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

AVANT-PROJET RÉVISÉ DE CONVENTION SUR LE RECOUVREMENT INTERNATIONAL DES ALIMENTS ENVERS LES ENFANTS ET D'AUTRES MEMBRES DE LA FAMILLE (Doc. prél. No 29)

AVANT-PROJET DE PROTOCOLE SUR LA LOI APPLICABLE AUX OBLIGATIONS ALIMENTAIRES (Doc. prél. No 30)

Observations sur l'avant-projet révisé de Convention et sur l'avant-projet de Protocole ont été reçues de la part de :

- Australie
- Etats-Unis d'Amérique
- Japon
- Nouvelle-Zélande
- Philippines
- Suisse [français]
- Mercosur [English]
- Mercosur [Español]

(dernière mise à jour : 12 octobre 2007)

REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (Prel. Doc. No 29)

PRELIMINARY DRAFT PROTOCOL ON THE LAW APPLICABLE TO MAINTENANCE OBLIGATIONS (Prel. Doc. No 30)

Comments on the revised preliminary draft Convention and the preliminary draft Protocol have been received from:

- Australia
- Japan
- New-Zealand
- Philippines
- Switzerland [English]
- United States of America
- Mercosur [English]
- Mercosur [Español]

(last updated 12 October 2007)

Comments on the REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (Preliminary Document no. 29 of June 2007)

The Swiss delegation thanks the Permanent Bureau of the Hague Conference on Private International Law for its invitation to comment in writing on the REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE (Preliminary Document no. 29 of June 2007). At the current stage in discussions, the Swiss delegation is pleased to provide the Permanent Bureau with the following comments. We shall, however, take the liberty of making additional comments when the time comes, during the Diplomatic Session on the International Recovery of Child Support and other Forms of Family Maintenance which will be sitting from 5 November 2007.

We draw your attention again to our comments on Preliminary Document no. 16 of October 2005 published on the website of the Hague Conference on Private International Law in Preliminary Document no. 23 of June 2006 (Comments on the tentative draft Convention on the international recovery of child support and other forms of family maintenance received by the Permanent Bureau).

1. OBJECT, SCOPE AND DEFINITIONS

1.1 Object

The aims contained in Art. 1 a) to d) do not correspond to the main aims that the new instrument is supposed to pursue, viz. to strengthen cooperation between the authorities of the Contracting States and to ensure the recognition and enforcement of maintenance decisions. The aim set out under b) is therefore of subsidiary to the other aims; it would even be more accurate to say that it is an integral part of the cooperation as defined under a).

1.2 Scope

The Convention should take account of the fact that initial education for children in many countries continues beyond the age of 21 and that these children often do not have their own financial means until this is completed. The applicability of the Convention should therefore not be restricted to support obligations to children up to the age of 21 but go beyond this and in particular also cover those who have obtained the entitlement to support beyond the age of 21.

In respect of the maintenance of a spouse, we would appreciate it if an additional effort could be made to secure as comprehensive as possible an application of the Convention.

1.3 Definitions

In order to ensure that the competent authorities can really comply with the duties that come under "legal assistance", we propose the following short text:
"Legal assistance" means the assistance necessary to enable applicants to assert their rights and to ensure that applications are effectively dealt with in the requested State. This includes assistance such as general information of a legal nature (at least), assistance in bringing a case before an authority and legal representation.

In respect of "legal advice", we note that in Switzerland the competent authorities (Central Authority at federal level and cantonal authorities responsible for recovery) are not in a position to offer such a service.

2. ADMINISTRATIVE COOPERATION

2.1 Helping to locate the creditor (Art. 6.2 b)

The Swiss delegation has always resisted an obligation to act on behalf of debtors being imposed under the Convention on the Central Authorities in large part due to the difficulties these authorities would encounter if they had to carry out the same activity on behalf of the creditor and debtor (see, too, 2.5 of the comments made by Switzerland regarding the tentative draft Convention of October 2005, in the Preliminary Document no. 23 of June 2006: "... The right granted to the debtor to request, via the Central Authorities, a modification of a maintenance decision is, in our opinion, likely to cause a conflict of interests for the Central Authorities which are already taking steps on behalf of the creditor. At the very least this right would substantially complicate the course of the proceedings. It is important also not to lose sight of the problems regarding costs which the authorities will face ..."). Now the Drafting Committee has included a clause, without any prior discussion in the Special Commission, stipulating that the Central Authorities have a duty to locate the creditor (and this also prior to the submission of an application under the Convention, see Art. 7). This clause is no longer in keeping with the objective of the Convention, which is to guarantee recovery of maintenance by the (often needy) creditor.

2.2 Obtaining relevant information relating to income and other financial circumstances, and the location of assets

In Switzerland, opportunities to obtain information relating to financial circumstances are very limited. In addition, it can be seen from fig. 142 (p. 31) of the DRAFT EXPLANATORY REPORT (Preliminary Document no. 32 of August 2007) that such information on the debtor could be used, for example, for proceedings to obtain a ruling on maintenance in the creditor state. This must be seen, however, in the light of the problem described under 2.3 below. Here it would relate to a taking of evidence that would have to be carried out in accordance with existing international regulations.

