

## **Proposal by the delegation of the United States of America**

### **REGARDING CHAPTER I (SCOPE AND DEFINITIONS) OF PRELIMINARY DOCUMENT NO. 16 (TENTATIVE DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE)**

The United States makes the following comments and proposals regarding Chapter I:

#### **General Comment**

Our first comment is a general one, and applies to the entire Convention. In our view, a table of contents would be helpful to making the Convention user-friendly. We understand that, traditionally, Hague conventions did not even include titles for individual articles. We note that the most recent Hague conventions, as well as conventions adopted under the auspices of most other international organizations, do include titles. We propose that this Convention go one step further and include a table of contents. If there is any reason why this is a bad idea, we will be very glad to have this explained to us. However, we think that the Convention should be as easy to understand and use as possible. This is a Convention that emphasizes administrative cooperation. It will be used by non-lawyer caseworkers who handle individual child support cases and by private attorneys not familiar with international conventions. Why not make it as easy as possible for them to find the relevant article in the Convention?

#### **Article 1 Object**

1. Enforcement is obviously one of the key steps in the effective recovery of child support. Therefore, the United States supports the removal of the brackets around Article 1(d), and the retention of the bracketed text.
2. Given the list of available applications under Article 10, the United States also suggests the following amendment to Article 1(b): “making available applications for the establishment and modification of maintenance decisions and for other procedures;”

#### **Article 2 Scope**

Children cannot control the circumstances into which they are born. All children should be entitled to maintenance, without regard to the marital status of their parents. Even without the bracketed language, we would interpret Article 2(1) to cover all children. However, if, in order to ensure that the Convention applies regardless of the marital status of the parents, it is necessary to state this explicitly, the United States supports the removal of the brackets in Article 2(1) and the retention of the bracketed text.

#### **Article 3 Definitions**

1. With one caveat, the United States supports the definition of “legal assistance” in Article 3(c), and therefore we support the removal of the brackets and the retention of the bracketed text. The caveat is that we are concerned about the meaning of the phrase “legal representation.” In those U.S. states where legal assistance is necessary in a child support case being handled by a state child support agency, there is no attorney-client relationship between a child support applicant and the child support agency lawyer who will bring the applicant’s case before the tribunal. Thus, the attorney does not “represent” the applicant in the technical, legal sense. Article 13(1) requires States to provide free legal assistance where necessary. If this means that where legal assistance is necessary, all forms of such assistance that are listed in the definition in Article 3(c) must be provided, then the United States could not accept the inclusion of “legal representation.” However, if it means that States must provide whatever form of legal assistance that is necessary to provide effective access to procedures, and need not provide other forms of legal assistance listed in the definition, then the United States can accept the inclusion of “legal representation.” We request that this be clarified.

2. Article 3 (d) and (e) address the question of whether the Convention should use the term “habitual residence,” “residence,” or some other term. The United States supports the deletion of “habitual” wherever the phrase “habitual residence” appears in the Convention. We repeat here the explanation we provided in a submission to the 2005 Special Commission.

3. There are two reasons for our position. First, there is a great deal of inconsistent and confusing caselaw interpreting this term in the context of the Hague Convention on the Civil Aspects of Child Abduction (“Abduction Convention”). There is no need to import this caselaw into the maintenance convention. Second, even if there was clear agreement of what “habitual residence” means in the abduction context, that is not the standard that should be applied in a maintenance context.

4. Every one agrees that the term “habitual residence” is fact specific and thus a determination of a child’s habitual residence depends on the specific facts and circumstances of a particular case. However, there is disagreement concerning the appropriate legal standard within which the factual determination is made. Numerous U.S. cases illustrate this confusion. For example, in Feder v. Evans-Feder, 63 F.3d 217 (3<sup>rd</sup> Cir. 1995), the court set the test as “[H]abitual residence is the place where [the child] has been physically present for an amount of time sufficient for acclimatization and which has a 'degree of settled purpose' from the child's perspective.”). On the other hand, the court in Mozes v. Mozes, 239 F.3d 1067 (9<sup>th</sup> Cir. 2001), focused not on acclimatization but rather on the parents’ intent. The court determined that before a child’s habitual residence can shift there must be a mutual agreement between the parents to abandon an old habitual residence and to acquire a new one. If the parents do not agree then the child’s habitual residence cannot shift. Most recently the Second Circuit in Gitter v. Gitter, 396 F.3d 124 (2<sup>nd</sup> Cir. 2005) put the two tests together, holding that one first looks at the parents’ intent. However, regardless of the parents’ intent, habitual residence may shift if the child is acclimatized to the new location. It is our understanding that this confusing and inconsistent caselaw is not limited to the United States.

5. We do not need a convention that bogs us down in these difficult legal tests. Child support is quite different from child abduction. In child abduction cases we are concerned with the movement of the child. The Abduction Convention recognizes that harm can occur when a child is taken from the place where he or she is primarily connected to a different location. Therefore, it was necessary to interpret “habitual residence” more narrowly than “mere” residence. In this Convention we are not concerned with the movement of the child. We are only concerned with the movement of money, a quite different matter. The purpose of including a reference to “residence” in the maintenance convention is simply to ensure that the person seeking assistance under the convention resides in a Contracting State. The term “residence” in the maintenance context should be interpreted much more broadly than in the abduction context, as our goal is to make it easier, not harder, to recover maintenance.

