American Children's Institute (IIN), and International Commission on Civil Status (CIEC); (b) representatives for non-governmental organizations: International Bar Association (IBA), International Social Service (ISS), International Society of Family Law (ISFL), International Association of Juvenile and Family Court Magistrates (AIMJF), Inter-American Bar Association (IABA), International Federation Terre des Hommes (FITDH), Defence for Children International (DCI), International Academy of Matrimonial Lawyers (IAML), International Association of Voluntary Adoption Agencies and NGOs (IAVAAN), Committee for Cooperation within the Nordic Adoption and Parent Organizations (NCA) and Euradopt.

²⁰ "Preliminary Draft Convention adopted by the Special Commission and Report by G. Parra-Aranguren", Prel. Doc. No 7 of September 1992 for the attention of the Seventeenth Session, with more detailed information regarding the preparatory work (Nos 1-19, pp. 32-51).

(ISS) and the United Nations High Commissioner for Refugees (UNHCR) sent their comments before 1 March 1993, which were immediately circulated as "Preliminary Document No 8"; afterwards comments were received from Australia, Austria, Madagascar, Norway, Netherlands, United Kingdom (Prel. Doc. No 8, Add. I), Germany (Prel. Doc. No 8, Add. II), Sri Lanka and the International Union of Latin Notaries (Prel. Doc. No 8, Add. III), and from Albania, Turkey and the Inter-American Children's Institute (Prel. Doc. No 8, Add. IV).

C *Seventeenth Session*

19 The Seventeenth Session was held at The Hague from 10 to 29 May 1993, Mr J.C. Schultsz (Netherlands) was elected President, and Mrs I.M. de Magalhães Collaço (Portugal), Mr T. Bán (Hungary), Mr Tang Chengyuan (China), Mr J.L. Siqueiros (Mexico) and Mr P.H. Pfund (United States) Vice-Presidents. Honourary Presidents were the Netherlands' Ministers of Foreign Affairs and of Justice, H.E. Mr P.H. Kooijmans and H.E. Mr E.M.H. Hirsch Ballin, respectively.

20 Two Commissions were constituted, the first one to consider general affairs, under the chairmanship of Mrs R.K. Buure-Hägglund (Finland), which held four meetings. The Second Commission was entrusted with the preparation of the "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption"; as Chairman was appointed Mr T.B. Smith QC (Canada), Mr K.J. Pirrung (Germany) would act as Vice-Chairman, Mr G. Parra-Aranguren (Venezuela) as Reporter and Mrs L. Balanon (Philippines) as Consultant Reporter.

21 The following Member States were represented: Argentina, Australia, Austria, Belgium, Canada, Chile, China, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Norway, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela.

22 The non-Member States that participated were: Albania, Belarus, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Colombia, Costa Rica, El Salvador, Ecuador, Haiti, Holy See, Honduras, India, Indonesia, Kenya, Republic of Korea, Lebanon, Madagascar, Mauritius, Nepal, Panama, Peru, Philippines, Russian Federation, Senegal, Sri Lanka, Thailand and Viet Nam.

23 The following Inter-Governmental Organizations were represented: United Nations (UN), United Nations High Commissioner for Refugees (UNHCR), International Criminal Police Organization (Interpol), Inter-American Children's Institute (IIN) and International Commission on Civil Status (CIEC). Non-governmental International Organizations also participated, as follows: International Bar Association (IBA), International Social Service (ISS), International Society on Family Law (ISFL), International Association of Juvenile and Family Court Magistrates (AIMJF), Inter-American Bar Association (IABA), International Federation Terre des Hommes (FITDH), Defence for Children International (DCI), International Union of Latin Notaries (UINL), International Academy of Matrimonial Lawyers (IAML), International Association of Voluntary Adoption Agencies and NGOs (IAVAAN), Euradopt, Committee for Cooperation within the Nordic Adoption and Parent Organizations (NCA) and North-American Council on Adoptable Children (NACAC).

24 The Drafting Committee was composed of Mr K.J. Pirrung (Germany), as Chairman, Ms C. Jacob (France), Mrs R.K. Buure-Hägglund (Finland), Mr W.R. Duncan (Ireland), Mr P.H. Pfund (United States), Mr Tang Chengyuan (China), Mr M.J.P. Verwilghen (Belgium), the Reporter Mr G. Parra-Aranguren (Venezuela) and the Consultant Reporter Mrs L. Balanon (Philippines).

25 A Committee on Recognition was designated, with Mr A. Bucher (Switzerland) as Chairman, the other members being Mrs M. Ripoll de Urrutia (Colombia),

Mrs I.M. de Magalhães Collaço (Portugal), Ms G.F. DeHart (United States), Mr P. Picone (Italy), Mr J.L. Siqueiros (Mexico) and Mr R.G.S. Aitken (United Kingdom).

26 A Federal Clauses Committee was also nominated, with Mrs A. Borrás (Spain) acting as Chairman, Mr R.F. Wagner (Germany), Mr H. Povoas and Mr J.R. Figueiredo Santoro (Brazil), Ms L. Lussier (Canada), Mr G. Nehmé (Lebanon), Ms A. Dzougueva and Mr I. Berestnev (Russian Federation).

27 The Second Commission held twenty-one sessions, 201 working documents were distributed; the Drafting Committee, the Recognition Committee and the Federal Clauses Committee met on numerous occasions throughout the Seventeenth Session, and so did a special group created to consider articles 6, 7 and 17 of the draft Convention.

28 The Permanent Bureau gave invaluable support to the work undertaken, in particular Mr J.H.A. van Loon, and the contribution of Mr G.A.L. Droz, Mr M.L. Pelichet and Mr C.A. Dyer was outstanding too. The delegates also benefited from the superb work not only of the Recording Secretaries, Mr G. Carducci, Mrs N. Meyer-Fabre, Mrs C. van den Muijsenbergh-Cissé, Mr T.G. Portwood, Miss S.E. Roberts, Miss A. Vallez, Mr W.P. Vogt and Mrs K.S. Williams, but also of the Assistant Secretaries, Miss C. González Beilfuss, Ms C. Lima Marques and Mr M. Pestman, and of the team of interpreters, Mrs M. Misrahi, Mrs M. Rühl, Mr P. Spitz, Mrs C. Hare and Mr C. Lord.

29 The Convention was examined in two full Plenary Sessions, before being unanimously approved on 28 May 1993. The signature of the Final Act which contained the text of the Convention took place the following day, 29 May 1993, after some linguistic amendments had been made, at the Closing Session of the Diplomatic Conference in the Court Room of the Peace Palace.

TITLE OF THE CONVENTION

30 The title usually aims to summarize in a concise manner the matters regulated by the Convention, mentioning only those which are most important, in this case the protection of children and the co-operation among the Contracting States in respect of intercountry adoption.

31 The title of the draft was modified, because the Diplomatic Conference decided to mention the protection of children in the first place, in order to stress its importance as the main subject-matter of the Convention.

32 The English denomination "intercountry adoption" was accepted without any problem, because it indicates clearly the matters regulated by the Convention and because of its conformity with Article 21 of the UN Convention of 20 November 1989 on the Rights of the Child (hereinafter referred to as the CRC).

33 On the other hand, the French expression "*adoption transnationale*" was objected to from the very beginning of the work undertaken by the Special Commission. It was pointed out that the word "*transnationale*" was mainly accepted in the law regulating international transactions, and that it has never been used in any multilateral convention dealing with family relations.

34 Working Document No 6, submitted by Belgium, reminded that the same difficulty arose when the 1965 Hague Adoption Convention was discussed, the expression "intercountry adoption" being translated as "*adoption sur le plan international*". However, this denomination was not considered appropriate for the present Convention, which does not cover all international adoption cases, but only one class of them: those expressly

indicated in Article 2, *i.e.* the adoption of a child habitually resident in one State (the "State of origin") by spouses or a person habitually resident in another State (the "receiving State").

35 Therefore, the following suggestions were made: *adoption transfrontière*, because the process of adoption goes over the geographical borders of the States concerned; *adoption interétatique*, since the persons interested in the adoption are resident in different States; and *adoption internationale*, as the one generally accepted. This last suggestion was finally approved, even though not entirely satisfactory, just to conform to tradition and because no better term could be found.

PREAMBLE

Introductory phrase

36 The Preamble of the Convention is very long when compared with other Conventions approved by the Hague Conference, but from the very beginning the experts attending the Special Commission meetings insisted on the importance of the Preamble as guidance for the interpreter when applying the Convention to particular situations, and this explains why the Diplomatic Conference added two more paragraphs to the draft.

First paragraph

37 The first paragraph is new and was approved by consensus, because it aims to underline the role of the family in the nurturance and development of the child. This is in recognition of the right of the child to a family, where his or her personality is formed and developed. The idea was originally suggested by the Swedish delegation and the Committee for Cooperation within the Nordic Adoption and Parent Organizations in their comments to the draft (Prel. Doc. No 8, p. 4), and was reproduced by Indonesia in Working Document No 46 with the following addition: "Bearing in mind that the child for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding". This proposal represented a complement to Working Document No 15, submitted by Colombia, proposing this paragraph: "Bearing in mind that a child, for the full and harmonious development of his or her personality, should grow up in a family environment"; an idea also found in Working Document No 24, presented by Austria, as follows: "Bearing in mind that a child, for the full and harmonious development of his or her personality, should grow up in a family environment".

Second paragraph

38 Working Document No 21, submitted by Defence for Children International and International Social Service, proposed the wording of the second paragraph because of their strong belief in the importance that should be given to the biological family of the child, for psycho-social as well as for legal reasons, implicitly stressing thereby the subsidiary nature of adoption. The suggestion was reproduced by Indonesia in Working Document No 46. Italy suggested to add: "appropriate measures should be taken by every State to enable children to remain under the care of their biological family", in order to stress in the very Preamble of the Convention the duty of the Contracting States to do their best to keep the child within his or her biological family. But this addition was not accepted.

39 The Indonesian proposal was approved by a large majority, even though some participants considered it unnecessary, because the subsidiarity principle in intercountry adoption was already embodied in Article 4, sub-paragraph *b*, and, besides, the Preamble would become too lengthy and complex, should it reproduce all the principles contained in

the UN Convention.

Third paragraph

40 The third paragraph of the Preamble reproduces the text of the draft (first paragraph of the Preamble) and confirms the ideas expressed in Article 21, sub-paragraph *b*, CRC, according to which all States Parties that recognize or permit the system of adoption shall "*recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family, or cannot in any suitable manner be cared for in the child's country of origin*".

41 However, the formulation of the third paragraph of the Preamble is not literally the same, because it makes reference to only one of the alternative possibilities of taking care of the child referred to in Article 20, paragraph 3, CRC: "*inter alia, foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of the children*".

42 In this respect, it is to be recalled that, in the second reading, Egypt submitted Working Document No 124 suggesting the addition of a new paragraph to the Preamble, reading as follows: "*Taking into account the other alternatives and forms of child care, e.g. foster placement - kafalah as enshrined in Islamic law, and the need to promote international co-operation therein*". In support of his proposal, the Egyptian Delegate insisted on the need for international co-operation with regard to various forms of child care other than adoption, such as custody, foster placement and *kafalah*, mentioned in the UN Declaration of 3 December 1986 on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, and in the CRC. He also stressed the fact that such alternatives are accepted all over the world, and notwithstanding that falling short of full legal adoption, they often provide for the same health, social and educational care for the child as that obtained through adoption. Besides, the consideration of such alternatives within the Convention would permit the avoidance of trafficking and abuse, and to take appropriate care of children in countries where adoption is not recognized. However, the Egyptian proposal could not be considered for lack of enough support.

43 The third paragraph of the Preamble, in referring to permanent or suitable family care, does not deny or ignore other child care alternatives, but highlights the importance of permanent family care as the preferred alternative to care by the child's family of origin.

44 The third paragraph of the Preamble expressly indicates that intercountry adoption is one possible alternative for the care of the child, and, in this respect, it is to be recalled that, according to Article 3 of the UN Declaration of 3 December 1986, "*The first priority for a child is to be cared for by his or her own parents*". Therefore, paragraph three reproduces the idea expressed by the second paragraph of the Preamble to insist on the subsidiary nature of intercountry adoption, that is also stressed by Article 4, sub-paragraph *b*, of the Convention.

45 The third paragraph amends the text of the draft, because it reads "a child for whom a suitable family cannot be found in his or her State of origin" instead of "a child who cannot in any suitable manner be cared for in his or her country of origin". This modification had initially been unsuccessfully requested by Colombia in Working Document No 2, aiming to ensure that a child should always be placed in a family rather than in an institution or in any kind of environment other than a family.

46 Working Document No 186, submitted by Bolivia and Colombia, in the second reading took up the matter again also stressing the point that the third paragraph should not give the impression that States of origin were not able to take care of their children, it being also recalled that the right to a family is a fundamental right of the child that has to be fulfilled by intercountry adoption, but as an alternative and subsidiary solution. This time the proposal was approved by a clear majority, without discussion of the substance. The idea behind the amendment is that the placement of a child in a family, including in

intercountry adoption, is the best option among all forms of alternative care, in particular to be preferred over institutionalization. The new formulation strengthens the introductory language, which is the same in the preliminary draft and in the definitive text: "Recognizing that intercountry adoption may offer the advantage of a permanent family to a child". It thus emphasizes the benefits which the child may derive from acquiring an adoptive family.

47 The amendment made to the third paragraph of the Preamble and the introduction of the first two paragraphs are very important for the appropriate interpretation of the Convention, in particular of its Article 4. In fact, as expressed in the "Statement" made by the Holy See to the Hague Conference, they undoubtedly confirm a fundamental principle, *i.e.*, that "children are not isolated individuals but are born in and belong to a particular environment. Only if this native environment cannot, in one way or another, provide for a minimum of care and education should adoption be contemplated. The possibility of providing a better material future is certainly not, of itself, a sufficient reason for resorting to adoption."

Fourth paragraph

48 The fourth paragraph of the Preamble reproduces the text of the draft (second paragraph of the Preamble) and repeats the ideas expressed by Article 21, introductory paragraph, and by Article 35 CRC that require the States Parties to "*ensure that the best interests of the child shall be the paramount consideration*" and to "*take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of, or traffic in children for any purpose or in any form*".

49 The phrase "the best interests of the child shall be the paramount consideration" makes clear that the interests of other persons must also be taken into consideration, *e.g.*, the biological parents or the prospective adoptive parents. Undoubtedly, their rights are also entitled to protection and therefore a balance among the interests of *all* persons concerned must be reached, as is provided for in Article 3, paragraph 2, CRC: "*States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*"

50 In this respect, the observation made by Greece is to be reminded, according to which all adoptions under the Convention must be made in the "interests of the child", even though the conventional rules sometimes refer to the "best interests of the child", and in other occasions merely to the "interests of the child", giving the impression that there were two different concepts, the former being stronger than the latter. Besides, it was observed that the strict interpretation of the word "best" might render impossible some good adoptions and to avoid such undesirable result, it should be construed as meaning the "real" or "true" interests of the child.

51 The reference made by the fourth paragraph of the Preamble to respect "his or her fundamental rights" follows the suggestion approved by the Latin-American countries at the Quito meeting (April 1991, *supra* No 12) and was reproduced in Article 1, sub-paragraph *a*, when establishing the objects of the draft Convention. Sub-paragraph *a* of Article 1 was amended by the addition of the phrase "as recognized in international law", but the fourth paragraph of the Preamble remained unchanged. However, the meaning is the same in both provisions, despite the different formulation.

52 Despite the last part of the fourth paragraph of the Preamble, it is always to bear in mind that the fundamental objects of the Convention are the establishment of certain safeguards to protect the child in case of intercountry adoption, and of a system of co-operation among the Contracting States to guarantee the observation of those safeguards. Therefore, the Convention does not prevent directly, but only indirectly, "the abduction, the sale of, or traffic in children", as is repeated in sub-paragraph *b* of Article 1, because it is expected that the observance of the Convention's rules will bring about the avoidance of such abuses.

53 For this reason, the Special Commission did not accept the proposal suggesting that the Convention be termed expressly "an instrument against illicit and irregular activities in this field", since it neither regulates the criminal aspects of abuses against children, nor other illicit or irregular activities in this field, that are manifold, like concealing of civil status or surrogate parenting, as they were summarized at the very beginning of the work undertaken, in Preliminary Document No 1 (No 80 and, *supra*, footnote 12) and in Preliminary Document No 3 (No 3, p. 21; *supra*, footnote 13). The same reason also explains the failure of Working Document No 73, submitted by Belarus and the Russian Federation, suggesting to mention in this paragraph of the Preamble and in Article 1, sub-paragraph *b*, that the Convention also aims to prevent "the exploitation of the work of children and their utilization for the purpose of scientific investigations, without the consent of the competent authorities of the State where the child habitually resides".

54 It should also be reminded that, at the preparatory stage of the Convention, contacts were made with the International Criminal Police Organization (Interpol) and its Secretary General expressed his strong support for a convention of this specific type, because "*the establishment of strict international civil and administrative procedures would make it much more difficult for people to use intercountry adoption procedures as a means of trafficking in children, or as a cover for moving children from one country to another*". On the same occasion it was also suggested that, in particular, the system of Central Authorities would offer the possibility of reporting offenses against criminal law "*to the appropriate department so that international police or judicial co-operation may begin, if necessary*" (Prel. Doc. No 5 of April 1991). After the completion of the Convention, the 62th General Assembly Session of the International Criminal Police Organization (Interpol) took a clear stand in favour of the Convention (see Postscript, *infra*, No 615).

Fifth paragraph

55 The fifth paragraph of the Preamble reproduces the text of the draft (third paragraph of the Preamble) and even though there is not an express provision as to this effect, there was consensus that the Convention shall be considered as an international instrument prepared following the suggestion made by Article 21, sub-paragraph *e*, CRC, which requires the States Parties "*to promote, where appropriate, the objectives of this article by concluding bilateral or multilateral arrangements or agreements*".

56 The fifth paragraph of the Preamble mentions specifically only the UN Convention and the UN Declaration because of their worldwide character, "taking into account" the principles set forth in them. Therefore, it is made clear that this Convention is not to reproduce all their provisions, no matter how important they may be, but only to take them as the starting point for the best regulation of intercountry adoptions.

57 Paragraph five of the Preamble moreover prescribes, in general terms, the "taking into account" of the "principles set forth in international instruments". Although they are not expressly identified, the preparatory work clearly evidences that the reference is mainly to the *1965 Hague Adoption Convention*, the *European Convention of 24 April 1967 on the adoption of children* and the *Inter-American Convention of 24 May 1984 on the conflict of laws concerning the adoption of minors*.

58 Despite some opposition at the beginning of the preparatory work, it was approved by consensus that the international instruments referred to shall only be "taken into account", thereby expressing also the general feeling that it was desirable to avoid conflicts between this Convention and other conventions presently in force among Contracting States.

CHAPTER I — SCOPE OF THE CONVENTION

59 The objects of the Convention were defined in Article 1 by consensus, it being understood from the very beginning of the work undertaken that it could not solve all

problems related to children, no matter how important they may be. Therefore, the aims pursued are restricted to establish certain safeguards to ensure that intercountry adoptions take place in the best interests of the child, to provide a system of international co-operation amongst the States and to secure in Contracting States the recognition of adoptions made in accordance with the Convention.

60 Chapter I also regulates the scope of application of the Convention, specifying in Article 2 when the adoption is to be considered an intercountry adoption, and in Article 3 at what point in the procedure the Convention ceases to apply when the child attains the age of eighteen years during that procedure.

Article 1

Sub-paragraph a

61 Sub-paragraph *a* reproduces the text of the draft (sub-paragraph *a*, article 1) with the addition of the words "as recognized in international law", at the suggestion of Working Document No 4, submitted by Switzerland.

62 The idea behind the amendment was to determine more precisely the fundamental rights of the child, not limited to those defined by the CRC, situating them on the international plane. The aim is to prevent different interpretations from being given in the various Contracting States, and to prevent them from restricting the concept of fundamental rights of the child to those sanctioned by their own constitutional rules. Although there was agreement in substance, the proposal was considered somewhat vague and for the sake of clarity another formula was submitted to consideration: "as recognized by international law in the instruments mentioned in the Preamble", but the Swiss suggestion was approved by a large majority, notwithstanding that not all uncertainties disappear, unless it were accepted that all the rights recognized to the child by international law are considered fundamental.

63 Therefore, sub-paragraph *a* of Article 1 indicates one of the main objects of the Convention, that is, the establishment of safeguards to ensure the best interests of the child and the respect of his or her fundamental rights, as recognized by international law. The same idea is also included in the fourth paragraph of the Preamble and, consequently, the comments made there are valid here, in particular, that "the best interests of the child" shall be understood as a paramount consideration, *i.e.* taking into account the rights of other persons involved in the adoption.

64 Undoubtedly, the establishment of certain safeguards will bring about the protection of the best interests of the child, as a paramount consideration, and the respect of his or her fundamental rights, as recognized by international law. Those requirements have to be complied with by all the adoptions covered by the Convention. Therefore, it is not enough for the Contracting States to observe the principle of equal treatment between national and intercountry adoptions, as prescribed as a minimum by Article 21, sub-paragraph *c*, CRC when requiring the States Parties to "*ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption*".

Sub-paragraph b

65 Sub-paragraph *b* reproduces the text of the draft (sub-paragraph *b*, article 1) and it aims to "establish a system of co-operation amongst Contracting States", thus indicating that the Convention does not pretend to solve all problems related to children's intercountry adoption, in particular, to determine the law applicable to the granting of the adoption or to its effects. Nevertheless, some jurisdictional problems are dealt with indirectly, *e.g.* by making a distribution of responsibilities between the State of origin and the receiving State.

66 Sub-paragraph *b* specifies that the system of co-operation established is to ensure the observance of the safeguards set up by the Convention, it being understood that thereby the abduction, the sale of, or traffic in children are prevented. Since this idea is also mentioned in the fourth paragraph of the Preamble, the comments made there are also valid here, especially that the Convention does not aim to combat directly, but indirectly, such abuses and other illegal or illicit activities against children, problems that are left to other international instruments or to national legislation.

67 For this reason, for instance, the Organization of American States undertook the preparation of a draft Convention on International Traffic in Minors, approved in Oaxtepec, Mexico, in October 1993, to be considered by the Fifth Inter-American Specialized Conference on Private International Law, convoked to be held in Mexico in March 1994.

Sub-paragraph c

68 Sub-paragraph *c* of Article 1 aims "to secure the recognition in Contracting States of adoptions made in accordance with the Convention". Undoubtedly, this is a very important issue in daily life, because if the adoption decree is not recognized abroad, it does not make much sense to establish certain safeguards for the protection of the child and to agree on a system of co-operation amongst the Contracting States.

69 Sub-paragraph *c* should be read in conjunction with Article 23 that prescribes, as a principle, the recognition by operation of law of the adoptions granted according to the conventional rules. Therefore, it is clear that the object aimed at by the Convention is not merely to "promote", but to "ensure" their recognition.

Article 2

Paragraph 1

70 The first paragraph reproduces the text of the draft (article 2) and includes in the English text the words "shall apply" to stress the mandatory character of the Convention, making it clear that all intercountry adoptions granted by the Contracting States must comply with the conventional rules. It was accepted by consensus that this mandatory character was the only manner to achieve some of the main objects pursued by the Convention, *i.e.*, the protection of the best interests of the child as well as the respect for his or her fundamental rights (sub-paragraph *a* of Article 1): to prevent abuses, such as abduction, the sale of, traffic in, and other illegal or illicit activities against children (sub-paragraph *b* of Article 1), and to secure the recognition in Contracting States of adoptions made in accordance with the Convention (sub-paragraph *c* of Article 1).

71 Article 2 does not take into consideration the nationality of the parties to determine the scope of the Convention, among other reasons because the State of the nationality would not be able to comply with many of the obligations imposed by the Convention's rules, such as the preparation of the reports required by Articles 15 and 16. Therefore, even though the nationality of the parties shall not be a barrier to intercountry adoptions, it should not be forgotten that it may be one of the elements to be considered by the State of origin and the receiving State, as well as other personal characteristics, before agreeing that the adoption may proceed, as established by Article 17, sub-paragraph *c*.

72 Nevertheless, Working Document No 124, submitted by Egypt for the second reading, proposed to add a new article to Chapter I, as follows: "*This Convention shall not apply to citizens of the countries in which adoption is considered against the domestic law*"; when introduced for consideration, it was amended to read: "*This Convention shall not apply to citizens of the countries in which adoption is considered against the public policy unless intercountry adoption is necessary for the best interests of the child*". It was explained that the proposal intended to cover the situation that might arise when the adopted child is a citizen of a country which considers adoption to be against its public policy, but resides habitually in a Contracting State where adoption is admitted. The

granting of adoption of a child "may well cause the individual grave harm and put him or her in an intolerable situation", because the State of his or her nationality will continue to consider the child as a national and will not give information on him or her, "if they felt humiliated about the lack of consultation concerning the adoption". Besides, the State of the nationality will hold the child accountable for violating its laws, and when returning, he or she will be prejudiced in matters such as taxation. Therefore, the suggested formula aimed to obtain a reasonable compromise, in line with the acknowledged public policy exception in matters of recognition of foreign adoptions, since it would keep the door open for adoption of children who are citizens either of countries which do not recognize adoption but that do not consider it against their public policy, or of countries which consider adoption against their public policy but are willing to recognize adoptions in cases of necessity. However, the proposal could not be considered, in accordance with the Rules of Procedure, for lack of enough support.

73 Although the Convention does not expressly take into consideration the nationality of the interested parties to the adoption, Article 2 refers to the countries where the child and the prospective adoptive parents are resident as the "State of origin" and as the "receiving State", respectively. The expression "State of origin" was criticized, because it may bring about misunderstandings if interpreted as the "State of the nationality". However, it was kept because its specific meaning within the Convention was considered very clear and no confusion should reasonably arise.

74 El Salvador presented Working Document No 28 to make the point that the adoption process shall necessarily be carried out in the State of origin, and suggested to modify Article 2 as follows: "The Convention shall apply where a child habitually resident in one Contracting State (State of origin) is to be displaced to another Contracting State after his/her legal adoption process is concluded in the State of origin by spouses or by a person habitually resident in the receiving State". However, there was no agreement on the idea that the interests of the child are necessarily better served when the adoption is only granted in the State of origin since an important number of countries, *e.g.* in Asia, accept that the adoption take place in the receiving State. On the other hand, the Convention does not affect any law of a State of origin which requires that the adoption take place in that State (Article 28). For this reason the Convention applies no matter where the adoption takes place, either in the State of origin or in the receiving State. Consequently, Article 2 covers the following cases: (a) where the adoption is granted either in the State of origin or in the receiving State before the child is moved to the receiving State; (b) where the child is moved to the receiving State and the adoption takes place after his or her arrival there, either in the State of origin or in the receiving State; and (c) where the child is moved to the receiving State for the purposes of adoption, although no adoption takes place either in the State of origin or in the receiving State.

75 The Convention does not regulate the special case covered by the 1984 Inter-American Convention, that prescribes in its Article 20: "*A State Party may at any time declare that this Convention applies to adoptions of minors habitually resident in it by persons also habitually resident in it, when, in the opinion of the authority concerned, the circumstances of a given case indicate that the adopter (or adopters) plans to establish his domicile in another State Party after the adoption has been granted.*". Although all relevant elements are only connected with one law at the time when the adoption takes place, this provision was considered advisable because the Convention's rules may be useful to protect the best interests of the child, in the event that afterwards it becomes an intercountry adoption, for instance, to supervise the adjustment of the child to the new family.

76 According to Article 2, the prospective adoptive parents must be habitually resident in the receiving State at the time when they present their application for adoption, as prescribed also by Article 14, and the condition of the child's residence in the State of origin shall be fulfilled when the duties imposed by Article 16 are to be discharged by the Central Authorities. Therefore, the Convention's rules will have to be observed, even if either the prospective adoptive parents or the child establish afterwards their habitual residence in another Contracting State.

77 Article 2 also requires as a condition for the application of the Convention that the child and the prospective adoptive parents be habitually resident in different Contracting States. Thus, the Convention does not cover the cases where the child is habitually resident in one Contracting State and the prospective adoptive parents reside habitually in a non-Contracting State, or vice versa, the question as to whether or not such a non-Contracting State becomes a Contracting State once the adoption has been made, being irrelevant.

78 The Convention does not provide a rule to determine when the child or the prospective adoptive parents are to be considered habitually resident in a Contracting State. However, this problem shall not arise often, taking into account the factual character of the habitual residence, and if that is the case, the question will not give rise to practical difficulties because the agreement of both States is required for the continuation of the adoption, as established by Article 17, sub-paragraph c.

79 The question as to the persons who could be prospective adoptive parents was discussed at length in the Special Commission, in particular whether the Convention should cover adoptions applied for by non-married persons of different sex cohabiting together in a stable manner, or by homosexuals or lesbians, living as a couple or individually. Notwithstanding the fact that these cases were thoroughly examined, the problems they raise may be qualified as false problems, since the State of origin and the receiving State shall collaborate from the very beginning and they may refuse the agreement for the adoption to continue, for instance, because of the personal conditions of the prospective adoptive parents. Moreover, in case they agree to those specific kinds of adoption, the other Contracting States are entitled to refuse its recognition on public policy grounds, as permitted by Article 24.

80 Nevertheless, as the matter is a very sensitive one, article 2 of the draft restricted itself to approving the less problematic approach, *i.e.* to cover only the adoptions by "spouses" (male and female) and by "a person", married or not married. Besides, the Report of the Special Commission made it clear that article 2 refers to "spouses" in the first place, because it is the most common case when compared with the adoption granted to "a person", either male or female, and not because single adoptions are "abnormal".

81 Notwithstanding the lengthy discussion of the matter in the Special Commission, the question was raised again in the Diplomatic Conference. In fact, Working Document No 54, submitted by Korea, suggested to delete the words "spouses or a person" and to insert in lieu thereof "a husband and a wife or an unmarried individual", because "since certain countries now have laws allowing "spouses" to be of the same sex, the change is required for purposes of clarity"; besides, the term "a person" must be changed "to avoid the problem of a married person adopting without the consent of his wife or her husband". Furthermore, the draft's language "would allow the Convention to be used as a vehicle to legalize so-called "surrogate parenting" agreements, wherein a wife adopts the child of her husband, a child who has been born to a woman paid to be inseminated by her husband".