2.3 International judicial assistance and cooperation between administrative authorities

Under this heading, reference must be made to the functions of the Central Authorities including the application for specific measures (see Art. 5 to 7) and to the importance of the coordination of the new Convention with other existing international instruments (Art. 45). In this regard the Swiss delegation has always maintained that the new Convention would not be able to invalidate the existing provisions on international judicial assistance. This comment holds true particularly for the provisions on the service of documents and the taking of evidence (particularly those containing the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters). The service of documents and the taking of evidence are therefore subject to strict rules guaranteeing the respect of the rights of defendants. If these rights are not respected, this can prejudice the recognition of a decision, which

should be avoided. From this point of view we consider as problematic both the fact of wanting to facilitate the obtaining of documentary or other evidence and the service of documents (Art. 6.2 g) and j)), and the idea of providing assistance in establishing parentage and to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures (Art. 6.2 h) and i)). Whether or not an application is pending makes no difference at all to this problem (Art. 7). Current practice under the Convention of 20 June 1956 on the Recovery Abroad of Maintenance (New York Convention) already makes it possible to fully gauge the difficulties that would arise if the transmission of requests for service of documents and the taking of evidence were no longer governed by international judicial assistance norms but by the Convention on the International Recovery of Child Support and other Forms of Family Maintenance and if it were the responsibility of the Central Authorities established under the latter Convention: the guaranteeing of the rights of proceedings of the parties would be seriously threatened, not least by the extreme shortness of the deadlines applying to the proceedings.

2.4 Central Authority costs

The costs as set out in Art. 8.2 should be notified to the requesting authority prior to providing a service and the requesting authority should be requested to guarantee payment of these costs.

3. APPLICATIONS THROUGH CENTRAL AUTHORITIES

3.1 Subsidiarity

If the defendant does not live in the requested State, it should be left to the requested State as to whether it acts only in a subsidiary capacity in respect of the applications provided for under Art. 10.1 a) and b), i.e. after it has been proven that these applications would not be successful in the defendant's state of residence. We therefore suggest an amendment to Art. 10.3 in this regard.

3.2 Available applications

The establishment and modification of decisions provided for in Art. 10.1 are not the (primary) object of this Convention. They should also, as far as possible, take place in the creditor's State of residence unless this State has no jurisdiction in the matter, or recognition and enforcement of a decision issued in that State were not possible in the requested State due to the absence of a basis of recognition and enforcement as defined in Art. 17.

3.3 Activities on behalf of the debtor

With regard to the obligation of the Central Authority to act on behalf of the debtor (Art. 10.2), we reiterate our view and refer to our comments under 2.1: The right granted to the debtor to request, via the Central Authorities, a modification of a maintenance decision is, in our opinion, likely to cause a conflict of interests for the Central Authorities which are already taking steps on behalf of the creditor. At the very least this right would substantially complicate the course of the proceedings. Even if, as some States maintain, there is no (legal) representation either for the debtor or for the creditor, with only the interests of the State being represented, it is still not clear why the State should act on behalf of the debtor. The Convention we are considering aims at obtaining recovery of maintenance and not at assisting, free of charge (the Central Authority does not usually charge for its services) and with

taxpayers' money, debtors who are under a legal obligation to pay maintenance in exculpating themselves of their duties.

3.4 Content of the application

For reasons of private international law (issues concerning the applicable law or recognition and enforcement) the nationalities of the applicants and defendants should be given. Details of the place of birth or place of origin would also be useful.

3.5 Information on the creditor's financial situation (Art. 11, Option 1, 2 a)

We agree that the documents regarding the creditor's financial circumstances should not be systematically communicated to the authorities, but solely if appropriate in the case in question or if the creditor requests free legal assistance.

3.6 Processing of applications

It is not certain that the tasks linked to the "processing of applications" can be adequately accomplished by the Central Authority alone (Art. 12). On the contrary, it would seem preferable to provide for some sort of obligation on the judicial authorities who are dealing with the case to provide information.

3.7 Effective access to proceedings

The Swiss delegation prefers the version (Work. Doc. No 125) proposed jointly with another delegation at the last meeting of the Special Commission.

4. RECOGNITION AND ENFORCEMENT

4.1 Scope of the chapter

With reference to Art. 16.3 a) and b) we maintain the following: Switzerland, like other countries, is familiar with maintenance agreements. These have to be approved by courts or by guardianship authorities. The decisions made by the guardianship authorities are subject to appeal but in certain cantons the appeal is not directly to a court of law but to another authority, i.e. it is only in the course of further proceedings that such issues come before a court of law. In addition there is no consensus of opinion in Swiss legal doctrine as to whether maintenance agreements approved by guardianship authorities override an objection in enforcement proceedings definitively (and hence are identical to court rulings) or only provisionally. If the effect is only provisional, they are enforceable but the debtor may bring a court action for a declaration that the claim is unfounded. The Swiss delegation proposes that the wording in Art. 16.3 a) and b) be amended as follows:

a) may be modified by a judicial authority; and

b) have a similar force and effect as a decision of a judicial authority on the same matter.

4.2 Right to be heard (Art. 19 e)

In cases where the defendant is resident in a State that is different from the State in which the proceedings are taking place, it should be ensured that he is duly notified of these proceedings or of the decision in accordance with the relevant provisions on international judicial assistance. In its current version, the wording of the draft does not mention this requirement.

4.3 Procedure on an application for recognition and enforcement (Art. 20)

As regards Art. 20.2 a), it should be noted that in most cases (at least in Switzerland) proceedings do not follow the recommended procedure. In fact, decisions from the requesting State are not immediately transmitted to the court with competence to decide on recognition; the authorities first of all contact the debtor to try to find an amicable solution with him. It is only in connection with enforcement that the question of recognition of the foreign decision is examined as a preliminary issue. Art. 20.11 does not cover this type of procedure; nor is it mentioned in the DRAFT EXPLANATORY REPORT (Preliminary Document no. 32 of August 2007) on Art. 20. We recommend that, where possible, an amicable settlement with the debtor be sought first. This process should also be provided for in Art. 20 of the Convention.

4.4 Documents (Art. 21)

For proceedings in courts of law and before other authorities, it is essential that certain documents are available in their original version or as a certified copy. Ordinary photocopies are not sufficient for this purpose. In addition, for the application to be efficiently processed, these documents should be systematically submitted together with the application and not produced only at the request of the competent authority, as is provided for in Art. 21.3 as it stands at present.

5. ENFORCEMENT BY THE REQUESTED STATE

The manner in which enforcement measures are applied should be left to the requested State, with the result that Art. 30 is superfluous.