6. The following example illustrates why the use of “habitual residence” in the maintenance context would be a mistake. Suppose a support order is entered in the United States at a time when all the parties are resident there. The debtor continues to reside there. The creditor and the child leave for a one year residency in Australia. The debtor stops paying. If the creditor sought help from the Australia Central Authority to have the United States enforce its own order against the debtor, the objection would be that the creditor is not habitually resident in Australia. The creditor would have to return to the United States to recover the maintenance.

7. Once it is agreed that “habitual” should be deleted, then the issue is whether there needs to be a definition of residence in the Convention. It may be sufficient to leave this to national law and include language in the Explanatory Report clarifying that “residence” in this Convention is not subject to all of the criteria that have been attached to “habitual residence” in the context of the Abduction Convention.

8. We recognize that this issue arises in different contexts in the draft Convention: Chapter III (Administrative Co-operation) and Chapters IV (Limitation on Proceedings by the Debtor) and V (Recognition and Enforcement). We cannot see any justification for limiting access to the administrative cooperation provisions to applicants who are “habitually resident” or “resident” in the Requesting State. These terms have technical legal meanings that are not relevant to whether a person should be able to make an application under the Convention. Therefore, we endorse the suggestion in footnote 2 of Preliminary Document No. 16, which is that the Article 3(e) definition of “Requesting State” (a term which is only used in Chapter III and Article 40) be changed to “a Contracting State where the applicant lives,” rather than “a Contracting State in which the applicant has his or her [habitual] residence.”

9. With respect to Chapters IV and V, we understand that it would cause a problem for some States if jurisdiction under the Convention could be based on the fact that someone was simply present in or lived in a Contracting State. We could therefore accept the language in Article 3(d), which provides that “residence” includes habitual residence but excludes mere presence.”

10. In order to make the Convention user-friendly for child support workers and private attorneys, we believe it would be useful to have a discussion in the Report, not in the text of the Convention, of the meaning of the term “competent authority,” as contrasted with “Central Authority.”

**Proposal by the delegation of the United States of America**

REGARDING CHAPTER II (ADMINISTRATIVE CO-OPERATION) OF  
PRELIMINARY DOCUMENT NO. 16  
(TENTATIVE DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF  
CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE)

The United States makes the following comments and proposals regarding Chapter II:

**General Comment**

In addition to the comments noted herein, the United States supports the drafting recommendations for Articles 4 and 5 made in the Reports of the Monitoring and Review Sub-Committee and the Country Profiles Subcommittee of the Administrative Cooperation Working Group.

**Article 6 Specific functions of Central Authorities**

1. In the preamble of Article 6(2), the United States prefers the strongest possible language. Of the two choices, “all appropriate measures,” appears to us to be the stronger and thus we prefer it over “most effective measures available.”
2. In Article 6(2)(f), the United States supports the deletion of the brackets and the retention of the bracketed language (“collection and”), so that the text would read that Central Authorities shall take measures “to facilitate the collection and expeditious transfer of maintenance payments.” The Convention should cover every step of the process from the initial request to the receipt of the support by the custodial parent. Given the very flexible language of Article 6, a requirement to take “all appropriate measures” to “facilitate” the collection of payments is not onerous.
3. In Article 6(2)(i), which provides for the attachment of property in order to secure the payment of maintenance, the United States supports the deletion of the brackets and the retention of the bracketed language.
4. In Article 6(2)(j), which provides that the facilitation of service of documents is a function of the Central Authority, the United States strongly supports the deletion of the brackets and the retention of the bracketed language.
5. We understand that some States regard the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters to be the exclusive means of service in all international cases, including child support cases. As a policy matter, we think that that is inconsistent with the goal of our Convention, as stated in the Preamble, of securing the “prompt and effective” recovery of maintenance. In many countries, including the United States, the Central Authority for international child support matters is not the same as the Central Authority under the Service Convention. A U.S. child support caseworker who handles few international cases will not be familiar

with the Service Convention. It would be much faster, simpler and probably cheaper, for the child support Central Authorities to handle service requests in child support cases.

6. However, much as the United States would prefer a requirement that the child support Central Authorities must actually be responsible for service of documents, draft Article 6(j) does not so provide. All it requires is that the child support Central Authorities “facilitate” service. We assume that a State could meet that obligation by providing an applicant with information about how to request service under the Service Convention. Thus, there is no harm in including 6(2)(j). And, it might help States that would like their child support Central Authorities to handle service of document requests, but need a legal basis for them to do so. We note that Article 6(g), which is not bracketed, provides that States must take appropriate measures to “facilitate the obtaining of documentary and other evidence.” Just as with the Service Convention, some States regard the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters to be the exclusive means of obtaining evidence in international cases. We do not see that 6(2)(j) raises any different issues than 6(2)(g).

7. The United States strongly supports the suggestion included in the Reports of the Monitoring and Review Sub-Committee and Country Profiles Sub-Committee of the Administrative Cooperation Working Group that a new sub-paragraph be added to Article 5 that would require Central Authorities to provide a description of the measures they will take to meet their obligations under Article 6(2). We also support their suggestion that the Convention state (perhaps in Chapter VII – General Provisions) that the Country Profile can be used to comply with all of the Convention’s information requirements. The Article 6(2) obligations are so flexibly worded that there may be a vast difference among countries in the level of services provided. This is of great concern to the United States. Requiring States to state specifically what they will do with regard to each obligation under Article 6(2) will at least bring some transparency and accountability to the process.