82 The deletion of the word "person" was also supported to make it clear that in principle the adoption should only take place within a family, but it was pointed out that such elimination would not solve all the problems, because in that case the adoptions by homosexuals would be out of the scope of the Convention, and the children so adopted would not benefit from the Convention's rules. Besides, it may also be possible that a heterosexual couple adopts a child, and after being divorced one of them forms a couple with a person of the same sex. As a matter of fact, the only solution would be to prohibit the adoption by homosexuals, either as an individual or as a couple, and the revocation of the adoption, if such case occurs after a "normal" adoption, is granted. However, all those problems are not under the scope of the Convention and should be solved according to the internal law of each Contracting State.

83 Working Document No 15, submitted by Colombia, also suggested to determine that the term "spouses" means a couple formed by a man and a woman, and that it cannot

be understood as a couple of homosexuals. In this respect, it was reminded that the French word "*époux*" only applies to heterosexual couples, because the homosexual couples are known as "*partenariat*", and that successive adoptions by individuals may come out as adoption by homosexual couples.

84 Notwithstanding the fact that the Colombian proposal was not successful, the underlying idea was accepted by consensus and it was decided that the Report would make a clear statement in this sense; the Delegate of the Holy See requested in the second reading to have reflected in the Report that the Second Commission had strongly acknowledged the importance of adoptions by spouses as the most common form of intercountry adoptions. This remark is undoubtedly supported by paragraphs 1 and 2, which were added to the draft to emphasize the placement in a family as the first priority, an idea already included in the draft's first paragraph that became the third paragraph of the Convention's Preamble, and keeping in mind that it was modified to stress the fact that a "suitable family" cannot be found in the State of origin to take care of the child.

85 The amendments to the Preamble also make clear that, as remarked in the Statement made by the Holy See to the Hague Conference, "that the couple's stable union is vital and essential for the upbringing of their children. The evident misery of children who are victims of broken marriages and the similar difficulties of significant numbers of children brought up by single parents or unmarried couples, convey a clear signal. The extra risks to which children are exposed if they are not brought up in a normal family environment, can in no way be defended as being in the best interest of the child. Or, to express it in the terms of the Convention now under consideration, placement in stable families is inherently in the best interest of the child."

86 The first paragraph of Article 2 should be read in conjunction with Article 26, paragraphs 2 and 3, because the Convention is to be applied not only for the granting of the adoption, when the child is moved from the receiving State to another Contracting State, but also to determine his or her rights as adoptive child. Likewise with Article 27, since the scope of the Convention covers the possible conversion of the adoption too.

Paragraph 2

87 Article C of Preliminary Document No 4 submitted to consideration of the Special Commission, defined the "adoption" for the purposes of the Convention as any legal institution which created a permanent social and legal relationship of parent and child. Notwithstanding the importance of the issue, consensus could not be reached upon it, because certain participants maintained that the term need not be defined because its meaning was clear enough, but others pointed out the adoption may or may not terminate the legal relationship between the child and his or her biological parents, all depending on the law in force in the various countries, and even if it is terminated, there is no agreement as to what other consequences the adoption brings about. This lack of consensus explains the absence of a definition in the draft Convention.

88 The question was examined anew in the Diplomatic Conference, where several proposals were made: (a) Working Document No 7, presented by the USA, suggested the addition of a second paragraph stating: "For the purposes of this Convention, adoption means any legal process which irrevocably terminates the relationship of parent and child with respect to the biological parents and creates the relationship of parent and child with respect to the adoptive parents or parent"; (b) Working Document No 16, submitted by Spain, proposed to specify "that for the purposes of the Convention, "adoption" refers to the establishment of a parent-child relationship between the child and the adoptive parents, and if this is the case, the termination of the legal relationship between the child and his or her family of origin"; and (c) Working Document No 54, submitted by Korea, suggested the following text: "For the purposes of this Convention, "adoption" means the legal action by which all rights and responsibilities of biological parents in respect to a child are terminated and all rights and responsibilities are transferred to the adoptive parents".

89 The latter proposal was explained by the Delegate of Korea as follows: "Adoption of

children across national boundaries require that their best interest be protected. Children are protected best when their new adoptive parents have the full rights and responsibilities needed to exercise their parental role properly. Psychologically as well as physically, the distance in adoptions across national boundaries require that a child has a sense of permanence in the adoptive family. This is not to say that variation may not exist, as provided under general national laws. Such current variations, including restrictions on the use of family names and the right to inherit from the adoptive family, should be respected in the Convention. Such respect, however, must not be allowed to interfere with the goals of the Convention for children from countries of origin when those countries' laws provide for full and unrestricted adoptions."

90 Besides, it is to be reminded that from the very beginning of the Diplomatic Conference, the Egyptian delegation insisted on a solution of the problems caused by the draft Convention to countries like Egypt which, despite the fact that they do not recognize a system of adoption, provide for other manners to take care of children, like *kafalah*, fostering and guardianship. Therefore, according to his views, which were not shared however by the other delegations, the concept of adoption should be wide enough to include all those possibilities.

91 Notwithstanding the fact that some participants were against a definition of "adoption", the large majority was "in favour of an all-inclusive definition rather than one confined to full adoption". Therefore, it was preferred to give a wider definition of "adoption", not prescribing whether the pre-existing legal parent-child relationship between the child and his or her parents would be terminated, and as a consequence of this broader concept, Article 27 of the Convention also regulates the conversion of the adoption.

92 Working Document No 13, presented by Germany, suggested to exclude from the scope of the Convention the cases where the prospective adoptive parents and the child (a) are directly or collaterally related up to the [fourth] degree, or (b) possess the same nationality. The exclusion of the adoptions among relatives or within a family aimed to permit the application of more flexible rules, but the application of the Convention to all kinds of adoption was sustained, because there is no guarantee that abuses of children do not occur in cases of adoptions within the same family. However, the Convention gives them a special treatment, in some respects: (a) Article 26, sub-paragraph c, admits the possibility of the termination of the pre-existing legal relationship between the child and his or her mother and father, but not with the other members of the family, and (b) Article 29 excepts the adoptions that take place within a family from the prohibition of contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child.

93 The text submitted to the second reading by the Drafting Committee (Work. Doc. No 179) was criticized in as much as the English version ("permanent parent-child relationship") used the word "permanent", and therefore was stronger than the French text. However, no changes were made because of the difficulties to translate into English the French expression "*lien de filiation*".

94 The second paragraph of Article 2 clarifies that the Convention covers all kinds of adoptions that bring about the creation of a permanent parent-child relationship, no matter whether the pre-existing legal relationship between the child and his or her mother and father is ended completely (full adoption) or only partially (simple or limited adoption). But the Convention does not cover "adoptions" which are only adoptions in name but do not establish a permanent parent-child relationship.

Article 3

95 Article 3 solves the question as to the children covered by the Convention, which gave rise to different opinions when discussed by the Special Commission. Some participants sustained that there should be no specific provision on this matter, leaving the decision to the State of origin, as it is done by the Inter-American Convention that allows

each Contracting State to define what is to be understood by "minority", but general consensus was reached to fix a maximum age limit for the application of the Convention in order to avoid ambiguities and various interpretations on such an important matter. Since it had been decided to follow, as far as possible, the principles sanctioned by the CRC, the age of eighteen years was finally accepted to define when a person ceases to be a minor. This point was not an object of discussion during the Diplomatic Conference, and for that reason Article 3 of the Convention reproduces the text of the draft (article 3), that fixed the age of 18 years to determine when a person ceases to be a minor.

96 Article 3 only aims to determine the scope of application of the Convention, *i.e.* the children covered by the Convention's rules, and does not pretend to establish the maximum age for the child to be adoptable. This last question refers to the child's adoptability and continues to be governed by the applicable law determined by the conflict rules of each State, like all other substantive conditions for the adoption. Consequently, when the applicable law only permits the adoption of children under a lower age, *i.e.* twelve years old or less, this requirement should be observed and the adoption cannot take place, irrespective of Article 3 of the Convention.

97 Moreover, the question regulated by Article 3 must be clearly separated from the recognition of the adoption. This distinction is very important and must be kept in mind to avoid misunderstandings. Once the agreements referred to by Article 17, sub-paragraph *c*, have been obtained before the child attains eighteen years, recognition follows automatically under Article 23 when the rules of the Convention have been complied with, and should not be impaired because the child reaches the age of eighteen, or if the adoption is granted after his or her attaining such age.

98 Article 3 of the draft prescribed that the Convention ceased to apply if the child attains the age of eighteen years without an adoption having taken place in the State of origin, or in the receiving State. However, not only in the Special Commission (see Report of the Special Commission, No 58), but also in the Diplomatic Conference some participants considered it advisable, in certain cases, to extend the benefits of the Convention notwithstanding that the child has reached the age of eighteen before an adoption being granted.

99 In fact, Working Document No 60, presented by Uruguay, proposed a new text to Article 3, as follows: "If the child attains the age of eighteen years after the transfer to the receiving State and before being adopted, either in the State of origin or in the receiving State, the Convention shall apply"; Working Document No 166, submitted by Italy, suggested to prescribe that the Convention shall apply "if the child has not attained the age of eighteen years at the moment when the Central Authorities of the States concerned have agreed that the adoption may proceed according to Article 17 of the Convention". The idea behind both proposals was to extend the chances for an intercountry adoption, because it was considered unacceptable that a child, after his or her transfer to the receiving State, should not be able to benefit from the Convention, just because he or she has attained eighteen years before the adoption proceedings are finished. A large majority was in favour of the Italian suggestion, that became Article 3, even though, as remarked, it would permit that a child might be a great deal older than eighteen, *i.e.* be an adult, at the time at which he or she is adopted.

100 Working Document No 15, submitted by Colombia, unsuccessfully suggested the addition of a new paragraph, as follows: "However, the Convention shall also be applied when the adopting parent or adopting parents have had the personal care of the minor before the child reached the age of eighteen years". The purpose was to extend the protection of the Convention to cases where a child had been living with a parent before the age of eighteen.

CHAPTER II — REQUIREMENTS FOR INTERCOUNTRY ADOPTIONS

101 "Fundamental Provisions" was the title assigned to Chapter II by the draft: the possibility to change it was discussed but rejected by the Special Commission (Report of the Special Commission, Nos 61-65).

102 Nevertheless, the question was raised again by Belgium in the Diplomatic Conference when presenting Working Document No 36 proposing to replace it by: "Conditions of the Adoption". This suggestion was modified by Belgium itself in Working Document No 133 by the expression: "Fundamental Conditions of Intercountry Adoptions". The Belgian Delegate considered it advisable to avoid the misunderstandings that might arise from the title of the draft, firstly because it might make it appear that all the fundamental provisions were included in Chapter II, a false conclusion, since other "fundamental" provisions were found in other chapters, and secondly, for giving the wrong impression that Chapter II was more important than the others.

103 However, the question of the title was left open until the contents of the various chapters were known. Then, Working Document No 179, submitted by the Drafting Committee, suggested the following denomination: "Requirements for Intercountry Adoptions", which proposal was approved without any comment.

104 According to Article 1, sub-paragraph *b*, one of the objects of the Convention is "to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children". Therefore, the Convention is structured as an instrument of co-operation and to that effect it establishes a distribution of responsibilities between the States most concerned with intercountry adoption, the State of origin and the receiving State.

105 Article 4 determines the duties of the *State of origin* regarding the substantive requirements to be verified by its competent authorities before any adoption under the Convention shall be granted, *i.e.*, (*a*) the adoptability of the child, (*b*) respect of the subsidiarity principle; (*c*) the necessary consents of other persons than the child, and (*d*) the wishes, opinions or consent of the child.

106 The responsibilities of the *receiving State* in this respect are prescribed in Article 5. Before an adoption under the Convention is granted, its competent authorities shall verify that: (*a*) the prospective adoptive parents are eligible and suited to adopt, (*b*) the prospective adoptive parents have been counselled as may be necessary, and (*c*) the child is or will be authorized to enter and reside permanently within its territory.

107 Working Document No 18, submitted by Spain, proposed a new article for Chapter II, reading as follows: "The Central Authorities of the State of origin of the child and of the receiving State shall take part in all the actions established in the present Chapter to ensure the child protection and the other aims of the Convention.". However, it was withdrawn before being considered.

Article 4

Introductory phrase

108 The introductory phrase reproduces, without modification, the text of the draft (introductory phrase of article 5), and Article 4 is included in Chapter II because it establishes the conditions that have to be complied with in all cases, no matter what the applicable law may provide. Following the structure of the Convention, it defines the responsibilities to be discharged by the State of origin and, therefore, no adoption within the scope of the Convention shall be granted, either in the State of origin or in the receiving State, unless the competent authorities of the State of origin have verified compliance with those specific conditions, *i.e.* (*a*) the adoptability of the child, (*b*) respect

of the subsidiarity principle; (c) the obtaining of the necessary consents of other persons than the child, and (d) if required, the wishes, opinions or consent of the child. Therefore, these conditions represent minimum safeguards that cannot be disregarded, it being understood that for the granting of the adoption additional requirements might be imposed by the Contracting State where it takes place.

109 The conditions established by Article 4 are directed to attaining one of the main objects of the Convention, as set out by sub-paragraph *a* of Article 1, and represent the minimum safeguards considered necessary to "ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights".

110 The regulation established by Article 4 specifies the guidelines set out by Article 21, sub-paragraph *a*, CRC that imposes upon the States Parties the duty to "*ensure that the adoption of a child is authorized only by the competent authorities who determine, in accordance with the applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary*".

111 The verification of the safeguards established by Article 4 is not necessarily made by the Central Authority provided for by Chapter III of the Convention, but by the "competent authorities" of the State of origin. The State of origin is at liberty to determine which are the competent authorities, either administrative, judicial or even the Central Authority.

112 The introductory phrase of the first paragraph should be read in conjunction with sub-paragraph *c* of Article 36 to determine the competent authorities in case that a Contracting State has two or more systems of law with regard to adoption applicable in different territorial units.

113 Article 4 only establishes minimum standards. Therefore, as already mentioned, the State of origin or the receiving State may impose compliance with additional conditions, as is evidenced by reading the first paragraph of Article 4 in connection with sub-paragraph *a* of Article 17.

114 The question as to whether, once the competent authorities of the State of origin have verified the conditions sanctioned by Article 4, a new verification may be undertaken by the competent authorities of the receiving State, is discussed *infra*, Nos 324-342 (Art. 17). Under Article 17, sub-paragraph *c*, the receiving State is at liberty to give or withhold its agreement for the adoption to proceed, and in this way has the possibility not to impose on the State of origin adoptions which are not acceptable to that State, but to refuse its co-operation with adoptions that are not in conformity with its own rules (including rules of private international law) or to make its co-operation dependent on the respect of its own rules by the State of origin.

115 Persons reading this Article should also be aware of Article 29, that prohibits, as a rule, personal contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs *a* to *c*, and Article 5, sub-paragraph *a*, have been met.

Sub-paragraph a

116 Sub-paragraph *a* is a repetition of the text suggested by the draft in article 5, sub-paragraph *a*, and submits the granting of the adoption to a previous decision regarding the adoptability of the child, a requirement also prescribed by Article 21, sub-paragraph *a*, CRC. It is to be read in conjunction with Article 16, sub-paragraph *b*, that demands, in the report to be prepared, information about the adoptability of the child.

117 The expression "adoptable" was criticized as inappropriate by many participants during the meetings of the Special Commission, it being observed that it suggests the idea

of "availability", as if the child was an item of merchandise to be acquired by the prospective adoptive parents, and also that it might be understood as only referring to the legal conditions necessary for the adoption. Nevertheless, the term was maintained for the very simple reason that no better word could be found. The expression "in need of adoption" is less appropriate, because a child may need to be adopted but not fulfil the necessary legal requirements, and "free for adoption" does not take into account the various aspects that have to be examined for granting the adoption, not only the legal requirements but also the psycho-social conditions of the child.

118 Despite the exhaustive discussion in the Special Commission, the question was raised again during the Seventeenth Session. Working Document No 21, submitted by Defence for Children International and International Social Service, recalled that the Regional Seminar held in Manila in April 1992 on "Protecting Children's Rights in Intercountry Adoptions and Preventing Trafficking and Sale of Children" requested to consider carefully the appropriateness of this term, since the connotation of "adoptable" is "available" or "freed up", meaning that the child concerned may be perceived as the object rather than the subject of an adoption. A similar comment was made by Greece in the second reading, when remarking that the term "adoptable" had to be understood in the juridical sense, *i.e.*, *prima facie* according to the law applicable and not in the factual meaning of the word, then a child may be in need of adoption but without being adoptable, because of non-compliance with the necessary legal conditions. However, the text accepted by the Special Commission was maintained without further examination of the matter, for the very same reason, *i.e.* because no better term could be found, after Germany withdrew its proposal (Work. Doc. No 14) to have the text reading: "can be adopted", because of the various interpretations that it may suggest.

119 The adoptability of the child shall be determined by the competent authorities of the State of origin according to the criteria of the applicable law as well as psycho-social and cultural factors. This conclusion was expressly acknowledged during the discussion of Working Document No 49, submitted by Peru, which suggested the addition of the following words: "in accordance with his or her national law", because Peruvian law requires a previous declaration of abandonment before the child is considered as "adoptable". The proposal was not approved, however, since the determination of the adoptability by the State of origin has to be decided according to its conflict rules, that may prescribe the application of a different law, it also being pointed out that the unification of the conflict rules was not among the objectives of the Convention and that Article 2 had not selected the nationality but the habitual residence to determine the scope of application of the Convention.

Sub-paragraph b

120 Sub-paragraph *b* reproduces without change the text suggested by the draft in article 5, sub-paragraph *b*, confirming the subsidiarity principle of the intercountry adoption, already included in the third paragraph of the Preamble and, for this reason, the comments made there are valid here (*supra*, Nos 40-47).

121 The question as to how to determine when an "internal" or "national" adoption is not possible, was not discussed again during the Seventeenth Session and consequently, the State of origin shall be responsible for the observance of the subsidiarity principle sanctioned by the Convention. Working Document No 51, submitted by Poland, suggested to add the words "and it is admissible" to sub-paragraph *b*, the underlying idea being that the conditions for intercountry adoption may differ from those required for internal adoptions, but the proposal was not considered in the second reading, in accordance with the Rules of Procedure, because of lack of support.

122 The basis for assigning this responsibility to the State of origin was that, usually, it will be in the best position to determine that there is no "national" or "internal" solution for the specific child to be adopted. None the less, the receiving State is allowed to control such determination, because its Central Authority is at liberty to give its agreement for the adoption to proceed, as permitted by Article 17, sub-paragraph *c* (*cf. supra*, No 114).

123 Notwithstanding the express acceptance of the subsidiarity principle, there was consensus that, in certain circumstances, the best interests of the child may require that he or she be placed for adoption abroad, even though there is a family available in the State of origin, for instance, in cases of adoption among relatives, or of a child with a special handicap and he or she cannot adequately be taken care of.

124 According to sub-paragraph *b* of Article 4, the subsidiarity principle of intercountry adoption has to take into account the best interests of the child, a principle already expressed in the fourth paragraph of the Preamble and in Article 1, sub-paragraph *a*. In this respect, as already remarked, the best interests of the child shall be understood to be the paramount consideration, following the guidelines set out by Article 21, first paragraph, CRC, according to which the "*States Parties which recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration ...*".

Sub-paragraph c

125 Sub-paragraph *c* of Article 4 develops the principles laid down in Article 21, sub-paragraph *a*, CRC, when imposing upon the States Parties the duty to ensure that, if required, the parents, relatives and legal guardians "*have given their informed consent to the adoption on the basis of such counselling as may be necessary*".

126 The Convention follows the draft when regulating separately the child's consent from the consent of the other persons intervening in the adoption. Therefore, sub-paragraph *c* of Article 4 establishes the minimum safeguards relating to the consent of those other persons, and sub-paragraph *d* deals only with the wishes, opinions and/or consent of the child. For this reason, there are some inevitable repetitions, but they do not bring about any damage and avoid any possible misunderstanding.

127 The Convention also makes a clear distinction between the consents required for the adoption, to be obtained on behalf of the child from the persons, institutions and authorities, regulated by Article 4, and the agreement of the prospective adoptive parents referred to in Article 17, that cannot be characterized as a consent in the strictly legal sense.

128 Sub-paragraph *c* of Article 4 should be read in conjunction with the decision approved by the Seventeenth Session of the Hague Conference expressing the Wish that the experts participating in the first meeting of the Special Commission to be convened in accordance with Article 42, establish recommended forms to be used for the consents required by Article 4, sub-paragraph *c* (as well as for the certification provided for by Article 23, paragraph 1), to promote the proper and uniform application of those provisions.

Sub-paragraph c (1)

129 The persons whose consent is necessary on behalf of the child are determined by the applicable law: it will usually include not only the child's biological parents, but also his or her relatives or legal guardians, with the intervention of the competent authorities, where required.

130 According to sub-paragraph *c* (1), the consents shall be given after appropriate counselling, and to facilitate compliance with this condition, Article 9, sub-paragraph *c*, prescribes that the Central Authorities of the Contracting States are to take, directly or through public authorities or other bodies duly accredited in their States, all appropriate measures, in particular to "promote the development of adoption counselling and post-adoption services in their States".

131 Sub-paragraph *c* (1) includes the words "as may be necessary", because previous counselling does not always have to be given, as in the case where institutions or

authorities ought to intervene, for they are not supposed to need it.

132 The consents required from the persons (as apart from the institutions and authorities) referred to by sub-paragraph c (1) as a rule shall be given in general terms, since those persons do not know who the prospective adoptive parents are, except in the case of adoptions within a family. (Cf. Article 29 prohibiting personal contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child.)

133 The last sentence of sub-paragraph c (1) represents a substantial amendment to the draft article 5(c)(i), which required to give counselling and information, not only concerning "the effects of their consent", but also concerning the adoption and, correspondingly, sub-paragraph c(v) prescribed the verification that "the consents have been given in the full knowledge of the effects of the adoption in the receiving State". As was explained in the Report of the Special Commission, such condition was not satisfactory for several reasons: (a) at the stage when the consents are given, the receiving State was not known yet; (b) the question as to which law was to be applied to the effects of the adoption had not been settled by the draft; (c) complete and detailed counselling and information regarding the effects of the adoption would need a short legal course on adoption that average persons will not even be able to understand; and (d) the impossibility to counsel and to inform about the possible changes of the law of the receiving State, in case it were known.

134 Working Document No 11, submitted by Belgium, Ireland and Switzerland, insisted on the inconvenience of the solution accepted by the draft and suggested not to require counselling and information concerning the effects of the adoption, but only "in particular, whether or not the consent implies the termination of the legal relationship between the child and his or her family of origin". They remarked that this was the most important matter to be counselled and informed about before the consent was given, because, according to comparative law, there were three possible situations: (a) certain States, like Rwanda, maintain such relationship notwithstanding the adoption; (b) in other States, like in Nicaragua, the adoption necessarily brings about the final rupture of the legal relationship between the child and his or her family of origin; and (c) the great majority of States, like Belgium, Romania and Chile, admit several classes of adoption, the maintenance of that legal relationship depending on the type of adoption granted. Therefore, Working Document No 11 concluded that the counselling and information could only be given taking into account the law of the State of origin, and referred to the *general effects*, but not to the *particular consequences* of the adoption, i.e. the possible transfer of the right of custody, the rights of the adopted child to the succession to the estate of his or her adoptive parents, the possible change of his or her name, his or her possible social security rights in the receiving State, and so on.

135 There was consensus that the Convention should not contain a conflicts rule on the effects of the adoption and for this reason, article 5(c)(v) of the draft was deleted, because it submitted those effects to the law of the receiving State.

136 It was also decided that the counselling and information could not cover all the ultimate effects of the consent given, because such requirement would be "illusory and impracticable", as remarked by the Swiss delegation, but only to those effects considered to be the most important.

137 Therefore, following the suggestion in Working Document No 11, sub-paragraph c (1) expressly mentions that the counselling and information shall refer to the point as to whether or not the adoption "will result in the termination of the legal relationship between the child and his or her family of origin". In case of an adoption among relatives, it should be explained that the legal relationship will only be terminated with the child's mother and father, but not with other relatives. If the persons whose consent is necessary have in mind an adoption that maintains such permanent legal relationship, the adoption granted cannot bring about its termination, because it would violate one of the fundamental conditions for the granting of the adoption.

138 Therefore, the counselling and information shall be directed, at least, to explain to those whose consent is necessary which are the effects of the adoption according to Article 26 of the Convention, and the possibility of its conversion as permitted by Article 27. It may also be advisable to make reference as to the possible revocation or nullity of the adoption.

139 Sub-paragraph c (1) should be read in conjunction with Article 16, sub-paragraph c, requiring that the Central Authority of the State of origin, once satisfied that the child is adoptable, shall ensure that the consents have been obtained in accordance with Article 4. It should also be read in conjunction with Article 29, because the obtaining of those consents is one of the conditions to be complied with before the contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child are permitted.

Sub-paragraph c (2)

140 Sub-paragraph c (2) reproduces in substance the text of the draft (article 5(c)(ii)) and establishes certain conditions that necessarily have to be complied with for the validity of the consent given to the adoption, no matter what the applicable law may prescribe. Nevertheless, some amendments were made to clarify its actual sense, the first being a linguistic one, because the word "they" at the beginning was substituted, in the very Closing Session of the Diplomatic Conference, by the expression "such persons, institutions and authorities".

141 The draft required that "they have given free and unconditional consent". Therefore, it should have been given "freely", not being affected by a defect, *e.g.*, in case of fraud, misrepresentation, duress, undue influence or mistake. Sub-paragraph c (3) is a substantive rule established by the Convention that has to be applied by all Contracting States. All other questions relating to the validity of the consents given are to be determined by the conflict rules of the State of origin, because it was not considered advisable to insert many substantive rules in the Convention.

142 Working Document No 71, submitted by Belarus, unsuccessfully suggested to require expressly that the consents have not been obtained by *menace or violence* to avoid vices in the consents given, but despite the fact that everybody agreed with the substance, it was considered unnecessary because of the general principle of law prescribing that a consent affected by a vice is not a binding one.

143 Sub-paragraph c (ii) of the draft also required that the consent be "unconditional", *i.e.* not submitted to any kind of conditions and therefore not contingent upon the occurrence of some uncertain future event. However, Working Document No 8, submitted by the United States of America, observed that there may be some circumstances in which the imposition of some conditions by the biological parents may be deemed appropriate and permitted by the State of origin, *i.e.* adoption by a family of the same religion, as was also exemplified in Working Document No 40, presented by Ireland. Therefore, the United States made the suggestion to delete the word "unconditional" and to use the word "voluntary" instead of "free" to qualify the consent. The proposal was accepted by consensus, but the term "voluntary" was considered not advisable, because it does not mean the same as the word "*libre*" in the French version and for this reason, the expression "freely" was finally approved.

144 The draft required that the consent be given "in writing". This condition was criticized at the Seventeenth Session because of its possible misinterpretation in case of persons who are illiterate, a situation very frequent in many States of origin, as pointed out on several occasions by delegates coming from various geographical regions. Working Document No 49, submitted by Peru, remarked the "high percentage of persons who are illiterate and would only be able to give an oral consent" and, during the second reading, the Delegate of Nepal too called the attention of the Commission "that the literacy rates in some States were very low".

145 Many participants qualified the objection as a false problem, because it mixed two different questions: the expression of the consent, that may be in writing or oral before the competent authority, and the proof of the consent that must be in writing even though expressed orally. However, for the sake of clarity and to avoid misunderstandings, the term "in writing" was substituted by "expressed or evidenced in writing".

146 Working Document No 190, presented by the United Kingdom during the second reading, suggested that the words "in the required legal form" be substituted by "in such form as may be required", to provide greater flexibility by not submitting the consent to a prescribed form. Notwithstanding the remark made by Germany that the absence of a prescribed form also constitutes a form, the Swiss delegation reminded that the written form is (at least for the evidence of the consent) mandatory according to Article 4(c)(2). The proposal of the United Kingdom was not considered because of lack of support.

Sub-paragraph c (3)

147 Sub-paragraph c (3) reproduces the text of the draft (article 5(c)(iii)), which required that the consents shall "not have been induced by payment or compensation of any kind".

148 Article 5(c)(iii) of the draft also required that the consents given "have become irrevocable", a condition not satisfactory to some participants. As a matter of fact, Working Documents Nos 22 and 25, submitted by the United Kingdom and Australia, respectively, suggested to add the words: "pursuant to the law of the State of origin", but the proposal was not successful because it could be misunderstood as dealing with the applicable law, which is outside the scope of the Convention. Sweden presented Working Document No 26, sustaining that it would be against the fundamental rights of the biological parents not to allow the revocation of their consent as long as the adoption has not taken place, even though acknowledging that the possibility of such revocation should not be solved by the Convention, but left to the applicable law.

149 Working Document No 40, submitted by Ireland, suggested to insert the words "have not been withdrawn" instead of "have become irrevocable", because in several countries the consent to adoption only becomes irrevocable on the making of the adoption order. This suggestion was accepted and sub-paragraph c (3) was modified accordingly.

150 The amendment made to sub-paragraph c (3) leaves open the question as to what law applies to the possible revocation of the consents given. This question will in principle have to be decided according to the conflicts rules of the State of origin.

151 The condition established by sub-paragraph c (3) is also prescribed by sub-paragraph d (3) in regard to the consent of the child and should be read in conjunction with Article 32, paragraph 1, which establishes a general prohibition for anyone to derive improper financial or other gain from an activity related to an intercountry adoption. Therefore, the consents must also not either have been induced by "other gain" different from payment or compensation of any kind.

152 Sub-paragraph c (3) should be read in conjunction with Articles 16, sub-paragraph c, and 29, for the reasons stated *supra*, No 139, requiring the Central Authority of the State of origin, once it is satisfied that the child is adoptable, to ensure that the consents have been obtained in accordance with Article 4, and also with Article 29, because it is one of the conditions to be complied with before the contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child are permitted.