6. GENERAL PROVISIONS

6.1 Power of attorney (Art. 39) and representation of the creditor

As stated in the revised preliminary draft Convention, the requested State's Central Authority may require a power of attorney authorising it to act on behalf of the applicant only if it acts as legal representative in judicial proceedings or before other authorities. However, it is a fact, particularly in Switzerland, that the applicant's representative is required to produce a power of attorney whether or not he represents his clients in courts of law or before other authorities. This also applies to authorities who are acting in accordance with the Convention, since they represent the interests of the applicant vis-à-vis the defendant. It is therefore quite feasible that the two parties will come to an out-of-court settlement and hence there is no need for legal proceedings or proceedings before another authority. In addition, we believe that an application must always arise out of the unequivocal will of the person who makes the application and that this person must also be aware of the scope of the power that he is giving. Consequently, we advocate that the power of attorney be maintained. The power of attorney is also necessary for the proceedings in terms of Art. 20. Amendments in this respect should be made to Art. 11.1.

6.2 Coordination of instruments and supplementary agreements (Art. 45)

As already discussed under 2.3, the provisions regarding international judicial assistance must also be complied with for proceedings under this Convention. The main instruments include the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial

Matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

6.3 Review of practical operation of the Convention (Art. 48)

It is recommended that the practical operation of the Convention is monitored. However, there should not be an inordinate number of obligations imposed on Contracting States with regard to statistics, etc.

7. OTHER IMPORTANT POINTS

7.1 Standard forms

We would like to avoid having unnecessarily complicated forms which would lead to excess paperwork. We would also draw your attention to issues that could give rise to difficulties:

- if the forms are binding for the courts
- if the Central Authorities are responsible for the content of the forms
- if the applications are turned down because they do not fully comply with the requirements of the form (excessive formalism)
- if the forms are mandatory, any change made to the standard form would have to be made subject to the internal legislative procedure. For some States this would mean that they would have to obtain approval for the decision from their parliament. This system would be very difficult for States that did not agree to the change but lost out to a majority decision (Art. 49.2). The possibility of making a reservation, as stipulated in Art. 49.3, does not simplify the situation, as this would mean that the forms to be used would vary from State to State. If, however, there were a decision to opt for forms that are merely recommended, but whose use would not be mandatory, this would greatly simplify any modification procedure, which could then be carried out within a Hague Conference Special Commission, for example.

We have the following comments, which are not exhaustive, on the REPORT OF THE FORMS COMMITTEE and the proposed forms:

a) We think that the applications should be signed by the applicants themselves and not by the Central Authority. The applicants should be quite clear about the authorisation they are conferring. If, as we mentioned under 6.1 on the power of attorney, the applicants do not sign their application or establish a power of attorney, it will no longer be possible to determine exactly what the nature of the authorisation that they are conferring is. Furthermore it is not possible or desirable for the Central Authority to be made responsible for the content of the applications.

b) The use of forms still means that international judicial assistance channels have to be complied with, as described under 2.3. This obligation could quite easily be overlooked as the forms state explicitly that a Central Authority may quite simply send the decision taken by a court to another Central Authority.

c) Abstract of a decision: The type of decision (divorce decree, decision on provisional measures, etc.) should also be mentioned as well as information that the ruling is enforceable, whether there is a default judgment, and information on the notification of the debtor and his right to be heard.

7.2 Establishment of parentage

The establishment of parentage goes beyond the scope of the Convention being drawn up. It is too great a burden for the Central Authorities. It would therefore be advisable to have this point regulated in a separate instrument. Similarly, any assistance that the Central Authorities would be required to provide in order to establish parentage with a view to recovery of maintenance (Art. 6.2 h) also poses problems as we pointed out under 2.3.

Proposals and Comments of the United States of America

The following comments do not constitute all of the United States comments on the Draft Convention. While a few comments on the Draft Explanatory Report are included, there was insufficient time to do a thorough study of the Report. We assume that the Diplomatic Conference and the Permanent Bureau will consider what sort of process should be used to provide States an opportunity to comment on the Report before it is finalized.

The United States intends to submit a separate paper on the treatment of costs under the Convention (Articles 3(c), 6, 8, 14 and 40).

CHAPTER I (SCOPE AND DEFINITIONS) OF
PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Article 2 Scope

1. Para 1: Remove the brackets and retain the bracketed language. We note that this paragraph needs to be read in conjunction with Article 10(3), which states that applications under the Convention shall be determined according to the law of the requested State.

2. Para 3: Children cannot control the circumstances into which they are born. All children are entitled to support from their parents, without regard to the marital status of the parents. Even without the bracketed language, we would interpret Article 2 to cover all children. However, if there is any question about whether the Convention applies to all children, regardless of the marital status of the parents, the United States supports the removal of the brackets and the retention of the bracketed language.

Article 3 Definitions

1. Para (c): The definition of "legal assistance" is closely related to the treatment of costs in Articles 8 and 14. The United States intends to submit a separate paper on that topic and will address this definition there.

Proposals and comments by the delegation of the United States of America

CHAPTER II (ADMINISTRATIVE COOPERATION) OF
PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Article 5 General functions of Central Authorities

1. Clause (b): Article 5(b) is repeated in Article 51(1)(a), except that Article 5 imposes the obligation to provide the information about maintenance laws and procedures on the Central Authority, while Article 51 imposes it on the Contracting State. We strongly support the retention of all of Article 51 and the removal of the brackets. If Article 51 is retained, Article 5(b) can be deleted.

Article 6 Specific Functions of Central Authorities

1. Para 2(i): The United States supports the removal of the brackets and the retention of the bracketed language. The obligation to take "all appropriate measures" to "initiate or facilitate" the institution of proceedings to obtain "any necessary provisional measures" (i.e., freezing of the debtor's assets pending the outcome of the maintenance case) is extremely flexible. Given this flexibility, there can be no harm in including it. And, it might help countries that would like their child support Central Authorities to be able to handle requests from other countries for provisional measures such as the freezing of assets but need a treaty basis in order to be able to do so under their domestic law.