### **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 or the debtor’s assets) 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). Article 7(2) is important because it might enable a Requesting State to keep the case, 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. Given the very flexible language of the measures under Article 6, and the very flexible nature of the obligations under Article 7, we do not believe that Article 7 will be burdensome.

2. As noted in our Working Paper submitted to the 2005 Special Commission, the United States suggests that Article 7(1) be as broad as possible. Therefore, we support the deletion of the brackets and the retention of the bracketed language. Within the first set

of brackets, we also support adding Article 6(2)(g) and (h) (facilitation of the obtaining of evidence and the provision of assistance in establishing parentage) to the list of measures.

3. The United States also supports the deletion of the brackets in Article 7(2) and retention of the bracketed language.

### **Article 8 Central Authority costs**

We support Article 8(1)'s requirement that Central Authorities shall not charge applicants for their services. We are concerned, however, about Article 8(2), which allows Central Authorities to impose reasonable charges for services "additional to or at a higher level than" those listed under Article 6(2). We realize that, because the obligations listed in Article 6(2) are drafted so flexibly, some Central Authorities will do more or less than other Central Authorities in complying with Article 6(2). And we agree that it should be possible in individual cases for a Central Authority to do more than it usually would, but only if it can charge for the extra service. But we fear that explicitly stating this possibility in Article 8(2) may invite or encourage States to provide only the bare minimum for free, and to charge for numerous Central Authority services. Even without Article 8(2), a State would be free to do what that paragraph allows. We believe it would be safer to delete Article 8(2), in order to avoid the unintended consequence that it will encourage Central Authorities to do less.

**Proposal by the delegation of the United States of America****REGARDING CHAPTER III (APPLICATIONS) OF  
PRELIMINARY DOCUMENT NO. 16  
(TENTATIVE DRAFT CONVENTION ON THE INTERNATIONAL RECOVERY OF  
CHILD SUPPORT AND OTHER FORMS OF FAMILY MAINTENANCE)**

The United States makes the following comments and proposals regarding Chapter III:

**General Comment**

1. In addition to the comments noted herein, the United States supports the drafting recommendations for Article 13 made in the Reports of the Monitoring and Review Sub-Committee and the Country Profiles Sub-Committee of the Administrative Cooperation Working Group. Requiring States to provide a description of how they will provide applicants with effective access to procedures will add transparency and accountability to the process.

2. Before making comments on specific articles in Chapter III, the United States would like to make a general comment that applies to the entire Chapter, and to other parts of the Convention as well. We believe that the Convention does not clearly state which articles apply only to applications made through Central Authorities and which articles also apply to requests made directly to the competent authority (tribunal). This will cause confusion for private attorneys and for tribunals. For example, it is not clear to us whether all of Chapter III is intended to be limited to applications through Central Authorities. The chapeau of Article 6(1) (“Central Authorities shall provide assistance in relation to applications under Chapter III.”) suggests that Chapter III is so limited. On the other hand, Article 9 (“Where the assistance of a Central Authority is requested ...”) suggests that Chapter III covers both types of requests.

**Article 9 Application through Central Authority**

1. We agree in principle with Article 9’s requirement that, generally, if a foreign applicant wants the assistance of the requested State’s Central Authority in making an application under the Convention, then that application must be made through the Central Authority of the requesting State to the Central Authority of the requested State. After all, one of the main purposes of the Convention is to set up a smooth system of cooperation between Central Authorities. In most cases, if a foreign applicant bypasses her or his country’s Central Authority and goes directly to the Central Authority of the requested State, the case processing is likely to be less efficient.

2. However, there may be cases when it makes no sense to insert the extra step of requiring a foreign applicant to go through the requesting State’s Central Authority. What if the applicant is a U.S. citizen residing in Germany, and she wants to ask a U.S. state to establish an order against a U.S. citizen residing in the United States? She may not speak German. There does not seem to be any reason to require her to ask the

German Central Authority to get involved, when she could more easily go directly to the U.S. Central Authority. Sending documents in the “original” German language, plus a translation into English, would also be a needless expense. There may be other situations where it also would not seem appropriate to require the foreign applicant to go through the requesting State’s Central Authority. For example, what if the requesting State’s Central Authority, for whatever reason, is ineffective and does not promptly and accurately complete the application process? One could argue that it would be unjust to prohibit the applicant from going directly to the requested State’s Central Authority. On the other hand, one could argue that the requesting State’s Central Authority should not be rewarded for doing a bad job by having its caseload reduced, but rather should be required to improve.

3. The United States believes that the appropriate solution to this issue is to have the “default” rule be that applications to a Central Authority must be made through the requesting State’s Central Authority, but to add a second paragraph to Article 9 that would provide that the requested Central Authority may, at its discretion, accept applications directly from an individual foreign applicant.

#### **Article 10 Available applications**

1. The United States supports the removal of the brackets and the retention of the bracketed language in Article 10(d).
2. With regard to Article 10(1)(a) and footnote 6, the United States believes that an application to recognize and enforce a decision in a requested State should extend to a decision made in a non-Contracting State which is entitled to recognition in the requested State and we support inserting an Article 10(1)(a) bis to cover this situation. This would cover the situation where State A (a party to the Convention) asks State B (a party to the Convention) to recognize and enforce a decision made in State C (not a party to the Convention) in favor of an applicant who now resides in State A.
3. With regard to Article 10(2) and footnote 9, we support adding to the available applications an application for a potential debtor to request the establishment of a decision. This is consistent with the concept of encouraging voluntary payments, which many delegations have supported.

