Options

11 Which options are open to Member States of the Conference who see the (potential) need for a convention on (jurisdiction and) recognition and enforcement of judgments which would bridge the important economic centres in the world? It would seem that the three main options would be the following:

(1) acceding to the Lugano Convention;

(2) becoming a Party to the 1971 Hague Convention and its Protocol;

(3) negotiating and becoming a Party to a new convention on (jurisdiction and) recognition and enforcement of judgments.

12 (1) Acceding to the Lugano Convention may be a possibility for some States, but (see No 10 *supra*) only on invitation and with the consent of all Contracting States to the Lugano Convention. Moreover, the Lugano Convention's solutions may pose problems. First, the exorbitant jurisdictional bases enumerated in Article 3 of Lugano may violate due process standards of some States and, accordingly, those States could not agree to enforce judgments rendered in another Contracting State on one of these bases against a person not domiciled in a Contracting State. Secondly, the exhaustive listing of direct grounds of jurisdiction may pose problems to some States: the very principle of non-review by the enforcing court of the jurisdictional grounds assumed by the first court may not be acceptable; the system may be too rigid and some of the jurisdictional bases recognized by Lugano may well be either overly broad or overly restrictive.

(2) Becoming a Party to the Hague Convention and its Protocol and concluding the Supplementary Agreements referred to in Chapter V of that Convention is a second option, which should perhaps not be too readily excluded. After all, the Convention and its Protocol are in force as international instruments and no major objections have been raised against it, except for its somewhat complicated form. It might be worthwhile examining with the current States Parties – the Netherlands, Portugal and Cyprus – whether it would not be possible to agree on a standard Supplementary Agreement.

(3) If none of the two options above were acceptable, the third main option would be to negotiate a new convention which might lean towards a convention of the Lugano type – based on direct grounds of jurisdiction – or towards the Hague Convention – based on indirect grounds of jurisdiction – or it might, as suggested in the US proposal, be of an intermediate type.

Objectives of a new convention

a *Eliminating exorbitant jurisdictional grounds*

13 Whichever of the three types of convention just mentioned is chosen, one of its main purposes should be to deal in clear terms with jurisdictional bases that are unacceptable for recognition purposes. As we have seen, an authoritative list of such bases already exists and is contained in Article 4 of the Protocol to the Hague Convention.

b 'Traité double', 'traité simple' *or an intermediary solution?*

14 Should the Convention be a '*traité simple*', providing only for indirect grounds of jurisdiction, or a '*traité double*', providing also for direct grounds of jurisdiction? The Legal Adviser of the US makes an unorthodox proposal: 'While taking account of the 1971 Hague Convention, we would propose that the Hague Conference build on the Brussels and Lugano Conventions in seeking to achieve a convention that is capable of meeting the needs of and being broadly accepted by the larger community represented by the Member States of the Hague Conference. For example, it appears that it might be possible to accept certain of the bases of jurisdiction and bases for recognition and enforcement of judgments set out in the Brussels and Lugano Conventions and thereby make provision for a generally accepted system for use in Europe and beyond. However, other aspects of these Conventions may not be so broadly acceptable and would need change to accommodate the needs and preferences of countries from other regions of the world than Western Europe. It seems to us that we need not necessarily choose between a *traité simple*, dealing essentially only with those judgments that are entitled to recognition and enforcement in party States, and a *traité double* also dealing with permissible bases of jurisdiction for litigation involving persons or entities habitually resident in party States. We believe that there should be consideration of the possibility for party States to utilize jurisdictional bases for litigation that are not designated as permissible or exorbitant by the convention.'

