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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 des États suivants :

- Australie
- Japon
- Nouvelle-Zélande
- Philippines
- Pologne

(dernière mise à jour : 26 septembre 2007)

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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 the following States:

- Australia
- Japan
- New Zealand
- the Philippines
- Poland

(last updated 26 September 2007)

Australian Government

Child Support Agency

REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

AUSTRALIAN COMMENTS ON PRELIMINARY DOCUMENT 29 SEPTEMBER 2007

PRELIMINARY NOTE: These comments are not intended to be comprehensive and may be changed before the Diplomatic Session.

CHAPTER I – OBJECT, SCOPE AND DEFINITIONS

Article 2 Scope

Article 2(3)

The text within square brackets should be retained. The draft Explanatory Report at paragraph 54 states that even if paragraph 3 is deleted, it is the overwhelming view of the Special Commission that the Convention applies to all children without discrimination. Paragraph 3 should be retained because it is preferable that it be overt that the Convention applies to all children without discrimination.

The difficulties for States that cannot accommodate this scope are acknowledged. The preferred approach is that these States rely on the "public policy" exception in Art 19 *a)* or an additional ground for refusing recognition and enforcement, as proposed in Working Document 51.

Article 3 Definitions

Articles 3 a) and b)

The definitions of "creditor" and "debtor" should be retained to make it clear that the Convention applies to persons who are seeking a maintenance decision for the first time, as well as persons who are already subject to a maintenance decision.

CHAPTER II – ADMINISTRATIVE CO-OPERATION

Article 5 General functions of Central Authorities

Article 5 b)

The obligation in paragraph *b)* should be retained. It is important for the effective operation of the Convention. If Article 51 is accepted then paragraph *b)* could be deleted.

Article 6 Specific functions of Central Authorities

Article 6(1) b)

The draft Explanatory Report states that sub-paragraph *b)* is inspired by Article 7 of the 1980 Hague Child Abduction Convention, but the words "judicial or administrative" have been deleted before "proceedings". These additional words should be included in this Convention also, to avoid any doubt that appropriate proceedings may be of either a judicial or administrative nature.

Article 6(2) b)

The words "or the creditor" in sub-paragraph *b)* should be retained to ensure applications made by a debtor can be processed effectively.

Article 7 Requests for specific measures

Article 7(1)

There is uncertainty about the application of Article 7 in a case where an application under the Convention is not yet contemplated. For example, if a creditor in Australia seeks establishment of a maintenance decision by an Australian authority against a debtor living in the United Kingdom. At this stage it is not yet necessary to contemplate an application under the Convention because the debtor may pay voluntarily, but it would be very useful to be able to obtain accurate information about the income and other financial resources of the debtor for the purpose of establishment.

The above situation is not covered by the current wording of Article 7(1), because at the time of the request no application under Article 10 is contemplated. It would appear to instead fall within Article 7(2) as an internal case having an international element. However, the draft Explanatory Report is not clear on this point. Paragraph 199 identifies one situation in which a request for specific measures could be made by a Central Authority as "where establishment, modification or enforcement of a maintenance decision is being undertaken in the requesting country and help from the requested country is needed for the proceedings" and implies that this situation does fall within Article 7(1). Paragraph 211 states that a request under Article 7(1) could be made to assist a person to decide if an Article 10 application "should *or could*" be made (emphasis added) and paragraph 212 refers to a "possible" Article 10 application. This also implies that a request under Article 7(1) could properly be made where no application under Article 10 is contemplated.

The wider application for Article 7(1) implied in the Explanatory Report is preferred because this would directly support the aim of the Convention to improve the international recovery of child maintenance. The wording of Article 7(1) could be clarified by amending the second sentence as follows:

"The Requested Central shall take such measures if satisfied that they are necessary to assist a potential applicant under Article 10."

This would also make clear the difference between Article 7(1) and 7(2).

The reference in Article 7(1) to Articles 6(2) g), h), i) and j) is supported.

Article 7(2)

Article 7(2) should be retained.