Sub-paragraph c (4)

153 Sub-paragraph c (4) reproduces the text of the draft (article 5(c)(iv)) and represents a compromise reached in the Special Commission, after discussing at length the

question as to when the consents required for the adoption should be given, in particular in the case of the mother. Some opinions were in the sense that the applicable law should decide the validity of her consent before the birth of the child and its possible revocation, but the overwhelming majority wanted to prevent abuses against unmarried mothers and to guarantee the seriousness of their consent, to ensure that measures are taken to prevent mothers from making hurried decisions caused by strain, anxiety or pressures to give their consent, requiring their consent to be given after the birth of the child.

154 Working Document No 17, submitted by Spain, proposed that the consent of the mother, where required, should have been given "only after, at least, thirty days since the birth of the child". Working Document No 41, submitted by Italy, permitted the consent of the mother before the birth of the child, but required her confirmation afterwards. However, both proposals were unsuccessful. It was pointed out that the text of the draft represented a compromise and that a somewhat flexible provision would be better than a rigid requirement, because it may take account of the cultural, sociological and psychological differences that, undoubtedly, may affect the time advisable to accept the revocation of the consent given by the mother. Therefore, the solution accepted in the draft was maintained and for this reason, the period after the child's birth to revoke the consent of the mother is left to the applicable law according to the conflict rules of the State of origin.

155 The words "where required" take care of the cases where the consent of the mother is not necessary for the validity of the adoption, *e.g.*, if she is dead, if her parental rights have been suspended, or if the child has been declared abandoned by the competent authority.

Sub-paragraph d

Introductory phrase

156 The introductory phrase of sub-paragraph *d* reproduces the text of the draft (introductory phrase of article 5 *d*) that aimed to develop the principles contained in Article 12 CRC. Therefore, it requires verification of the wishes, opinions and consent of the child in a different sub-paragraph from the one regulating the consent necessary from other persons, institutions or authorities for the validity of the adoption, and specifies that to fulfil this responsibility, the competent authorities of the State of origin have to take into account "the age and degree of maturity of the child".

157 Some participants to the Special Commission suggested to fix an age limit, as is required by several national laws for the necessary intervention of the child in any judicial or administrative proceedings affecting his future. However, a broader and more flexible formulation was approved, not determining how old the child should be in order to be heard and taking into consideration his or her wishes, opinions or consent, but leaving the decision to the competent authorities of the State of origin.

158 Working Document No 17, submitted by Spain, suggested to require the consent of the child over twelve years of age, but this proposal did not succeed because a more flexible formula was considered to be more realistic, and moreover was in line with Article 12(1) CRC.

Sub-paragraph d (1)

159 Sub-paragraph *d* (1) repeats the text of the draft (article 5(*d*)(*i*)). It reproduces, in substance, the requirement prescribed by sub-paragraph *c* (1) for the persons, institutions and authorities whose consent is necessary for adoption and for this reason, the comments made there are valid here.

160 However, it is to be observed that sub-paragraph *d* (1) maintains the formula of the draft and requires due counselling and information "of the effects of the adoption", notwithstanding the fact that this condition had been rejected in sub-paragraph *c* (1) because of

the practical impossibility or the difficulties to comply with such requisite. Despite its maintenance, sub-paragraph *d* (1) shall be understood similarly as sub-paragraph *c* (1), *i.e.* to give counselling and information of the effects provided by Article 26, sub-paragraphs *a* and *b*; also as to whether the adoption terminates the pre-existing legal relationship between the child and his or her mother and father, and as the case may be with his or her family, as mentioned by sub-paragraph *c* of the same Article, and the possibility of its conversion as permitted by Article 27.

161 As already remarked, the consent of the child, having regard to his or her age and maturity, shall be given not to the adoption in general, but for the specific adoption in a particular case, since it would be against his or her fundamental rights to have the child adopted without even knowing who the adoptive parents are going to be.

162 Sub-paragraph *d* (1) only imposes the obtaining of the consent of the child "where required". Therefore, the determination of the cases where it must be obtained shall be decided by the applicable law.

163 Sub-paragraph *d* (1) should be read in conjunction with Article 16, sub-paragraph *c*, requiring that once the Central Authority of the State of origin is satisfied that the child is adoptable, it shall ensure that the consents have been obtained in accordance with Article 4.

Sub-paragraph d (2)

164 Sub-paragraph *d* (2) reproduces the text of the draft (article 5(*d*)(*ii*)) and prescribes that, even though the consent of the child is not always required, the competent authorities of the State of origin shall give consideration to the "child's wishes and opinions", it being understood that it is not enough to permit the child to express him- or herself, but to have his or her wishes or opinions taken into account.

165 When this question was discussed in the Special Commission, it was observed that sub-paragraph *d* (2) was not as explicit as Articles 12 and 13 CRC, which establish the freedom of opinion and expression of the child. Nevertheless, the decision was taken that the Convention should restrict itself to regulating the most essential issues of substantive law in relation to intercountry adoption, leaving all others to the applicable law.

166 Sub-paragraph *d* (2) should be read in conjunction with Article 16, sub-paragraph *c*, for the reasons stated *supra*, No 163.

Sub-paragraph d (3)

167 Sub-paragraph *d* (3) reproduces the first part of article 5(*d*)(*iii*) of the draft, with some amendments similar to the changes made to Article 4(*c*)(2). Therefore, for the same reasons, the consent is not required to be "unconditional", but it shall have been given freely and "expressed or evidenced in writing".

168 Sub-paragraph *d* (3) should be read in conjunction with Article 16, sub-paragraph *c*, for the reasons stated *supra*, No 163.

Sub-paragraph d (4)

169 Sub-paragraph *d* (4) reproduces without changes the last sentence of article 5(*d*)(*iii*) of the draft, because it was considered advisable to have a separate provision on this specific question.

170 The same condition is sanctioned by sub-paragraph *c* (3) regarding the persons, institutions and authorities whose consent is necessary for adoption; it should be read in conjunction with Article 32, paragraph 1, which establishes a general prohibition for anyone to derive improper financial or other gain from any activity related to an intercountry adoption. Therefore, the consents shall not have been induced by "other gain" different

from payment or compensation of any kind.

171 Even though not expressly stated, it is to be understood that the consent given has not been withdrawn, as is expressly required in Article 4(c)(3).

172 Sub-paragraph *d* (4) should be read in conjunction with Article 16, sub-paragraph *c*, for the reasons stated *supra*, No 163.

Article 5

Introductory phrase

173 According to the system of co-operation and distribution of responsibilities designed by the Convention, Article 5 sets out the obligations to be complied with by the receiving State before any adoption within the scope of the Convention shall take place. Consequently, the competent authorities of the receiving State have to verify that the prospective adoptive parents are eligible and suited to adopt, that the prospective adoptive parents have been counselled as may be necessary, and that the child is or will be authorized to enter and reside permanently within its territory.

174 The introductory phrase of Article 5 reproduces the text of the draft, with the only change that the last words ("have determined") were deleted to take care, from a linguistic point of view, of the inclusion of the new sub-paragraph *b*.

175 The conditions sanctioned by Article 5 have to be fulfilled cumulatively, but it is to be kept in mind that they are only minimum safeguards and for that reason, the receiving State is free to impose the verification of additional requirements.

176 According to Article 5, the verification has to be made by the "competent authorities" and, therefore, the receiving State will determine which are those authorities, either judicial or administrative, or even the Central Authority regulated by Chapter III of the Convention.

177 Article 5 should be read in conjunction with Article 36, sub-paragraph *c*, to determine the competent authorities in case that a Contracting State has two or more systems of law with regard to adoption applicable in different territorial units.

178 Working Document No 19, submitted by Spain, suggested the inclusion of a new article reading as follows: "For the purposes of articles 6 and 7 (of the draft Convention), consuls shall be considered competent authorities of the receiving State, as long as their intervention is not prohibited by the State of origin." The proposal was made because it reflects the internal law of Spain and also corresponds with Article 5 *f* of the UN Vienna Convention on Consular Relations. However, it failed because it was considered unwise to delve into the question of which authority should be looked upon as being a competent authority.

179 Working Document No 149, submitted by Belgium, Spain and Switzerland, suggested to include as an additional condition to the adoption, if granted in the State of origin, the compliance with the requirements for the placement of the child with the prospective adoptive parents, *i.e.* the agreement of both States to the placement. In spite of the fact that the proposal was not formally approved, the idea behind it re-appears in Article 17 of the Convention.

Sub-paragraph a

180 Sub-paragraph *a* repeats the text of the draft (article 6, sub-paragraph *a*) and should be read in conjunction with Article 15, first paragraph. It establishes that the competent authorities of the receiving State have to determine that the prospective adoptive parents comply with two different kinds of requirements: (*a*) to be "eligible", *i.e.*

to fulfil all legal conditions; and (b) to be "suited", meaning to satisfy the necessary socio-psychological qualifications.

181 Nevertheless, such determination may be verified by the competent authorities of the State of origin before agreeing to the continuation of the adoption process according to Article 17, sub-paragraph c.

182 Sub-paragraph a should be read in conjunction with Article 29 which prohibits, as a rule, personal contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a to c, and to Article 5, sub-paragraph a, have been met.

Sub-paragraph b

183 Sub-paragraph b matches the requirement prescribed by the first sentence in Article 4(c)(1) and it was included in Article 5, because this task is easier to be complied with in the receiving State, where the prospective adoptive parents are habitually resident. It is to be kept in mind, however, that the competent authorities of the State of origin, in accordance with sub-paragraph a of Article 17, have to verify the agreement of the prospective adoptive parents to the adoption.

184 Sub-paragraph b requires that the prospective adoptive parents have been counselled, as may be necessary, and to facilitate compliance with this condition, Article 9, sub-paragraph c, prescribes that the Central Authorities of the Contracting States shall take, directly or through public authorities or other bodies duly accredited in their States, all appropriate measures, in particular to "promote the development of adoption counselling and post-adoption services in their States".

Sub-paragraph c

185 Sub-paragraph c reproduces the text of the draft (article 6, sub-paragraph b) and should be read in conjunction with Article 18, prescribing that the Central Authorities of both States shall take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.

186 Sub-paragraph c establishes a substantive condition for the adoption and the idea behind it was accepted by consensus. Certainly, there is no sense in granting the adoption if the child is not allowed to enter and to reside permanently in the receiving State, where the prospective adoptive parents are habitually resident, and the same reason explains Article 18.

187 Usually, the adoptive family will settle in the State where the prospective adoptive parents were habitually resident at the beginning of the adoption proceedings, but if they move meanwhile to another Contracting State, it seems unavoidable to understand that the latter country has to be considered as the receiving State for the purposes of sub-paragraph c.

188 The formulation "the child is or will be authorized" is broad enough to cover also the cases where no authorization or visa requirement is necessary to enter or to reside permanently in the receiving State, as it occurs, for example, among the States belonging to the European Union.

189 The determination made according to sub-paragraph c is to be verified by the competent authorities of the State of origin before taking any decision to entrust the child to the prospective adoptive parents, according to Article 17, sub-paragraph d.

CHAPTER III — CENTRAL AUTHORITIES AND ACCREDITED BODIES

190 The title of Chapter III reproduces the text of the draft and does not mention

specifically the public authorities that may fulfil some of the functions assigned to the Central Authorities, the explanation being that they "are less visible" in the regulation made by the Convention (Report of the Special Commission, No 144).

191 Because of the wide differences among the legislations with respect to methods for the structuring and exercising of control over intercountry adoptions, it was admitted from the very beginning of the work undertaken that "it would probably be very difficult to co-ordinate their use under a convention text, unless the convention established a system of Central Authorities on the model of the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, of the *Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters* and, in particular, of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter: the Hague Child Abduction Convention) and its European and American counterparts (the *European Convention of 20 May 1980 on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children*, and the *Inter-American Convention of 14 July 1989 on the International Return of Children*) setting out certain specific powers and duties of these Central Authorities".

192 Since the Convention on intercountry adoption mainly purports to be an instrument for co-operation between the judicial and administrative authorities of the Contracting States, a choice had to be made between the advantages of direct co-operation and the benefits arising from the nomination by each Contracting State of a Central Authority to co-ordinate and channel the intended co-operation. It was decided to impose on the Contracting States the duty, not to create, but to designate a Central Authority, even though it was acknowledged that some functions could not in all countries be fulfilled by the Central Authorities themselves, like the granting of the adoption, which is usually subject to intervention by the courts.

193 The existing differences among the States explains the solution of the problem as to whether the duties imposed by the Convention on each Contracting State might be discharged directly by the Central Authority or also through some other competent authorities or bodies duly accredited in the State. It was suggested that each Contracting State should decide by itself whether the obligations imposed upon the Central Authorities could be delegated, it being understood that they would remain the "operator" of the co-operation among the Contracting States. Nevertheless, it was agreed that there were some functions to be performed directly by the Central Authorities (Article 7) and others that could be delegated (Articles 8 and 9). However, the Convention differs from the draft, because it restricts the possibility of delegation, since there are some cases where the functions assigned shall only be performed either by the Central Authority directly or through public authorities (Article 8), while the duties defined by Article 9 may also be performed by bodies duly accredited.

Article 6

General comments

194 Article 6 reproduces in substance Article 6 of the Hague Child Abduction Convention and, therefore, the comments made to this provision are applicable to Article 6.

195 According to Article 6, there is no need to create, but only to designate, a "Central Authority", an observation which must be kept in mind to avoid any misunderstanding. As a matter of fact, it would be wrong to believe that the ratification, acceptance, approval of or accession to the Convention must necessarily cause extraordinary administrative expenses to the Contracting States, because of the role assigned to the Central Authorities. In many States there already exists a governmental body acting as "Central Authority" in matters of intercountry adoption; in others, an existing service or division of a Ministry may be designated as such.

Paragraph 1

196 The first paragraph reproduces the text of the draft (article 8, first paragraph) and prescribes that the Central Authority shall discharge the duties imposed by the Convention upon them. However, this first paragraph should be read in conjunction with Articles 8 and 9 which, depending on the duties to be performed, permit the delegation of the functions assigned to the Central Authority to other public authorities and accredited bodies, within the limits and under the conditions determined by the law of each Contracting State. It should also be read in conjunction with Article 22 which permits, within some limits and under certain conditions, the delegation of the functions assigned to the Central Authority by Chapter IV to other public authorities or accredited bodies, or even non-accredited bodies or persons.

197 Upon examination of the first paragraph, during the meetings of the Special Commission, the possibility was suggested for each Contracting State to designate as Central Authority not a governmental body, but a semi-governmental or a non-governmental body. It was agreed that each Contracting State should be free to decide how to comply with the duties imposed by the Convention, and therefore to designate the Central Authority it considers most adequate. Even though the proposal was not successful, one should keep in mind the possibility of delegation of the duties assigned to Central Authorities, to the extent permitted by Articles 8, 9 and 22 of the Convention.

Paragraph 2

198 Article 8, second paragraph, of the draft dealt with Federal States and reproduced, in substance, the same formula as the one used by the Hague Child Abduction Convention. However, the Special Commission accepted a reference to "States having autonomous territorial units", instead of "... autonomous territorial organizations".

199 During the first reading of the draft, the Belgian delegation pointed out that this formulation was incomplete, because it did not permit the Contracting States to determine the "personal" extension of the various Central Authorities. Therefore, its Working Document No 3 suggested to complement the first sentence of the second paragraph permitting the Contracting States "to specify the personal extent" of the functions of their Central Authorities. However, to avoid possible misunderstanding, it was decided, with no objections, to reach the same result by making only reference to the "extent" of the functions, deleting the specification "territorial" included in the draft.

200 Notwithstanding this unrestricted approval, the question was raised again in the second reading by the Canadian delegation, which insisted on the utmost importance for Federal States to include a reference to the territorial extent of the functions to be performed by more than one Central Authority. Therefore, its Working Document No 185 suggested the re-insertion of the word "territorial" before "extent", so that the Article would be in line with the formula approved in other Hague Conventions, in particular the Child Abduction Convention. The proposal could not be considered, however, in accordance with the Rules of Procedure, because there was not enough support, but it was agreed that the Report should explain that the alteration did not intend to modify the substance of the Article.

201 The question was submitted again to the Plenary Session of the Conference, because Working Document No 5, presented by Australia, Belgium, Brazil, Canada, Germany, Mexico, Russian Federation, Spain, Switzerland and the United States of America, suggested to insert the words "territorial or personal" before the word "extent" in the first sentence of paragraph 2 of Article 6. On this occasion, the proposal was approved by a large majority.

Article 7

Paragraph 1

202 The first paragraph does not modify the text of the draft (article 9, first paragraph), which reproduced the wording of Article 7 of the Hague Child Abduction Convention, with the necessary adjustments, and provides, in general terms, that Central Authorities should co-operate with each other and promote co-operation amongst the competent authorities in their States to protect children and to achieve the other objects of the Convention. Some of these duties have to be discharged directly, but most of them may be performed, with some restrictions, through other public authorities or accredited bodies.

203 The first paragraph of Article 7 should be read in conjunction with sub-paragraph c of Article 36, to determine the competent authorities, in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

Paragraph 2

204 The second paragraph reproduces in substance the text of the draft (article 9, second paragraph) and provides an enumeration of the duties that have to be directly discharged by the Central Authority, not permitting their delegation to other public authorities or accredited bodies.

205 During the second reading of the draft, Belgium submitted Working Document No 176, suggesting the inclusion of the word "directly" to avoid any misunderstandings and to clarify that the functions enumerated by the second paragraph of Article 7 cannot be delegated.

206 Therefore, the second paragraph of Article 7 differs from Article 6 of the Hague Child Abduction Convention, because the latter rule does not prescribe that the functions assigned by the Convention shall be discharged directly by the Central Authority. Nevertheless, the practical result is quite similar, because the duties imposed by sub-paragraphs *a* and *b* are of a very general nature.

207 During the meetings of the Special Commission, a proposal was made to extend the list of duties to be performed directly by the Central Authority, *i.e.*, to prevent any improper financial gain, child abduction, sale of and trafficking in children and, in general, other acts and practices not in conformity with the Convention. A similar suggestion was submitted at the Seventeenth Session and led to Article 8.

Sub-paragraph a

208 Sub-paragraph *a* reproduces the text of the draft (article 9, sub-paragraph *a*) and requires that the Central Authorities shall take all appropriate measures to provide information as to the laws of their States concerning adoption. This kind of information is very important to permit the Contracting States to agree that the adoption may proceed, as prescribed by Article 17, sub-paragraph *c*, in connection with paragraph 1 of Article 19.

209 Sub-paragraph *a* also requires that all necessary measures be taken to provide other general information, such as statistics and standard forms. This duty should be read, however, in conjunction with Article 16, paragraph 2, which prescribes not to reveal in the report on the child the identity of his or her mother and father if, in the State of origin, these identities may not be disclosed. Article 30 is also to be taken into consideration, because it imposes on the Contracting States the responsibility of preserving the information concerning the child's origin, as well as Article 31, which regulates the protection of the personal data gathered or transmitted.

210 The reference to standard forms made by sub-paragraph *a* emphasizes their ultimate future importance in facilitating the functioning of the Convention, and should be read in conjunction with the Wish expressed by the Seventeenth Session that the experts participating in the first meeting of the Special Commission to be convened in accordance with Article 42 establish recommended forms, in particular for the consents required by

Article 4, sub-paragraph *c*, and for the certification referred to in Article 23.

211 The duty imposed by sub-paragraph *a* to be discharged directly by the Central Authority is only "to take all appropriate measures" to provide the required information. Therefore, the collection and preparation of the information may and usually will be undertaken by specialized persons, bodies or authorities, and not by the Central Authority itself.

Sub-paragraph b

212 Sub-paragraph *b* reproduces the text of the draft (article 9, sub-paragraph *b*) and imposes upon the Central Authorities the obligation of taking all appropriate measures to keep each other informed about the operation of the Convention and, as far as possible, of eliminating any obstacles to its application. This provision is to be read in conjunction with Article 33, which puts upon the Central Authority the responsibility for ensuring that appropriate measures are taken to prevent the provisions of the Convention from not being respected or the serious risk that they may not be respected.

213 The obligation imposed by sub-paragraph *b* upon the Central Authority is merely to obtain, from other sources as the case may be, the information on the operation of the Convention, and it has not either the duty to eliminate directly any obstacles to the application of the Convention, but to take all appropriate measures for that purpose.

Article 8

214 The function assigned to Central Authorities by Article 8 was included in the draft as sub-paragraph *c* of article 10 among those duties that could be performed through other public authorities or accredited bodies. However, Working Document No 26, submitted by Sweden, pointed out that the accredited bodies were themselves subject to supervision pursuant to Article 11, sub-paragraph *c*. Consequently, it was not appropriate to permit the delegation of such supervision tasks to the accredited bodies. For that reason, it was suggested to separate this function, restricting its possible delegation to other public authorities and in no case to the accredited bodies. The idea was accepted and the obligation was laid down for the sake of clarity in an independent provision, as Article 8, despite the observations made by the delegations of Finland and Belgium that in their countries, these supervision duties were usually imposed on accredited bodies, because they know better what the practical problems are.

215 Therefore, the function defined by Article 8 is to be performed directly by the Central Authority or by other public authorities, but not by any accredited body, it being understood that any delegation by the Central Authority to other public authorities is only possible to the extent permitted and under the conditions established by each Contracting State.

216 Article 8 does not make any distinction as to the public authorities referred to in its introductory phrase. Consequently, they may be judicial or administrative, depending on the law of each Contracting State. Article 8 should be read in conjunction with Article 36, sub-paragraph *c*, to determine the public authorities in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

217 As in Articles 7 and 9, the duty imposed by Article 8 on the Central Authorities is only to take "all appropriate measures" which, in this case, have to be taken directly or through other public authorities, not through accredited bodies or persons or non-accredited bodies, but always under the terms and conditions prescribed by the law of the Contracting State.

218 Article 8 is to be read in conjunction with Article 32, which prohibits the obtaining of improper financial or other gain from any activity related to an intercountry adoption, and

with Article 33 directed to prevent any violation or any serious risk of violation of the Convention.

219 Working Document No 48, submitted by Germany, suggested to delete the word "improper" in the English version to prevent the conclusion that there are some other gains that may be considered "proper" and can be made. A similar proposal, to delete the word "*indu*" in the French text, was made by Working Document No 86, presented by France, notwithstanding the fact that the same term is used by the CRC, since, for a French-speaking person, such an adjective is "*choquant*", a remark supported by the Observer for Defence for Children International. In this respect, the Colombian Delegate expressed her fears that such deletion in Article 8, as well as in Article 32, could affect the donations usually made to the adoption centres when visited by prospective adoptive parents, strongly remarking that those donations have facilitated a greater protection for children in Colombia. After due consideration of the matter, it was decided that Article 8 should maintain the same language as in the UN Convention, to avoid the possibility of a diverse interpretation of both Conventions based on the formal difference of the texts sanctioned (see the comments on Article 32, Nos 526-534, *infra*).

220 Since the duties established by Article 8 are cast in very general terms, each Contracting State will be at liberty to determine when a practice shall be qualified as "contrary to the objects of the Convention". However, in case of different interpretations, the question may be examined during the meeting of the Special Commission to be convened according to Article 42 to review the practical operation of the Convention.

Article 9

Introductory phrase

221 The introductory phrase is a reproduction of the draft (introductory phrase of article 10), permitting each Contracting State to decide how the responsibilities imposed upon the Central Authorities by the Convention are to be discharged, with the exception of those that must be performed directly, enumerated by Article 7, and of those that only may be discharged directly or through public authorities, as prescribed by Article 8. However, such freedom is not unrestricted, because the delegation is solely permitted to other public authorities or accredited bodies, and exceptionally persons or bodies not accredited may perform all or some of the functions assigned to the Central Authorities by Chapter IV of the Convention, within the limits and under the conditions sanctioned by Article 22.

222 Even though not expressly stated, it is implicit in the introductory phrase of Article 9 that the delegation of responsibilities is only possible to the extent permitted and under the conditions established by the law of each Contracting State.

223 The introductory phrase of Article 9 should be read in conjunction with subparagraphs *c* and *d* of Article 36 to determine the public authorities or the accredited bodies in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

224 Therefore, Article 9 allows a great measure of flexibility in the functioning of the Convention, and each Contracting State will take its own decision as to how the duties imposed upon the Central Authorities are to be discharged. It may prohibit any delegation at all, or permit a general or partial delegation to the extent authorized by Articles 7 and 8, but in every case the Contracting State will remain responsible for any violation of the Convention, under public international law.

225 According to Articles 8, 9 and 22 of the Convention, the responsibilities assigned to the Central Authorities by the Convention may be discharged, depending on the function in question, by other public authorities, accredited bodies, or even in certain cases by non-accredited bodies or persons. Consequently, the Central Authorities are not necessarily the

sole "operators" of the Convention and co-operation may be obtained through other channels, as permitted by the law of each Contracting State. This feature makes the present Convention different from the Hague Child Abduction Convention, where the Central Authority remains the unique institution responsible for compliance with the obligations imposed by the Convention. For this reason, it is more flexible and may bring about a factual decentralization of the functions assigned to the Central Authority.

226 Because of the factual decentralization that may arise in case of delegation, the Report of the Special Commission (No 166) suggested to require from each Contracting State to transmit to the Secretary General of the Conference the relevant information indicating the public authorities or accredited bodies and, if the declaration of the second paragraph of Article 22 has been made, the non-accredited bodies or persons that may perform some duties assigned to the Central Authority by the Convention and to which extent. This suggestion was accepted by the Seventeenth Session and was laid down in Article 13 in relation to accredited bodies, and for non-accredited bodies or persons in the third paragraph of Article 22. Nevertheless, it is advisable to transmit also the relevant information regarding the public authorities referred to by Articles 8, 9 and 22, first paragraph.

227 The enumeration made by Article 9 does not pretend to be an exhaustive list of the responsibilities imposed upon the Central Authorities, as is evidenced by the term "in particular" at the end of the introductory phrase, and because other functions are assigned to Central Authorities in Chapter IV of the Convention. Therefore, functions not mentioned by sub-paragraphs *a* and *b* of Article 7 may, with the exception of Article 33, be delegated, with the restrictions established by Article 8, under the terms and conditions fixed by the law of each Contracting State. This possibility of delegation is confirmed by the first paragraph of Article 22 for the functions assigned to Central Authorities under Chapter IV.

228 Like Article 8, Article 9 does not make any distinction and, consequently, the public authorities referred to in its introductory phrase may be judicial or administrative, all depending on the law of each Contracting State.

Sub-paragraph a

229 Sub-paragraph *a* reproduces the text of the draft (article 10, sub-paragraph *a*), with the amendment suggested by France in Working Document No 86 to delete its last sentence which made specific reference to Article 30. The deletion was approved, because it confused two different questions: (1) the collection and exchange of information for the adoption project, referred to in sub-paragraph *a*, and (2) the access to such information by the child, once the adoption has already been granted, regulated by Article 30.

230 Sub-paragraph *a* imposes upon the Central Authority the obligation to take all appropriate measures for the collection, preservation and exchange of information regarding the child and the prospective adoptive parents, so far as is necessary to complete the adoption. However, in order not to overburden the Central Authority, it was understood that this duty should be fulfilled within the limits and under the conditions established by the law of each Contracting State.

231 Working Documents Nos 22 and 25, submitted by the United Kingdom and Australia, respectively, suggested that the collection, preservation and exchange of information should also refer to "the child's birth parent(s)" because, whenever a child is, pursuant to Article 30, entitled to accede to the information concerning his or her origins, it should be as complete as possible. In this respect, it was pointed out that, notwithstanding the importance of the information proposed to be added, the requirement could not be complied with when the child's birth parent(s) are unknown, and that it should better be restricted to non-identifying information. The suggestion was rejected by a slight majority.

Sub-paragraph b

232 Sub-paragraph *b* reproduces the text of the draft (article 10, sub-paragraph *b*) and

refers to the measures that shall be taken to facilitate, follow and expedite proceedings with a view to obtaining the adoption. This obligation is reproduced by other Articles of the Convention, *i.e.*, 18, 19 (first paragraph), 20 and by Article 35, in general terms, for all competent authorities.

233 The importance of sub-paragraph *b* was generally acknowledged as a device to protect the best interests of the child and to achieve one of the main objects of the Convention. For this reason, Working Document No 20, submitted by Spain, suggested the following formulation: "Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures to facilitate, follow and expedite proceedings in order to obtain the adoption, carrying out all the functions established in Chapter IV, and shall intervene before judicial or extrajudicial authorities". However, the proposal was not successful, it being objected that the term "intervention" has a clearly different meaning in the law of civil procedure and that the text suggested would excessively interfere with the constitutional laws of the Contracting States.

Sub-paragraph c

234 According to sub-paragraph *c*, Central Authorities shall take all appropriate measures to promote the development of adoption counselling services in their States. The express mention of this responsibility is easily understandable, taking into account the importance assigned to appropriate counselling, a condition for the adoption, by Article 4, sub-paragraphs *c* and *d*, and by Article 5, sub-paragraph *b*.

235 Sub-paragraph *c* reproduces the text of the draft (article 10, sub-paragraph *d*), but the words "post-adoption services" were added, at the request of Korea in Working Document No 91, as modified by Ireland. The amendment was approved for the sake of clarification and because of the importance of post-adoption services "to ensure the child's adjustment into his or her new home or environment, and successful outcome of the adoption". The same idea had been proposed by the Philippines, when suggesting that the Convention should promote the social and cultural protection of the adopted children, and make, through the Central Authorities, a conscious effort to see that they were not only be protected, but also integrated into their new environment.

Sub-paragraph d

236 Sub-paragraph *d* reproduces the text of the draft (article 10, sub-paragraph *e*) and requires that Central Authorities shall take all appropriate measures to provide each other with general evaluation reports about experience with intercountry adoption. This provision should be read in conjunction with paragraph 2 of Article 16 and with Article 30 on data protection.

Sub-paragraph e

237 Sub-paragraph *e* reproduces Working Document No 192, submitted by Japan, and represents a compromise solution, to attend the request made in the Diplomatic Conference by delegates coming from States of origin of the children.