#### **Article 11 Application contents**

1. The United States commends the Forms Working Group for its comprehensive report and development of recommended standardized forms. We believe that the use of uniform forms in cases that are processed through Central Authorities would greatly improve the efficiency and effectiveness of international child support case processing. Therefore, we support a provision that states that, for at least some of the forms under the Convention, the use of forms annexed to the Convention is mandatory in cases processed through Central Authorities. We note that the Forms Working Group supports the use of mandatory forms for the application for Recognition or Recognition and Enforcement.

We would like to hear the views of the Forms Working Group as to which other forms it believes should be mandatory. If there are to be mandatory forms, there must also be a provision for an expedited process to amend those forms.

2. We support the recommendations of the Forms Working Group with regard to Article 11. In Article 11 1(b) of Option 1, we support the deletion of the brackets and the retention of the bracketed language. However, we are concerned about the need to maintain the confidentiality of the applicant's personal information. In the report of the Forms Working Group, its members also raised a concern about the confidentiality of personal information. We suggest that a statement be added to Article 11 that makes it clear that all of this information is subject to the requirements of Articles 33, 34, and 35 regarding protection of personal information, confidentiality, and nondisclosure. In addition, we would like clarification of whether "address" necessarily means the residential address of the applicant. Could applicant's "address" be interpreted to allow listing the address of the Central Authority? That would alleviate some of our concerns about protecting the applicant's personal information in domestic violence cases.

3. We support the deletion of the brackets and the retention of the bracketed language in Article 11 (1) (f) and (g) and Article 11(2)(c).

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

The United States supports the deletion of the brackets and the retention of the bracketed language in Article 12(4) and (8). Article 12(4)'s requirement that the requested Central Authority provide a status report within 3 months of the acknowledgement adds a helpful degree of accountability which should make case processing more efficient. Article 12(8), which limits the requested Central Authority's ability to reject an application to extremely rare circumstances, is important to the overall goal of reducing the number of times an application is substantively reviewed.

### **Article 13 Effective access to procedures**

1. Footnote 18 asks whether Article 13 should apply to applications by public bodies. We certainly believe that it should.

2. Footnote 18 also asks whether Article 13 should apply to direct applications. Our first recommendation is that the text clarify what is meant; we find the terminology "direct applications" confusing. In the United States, a "direct application" refers to an application made by an individual applicant directly to the requested Central Authority, without the involvement of the requesting Central Authority. Such an application differs from a request filed by a private attorney and forwarded directly to the competent authority (the tribunal) in the requested State, without involvement of a Central Authority. We refer to these latter cases as "direct requests." The Convention seems to use the term "direct application" to refer to both types of cases. In our comments we will

use the term “applications” to refer to cases that go through Central Authorities, and the term “requests” to cases that go directly to a competent authority.

3. Article 13’s rules should not apply to requests made directly to the competent authority. We note that in some States, the competent authority may be the same entity that acts as the Central Authority, but these are two separate functions. It could pose great difficulties for a court, for example, if it was required to provide all the services that an applicant could expect to receive from a Central Authority in cases processed through the Central Authorities.

4. The United States remains very concerned that if applicants are required to pay any significant costs for services under the Convention, that will be tantamount to the denial of services to many if not most U.S. applicants. In our experience, most creditors who seek the assistance of U.S. child support agencies are people of limited means. The ex-wife of a movie star will usually hire a private attorney and not seek the assistance of a government agency. For applications made through Central Authorities, we believe that virtually all services (legal, administrative and any other type) should be at no or minimal cost to the creditor. As currently drafted, Article 13 fails to address adequately this concern.

5. One way to alleviate our concern would be to delete the current text of bracketed Article 13 (5) and substitute language similar to that included in footnote 19. States’ means tests vary widely, and not just due to States’ different levels of resources. In our bilateral child support negotiations, the United States has learned that many developed States with standards of living comparable to that of the United States have means tests set so low that few if any U.S. applicants – even those whose income is below the poverty line – would qualify for legal assistance. We therefore suggest that, if there is to be a means test, it must be the means test of the requesting State. We propose the following:

“Any applicant who is entitled under the same circumstances to complete or partial legal assistance or exemption from costs or expenses in the requesting State shall be entitled in any proceedings under this chapter to equivalent assistance or exemption in the requested State.”

Note that, in addition to using the means test of the requesting State, our proposal would also expand the provision of assistance to all proceedings under the chapter (not just recognition and enforcement) and would cover all “applicants” (not just creditors). Applicant debtors should have equal access to services under the Convention, especially since they are limited by the Convention in where they can seek a modification of the decision. Having a child support system that is fair to both creditors and debtors will promote respect for the system, and will encourage voluntary compliance.

6. Another approach to making sure that no applicant is denied effective access to procedures because he or she cannot afford to pay the costs is to have a two-pronged rule. The general, “default” rule must be that all services, including legal assistance, are

provided free of charge to the applicant; however, there could be exceptions for specific services, such as genetic testing. Other alternatives could include providing all services free of charge to any individual who has in the past received, or is currently receiving, public assistance in the requesting State.

7. The United States is open to suggestions from other countries about how to ensure effective access to procedures for all applicants. The current text of Article 13 is inadequate. The United States cannot join a Convention that would be a barrier to most U.S. applicants.