CHAPTER III - APPLICATIONS THROUGH CENTRAL AUTHORITIES

Article 10 Available applications

Article 10(1) d)

Sub-paragraph *d)* is currently limited to cases where the bases for refusing to recognise or enforce a prior decision are a lack of jurisdiction under Article 17 or the grounds specified in Article 19 *b)* or *e)*. This provision should also apply where the ground for refusal was Article 19 *a)* (recognition or enforcement of a decision is manifestly incompatible with the public policy of the State addressed). It is possible that recognition of a decision is refused on this basis, but a decision could be established in the State addressed for the same parties under different conditions.

For example, the laws of a Contracting State may permit marriage between same-sex persons and a maintenance decision of that state may be based on such a marriage. The Commonwealth laws of Australia do not provide for recognition of a maintenance decision that is based on a same-sex relationship. However, some State and Territory legislation provides for the establishment of a maintenance decision based on a de-facto relationship between the same parties.

A further example is a decision concerning a maintenance obligation towards a child born out of wedlock. At a previous Special Commission meeting it was suggested by one expert that a state may be unable to recognise and enforce such a decision, but this did not mean maintenance could not be obtained for the child by other means, for example if the debtor acknowledges the child. Provision for an application for establishment of a new decision may be useful in these circumstances.

Article 10(2)

Applications under Article 10(2) should be equally subject to the obligations to provide assistance in Article 6 and to provide effective access in Article 14.

Paragraph 2 should also provide for applications by "debtors" for establishment of a decision. This would create a greater equity between debtors and creditors and encourage debtors to accept responsibility for maintenance obligations. These applications would be subject to the jurisdictional rules of the requested state.

The following wording is proposed:

"The following categories of application shall be available to a debtor in a requesting State seeking to pay maintenance under this Convention or against whom there is an existing maintenance decision:
a) establishment of a decision in the requested State where there is no existing decision;
b) modification of a decision made in the requested State;
c) modification of a decision made in a State other than the requested State."

Article 11 Application contents

Article 11(1) e)

There is uncertainty about the precise meaning of the term "the grounds upon which the application is based", with regard to the different types of application that may be made under the Convention. For an application for recognition and enforcement of a decision, the "grounds" for the application might refer to the bases for recognition and enforcement under Article 17, i.e. the grounds on which it is a decision entitled to recognition and enforcement under the Convention. For an application for modification of a decision, the "grounds" for the application might be that the applicant's circumstances have changed. However, the draft Explanatory Report at paragraph 312 suggests this term might refer instead to the grounds of the maintenance obligation in question, for example, parentage.

To clarify this the following amendment should be considered:

e) the [legal] basis of the maintenance obligation
f) the grounds upon which the application is based

Article 11(3)

There is no inconsistency between Article 11(3) and Article 14 (Option 1 nor Option 2). Documentation concerning the entitlement of the applicant to legal assistance must only be provided if it is "necessary". It would only be necessary in cases where [under Option 1] Article 14(3) or 14(5), or [under Option 2] Article 14 *ter* apply, and not otherwise.

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

Article 12(2)

The Transmittal Form referred to in Article 12(2) is supported. It is an important element of the improved procedural framework established within Chapter III.

Article 12(9)

It is important to reduce delays that could be associated with seeking additional documents or information. To achieve this the word "may" in the second sentence ought to be replaced by the words "shall promptly".

There is also uncertainty about the precise length of the period to be allowed. The current wording suggests that the requested Central Authority must allow the Requesting Central Authority a period of "at least" 3 months, and could allow a greater period. The draft Explanatory Report at paragraph 364 suggests that 3 months should be the maximum allowed. To resolve this uncertainty the words "at least" should be deleted from Paragraph 9.

The following wording is suggested:

"However, the requested Central Authority shall promptly ask the requesting Central Authority to produce these within a period of 3 months."

Article 14 Effective access to procedures

Option 2 is preferred.

These provisions should apply to public bodies. Free legal assistance should be given to public bodies under Article 14 (Option 2) *bis*.

Article 14(1)

"Applicant" should include a creditor, debtor or public body.