238 Working Document No 94, submitted by Colombia, Costa Rica and El Salvador, which was later withdrawn, suggested to impose upon the Central Authorities the duty to take all appropriate measures "to obtain follow-up of the adoption in the receiving State until his or her nationalization". Other Latin-American Delegates (Bolivia, Brazil, Mexico), as well as the Russian Federation, argued that the adopted children continue to be nationals of the State of origin and, because of that, there was an interest on its part to know the actual results of the adoption. The Delegate of Sri Lanka also remarked that States of origin have strong feelings on this question, even though, according to experience, request for post-adoptive monitoring had never been rejected, and Poland suggested in Working Document No 50 to "control that the child, after the adoption, has the possibility of using his or her fundamental rights".

239 Some participants objected to these proposals, based on constitutional grounds, because they could mean an interference with the sovereignty of the receiving State, but no objection was raised against voluntary monitoring after the adoption. The United States delegation remarked that sometimes it is very difficult to obtain information about a person, as there is no system of police registration in its country. It was also pointed out that such control could not possibly be made by the States of origin, taking into account the amount of children yearly adopted in some of them, and that, if abuses were detected, there would be no sanction provided by the Convention, because criminal law was not within the scope of the Convention.

240 Therefore, Working Document No 90, submitted by Uruguay, suggested that Central Authorities shall take all appropriate measures "to reply to any motivated request for information on a particular adoption"; this proposal was completed in the sense that the answer should be sent "as far as it may be possible". Following this idea, Working Document No 101, presented by Italy, imposed the duty to reply "as far as permitted by the law of the requested State", and Canada submitted Working Document No 102 suggesting that the reply should be sent "after consulting with competent authorities".

241 The final text was approved by a large majority, the United Kingdom opposing the mandatory character of the rule, even though acknowledging that in every case, the United Kingdom would recommend to pass the requested information to the State of origin.

Article 10

242 The question as to whether the responsibilities assigned to Central Authorities by the Convention may be discharged by individuals or private organizations, is a very sensitive issue because, according to experience, most of the abuses in intercountry adoptions arise because of the intervention of such "intermediaries" in the various stages of the adoption proceedings. For this very reason, some participants to the Special Commission did not want to accept that Central Authorities may delegate their responsibilities on accredited bodies, but others insisted on leaving to each Contracting State the determination of the manner in which to perform the Convention's duties.

243 The solution accepted by the draft (article 11) represented a compromise, permitting delegation only to public authorities and to private bodies duly accredited that comply, at least, with certain minimum requirements established by the Convention. However, as already remarked, this compromise became even more restricted when the matter was discussed in the Diplomatic Conference, because Article 8 of the Convention does not permit delegation to accredited bodies. Nevertheless, within the Convention's limits, each Contracting State is free to decide how the duties imposed upon the Central Authority are to be performed and to permit or not the possible delegation of its functions.

244 Article 10 reproduces the text of the draft (article 11), but the words "administrative and social" before the word "tasks" were deleted, to respond to the suggestion made by Austria in Working Document No 67, because it should be left to the Contracting States to determine the nature of the responsibilities to be performed by the accredited bodies.

245 The accreditation required by Article 10 shall be given in the manner determined by each Contracting State and not necessarily by the Central Authority. For this reason, since accreditation is not a specific task of the Central Authority, it was included neither in Article 7 nor in Articles 8 or 9.

246 Article 10 should be read in conjunction with sub-paragraph *c* of Article 36, to determine the competent public authorities in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

247 Article 10 should also be read in conjunction with sub-paragraph *c* of Article 11, which imposes upon each Contracting State not only the right to grant the accreditation, but also to revoke it if the continuous supervision evidences that the body in question does

not any longer fulfil the Convention's conditions and other legal requirements for accreditation. In such a case, the accreditation cannot be "maintained", as required by Article 10, and therefore has to be revoked.

248 Although acknowledging great freedom to the Contracting States for establishing the additional conditions to be observed by the bodies applying for accreditation, the Convention imposes certain standards that must be fulfilled in all cases, *i.e.*: demonstration of their competence to carry out properly the functions entrusted to them, as prescribed by the same Article 10; Article 11 sets up certain minimum requirements to be fulfilled, and Article 32 not only prohibits any improper financial gain connected with any activity related to intercountry adoption, but in its third paragraph also prescribes that the directors, administrators and employees of bodies involved in an adoption, accredited or not, shall not receive a remuneration which is unreasonably high in relation to the services rendered.

249 Article 10 refers to "bodies" and therefore, physical persons cannot be accredited under Chapter III of the Convention. This restriction was subject to criticism, because "bodies", juridical persons or not, do not necessarily offer better guarantees than private individuals for compliance with the duties imposed by the Convention on Central Authorities.

250 Article 10 refers only to "bodies", leaving open the question whether, in order to be accredited, they must have a separate legal personality. The answer shall be given by the law of each Contracting State.

251 The accreditation of bodies, according to Chapter III, is a condition necessary for the possible delegation to them of the functions assigned by the Convention to the Central Authority. Therefore it is not needed when non-accredited bodies or persons solely intervene to assist or collaborate with a view to appropriately complying with the responsibilities imposed by the Convention upon the Contracting States, *e.g.*, when preparing statistics, co-operating in the collection of the laws in force or activities of a similar kind.

252 Notwithstanding the fact that accreditation can only be granted to "bodies", the second paragraph of Article 22 admits the possibility, by way of an option, under certain conditions, requiring a special declaration by a State, that persons or bodies not accredited may perform certain functions assigned to the Central Authority by Chapter IV. However, this provision aims to solve the delicate problem presented by the so-called "private" or "independent" adoptions.

253 The accreditation granted according to Article 10 does not need to be a general one, and each Contracting State is at liberty to decide which tasks (administrative, social or of any other nature) may be entrusted to the accredited bodies. Consequently, the accreditation may be restricted to performing certain specific responsibilities and not others, all depending on the circumstances of the case.

Article 11

Introductory phrase

254 The introductory phrase reproduces the text of the draft (introductory phrase of article 12) and establishes certain minimum standards for the accreditation of bodies that shall be complied with in all cases. Consequently, each Contracting State is at liberty to specify and complete them, adding or not supplementary conditions, and to impose, for instance, the recommendations made by the Latin-American Meeting on Child Adoption and Child Trafficking (Quito, 1991) or by the Regional Seminar on Protecting Children's Rights in Intercountry Adoptions (Manila, 1992).

Sub-paragraph a

255 Sub-paragraph *a* reproduces the text of the draft (article 12, sub-paragraph *a*),

because there was general agreement in the sense that accredited bodies shall exclusively pursue non-profit objectives. It is up to the domestic law of the Contracting States to determine who (also individuals, and which categories of individuals) may create a legal person or entity with non-profit objectives, so complying with sub-paragraph *a* of Article 11.

256 The requirement imposed by sub-paragraph *a* "to pursue only non-profit objectives" is formulated in general terms, but it is subject "to the conditions and within such limits as may be established by the competent authorities of the State of accreditation". Consequently, there is a wide margin open for regulation that may and will be different in the various Contracting States, even though keeping in mind the objects to be achieved by the Convention.

Sub-paragraph b

257 Sub-paragraph *b* reproduces the text of the draft (article 12, sub-paragraph *b*), with only the amendment that the word "specially" before "qualified" was deleted, keeping in mind that the same conditions are required by Article 22(2)(*b*), which regulates the conditions to be fulfilled by non-accredited bodies or persons, when authorized to perform some of the functions assigned to the Central Authorities.

258 The deletion of the word "specially" was approved, as suggested by Working Document No 30, submitted by the United Kingdom, because it did not add anything, it being possible for a person to be qualified in the field of intercountry adoption by operation of their ethical standards and training or by their ethical standards and experience.

259 Sub-paragraph *b* establishes some minimum personal requirements as to the composition of the accredited bodies, prescribing that they shall "be directed and staffed by persons qualified by their ethical standards". This condition is to be fulfilled by all persons working for accredited bodies, their directors as well as other members of the staff.

260 The words "to work" were added to specify that directors and other members of the staff, who work themselves in the field of intercountry adoption, must be qualified by training or experience to do so. Those directors or staff members who do not themselves work in this field, need not to be qualified by training or experience, but still need to be qualified by their ethical standards.

261 Working Document No 21, submitted by Defence for Children International and International Social Service, aimed to ensure that intercountry adoptions are performed by qualified professionals, by suggesting the modification of the last sentence of sub-paragraph *b* to read: "and by appropriate training and experience to work in the field of intercountry adoption". This proposal could not be considered, however, because no delegation supported it.

Sub-paragraph c

262 Sub-paragraph *c* reproduces the text of the draft (article 12, sub-paragraph *c*) with a linguistic amendment and using the pronoun "its" instead of "their", because the introductory phrase of Article 11 is formulated in the singular ("An accredited body").

263 Sub-paragraph *c* also establishes certain minimum standards for the control of the accredited bodies and submits them to continuous supervision. Therefore, the maintenance of the accreditation, required by Article 10, is only possible when the results of the supervision have been satisfactory.

264 The supervision need not be made by the Central Authority itself, but by the "competent authority", as determined by the law of each Contracting State, that will also prescribe the procedure to be followed and the other substantive conditions to be controlled, in addition to those established by the Convention.

265 Article 11 should be read in conjunction with sub-paragraph *c* of Article 36, to determine the competent authorities in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

266 The continuous supervision shall, at least, control the composition, operation and financial situation of the accredited bodies: (1) the composition, to verify the requirements set up by sub-paragraph *b* of Article 11; (2) the operation, to check the compliance with sub-paragraph *a* of Article 11 and with Article 32; and (3) the financial situation, to avoid any improper practices in their actual operation.

Article 12

267 The text reproduces the idea contained in article 13 of the draft, the only change being the amendment suggested by Working Document No 5, submitted by Belgium, to have the last sentence modified as follows: "if the competent authorities of both States have authorized it". The proposal was approved without opposition and the idea behind it was to solve any problems in the case of States having more than one system of law or autonomous territorial units.

268 Article 12 permits the intervention of accredited bodies but, as previously remarked, their functioning in intercountry adoptions is a very sensitive issue for many countries, and for that reason, Article 12 recognizes to each Contracting State freedom to permit or to refuse their activities within its territory, notwithstanding the fact that they may have been authorized to act in another. Consequently, when a body already accredited in one Contracting State wishes to act in another, it must obtain authorization from the second, which permission may be denied if the latter State is against the intervention on its territory of private bodies in the handling of intercountry adoptions.

269 Article 12 is formulated in general terms. Therefore, since no distinction is made, "authorization" must be obtained from both States to act either "directly" or "indirectly".

270 Article 12 should be read in conjunction with sub-paragraph *c* of Article 36, to determine the competent authorities in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

Article 13

271 The draft did not include such an article and it was added by the Diplomatic Conference when approving, without amendments, the suggestion made in Working Document No 177, submitted by Switzerland, to the effect that co-operation is a fundamental element of the Convention and one of its main objectives. The proposal, once approved, was complemented by Canada when requiring to specify that the designation of the Central Authority is made by each Contracting State.

272 A similar provision is to be found in former Hague Conventions, *i.e. on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Article 21), *on the Taking of Evidence Abroad in Civil or Commercial Matters* (Article 35) and *on the International Access to Justice* (Article 29). However, they all prescribe that the notification should be made by each Contracting State to the depositary, the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

273 The system prescribed by Article 13 is less formal, since the notification is only made to the Permanent Bureau of the Hague Conference on private international law, aiming thereby to avoid unnecessary delays that may arise in case of a formal notification through diplomatic channels to the depositary of the Convention, as required by the above-mentioned Hague Conventions.

274 Article 13 does not expressly prescribe the notification of the names and addresses

of the other public authorities, and the extent of their functions, that according to Articles 8 and 9 may discharge functions assigned to the Central Authorities. However, it is advisable that such information be also transmitted for further dissemination.

275 A similar notification is prescribed by Article 22, paragraph 3, when requiring the Contracting States which make the declaration permitted by paragraph 2 of the same Article, to keep the Permanent Bureau of the Hague Conference on private international law informed of the names and addresses of the non-accredited bodies and persons authorized to perform the functions of the Central Authorities under Articles 15 to 21.

276 Even though not expressly prescribed, Article 13 is to be read in conjunction with Article 22, paragraph 3, which requires from each Contracting State to transmit any change that may occur, *i.e.*, the extent of the functions of the Central Authorities or other public authorities has been modified, or the accreditation has been affected by revocation, suspension or by any other reason.

277 The non-compliance with the duty to send the required information, would enable other Contracting States to act in accordance with Article 33, but will not affect the adoption granted, that shall be considered an adoption within the Convention for all legal purposes, in particular, for its recognition by the Contracting States.

278 Article 13 does not indicate the aim pursued with the notification required, but it is evident that the Permanent Bureau of the Hague Conference on private international law shall disseminate the information received to the interested States, *i.e.*, the States Members of the Hague Conference and the other Contracting States.

279 Even though Article 13 is not expressly mentioned in Article 48, there should be no objection for each Contracting State to transmit the same information to the depositary of the Convention.

CHAPTER IV — PROCEDURAL REQUIREMENTS IN INTERCOUNTRY ADOPTION

280 The draft's title for Chapter IV was criticized in Working Documents Nos 36 and 133, submitted by Belgium, because the mere denomination "Procedure" could be misunderstood as referring only to procedure before judicial courts, a misleading assumption, since the Convention regulates the co-operation between Central Authorities of the Contracting States. Therefore, it should be replaced by "Co-operation between Central Authorities" and, following this proposal, Working Document No 179, submitted by the Drafting Committee, gave to Chapter IV this title: "Procedure for Co-operation between Central Authorities".

281 The suggestion was objected to because, first, the general rules for co-operation between Central Authorities are set out in Chapter III and, second, Chapter IV includes a number of very important articles about procedural matters other than those relating to co-operation. These reasons explain Working Document No 181, presented by the United Kingdom, Colombia, Ireland, Australia and Mexico, proposing its substitution for: "Procedural Requirements in Intercountry Adoption"; this suggestion was approved in the second reading.

282 Chapter IV aims at designing a procedure that will protect the fundamental interests of all the parties involved in intercountry adoptions, in particular the child, the biological parents and the prospective adoptive parents. Consequently, it establishes important safeguards for the protection of those interests, but, at the same time, an effort was made to simplify the existing procedures and to maximize the chances of homeless children being integrated into adequate homes in other Contracting States.

283 After some discussion in the Special Commission, consensus was reached as to the

mandatory character of the rules of Chapter IV, and this character was maintained in the Convention without objection. Therefore, they are not a facility available to the parties, but must be applied in all cases.

284 Chapter IV should be read in conjunction with Article 39, paragraph 2, which permits any Contracting State to enter into agreements with one or more other Contracting States, with a view to improving the application of the Convention in their mutual relations. In this respect, it is also to be kept in mind that Article 25 permits any Contracting State to declare to the depositary that it will not be bound under this Convention to recognize the adoptions made in accordance with such agreements. Furthermore, paragraph 2 of Article 39 establishes another restriction, by prescribing "that these agreements may derogate only from the provisions of Articles 14 to 16 and 18 to 21", maintaining therefore the mandatory character of Article 17 in all adoption cases covered by the Convention.

285 Although several articles of Chapter IV are formulated in the plural, *i.e.* persons, prospective adoptive parents, they also apply to the cases where the adoption is petitioned for and granted to a single person, as is also envisaged by Article 2 of the Convention.

286 Working Document No 187, submitted by Australia in the second reading, suggested to change the order of the articles, so that Article 16 comes first, Article 14 second, and Article 15 third, because "it would present a better picture to the world if the text of the Convention were first to deal with matters concerning the child, such as the consent of the child's parents, and then to consider the suitability of the prospective adoptive parents, taking into account that the emphasis behind intercountry adoption was on finding parents for children rather than on finding children for parents". However, the proposal did not obtain enough support to be considered.

287 Working Document No 176, submitted by Belgium, proposed to reorder the articles, so that in the first place the entrustment would be regulated (Article 17), secondly, the necessary authorizations for the transfer (Article 18), and in the third place, the conditions for the transfer (Article 19, paragraph 1). The suggested change was approved in the second reading, aiming to facilitate the tasks of the persons who did not participate in the preparation of the articles, but have to apply the Convention to particular cases.

Article 14

288 Article 14 reproduces the text of the draft (article 14) and prescribes, in order to prevent abuses, that the proceedings for adoption shall start with an application addressed to the Central Authority in the State of the habitual residence of the prospective adoptive parents.

289 Article 14 does not expressly regulate the formal requirements to be fulfilled by the application. Consequently, these shall be determined by the law of the habitual residence of the prospective adoptive parents, it being understood, however, that they have to identify themselves, and give all the necessary information to facilitate the preparation of the report prescribed by Article 15.

290 The rule established by Article 14 is mandatory, but should be read in conjunction with paragraph 1 of Article 22 and, consequently, the application may be presented to other public authorities different from the Central Authority or to any accredited body when permitted by the law of the habitual residence of the prospective adoptive parents.

291 It follows from Article 14 that the prospective adoptive parents are not allowed to apply directly to the Central Authority or to any other public authority or accredited body of the State of origin. This possibility was suggested, unsuccessfully, during the meetings of the Special Commission and again at the Diplomatic Conference. Working Document No 75, submitted by the United States, proposed that the prospective adoptive parents could pursue their application directly with the Central Authority of the State of origin, when and under the conditions established by both States, satisfying in this manner the interests of

the concerned States. Working Document No 93, presented by Japan, suggested the addition of the following words: "or in the State of the child's habitual residence", arguing that the text of the draft was too restrictive, because it did not permit direct application to the Central Authority of the State of origin, notwithstanding the fact that the child and the prospective adoptive parents have the same nationality.

292 However, several objections were raised against these proposals, *i.e.*: (1) the difficulties in the receiving State to control all applications coming from the delegated authorities in the State of origin; (2) the better guarantee of the rights of the child and of the family of origin when the application is channelled through the Central Authority of the receiving State; (3) the bitter and recent experiences in some countries, arising out of the direct contact of the prospective adoptive parents with the countries of origin, abuses that should be prevented by the Convention, raising the standards at an international level; (4) the disadvantages that were to be supported by those States which stuck to the safer and more formal procedure, if other States were authorized to permit direct contact with the authorities of the State of origin; (5) and that the Convention should not encourage such dangerous possibilities by expressly regulating them.

Article 15

Paragraph 1

293 The first paragraph reproduces the text of the draft (article 15, first paragraph) with a small linguistic change, because it was approved that the phrase "and the characteristics of the children" should be modified to read "as well as the characteristics of the children". The word "*considère*" in the first line of the French text of Articles 15 and 16 should be read in light of the English text "... is satisfied". In certain jurisdictions, the Central Authority's task will be limited to verifying psychological, social and legal requirements to be determined by other competent authorities, courts in particular. The wording of the French text does not detract from the powers of those competent authorities.

294 According to the system of co-operation and distribution of responsibilities designed by the Convention, Article 15 prescribes that, once the application is presented to the Central Authority of the receiving State, it has to verify whether or not the prospective adoptive parents are eligible and suited to adopt, as is expressly required by Article 5, subparagraph *a*, of the Convention. Therefore, it shall establish their compliance not only with all legal conditions prescribed by the applicable law, as determined by the receiving State, but also with the necessary socio-psychological requirements needed to guarantee the success of the adoption.

295 Since all legal conditions have to be checked, even though they are not expressly mentioned, the Central Authority of the receiving State shall ensure, in particular, that the consent of the other spouse has been obtained in accordance with the Convention, whenever a married person applies for a single adoption, where that is possible under the applicable law.

296 Immediately after, the Central Authority shall prepare a report on the prospective adoptive parents, containing all necessary information and, in particular, their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons (*i.e.* motivations) for adoption, ability to undertake an intercountry adoption, and the characteristics of the child for whom they would be qualified to care.

297 The last lines of Article 15(1) prescribe that the report shall include information as to "the characteristics of the children for whom they would be qualified to care" and the idea behind it is the advisability to find out the preferences of the prospective adoptive parents, as an additional safeguard to guarantee the success of the adoption, it being understood that they should be expressed in general terms, *e.g.* age, religion and special needs (disability etc.) of a child in accordance with their parenting skills and experiences, children professing a certain religion, and not make reference to a specific child in

particular.

298 The enumeration of items made by Article 15 is not limitative and the report may include any other kind of information considered relevant by the Central Authority of the receiving State, since the aim pursued by the report is to transmit enough personal data concerning the prospective adoptive parents to the Central Authority of the State of origin, so that the appropriate child may be matched with them.

299 Therefore, and notwithstanding the failure in the second reading of Working Document No 166, submitted by Argentina, because of lack of support, there is no objection, on the contrary, it is advisable to add "religion", as suggested, as an additional information to be given in the report prescribed by Articles 15 and 16, because it is a different element from the "background" and the "family and medical history" of the child.

300 The observations made in this respect by the Holy See are very important, because they strongly stress that "religious motives play a very important part in sustaining the stability of marriage and the sense of obligation needed to bring up children. The loss of traditional values has undermined the religious convictions, more or less consciously felt, which sustained marriage in the past. It is for such reasons that the religious attitude of prospective adopters should be explicitly taken into account, together with the religious background of the child. If the child's best interests lie with a stable and devoted family, then it seems imperative that the seriousness of religious attitudes, in the broad sense of the term, be looked into as one of the essential conditions to ensure successful adoption. This dimension should not be overlooked when adoption is contemplated."

301 The first paragraph of Article 15 should be read in conjunction with Article 22, paragraph 1, and consequently the report may be prepared by other public authorities or accredited bodies, where permitted by the law of the habitual residence of the prospective adoptive parents. Nevertheless, no matter whether or not such authorization has been given, it is understood that the Central Authority of the receiving State may rely on other authorities or specialized bodies for the actual verification of the information to be included in the report.

302 Furthermore, it is to be kept in mind that, even though a Contracting State declares that the functions of the Central Authority under Articles 15 to 21 may be performed by non-accredited bodies or persons, as permitted by sub-paragraph 2 of Article 22, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities in accordance with paragraph 5 of the same Article.

Paragraph 2

303 Paragraph 2 of Article 15 reproduces the text of the draft and prescribes that the report shall be transmitted by the Central Authority of the receiving State to the Central Authority of the State of origin. The rule is mandatory, but should also be read in conjunction with the first two paragraphs of Article 22, so that the transmission and the reception of the report may take place through other public authorities or accredited bodies. It may even take place through non-accredited bodies or persons, when the Convention's rules have been complied with and it is authorized by the receiving State and by the State of origin, respectively.

304 This second paragraph should be read in conjunction with the third paragraph of Article 19 so that, if the transfer of the child does not take place, the report is to be sent back to the authorities who forwarded them.

305 During the second reading, Working Document No 37, submitted by Italy, suggested to modify paragraph 2 of Article 15 as follows: "This report is transmitted to the Central Authority of the State of origin either directly by the Central Authority of the receiving State, or by the prospective adoptive parents, if they have been authorized in writing to do so by the Central Authority of the receiving State, and this possibility is

accepted by the Central Authority of the State of origin." Therefore, a distinction was made between the presentation of the application that has to occur in the receiving State and the transmission of the application, that could be done either by the Central Authority of the State of origin or directly by the prospective adoptive parents, when duly authorized in writing.

306 The proposal had enough support, it being pointed out that it could permit the prospective adoptive parents to ensure the effective transmission of the report to the receiving State, and that both Central Authorities would remain involved, notwithstanding the fact that the report was transmitted directly by the prospective adoptive parents, since their authorization was required. However, the proposal was not accepted, a second vote being necessary to take the final decision.

Article 16

Paragraph 1

Introductory phrase

307 The introductory phrase reproduces the text of the draft (introductory phrase of article 16) and establishes one of the functions to be performed by the Central Authority of the State of origin, in accordance with the system of distribution of responsibilities and co-operation designed by the Convention. As in Article 15, the word "*considère*" in the first line of the first paragraph of Article 16 should be understood in light of the English text "... is satisfied" (see No 293 *supra*).

Sub-paragraph a

308 The preparation of the report on the child is a necessary step to establish his or her psycho-social conditions, because it is only afterwards that an appropriate decision on the matching may take place, thereby protecting the interests of all persons involved, the child and the prospective adoptive parents.

309 Sub-paragraph *a* reproduces the text of the draft (article 16, sub-paragraph *a*), but instead of requiring only information about his or her "family and medical history", it is now specified that the report shall provide information about his or her "family history, medical history, including that of the child's family". The addition is also to be found in Article 7 of the 1984 Inter-American Convention on Conflicts of Laws Concerning the Adoption of Minors, and was included to respond to the suggestion made by the United Kingdom in Working Document No 83, on the ground that the more information is obtained at this stage the better it is, and because medical information could well be relevant for his or her treatment in later life. This sub-paragraph should be read in conjunction with Article 30 ensuring that information on the child's origin, particularly his or her parents' identity and medical history, shall be preserved as well as the child's access to such information under certain conditions.

310 Working Document No 166, presented by Argentina, requiring information as to the religion, was not successful for lack of support, but it is to be kept in mind that the items enumerated in sub-paragraph *a* of Article 16 are similar to those mentioned in Article 15 for the prospective adoptive parents. Consequently, they are not limitative either and the report may include whatever other information is considered advisable by the Central Authority of the State of origin. The "religious background" is included in the new sub-paragraph *b* and, furthermore, the last words of sub-paragraph *a* refer to "any special needs of the child", so that all his or her particularities should be mentioned, such as religion, being a sibling, handicapped (physically or emotionally), or an older child (see comments on paragraph 1 of Article 15).

311 The preparation of the report prescribed by sub-paragraph *a* is not conditional upon the reception of the application presented by the prospective adoptive parents in the

receiving State. It is a task to be performed not because there are some applicants waiting for a child, but as soon as the Central Authority of the State of origin determines the existence of children who may be better protected through intercountry adoption. A list of adoptable children shall be maintained for ready reference for matching and to ensure that placements are made as soon as possible to prevent delays which are inimical to the welfare of the child.

312 Sub-paragraph *a* of Article 16 should be read in conjunction with Article 22, paragraph 1, and consequently the report may be prepared by other public authorities or accredited bodies, where permitted by the law of the habitual residence of the child. However, no matter whether such authorization has been given, it is understood that the Central Authority of the State of origin may rely on other authorities or specialized bodies for the actual verification of the information to be included in the report.

313 Besides, it is to be kept in mind that, even though a Contracting State declares that the functions of the Central Authority under Articles 15 to 21 may be performed by non-accredited bodies or persons, according to paragraph 2 of Article 22, the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities, as permitted by paragraph 1 of Article 22.

Sub-paragraph b

314 Sub-paragraph *b* is new and follows the suggestion made by Egypt in Working Document No 53, on the grounds that it is important that the adoptive child retains links with his or her past, and have an understanding of his or her background, taking especially into account all his or her cultural, religious and ethnic elements, as prescribed by the CRC. The suggestion received general support and the importance to face this specific aspect was remarked, in order to avoid the problems that the Hague Convention on the Civil Aspects of International Child Abduction had run into, where ethnic or cultural backgrounds were an issue. Working Document No 179, submitted by the Drafting Committee, reproduced the proposal, but left open the location of the article, either in Chapter IV, because it mainly deals with procedural matters, or in Chapter II, as suggested by Egypt.

315 Notwithstanding the consensus among the delegates, it was pointed out that the phrase "give due consideration" may be interpreted as discriminating against the child, in violation of the UN Convention. However, the Chairman of the Drafting Committee explained that the wording had been taken from Working Document No 53, and the word "due" was included to align as close as possible with Article 29 CRC.

316 Sub-paragraph *b* should be read in conjunction with paragraph 1 of Article 22, so that the verification of the consents may be made by other public authorities or accredited bodies, when permitted by the law of the State of origin, and even by non-accredited bodies or persons, in accordance with paragraph 2 of the same Article 22, but always under the responsibility of the Central Authority.

Sub-paragraph c

317 Sub-paragraph *c* reproduces the text of the draft (article 16, sub-paragraph *b*) and should be read in conjunction with paragraph 1 of Article 22 (*cf.* No 316, *supra*).

Sub-paragraph d

318 Sub-paragraph *d* reproduces the text of the draft (article 16, sub-paragraph *c*) and therefore it merely requires that the Central Authority shall determine whether the "envisaged placement", not the adoption itself, is in the best interests of the child. This is done after the "matching". The matching process ensures the identification of the adoptive parents from among the approved applicants who can best meet the needs of the child based on the reports on the child and on the prospective adoptive parents. The importance of the "matching" process (the term does not appear in the text of the Convention because no French equivalent exists) was stressed throughout the negotiations of the Convention.

Of course, it must be remarked that, at this stage of the proceedings, the State of origin cannot give any assurance as to whether the prospective adoptive parents agree to the placement, because the report on the child has not been sent yet to the receiving State. Therefore, it is only afterwards that such control may take place and also the verification regarding the eligibility and suitability to adopt of the prospective adoptive parents for the child matched to them.

319 Sub-paragraph *d* is to be read in conjunction with paragraph 1 of Article 22 (*cf.* No 316, *supra*).

Paragraph 2

320 The beginning of paragraph 2 reproduces the text of the draft (article 16, second paragraph), when prescribing that the Central Authority of the State of origin shall send the report on the child to the Central Authority of the receiving State. It is to be read in conjunction with paragraph 1 of Article 22 (*cf.* No 316, *supra*).

321 Paragraph 2 of Article 16 should be read in conjunction with Article 19, paragraph 3, because if the transfer of the child does not take place, the report is to be sent back to the authority who forwarded it, and also with Article 30 on preservation and access to the information collected, as well as with Article 31 on data protection.

