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**RESPONSE OF
THE UNITED STATES OF AMERICA
TO**

**ÉTUDE DE FAISABILITÉ SUR L'ADMINISTRATION DU DROIT ÉTRANGER
QUESTIONNAIRE**

préparé par le Bureau Permanent

* * *

**FEASIBILITY STUDY ON THE TREATMENT OF FOREIGN LAW
QUESTIONNAIRE**

drawn up by the Permanent Bureau

*Document préliminaire No 25 d'octobre 2007
à l'intention du Conseil d'avril 2008
sur les affaires générales et la politique de la Conférence*

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*Preliminary Document No 25 of October 2007
for the attention of the Council of April 2008
on General Affairs and Policy of the Conference*

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Questionnaire

to assess the practical difficulties in accessing the content of foreign law

and the need for the development of a global instrument in this area

Introduction

In April 2006, the then Special Commission (now called Council) on General Affairs and Policy of the Hague Conference on Private International Law (the "Hague Conference") invited the Permanent Bureau to prepare a feasibility study on the development of a new instrument for cross-border co-operation concerning the treatment of foreign law.¹

With a view to beginning the assessment of the need for such an instrument, the Permanent Bureau organised a meeting of experts in this area with either a commercial law or family law perspective. This meeting took place on 23-24 February 2007. In preparation for the meeting, the experts were provided with a succinct analysis document drawn up by the Permanent Bureau. At the meeting, the experts were also provided with summary tables on the status of and access to foreign law in a sample of jurisdictions and a sample of legal norms in relation to the treatment of foreign law. A Report on the meeting was prepared for the attention of the Council of April 2007.² The experts emphasised "that there should be no attempt to comprehensively harmonise the different approaches to the treatment of foreign law, as there is no need or likelihood of success for harmonisation."³ The experts acknowledged, however, "that there is clearly a need to facilitate access to foreign law" and "supported the Permanent Bureau's continued work in the area."⁴ The meeting concluded that further work was required in order to reach an affirmative or negative answer regarding the feasibility of establishing an efficient and effective instrument under the auspices of the Hague Conference. In particular, the experts suggested that a Questionnaire be prepared as part of a more elaborate scientific study.⁵

At its April 2007 meeting, the Council invited the Permanent Bureau to develop a Questionnaire, as suggested by the meeting of experts, with a view to identifying practical difficulties in accessing the content of foreign law and determining the areas of foreign law for which information is required.⁶ This questionnaire would also invite Members to comment on the models suggested in the Report on the meeting of experts and their possible implementation.⁷ Finally, the questionnaire should

¹ See Prel. Doc. No 11 of June 2006, "Conclusions of the Special Commission of 3-5 April 2006 on General Affairs and Policy of the Conference", for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, para. 4. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs".

² See Prel. Doc. No 21 A of March 2007, "Feasibility Study on the Treatment of Foreign Law – Report on the meeting of 23-24 February 2007", prepared by the Permanent Bureau, for the attention of the Council of April 2007 on General Affairs and Policy of the Conference. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs". Annex 1 of this document contains a list of the experts who attended the meeting. Annex 2 contains the succinct analysis document drawn up by the Permanent Bureau and which formed the basis for the discussions at the experts meeting. The summary tables and sample of legal norms prepared for the experts meeting are reproduced in Prel. Doc. Nos 21 B and 21 C respectively; both documents are of March 2007 and are also available at < www.hcch.net >, under "Work in Progress" then "General Affairs".

³ See *ibid.*, Prel. Doc. No 21 A, 3rd para. of the introduction.

⁴ *Ibid.*, 1st para. of the conclusion.

⁵ *Ibid.*

⁶ See Prel. Doc. No 24 of July 2007, "Report of the Council on General Affairs and Policy of the Conference of 2-4 April 2007", para. 5. This document is available at < www.hcch.net > under "Work in Progress" then "General Affairs".

⁷ See Prel. Doc. No 21 A of March 2007, *supra*, note 2, for a description of the models: "Information Sheets and Country Profile Model"; "Network of Experts and Specialised Institutes Model"; "Direct Judicial Communications Model"; and "Revision of the Co-operative Mechanisms of the London and Montevideo Conventions". See also *ibid.*, Ann. 2, paras 54-65.

seek to identify in particular whether there is a practical need for the development of such an instrument.

The following Questionnaire addressed to the Members of the Organisation has been prepared for that purpose. Conscious of the short delay to respond to this Questionnaire, the Permanent Bureau invites Members of the Organisation to bring to the attention of their judicial authorities Questions Nos 15 to 28.