**Proposal by the delegation of the United States of America**

REGARDING CHAPTER IV (RESTRICTIONS ON DEBTORS BRINGING  
PROCEEDINGS)  
OF PRELIMINARY DOCUMENT NO. 16  
(TENTATIVE 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 14**

1. The United States favors eliminating the reference to “debtor” in the title of the Chapter and in the title of Article 14. Thus, we propose that the Chapter be titled “Restrictions on Bringing Proceedings” and that Article 14 be titled “Limit on Proceedings.” In the United States, debtors and creditors have equal access to legal forums that hear proceedings for a new or modified decision. We can accept Article 14 because the rule it outlines is consistent with that in our domestic law, which places a similar restriction whenever either party or child resides in the State of origin. However, by having a Chapter or Article title that singles out debtors, the Convention unnecessarily raises due process issues within the United States that could easily be avoided by elimination of a few words in that title.

2. The United States supports the concept behind Article 14(1), which is an effort to limit multiple orders to the greatest extent possible. However, as drafted, this paragraph could be read as prohibiting a debtor from bringing proceedings for a new or modified decision even when the debtor’s State would not recognize the original order. This would raise constitutional concerns for the United State. If a court in the United States cannot recognize the original decision, as a legal matter the decision does not exist; it would be a denial of due process to then prohibit a debtor from seeking to establish paternity and a child support order if there was no valid order in existence. To address this concern, we propose adding the following as a new subparagraph to Article 14(2):

“The previous paragraph shall not apply –

...

d) if the original decision cannot be recognized and enforced in the State where the debtor brings proceedings for a new or modified decision.”

**Proposal by the delegation of the United States of America**

REGARDING CHAPTER V (RECOGNITION AND ENFORCEMENT)  
OF PRELIMINARY DOCUMENT NO. 16  
(TENTATIVE 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 15 Scope of the chapter**

1. The United States supports the deletion of the brackets and the retention of the bracketed language dealing with retroactive maintenance in Article 15(1).
2. With respect to Article 15(4), we reserve our opinion until we have more information about private agreements and authentic instruments.
3. With respect to Article 15(5), we support the concept that the streamlined rules on recognition and enforcement established in this chapter should also apply to requests made directly to the competent authority. We suggest, however, that “application for recognition and enforcement made directly to a competent authority” should be changed to “request for recognition and enforcement made directly to a competent authority” in order to avoid confusing this request with applications to Central Authorities made under Chapter III. Requests made directly to the competent authority may very well not be in the same format as “applications” under Chapter III, as the competent authority may require a different format.

**Article 16 Bases for recognition and enforcement**

1. For the reasons explained in our comments on Chapter I, Article 3, we support deletion of “habitually” everywhere it appears in Article 16.
2. In Article 16(1)(e), we can accept the deletion of the brackets and the retention of the bracketed language so long as Article 16(2) allows a State to make a reservation with respect to Article 16(1)(e). It is a basic principle of family law in the United States that parties cannot stipulate jurisdiction that would not otherwise exist. For jurisdiction to exist in a family law case there must be a nexus between the parties and the forum.
3. In Article 16(1)(f), we can accept the deletion of the brackets and the retention of the bracketed language, so long as Article 16(2) allows a State to make a reservation with respect to Article 16(1)(f). Jurisdiction based on “personal status” could be, in practice, jurisdiction based on the fact that the creditor is resident in the State entering the decision. That would raise constitutional concerns for the United States, as we have explained before with respect to our concerns about creditor-based jurisdiction in Article 16(1)(c).

4. In Article 16(3) we support the deletion of the brackets around “factual” and the retention of the bracketed language. This paragraph is in the Convention primarily to clarify the United States’ obligation to recognize and enforce a foreign decision based on the creditor’s residence if there are any facts in the case that would support jurisdiction under U.S. law. As this paragraph is directed at the United States, we believe it would be appropriate to draft it so that it will be understood by U.S. tribunals. The use of the phrase “factual circumstances” is clearer than simply “circumstances.”

5. We agree with the concept expressed in Article 16(4), but we are concerned that the drafting of the second sentence could be confusing. Our understanding is that this Article is intended to provide in the first sentence that if the United States, for example, is unable to recognize a decision because it has made a reservation to creditor-based jurisdiction under Article 16(2), then it must take appropriate measures to establish a new decision for the applicant. We support this concept, so long as it is limited to child support.

6. Our understanding is that the second sentence of Article 16(4) is intended to acknowledge that the first sentence only applies to applications that are made through Central Authorities, and not to requests for recognition and enforcement made by an individual applicant directly to the competent authority in the requested State, without the assistance of any Central Authority. As explained above in our comment on Article 15(5), the use of the phrase “direct applications for recognition and enforcement” is confusing. A creditor who is making a request directly to the competent authority is not making an “application” under Article 10, which would go through a Central Authority.

7. To avoid confusion, we suggest that the second sentence of Article 16(4) be deleted, and that the following be inserted in its place:

“The preceding sentence applies only to applications made through Central Authorities.”

8. If Article 16(5) is limited to the parent-child relationship, as suggested in footnote 24, the United States can accept it, so long as Article 44 (Reservation on scope) permits a State to make a reservation with regard to children over the age of 18.

### **Article 19 Procedure on an application for recognition and enforcement**

1. For the reasons discussed above with respect to Article 15(5), we suggest that the title to this article be changed to “Procedure on an application or a request for recognition and enforcement.”