2. Article 6 is closely related to the treatment of costs, and we will address this relationship in the separate paper we submit on costs.

Article 7 Requests for specific measures

1. We believe that this is an important article, because, in some situations, it may be necessary for a Requested Central Authority to take certain specific measures (such as locating the debtor) in order for an applicant in the Requesting State to be able to complete an application to be sent to the Requested State. That is the situation covered by Article 7(1). The United States strongly urges that Article 7(1) be as broad as possible. Therefore, we support the deletion of all of the brackets and the retention of all of the bracketed language. Including Article 6(2)(g), (h), (i), and (j) (facilitation of the obtaining of evidence, the provision of assistance in establishing parentage, assistance with provisional measures, and facilitation of service of documents) in the list of measures will expand the usefulness of Article 7(1).

2. Article 7(2) is important because it might enable a Requesting State to keep the case, at least until an order is established, rather than sending the entire case to the Requested State, if the Requested State could, instead, simply take certain measures to help the Requesting State. This could result in significantly improved efficiency and reduction in over-all costs of the action. We support the deletion of the brackets and the retention of the bracketed language.

3. Given the very real benefit to children that this Article will provide, the very flexible language of the measures under Article 6, and the discretionary nature of the obligations under Article 7, we support the deletion of all brackets within Article 7 and the retention of the bracketed language. The Explanatory Report notes, at paragraph 208, that such specific measures "can already be accomplished on a voluntary basis under the 1956 New York Convention," and the United States strongly agrees with the Reporters' comments at paragraph 217 that "[i]t would be unfortunate if [the language in square brackets] was omitted from a Convention whose primary aim is to improve the recovery of maintenance for children."

Article 8 Central Authority costs

1. Article 8 is closely related to Articles 6, 14, and 40. The United States intends to submit a separate paper dealing with these cost-related articles because of the importance of these articles to us. Our only comment here is that we do not believe that there is any reason to treat costs related to Article 7 requests any differently than costs related to Article 10 requests. We will explain why in our costs paper.

Article 11 Application Contents

1. Although there are two options for Article 11, we believe that the consensus is in favor of Option 1, which would mean that the application forms would be recommended, rather than mandatory. We too prefer Option 1. We support the deletion of the brackets in 11(1)(h) (contact information for person or unit handling an application), which was inserted at the request of the Forms Working Group.

Article 12 Transmission, receipt and processing of applications and cases through Central Authorities

1. Para. 2: The first sentence of this paragraph provides that the requesting Central Authority may only decline to transmit an application if is not satisfied that the requirements of the Convention are met. The explanation of this sentence in the Explanatory Report (paragraphs 336-338) concerns us, as we have a different understanding of the sentence. According to the Report, this sentence means that there is no possibility for the requesting Central Authority to refuse to transmit an application on the grounds that it is not made in good faith or is not well-founded. We agree with the Report that the Special Commission previously decided not to explicitly state that an application could be rejected on those grounds, because of fear that this might encourage a routine ex officio review of the merits of a case by a requesting Central Authority. We

disagree, however, with the Report's interpretation of "when satisfied that the application complies with the requirements of the Convention." We believe that that language is flexible enough to allow a requesting Central Authority to reject an application in the rare case when it is obvious from the face of the application that it was completely without merit. Examples that come to mind would be multiple requests for modification with no claim of changed circumstances, or totally implausible claims against a public figure not based on any credible evidence. Under those very rare circumstances, a requesting Central Authority would certainly have the discretion not to pursue a purely domestic case, and it must also have this discretion in an international case. We believe that the first sentence of 12(2) can be read so as to provide this discretion. The Explanatory Report should be modified to reflect this understanding.

2. The third sentence of 12(2) should be retained without the brackets at the beginning and end of the sentence. It has already been agreed in Article 21 that the documents that accompany an application for recognition and enforcement of a decision do not need to be certified, unless requested. The third sentence simply explains in more detail that the requesting Central Authority would be responsible for obtaining the certified copies from the competent authority and transmitting them to the requested Central Authority. If private agreements and authentic instruments are included in the scope of Chapter IV, then the brackets within the third sentence should be removed and the language retained. We address authentic instruments and private agreements in our comments on Chapter IV.

3. Para. 3: The bracketed language refers to a form for acknowledging receipt of an application. In general, the United States supports the work of the Forms Working Group and the provision of recommended forms. We therefore suggest the deletion of the bracketed language and the addition of a new paragraph 3 bis, which would contain language similar to that in Article 11(4): "An acknowledgement under Article 12 may be made in the form recommended and published by the Hague Conference on Private International Law."

4. Para. 8: The first sentence of this paragraph states that the requested Central Authority may refuse to process an application only if it is manifest that the requirements of the Convention are not fulfilled. As such, it is similar to the first sentence of paragraph 2, except that the standard is even more stringent – it must be "manifest" that the Convention's requirements are not met. It makes sense to have a more stringent standard for the requested Central Authority, as the application will already have been reviewed by the requesting Central Authority to ensure that it complies with the Convention. We have the same concern about the Explanatory Report's interpretation (paragraphs 360 and 361) of this paragraph as we have concerning the Report's interpretation of Article 12(2). The Report (paragraph 360) suggests that "vexatious" or repeat applications by a party "who is abusing the Convention process" could not be rejected under this paragraph. Our reading of Article 12(8) would allow a requested Central Authority to refuse to process an application in the extremely rare case where it was obvious from the face of the application that it had no merit. For example, if a previous application by the same party concerning the same debtor had already been

processed, and had failed for cause, a subsequent application on the same grounds with no change of circumstances would be properly refused. The Report should be modified to reflect this understanding.