Article 14 bis(1)

Article 14 bis (1) must apply to both creditors and debtors. There is an important relationship between the obligation to provide effective access and Article 15 – limit on proceedings. Article 15 will operate to restrict the right of a debtor to seek modification of a decision in a convenient jurisdiction. This can only be justified if the Convention also creates a means for the debtor to bring an application for modification under the Convention (Article 10(2)) and a meaningful right for a debtor to effective access to procedures (Article 14).

Article 14 bis(2) b)

The words in square brackets regarding appeals should be reconsidered. Article 14 (Option 2) paragraph 1 refers to "...the procedures, including enforcement and appeal procedures, arising from applications...". This indicates that procedures arising from an application include appeals procedures. Thus the reference in paragraph 2 *b)* to "or any appeal" is incorrect. The words should either be deleted (and it would be implicit that this includes appeal processes), or be amended to: "including any appeal".

Article 14 bis (2) c)

Option C is preferred. The advantages of filtering out the few undeserving cases are outweighed by the burden of overly complex rules.

Article 14 ter b)

As the draft currently stands a debtor cannot apply for recognition and enforcement under the Convention, therefore this provision need apply only to creditors.

CHAPTER V – RECOGNITION AND ENFORCEMENT

Article 19 Grounds for refusing recognition and enforcement

Article 19 e)

There has been discussion in the Special Commission meetings about whether the assessment of whether a respondent has had "proper notice" is to be made in accordance with the law of the state of origin or the law of the state addressed. The draft Explanatory Report is not clear on the question. At paragraph 517 the report states that it is not necessary for the defendant to have been "duly served" and further that the term "proper notice" accommodates both judicial and administrative systems. However, paragraphs 519-520 of the report suggest that if notice of a decision is not served in accordance with the internal law of the States of civil law tradition, the decision will not be entitled to recognition and enforcement under the Convention. This question should be clearly resolved in the Convention.

Article 20 Procedure on an application for recognition and enforcement

Article 20(4)

The grounds on which the relevant authority in the requested State may review *ex officio* an application for recognition and enforcement should exclude Article 17, but include Articles 19 *a)*, *c)* and *d)*. In Australia the competent authority for recognition and enforcement is likely to be aware, even without submissions by the applicant or respondent, that the circumstances in paragraph *c)* or *d)* apply. If the competent authority cannot refuse to make a declaration or registration at this point, the authority will be forced to register a decision that is incompatible with a prior decision that is also registered for enforcement.

Article 20(6)

There is a typographical error in paragraph 6 – it should read: "notification under paragraph 5".

Article 20(8)

Recognition and enforcement might be applied for in respect of payments that fell due in the past as well as payments due in the future. If the debt for past payments has been fulfilled, a challenge or appeal should be allowed against recognition and enforcement of that part of the decision only.

The following wording is suggested:

"A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt regarding recognition and enforcement in respect of payments that fell due in the past."

Article 20(11)

The Drafting Committee has raised the question whether there are any provisions in Article 20 from which Contracting States should not be able to derogate. The requirements to notify the applicant and the respondent under paragraphs 5 and 9 are important protections and should be guaranteed.

Article 21 Documents

Article 21(1) b)

The documents listed in paragraph *b)* must be provided in all circumstances. However, for applications between some states a document stating that the requirements of Article 16(3) are met will never be necessary. Article 21 should provide flexibility for these states to operate on this basis and in accordance with the spirit of trust and cooperation underpinning the Convention.

The following wording is suggested:

...
b) a document stating that the decision is enforceable in the State of origin;
c) in the case of a decision by an administrative authority, a document stating that the requirements of Article 16(3) are met, save where the requested State has made a declaration in accordance with Article 58 that such a document is not required.

Article 21(1) f)

The wording of paragraph f may need to be amended if Article 14 *ter* b) (Option 2) is amended as suggested in paragraph 441 of the Explanatory Report.

The following wording could be considered:

" f) where necessary, documentation showing the extent to which the applicant is entitled to free legal assistance in the State of origin."

CHAPTER VI – ENFORCEMENT BY THE REQUESTED STATE

Article 28 Enforcement under national law

Article 28(3)

Paragraph 3 contains a very important principle for Australia. Where a decision has been declared enforceable or registered for enforcement under the Convention, the competent authority in the State addressed must proceed to take enforcement measures, in accordance with the law of the State addressed.