The Permanent Bureau would very much appreciate receiving your answers (in either English or French) **before 11 January 2008** in order to have sufficient time to prepare, before the end of February 2008, a Report summarising the results of this consultation for the attention of the Council of early April 2008. Answers should be sent by e-mail to < secretariat@hcch.net > with the following heading and indication in the subject field: "Questionnaire concerning the Treatment of Foreign Law – [name of the Member of the Organisation]". Your cooperation in responding to this Questionnaire is very much appreciated.

Identification

Name of the Member State: United States of America

For follow-up purposes

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Part I – General Questions

Please answer the following general questions with regard to the *European Convention of 7 June 1968 on Information on Foreign Law* (the “London Convention”), the *Inter-American Convention of 8 May 1979 on Proof of and Information on Foreign Law* (the “Montevideo Convention”), the *Convention of 22 January 1993 on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters* (the “Minsk Convention”) and any bilateral treaty on proof of and / or information on foreign law (“bilateral treaty”).

In this Questionnaire, the term “foreign law” encompasses both foreign internal (substantive) law and foreign private international law.

PRELIMINARY COMMENT: The Questionnaire refers to “State” in terms of country. In the United States, the individual constituent states have their own system of courts and procedures, as well as their own rules of evidence for these courts. So do the District of Columbia and the territories and possessions. While the majority of states tend to follow the federal procedural system at least to some extent, there are many variations. In responding to this Questionnaire, the general reference will be to the federal system, rather than the variations.

In the federal courts, the proof of foreign law is largely governed by Federal Rule of Civil Procedure 44.1. Since 1966 the issue has been treated as a matter of law, not fact, with limited formal or evidentiary requirements for consideration by a court.

Rule 44.1 provides:

Determining Foreign Law

A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, a court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.

This model is also used in the court procedural systems of more than half the states.

In both rules of procedure and evidence, as well as case law, the individual state courts refer to sister state law as “foreign law,” a practice which allows some confusion in terminology. In addition, many of the individual states have adopted versions of a model law that provides for certification of an uncertain question of state law from the federal court to the highest court of a state. This Questionnaire does not address these cases involving only questions of internal law.

- 1) Is your State Party to:
 - a) The London Convention⁸ YES NO
 - b) The Montevideo Convention⁹ YES NO

⁸ This Convention is not restricted to Member States of the Council of Europe (Art. 18). See Prel. Doc. No 21 C, *supra*, note 2, for the text of that Convention.

- c) The Minsk Convention¹⁰ YES NO
d) Any bilateral treaty YES NO
(Please indicate the number of bilateral treaties concluded: ____)

2) If not, does your State intend to become in the near future a Party to:

- a) The London Convention YES NO
b) The Montevideo Convention YES NO
c) The Minsk Convention YES NO
d) or conclude any bilateral treaty YES NO

3) Please indicate (if applicable) the number of requests received in 2006 and the average number of weeks taken to respond to the requests under: **N/A**

- a) The London Convention No of requests: ____ No of weeks: ____
b) The Montevideo Convention No of requests: ____ No of weeks: ____
c) The Minsk Convention No of requests: ____ No of weeks: ____
d) Any bilateral treaty No of requests: ____ No of weeks: ____

4) Please indicate (if applicable) the number of requests that emanated from the judicial authorities in your State in 2006 and the average number of weeks taken to respond to these requests under: **N/A**

- a) The London Convention No of requests: ____ No of weeks: ____
b) The Montevideo Convention No of requests: ____ No of weeks: ____
c) The Minsk Convention No of requests: ____ No of weeks: ____
d) Any bilateral treaty No of requests: ____ No of weeks: ____

5) Do you foresee an increase in the number of requests referred to in: **N/A**

- a) Question No 3 (incoming requests)
 YES
 NO
b) Question No 4 (outgoing requests)?
 YES
 NO

6) If so, in which areas of the law? Please specify for each of the sub-questions: **N/A**

- a)
b)

7) Please indicate, if applicable, in bullet form to what extent you are satisfied with the instruments referred to in Question No 1: **N/A**

⁹ This Convention is not restricted to Member States of the Organisation of American States (Art. 13). See Prel. Doc. No 21 C, *supra*, note 2, for the text of that Convention.