322 According to the text of the draft, the Central Authority of the State of origin was to send to the Central Authority of the receiving State "particulars of the determination made under sub-paragraph 4 *c*", *i.e.* whether the envisaged placement is in the best interests of the child. In order to clarify the provision, Working Document No 68, submitted by Austria, suggested to add that the "consents obtained in accordance with Article 5 [4 of the Convention] shall also be made available to the Central Authority"; Germany, in Working Document No 70, specified that "proof of the consent (sub-paragraph *b*)" shall be sent, and Working Document No 97, submitted by France, suggested to require the transmission "of the documents relating to the consents mentioned in sub-paragraph *c* and the reasons for the verification referred to in sub-paragraph *d*". Taking into account those proposals, the second paragraph of Article 16 was amended to require "proof that the necessary consents have been obtained and the reasons for its determination on the placement", but it is to be understood that the obtaining of the consents implicitly means that they have not been validly withdrawn, the word "proof" being preferred to "certification" or to "evidence", because the last one has a different technical meaning in common law countries.

323 Working Document No 111, submitted by Belgium, suggested the addition to Article 16 of the following sentence: "if, in the State of origin, the identity of the mother and/or the father of the child may not be disclosed, this report should not mention his or her identity". The proposal was approved. If the identity of the parents is to be protected, it will not be possible to supply a copy of the parental consent and, in that case, the law of the receiving State where the adoption is to be granted, shall decide whether or not just a certification of the consents, issued by the Central Authority of the State of origin, would be enough, without identification of the parents.

Article 17

Introductory phrase

324 The regulation provided for by the Convention follows the suggestions made in Working Document No 39, submitted by the delegation of Ireland stressing the importance of maintaining a clear distinction between (*a*) conditions for the making of an adoption, (*b*) conditions for the placement of the child, and (*c*) conditions for the transfer of the child from the State of origin to the receiving State. Therefore, Article 17 expressly determines the conditions for the placement; the requirements for the adoption are implicitly regulated by paragraph *c*, and paragraph 1 of Article 19 prescribes the necessary requisites for the transfer, no matter whether it occurs before or after the entrustment of the child to his or

her prospective adoptive parents.

325 The main features of Article 17 are found in Working Document No 162, submitted by a group *ad hoc* created to consider articles 6, 7 and 17 of the draft, and the regulations suggested try to take into account and to protect, in a realistic and flexible way, the fundamental interests of the child and of the States mainly concerned, the State of origin and the receiving State. Therefore, consideration was given to the differences as to how the placement is carried out, because in some countries, like in India, the decision about where to place the child is taken in a very formal manner, but other States do not require a formal decision and the matter is left in the hands of an agency. Besides, the group also acknowledged that, in those cases where the placement precedes the adoption (the common case), matters could only be provisionally sorted out at the time of placement, since the final decision is only to be made at the time when the adoption proceedings finish. For this reason, a problem may arise which is not solved by the Convention, in the case that the administrative authorities do not see any bar to the adoption, but at the very end the court has a different opinion.

326 The Delegate of Ireland, speaking on behalf of the group, explained the functioning of the regulation suggested in Working Document No 162, as follows: "The procedures relating to the entrustment of the child to the prospective adoptive parents and the conditions to be met would necessarily occur before the adoption order, except in the case in which the two happened simultaneously. Thus, all the conditions for the placement of the child would have to be met either before or at the time of the adoption. Likewise, all the conditions for the transfer of the child would have to be met before the transfer and before or at the time of the adoption". He added that by using the word "conditions", he meant procedural steps to be satisfied and not formal conditions binding the judge pronouncing the adoption order" (Minutes No 14).

327 The introductory phrase of Article 17 differs from the draft (introductory phrase of article 17) not only by using the word "entrusted" instead of "placement", but also by covering any decision regarding the entrustment of the child and restricting its scope to decisions made in the State of origin, and furthermore because the express reference to "his or her adoption" was deleted.

328 The change of the word "placement", used by article 17 of the draft, was decided by the group to avoid any possible confusion, taking into account its possible different meanings: in English, "placement" refers to the physical deliverance of the child to a person, while in French it may be understood either as the factual placement or in a legal sense, *i.e.* the transfer of the custody of the child to the prospective adoptive parents. Notwithstanding the persistence of some delegations all along the Conference to insert the word "placement" in Article 17, as in other articles of the Convention, the term "entrustment" was maintained for the sake of clarity and because it offers the advantage that whoever does not understand its exact meaning will try to find it out and therefore obtain a satisfactory explanation.

329 The decision referred to in the introductory phrase of Article 17 is to be taken by the competent authorities of the State of origin, not necessarily the Central Authorities, since it may be rendered by an administrative or a judicial authority. Consequently, it should be read in conjunction with sub-paragraph c of Article 36 in the case of a State having two or more systems of law with regard to adoption applicable in different territorial units.

Sub-paragraph a

330 Sub-paragraph *a* of Article 17 reproduces the text of the draft (article 17, sub-paragraph *a*) and does not need any further comment, since the child can only be entrusted to the prospective adoptive parents with their agreement. The verification required should be extended to the consent of the spouse, in case of a single adoption by a married person, and it can be made by public authorities or accredited bodies other than the Central Authority, or even by non-accredited bodies or persons, according to paragraphs 1 and 2 of Article 22, in all cases when permitted by the law of the State of

origin.

Sub-paragraph b

331 Article 17, sub-paragraph *b*, of the draft required as one of the conditions for the placement of the child with his or her prospective adoptive parents, the agreement of the Central Authorities of both States, the State of origin and the receiving State. This "double check" was criticized by the United States of America and in Working Document No 10 its modification was suggested to demand the consent of the Central Authority of the receiving State, only if required, because, as drafted, such consent is necessary "not just where the adoption is to take place in the receiving State, but even where the adoption is to take place in the State of origin and even where the receiving State has no interest in reviewing the decision of the authorities of the State of origin".

332 The suggestion made by the United States was supported, but also found strong opposition, the arguments in favour and against being sustained by delegations coming from States of origin and from receiving States. On the one hand, it was qualified as "unwise" to impose the participation of the receiving State in the "matching" process, it also being denied that no control would be exercised by the receiving State over the placement if its formal agreement were left optional. On the other hand, the importance of the participation of the receiving State in the "matching" of the child was insisted upon, no matter how onerous this task may be, and it was argued furthermore that allowing the receiving States to opt out, would be an invitation to maintain existing abuses.

333 Since no agreement could be reached, several compromises were suggested to prescribe the agreement of the receiving State, as a rule, but with the following variants: (a) unless the law of the receiving State does not require such agreement (Work. Doc. No 162, submitted by the special group); (b) "unless no such agreement is required under the laws of both States" (Work. Doc. No 175, submitted by Colombia, Australia, the United Kingdom and the Philippines); and (c) "unless the competent authorities of both States have made a declaration to the depositary of the Convention that such an approval is unnecessary" (Work. Doc. No 182, submitted by the United Kingdom, Colombia, the Philippines, Mexico, Australia and Uruguay).

334 At the very end of the second reading, a great effort was made and a compromise was reached, based on the suggestion made in Working Document No 198, presented by the United Kingdom, Colombia, Peru, Australia, Brazil, Costa Rica, United States of America, Ireland, Netherlands, Canada, Denmark, Bulgaria, Mexico, Romania, Sweden and Uruguay, which proposed to have sub-paragraph *b* reading as follows: "the Central Authority of the receiving State has approved such decision where such approval is required: (i) by the law of that State, or (ii) by the Central Authority of the State of origin". After some linguistic changes made by the Drafting Committee, sub-paragraph *b* was finally accepted, evidencing, undoubtedly, the strong desire to obtain reasonable compromises.

Sub-paragraph c

335 Sub-paragraph *c* requires the agreement of the Central Authorities of both States "so that the adoption may proceed", the word "proceed" meaning that the adoption could advance to the next stage in the process towards its completion. Consequently, it is a notion larger than "entrustment", "placement" or "transfer" of the child, but not so extensive as to cover the final granting of the adoption.

336 The agreement provided by sub-paragraph *c* does not guarantee that the adoption will be made, because its granting depends on compliance with all other conditions required by the applicable law, as determined by the conflict rules of the State of origin or of the receiving State, depending where the adoption is to be made.

337 Article 7, sub-paragraph *a*, of the draft required that the competent authorities of both States verify that there existed "no bar" to the adoption, but this formulation was

considered to be too strong by the special group, taking into account the practical difficulties to make such a determination and because it would not be binding on the court, when the final decision on the adoption is pronounced. However, the special group considered necessary to include a provision enabling both States, the State of origin or the receiving State, to stop an adoption from going ahead if it appears to either that it presents major legal obstacles. For this reason, sub-paragraph *c* was included, thereby also regulating implicitly the conditions for the adoption, because if one of them believes that there is a bar to the adoption, the Central Authority of the State of origin or of the receiving State has the right not to agree on the continuation of the adoption, and the procedure is blocked.

338 The special group exemplified the idea behind sub-paragraph *c* as follows: "if a prospective adoption were deemed acceptable in a State of origin, but the receiving State had legal problems about the age of the child or the difference in age between the child and the prospective adoptive parents, this was the point at which the receiving State could step in and voice its objection to the adoption going ahead" (Minutes No 14). The same reasoning applies to the case where the receiving State were to require a post-adoption probationary period for the recognition of the adoption granted in the State of origin and, therefore, sub-paragraph *c* takes care of the problem regulated by article 23 of the draft, which was deleted and is not directly solved by the Convention.

339 Sub-paragraph *c* should be read in conjunction with Article 23, paragraph 1, second sentence.

Sub-paragraph d

340 Sub-paragraph *d* only requires from the State of origin to verify that, in accordance with Article 5, the competent authorities of the receiving State have determined that the prospective adoptive parents are eligible and suited to adopt, and that the child is or will be authorized to enter and reside permanently in the receiving State. Nevertheless, before agreeing to the continuation of the adoption, as permitted by sub-paragraph *c*, it is also possible for the State of origin to control such determinations, and also that the prospective adoptive parents have been counselled as may be necessary, according to sub-paragraph *b* of Article 5.

341 The verification required by sub-paragraph *d* merely refers to sub-paragraph *a* of Article 5, which establishes, *in abstracto*, the qualifications of the prospective adoptive parents but, even though not expressly mentioned, it is understood that the particular adoption has to be kept in mind before any decision is taken on the "entrustment" of the child.

342 Sub-paragraph *d* does not expressly provide that the verification shall be made by the Central Authorities and therefore, this duty is to be discharged by the competent authorities of the State of origin. Consequently, it should be read in conjunction with sub-paragraph *c* of Article 36 in the case of a State having two or more systems of law with regard to adoption applicable in different territorial units.

Article 18

343 Article 18 reproduces the text of the draft (article 18, introductory phrase), even though some participants to the Special Commission considered it unnecessary, because it repeated the requirement by sub-paragraph *c* of Article 5. However, Article 18 is broader, for it also regulates the obtaining of the permission for the child to leave the State of origin, so as to avoid "limbo" situations for the child.

344 Although not expressly mentioned, it is understood that Article 18 is not to function when such permission is not needed, as among the States belonging to the European Union.

345 Article 18 should be read in conjunction with Article 22, paragraphs 1 and 5. Therefore, the necessary steps may be taken by other public authorities or accredited bodies, or even by non-accredited bodies or persons, when permitted by the Convention's rules and authorized by the law of each Contracting State.

346 Working Document No 85, submitted by Colombia, Costa Rica and El Salvador, proposed to add after "State of origin", the following phrase: "when permitted by the law of the State of origin". However, it was considered unnecessary, because the idea is covered by Article 18.

Article 19

Paragraph 1

347 Article 7 of the draft required for the transfer of the child that the competent authorities of the State of origin and of the receiving State: (a) "have verified that no bar exists to the adoption under the laws of their States", and (b) "have verified that the child should be entrusted to the prospective adoptive parents". Because of the importance of the matter, a special working group was created to consider the various proposals on articles 6, 7 and 17 of the draft and, after a full examination of the questions involved, it concluded that the requirements for the transfer of the child should be the same as those established for his or her entrustment to the prospective adoptive parents. Therefore, Working Document No 162 formally submitted this proposal, which was approved without further discussion, because it was kept in mind that the transfer of the child may take place prior to or after the adoption and also some time before or after the child is entrusted to his or her prospective adoptive parents.

Paragraph 2

348 The second paragraph of Article 19 reproduces the text of the draft (article 18, second sentence) and was maintained, because of its practical importance, even though it may be considered implicit in Article 21, sub-paragraph e, CRC, which provides that States Parties shall "*ensure that the placement of the child in another country is carried out by competent authorities or organs*". Therefore, the UN Convention imposes upon the States Parties the duty to take all measures necessary to guarantee that the transfer of the child to the receiving State takes place in secure and appropriate circumstances.

349 Some amendments were suggested to replace the expression "if possible" in paragraph 2 of Article 19. Working Document No 80, submitted by Madagascar, proposed to prescribe instead: "if provided for by the law of the State of origin", reminding the various rules recently enacted in response to the denunciations made by the international media about illegal departures of children from Madagascar. Working Document No 87, submitted by Bolivia, suggested to provide: "necessarily in the company of the adoptive parents".

350 Therefore, this question was raised again, even though a compromise had been reached at the Special Commission, where a strong majority had agreed that the best manner to transfer the child is when accompanied by his or her adoptive parents if the adoption will take place after the transfer, either in the State of origin or in the receiving State. Nevertheless, the words "if possible" were added by consensus, to take into account some cases where this requirement may be difficult to comply with, *i.e.* because it would be too expensive or for some other reason, factual or legal.

351 The proposals made by Madagascar and Bolivia were not accepted because of the compromise already reached, and so as not to modify existing practices and the law of many States of origin, as well as receiving States. Nevertheless, the question was raised anew in the second reading. Working Document No 127, submitted by Italy, suggested to impose the company of the adoptive parents or of the prospective adoptive parents "if the Central Authority of one of the two States require it", and Working Document No 152,

submitted by Madagascar, "only when demanded by the Central Authority of the State of origin". There was, however, no support for reconsideration of the Article.

Paragraph 3

352 The third paragraph was included in the Convention in response to the idea behind Working Document No 70, submitted by Germany, suggesting the addition of a new paragraph to take care of the German data protection legislation, as follows: "If an adoption does not take place, the reports under Articles 15 and 16 are to be sent back to the other authority for destruction after (three) years". The phrase "if an adoption does not take place" was considered to be too vague and was replaced by "if the transfer of the child does not take place". Moreover, the words "for destruction after (three) years" were criticized and it was finally decided to delete these words.

Article 20

353 Article 20 reproduces the text of the draft (article 19) and, although it may be considered a repetition of sub-paragraph *b* of Article 9, was included as a separate provision because the reciprocal information is very important, in particular to permit the State of origin to be kept up to date about the progress of the adoption. This very reason also explains similar provisions included in some bilateral arrangements on intercountry adoption.

354 Article 20 is formulated in general terms and, therefore, it covers all necessary information prior to the granting of the adoption, either in the State of origin or in the receiving State.

355 Working Document No 85, submitted by Colombia, Costa Rica and El Salvador, unsuccessfully suggested to delete the phrase "if a probationary period is required" and to insert instead: "whenever such a placement is permitted by the law of the State of origin". The proposed deletion was objected, because it would force the receiving State to recognize an adoption granted in the State of origin, although no probationary period has taken place. Furthermore, the importance of the probationary period was strongly stressed and the absence of any reference to it was considered against the objectives of the Convention, *i.e.* to "establish a system of co-operation amongst Contracting States" and a "matching" of the conditions prescribed by each of the interested States.

356 At the request of the Australian Delegate, it is explained that the "probationary period" referred to in Article 20 has a different meaning from that used in article 23 of the draft, which dealt with a different situation, *i.e.*, the post-adoption probationary period in the receiving State, as a condition for the recognition of the adoption, a possibility which is not admitted by the Convention. In contrast, the probationary period in Article 20 refers to the post-placement period prior to the adoption where services are provided to ensure the adjustment and integration of the child with the prospective adoptive parents as well as their emotional readiness for the legal union. This probationary period should be read in conjunction with Article 21 where the child is transferred to the receiving State for purposes of adoption or completion of the adoption.

Article 21

Paragraph 1

Introductory phrase

357 The introductory phrase of paragraph 1 reproduces the text of the draft (article 20, first paragraph) and takes care of the situation that may arise notwithstanding the safeguards established by the Convention for the entrustment and the transfer of the child to the receiving State for the probationary period prior to the adoption, when the continued

placement with the prospective adoptive parents in that State is not in the child's best interests. Therefore, Article 21 prescribes certain measures to be taken to protect the child, whether the adoption is to be granted in the receiving State or, as may exceptionally be the case, in the State of origin.

358 Article 21 does not expressly regulate the case where the child remains in the State of origin. Nevertheless, it is understood that the competent authorities of that State have to take all necessary measures to protect the child if they determine that his or her continued placement with the prospective adoptive parents is manifestly no longer in the child's best interests.

359 Paragraph 1 of Article 21 should be read in conjunction with paragraph 1 of Article 22 and, consequently, this responsibility may be discharged by public authorities other than the Central Authority or by an accredited body, or even by non-accredited bodies or persons, when permitted by the law of the habitual residence of the prospective adoptive parents.

360 Article 21 only applies where the adoption has not been made yet, but the child has been entrusted to the prospective adoptive parents and transferred to the receiving State. Thus, it cannot cover the cases where the State of origin does not permit the transfer of the child to the receiving State before the adoption takes place.

Sub-paragraph a

361 Sub-paragraph *a* of paragraph 1 of Article 21 reproduces the text of the draft (sub-paragraph *a* of article 20), but a linguistic change was made, because the word "to" was added before "arrange".

362 There is no doubt that the first measure to be taken to protect the child in the receiving State, whenever the placement fails, is to cause him or her to be withdrawn from the prospective adoptive parents. The formulation used by sub-paragraph *a* is descriptive, trying to specify the aim pursued, *i.e.* to put an end to the situation, and avoids the reference to legal notions, like "custody", that may give rise to serious problems of interpretation in certain countries.

363 Sub-paragraph *a* provides that the Central Authority of the receiving State shall take all necessary measures to arrange "temporary care" for the child, thereby stressing the emergency of the situation and leaving open the possible ways to take care of the child. Working Document No 103, submitted by Spain, suggested to "entrust the child to the care of an authority or public body of the receiving State", but it did not succeed, it being pointed out that, usually, the child is entrusted to a foster family in the receiving State, not necessarily interested in the adoption.

Sub-paragraph b

364 The first part of sub-paragraph *b* reproduces the text of the draft (article 20, sub-paragraph *b*), prescribing that the Central Authority of the receiving State shall take the measures necessary to protect the child, "in consultation with the Central Authority of the State of origin, to arrange without delay a new placement of the child with a view to adoption".

365 The word "placement" used by sub-paragraph *b* has the same meaning as "entrustment" in Article 17 (see *supra*, No 328).

366 The formulation retained by the first lines of sub-paragraph *b* is somewhat contradictory and is subject to the same comments made to the draft (Report of the Special Commission, No 242), because it prescribes that the placement has to be arranged "without delay", but "in consultation" with the Central Authority of the State of origin. However, this last requirement may be too time-consuming, bringing about a "limbo" situation for the child and a delay of the necessary actions to protect the best interests of

the child. But since the child has not been adopted, it was deemed necessary to consult the State of origin and with the system of co-operation already in place the child being in "limbo" should be prevented.

367 Similar problems arise out of the second part of sub-paragraph *b*, which prescribes that the adoption after the placement shall not take place until the State of origin has been duly informed concerning the prospective adoptive parents. However, the question remains open as to whether the State of origin has expressly to agree to the new matching and placement, as provided by Article 17.

368 According to the Spanish delegation, the conditions and guarantees for the new placement should be the same as for the first, and that, to avoid the "limbo" situation of the child, the adoption should be possible in the receiving State if there is no opposition within a certain period. Therefore, its Working Documents Nos 103 and 168 proposed the following text: "to duly inform the Central Authority of the State of origin concerning the new prospective adoptive parents to enable them to give their consent to the new adoptive parents, within a reasonable period of time (a period not over three months). (In the absence of opposition during this period, the adoption may take place in the receiving State.)". However, the proposal did not succeed.

369 The delegation of Poland sustained a different approach, *e.g.* that the formalities of the second adoption should be simpler and, therefore, its Working Document No 107 suggested, with no success, to add at the end of sub-paragraph *b* the following words: "and has verified that there is no bar to adoption of the child by the new prospective adoptive parents".

370 Working Document No 21, submitted by Defence for Children International and International Social Service, with the support of the Netherlands, suggested to add at the end of the first part of sub-paragraph *b* the following words: "or, if this is not appropriate, to arrange alternative long-term care". The idea behind the proposal, which was accepted by the meeting, was to extend the scope of Article 21 to include situations in which neither an adoptive placement nor the return of the child to the State of origin, provided for by sub-paragraph *c*, appear to be satisfactory solutions, *e.g.*, when the child needs special treatment or attention.

Sub-paragraph c

371 Article 21, paragraph 1, sub-paragraph *c*, reproduces the text of the draft (article 20, first paragraph, sub-paragraph *c*) with the specification that the decision to return the child should only be taken "if his or her interests so require", as suggested by Working Document No 98, submitted by France; all measures to find alternative care in the receiving State having been exhausted and any prolonged stay of the child in that State no longer being for his or her welfare and interests.

Paragraph 2

372 Paragraph 2 of Article 21 reproduces the text of the draft (article 20, second paragraph) takes into account the contents of Article 12 CRC, repeating also the ideas included in sub-paragraph *d* of Article 4.

Article 22

373 The so-called "private" or "independent" adoptions were fully discussed in the Special Commission, where the arguments in favour and against were examined at length (Report of the Special Commission, Nos 249-256) and the solution approved represents a reasonable compromise between antagonistic positions. On the one hand, it permits that some non-accredited bodies or individuals carry out the functions assigned to the Central Authorities under Articles 15 to 21 (as accepted in the Convention), if they fulfil certain minimum standards before being allowed to act, but on the other hand, the Contracting

States are not forced to accept the participation of non-accredited bodies or persons by making an express declaration in this sense. Therefore, Contracting States may assume the position they consider the best by remaining silent (indicating acceptance) or by declaring their objection to such participation.

Paragraph 1

374 Paragraph 1 of Article 22 reproduces the text of the draft (article 21, first paragraph), expressing the idea that the procedural rules should be flexible enough to assure the best possible functioning of the Convention. Therefore, it was not considered advisable to impose upon the Central Authorities the obligation to discharge the various tasks assigned to them by Chapter IV, and left to each Contracting State the decision on this important issue. For this reason, paragraph 1 of Article 21 accepts the possibility that Contracting States, to the extent permitted by the applicable law, may delegate the compliance of their duties to other public authorities or to bodies accredited under the rules of Chapter III.

375 Strictly speaking, this provision is not needed, taking into account that the functions relating to procedural matters assigned to Central Authorities according to Chapter IV, are not included within those mentioned in Article 7 that shall be discharged directly by Central Authorities, nor in Article 8 that permits delegation only to other public authorities. Therefore, they fall within the scope of Article 9, which enables Central Authorities to act either directly or through other public authorities or accredited bodies in their States, to the extent permitted by the applicable law. Nevertheless, paragraph 1 of Article 22 was included to avoid any kind of misunderstanding, in particular because its second, fourth and fifth paragraphs prescribe a special regulation for certain activities that may be performed by certain non-accredited bodies or persons.

376 The Delegate of Italy made the remark that the text in Articles 8, 9 and 22 was not the same. In fact, Article 8 permits Central Authorities to take the necessary measures through public authorities, and Article 9 through public authorities or other accredited bodies, it being clear therefore that the Central Authority is responsible for the action undertaken by the delegated bodies. Article 22, paragraph 1, on the contrary, reads that the functions assigned to the Central Authority by Chapter IV may be performed by public authorities or other accredited bodies, the same expression being used in paragraph 2 with reference to non-accredited bodies or persons. However, the text of Article 22, in spite of the formal difference, should be understood in the same sense, *e.g.* that a delegation has been made.

377 Paragraph 1 of Article 22 should be read in conjunction with sub-paragraphs *c* and *d* of Article 36, to determine the competent authorities, the public authorities, or the accredited bodies, in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

Paragraph 2

378 Paragraph 2 of Article 22 reproduces the text of the draft (article 21, first part of the second paragraph), admitting a limited possibility of "independent" or "private" adoptions and entitles any Contracting State to declare that the procedural functions assigned to the Central Authority under Articles 15 to 21 may also be performed, but only in that State, by persons or bodies other than the public authorities or bodies accredited according to Chapter III. Therefore, paragraph 2 is more restricted than the draft, because Article 14 is expressly excluded, as suggested by Working Document No 170, submitted by Italy and the United States of America.

379 Besides, paragraph 2 is also restricted by paragraph 5 of the same Article 22, according to which "the reports provided for in Articles 15 and 16 shall, in every case, be prepared under the responsibility of the Central Authority or other authorities or bodies in accordance with paragraph 1".

380 Paragraph 2 of Article 22 should be read in conjunction with sub-paragraph *d* of Article 48 and therefore, the Contracting States shall notify to the depositary the delegation made to non-accredited bodies or persons for further dissemination to the States Members of the Hague Conference on private international law, the other States which participated in the Seventeenth Session and the States which have acceded to the Convention.

381 Paragraph 2 does not establish a time limit for the declaration. Therefore, it could be made at any moment and, even though not expressly provided for, such declaration may also be withdrawn at any time, but the depositary should be notified.

382 An express declaration by the Contracting State is required by paragraph 2 to permit the non-accredited bodies or persons to discharge the functions assigned to the Central Authorities under Articles 15 to 21. Therefore, the silence of the Contracting State is to be construed as an objection against bodies or persons non-accredited by that State to discharge functions assigned to the Central Authority of that State.

383 Sub-paragraphs *a* and *b* prescribe certain requirements that necessarily have to be complied with by the non-accredited bodies or persons to be allowed to perform the functions assigned to the Central Authorities under Articles 15 to 21, but they are only minimum standards and therefore, each Contracting State is authorized to establish additional conditions, to supervise their activities and to determine the extent of the functions that they may discharge.

384 The authorized non-accredited bodies or persons are "subject to the supervision of the competent authorities" of the State that has made the declaration of paragraph 2. Such supervision will certainly include their compliance with the rules of the Convention, in particular, the prohibition to derive improper financial or other gain from any activity related to intercountry adoption and the requirements established by sub-paragraphs *a* and *b* of Article 22.

385 Working Documents Nos 82 and 83, submitted by Australia and the United Kingdom, respectively, suggested to delete the words "subject to the supervision of the competent authorities of that State" and replace them with the phrase "subject to supervision by the competent authorities of the State of any intercountry adoption activities". However, the proposals did not succeed, being implicit in the text finally approved.

Sub-paragraph a

386 Sub-paragraph *a* reproduces the text of the draft (article 21, last words of the second paragraph) and prescribes that the non-accredited bodies or persons shall meet the requirements of integrity, professional competence, experience and accountability of the State making the declaration. As already observed, these are minimum standards and therefore, each Contracting State is authorized to establish additional conditions.

Sub-paragraph b

387 Sub-paragraph *b* is new and follows the suggestions made by Australia, the United States of America and the United Kingdom in Working Documents Nos 82, 121 and 136, to ensure that there is consistency of approach between the regulation of accredited bodies (sub-paragraph *b* of Article 11) and non-accredited bodies or persons. It was not considered enough to require that they be "professional", because in many countries, the various professions are self-regulatory, in particular as to the practices and ethical standards of that particular profession.

388 Working Document No 196, submitted by Nepal, suggested the addition of "integrity", as required by Article 22, but the proposal did not obtain enough support to be considered, according to the Rules of Procedure. However, as already remarked, the conditions sanctioned by sub-paragraph *b* are minimum standards and, therefore, each Contracting State is authorized to establish additional conditions.

389 Notwithstanding the consistency of approach aimed at, it is to be remarked that the regulation sanctioned by the Convention for accredited bodies and non-accredited bodies or persons is not exactly the same, because the latter do not have to fulfil the condition prescribed by sub-paragraph *a* of Article 11, *i.e.* to "pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation".

Paragraph 3

390 Paragraph 3 of Article 22 was introduced following the suggestion made by France in Working Document No 99, amended in the sense that the information should be given not to the depositary, but to the Permanent Bureau of the Hague Conference on private international law, for the sake of flexibility and to make the text of the Convention not any heavier. This rule is similar to the one established by Article 13 for accredited bodies.

391 Even though not expressly prescribed, the purpose of the notification is to enable the Permanent Bureau to disseminate the information received to the States Members of the Hague Conference and to the States Parties to the Convention.

392 Notwithstanding the rule sanctioned by paragraph 3 of Article 22, it is understood that the violation of the duty to inform the Permanent Bureau shall not affect the adoption, but may give rise to present a complaint as permitted by Article 33.

Paragraph 4

393 Paragraph 4 of Article 22 reproduces the text of the draft (article 21, third paragraph) and therefore, the declaration required is to be made to the depositary of the Convention.

394 Even though it is not expressly provided for, no reasonable doubt may arise as to the possibility to withdraw, at any time, the declaration made in accordance with paragraph 4. It shall be notified to the depositary.

395 Working Document No 99, submitted by France, suggested to make a reverse presentation of the solutions approved in paragraphs 2 and 4, amending paragraph 2 to read as follows: "Any Contracting State may declare to the depositary of this Convention that adoptions of children habitually resident in its territory may as well take place if the functions of the Central Authorities are performed in accordance with the second paragraph". The idea behind the proposal was to emphasize that intercountry adoptions made through Central Authorities are to be preferred. Therefore, Contracting States were only to make a positive declaration if they agree with the delegation permitted by the second paragraph, and silence were to be interpreted against such delegation. However, because of the sensitivity of the compromise achieved, the suggestion did not obtain enough support to be considered in the second reading.

396 For that reason, according to paragraph 4, silence by a State is to be interpreted as an acceptance that intercountry adoptions of children habitually resident in its territory may also take place if the functions assigned to the Central Authority of the receiving State are performed by non-accredited bodies or persons, as permitted by paragraph 2 of the same Article.

397 A different question is whether those non-accredited bodies or persons authorized to act in one Contracting State may also perform activities related with intercountry adoption on the territory of another Contracting State. This question has to be answered in the same sense as in the case of accredited bodies, Article 12 requiring the authorization of both States.