2. Article 19 speaks of a “determination” made by a competent authority in the requested State that a decision may be recognized and enforced. This determination is based on a review of the decision, which occurs prior to notice to the parties and prior to the submission of any evidence. In some countries, including the United States and Canada, there is no such “determination.” In fact, as noted in our comments, there is no review at this early stage. Rather, the foreign decision is registered for recognition and enforcement. Immediately upon registration the order is enforceable. Because the

registration process, as used in States such as Canada and the United States, is an even more expedited process for recognition and enforcement than that set forth in Article 19, it is critical that the language in Article 19 be flexible enough to accommodate it. We therefore suggest adding a reference to “registration for recognition and enforcement” everywhere in Article 19 where there is a reference to a “determination” of whether the decision may be recognized and enforced.

3. Article 19(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 19(6-7)), 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. Our preference is that there be no review at this stage. At most, the review at the Article 19(4) stage should be limited to the grounds set forth in Article 18(a) (public policy).

4. We are very concerned that if the *ex officio* review (i.e., the *exequatur* process) is expanded to include the reasons specified in Articles 16 and all of 18, the result could be a significant delay in enforcement.

5. We ask those States that support an expanded *ex officio* review to consider what practical impact that will have. At the Article 19(4) stage, the competent authority will only have before it the Application (or request) and the decision itself. No additional evidence is permitted, and – under the Convention -- the respondent will not at that point even have notice of the application. Thus, it is very unlikely that a competent authority will have any way of knowing whether any of the Article 16 or 18 reasons for refusing recognition exists. The only impact of building in a separate *ex officio* review at this stage is delay.

6. Perhaps the concern of some States is not for cases that go through the Central Authorities (because those applications will be reviewed by both Central Authorities under Article 12), but rather for requests that are made directly to the competent authority. If that is the case, we would prefer to see Article 19(4) not apply to direct requests, rather than broadening the level of *ex officio* review.

7. In Article 19(5), we would like some clarification of what the phrase “on the ground[s] of [fact and] law” adds to Article 19(7)’s listing of the grounds for challenge.

8. Regardless of how the “habitual” residence question is resolved in other articles of the Convention, there is no reason to include “habitual” in Article 19(6). This paragraph gives a contesting party who resides in a State other than the State that makes the Article 19 determination a longer time to lodge a challenge than is allowed for a party who resides in the same State. With respect to the actual number of days within which the challenge must be filed, we believe that 30 days for a challenger in the same State and 60 days for a challenger outside that State are appropriate.

9. We propose adding an Article 19(8) bis to explicitly state that the parties must be notified of the outcome of the challenge or appeal.

10. We support the deletion of the brackets around Article 19(9) and retention of the bracketed language.

11. With all of the changes to Article 19 that we have suggested, it would read as follows:

**Article 19 Procedure on an application or a request for recognition and enforcement**

1. Subject to the provisions of this Chapter, the procedures for recognition and enforcement shall be governed by the law of the State addressed.
2. Where an application has been made through Central Authorities in accordance with Chapter III, the requested Central Authority shall promptly refer the application to the competent authority for determination of whether the decision may be recognized and enforced in the requested State, or for registration of the decision for recognition and enforcement in the requested State. If it is the competent authority, the Central Authority shall make such determination or register the decision.
3. The competent authority shall make the determination or register the decision without delay. Upon determination or upon registration of the decision for recognition and enforcement, the decision is enforceable.
4. Recognition and enforcement, or registration for recognition and enforcement, may [not be refused] [be refused only for the reasons specified in Article 18(a)]. At this stage neither the applicant nor the respondent is entitled to make any submissions.
5. The applicant, directly or through the Central Authority of the requesting State, and the respondent shall be promptly notified of the determination or registration made under paragraphs 2 and 3 and shall have the right to challenge or appeal on the ground[s] of [fact and] law against that determination or registration.
6. A challenge or an appeal is to be lodged within [30] days of notification of the determination or the registration. If the contesting party is resident in a Contracting State other than that in which the determination or registration was made, the challenge or appeal shall be lodged within [60] days of notification.
7. A challenge or appeal may be founded only on the following –
  - a) the grounds for refusing recognition and enforcement set out in Article 18;
  - b) the bases for recognition and enforcement under Article 16.

8. A challenge or an appeal by a respondent may also be founded on the fulfilment of the debt if the recognition and enforcement was only applied for in respect of payments that fell due in the past.

8bis. The applicant, directly or through the Central Authority of the requesting State, and the respondent shall be promptly notified of the decision following the challenge or the appeal.

9. Further appeal is possible only if permitted by the law of the State addressed.

## **Article 20 Documents**

1. For the reasons explained in our comments on Article 15(5), we propose adding “or request” in the chapeau.

2. With respect to the two options for Article 20(a), we support a middle ground. Allowing the submission of an abstract (i.e., excerpts, not a summary) of a maintenance decision, rather than the entire decision, could save significant translation costs. In many cases, the entire decision may cover divorce, custody, access, and property division, as well as maintenance. In such cases, translating the entire decision serves no purpose. Therefore, we support the alternative proposal for Article 20(a). However, there may be tribunals that require the entire decision. Rather than delay proceedings while a copy of the decision is obtained, we recommend that, in addition to the abstract, the entire decision should also be submitted. However, the applicant need only send the decision in its original language. If, in a particular case, the requested State requires a translation of the entire decision, the requested State would have to pay for the translation. Thus, both options should be included as mandatory in Article 20. Article 39 should be amended to require a translation of the decision only if requested by the requested State.