15 The main advantage of this proposal over a *traité simple*, it would seem, is that it will achieve partial *uniformity* at the level of jurisdictional grounds among Contracting States. The uniformity will only be partial because countries would remain free to maintain existing non-exorbitant grounds of jurisdiction and, indeed, might create new ones which leaves room for new developments in response to new needs. This would mean, however, that the enforcing court, just as in the case of a *traité simple*, but unlike the Lugano Convention, *could* not *dispense with controlling the grounds upon which the original court has based its jurisdiction*. Moreover, if the grounds of jurisdiction offered by the new convention were to be direct, but not exclusive, this must mean that the parties were offered the choice between approaching different courts in different jurisdictions. This would mean opening the doors for forum shopping and it would lead to difficult problems of *lis pendens*.

16 One of the problems with a convention of a *traité double* type is that unless the new grounds of jurisdiction were to be framed very close to those of the Lugano Convention, one may expect some reluctance on the part of (some of) the Lugano countries to accept such grounds.[14]

[14] The negotiations among the six original EC countries and Ireland, the United Kingdom and Denmark, then among those nine and the three new members, followed by those among the EC and EFTA countries have shown that possibilities for change from the basic scheme were, in fact, very limited, if not minimal.

Des raisons supplémentaires incitant à se tenir aussi près que possible des textes de Bruxelles et de Lugano peuvent découler du système d'interprétation uniforme. La Cour de Justice des Communautés européennes de Luxembourg assure l'interprétation uniforme de la Convention de Bruxelles. Dans la Convention de Lugano, un système a été mis sur pied, en vertu du *Protocole No 2 sur l'interprétation uniforme de la Convention*, par lequel les tribunaux de chaque pays «tiennent dûment compte ... des principes définis par toute décision pertinente rendue par des tribunaux des autres Etats contractants concernant des dispositions de la ... Convention», et «un système d'échange d'informations concernant les décisions rendues en application de la ... Convention ainsi que les décisions pertinentes rendues en application de la Convention de Bruxelles» a été mis en place[15]. Etant donné le rôle dominant de la Cour de Luxembourg, cela signifie très probablement que cette juridiction dictera aux pays de l'AELE l'interprétation de la Convention de Lugano.

17 La solution du *traité simple* éviterait ces difficultés et les pays membres de la CEE ou de l'AELE ne seraient plus soumis aux mêmes pressions pour rester le plus près possible du texte sacro-saint de la Convention de Bruxelles ou de Lugano et l'on pourrait continuer à dégager de nouveaux chefs de compétence non exorbitants. En même temps, si la Convention devait faire l'objet d'une large ratification, les chefs de compétence indirecte acquerraient une respectabilité internationale qui aurait un effet d'uniformisation. Bref, un bon traité simple présenterait dans une large mesure les avantages de la suggestion intermédiaire tout en en évitant les inconvénients.

18 On ne saurait bien entendu exclure que des négociations au sein de la Conférence de La Haye aboutissent à un nouveau traité double. La démarche la plus prudente consisterait cependant à examiner pour commencer la possibilité d'un traité simple afin de déterminer s'il serait possible de franchir un nouveau pas. C'était là aussi la ligne de conduite adoptée par les négociateurs initiaux de la Convention de Bruxelles.

19 On peut trouver dans les articles 10 et 11 de la Convention de 1971 les éléments d'une «liste blanche» de chefs de compétence indirecte pouvant être tenus pour acceptables. Certains devraient être revisés pour tenir compte des évolutions ultérieures (par exemple 10 (4) *lex loci delicti*). D'autres inspirations pourraient être puisées dans la Convention de Lugano, bien qu'il soit permis de se poser des questions au sujet de l'acceptabilité internationale (au-delà de l'Europe) de chefs de compétence comme la possibilité, pour le créancier d'aliments, d'assigner, à son gré, le débiteur soit dans le for où il a lui-même son domicile, soit dans le pays du débiteur; les privilèges de juridiction reconnus aux détenteurs de polices d'assurances et aux consommateurs; l'article 5 (1) relatif au *forum contractus*, tel qu'il a été interprété, eu égard à la Convention de Rome, par la Cour de justice des Communautés européennes, etc.[16].