The suggestion by the Drafting Committee in Preliminary Document 27 for the inclusion of wording to the effect that in the case of applications through Central Authorities enforcement should be without further cost to the applicant is strongly supported.

Article 29 Non-discrimination

There is a significant inter-relationship between Article 29 and the other provisions of Chapter VI that should be noted. For those States with well developed enforcement infrastructure and a wide range of enforcement methods, Article 29 will create an obligation to extend their system to benefit international creditors. This will be at a significant cost burden to those states. For other states lacking extensive systems for enforcement, Article 29 does not impose any great burden at all. The other provisions in Chapter VI, such as Articles 28 and 30, are essential to address this imbalance. Those provisions encourage all Contracting States to make available effective measures for enforcement of decisions.

Article 30 Enforcement measures

Article 30(2)

Paragraph 2 is an important provision for Australia. Article 30 requires Contracting States to make available effective measures for enforcement of decisions and paragraph 2 notes some measures that have proven to be effective in Member States. As noted above with respect to Article 29, this provision is intended to reassure States that already have effective systems for enforcement and will be obliged to apply these to cases under the Convention.

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.

Revised Preliminary Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

Submission on Preliminary Document No 29 of June 2007

September 2007

NEW ZEALAND

INTRODUCTORY COMMENTS

We have prepared our comments taking into account both the draft Convention (Preliminary Document No 29) and the draft Explanatory Report (Preliminary Document No 32). In many instances, our original concerns have been addressed by the detailed and thorough explanation in the Explanatory Report. We have found the Report to be an invaluable aid and wish to express our appreciation to the Co-Rapporteurs for their hard work.

We also wish to acknowledge the work of the Drafting Committee. The draft Convention has clearly been improved as a result of their recent revisions. Our comments below are primarily directed to further improving the operation of the Convention or promoting greater clarity.

CHAPTER I – SCOPE AND DEFINITIONS

Article 2 Scope

Article 2(1)

We have a query about the interface between this paragraph and Option 2 of Article 14. Article 2(1) refers to "maintenance obligations arising from a parent-child relationship". Assuming the words in square brackets remain, this concept is extended to include a combined claim for spousal support. Article 14 bis (1) also refers to maintenance obligations arising from a parent-child relationship. It does not expressly refer to a combined claim for spousal support.

In light of Article 14 ter, we understand that the requirement to provide free legal assistance under Article 14 bis would not extend to spousal support that might be combined with that child support claim. However, the extended concept in Article 2(1) might be seen as colouring references to "maintenance obligations arising from a parent-child relationship" in other parts of the Convention, such as Article 14 bis.

We would have concerns if this were the case. To avoid this outcome, we would like to either see the drafting clarified or the intended approach reflected in the Explanatory Report.

Article 2(3)

We strongly support the Convention extending to children regardless of the marital status of their parents. Having regard to the discussion in the draft Explanatory Report, we are relaxed whether this clause remains or is deleted.

Where States have concerns with the inclusion of children regardless of the marital status of their parents, we consider the Convention provides, or could readily provide, scope for these concerns to be accommodated:

- States can refuse to accept a case under Article 19 a) on the basis that recognition is manifestly incompatible with the public policy of the State addressed.

- The Convention could be amended to allow States to make a reservation if they have legal problems with the words (on the basis that Article 57 is amended to allow this).

We recognise the validity of other States' concerns, but we believe they should not cause those States to reject the Convention altogether.

Article 2(4)

Consequent on our comment above, if Article 2(3) is retained, we would support the removal of [ ] and retaining the text.

Footnote 2

We support allowing public bodies to apply to establish or modify a decision on behalf of a creditor. This ensures that those States which provide support for children and seek reimbursement from child support payments are not disadvantaged, if they need to take these steps.

CHAPTER II – ADMINISTRATIVE CO-OPERATION

Article 6 Specific functions of Central Authorities

Article 6(2) i)

We favour removing the [ ] around this paragraph and retaining the text.