3. In Article 20(b), we support the deletion of the first set of brackets and retention of the bracketed language. In keeping with the goal of making the process as simple and quick as possible, the inclusion of a certificate of enforceability should not be required for decisions sent to countries, such as the United States, that do not require them. Information as to whether a State requires a certificate of enforceability can be included in the Country Profile. The language in the second set of brackets should be deleted, as it is redundant: if an administrative decision does not meet the requirements of Article 15(3), then it is not covered by the Convention, and obviously Article 20 will not apply.

4. We support the deletion of the brackets in Article 20(d) and the retention of the bracketed language.

5. Information about indexation or automatic adjustment should be included. However, the requesting State should make the calculation, as there is too great a risk of error if the requested State makes it. Therefore, we suggest that Article 20(e) be revised as follows:

“in the case of a decision providing for automatic adjustment by indexation, a document providing the basis for the indexation, supplemented by a statement from the State of origin of the adjusted amount and its effective date.”

6. Article 20(f) should be consistent with the language used in Article 13. Thus, we suggest it be revised as follows:

“where necessary, documentation concerning the entitlement of the applicant to complete or partial legal assistance or exemption from costs or expenses in the State of origin.”

#### **Article 24 Physical presence of the child or applicant**

The brackets should be removed and the bracketed language retained. 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 25 Authentic instruments and private agreements**

The United States is unfamiliar with “authentic instruments.” Moreover, a private agreement that is not incorporated into a judicial decision is not generally enforceable as a judicial decision in the United States. We are concerned about the possibility of abuse of unequal bargaining power, or the possibility of parents bargaining away the rights of the child. If authentic instruments and private agreements are to be covered by the Convention, we need to consider 1) whether Article 25(1), which limits the grounds for refusing to recognize these agreements/instruments to public policy, is too narrow; and 2) whether the Convention should apply to all such agreements/instruments or only to those where the application for recognition and enforcement is made through Central Authorities and not directly to the competent authority. In particular, we would be interested in learning the grounds on which such agreements/instruments can be challenged in the States that give effect to them as decisions.

**Proposal by the delegation of the United States of America**

REGARDING CHAPTER VI (ENFORCEMENT BY THE REQUESTED STATE)  
OF PRELIMINARY DOCUMENT NO. 16  
(TENTATIVE 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 VI:

**Article 29 Enforcement measures**

We strongly support deletion of the brackets and retention of the bracketed language. The measures of enforcement specified in (a) through (h) are not mandatory. Nevertheless, we think that including them in the Convention serves a useful hortatory purpose. Without effective enforcement remedies, support will not reach needy families – no matter how strong the rest of a State’s child support system is. Inclusion of the examples within Article 29 may inspire States to review their laws to determine if more effective enforcement remedies are needed.

**Proposal of the United States of America**

REGARDING CHAPTER VII (PUBLIC BODIES)  
OF PRELIMINARY DOCUMENT NO. 16  
(TENTATIVE 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 VII:

**Article 32 Public bodies as applicants**

1. In Article 32(1), following the words “The reference to creditor in Article 10(1),” the United States recommends the addition of “and to applicant in Article 13(5).” (We refer to the text of Article 13(5) with the amendments proposed by the United States.) This addition would clarify that a public body is covered by the provisions for free legal assistance and exemption from costs and expenses.
2. The bracketed language in Article 32(3) should be deleted. It is redundant, as this point is covered by Article 32(2), as noted in footnote 35.
3. We support the recommendation made by the Report of the Monitoring and Review Sub-Committee of the Administrative Cooperation Working Group that, in Article 32 (5), the phrase “upon request” should be inserted before “furnish any document necessary.” The United States, for example, would normally not require any proof that the public body has the right to seek reimbursement of benefits it has provided the creditor. The bracketed language within Article 32(5) should be deleted, as it is superfluous if the bracketed language in Article 32(3) is deleted.

## **Proposal of the United States of America**

### REGARDING CHAPTER VIII (GENERAL PROVISIONS) OF PRELIMINARY DOCUMENT NO. 16 (TENTATIVE 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 VIII:

#### **New Article on Country Profiles**

The United States thanks the Country Profiles Sub-Committee of the Administrative Cooperation Working Group for the excellent work it has done developing the Country Profile document. The use of this document by Contracting States will result in a huge improvement in the efficiency and effectiveness of international child support case processing. We note that the Country Profile closely follows the information requirements that the Monitoring and Review Sub-Committee of the Administrative Cooperation Working Group recommends be included in the Convention. The need for this information and the need for the information to be submitted in a standardized format are so important to the success of the Convention that the United States believes that there should be a provision in the Convention that states that States can comply with the obligation under specified articles to provide certain information by completing the Country Profile form. There would also have to be included a provision for expedited amendment of the form.

#### **Article 33 Protection of personal information**

Strike “they were” and insert “it was.”

#### **Article 34 Confidentiality**

The reference to any authority processing “such” information is unclear. It should be changed to processing “personal” information. Alternatively, Articles 33 and 34 could be combined and then “such” could be retained.

#### **Article 35 Non disclosure of information**

1. The title should be either “Nondisclosure” or “Non-disclosure.”
2. It is not clear in the first sentence which State is entitled to make the determination that certain information should not be disclosed to the respondent. We believe that the protection should be broad and that either State should be able to make a determination that certain information should not be disclosed because of risk of harm to a party or child. For example, perhaps the requested State becomes aware of information not known to the requesting State that suggests that the respondent is a threat to the applicant or child. The requested State should be able to determine that location information should not be disclosed to the respondent. Each State should have to comply with such a determination by the other. Thus, the concept of Article 35 should be:

a. If the requesting State believes that disclosure of certain information to the respondent would endanger any party or child, it may instruct the requested State not to make such a disclosure.

b) The requested State must comply with instructions from the requesting State not to disclose certain information.

c) Even if the requesting State has not instructed the requested State not to disclose certain information, the requested State may conclude on its own that the information should not be disclosed, and may so instruct the requesting State.

d) The requesting State must comply with instructions from the requested State not to disclose certain information.