Paragraph 5

398 Paragraph 5 is a new provision, which was included in response to the suggestion made by the United States and Italy in Working Document No 170, aiming to make it clear that non-accredited bodies or persons may participate in the preparation of the reports provided for by Articles 15 and 16. However, at the same time, it was stressed that the responsibility for the reports remains with the Central Authority or with the other public authorities or bodies accredited under Chapter III to the extent permitted by the law of its State, as prescribed by paragraph 1 of the same Article 22.

CHAPTER V — RECOGNITION AND EFFECTS OF THE ADOPTION

399 Articles 23, 24 and 25 deal with the recognition of the adoption granted in any Contracting State and develop one of the aims pursued by the Convention, *i.e.* "to secure the recognition in Contracting States of adoptions made in accordance with the Convention", as established by sub-paragraph *c* of Article 1. Furthermore, Chapter V includes Article 26, partially dealing with the effects of the adoption and Article 27, which regulates one specific case of conversion of the adoption.

400 As suggested in the Report of the Special Commission, Working Document No 133, submitted by Belgium, proposed to modify the title of Chapter V to read as follows: "Recognition and Effects of Inter-country Adoptions". The proposal was approved, subject to the intervention of the Drafting Committee, which made the final linguistic amendment.

401 The Recognition Committee advised the deletion of article 23 of the draft. This article enabled the receiving State to make its full recognition of an adoption granted in any Contracting State in accordance with the Convention conditional upon the successful completion of an additional — post-adoption — probationary period in the receiving State. This possibility was considered not to be in the best interests of the child, because the adoption would become territorially limited, notwithstanding its compliance with the Convention; furthermore, it was pointed out that the concerns of the States requiring a post-adoption probationary period were protected by the Convention, since they have the right not to agree to the continuation of the adoption, as permitted by sub-paragraph *c* of Article 17.

Article 23

Paragraph 1

First sentence

402 The first sentence of paragraph 1 reproduces the text of the draft (article 22, first paragraph) and aims at facilitating the recognition in all Contracting States of the adoption granted according to the Convention. Therefore, it provides for its recognition by operation of law, thus superseding the existing practice that an adoption already granted in the State of origin is to be made anew in the receiving State only in order to produce such effects, and also prevents a revision of the contents of the foreign adoption. For these reasons, it only required a certification, made by the competent authorities of the State where the adoption took place, attesting that the Convention's rules were complied with and that the agreements under sub-paragraph *c* of Article 17 were given, specifying when and by whom.

403 The first sentence of paragraph 1 refers to "the State of adoption", it being understood that this could be the State of origin or the receiving State, depending on the circumstances of the case.

404 The certification required by Article 23 is to be carried out by "the competent authority". Therefore, each Contracting State is at liberty to determine whether it shall be an administrative or a judicial authority. The relevant information is to be sent to the depositary of the Convention, according to paragraph 2 of the same Article 23.

405 The first sentence of paragraph 1 should be read in conjunction with sub-paragraph c of Article 36 to determine the competent authorities in the case of a State having two or more systems of law with regard to adoption applicable in different territorial units.

406 Working Document No 72, submitted by France, unsuccessfully suggested that the certification be made by the Central Authority, because it is supposed to be in the best position to discharge such function. The objection was raised, however, that this might bring about conflicts among independent powers within the State, since an administrative authority is not to control the work performed by the courts.

407 The Convention does not regulate the formal requirements of the certification, even though there was consensus about the advantage of making it according to a standard form. Therefore, Article 23 should be read in conjunction with the Wish included in the Final Act of the Seventeenth Session, that the experts participating in the first meeting of the Special Commission to be convened in accordance with Article 42 of the Convention establish a recommended form for the document certifying that the adoption has been made in accordance with the Convention (Final Act, under E).

408 Once the certification is presented, the adoption granted is to be recognized "automatically", by operation of law. The recognizing State may control the instrumental validity of the certification. It may refuse recognition only in accordance with Article 24 (or 25). This solution certainly goes very far, since it may result in the recognition of an adoption, in spite of its disregard of the Convention's rules. However, the second sentence of paragraph 1 aims at preventing such extreme cases (see *infra*, Nos 414-415).

409 The phrase "by operation of law" is not very accurate, but was retained because no better wording could be found to express that recognition shall take place automatically, *i.e.* without the need for a procedure for recognition, enforcement or registration. During the second reading, the delegation of Nepal submitted Working Document No 196, pointing out that this imposed on the Contracting States an obligation to modify their internal laws and, for that reason, suggested unsuccessfully its replacement by the words "duly recognized". Consequently, a previous *exequatur* is not necessary for the recognition of the adoption. Of course, the Convention does not prohibit its being obtained, in which case the *exequatur* proceedings are governed by the *lex loci*.

410 Article 23 does not provide for automatic recognition of a decision to refuse recognition of the adoption, as was suggested by the United Kingdom in Working Document No 83. It was considered that such ruling would diverge too far from the objectives pursued by the Convention, which aims, in particular, at the promotion of co-operation among the Contracting States to protect children in cases of intercountry adoptions (Article 1, sub-paragraph b).

411 The Convention does not specifically answer the question as to whether an adoption granted in a Contracting State and falling within its scope of application, but not in accordance with the Convention's rules, could be recognized by another Contracting State whose internal laws permit such recognition. Undoubtedly, in such a case, the Contracting State granting the adoption is violating the Convention, because its provisions are mandatory and such conduct may give rise to the complaint permitted by Article 33, but the question of the recognition would be outside of the Convention and the answer should depend on the law applicable in the recognizing State, always taking into account the best interests of the child.

412 Working Document No 104, submitted by Spain when discussing Article 22, suggested to add a new paragraph prescribing: "Equally, any Contracting State may

declare to the depositary of this Convention that child adoptions will not be recognized in that State unless the functions conferred on the Central Authorities have been carried out in conformity with the first paragraph of this Article". The idea behind the proposal was the guarantee that has to be made by the State of the habitual residence granting the adoption, and to prevent the risks of fraud. However, it was observed that such denial of recognition may not be in the best interests of the child, as exemplified by Canada with the case of a Spanish professor habitually resident in the United States who obtains a legally valid intercountry adoption without the intervention of the Central Authorities, continues to reside there for ten years or more and only afterwards returns to Spain, and the proposal failed. Undoubtedly, it would be very difficult to accept the denial of recognition of the adoption, just because the Central Authorities did not intervene.

413 Working Document No 106, submitted by Spain, also suggested the addition of a new paragraph to Article 23 prescribing that the breach of Article 32 cannot serve as cause for the denial of the recognition of the adoption. Although the idea was generally accepted, the proposal was withdrawn, since it was considered not advisable to make distinctions among the rules of the Convention and because it would be unreasonable to deny recognition to an adoption already made, just for the violation of Article 32.

Second sentence

414 The second sentence of paragraph 1 was included in the Convention as a result of the suggestion made by the Recognition Committee, when submitting Working Document No 142, to include the following text: "The certificate shall expressly mention that the requirements of Chapter II have been satisfied". A similar aim was pursued by Working Document No 145, submitted by Denmark, proposing to add these words to Article 23: "giving the particulars of the approval of the competent authorities of the other State concerned", and also by the Netherlands, in Working Document No 163, suggesting that the certification shall "make express reference to the statements by the Central Authorities saying, each for the State concerned, that the requirements mentioned in Articles 6 and 17 have been met". However, a clear majority rejected such proposals, which were criticized as weakening the Convention and, in particular, the reference to Chapter II was considered very unsatisfactory, because it gave the impression that not all the conventional rules had been complied with, it being unacceptable to divide them into two classes: fundamental and non-fundamental.

415 Nevertheless, the question was discussed anew in the third reading, because the delegations of Bulgaria, Denmark, Ireland, the Netherlands, the Philippines, Romania, the Russian Federation, Slovenia, Spain and the United Kingdom presented Working Document No 183, suggesting the addition of the following sentence to paragraph 1: "The certificate shall contain the date on which the competent authority of the other State concerned has agreed that the adoption may proceed and shall identify this authority". As explained by the proposers, compliance with the condition established by Article 17, sub-paragraph c, "is crucial for the outcome of each adoption and for the success of the Convention". Therefore, any mistake on this point would be especially grave, and the information required should not only identify the case, but would also prevent the issuing of the certification by the State of adoption, if in fact the other Contracting State has not agreed. Besides, the inclusion of such information will not impose extra work since, before issuing the certificate, the authority of the State of origin must have read the file and determine the compliance with conditions sanctioned by the Convention. The proposal was approved, because it provided better and more practicable evidence, although it was reminded again that all requirements of the Convention were equally important, and that it was not advisable to highlight a single one.

Paragraph 2

416 Since paragraph 1 of Article 23 only refers to "the competent authority" of the State of adoption, as a practical matter it is advisable to have the relevant information disseminated among the Contracting States. Therefore, its text was suggested by Working Document No 142, submitted by the Recognition Committee. There was general

agreement, even though some preferences for a centralized certification were also supported. During the second reading, Working Document No 196, presented by Nepal, unsuccessfully proposed to insert the words "jurisdictional extent" before "the functions of the authority".

417 According to paragraph 2 of Article 23, the notification is also to be made in case of "any modification in the designation of these authorities", a provision that should be understood to include the identity as well as the functions of the authorities competent to issue the certification.

418 The notification required by paragraph 2 of Article 23 is to be made to the depositary of the Convention, the Ministry of Foreign Affairs of the Kingdom of the Netherlands, which will transmit the information to the States mentioned in Article 48.

419 Paragraph 2 of Article 23 should be read in conjunction with sub-paragraphs *c* and *d* of Article 36 to determine the competent authorities, the public authorities or the accredited bodies, in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

420 It is not understandable why the required notification shall be made by "each Contracting State" at the time of the "signature" of the Convention, since a State does not become a Contracting State because of its mere signing of the Convention. Besides, the entering into force of the Convention is regulated by Article 43 and for this purpose, the signature is not relevant at all, but the expiration of three months after the deposit of the third instrument of its ratification, acceptance or approval.

Article 24

421 Article 24 establishes as an independent provision the exception of public policy to the recognition of foreign adoptions, which had been included in article 22, second paragraph, of the draft. The question was fully discussed in the Recognition Committee and the initial lack of consensus explains the various suggestions made in Working Document No 142, submitted to the Second Commission of the Conference.

422 The most radical position was variant III of article 22 A, suggesting to delete the exception of public policy, because it may weaken the recognition by operation of law of foreign adoptions. In support of the proposal it was reminded that such a clause is not included in the Hague Child Abduction Convention. However, the suggestion was rejected by a large majority.

423 The United States of America tried to restrict the application of the public policy exception and suggested the article to read as follows: "The recognition of an adoption in a Contracting State may only be refused if the child has been abducted or the consents to its adoption were false, fraudulent, or coerced and if it is in the best interests of the child to do so" (Work. Doc. No 77, as reproduced in Work. Doc. No 142, article 22 A, variant II), and as a sub-variant the following text was to be added: "Recognition may only be refused by the competent authorities of the receiving State. The decision to refuse recognition shall be recognized by operation of law in the other Contracting States" (Work. Doc. No 142, article 22 A, variant II, sub-variant). The proposal failed, however, it being pointed out that "public policy was a general principle which could not be reduced to some particular rules".

424 Variant I of article 22 A, as presented by Working Document No 142, reproduced the text of the draft (article 22, second paragraph), providing that "the recognition of an adoption in a Contracting State may only be refused if the adoption is manifestly contrary to its public policy and to the best interests of the child". Such formulation required that both grounds for refusal work cumulatively. Therefore, recognition by operation of law cannot be denied when the adoption brings about results manifestly contrary to public policy, but not to the best interests of the child, and vice versa, the adoption shall be recognized if it is not manifestly contrary to public policy, even though against the best

interests of the child. Nevertheless, as pointed out in the Report of the Special Commission (No 266), this is a rather exceptional situation that will very seldom occur.

425 Article 22 A, sub-variant 2 of variant I, suggested that the recognition of an adoption in a Contracting State may only be refused "if the adoption manifestly violates fundamental principles of public policy and the best interests of the child". Consequently, in this case, both grounds were also to work cumulatively.

426 The text finally approved was sub-variant 1 of variant I of article 22 A, submitted by the Recognition Committee in Working Document No 142, providing that "the recognition of an adoption in a Contracting State may only be refused if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child". Therefore, it does not prescribe the cumulative application of both grounds, since the best interests of the child are only to be taken into account, it being understood that the notion of public policy shall be interpreted very restrictively, *i.e.* with reference to the "fundamental principles" of the recognizing State.

427 Working Document No 106, submitted by Spain, suggested the addition of a third paragraph expressly prescribing that the violation of Article 32 "cannot serve as cause for the denial of the recognition of the adoption". The proposal failed, however, since it was understood to be included in the public policy exception.

428 Neither Article 24 nor any other articles of the Convention provides for the exception of the unknown institution as a ground to refuse recognition of the adoption granted in a Contracting State, a possibility expressly rejected by Article 5 of the Inter-American Convention (La Paz, 1984). Thus, the solution is the same and the fact that the recognizing State does not have the institution of adoption, or a particular form of adoption, cannot be used as a ground to deny recognition to foreign adoptions.

Article 25

429 Article 25 is a new provision that has to be read in conjunction with paragraph 2 of Article 39, because together they represent the compromise reached between the supporters and opponents of the possibility of future agreements among Contracting States on matters regulated by this Convention. These agreements are permitted, within certain limits, by paragraph 2 of Article 39, but the other Contracting States have the right to declare to the depositary not to be bound under the Convention to recognize the adoptions made in accordance with them.

430 Article 25 requires a positive action from the third Contracting State and therefore, in case no declaration is made, it will be bound under the Convention to recognize the adoptions made under the agreements permitted by paragraph 2 of Article 39.

431 Article 25 prescribes that the declaration is to be made to the depositary of the Convention, the Ministry of Foreign Affairs of the Kingdom of the Netherlands, which will inform the States mentioned in Article 48.

432 Article 25 does not prescribe when the declaration is to be made, therefore it is necessary to distinguish two situations. The first one is when a State becomes a Party to the Convention and other Contracting States have already entered into the agreements permitted by paragraph 2 of Article 39. In that case, the declaration is to be made at the time of ratification, acceptance, approval of or accession to the Convention. However, it is also possible to make it afterwards, but then the declaration will only have effects for the future, and the third Contracting State shall be bound under the Convention to recognize the adoptions made in accordance with those agreements after it has become a Party to the Convention, but before making the declaration to the depositary.

433 The second possibility is that the State is already a Party to the Convention when the agreements permitted by paragraph 2 of Article 39 are entered into between one

Contracting State and one or more other Contracting States. Then the declaration is to be made as soon as possible, no period being fixed by the Convention, once the third Contracting State receives from the depositary the notification prescribed by Article 48, sub-paragraph *d*. However, the declaration may also be made afterwards, but in that case the third Contracting State shall be bound under the Convention to recognize the adoptions made before, in accordance with those agreements.

434 The effect of the declaration permitted by Article 25 is that the third Contracting State shall not be bound to recognize the adoptions made in accordance with the agreements permitted by paragraph 2 of Article 39. However, there is no prohibition to recognize them according to the internal law of the Contracting State that has made the declaration.

435 Although not expressly prescribed, the declaration may be withdrawn at any time by the third Contracting State that made it and shall be communicated to the depositary of the Convention for the notification prescribed by sub-paragraph *d* of Article 48. From that moment on, the third Contracting State shall be conventionally bound to recognize the future adoptions made in accordance with those agreements, but the Convention is silent in respect of the adoptions already granted.

Article 26

Paragraph 1

Introductory phrase

436 The Special Commission could not reach an agreement on the rights that the adoptive child shall enjoy in the recognizing State and in the other Contracting States, because some of its participants argued that the object of the Convention was not to regulate the legal condition of the adoptive children, but to promote and facilitate the co-operation between the Contracting States in order to ensure that intercountry adoptions take place in the best interests of the child.

437 The question relating to the rights and duties of the adoptive children is connected with the scope assigned to the Convention, as explained in the Report of the Special Commission (Nos 282-295). A number of problems could have been avoided if the Convention had been limited to adoptions that terminate the legal relationship between the child and his or her family of origin. This was the solution approved, as a rule, in the 1984 Inter-American Convention, Article 1 of which provides that it "*shall apply to adoptions of minors in the form of full adoption, adoptive legitimation, and other similar institutions that confer on the adoptee a legally established filiation*".

438 Most of the participants, however, not only of the Special Commission but also of the Diplomatic Conference, were of the opinion that it would be preferable not to restrict the scope of the Convention to the type of adoptions that terminate the legal relationship between the child and his or her family of origin, and that it was desirable to include all possible kinds of intercountry adoptions. For this reason, it was necessary to consider the different types of adoptions that, roughly speaking, may be classified in three main groups, as follows: (1) the first admits only a radical kind of adoption that fully terminates the legal relationship between the child and his or her family of origin (full adoption); (2) the second class only accepts a less radical type of adoption that does not completely terminate such legal relationship (simple or limited adoption), and (3) the last group admits both kinds of adoptions, the most radical and the less radical, accepting therefore that the legal relationship between the child and his or her family of origin may or may not be terminated, all depending on the type of adoption granted in the particular case.

439 After great efforts had been made, in a sincere spirit of compromise a minimum consensus could be reached as to certain effects arising from all the adoptions covered by the Convention. Article 26 was approved, whose aim is only to give a partial answer to the

question relating to the effects of the adoption, as follows: (1) paragraph 1 establishes certain minimum effects to be brought about by all adoptions made under the Convention, irrespective of the law applicable according to the conflicts rules of the recognizing State; (2) paragraph 2 regulates the effects in the particular case where the adoption (completely) terminates a pre-existing legal relationship between the child and his or her mother and father, if such consequence is established by the law of the State where the adoption was granted, in the receiving State or any other Contracting State where the adoption is recognized; and (3) paragraph 3 safeguards the application of any provision more favourable to the child in force in the Contracting State which recognizes the adoption.

Sub-paragraph a

440 Sub-paragraph *a* reproduces the basic idea suggested in Working Document No 142, submitted by the Recognition Committee, that had already been accepted in the draft (first paragraph of article 24), prescribing that "a child whose adoption is recognized in a Contracting State, shall be considered in law as the child of the adoptive parents".

441 Sub-paragraph *a* should be read in conjunction with Article 2, paragraph 2, according to which "the Convention covers only adoptions which create a permanent parent-child relationship". Therefore, if such a relationship is not created according to the law applicable in accordance with the conflict rules of the Contracting State where it was made, the adoption granted is not covered by the Convention.

442 However, there is a difference in the text, because paragraph 2 of Article 2 refers to "adoptions which create a permanent legal parent-child relationship", the permanent character not being mentioned by sub-paragraph *a* of Article 26. Nevertheless, the idea is the same as is evidenced by the French version that in both cases allude to a *lien de filiation*.

443 According to sub-paragraph *a*, the recognition of the legal parent-child relationship between the child and his or her adoptive parents created by the adoption, has to be recognized in any other Contracting State, whether or not the pre-existing legal parent-child relationship between the child and his or her mother and father is preserved or terminated as a result of the adoption. This demonstrates the broad scope of the Convention which covers all classes of possible adoptions.

444 Sub-paragraph *a* includes sub-paragraph *b*, because the legal parent-child relationship between the child and his or her prospective adoptive parents implies, as a minimum, the parental responsibility of the adoptive parents for the child. Nevertheless, they do not necessarily coincide because other effects may arise from the parent-child relationship than the parental responsibility, all depending on the applicable law.

Sub-paragraph b

445 Sub-paragraph *b* reproduces the suggestion made by the Drafting Committee in Working Document No 180, to take care of some observations made while discussing the suggestion presented by the Recognition Committee in Working Document No 142 (article 24(1)(b)).

446 The expression "parental responsibility" was approved, instead of "parental authority" used in Working Document No 142, because it is the language commonly used in international documents and to clarify and stress, as far as possible, that parenthood gives rise not only to rights but also to duties.

447 Greece proposed to delete sub-paragraph *b*, because the parental responsibility of the adoptive parents for the child is a consequence of the legal parent-child relationship between the child and his or her adoptive parents, that has to be recognized according to sub-paragraph *a*. However, as observed (*supra*, No 444) it was pointed out that both sub-paragraphs do not necessarily have the same scope, because there may be other effects

arising from the legal parent-child relationship between the child and his or her adoptive parents. Furthermore, the express mention of this effect was considered advisable, taking into account that the legal parent-child relationship continues and not the parental authority when the child attains the majority and because the best interests and the protection of the child are the paramount consideration of all intercountry adoptions.

Sub-paragraph c

448 Sub-paragraph *c* reproduces the suggestion made by the Drafting Committee in Working Document No 180 (article 24, paragraph 1, sub-paragraph *c*) which took into account the discussion of Working Document No 142 (article 24(1)(*c*)) presented by the Recognition Committee, based on the text of the draft (article 24, second paragraph).

449 Working Document No 142, submitted by the Recognition Committee, made reference to "any pre-existing legal relationship of the child with his or her mother and father", but the word "any" was changed by "a", to accept the possibility that in some cases some links between the child and his or her mother or father remain. The amendment took into consideration the comments made by Germany and Austria, reminding that in the case of an adoption within a family, there may remain some legal relationships between the child and one of his or her parents, in accordance with the law of the State where the adoption is made, even though the granting of adoption terminates the legal relationship between the child and the other parent.

450 The amendment was approved in spite of the objection made by some participants, that the maintenance of the legal relationship between the child and his or her mother or father may give that parent a right to enter and to reside in the receiving State, a result considered against the restrictive immigration policy of the European countries nowadays. No doubt, such a possibility is true, but the argument was not considered valid, because the receiving State is in the position not to agree to the continuation of the adoption, according to sub-paragraph *c* of Article 17.

451 The reference made by sub-paragraph *c* to "a pre-existing legal relationship between the child and his or her mother and father" is to be understood as referring to the *lien de filiation* and, for the sake of consistency with paragraph 2 of Article 2, it should have included the term "permanent".

452 Sub-paragraph *c* of Article 26 may have the effect of imposing on the receiving State a duty to recognize the termination of a pre-existing legal parent-child relationship between the child and his or her mother and father, even though such an effect would not have been produced had the adoption been granted in the recognizing State.

453 Certainly, the State of origin or the receiving State may avoid such a consequence just by not agreeing to the continuation of the adoption, as permitted by Article 17, sub-paragraph *c*, but it is to be kept in mind that such a possibility is not open to any other Contracting State, because the agreement of third States is not a condition required by the Convention to grant the adoption. Therefore, the third Contracting State is bound under the Convention to recognize the termination of such a pre-existing legal parent-child relationship between the child and his or her mother and father, even though the law applicable according to its conflict rules would not admit that termination.

454 Working Document No 193, submitted in the second reading by France, Uruguay, Belgium, Madagascar, Benin and Burkina Faso, suggested to harmonize the French version of sub-paragraph *c* with the English by adding the word "*définitive*" after "*rupture*", because the expression "terminate" used in the English text was to be understood as "*rupture définitive*" and not a mere "*rupture*". However, the proposal was strongly objected to because of its unsatisfactory results, as evidenced by recent experiences with France, where the effects of a revocable adoption are not recognized, even though the pre-existing legal parent-child relationship is terminated since, because of the possibility of the revocation, there is no "*rupture définitive*".

455 Revocation of the adoption is not covered by the Convention and therefore, it is not entitled to recognition by operation of law, according to Article 23, the question being dealt with by each Contracting State according to its own law. The same applies to any decision that revokes the termination of the pre-existing parent-child relationship after the adoption is granted, whether or not the adoption is maintained.

456 Sub-paragraph *c* is another evidence of the broad scope of the Convention that covers all kinds of adoptions which create a permanent legal parent-child relationship, as specified by paragraph 2 of Article 2, whether or not the former relationship with his or her mother and father remains in force.

457 Sub-paragraph *c* only regulates adoptions granted in a Contracting State, that could be the State of origin or the receiving State, and does not aim to establish rules for adoptions made in non-Contracting States. The termination of the legal parent-child relationship as a consequence of the conversion of the adoption, is not regulated by sub-paragraph *c*, but by Article 27.

458 The choice of the place where the adoption was made, to decide on the termination of a pre-existing legal relationship between the child and his or her mother and father, was criticized as being inconsistent with the habitual residence of the child, used elsewhere in the Convention to determine the scope of application. The difficulty disappears when it is realized that Article 26 is to be read in conjunction with Article 23, which refers to the adoption certified as having been made in accordance with the Convention, including its Article 2. The lack of any reference in sub-paragraph *c* to the law of the State of origin was also pointed out, it being also suggested to take into account the kind of consent given according to Article 4, sub-paragraphs *c* and *d*, before recognizing the adoption. However, this suggestion was rejected, because it would permit the revision of the adoption granted, in contradiction with the respect due to the certification issued in accordance with Article 23.

Paragraph 2

459 Working Document No 142, submitted by the Recognition Committee, suggested as effects of the adoption the most favourable legal status granted to adoptive children in the recognizing State, but this solution was modified in Working Document No 171, also submitted by the Recognition Committee, to prescribe that "the child shall enjoy in the Contracting State where the adoption is recognized, the rights equivalent to those resulting from adoptions granted in that State".

460 The proposals were objected to on several grounds: (a) France insisted on the irrevocable character of the adoption according to French law and suggested that each Contracting State apply its own conflict rules to determine the effects of the adoption (Work. Doc. No 72); (b) Japan proposed the deletion of the second paragraph because of the difficulty to understand why the most favourable law is to be applied automatically in cases in which a post-adoption transfer of the child takes place, whereas the effects of the adoption are determined by the applicable law according to the conflict rules of the State where the adoption is made if the child remains there (Work. Doc. No 161); (c) Germany did not want the change of the applicable law depending on where the child happens to be, and therefore favoured the law of the receiving State (Work. Doc. No 173); (d) the United Kingdom remarked the inconvenience of the suggested solution from the standpoint of British nationality law, because the children adopted under the Convention would acquire automatically British nationality with the adoption order, even though they may not comply with all the legal requirements, whereas children adopted outside the Convention would not necessarily acquire British nationality (Work. Doc. No 155); (e) Ireland observed that it is not the recognizing State but the receiving State, where the child is habitually resident, that has to provide for his or her welfare, health and social care.

461 Working Document No 180, submitted by the Drafting Committee, proposed to solve the problem in all Contracting States by a reference to the most favourable status granted to adoptive children in the State of his or her habitual residence, if this is a

Contracting State, as had been suggested by Germany and approved by the Second Commission. Notwithstanding the possible advantages to give a fixed status to the child and to guarantee his or her equality of treatment in all Contracting States, the text was objected to because it represented a disguised uniform conflict rule that would bring an element of confusion in the functioning of the conflict systems of all Contracting States.

462 Working Document No 188, submitted by Germany and Ireland, was restricted to determine the effects of the adoption only in the receiving State according to the law of the receiving State, therefore leaving open the question as to the rights of the child in all other Contracting States that recognize the adoption. The idea behind the proposal was to have a clear solution for the main problem, because the child is usually habitually resident in the receiving State, and acknowledging that it does not guarantee the protection of the child's rights for the future, *i.e.* in the frequent case of international migrations, when he or she is moved from the receiving State to another Contracting State or to a third State.

463 The decision was confined to make a choice between Working Documents Nos 171 and 188, but both were unsuccessful because the vote was equally divided, the majority of the participants also disliking the text suggested by the Drafting Committee in Working Document No 180. For these reasons, Ireland and Switzerland looked for and suggested a compromise solution in Working Document No 201 that was approved on the understanding that it would be unrealistic to try to solve all questions relating to the effects of the adoption in a convention essentially dealing with co-operation amongst the Contracting States.

464 Paragraph 2 of Article 26 only regulates the case where the termination of a pre-existing legal parent-child relationship is admitted in the State where the adoption is granted, *i.e.* the State of origin or the receiving State. The child shall enjoy in the receiving State where the adoption is recognized or (if no adoption is made in the State of origin) granted and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having such effect in each such Contracting State. Therefore, paragraph 2 of Article 26 cannot come into operation if the State where the adoption is made does not accept the termination of such pre-existing legal parent-child relationship and, in that case, the rights belonging to the adoptive child will be determined in accordance with Article 26, paragraph 1, sub-paragraphs *a* and *b*, and paragraph 3.

465 The aim pursued by paragraph 2 is to guarantee that the child adopted in intercountry adoption in accordance with the Convention enjoys a legal status and protection equivalent to that of any other adopted child, as is prescribed by sub-paragraph *c* of Article 21 CRC, which imposes on the States Parties recognizing and/or permitting the system of adoption the obligation "to ensure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption".

466 The practical importance of paragraph 2 can easily be evidenced in the case where either the receiving State (if it is there that the adoption is granted) or the recognizing State admits both adoptions that terminate the pre-existing legal parent-child relationship and adoptions that do not terminate it, because in that case the child shall enjoy the rights arising from the adoption that ends such relationship.

467 Notwithstanding its broad terms used, paragraph 2 should be read in conjunction with sub-paragraph *c* of Article 26 as referring to the termination of "a pre-existing legal relationship between the child and his or her mother and father".

468 The termination of the pre-existing legal parent-child relationship referred to in paragraph 2 of Article 26 does not require to be "definitive", and it also covers the exceptional cases where the revocation of the adoption is possible.

469 The reference to the "receiving State" in paragraph 2 aims to cover cases outside of recognition where the adoption is being made in the receiving State. Although not

expressly mentioned, the same rule must be deemed to apply in the exceptional case where, after the child has moved to the receiving State, the adoption is granted — not in the receiving State but — in the State of origin.

Paragraph 3

470 Paragraph 3 is, strictly speaking, superfluous, because it goes without saying that the Convention does not prevent a Contracting State which recognizes an adoption to afford a better protection to the child than it has to under paragraphs 1 and 2. The same goes for the receiving State in the case where the adoption is not made in the State of origin but in the receiving State.

471 As an example of the idea reflected in this paragraph, one could think of a case where the child was adopted by way of a "simple" adoption in the State of origin or in the receiving State and without acquiring rights of inheritance *vis-à-vis* members of the adoptive family. In this case, neither paragraph 1 c nor paragraph 2 applies, because the pre-existing legal relationship between the child and his or her mother and father is not terminated. Nevertheless, under paragraph 3, the laws of the recognizing State may accord rights of inheritance *vis-à-vis* the adoptive family to the child.