CHAPTER III – APPLICATIONS

Article 11 Application contents

Option 1 and Option 2

We support the recommendation of the Forms Working Group on the issue of which forms should be mandatory and which should be recommended only.

Article 14 Effective access to procedures

Option 1 or Option 2

We support Option 2.

Public bodies

We consider public bodies should be entitled to free legal assistance under Option 2. A public body is either acting in place or the creditor or seeking reimbursement of benefits provided to the creditor in lieu of maintenance. States that offer creditors these advantages should benefit from the same level of access to procedures as individual applicants would enjoy. If not, the extra costs incurred by the public body may ultimately be borne by the creditor, or systems that assist the creditor in this way will be disadvantaged and exposed to greater costs. This may negatively impact on their ability to assist future creditors.

If Option 2 is adopted, these States will be required to provide free legal assistance to applicants from States that do not provide creditors with benefits in lieu of maintenance.

Yet they will be unable to secure reciprocal free assistance, simply because they have a system that supports and advantages creditors. It is inequitable that these States will end up bearing a double layer of cost under the Convention.

Option 2 Article 14(5)

We support extending the benefits of this paragraph to debtors. We consider it important to treat both parties in an even-handed way. In our view, a debtor is more likely to comply voluntarily if he or she considers they have been fairly treated.

Article 14 bis Free legal assistance for child support applications

Article 14 bis (1)

We support the deletion of the words in [ ] as we consider that creditors and debtors should be treated on an equal basis, for the reasons outlined in the draft Explanatory Report. As noted above, we also support free services being made available to public bodies.

As noted in our comments under Article 2, we query whether the reference to "maintenance obligations arising from a parent child relationship" is intended to extend to a combined claim for spousal support. In our view, it should only apply to pure child support matters and not include the spousal support component. For one thing, it is likely to encourage the linking of claims to take advantage of the higher level of free assistance offered. Although we feel able to support special arrangements for child support, we would find it more difficult to do so for spousal maintenance.

Article 14 bis (2) a)

We support the removal of the [ ] brackets around paragraph a) and the retention of the text. This would enable States that currently were unable to fund the cost of such tests to have the option of charging. Over time, as testing costs reduce or States are better placed to provide the tests, more States could move to provide the service for free. This seems consistent with the discussion in the Explanatory Report about States and Central Authorities improving their services over time as resources allow. We note that States are still obliged to provide effective access to procedures and Central Authorities have obligations under Article 6.

Article 14 bis (2) b)

As explained at the meeting in May this year, our system is an administrative one. Child support is determined administratively using a statutory formula. There is an opportunity to seek an independent review of that determination within the administrative system. From there, there are rights of appeal into our courts system. Steps up to and including the review are free but after that people would need to apply for legal aid to pursue an appeal. With a formula basis for assessing child support, the scope for substantive appeals is significantly reduced. Our preference, with option 2, would be to include the first review or appeal from the initial decision or determination but exclude subsequent ones. If that is not accepted by other States, then we would want to see the [ ] in this paragraph deleted but the words retained. This would clearly give us the ability to refuse free legal assistance to appeals devoid of merit.

Article 14 bis (2) c)

We prefer option C, on the basis that the other two options are very complex and will be extremely difficult to apply. If these cases are likely to be rare, there seems little benefit in trying to apply complex tests. If Option A or B is favoured by the majority of States, then ideally the tests should be adjusted to make them easier to apply.

Article 14 ter Applications not qualifying under Article 14 bis

We have a query about the placement of this article. Article 2(1) states that Chapters II and III do not apply to spousal support claims. However, the discussion in paragraph 437 of the draft Explanatory Report suggests that this Article applies to a wide class of applications including those for spousal support (presumably including one that has been combined with a claim for child support as per our comments under Article 14 bis(1)). We therefore query whether the placement of this article is correct, or whether Article 2 should be adjusted to clarify that although chapters II and III do not apply to spousal support claims, Article 14 ter does.