Article 13 Means of communications – Admissibility

1. We would like an explanation of the scope of Article 13. Paragraph 366 of the Explanatory Report states that domestic rules of evidence would still be applicable with regard to the substance of the documents. This suggests to us that Article 13 would prohibit a challenge to the admissibility of such documents based on the form of the document. However, Article 13 itself only addresses one aspect of the form of the document, namely the means of communication. Is Article 13 supposed to eliminate all challenges based on form, or just challenges based on the means of communication? For example, a State may require a raised seal in order for a certain type of document to be admissible. So far as we know, if a document with a raised seal is transmitted electronically, the seal is not going to be raised when the document is received. Would Article 13 mean that the requested State's rule on raised seals could not be applied? That is what we would infer from the Explanatory Report; but it is not the only way Article 13 itself could be interpreted. It could also be interpreted as permitting the requested State to apply its rule on raised seals, and not admit the document, so long as its refusal was not based on the fact that the document was transmitted electronically. (Some day there may be a way to transmit a raised seal electronically!) If this second, narrower, interpretation of Article 13 is correct, then the Report should be modified to make it clear that the Article only addresses one aspect of the form of a document. In our consultations with U.S. child support officials, there was no agreement on what Article 13 is intended to mean.

Article 14 Effective access to procedures

1. The United States is submitting a separate paper on costs, which will address Articles 6, 8, 14 and 40.

Proposals and comments by the delegation of the United States of America

CHAPTER IV (RESTRICTIONS ON BRINGING PROCEEDINGS) OF PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

The United States makes the following comments and proposals on Chapter IV:

Article 15

1. Para. 2(a): We think there is a typographical error in the first sentence of paragraph 455 of the Explanatory Report. The last part of the sentence should state "EXCEPT IN DISPUTES (emphasis added) relating to obligations in respect of children".

Proposals and Comments of the United States

CHAPTER V (RECOGNITION AND ENFORCEMENT) OF
PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

The United States makes the following comments and proposals on Chapter V:

Article 16 Scope of the chapter

1. Para. 3(a): We suggest that it would be clearer if the words "may be made subject to" are deleted and "are subject to" is inserted instead.

2. Para. 4: In the United States, private agreements are not recognized and enforced as decisions unless they are, in fact, incorporated in a decision. The concept of "authentic instruments" does not exist in the United States. However, we would have no objection to removing the brackets and retaining the bracketed language so long as the safeguards included in Article 26(5) and (6) are included. Article 26(5) would require that proceedings for recognition and enforcement of a private agreement or authentic instrument be suspended if either party is challenging its validity before a competent authority. Article 26(6) would allow a State to declare that applications for recognition and enforcement of private agreements and authentic instruments must be made through the requesting State's Central Authority and not directly to the competent authority in the requested State. If private agreements and authentic instruments are included in the scope of the chapter, we should consider carefully which specific provisions of the chapter should not apply to such agreements/instruments.

Article 17 Bases for recognition and enforcement

1. Para. 1(d): A footnote indicates that two delegations may wish to add language permitting a reservation with respect to this paragraph. We urge States to accept this paragraph, the only consequence of which we believe will be to give the United States an additional mandatory jurisdictional basis on which it will be required to recognize other States' decisions. Paragraph (d) covers a subset of the cases covered by paragraph (c). Our understanding is that the United States will be the only or nearly the only State to take a reservation to paragraph (c) (habitual residence of the creditor). But we would not need to take a reservation to paragraph (d), which provides that States shall recognize and enforce a foreign order if the child was resident in the State of origin when the proceedings were instituted, PROVIDED that the respondent lived with the child in that State at some time or lived in that State and provided support for the child there at some time. All of the cases covered by paragraph (d) would thus also be covered by paragraph (c). Paragraph (d) will impose an additional obligation only on States, like the United States, that are not bound by paragraph (c), and that obligation will work to the benefit of other States.

2. Para. 4: We support the substance of this paragraph, which is to require States to take appropriate steps to institute a proceeding to establish a new decision (the State cannot guarantee the result) if they are unable to recognize and enforce a foreign decision as a result of a jurisdictional reservation taken under Article 17(2). Further, we support the proviso that this requirement only applies to applications made through Central Authorities. The last clause of the last sentence ("unless a new application is made under Article 10(1)(d)") could be misread as preventing private attorneys from instituting a proceeding to establish a new decision outside of the Central Authorities system. A direct applicant whose foreign decision has been rejected because of jurisdictional problems can always ask her private attorney to institute a new proceeding with the competent authority to establish a new decision. (We suggest that paragraph 499 of the Explanatory Report be revised to make this clear.) In order to remove these ambiguities, we propose the following language:

> A Central Authority shall, if recognition of a decision is not possible as a result of a reservation under paragraph 2, and, if the debtor is habitually resident in that State, take all appropriate measures to institute a proceeding to establish a decision. The preceding sentence does not apply to direct applications for recognition and enforcement under Article 16(5).

3. Para. 5: This paragraph needs to be revised to reflect its original intent. If a decision in favor of a child under the age of 18 is rejected by virtue only of a reservation under Article 17(1), we agree that the forum State, in a proceeding to establish a new decision, should not be allowed to declare the child ineligible for support by virtue only of the fact that under the lex fori the age of majority is lower than 18. This was the intent of paragraph 5 but, as currently drafted, "eligibility" could be read much more broadly.

The current draft states that a decision in favor of a child under the age of 18 that is rejected solely because of a reservation under Article 17(1) shall be accepted as establishing the "eligibility" of that child for maintenance. The Report (paragraph 501) makes clear that this does not refer to the quantum of maintenance. However, the Report suggests in paragraph 500 that age is only an example of what "eligibility" means under Article 17(5). We believe that age was the sole criteria that this paragraph was intended to address. Otherwise, the paragraph could deny the respondent of legitimate defenses. The following example will illustrate this problem. A default order is established by a U.K. tribunal against a U.S. debtor. The order is rejected by the U.S. tribunal because the sole basis of jurisdiction that could be asserted against the U.S. debtor was that the creditor was habitually resident in the U.K. Under those circumstances, the U.S. debtor had no obligation under U.S. law to participate in the U.K. proceeding. In a U.S. proceeding to establish a new decision, the U.S. debtor seeks to prove that he is not the father of the child. A refusal to allow him to raise this defense would be a denial of due process. And yet, "eligibility" as used in Article 17(5) could be read as meaning that parentage could not be contested.