c *Procédure simplifiée de reconnaissance et d'exécution*

20 La nouvelle convention devrait sans doute également prévoir une méthode simple et rapide pour obtenir la reconnaissance et l'exécution des jugements auxquels s'applique la convention. Les Conventions de Bruxelles et de Lugano prévoient une procédure simplifiée de cette nature dans leur chapitre III. Bien qu'en vertu d'un traité simple le tribunal d'exécution ne puisse se dispenser de contrôler les chefs de compétence sur lesquels repose le jugement original, il est concevable que la procédure d'exécution[17] demeure simple. On pourrait par exemple imaginer qu'à la demande de toute partie intéressée le tribunal originel certifie s'être assuré que sa compétence était fondée sur un motif correspondant à l'un ou plusieurs des chefs de compétence de la convention. En pareil cas une procédure simplifiée comme celle que prévoient les articles 27 et 34 de la Convention de Lugano pourrait être établie.

Négociations au sein de la Conférence de La Haye

21 Le choix de la Conférence de La Haye comme forum de négociations présenterait certains avantages, mais comporterait aussi certaines limitations. Il est clair qu'il ne serait pas possible de négocier dans le cadre de la Conférence si certains de ses Etats membres étaient exclus des pourparlers. De même que la Convention de 1971 et son Protocole ont été négociés entre tous les Membres de la Conférence de La Haye de l'époque, de même toutes nouvelles négociations devraient se dérouler avec une participation identique.
La Conférence de La Haye se heurte certes à certaines contraintes dues à son infrastructure. Il ne serait pas possible de négocier en une douzaine de langues. En revanche, la Conférence offre l'avantage d'une certaine continuité des procédures de négociations, des méthodes de travail souples et informelles et le bénéfice de son expertise.

22 La Conférence de La Haye compte aujourd'hui 37 Etats membres, comprenant tous les Etats de la CEE et ceux de l'AELE, à l'exception de l'Islande et du Liechtenstein. Ces deux Etats pourraient être invités à participer aux travaux de la Conférence si l'on estime «qu'à raison de la matière traitée, la nécessité s'en fait sentir»[18]. Les procédures de vote de la Conférence sont flexibles: on peut concevoir de procéder d'une manière générale par voie de «votes indicatifs» ou de consensus.

23 La proposition des Etats-Unis suggère que la nouvelle convention «entrerait en vigueur seulement entre les Etats ratifiant ou adhérant qui accepteraient réciproquement que la convention entre en vigueur entre eux». Techniquement, ce système est certainement possible: on pourrait très bien imaginer un système dans lequel l'établissement de relations conventionnelles entre les Etats ratifiant la convention serait subordonné à une acceptation réciproque. Un tel système se rapprocherait de celui de l'article 38(4) de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants* pour ce qui est des adhésions, sauf que le système s'étendrait aux Etats ayant négocié

[15] Le Greffier de la Cour de Luxembourg est désigné comme étant l' «organisme central» chargé de la transmission, de la classification et de la communication des jugements et documents pertinents (article 2 du Protocole).
[16] On pourrait s'inspirer également de la Convention nordique de 1977; du Traité d'Ottawa du 24 avril 1984 entre la Grande-Bretagne et le Canada, et des articles 1-3 de la Convention inter-américaine sur la compétence internationale en matière de validité extra-territoriale des jugements étrangers, 1984.

[17] La reconnaissance présente probablement moins de problèmes, aussi la laisserons-nous de côté pour simplifier.
[18] Décision de la Quatorzième session de la Conférence de La Haye, Acte final D1, *Actes et documents de la Quatorzième session (1980)*, tome I, p. I-63.

Exécution des jugements

Additional pressure to stick as closely as possible to the existing Brussels and Lugano texts may come from the system of uniform interpretation. The EC Court of Luxembourg ensures the uniform interpretation of the Brussels Convention. In the Lugano Convention a system has been set up, under *Protocol No 2 on uniform interpretation of the Convention*, by which the courts of each country will 'pay due account to the principles laid down by any relevant decision delivered by courts of the other Contracting States concerning provisions of this Convention', and a 'system of exchange of information concerning judgments delivered pursuant to this Convention as well as relevant judgments under the Brussels Convention' has been set up.[15] Given the weight and authority of the Court in Luxembourg, this will in all likelihood mean that this Court will have a decisive impact on the course of the interpretation of the Lugano Convention by the EFTA countries.