CHAPTER V – RECOGNITION AND ENFORCEMENT

Article 16 Scope of the Chapter

Article 16(1)

We understand that this paragraph is drawn from the 1973 Hague Maintenance Convention (Enforcement). However, we would prefer to see additional words added to clarify that settlements or agreements concluded before or approved by a judicial or administrative authority should be enforceable in the same manner as a decision rendered by the authority. This provides an assurance that only agreements or settlements that are enforceable as decisions in the State of origin are enforced as such in the State addressed. It would not be appropriate for an agreement or settlement to have greater effect under the Convention than it would have in the State of origin.

Article 20 Procedure on an application for recognition and enforcement

Article 20(6)

The cross-reference to "paragraph 6" should refer to "paragraph 5".

Article 25 Physical presence of the child or applicant

We support removing the [ ] around this Article and retaining the text.

Article 26 Authentic instruments and private agreements

We agree with the comment in the draft Explanatory Report that it is important to accommodate the trend towards using alternative dispute resolution. We therefore support, in principle, the idea of including authentic instruments and private agreements within the Convention. However, as noted in the draft Explanatory Report, some States do not have authentic instruments and others are unfamiliar with private agreements. There are also potential concerns with arrangements that have not been subject to judicial or administrative scrutiny. We therefore suggest that States should have the ability to "opt-in"

to coverage under this Article either in respect of authentic agreements or private agreements, or both.

CHAPTER VII – PUBLIC BODIES

Article 33 Public bodies as applicants

Please refer to our comments under Article 14 about public bodies.

CHAPTER VIII – GENERAL PROVISIONS

Article 35 Protection of personal information

We suggest that the Explanatory Report could, for the sake of clarity, explain the breadth of the term 'use' as, for example, including disclosure of information, given this latter term is used in Article 37.

Article 37 Non-disclosure of information

While we strongly support the intention behind this Article, we suggest that the Explanatory Report could clarify that this Article is not intended to be used to protect debtors from enforcement action.

Article 40 Costs recovery

To the extent that costs may be charged for services under Article 8, our understanding is that those costs that would be payable by an applicant would normally be paid at the time the services are provided, before any maintenance is collected. We assume that this is not prevented by Article 40.

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KALAYAAN

August 31, 2007

MR. WILLIAM DUNCAN
Deputy Secretary General
Hague Conference on Private International Law
Scheveningseweg 6
2517 KT THE HAGUE
The Netherlands

RE: COMMENT TO THE REVISED PRELIMINARY DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE

Sir;

We find the Draft Convention to be in order. However, to promote the best interest of children, we proposed the following:

Article 2 Scope

In No.3 please delete square brackets.

Consistent with the Convention on the Rights of the Child, this Convention should apply to all children without discrimination.

Article 52 Signature, Ratification and Accession

To give all States the opportunity to be a Party to this Convention, we prefer Option 2 as mode of Ratification and Accession.

Respectfully Submitted.

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Director, Legal Services

cc: Asst. Secretary Evan P. Garcia
Dept. of Foreign Affairs
Manila, Philippines

REPUBLIKA NG PILIPINAS
KAGAWARAN NG KAGALINGANG PANLIPUNAN AT PAGPAPAUNLAD
(DEPARTMENT OF SOCIAL WELFARE AND DEVELOPMENT)
BATASAN PAMBANSA COMPLEX, CONSTITUTION HILLS
QUEZON CITY

Written comments of Polish delegation to the preliminary draft Protocol on the Law Applicable to Maintenance

In general, the Polish Delegation welcomes the proposed Protocol on applicable law to maintenance obligations. Since we achieved a considerable progress in May 2007, only a few questions require further discussion during the Diplomatic Session in November. We believe that in spite of the demanding timetable, we will be able to adopt both the Convention and the Protocol.

1. The Polish delegation fully supports the general objective of the Protocol which is to ensure the application of the law the most appropriate to the actual situation of the creditor. We agree that the best connection is the habitual residence.

   Nevertheless, we would like to make a comment regarding the very notion "habitual residence". Contrary to the *Explanatory notes* drawn up by prof. A. Bonomi (doc. No 33, sec. 33), we do not associate this notion with the factor of stability. Our courts have already interpreted this connection for the purposes of the Convention 1973 and EU regulations. There is a tendency to understand "habitual residence" as a place where the living activity is concentrated regardless of its time frames. Such assignment is based on subjective perception of the person concerned and relies on his/her declaration before a court. Above all, we consider the provision of the article 3 (1) coherent, while a possible appearance of lacuna resulting from the temporary lack of habitual residence remains only a theoretical problem.