If there are States where the age of majority is lower than 18, then Article 17(5) should be revised to reflect the narrow rule that such a State cannot declare a child ineligible for support on that basis alone in an establishment case brought under Article 17(4). Otherwise, Article 17(5) should be deleted.

Article 19 Grounds for refusing recognition and enforcement

1. Para.(d): As the Report points out (paragraph 516), the text of this subparagraph does not say anything about the date of the incompatible decision made in a third State. Such a decision should only prevail if it was established prior to the decision at issue in Article 19(d) and the text should be modified to reflect this.

Article 20 Procedure on an application for recognition and enforcement

1. Para 4: Article 20(4) addresses the level of *ex officio* review that will be allowed at this stage in the process. The United States believes that this provision is one of the most important in the Convention. As one of the main goals of the Convention is to simplify the process of recognition and enforcement of foreign child support orders, we believe that the level of review at this stage should be minimal. Later, at the challenge or appeal stage (Article 20 (6-8), the respondent will have a full opportunity to contest the decision. There is no reason why the full review process should be done more than once. At most, the review at the Article 19(4) stage should be limited to the grounds set forth in Article 18(a) (public policy).

We are very concerned that if the *ex officio* review is expanded to include the reasons specified in Articles 17 and all of 19, the result could be a significant delay in getting child support to needy families. It is our experience that the *exequatur* process at this stage can delay the final resolution of the case for months or years. It is our understanding that, in some countries, the competent authority for this *ex officio* review of a foreign order is not even the same entity as the competent authority for the appeal or challenge. Even in countries where there is a single competent authority, there is no reason to have two opportunities for review. **If the Convention provides for a level of review at this stage of the proceedings that goes beyond public policy, in practical terms this may mean that for large numbers of applicants, the Convention will be useless.**

A possible concern of some States is that they may have a one-stage process for recognition and enforcement of foreign orders, rather than the two-stage process contemplated by Article 20. Those states are free to use simpler or more expeditious procedures. This is reflected in Article 20(10), as well as in Article 46(b). We agree with paragraph 548 of the Report that there is some overlap, and suggest the deletion of Article 20(10). We note the concern expressed in footnote 8 and in paragraph 548 of the Report that, while allowing the use of simple expeditious procedures is a good thing, there should be a level of due process which these procedures must meet. We would propose adding language along the following lines to Article 46(b) and/or Article 20(11): "so long as the procedures include the grounds for challenge set forth in Article 20 (7-9)."

We would ask those States that support an expanded *ex officio* review to consider what practical impact that would have. At the Article 20(4) stage, the competent authority will only have before it the documentation received from the petitioner. No additional evidence will be permitted, and the respondent will not at that point even have notice of the case. Thus, it is very unlikely that a competent authority would have any way of knowing whether any of the Article 17 or 19 reasons for refusing recognition exist. The only impact of building in a separate *ex officio* review at this stage would be delay.

2. The use of the phrase "challenge or appeal" in Article 20(5-8): We strongly urge that the words "or appeal" be deleted from these paragraphs, as they are confusing and unnecessary. As used in these paragraphs, "challenge or appeal" refers to a review at the trial, or first, level. The word "appeal" is used with a different meaning in Article 20(10) and Article 14(1), where it means a second review by another body at an appellate level. The deletion of "or appeal" in Article 20(5-8) would make no substantive change but would prevent a great deal of confusion, at least in countries like the United States, where "appeal" is a term reserved for the second level of review, and is not used to refer to a trial-level proceeding.

3. Para. 6: The reference to paragraph 6 should be a reference to paragraph 5.

Article 21 Documents

1. Para 1(c): We have no disagreement with the intended substance of this subparagraph, but suggest that the drafting needs to be made consistent with Article 19(e). As drafted, Article 21(1)(c) literally means that the document must establish that there was NOT notice and an opportunity to be heard when, of course, it is the opposite that is intended.

Article 25 Physical presence of the child or applicant

This important, but not yet discussed, provision should be moved to Chapter VIII (General Provisions), as the provision should apply to requests for establishment and modification, as well as for recognition and enforcement. The brackets should be removed and the bracketed language retained, except that "under this Chapter" should be changed to "under this Convention." Obviously, the entire structure and purpose of the Convention would be undermined if a tribunal could demand the physical presence of the child or other creditor.

Article 26 Authentic instruments and private agreements

1. As stated in our comments on Article 16(4), we have no objection to the inclusion of authentic instruments and private agreements in this chapter, even though authentic instruments are not used in the United States, and private agreements are not recognized as decisions unless they are incorporated into a court decision.

2. Para. 2(c): We make the same comment with regards to this paragraph as we made with regard to Article 19(d), which is that this paragraph needs to address the timing of the decision made in the third State.

3. Para 2 generally: As with Article 20, the documents required under this paragraph do not have to be certified in the first instance. Obviously, there should be at least as much opportunity for authorities to require certified documents in the case of authentic instruments or private agreements as there is in the case of tribunal decisions. We are concerned that Article 26(2) does not completely mirror Article 20, at least with direct applications. If the application goes through the Central Authorities, then Article 12(2) provides that the requested Central Authority can require the submission of certified documents required by Article 20 or Article 26. But Article 20(3) also provides that certified documents can be demanded (in both Central Authority and direct application cases) if there is a challenge, or *sua sponte,* by the competent authority. Similar provisions should be added to Article 26.