17 The format of a *traité simple* would avoid these difficulties, the EC or EFTA countries would be less under pressure to stick as closely as possible to the Brussels or Lugano Convention texts, and the development of new non-exorbitant jurisdictional grounds could continue. At the same time, if the Convention were to be broadly ratified, the indirect grounds of jurisdiction would acquire international respectability which would have a uniformizing effect. In short, a good *traité simple* would have many of the same advantages as the intermediate suggestion, while avoiding its inconveniences.

18 Of course, it cannot be excluded that negotiations in the Hague Conference might lead to a new *traité double*. The most cautious approach, however, it would seem would be to start with examining the possibility of a *traité simple* and see whether one could made a further step. This was also the course taken by the initial negotiators of the Brussels Convention.

19 Elements for a 'white list' of acceptable indirect jurisdictional grounds may be found in Articles 10 and 11 of the 1971 Convention. Some of these will need revision in light of subsequent developments (*e.g.* 10(4), *lex loci delicti*). Additional inspiration can be found in the Lugano Convention, although questions may arise as to the international (*i.e.* beyond Europe) acceptability of such grounds of jurisdiction as the option for support claimants to sue, at their option, the obligor either in their domiciliary forum or in the obligor's home country; the jurisdictional privileges granted to policy holders and consumers; Article 5(1) relating to the *forum contractus* as this provision has been interpreted, in light of the Rome Convention, by the European Court of Justice, etc.[16]

c *Simplified recognition and enforcement procedures*

20 One of the main purposes of a new convention should, no doubt, be to provide for a simplified and expeditious method for obtaining the recognition and enforcement of judgments that benefit from the convention. The Brussels and Lugano Conventions provide for such a simplified procedure in their Chapters III. Even though under a *traité simple* the enforcing court cannot dispense with a control for the jurisdictional grounds of the original judgment, it is conceivable that the procedure for enforcement[17] may nevertheless be a simple one. One could imagine, for example, that at the request of any interested party the original court confirms that it has verified that it has assumed jurisdiction on a ground which corresponds with one or more of the grounds of jurisdiction of the Convention. In that case a simplified procedure along the lines of Articles 27 and 34 of the Lugano Convention could be established.

Negotiating within the Hague Conference

21 Choosing the Hague Conference as a forum for negotiations would present certain advantages over other fora as well as involve some limitations. Clearly, negotiations within the framework of the Hague Conference would not be possible if some Member States were to be excluded from those negotiations. Just as the 1971 Convention and its Protocol were negotiated among all Hague Conference Members at the time, so would any new negotiations.

Obviously, the Hague Conference has its limitations in terms of its infrastructure. It would not be possible to negotiate in twelve languages or so. On the other hand, the Conference can offer a certain continuity in negotiation procedures, flexibility, informal working methods and expertise.

22 The Hague Conference now includes 37 Member States, including all EC States and all EFTA States with the exception of Iceland and Liechtenstein. These two countries may be invited to participate in the work of the Conference if it is felt that 'by virtue of the subject treated ... such participation is necessary'.[18] The Conference's voting procedures are flexible: it would be conceivable to proceed largely by way of 'indicative voting' or consensus.

23 The US proposal suggests that the new convention 'would enter into force only between ratifying or acceding States that agree that it should enter into force as between them'.
Technically speaking this is certainly feasible: one could very well imagine a system by which the establishment of treaty relationships between ratifying States would be made subject to mutual acceptance of such relationships. Such a system would come close to that of Article 38(4) of the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* for accessions, except that it would extend to the negotiating States themselves. It would amount to a 'bilaterali-

[15] The Luxembourg Court's Registrar is designated as the 'central body' for transmission, classification and communication of relevant judgments and documents (Article 2 of the Protocol).
[16] Further inspiration might be found in the Nordic Convention of 1977; in the Ottawa Treaty of 24 April 1984 between Britain and Canada; and Articles 1-3 of the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, 1984.