   Since there are no provision regarding the applicable law relating to the definition of "habitual residence", we understand that its interpretation will be provided by the law of the court. We are of the opinion that for the purposes of clarity and in order to make this understanding obvious, the solution applied in the EU regulation "Brussel I"[1] might be taken into account.

   However, we have some reservations regarding so-called "mobile conflicts". The approach to this question in the article 3 (2) is difficult to accept for practical reasons.

[1] Council regulation (EC)of 22 December 2000, no 44/2001; article 59: "1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law. 2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State".

Considering the fact that the entire process and cognisance of the case is conducted in accordance with the provisions, principles and purposes determined by the applicable law, the change of "habitual residence" in procedure, should not have effects on the ground of conflict of law. We would like to emphasize that the application of foreign law is already a difficult task for courts. The sudden change(s) of the applicable law would lead to unnecessary extension of procedure and the additional costs. From the debtor point of view, this introduces uncertainty of law.

Furthermore, we cannot fully agree with the reasoning that the logical and imminent consequence of the change of "habitual residence" is the change of applicable law. This circumstance will have impact on the court establishment of facts (ex. the creditor's needs) at the moment of giving a decision, however the decision will be made within the confines of the law relevant to the moment of institution of the proceedings.

2. We agree with the concept of *favor creditoris* regarding children-parents relations. We understand that the change in order of connections in article 4 compared to the articles 4-6 of the Convention of 1973, reflects the logical consequence of renouncing the general rule from article 3.

   As to the paragraph 4, we support its maintaining. Even if the connection of "common nationality" can have little in common with the current situation of both –creditor and debtor, we consider that the national law is the best ground for agreement and understanding of the rights and obligations between parties.

3. We realise how difficult task it is to find the most appropriate connection regarding the specificity of relations between spouses and ex-spouses. We are much in favor with the option 1, while option 3 seems to be too discretionary. Apart from the choice between three given options, we feel it would be useful to adopt an objective and precise connection, even if in some circumstances it will be perceived as arbitrary.

   As to the question of the character of the rule in article 5, we would like to see this provision rather as "an exclusive rule" than "special rule". We envisage the possible contentions when the creditor requests the application of the law according to general rule, while the debtor to the special one. In our opinion, the relations between articles 3 and 5 should be subject of further discussion.

4. We support extension of the categories of debtors entitled to raise defence on the basis that there is no such obligation under the law of habitual residence of the debtor.

5. We would like to emphasize that Polish delegation have no objection against leaving the possibility to make a choice of law regarding maintenance obligations. During previous discussions we were even in favor of opening this possibility to children as having their legal representatives. In this context, we think that the choice of law proposed in article 8 is too limited, and, in consequence, devoid of its practical aspects.

   Following the solution in article 7 (2), we suggest imposing time limits by adding: "[...] at any time *prior to institution of proceedings*".

   We would like to draw your attention especially to restrictions in paragraph 4, which have even further-reaching impact than the public policy clause. In our view, the overall regulation of article 8 deprives the choice of its contractual predictability and effectiveness. In our opinion, the provision of the paragraph 4 can have a discouraging effect to the use of this institution and would lead the parties to the additional contentions regarding applicable law.

6. We would like to express our reservations regarding letters c and d of the article 10. We understand that the list of components governed by the applicable is exemplary, but we have some concerns regarding the institutions of legitimacy to institute the proceedings or limitation/prescription which have also procedural function and their automatic use ("ex officio") would be inappropriate.

7. The Polish delegation considers as extremely important to have the clear rule on public policy, especially when the Protocol does not provide the possibility to extend or restrict its application.

   As to the paragraph 2 of the article 12, we consider this provision to be very useful, however it needs to be stressed that it might have a distorting impact on the understanding of the notion "public policy" used in the *chapeau*. Therefore, we strongly advocate for moving this provision to the article 10.