Proposals and Comments of the United States

CHAPTER VI (ENFORCEMENT BY THE REQUESTED STATE) OF
PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL
RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY
MAINTENANCE

Article 32

This Article can be deleted if Article 51 is retained. We think it makes sense to include all of the requirements for information to be submitted to the Permanent Bureau in Article 51, rather than scattering them throughout the Convention. This is especially true because Article 51 explains that States can fufill all of their informational requirements by completing the Country Profile.

Proposals and Comments of the United States

CHAPTER VII (PUBLIC BODIES) OF
PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Article 33 Public bodies as applicants

1. We strongly believe that the definition of "creditor" should include a public body acting in place of an individual creditor for all child support cases (establishment, recognition and enforcement and modification) covered by the Convention. So long as the public body's recovery is restricted to benefits provided in lieu of child maintenance, we see no reason to treat the public body any differently than the individual creditor. We understand this to mean that the public body can only recover what the debtor would be (or, for prior periods, would have been) obliged to pay as child support. If the public body provided higher benefits than the debtor would be ordered to pay under the relevant child support guidelines, it cannot recover the excess from the debtor; if it provided lower benefits than the debtor was or would have been ordered to pay the individual creditor, it cannot recover more than it paid.

2. We also believe that, for child support cases, public bodies should be treated as applicants under Article 14, i.e., receive the same level of free services. (If there is any exception to free services for wealthy individuals, that exception obviously would not apply to public bodies.)

3. As a technical drafting matter, we note that Article 33(1) uses the phrase "benefits provided in lieu of maintenance" while Article 33(2) uses the phrase "benefits provided ... in place of maintenance." We suggest that "in lieu of" be used in both paragraphs.

Proposals and Comments of the United States

CHAPTER VIII (GENERAL PROVISIONS) OF
PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL
RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY
MAINTENANCE

Article 40 Recovery of Costs

1. Article 40(1) may be changed, depending on the resolution of Articles 8 and 14. We will address this in a separate paper on costs.

Article 42 Means and costs of translation

1. Para. 1: We support the flexibility that this paragraph provides Central Authorities and would urge one addition that would provide even further flexibility. The first sentence provides that Central Authorities may agree in an individual case that the translation will be done in the requested State, rather than in the requesting State. We suggest inserting the words "or generally" after "in an individual case." This would make it clear that Central Authorities would have the flexibility to agree that all applications between the two of them would be translated in the requested State. Certain States with which the United States has bilateral arrangements have requested that we not attempt to translate our documents into their languages, but rather let them do it. We note that paragraph 2 addresses the cost of translation in such cases.

2. Para. 3: We suggest that a period be inserted after "related documents" and that the rest of the sentence be deleted. While the United States generally does not charge its own applicants for translation costs, it seems inappropriate for this Convention to be regulating the entirely internal procedures that govern the relation between the requesting Central Authority and its own applicant.

Article 45 Co-ordination of instruments and supplementary agreements

1. Like many States, the United States has concluded a number of bilateral child support agreements, or more informal bilateral reciprocity arrangements, with many foreign countries, as well as nearly all Canadian provinces and territories. All of these are consistent with the objects and purposes of this Convention and, in fact, because of their bilateral nature, they provide for even closer cooperation and more efficient services than may be provided for under the draft Convention. We certainly want to preserve these bilateral agreements and arrangements, and the possibility to continue to conclude additional such agreements and arrangements. We believe that this Article achieves this goal, except in two respects. Article 45(1) protects existing international agreements; Article 45(2) protects the ability to conclude future agreements consistent with the Convention; and Article 45(3) states that the previous two paragraphs also apply to reciprocity schemes, which would cover our informal arrangements with other countries.

2. We have, however, two concerns about Article 45 which we think can be easily addressed. **First**, we note that Article 45 (3) addresses reciprocity schemes "based on special ties between the States concerned." We propose deleting the quoted phrase. It does not add anything. The fact that that a child and custodial parent are in one State and the noncustodial parent with a duty of support in the other seems to us to be enough of a special tie. And it might be misinterpreted as requiring something more. **Second**, Article 45 does not address reciprocity arrangements between a State and the territorial unit of another State, such as the arrangements the United States has, at the federal level, with nearly every Canadian jurisdiction, at the provincial and territorial level. We understand that Canada will be making a proposal to address this, and we expect to support that proposal.

Article 46 Most effective rule

1. We note that this article allows the application of any other law in force in the requested State that provides for more expeditious procedures on an application for recognition and enforcement of maintenance decisions. Among other things, this addresses the concerns of States that have simpler recognition and enforcement procedures than those detailed in Article 20. We refer to our comments on Article 20(11), which note that any simplified procedures still must meet due process standards.

Article 50 Transitional provisions

1. We support removing the brackets and retaining the bracketed language in the title and in Article 50(1). It is sensible that the Convention should apply to applications made after entry into force of the Convention for the relevant States.

2. We propose that Article 50(2) be deleted. There is no reason to exclude from the Convention payments falling due prior to the entry into force of the Convention. To exclude such overdue payments penalizes custodial parents and children with existing cases that involve arrears. It also creates an administrative burden on the competent authority which would have to carve out those arrears accruing prior to the Convention from those arrears accruing after the Convention. Children should not be penalized that way!

Article 51 Provision of information concerning laws, procedures and services

1. We support removing the brackets and retaining the language of Article 51. It will be very useful for Central Authorities to have this information. Moreover, requiring States to make this information available to all will improve the monitoring and review of the implementation of the Convention.

2. Para. 1(d): We think the phrase "including any limitations, in particular limitation periods, on enforcement" is unclear. We would like an explanation and perhaps some revisions to the drafting.

2. Para. (2): The Country Profile will be a very valuable tool. We think the process of amending it should be flexible, and therefore the Country Profile should not be part of the Convention. We thus support deleting the bracketed language.