[17] Recognition is likely to present less problems – we therefore leave it aside for the sake of simplicity.
[18] Decision of the Fourteenth Session of the Hague Conference, Final Act D1, *Actes et documents de la Quatorzième session (1980)*, Tome I, p. I-63.

eux-mêmes la convention. Cela équivaudrait à une «bilatéralisation» du régime du traité, mais de façon beaucoup moins complexe que dans le système de la Convention de La Haye de 1971.

24 Bien que techniquement possible, un système de bilatéralisation aurait le désavantage de créer un émiettement dans les relations entre Etats parties. La bilatéralisation est-elle évitable? Faut-il nécessairement partir de l'idée que par rapport à certains Etats – même des Etats membres de la Conférence de La Haye – on ne puisse *pas* avoir confiance dans les jugements rendus *en matière civile et commerciale* par les tribunaux de ces Etats? Plutôt que d'exclure toute une catégorie de jugements pour la simple raison que ceux-ci émanent de certains Etats, il semble qu'il soit préférable d'essayer de négocier une convention qui permettrait l'examen des jugements cas par cas. La technique permettant de refuser la reconnaissance et l'exécution d'un jugement dans le cas où celles-ci sont manifestement incompatibles avec l'ordre public de l'Etat requis, ou si la décision résulte d'une fraude commise dans la procédure, est si bien établie qu'il doit être possible d'élaborer un système conventionnel qui maintiendrait le contrôle des jugements étrangers (voir articles 5 et 6 de la Convention de La Haye et articles 27 et 34 des Conventions de Bruxelles et de Lugano, tels qu'interprétés par la Cour de Luxembourg).

25 Manifestement, il y a de nombreux aspects de cette matière très importante qui doivent encore être discutés et il semble qu'il soit trop tôt pour que la Commission spéciale sur les affaires générales de juin 1992 prenne une décision définitive à cet égard. Le Bureau Permanent pense qu'il serait préférable d'organiser avant la Dix-septième session une réunion d'une demi-semaine réunissant des experts dans ce domaine particulier, afin de discuter de l'opportunité et de la faisabilité de ce sujet pour permettre à la Conférence diplomatique de prendre sa décision.

zation' of the treaty regime as was the idea of the 1971 Hague Convention, but in a much less complicated way.

24 Although technically feasible, a system of bilateralization would have the disadvantage of creating a crumbled pattern of treaty relations. Is bilateralization unavoidable? Is it necessary to presume that, in respect of certain States – even Member States of the Hague Conference – judgments *in civil and commercial* proceedings made by the judiciary of those States can, as a rule, *not* be trusted? Rather than excluding the whole category of such judgments for no reason other than that they originate from a certain State, it would seem preferable to try and negotiate a convention which would permit a check on a case-by-case basis. The techniques of permitting refusal of enforcement of a judgment in the case of manifest incompatibility with public policy (*ordre public*) of the requested State or with its requirements of due process of law or if it was obtained by fraud are so well advanced that it should be possible to negotiate a convention system which would leave control over foreign judgments to the judiciary (*cf.* Articles 5 and 6 of the Hague Convention and Articles 27 and 34 of the Brussels and Lugano Conventions, as developed by the case law of the Luxembourg Court).

25 Obviously there are many aspects to this very important topic which need to be discussed and it may well be too early to take any clear decisions at the meeting of the Special Commission on general matters and policy in June 1992. It would seem to the Permanent Bureau that it might be advisable well ahead of the Seventeenth Session to organize a half-week meeting of experts in this particular field to discuss the feasibility of the topic in order to enable the Diplomatic Conference to take a decision.