Comments by the Government of Japan on Preliminary Document Nos. 29 and 30

The Government of Japan would like to express its appreciation for the work of the Drafting Committee in preparing the Draft Convention and the Draft Protocol.

The following are the comments of the Government of Japan on the Draft Convention and the Draft Protocol. Please note, however, that the following comments are not intended to be comprehensive and we may change or add comments subject to further review.

1. Prel. Doc. No 29

(1) Article 14

It is unreasonable for an applicant to be entitled to more favorable legal assistance or extensive exemption from costs and expenses in the requested State than that available to the citizens of the requested State. Therefore, whether or not the applicant is entitled to legal assistance or exemption from the costs and expenses of the case, including cases concerning maintenance obligations arising from a parent-child relationship towards a child under the age of 21, should be left to the decision of the requested State. We consider Option 2 of Article 14, especially Options A and B of Article 14bis (c), to be problematic. Consequently, Option 1 of Article 14 should be adopted.

(2) Articles 16 and 26

a) Owing to the differences in the legal systems of the many States concerning authentic instruments and private agreements, it is questionable whether the Convention, intended for ratification by a large number of States with their diverse domestic legislation, should cover authentic instruments and private agreements in a uniform manner. Consequently, it is appropriate to permit the contracting States to declare that they will apply the Convention to authentic instruments and private agreements (see Prel. Doc. No 26, Article 16).

b) Regarding Article 26(4) a), limiting the reasons for refusal of a declaration or registration to only those specified in paragraph 3 a) (public policy) would cause serious problems since in the case of reasons other than the public policy specified in paragraph a) authentic instruments or private agreements which should not have otherwise been enforced will be enforced necessitating the return over national boundaries of that which

has already been enforced. Therefore, the words “paragraph 3” in Article 26(4) a) should be retained and “paragraph 3 a)” should be deleted.

(3) Article 17(6)

Article 17(6) provides that a decision shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin. This provision should be revised so that recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired (see Article 8(4) of the Convention on Choice of Court Agreements). Otherwise, if a decision is reversed in the State of origin after it has been enforced in the State addressed, the debtor will have to recover his/her damages across the border, which would be detrimental to the interests of the debtor.

(4) Article 20

a) Paragraph 4

The second sentence of Article 20(4) denies the right for the party to make submissions at the proceeding of recognition or enforcement of decisions. According to this provision and Article 20(5), the party may make submissions only after a challenge or an appeal has been brought. This treatment could cause such problems as the respondent being burdened with recovering that which has already been unjustly enforced across the border without the respondent being afforded the opportunity to make submissions. Therefore, the second sentence of Article 20(4) should be deleted and the party should be given the opportunity to make submissions at the proceeding of recognition or enforcement of decisions.

Further, even if the party is given the opportunity to make submissions at the proceeding of recognition or enforcement, the same problem will occur when the reasons for refusing recognition or enforcement are limited to those in Article 19 a) (public policy). Subsequently, the words “Articles 17 and 19” in Article 20(4) should be retained and “[Article 19 a)]” should be deleted.

b) Paragraph 6

As this Convention is intended to be ratified by a large number of States which have great diversity in geographical or legal conditions, the periods for challenges or appeals should not be treated in a uniform manner. Additionally, if the periods were to be fixed by this Convention, then the length of periods for challenges or appeals would depend on whether or not this Convention applies and therefore legal stability would be diminished. For these reasons, the length of the periods for challenges or appeals is a

matter which should be left to the domestic laws of each State. Accordingly Article 20(6) should be deleted.

(5) Article 28(3)

Article 28(3) provides in the case of applications through Central Authorities, where a decision has been declared enforceable or registered for enforcement, enforcement shall proceed without the need for further action by the applicant. This provision, however, has not been discussed sufficiently at the Special Commission. In connection with this provision, Preliminary Document No 26 stated that there was a need for consideration for inclusion of wording to the effect that in the case of applications through Central Authorities, enforcement should be without further cost to the applicant (see Prel. Doc. No 26, Article 28(3)). However, procedural matters such as whether an application for enforcement measures is required and whether a fee for the application is required should be left to the domestic laws of each State. Accordingly Article 28(3) should be deleted.

2. Prel. Doc. No 30

(1) Article 4(4)

The law of the State of the parties' common nationality is also the law which is most closely connected with the parties. Therefore, from the viewpoint of protection of the creditor, if the creditor is unable to obtain maintenance from the debtor by virtue of the law of the State of the habitual residence of the creditor or the law of the forum, the law of the State of the parties' nationality should apply. Therefore, the brackets in Article 4(4) should be deleted and this provision should be retained.

(2) Article 6

Article 7 of the 1973 Convention on the Law Applicable to Maintenance Obligations provides that the debtor may contest a request from the creditor "in the case of a maintenance obligation between persons related collaterally or by affinity". Contrary to this provision, Article 6 of this Draft Protocol provides that the debtor may do so "in the case of maintenance obligations other than those arising from a parent-child relationship towards a child and those referred to in Article 5". According to this provision, theoretically, the debtor may contest a claim in the case of maintenance obligations between persons related lineally other than those arising from a parent-child relationship towards a child, such as in cases where maintenance obligation claims are made by a parent or a grandparent towards his or her adult child. While we support this Protocol providing a special rule on defense, we believe the scope of

application of such rule to require more deliberation.

(3) Article 8(3)

We believe that the reason Article 8(3) provides “Paragraph 1 shall not apply to maintenance obligations in respect of a child below a certain age or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in a position to protect his or her interest” is because the personal faculties are in question. For this reason, “a child below the age of [18][21]” in Article 8(3) should be read as “a child below the age of 18” so that this Protocol will be consistent with the “Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children”(1996) and the “Convention on the International Protection of Adults”(2000).

(4) Article 19

Even if Option 1 of Article 19 is adopted, if non-contracting States form their own domestic laws with the same contents as this Protocol, the outcome will consequently be the same as Option 2 of Article 19 having been adopted. In this respect, Option 1 becomes meaningless. From the standpoint of uniformity of private international law, it is not desirable for this Protocol to be open for ratification only by the contracting States to the Convention. Therefore Option 2 should be adopted.