CHAPTER IX (FINAL PROVISIONS) OF
PRELIMINARY DOCUMENT NO. 29
REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Article 49 Signature, ratification and accession

1. This provision is very important to the United States. It addresses the extent to which States are permitted to bilateralize the Convention, i.e., decide whether or not to accept a treaty relationship with a specific country. The United States strongly prefers Option 1, which permits a Contracting State to reject a treaty relationship with States that are not members of the Hague Conference and have not participated in the negotiation of the Convention. Under Option 2, no bilateralization would be possible. Because the obligations imposed under this Convention on Central Authorities in Article 6 are drafted so flexibly, there may be a vast difference among States as to the level of services offered. This could result in a lack of reciprocity, with State A providing extensive, free services to State B, while State B provides very little to State A. Option 1 will not completely resolve this problem, because it provides for bilateralization only as regards certain categories of States. But, it is better than Option 2. Within Option 1, the United States strongly prefers the second alternative paragraph 5.

2. The United States remains very concerned about a lack of reciprocity, not so much as between a wealthy and a poor country, but as between two developed countries, one of which provides extensive child support services and one of which does not. We will address these concerns in detail in a separate paper dealing with costs.

I) Study drawn up by the Technical Commission of the Meeting of Ministers of Justice of MERCOSUR Member States and Associate States on pending provisions of the Preliminary Draft Hague Convention on Maintenance, for the purpose of undertaking uniform positions within the framework of the Conference on Private International Law, to be held on the oncoming month of November.

As a result of the study on this subject-matter, consensus was reached by the Commission regarding the following provisions dealt with:

PERSONAL SCOPE

ARTICLE 2

Number 1

a) Propose to extend the capacity as beneficiary granted by the Convention to a child under the age of 21 to whoever, having reached that age, continues being a creditor pursuant to the law governing the application for support.

b) Delete brackets foreseen in art. 2, number 1, in connection to claims between spouses or former spouses in combination with claims for maintenance in respect of such children, thereby confirming its contents.

c) Extend the rights granted to spouses and former spouses to non-married couples.

d) Include disabled persons.

Number 3:

Delete brackets, confirming the wording of the paragraph and adding that "Decisions rendered pursuant to this Convention shall be without prejudice to questions of parentage and family relationships between support creditors and debtors. Where relevant, however, such decisions may be used as evidence.", in accordance with the provisions set forth in article 5 of the 1989 Inter-American Convention on Support Obligations.

Number 4:

Delete brackets

FREE LEGAL ASSISTANCE

ARTICLE 3, paragraph c

Delete brackets and ratify the definition given in 3.c, specially mentioning the costs of genetic testing, when such testing is necessary, and leaving the wording of the last sentence as follows: *"...This includes assistance such as legal advice, assistance in bringing a case before an authority, legal representation and exemption* ***from costs of genetic testing when this is necessary*** and from costs of proceedings."

ARTICLE 14

Chose Option 2 and delete the expression *"brought by the creditor"* in number 5.

ARTICLE 14 bis

Number 1. Delete brackets, ratifying its contents. It has been understood that the situation of the debtor is envisaged under the provisions of 14 ter.

Extend the benefits foreseen for parent-child relationships, to those envisaged in art. 2, number 1, according to the wording proposed *"ut-supra."*

Number 2.

Paragraph a): To be deleted, insisting on the inclusion of the cost exemption for the necessary genetic testing in the definition of "legal assistance" of Art. 3, paragraph c).

Paragraph b) To be deleted, since it was considered that its wording may authorize revisions, on the merits, of foreign decisions.

It is pointed out that the revision on the merits of the case, in proceedings for the recognition of foreign decisions, is expressly forbidden by the very same art. 24 of the Preliminary Draft Convention, as well as by art. 13 of the 1989 Inter-American Convention on Support Obligations (CIDIP IV).

Paragraph c) To be deleted, and if deletion would not be possible, maintaining the spirit of Option B), with pertinent modifications thereto, is considered adequate.

ARTICLE 14 ter

Paragraph a) For the reasons stated in the comments to art. 14 bis, number 2, paragraph b), it does not seem convenient to have pronouncements based on the merits of the case, in the process of deciding whether a free legal assistance is relevant or not.

Alternatively, it is proposed to replace the term "merits" for "admissibility".

Paragraph b) Delete "*creditor*" and ratify the term "*applicant.*"

TRANSFER OF FUNDS

ARTICLE 31.

There is agreement regarding the need of implementation of mechanisms tending to facilitate the transfer of funds and reduce its costs, taking into account for that purpose the Preliminary Document No. 9/2004 of the Hague Conference and art. 20 of the Inter-American Convention on Support Obligations.

RECOGNITION AND ENFORCEMENT

ARTICLE 10, number 3)

Deletion is suggested, since if it refers to the law of procedure, it has already been foreseen in art. 20.1 and if it refers to the merits, it would be an unsuitable solution in view of the aforesaid reasons.

PRECAUTIONARY MEASURES

ARTICLE 6 l)

Ratify contents, deleting brackets.

PARTY AUTONOMY

ARTICLES. 15, number 2, paragraph a) and 17, number 1, paragraph e)

The inconvenience of including the party autonomy in this subject-matter, for the purpose of deciding the jurisdiction, is pointed out, since this would eventually affect the international public order in some of the States of the region and thus the recognition of judgments rendered in such cases.

AUTHENTIC INSTRUMENTS AND PRIVATE AGREEMENTS

ARTICLE 26

By reason of the doubts arising from the statements of this article, it is deemed convenient that, for the purpose of deciding about the formula proposed, States attributing enforceability to authentic instruments and private agreements, should explain the conditions that said instruments shall meet in order to be considered as such.

TEMPORAL SCOPE

ARTICLE 50

Extend the application of this Convention to claims brought before it has entered into force, and, if this were not possible, confirm the provisions of number 2, ratifying the provisions between brackets.

ENTRY INTO FORCE

ARTICLE 52.

It was agreed that it was convenient to use option 1, number 5 (first wording) .