Final remarks

472 As already observed, Article 26 does not pretend to solve completely the question as to the effects of the adoption in the Contracting State that recognizes it. However, notwithstanding the complexity of the subject-matter, Article 26 gives adequate solutions for many of the situations that may arise, taking into account the different regulations of the adoption in the various States, as mentioned before.

473 In fact, there would be no problem in the following cases:

(a) if the adoption granted in one Contracting State terminates the pre-existing legal relationship between the child and his or her family of origin, and the recognizing State only accepts the same kind of adoption. Then, the effects of the adoption are those determined by sub-paragraphs *a*, *b* and *c* of paragraph 1 and paragraph 2, so that the child shall enjoy rights equivalent to those belonging to adoptive children in the recognizing State;

(b) if the adoption granted in one Contracting State does terminate the pre-existing legal relationship between the child and his or her family of origin, and the recognizing State admits not only that kind of adoption, but also the adoption that does not terminate such pre-existing legal relationship. The effects of the adoption are again determined by sub-paragraphs *a*, *b* and *c* of paragraph 1 and paragraph 2, and the child shall enjoy rights equivalent to those of a child adopted in the recognizing State with termination of the pre-existing parent-child relationship;

(c) if the adoption granted in one Contracting State does not terminate the legal relationship between the child and his or her family of origin, and the recognizing State only accepts the same kind of adoption. Then, the effects of the adoption are those determined by sub-paragraphs *a* and *b* of paragraph 1, so that the child shall enjoy rights equivalent to those of adoptive children in the recognizing State;

(d) if the adoption granted in one Contracting State does not terminate the pre-existing legal relationship between the child and his or her family of origin, and the recognizing Contracting State accepts not only this kind of adoption but also the adoption that terminates such legal relationship. In this case, the effects of the adoption are those determined by sub-paragraphs *a* and *b* of paragraph 1, so that the child shall enjoy in the recognizing State rights equivalent to those of children adopted in the less radical manner in relation to his or her family of origin. However, a conversion of the adoption may take place according to Article 27;

(e) if the adoption granted in one Contracting State terminates the pre-existing legal relationship between the child and his or her family of origin, and the recognizing State does not admit such a consequence. Then, the effects of the adoption are those determined by sub-paragraphs *a*, *b* and *c* of paragraph 1 of Article 26 (paragraph 2 cannot apply), so that the child shall enjoy a special status in the recognizing State;

(f) if the adoption granted in one Contracting State does not terminate the pre-existing legal relationship between the child and his or her family of origin, and the recognizing State only admits the type of adoption that terminates such relationship. In that case, the effects of the adoption are those determined by sub-paragraphs *a* and *b* of paragraph 1, and paragraph 2 does not apply. However, the adoption may be converted into a "full" adoption according to Article 27.

(g) in all of the above cases, the recognizing State may apply a more favourable rule or regime to the child under Article 26, paragraph 3.

Article 27

Paragraph 1

474 Article 27 is new and was suggested between square brackets in Working Document No 142, submitted by the Recognition Committee (article 24 A) to regulate the most frequent cases of conversion of the adoption.

475 Working Document No 142 established three conditions for the conversion: (*a*) that the law of the receiving State permits it; (*b*) that the consents referred to in Article 4, sub-paragraphs *c* and *d*, have been or are given for the purpose of an adoption having the effect of terminating a pre-existing legal parent-child relationship, and (*c*) that such an adoption is in the best interests of the child. This last requirement was deleted, because it was considered a repetition of the idea already laid down in the fourth paragraph of the Preamble.

476 Article 27 only regulates the most frequent situation, *i.e.* where the adoption granted in the State of origin is to be converted in the receiving State. Consequently, not all cases are solved by the Convention and the possible conversion of the adoption in any other Contracting State, even in the State of origin, is to be decided according to the conflict rules of the Contracting State where the conversion takes place and does not benefit from the Convention's rules, in particular from Article 23.

477 The possibility of conversion permitted by Article 27 is subject to the condition that the adoption was granted in the State of origin. Therefore, it has a more restricted scope than sub-paragraph *c*, paragraph 1 of Article 26, that refers to the Contracting State where the adoption is granted, *i.e.* the State of origin or the receiving State. Therefore, the Convention does not cover the case where the adoption is granted in the receiving State, the pre-existing legal parent-child relationship is maintained and subsequently, the adoption is converted into an adoption that does terminate such relationship, for example, because in the receiving State both kinds of adoptions are permitted by law. Then, the conversion so decreed would not benefit from the rules of the Convention, in particular from Article 23.

478 Article 27 is only to be applied where the adoption does not bring about the termination of the pre-existing legal relationship between the child and his or her mother and father, because if such termination is an effect of the adoption in the State where it was made, it has to be recognized according to Article 26, sub-paragraph *c*.

479 Even though paragraph 1 refers to "the effect of terminating a pre-existing legal parent-child relationship", this sentence should be read in conjunction with sub-paragraph *c* of Article 26, meaning "the effect of terminating a pre-existing permanent legal relationship between the child and his or her mother and father".

Sub-paragraph a

480 According to sub-paragraph *a*, the receiving State shall apply its own law to decide whether or not the conversion is possible. Therefore, it cannot take place if the law of the receiving State does not accept that the adoption may be converted or where the law of the receiving State does not accept that the adoption may bring about the termination of a pre-existing permanent legal relationship between the child and his or her mother and father.

481 During the discussion, it was suggested to replace "the law of the receiving State" by "the law of the State of the habitual residence of the child", and to permit the conversion in any other Contracting State if possible and according to the law of the receiving State. However, both proposals did not succeed.

Sub-paragraph b

482 The idea behind sub-paragraph *b* is easily understandable and seeks to prevent that the adoption terminates, because of the conversion, the pre-existing legal parent-child relationship, notwithstanding the fact that the necessary consents, required by Article 4, sub-paragraphs *c* and *d*, had been given for an adoption that does not have that effect.

483 As a practical matter, it is to be observed that the functioning of Article 27 will not present any problem when the required consents had been given to cover the possibility of the conversion of the adoption, but, if that is not the case, difficulties may be faced to obtain the consents required by sub-paragraph *c* of Article 4 once the child has been moved and is habitually resident in the receiving State with his or her adoptive parents.

Paragraph 2

484 Paragraph 2 was included to avoid any doubts as to the conventional duty to recognize the conversion by operation of law according to Article 23 and, for this reason, the comments made there are valid here. However, notwithstanding the fact that the competent authority of the receiving State shall certify its conformity with the Convention, the certification required by the second sentence of paragraph 1 of Article 23 is not needed, because such condition is not necessary for the conversion.

485 During the third lecture, the Greek Delegate insisted that paragraph 2 should refer to Articles 23 and 24 because they were not separable, since they represented a "unity both in law and in logic, one being the rule (Article 23) and the other the exception (Article 24)". Despite the agreement in substance, the suggestion was considered unnecessary, because the reference to Article 23 also includes Article 24. Anyhow, as expressly requested, this clarification is made here to avoid any possible misunderstanding.

486 The conversion made in accordance with paragraph 2 of Article 27 shall be recognized in all Contracting States, the State of origin included, even though the adoption which was granted there did not bring about the termination of the pre-existing legal parent-child relationship.

CHAPTER VI — GENERAL PROVISIONS

487 Chapter VI contains several articles, some of which are traditionally included in the Hague Conventions, like those dealing with the cases where any Contracting State has two or more systems of law applicable in different territorial units, the so-called "federal clause" (Article 36); or with different categories of persons (Article 37); Article 38 excludes from the scope of the Convention the conflicts among the internal laws in force within the same State; Article 39 regulates the relations to other conventions; and Article 40 deals with

possible reservations.

488 Chapter VI also includes some other general provisions specifically referring to intercountry adoption, *i.e.* Article 28 prescribing that the Convention does not affect certain prohibitions established by the law of the State of origin, since its aim is not to unify the internal legislation of the Contracting States in matters of adoption; Article 29 prohibiting contacts between the prospective adoptive parents and the child's parents or any other person who has care of the child; Article 30 on preservation and access to the information concerning the child's origin; Article 31 on data protection; Article 32 prohibiting improper financial or other gain from any activity related to intercountry adoption; Article 33 on the duty of competent authorities to inform the Central Authority if it finds that the Convention has not been respected; Article 34 on the costs of translations and Article 35 requiring the competent authorities to act expeditiously in the process of adoption.

Article 28

489 Working Document No 1, submitted by Colombia, aiming to restrict the scope of application of the Convention, suggested the addition of the following phrase to Article 2: "if the internal legislation of the State of origin allows the child to be moved to the receiving State before his/her adoption". Underlying this proposal was the desire to permit all Contracting States to avoid the problem that may arise if the Convention permits the removal of the child from the State of origin before the adoption has taken place because, according to Colombian law, "it is illegal to allow the child to be removed from Colombia until the adoption is completed". Therefore, the addition would allow any Contracting State to apply its own law in this respect.

490 There was clear support for the substance of the proposal, in particular from Latin-American countries, as exemplified by Working Document No 28, submitted by El Salvador, even though some participants observed that the addition was not necessary, since the Convention did not try to harmonize the internal law of the Contracting States regarding the adoption, but to create a flexible system of co-operation to ensure the observance of certain safeguards in cases of intercountry adoptions. Nevertheless, the clarification purposes were understood, it being also observed that the proposal did not carry the danger of doing any harm, but was very important for many countries.

491 Having regard to the objectives of the Convention, Colombia submitted Working Document No 29 proposing an extra provision with the following language: "The articles of the present Convention that determine and regulate the transfer of the child to the receiving State prior to adoption and its placement with the prospective adoptive parents, as well as the adoption in the receiving State, shall not apply whenever such a transfer, placement or adoption is not permitted by the law of the State of origin.". This proposal was replaced later by Working Document No 45, submitted by Colombia, Ireland, the United States of America and Belgium, to have the new article read: "The Convention shall not affect any law of a State of origin which requires that the adoption of a child habitually resident within its State takes place in its State or prohibits the child's placement in or transfer to the receiving State prior to adoption.".

492 Although agreeing with the substance, Italy observed that the proposal was at least ambiguous, because it permitted to argue *a contrario* that all other provisions of the Contracting States regulating the adoption were affected by the Convention. Therefore, it should be clearly stated that, as a rule, the Convention does not pretend to affect the law of the Contracting States, either the State of origin, the receiving State or any other Contracting State; to achieve this aim, Italy submitted Working Document No 123 suggesting the addition of the following article: "The Convention shall not affect the laws of the receiving States requiring to wait for a probationary period before the adoption is granted.".

493 Similar comments were made by Japan. In spite of being in agreement with the substance, it advised the formulation of the proposal in more general terms, having in mind

that the other regulations in the State of origin to achieve the same goal should also be preserved. Therefore, Japan suggested to prescribe expressly that the Convention shall not affect "any law of a State of origin which sets out further requirements or conditions as to the international adoption of a child habitually resident within its State, his or her placement, or his or her transfer to the receiving State" (Work. Doc. No 143).

494 Working Documents Nos 123 and 143, submitted by Italy and Japan, respectively, did not obtain enough support to be considered in the second reading in accordance with the Rules of Procedure, and the text as suggested by the Drafting Committee in Working Document No 180 was approved. However, for the sake of clarity, when interpreting Article 28, it is to be kept in mind that, beyond the regulation of the Convention itself, the Convention does not affect the law of the Contracting States, either the State of origin, the receiving State or any other Contracting State.

Article 29

495 Article 29 substantially reproduces the text of the draft (article 4), with some amendments to specify the prohibition of contacts between the parties to the intercountry adoption, aiming to prevent trafficking and any other kind of practices that may be contrary to the purposes of the Convention, in particular, to avoid that the consents required for the granting of the adoption are induced by payment or compensation, as is expressly forbidden by Article 4, sub-paragraph c(3).

496 The prohibition contained in Article 29 is not absolute, because it does not forbid contacts before the child has expressed his or her consent, wishes or opinions, as required by Article 4, sub-paragraph d. Besides, contacts are permitted in case of intrafamily adoptions and also under the conditions established by the law of the State of origin. Furthermore, it is limited in time, because the contacts are only permitted after it has been established that (1) the child is adoptable (Article 4, sub-paragraph a), (2) intercountry adoption is in the best interests of the child (Article 4, sub-paragraph b), (3) the consents required by Article 4, sub-paragraph c, have been obtained, and (4) the competent authorities of the receiving State have determined that the prospective adoptive parents are eligible and suited to adopt (Article 5, sub-paragraph a).

497 For this reason and because the prohibition against contacts is intended to prevent the circumstances in which improper payment or compensation of the consents required by Article 4 c is most likely to occur, Working Document No 6, submitted by the United States of America, suggested to move the article to the chapter on general provisions, where the bar on improper financial gain is placed. The proposal was approved by consensus.

498 Article 29 sanctions, as a rule, the prohibition of contacts in general terms, therefore including not only "direct, unsupervised contacts", but also "indirect" or "supervised" contacts. This distinction was expressly rejected by the Special Commission (Report of the Special Commission, No 67).

499 Article 4 of the draft did not permit, in principle, any contact between the prospective adoptive parents and the child, but Working Document No 9, submitted by the United States of America, suggested to remove the prohibition as applicable to the child, because the contact with the child does not have the potential for abuse that contact with the parents has, and may normally be both desirable and unavoidable. The proposal was accepted, and later attempts to restore the prohibition of contacts with the child were unsuccessful (Work. Doc. No 150, submitted by Australia, Philippines, United Kingdom, Colombia, Sri Lanka and Romania).

500 Article 29 also amended the text of the draft to attend the suggestion made in Working Document No 57, submitted by the United Kingdom and Belgium, to include in the prohibition "any other person who has care of the child"; the proposal was approved without objection. The French term "*garde*" should be interpreted in the sense of the English "care", *i.e.* in a factual rather than a legal sense, because it is the contact with

those in actual care of the child that Article 29 intends to prevent.

501 Working Document No 151, submitted by Australia and Sri Lanka, suggested to extend the prohibition to the representative of the prospective adoptive parents, including a person permitted to perform functions under the Convention by virtue of paragraph 2 of Article 22. However, the proposal did not obtain enough support to be considered in the second reading.

502 Article 29 also amended the text of the draft by admitting, as an exception, the cases where "the adoption takes place within a family". The idea had been suggested, in particular, by Working Documents Nos 2, 23 and 42, submitted by Colombia, France and Switzerland, respectively, to take account of life's realities, because contacts are impossible to be avoided in case of adoption among relatives, but the question remained open as to what is to be understood by "family", as observed by Sri Lanka. Its approval satisfied the wishes of other countries that favoured the possibility to exclude intrafamily adoptions from the scope of the Convention (Japan, Work. Doc. No 65; Germany, Work. Doc. No 146).

503 Working Document No 42, submitted by Switzerland, suggested to replace the last part of Article 29 by the following phrase: "under the conditions established by the competent authority of the State of origin". The idea behind the amendment is to grant flexibility and permit the setting of those conditions by the State of origin, either in general terms, by the legislator, or on a case-by-case basis, *i.e.* by the administrative or judicial authority, taking into account the particularities of the situation.

504 The Swiss suggestion was approved, the other proposals failed, therefore, *i.e.*: (a) the deletion of the phrase, suggested by France in Working Document No 23, in order to avoid the exercise of discretionary powers by the competent authorities of the State of origin; (b) the replacement proposed by Colombia in Working Document No 2 with the following phrase: "or when the State of origin deems it convenient in the best interests of the child"; and (c) the proposal made by Sweden (Work. Doc. No 26) to permit the exception: "if national law so provides", and the alternative suggestion to specify that the prohibition of contacts was "for the purpose of obtaining the relinquishment of parental rights or an adoption", so that the adoption shall not be prohibited "for the only reason that there has been a natural and innocent contact between the prospective adoptive parents and the child".

505 The last part of Article 29 should be read in conjunction with sub-paragraph c of Article 36 to determine the "competent authorities", in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

Article 30

General remarks

506 Article 30 regulates two different questions: (1) the collection and preservation of the information concerning the child's origin, and (2) the availability of or the access by the child to such information. Notwithstanding the substantive nature of the rules, which may make them not appropriate in a convention on international co-operation, they were included because of their importance and for the possible need of co-operation among the Contracting States, when the child tries to obtain information about his or her roots from any Contracting State where he or she is habitually resident.

507 Article 30 should be read in conjunction with Article 16, because the information referred to is mainly that required for the preparation of the report on the child that the Central Authority of the State of origin is to transmit to the Central Authority of the receiving State.

Paragraph 1

508 Paragraph 1 substantially reproduces the text of the draft (article 25), with the specification suggested in Working Document No 125, submitted by Belgium, regarding the information "concerning the identity of his or her parents", and his or her "medical history", proposed by Mexico when the text was considered, reminding in this sense Article 7 of the 1984 Inter-American Convention on Adoption.

509 Article 30 refers to the Contracting States in general, including the State of origin, the receiving State and any other Contracting State; it should be read in conjunction with sub-paragraph c of Article 36, to determine the "competent authorities", in the case of a Contracting State having two or more systems of law with regard to adoption applicable in different territorial units.

510 Article 30 is also to be read in conjunction with Article 9, according to which "Central Authorities shall take, directly or through public authorities or other bodies duly accredited in their State, all appropriate measures, in particular to: a collect, preserve and exchange information about the situation of the child and the prospective adoptive parents, so far as is necessary to complete the adoption;".

511 In spite of the agreement as to the importance of the preservation of the information concerning the child's origins, the practical problems for the States of origin were understood if they have to keep indefinitely all that information. Working Document No 70, submitted by Germany, unsuccessfully proposed that it shall be stored "up to the age of [25] of the child", but only as a minimum period, not as a maximum, because of the different rules in force in the various countries. Then it is up to the State preserving the information to determine not only how much information is to be preserved, but also for how long.

Paragraph 2

512 The right of the child to obtain information about his or her origins was not a matter for discussion, as it was admitted by the UN Convention (Article 7). However, the unrestricted access may be, in certain cases, contrary to paragraph 2 of Article 7 of the same UN Convention, which prescribes the respect of the rights and duties of his or her parents, among other persons. The question was raised in the Special Commission from the very beginning, where several participants stressed the inconvenience of recognizing an unlimited right of information in some special situations, *e.g.* when an unmarried mother has consented to the adoption of her child and years later is heavily damaged by the disclosure of her past, at a time when she may be happily married.

513 Therefore, Article 30 sanctions some restrictions to the right of the child to have access to the information concerning his or her origins, substantially reproducing the text of the draft (article 25). However, some amendments were approved.

514 The first one permits the access not only to the child, but also to "his or her representative" to facilitate such access, in particular, while the child has not attained the majority. Working Documents Nos 78 and 134, both presented by the United States of America, suggested to specify that the information "shall be released to the adoptive parents or other guardians of the child until the child's age of majority, and to the child after the age of majority". It was considered, however, that it was up to the applicable law to determine not only this question, but also the one proposed by Germany in Working Document No 70, according to which the following sentence was to be added: "Appropriate measures are to be taken to hinder access to these data by third persons.".

515 The draft granted access to the information insofar as this was permitted by the law of the State of origin and the law of the State where it was held. In the final text, the reference to the law of the State of origin was deleted, taking into account the difficulties to apply foreign law and to ascertain its contents when the child is living far away, in particular if the adoption has been made a long time ago. Besides, the law of the State of origin cannot be considered the most appropriate to govern the availability of or access by

the child to the information kept by the receiving State. These reasons and the nature of the rules that regulate access to the information collected and preserved in a State, usually considered applicable notwithstanding the foreign elements of the case, explain that Article 30 only permits such access according to the law of the State where it is preserved, the State of origin or the receiving State.

516 Working Documents Nos 82 and 83, submitted by Australia and the United Kingdom, respectively, unsuccessfully suggested that the access to the information held in the receiving State should be regulated by its laws, and in any case, if the child requires "further information from the State of origin, any additional information concerning the whereabouts of the birth parents may only be released by the State of origin in accordance with the law of the State of origin."

517 Working Document No 134, submitted by the United States of America, suggested to include the following phrase: "if such information does not reveal names or other identifying data", to take appropriate care of the question relating to identifying information, which is an extremely sensitive area. Consequently, there should be no ambiguity in the regulation, because, according to experience, once information about the place of birth, the birth hospital, the sex of the child, and so on, is known, it is extremely easy to find out the identity of the child's parents. However, some participants observed that this issue should be determined by the law of the State where the information is preserved, not forgetting that the State of origin may avoid any possible future difficulty by not giving the information, as permitted by paragraph 2 of Article 16.

518 No matter what the applicable law may provide, Article 30 prescribes that access to the information shall be granted "under appropriate guidance", in order to avoid, as far as possible, any prejudicial results for the child, either emotionally or for any other reason. However, for obvious reasons, this requirement shall be complied with where the information is to be obtained by the child and not by his or her representative. Besides, the information is only to be given after all appropriate measures have been taken, having regard to the age of the adoptive child and his or her other personal conditions that may require special precautions.

Article 31

519 Article 31 reproduces the text of the draft (article 26) and was included because of the consensus that, if no adequate protection is granted by the Convention, less information will be given by the parties concerned, and the final result would then be prejudicial to the success of intercountry adoptions. Consequently, Article 30 acknowledges the right of the child to discover his or her origins under certain conditions but, at the same time, the Convention looks forward to preventing excesses and abuses, therefore prescribing in Article 31 that the personal data collected or transmitted during the adoption proceedings and necessary for the preparation of the reports, should only be used for those purposes.

520 The same reasons explain the solution approved by the 1984 Inter-American Convention on adoption, although its Article 7 goes even further when prescribing: "*where called for, the secrecy of the adoption shall be guaranteed. However, whenever possible, medical background information on the minor and on the birth parents, if it is known, shall be communicated to the legally appropriate person, without mention of their names or of other data whereby they may be identified.*".

521 The suggestion to refer the matter to the legislation of the Contracting States did not succeed, because data protection has not the same level of development everywhere. Consequently, it was decided that the Convention should establish some minimum safeguards by prescribing that the information on the child and on the prospective adoptive parents should only be used for the purposes for which it was gathered or transmitted.

522 Article 31 is broad enough to protect not only the personal data collected in the

State of origin or in the receiving State, but also the information transmitted by one to another for the purposes of intercountry adoption.

523 The data protection sanctioned by Article 31 does not, however, prevent that the information gathered or transmitted may be used in general terms, without making specific reference to the persons involved, such as, for example, in the preparation of the anonymous statistics or the exemplification of problems arising from intercountry adoptions. There should not be any reasonable doubt as to this possibility, in view of Article 9, sub-paragraph *d*.

524 Working Document No 70, submitted by Germany, proposed the addition of detailed rules, but the proposal was withdrawn before being considered.

525 Working Document No 89, submitted by Sweden, suggested the deletion of the article, arguing that no difference is made between the data held in automatic files and data held in a manual form. Consequently, some problems could arise because legislation concerning data protection is not the same all over the world and, besides, conflicts may arise between the need to prevent abuses and the principle of public access to official records. Furthermore, it should be kept in mind that the same issue is dealt with in the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data (ETS No 108). The proposal was withdrawn, however, before being considered.

Article 32

Paragraph 1

526 Paragraph 1 reproduces the text of the draft (first paragraph of article 27), which confirmed in general terms, as an independent provision, the duty imposed by Article 21, sub-paragraph *d*, CRC on States Parties "to take all appropriate measures to prevent that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it". The same principle is also to be found as a condition for the validity of the adoption in Article 4, sub-paragraphs *c*(3) and *d*(4).

527 The importance of the matter had been strongly stressed in the Special Commission, where it was recalled "the existing situation reveals that it is not only the intermediary bodies that are attracted by improper financial gain", because "as it has sometimes happened, lawyers, notaries, public servants, even judges and university professors, have either requested or accepted excessive amounts of money or lavish gifts from prospective adoptive parents" (Report of the Special Commission, No 310).

528 Paragraph 1 of Article 32 only prohibits "improper" gain, financial or of any other nature. Therefore, all "proper gains" are permitted and, because of that, paragraph 2 not only permits the reimbursement of the direct and indirect costs and expenses incurred, but also the payment of reasonable professional fees to persons involved in the adoption, lawyers included.

529 Article 32 does not state the consequences of its violation, but undoubtedly the refusal of automatic recognition of the adoption would be too much in many cases. For this reason, Spain submitted Working Document No 106 (see the comments on Article 23, paragraph 1, first sentence, *supra*, No 411), and some other participants felt that it made little sense to formulate general prohibitions without indicating the effects of their possible violation.

Paragraph 2

530 Paragraph 2 substantially reproduces the text of the draft (second paragraph of article 27), but the express reference to "direct and indirect" costs was deleted, even though the decision was taken step by step. In the first place, Working Document No 131,

submitted by France, suggested to delete the word "indirect", because it is not very precise and may bring about confusion, although it was explained that "indirect costs" should be interpreted as something in excess of the real costs of a specific adoption, for instance, money to go into a contingency fund. The suggestion was objected to by Colombia, because the elimination might affect donations that are usually made there for child welfare purposes on the occasion of intercountry adoptions. Working Document No 147, submitted by the United Kingdom, Greece, Ireland, Switzerland, Australia and the United States of America, proposed to omit also the word "direct", because the distinction between "direct" and "indirect" costs and expenses may bring about a debate on accountancy principles, making therefore obscure the intention of the prohibition contained in paragraph 2 of Article 32 as it is evidenced by the city taxes, for example, which are considered "direct" or "indirect" expenses, all depending on the accountancy principles followed in the various countries. For this reason, the words "direct and indirect" were deleted.

531 According to some participants, the connotation of "reasonable" added to "professional fees" could cause special problems for countries with a common-law system, for this is a technical term allowing the courts to determine whether the amount of fees charged is appropriate or not, and because this question may, for example, depend on whether the court was situated in a small country town where the reasonable fees would be quite low, or in a big city, like New York, where much higher fees could be regarded as being reasonable. Therefore, Working Document No 141, submitted by the United States of America, suggested that "Central Authorities, public authorities, competent authorities, or accredited bodies may establish appropriate fees for direct and indirect costs and expenses related to adoption which take into account the full range of activities engaged by these authorities and bodies, including the costs of administering and operating services related to child welfare other than intercountry adoption". Similarly, Working Document No 106, submitted by Spain, made reference to "the fees permitted by the State in which that person exercises his or her profession". However, both proposals failed, it being considered that in some countries, the State does not fix the lawyers' fees and that they may give rise to abuses if the fees established are very low.

532 There was consensus to understand paragraph 2 broadly, including fees of any person involved in the adoption process, *e.g.* lawyers, psychologists, doctors.

Paragraph 3

533 Paragraph 3 reproduces the text of the draft (third paragraph of article 27) including the same prohibition for directors, administrators and employees of bodies, accredited or not (no distinction is made), to receive remunerations that are unreasonably high in relation to the services rendered.

534 Indeed, the determination as to when a remuneration is unreasonably high, is left to the Contracting States and for this reason, the decisions may differ from one another in similar cases.

Article 33

535 The first sentence of Article 33 should be read in conjunction with sub-paragraph c of Article 36, to determine the competent authorities in case that a Contracting State has two or more systems of law with regard to adoption applicable in different territorial units.

Notwithstanding that the reference is to "a competent authority", there should be no objection that the information be also transmitted by an accredited body or even by a non-accredited body or person.

536 The formulation of the first sentence is very broad and, therefore, the duty imposed on the authorities of the Contracting State covers not only individual cases, but also any systematic pattern of non-respect of the Convention. Besides, its general terms make the Article applicable also in cases where there is only an attempt to evade the Convention's

rules.

537 The second sentence should be read in conjunction with Article 7, sub-paragraph *b*, which imposes on the Central Authorities the duty to take directly, not permitting any delegation, all appropriate measures to keep each other informed about the operation of the Convention and, as far as possible, eliminate any obstacles to its application. Therefore, the Central Authority is not to wait for the information, but shall act *ex officio* whenever finding out the serious danger of or the violation of the Convention's rules.

538 The measures to be taken according to the second sentence of Article 33 do not preclude, indeed, any other right belonging to the Contracting States to act against violation of the Convention's rules, as provided by public international law.

539 Working Document No 82, submitted by Australia, suggested the inclusion of a new paragraph to Article 33, as follows: "Where Central Authorities cannot agree upon arrangements to overcome violations of the Convention, then a Contracting State may suspend the operation of the Convention with the other Contracting State if, in the former State's view, the other Contracting State was wilfully violating the Convention or the principles underlying the Convention. Any such suspension shall be limited to a duration not exceeding twelve months. Where a suspension occurs, the suspending State is obliged to immediately notify the Permanent Bureau of the suspension of the operation of the Convention between the two States and the basis therefore." A similar proposal was presented by the United Kingdom in Working Document No 83, the main difference being that the suspension should be for a specified period and not for a maximum of twelve months.

540 The suggestion reflects the Australian concern that, notwithstanding the terms of the Convention and the goodwill to respect it, there may be a lack of compliance with certain of its requirements in some cases. Where a Contracting State believes that approvals given in another State fail to appropriately comply with the requirements of the Convention, there will be approvals in name only and will amount to a condoning by that other State of trafficking, or other undesirable conduct in respect of children. A country in those circumstances, should be able to continue to apply the Convention with other ratifying or acceding countries, without having to deal with the country with which it has substantial disagreement. Then, the only alternative open would be to denounce the Convention and its obligations thereunder, but that is too high a price to pay and is certainly less desirable than suspension of the operation of the Convention with a particular country for some time. Nevertheless, the proposals did not succeed.

Article 34

541 This Article is new and originates from Working Document No 100, submitted by the Permanent Bureau, suggesting the following text: "The costs of all necessary translations are to be borne by the prospective adoptive parents"; this was complemented by Working Document No 130, submitted by Switzerland, to restrict its application to the cases where the State of destination requests the translation of the document.

542 Notwithstanding the approval of these proposals, the United States of America and the United Kingdom presented Working Document No 156, suggesting to avoid that the Convention prescribes who is to pay the costs of the translation, because they may be borne by the State itself, by the accredited bodies or by the prospective adoptive parents. Therefore, they proposed the following text: "Any State may require that the costs of all necessary translations be borne by the prospective adoptive parents". This proposal was approved and Article 34, as amended, was adopted. It may be noted that in practice, translations are generally included in the adoption expenses charged by the concerned authorities and accredited bodies.