### **Article 39 Language requirements**

1. In Article 39(1), the brackets should be removed and the bracketed language retained.

2. As mentioned in the U.S. comments on Article 20(a), we suggest that an abstract of the decision as well as the entire decision be submitted with an application. We also propose that the decision not be translated unless the requested State asks for a translation, in which case the requested State would bear the cost. Article 39(1) would therefore need to be amended as follows:

“Any application and related documents shall be in the original language, and, except for the maintenance decision, shall be accompanied by a translation ....”

A new sentence should be added at the end of Article 39(1):

“If requested, the maintenance decision shall be accompanied by such a translation.”

3. We support the deletion of the brackets and the retention of the bracketed language in Article 39(1).

### **Article 40 Means and costs of translation**

1. We support the deletion of the brackets and the retention of the bracketed language in Article 40(1).

2. In keeping with our proposal that the default rule should be that only the abstract of the decision needs to be translated, we suggest that the following new paragraph should be added at the end of Article 40:

“4. If the requested State requires a translation of the entirety of the maintenance decision, in addition to the abstract of the decision, it shall bear the cost of such translation.”

#### **Article 44 Reservation on scope**

1. In order for the United States to become a party to the new Convention, we would need to limit the scope of its application to child support, with two additions: first, we could agree to apply the Convention to requests (whether made through Central Authorities or directly to the competent authority) for recognition and enforcement of spousal support orders where there is also a child involved in the case; and second, we could also agree to accept the application of Chapters IV and V on Recognition and Enforcement (but not the chapters dealing with administrative cooperation) to “spousal-only” support orders, i.e., orders which do not involve a child.
2. The reasons for this position are grounded in our federal system. Under the U.S. Constitution, any power not explicitly granted to the federal government is reserved to the individual states. Family law, including maintenance, is one of those matters that traditionally has been governed by the laws of the individual U.S. states. Indeed, one of the reasons why the United States is not a party to the New York convention is that when it was concluded, the federal government did not play a major role in child support enforcement and it would have been difficult for the federal government to agree to a child support treaty that bound all of the states.
3. Obviously much has changed. The United States has a number of federal-level bilateral child support agreements, and we are taking an active role in the negotiation of this new Convention. What has made it much easier legally and politically for the federal government to take such an active role in international child support is the fact that in recent years the federal government has, by means of conditions imposed on the granting of federal funds to state child support programs, been able to impose various requirements on state child support systems. Thus, the federal government can require the individual states to apply the Convention to child support cases. As all U.S. states recognize a spousal support obligation, we can also agree to apply the Convention’s recognition and enforcement provisions to spousal support only cases that are submitted directly to the competent authority and do not require the services of the Central Authority.
4. We cannot undertake an obligation to apply the Convention to maintenance obligations based on any other type of relationship. We, therefore, will take a reservation to other family obligations. However, our reservation will be worded so that if an individual U.S. state chooses to recognize and enforce such decisions under the Convention, it may do so. Pursuant to the wording of our reservation, such actions would not invoke the services of the U.S. Central Authority

#### **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. However, the proposals of the Administrative Cooperation Working Group to add language to the Convention requiring States to provide, before they become parties, a detailed description of exactly how they will comply with their obligations under, for example, Articles 6(2) and 13, will alleviate some of our concern. Those proposals at least add transparency and accountability to the process.

#### **Article 54 Reservations**

Article 54(4) provides that a State that has made a reservation is not entitled to claim the application of the Convention to matters that are excluded by its reservation. The Vienna Convention on the Law of Treaties has a similar provision on the presumed reciprocity of reservations. We are concerned that Article 54(4), when coupled with Article 16(2), which allows a State to make a reservation as to one or more of the indirect bases of jurisdiction, could have a serious unintended consequence. For example, the United States will make a reservation with respect to Article 16(1)(c) (jurisdiction based on creditor's residence), because that basis does not meet U.S. due process requirements that there be a nexus between the defendant and the forum. There may be a case where the United States asks another State to recognize and enforce a U.S. decision that had a jurisdictional basis that the other State considers exorbitant. Some forms of U.S. long-arm jurisdiction (e.g., so-called "tag" jurisdiction, in which service on the defendant while he is present in the United States, even if only to change planes at a U.S. airport, is sufficient to subject him to U.S. jurisdiction) may be considered exorbitant by other States. In such a case, the creditor will likely be a resident of the United States, even though that will not be the basis of the U.S. court's jurisdiction over the debtor. We would expect the other State to recognize and enforce the U.S. order in such a case. We would not want Article 54(4) to permit a State to refuse to recognize and enforce a U.S. order where the only basis of jurisdiction that is acceptable to the requested State is the fact that the creditor resided in the United States. That would undermine the purpose of the Convention, which is to recognize and enforce more child support decisions. Therefore, if our interpretation of Article 54(4) is correct, a provision should be added to clarify that reservations with regard to Article 16 should not be subject to Article 54(4)'s reciprocity rule.

#### **Article 55 Declarations**

The United States supports the proposals made by the Administrative Cooperation Working Group with regard to this Article.