543 Article 34 was approved, in spite of the remarks of some participants stressing that these matters should be regulated by national law and not by the Convention.

544 Undoubtedly, the reference to the "prospective adoptive parents" is only appropriate before the adoption has been made, because afterwards they are the "adoptive parents".

Article 35

545 This Article is new and originates from Working Document No 89, submitted by Sweden, suggesting the inclusion of an article as follows: "The Central Authorities of the Contracting States shall act expeditiously in the procedure of the adoption.". Notwithstanding the fact that the Central Authorities, directly or through public authorities or other bodies duly accredited in their States, shall take all appropriate measures to "facilitate, follow and expedite proceedings with a view to obtaining the adoption", as was prescribed by sub-paragraph *b* of Article 9, this obligation was not considered sufficient and, for this reason, it was felt useful to include a provision similar to Article 9 of the Hague Convention on Child Abduction. The proposal found support, but the United Kingdom requested to make it broader, covering courts and all other bodies concerned with adoption; this was approved without objections.

546 Working Document No 184, submitted in the second reading by the United States, Finland, Ireland, the Philippines, Uruguay and Venezuela, suggested the deletion of Article 35 and the reformulation of Article 9, sub-paragraph *b*, to impose on the Central Authorities the duty to: "expedite such proceedings, if necessary encouraging the competent authorities to act promptly". The proposal was made because the formulation of Article 35 was "too general and impersonal", it also being observed that the file had to be examined carefully before a decision on the adoption, and to accelerate the proceedings may be against the best interests of the child. However, the new text was objected to by Sweden, because it did not cover all possible delays, in adoption and in follow-up procedures, and since only a minority of delegates supported the proposal, Working Document No 184 failed.

Article 36

Introductory phrase

547 Article 36 originates from Working Document No 100, submitted by the Permanent Bureau, which was revised by the Committee on Federal Clauses and presented in Working Document No 157. It is a traditional article in recent Hague Conventions to take care of the situation where one Contracting State is composed by two or more territorial units, each one having its own legal system of law with regard to adoption. Despite the fact that it is usually known as the "federal clause", it is to be kept in mind that Article 36 applies not only to States with a federal structure, for example, the United States of America, Canada, Australia and Switzerland, but also to those unitary States, like the United Kingdom and Spain, where the various territorial units have their own system of law.

548 The text approved reproduces the introductory phrase of Article 31 of the Hague Convention on Child Abduction with the necessary adjustment to make reference to adoption matters, as suggested by the Austrian delegation.

Sub-paragraph a

549 Sub-paragraph *a* reproduces without changes the text of sub-paragraph *a* of Article 31 of the Hague Convention on Child Abduction, to the effect that the habitual residence in a Contracting State which has two or more systems of law with regard to adoption applicable in different territorial units, shall be construed as referring to habitual residence in a territorial unit of that State. Therefore, the solution is given directly by the Convention, the inter-territorial rules of the State concerned not being taken into consideration.

Sub-paragraph b

550 The suggestion made by the Permanent Bureau in Working Document No 100 was modified by the Committee on Federal Clauses to follow Article 19 of the Hague Sales Convention, making therefore reference not "to the law of the relevant territorial unit", but "to the law in force in the relevant territorial unit".

Sub-paragraph c

551 Sub-paragraph *c* reproduces the text suggested in Working Document No 100, submitted by the Permanent Bureau, with the amendments made by the Committee on Federal Clauses in Working Document No 157, to mention not only the "competent authorities", but also the "public authorities", referred to in various articles of the Convention. Besides, some linguistic changes were undertaken by the Drafting Committee to simplify the formulation of the text.

Sub-paragraph d

552 The Committee on Federal Clauses added sub-paragraph *d* because of the particularities of this Convention that permits their intervention in the adoption process. No mention is made of the non-accredited bodies or persons referred to in Article 22, paragraphs 2 and 3, but any reference to them should be understood in the same way.

Article 37

553 Working Document No 100, submitted by the Permanent Bureau, reproduced Article 32 of the Hague Child Abduction Convention, which was not modified by the Committee on Federal Clauses. Working Document No 197, submitted by Nepal, for the sake of clarity suggested to add at the end the following phrase: "as applicable to such person", but the proposal did not obtain enough support to be considered in the second reading.

554 Article 37 is a traditional provision in the Hague Conventions and solves the problems arising in States with two or more systems of law applicable to different categories of persons. The practical importance of the question was raised by the Delegate of Lebanon who stressed that in his country there was not a uniform personal civil status, because of the coexistence of different communities, in particular the islamic and the christian. The islamic community does not provide for adoption and for inscription of the new name of the child in the registry books; the christian community admits different solutions according to the various religious rites, it then being the ecclesiastics and not the civil courts charged with adoption matters.

Article 38

555 Article 38 reproduces, with a small linguistic change, the suggestion made by the Permanent Bureau in Working Document No 100 which merely repeated Article 33 of the Hague Child Abduction Convention. It was not modified by the Committee on Federal Clauses (Work. Doc. No 157) and represents a traditional provision to exclude from the scope of the Convention the conflicts among the internal legislations in force within the same State.

556 The idea behind this provision, as explained by the Secretary General, is to prevent the necessity of applying the Convention to adoption cases in which a child was transferred from one unit of a Federal State to another. Therefore, the Drafting Committee was commended to look for the best formulation and the text submitted in its Working Document No 180 was finally approved.

Article 39

General remarks

557 The Special Commission discussed the question of the relation with other conventions and requested the Permanent Bureau to prepare a text to be examined in the Seventeenth Session, regulating the relations with the existing instruments expressly mentioned in the working documents submitted for its consideration (Report of the Special Commission, No 322).

558 For this reason, Working Document No 100, submitted by the Permanent Bureau, included the following provision: "The Convention does not prejudice the application, as between Parties to both Conventions, of (1) the Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, signed at The Hague, 15 November 1965; (2) the Convention on the Civil Aspects of International Child Abduction, signed at The Hague, 25 October 1980; or (3) the Convention on Conflict of Laws Concerning the Adoption of Minors, signed at La Paz, 24 May 1984."

559 The First Secretary at the Permanent Bureau explained that, in case of conflict, those instruments should take precedence over the present Convention. He acknowledged that the proposed article might not provide final answers to all possible problems "because of the large number of conventions on the subject of the protection of children", for example, the 1961 Hague Convention on the Competence of Authorities and the Applicable Law in the Protection of Minors. For this reason, a choice was made "to address only those conventions in which there seemed to be predictable potential conflicts, leaving aside other conventions for which the potential for conflict seemed less likely", for example, the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents. Consequently, the conflicts arising in relation to conventions not mentioned were to be solved by the Contracting States in accordance with the rules, if any, provided for in those other conventions, or the general rules of treaty law.

560 A different approach was taken by Working Document No 33, submitted by Belgium. It tried to solve the problem in general terms as follows: "This Convention shall replace in the relations of the States that are Parties to it, the Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions. This Convention does not affect any other international instruments to which Contracting States are or become Parties and which contain provisions on matters governed by this Convention, unless a contrary declaration is made by the States Parties to such instrument. In any case, a Contracting State cannot conclude with one or several other Contracting States any agreement derogating from the provisions of Chapters II and IV of the Convention."

561 Working Document No 61, submitted by Denmark, Finland, Norway and Sweden, dealt with a specific point only: "Notwithstanding the provisions of Chapter IV, any Contracting State may maintain or establish with another State simplified procedures for intercountry adoptions for cases where the child and the prospective adoptive parents are citizens of or habitual residents in those States, to the extent that these arrangements are compatible with the other provisions of this Convention.". This proposal was complemented by Working Document No 140 with the following sentence: "Each Contracting State which is a Party to an arrangement referred to in paragraph 1, shall declare the arrangement to the depositary of this Convention."

562 Taking into account the difficulties of the matter and looking for an equilibrium, both proposals were merged into Working Document No 153, submitted by Belgium, Finland and Ireland, the new text reading as follows: "1. The Convention does not affect any other international instrument to which Contracting States are Parties and which contain provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument. 2. Any Contracting State may enter into agreements supplementary to this Convention with one or more other Contracting States, with a view to improving its application in their mutual relations. These agreements may derogate only from the provisions of Articles 14 to 20, inclusive. The States which have

concluded such agreements shall transmit a certified copy of the agreements to the depositary of this Convention."

563 Working Document No 153, submitted by Belgium, Finland and Ireland, also proposed to include this new article: "Any Contracting State may inform the depositary of the Convention that adoptions made in accordance with an agreement concluded by application of the second paragraph of Article 30 shall, if this agreement derogates from the provisions of Articles 14 to 20, inclusive, not be recognized in that State."

564 The Belgian Delegate explained that the compromise intended by Working Document No 153 was structured as follows: the first paragraph takes into account the situation of States that were already bound by adoption treaties, like the Nordic countries, and reproduces the classic solution, recently confirmed by the 1988 Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons; the second paragraph admits the possibility of concluding complementary agreements, but only when some fundamental provisions of this Convention are not affected by them, and the new article permits each Contracting State not to recognize the adoptions decreed in accordance with those future agreements.

565 The compromise represented by Working Document No 153 was found acceptable and only slight amendments were made, as is evidenced by Working Document No 180, submitted by the Drafting Committee, the changes being: (1) the specification that the future agreements to be entered into among Contracting States are not to "complement" but to "improve the application of the Convention in their mutual relations"; (2) the inclusion of Article 17 within the provisions that may not be derogated from; and (3) the possibility for those future agreements to derogate only from the provisions of Articles 14 to 16 and 18 to 21.

Paragraph 1

566 Paragraph 1 of Article 39 takes into account the situation of those States already bound by treaties on adoption matters, like the Nordic countries, and provides that this Convention does not affect those treaties even though they differ from its rules, unless a contrary declaration is made by the States Parties to such instruments. However, the other Contracting States of this Convention are not under the obligation to recognize the adoptions granted under such existing agreements.

567 There is no obligation for the States Parties to existing conventions neither to declare nor to send a copy of them to the depositary of this Convention, as expressly prescribed by paragraph 2 for the future agreements. In this respect, it is to be kept in mind that the proposal requiring such notification, presented by Denmark, Finland, Norway and Sweden in Working Document No 140, failed.

568 There is no time limit established to make the contrary declaration permitted by paragraph 1 of Article 39 and, therefore, it could be made at any moment, the possibility of its revocation not being regulated by the Convention.

569 Working Document No 195, submitted by the United States of America and the United Kingdom, suggested to include a new article prescribing that "the Convention does not prejudice the application, as between Parties to both Conventions, of the Convention on the Civil Aspects of International Child Abduction, signed at The Hague, 25 October 1980". The proposal could not be considered because of lack of support, according to the Rules of Procedure, but there was consensus that the words of paragraph 1, "on matters governed by the Convention", are to be understood as including and permitting the application, whenever there is a conflict with this Convention, in particular, not only the Hague Child Abduction Convention, but also the 1965 Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions, and the 1984 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors.

Paragraph 2

570 The possibility to conclude future agreements to impose the application of this Convention, permitted by paragraph 2 of Article 39, aims to respect the traditional links and the historical, geographical or other factors that may approach certain Contracting States, as is the case with the Nordic countries, the States of the European Union, and the new States that have come into existence because of the recent events that occurred in the former Union of Socialist Soviet Republics (USSR), Czechoslovakia and Yugoslavia. However, it also applies where such background is not so important, like between Canada and the United States of America, or the United States of America and Mexico, as was pointed out by some participants.

571 In spite of the fact that Working Document No 195, submitted by the United States of America and the United Kingdom, failed on formal grounds, paragraph 2 of Article 39 does not include agreements such as the Hague Child Abduction Convention, the 1965 Hague Convention on Adoption, and the 1984 Inter-American Convention on the Adoption of Minors. Consequently, if any of these Treaties comes into force in any of the States Parties to this Convention, the other Contracting States are not entitled to make the declaration permitted by Article 25.

572 Similar considerations would also apply to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, because it cannot be considered as being included within the agreements referred to by paragraph 2 of Article 39. Therefore, its entering into force in any of the States Parties to this Convention, does not entitle the other Contracting States to make the declaration permitted by Article 25.

573 The agreements permitted by paragraph 2 may only derogate from the provisions of Articles 14 to 16 and 18 to 21, the idea behind this prohibition being that the fundamental rules of this Convention shall not be affected by future international instruments. Austria suggested in the third lecture to mention expressly paragraph 1 of Article 19 among the provisions that cannot be derogated from, but it was considered unnecessary because Article 39, paragraph 2, makes reference to Article 17, and Article 17 cannot be derogated from.

574 The second paragraph of Article 39 implies an important restriction of the rule of Article 41, first paragraph, first sentence, of the UN Vienna Convention on the Law of Treaties, that acknowledges in principle the freedom of the States to enter into multilateral or bilateral treaties derogating from an existing multilateral convention.

575 The last sentence of paragraph 2 imposes on the Contracting States Parties to such future conventions to transmit a copy to the depositary, so that it may comply with its duty under sub-paragraph e of Article 48. This is particularly important to enable the third Contracting States to make the declaration permitted by Article 25, not to be bound under the Convention to recognize adoptions made in accordance with such future agreements (see the comments on Article 25).

576 Nevertheless, the last sentence of the second paragraph does not establish a time limit for the transmission of the copy, and does not provide either for a sanction in case of violation of the duty imposed on the Contracting States entering into these future agreements.

577 The Convention does not contain a rule on its relationship with future treaties on matters governed by the Convention, other than those arising to impose the application of the Convention in their mutual relations (*e.g.* a new general convention on the protection of minors). The general rules of the law of treaties (see Article 30 of the UN Vienna Convention on the Law of Treaties) apply in such a case.

Article 40

578 At the end of the second reading, the Deputy Secretary General pointed to the need to include an article on reservations as in all former Hague Conventions, and mentioned as model to be followed Article 27 of the Hague Convention on the Law Applicable to Matrimonial Property Regimes. He insisted on the need to avoid any *a contrario* interpretation from the silence of the Convention on this point, in particular taking into account the mandatory character of the Convention's rules. The United Kingdom agreed with the proposal, notwithstanding that it would have preferred the possibility to make reservations on the question of the nationality of the adoptive child, as suggested in its Working Document No 174. Nepal and Indonesia proposed to follow Article 51 of the UN Convention on the Rights of the Child, permitting reservations not incompatible with the object and purpose of the Convention. The Philippines, supported by El Salvador, Mexico and Chile, suggested to apply the provisions of the UN Vienna Convention on the Law of Treaties. India preferred not to include such an article, and the Brazilian Delegate opposed the consideration of the proposal on formal grounds, based on the Rules of Procedure. However, a large majority approved Article 40, it being observed that the declarations permitted by Article 25 were not reservations.

Article 41

579 Article 41 was discussed on the basis of the proposal submitted by the Permanent Bureau in Working Document No 100, to the effect that "the Convention shall apply as between Contracting States only to adoptions made after its entry into force in those States". Although agreeing on the substance, Switzerland observed that the adoption may have been granted after the Convention enters into force, but prepared not according to the Convention's rules but rather according to the internal law of that State. Therefore, it was considered more appropriate to take into consideration the moment when the proceedings start, an idea that was accepted.

580 Working Document No 180, submitted by the Drafting Committee, specified the moment when the proceedings are to be considered to start, and suggested the following formulation: "The Convention shall apply, as between a receiving State and a State of origin, in every case where an application pursuant to Article 14 has been received after the Convention has entered into force in both States". The Italian Delegate observed the ambiguity of the proposal, but it became the final text after some linguistic adjustments.

581 Article 41 only establishes the conditions for the application of the Convention between the State of origin and the receiving State, but leaves open the question, as Switzerland observed, of its application in the relations with the other Contracting States.

582 The location of the provision, a problem raised by Belgium, whether in Chapter I where the scope of the Convention is determined, or in Chapter VI with the other general provisions, was decided in the last sense, as customary, taking into account the explanation made by the First Secretary at the Permanent Bureau that the aim of Article 41 is to restrict the application of the Convention to adoptions made after its coming into force.

583 Article 41 does not answer the question of the entering into force of the Convention in general, solved by Article 46, but its application to a particular case, assuming that the Convention is already in force in the State of origin and in the receiving State.

584 Working Document No 100, submitted by the Permanent Bureau, suggested a second paragraph for the article with the following text: "A Contracting State may at any time by declaration extend the application of Chapter V (Recognition) to other adoptions certified by the competent authority of the State of the adoption as having been made in accordance with the Convention". The idea behind the proposal was to give a rule to answer the question as to the validity of the adoptions already made in the Contracting States when a State becomes a Party to the Convention.

585 Some participants considered the proposal ambiguous and suggested its deletion or

its clarification, at least, but others sustained it. The Observer for the International Commission on Civil Status observed that it was unnecessary and dangerous, because the formulation might permit a wicked conclusion, if interpreted *a contrario*, since the natural consequence of a State becoming a Party to the Convention is the recognition of the adoptions already made in the Contracting States. Therefore, the "declaration" provided by the second paragraph could be interpreted as permitting the non-recognition of such adoptions and, for this reason, the proposal was rejected.

Article 42

586 Article 42 reproduces the text of the draft (article 29) and takes into account the remarkable experience of other Hague Conventions, in particular the Child Abduction Convention, to express the idea that the Convention on intercountry adoption should not be an end in itself, but rather lay the ground work for an ongoing review and amelioration of its application. Therefore, the Secretary General of the Hague Conference on private international law shall, after the Convention enters into force, convene Special Commissions, at regular intervals, to review its operation; meetings that may be attended by all States Parties, together with Member States and other non-Member States that participated in the Seventeenth Session, as well as by international organizations, public and private, invited to participate.

587 Article 42 should be read in conjunction with the decision approved by the Seventeenth Session of the Hague Conference expressing the Wish that the experts participating in the first meeting of the Special Commission to be convened in accordance with Article 42, establish recommended forms to be used for the consents required by Article 4, sub-paragraph *c*, and for the certification provided for by Article 23, paragraph 1, to promote the proper and uniform application of those provisions.

588 Working Document No 16, submitted by Spain, suggested to include as the first paragraph of Article 42 the following text: "The Contracting States shall endeavour that in applying the Convention, competent authorities and Central Authorities give a uniform interpretation to the terms of the Convention". According to this proposal, the meetings of the Special Commission shall also "facilitate its uniform interpretation", but the addition suggested did not succeed, because it was considered unnecessary. To this effect was observed that the uniform interpretation is implicit in all conventions, and the proposal did not fit in this specific case, taking into account the nature of this Convention, mainly addressed to promote co-operation among the Contracting States to ensure the respect of the safeguards in intercountry adoption, preventing thereby the abduction, sale of or traffic in children.

CHAPTER VII — FINAL CLAUSES

589 Chapter VII includes articles that are found in all Hague Conventions and following the pattern of the Hague Conference, they deal with signature, ratification, acceptance or approval (Article 43), accession (Article 44), the States with two or more territorial units in which different systems of law are applicable in relation to matters regulated by the Convention (Article 45), its entering into force (Article 46), its denunciation (Article 47), and the notification to be made by the depositary (Article 48).

590 Germany suggested to incorporate a clause similar to Article 29 of the Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons (hereinafter: the Successions Convention), but subsequently withdrew the proposal because of the difficulties to which such a clause might give rise in the context of a convention on international co-operation. The question of the relationship between this Convention and a possible future revised convention remains open.

Article 43

591 The Convention on the Law Applicable to Contracts for the International Sale of Goods was approved in the Extraordinary Session held in 1985 with the participation of Member and non-Member States, and its Article 25 "wanted to give to the States the broadest possible set of options for joining the Treaty". For that reason, as explained in the Report, "the traditional procedure (generally reserved for Conference Members) of signature, followed by ratification, acceptance or approval was put on the same footing with the method of accession which certain countries prefer because of its simplicity" (*Proceedings of the Extraordinary Session*, 14 to 30 October 1985, The Hague, 1987, p. 757, No 194).

592 The *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* was also approved with the participation of Member and non-Member States and notwithstanding this fact, its Article 43 does not follow the example of the Hague Sales Convention, but of Article 31 of the Hague Convention on International Access to Justice, as explained by the Secretary General when commenting on Working Document No 100, submitted by the Permanent Bureau.

593 Therefore, according to paragraph 1 of Article 43, the Convention is open for signature by the States which were Members of the Hague Conference at the time of its Seventeenth Session and by the non-Member States which participated in that Session, the non-Member States that did not participate in the Seventeenth Session being unable to sign the Convention.

594 The signatory States may ratify, accept or approve the Convention and the respective instrument is to be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Article 44

595 Because the accession to the Convention was not put on the same footing with the traditional method of signature, followed by ratification, acceptance or approval, it was necessary to provide for a special procedure for accession to the Convention. According to the Secretary General of the Hague Conference, there were three possibilities open: (1) to accede without any barriers, which was not advisable taking into account that the present Convention is one of co-operation; (2) to make the process of adoption more difficult, requiring each Contracting State to accept the accession of any other State, a solution which is not in the best interests of the child; and (3) to permit the accession unless an objection is raised within a particular time period, six months. Working Document No 100, submitted by the Permanent Bureau, chose the third alternative, which had already been accepted by Article 32 of the Hague Convention on International Access to Justice.

596 After some discussion, a large majority approved the proposal made by the Permanent Bureau, the period of six months being chosen instead of twelve to reject the accession, and it was specified that accession is only possible once the Convention has entered into force.

Article 45

597 Article 45 deals with the case where a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in the Convention. Working Document No 100, submitted by the Permanent Bureau, as explained by the Secretariat, suggested the classic formula, as it is found in Article 27 of the Hague Succession Convention, which was reviewed by the Committee on Federal Clauses (Work. Doc. No 157) and approved without any difficulty.

Article 46

598 Article 46 was included in Working Document No 100, submitted by the Permanent Bureau. The formula is the one normally used in Hague Conventions, providing for the coming into force of the Convention after three ratifications. The same period is to be applied in case of ratification, acceptance, approval or accession that takes place after its entry into force.

Article 47

599 Article 47 deals with the possible denunciation of the Convention and conforms with the suggestion made by the Permanent Bureau in Working Document No 100, that, as explained by the Secretariat, is similar to Article 30 of the Hague Succession Convention.

600 The United States of America considered it advisable to set up a procedure to deal with adoptions that had already started and were still pending at the time of the notification of the denunciation to the depositary. However, since denunciations are rather rare and the questions suggested to be solved are very difficult problems of inter-temporal nature, it was decided not to include a provision in the Convention leaving this question open to the Contracting States.

Article 48

601 Article 48 was suggested by the Permanent Bureau in Working Document No 100, and the Secretariat only reminded that, since this was "the province of the depositary", the provision could not really be looked into without consulting the depositary. Nevertheless, Mexico drew the attention to the need to include a reference to the participating States, non-Members of the Conference, a point that was included by the Drafting Committee and after consultation with the depositary finally approved with some linguistic changes.

FINAL REMARKS

A *Legalization*

602 Even though the elimination of the legalization requirement was suggested to the Special Commission, no decision was adopted because of lack of time to consider the matter and, for this reason, the Report of the Special Commission insisted on its practical importance to avoid unnecessary delays and expenses, sometimes very high, taking into account the best interests of the child. It was also mentioned that, since many participating States have not ratified the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, it would be advisable to keep in mind the solution reached in Article 23 of the Hague Child Abduction Convention (Report of the Special Commission, No 323).

603 Working Document No 130, submitted by Switzerland, intended to avoid all excessive administrative complications and to build confidence among the authorities of the Contracting States. Therefore, it proposed the addition of the following article: "The consent to the adoption and the decisions taken in conformity with the present Convention shall not be subject to any legalisation or similar formality.". Working Document No 138, submitted by Austria, extended the scope of the rule and reproduced Article 23 of the Hague Child Abduction Convention, which prescribes: "No legalisation or similar formality may be required in the context of this Convention.".

604 The proposal did not succeed, because several States feared that the provision might interfere with internal law, even though Austria explained that the purpose of the

elimination of the legalization requirement was not to interfere with the internal law of the Contracting States in matters of adoption, but only to abolish requirements on top of the legal procedures, e.g., diplomatic or consular legalization of decisions. To this end, it was recalled that the Hague Legalisation Convention defines legalization as "the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears". Austria also made it clear that the phrase "or similar formality" included in its Working Document No 138 referred to the certificate ("*l'apostille*") required by the above-mentioned Hague Convention.

605 Austria and Denmark reproduced the Austrian proposal in Working Document No 158 to be examined in the second reading, and Working Document No 200, submitted by the Permanent Bureau, suggested to complement it by a second paragraph, prescribing: "Any Contracting State may declare that it will not apply the preceding paragraph". The Brazilian Delegate opposed on procedural grounds and, unfortunately, the lack of support prevented the consideration of the proposal.

606 The Convention has not formally abolished the requirement of legalization, but legalization will not be necessary either for the States Parties to the 1961 Hague Legalisation Convention or in any other cases where the Contracting States agree to abolish it in their mutual relations. It would be desirable to look for a practical solution, possibly in the Special Commissions to be convened by the Secretary General in accordance with Article 42, because it is not easy to understand why documents channelled through the Central Authorities shall also have to comply with the requirement of legalization, assuming the relationship of trust among the Contracting States which is the basis of the whole Convention.

B *Refugee children*

607 The possible application of the Convention to refugee children was discussed in the Special Commission, but it was concluded that the conventional rules as drafted established sufficient safeguards and were flexible enough to take care of the problems presented by the adoption of refugee children.

608 A similar discussion took place in the Diplomatic Conference. Working Document No 12, submitted by the United States of America, suggested the addition of a new paragraph to Article 2, as follows: "The Convention shall also apply to children who have been displaced from their State of origin. In the case of a displaced child, the State in which the child is currently present shall carry out the responsibilities of the State of origin under the Convention.", and the United Nations High Commissioner for Refugees (UNHCR) suggested, in Working Document No 56, the addition of a second paragraph to Article 2, as follows: "The Convention shall also apply to children who have been displaced from their country of origin, including those seeking refugee status, and those considered to be refugees in accordance with applicable international or national law. In the case of a child displaced from his or her country of origin, the State in which the child is currently present shall carry out the responsibilities of the "State of origin" under the Convention."

609 Working Document No 31, submitted by Belgium, proposed the approval of a resolution convening a Special Commission to examine, in particular, the problems presented by refugee children. This suggestion prevailed and therefore the following Decision was adopted:

The Seventeenth Session of the Hague Conference on private international law;

Considering that the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption will apply to children habitually resident in the Contracting States under the circumstances described in Article 2 of

the Convention;

Concerned that refugee children and other internationally displaced children be afforded the special consideration within the framework of this Convention that their particularly vulnerable situation may require;

Considering the consequent need for further study and possibly the elaboration of a special instrument supplementary to this Convention;

Requests the Secretary General of the Hague Conference, in consultation with the United Nations High Commissioner for Refugees, to convoke in the near future a working group to examine this issue and make specific proposals which might be submitted to a Special Commission of the Hague Conference to ensure appropriate protection of these categories of children.

C *Model forms*

610 As reminded by the Report of the Special Commission (No 234) taking into account the good experience with other Hague Conventions, the Special Commission considered the advisability of preparing model forms to simplify and facilitate compliance with the Convention's rules in the various stages of the adoption proceedings, even though not as a part of, but as an annex to the Convention, to enable their being modified without the necessity of complying with too many formalities. However, the question was not discussed, despite the fact that some working documents for the elaboration of forms were presented.

611 The importance of the model forms was acknowledged by the Diplomatic Conference as an annex to the Convention, and the lack of time explains that no particular consideration was given to the forms suggested in Working Document No 32, submitted by Belgium, and in Working Documents Nos 55 and 79, both submitted by Spain. However, Belgium, Spain and Switzerland suggested, in Working Document No 189, the approval of a recommendation inviting the States represented at the first meeting of the Special Commission, to be held according to Article 42, the establishment of model forms to favour the proper and uniform application of the provisions relating to the consents required by Article 4, sub-paragraph c, and the certification prescribed by Article 23.

612 The idea was accepted by consensus and the Seventeenth Session approved the following Wish:

Considering that the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption provides —

a in Article 4, sub-paragraph c, that adoptions under the Convention shall take place only if the competent authorities of the State of origin of the child have ensured that the required consents have been given in conformity with certain safeguards,

b in Article 23, paragraph 1, that the recognition of an adoption made under the Convention requires a document certifying that the adoption has been made in accordance with the Convention,
Convinced that the use of forms based on a uniform model by the competent authorities of the Contracting States may promote the proper and uniform application of those provisions,

Expresses the Wish that the Experts participating in the first meeting of the Special Commission convened in accordance with Article 42 establish recommended forms to that effect.

D *Postscript*

613 Up to 31 December 1993, the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* has been signed by the following States: Brazil, Colombia, Costa Rica, Israel, Mexico, the Netherlands, Romania and Uruguay.

614 In compliance with the Decision adopted by the Seventeenth Session before-mentioned, the Permanent Bureau of the Hague Conference on private international law has convened a group of experts on refugee children that is to meet from 12-14 April 1994.

615 The interests in combatting offences against children in general explains that the International Criminal Police Organization (Interpol) has been deeply interested in this specific work of the Hague Conference from the very beginning, and that on the occasion of its 62nd General Assembly Session, held in Aruba (29 September to 5 October 1993) approved to recommend to the States Parties to the Organization "*that, without prejudice to the basic principles governing adoption in certain countries, Members examine their legislation and practices with a view to enabling them as soon as possible to become a Party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, and to introducing, where necessary, penal provisions to complement the provisions contained in the Hague Convention.*".

616 Some days later, a committee of experts convened by the Organization of American States met in Oaxtepec, Morelos (Mexico) from 13-17 October 1993 and approved a "Draft Inter-American Convention on International Traffic of Children", dealing with civil and penal aspects, that is to be considered in Mexico next spring by the Fifth Specialized Inter-American Conference on Private International Law (CIDIP-V).

Caracas, 31 December 1993.