¹⁰ The Minsk Convention states in Art. 15 that "[t]he central judicial authorities of the Contracting States shall provide one another upon request with information about the internal legislation in effect or which was in effect on their territories and about the practices of its application by the judicial authorities". This Convention is not restricted to Member States of the Commonwealth of Independent States (Art. 86). The text of the Minsk Convention can be found in Prel. Doc. No 27 of April 2005, "The Relationship between the Judgments Project and certain Regional Instruments in the arena of the Commonwealth of Independent States", prepared by E. Gerasimchuk for the Permanent Bureau, for the attention of the Twentieth Session of June 2005 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Ann. II. This document is available at: < www.hcch.net >, under "Conventions", then "Convention No 37", and "Preliminary Documents".

8) Please indicate, if applicable, in bullet form any shortcomings of these instruments:¹¹ **N/A**

Part II – Free public access to information on the content of the law

9) Does your State and / or Regional Economic Integration Organisation (“REIO”) provide online access to its legislation¹² through an official (governmental) website?

YES. Please specify whether this information is also provided in a non-official language and, if so, in which language(s):

NO. Does another, non-governmental body or organisation provide this information online (please specify which organisation or body)?

Individual agencies and departments of the federal government provide online access to legislation, such as www.ftc.gov, and also through sources such as the Library of Congress and its database, Thomas.loc.gov. State agencies and governments also maintain their own online sites and sources. In general these are offered in English.

10) Does your State and / or REIO respond to written or oral requests for information on the content and / or application of its law?^{13 14}

YES. Please specify for which areas of the law:

NO. Does another, non-governmental body or organisation provide this service (please specify which organisation or body)?

Generally there is no formal or centralized governmental mechanism for responding to requests for information on the application of law, although most federal agencies and many state ones do provide information to the general public concerning legislation applicable to their functions. In addition, federal and state authorities provide information for requests connected with fulfilling treaty obligations.

Universities (private and public), law firms, and academic centers also provide these services.

11) Are the services in Question No 10 available to people in other States?

YES. Is this service offered in any non-official language and, if so, in which?

¹¹ A list of Recommendations regarding day-to-day operations of the London Convention can be found in Prel. Doc. No 21 A, *supra*, note 2, Ann. 2, paras 62-63.

¹² In force or which was in force.

¹³ In this Part, and questions related thereafter in Part IV, the term “law” encompasses both internal (substantive) law and private international law, including relevant provisions in treaties and Conventions.

¹⁴ The areas could include the following subjects: the legal order in general; organisation of the courts of justice system; organisation of the administrative tribunals system; legal professions; access to justice including legal aid; jurisdiction of the courts / administrative tribunals; bringing a case to a court / an administrative tribunal; alternative dispute resolutions; procedural time limits; applicable law; service of documents; taking of evidence and modes of proof; interim measures and precautionary measures; enforcement of judgments; simplified and accelerated procedures; marriage and nullity of marriage; divorce and legal separations; parental responsibility; parent-child relationship; international child protection including child abduction and child adoption; protection of adults; maintenance (child support and other forms of family support); traffic accidents; products liability; other types of torts; consumer protection; commercial contracts; sale of goods; securities transactions; property; secured interests; inheritance; bankruptcy; choice of court agreements; or legalisation and / or certification of documents.

NO

In general, most of these services are readily to all persons (including those in foreign countries) but will usually be in English.

12) If yes, do people in other States have access to this service at the same costs as residents?

YES — but varies with the provider and terms on which it makes information available.

NO

13) Do you foresee the proportion of people in other States using these services increase in the future?

YES

NO

Please specify:

The need for access to information on the content of foreign law continues to increase. A mechanism to provide such access is likely to be used by a greater number of people if the services are available and if access is efficient, reliable, and cost effective.

Part III – Access to information on the content of foreign law at the litigation stage

14) Please indicate, where possible, a rough estimate of the percentage of civil and commercial law cases heard by the judicial authorities of your State in 2006 which required the application of foreign law and whether this percentage is likely to increase. If no estimate can be obtained for 2006, please refer to another year. Percentage: ____% (year: ____). Likely to increase: YES NO

The federal courts do not collect or maintain statistics on the number of cases requiring the application of foreign law. The number of cases that appear from a search of an independent database is not representative of the actual number of cases. In many cases, issues of foreign law are resolved in the lower courts prior to the final decision, and the final decision will not necessarily contain any discussion of this issue. In addition, many federal courts either accept the parties' agreement on the foreign law to be applied or, in the absence of satisfactory proof of foreign law, apply the forum law. If courts did not use forum law, the number of cases would be larger.

The actual number of cases does not necessarily reflect the amount at stake since the cost of proving foreign law, especially through the use of experts, can be significant enough to discourage controversies on foreign law, especially in smaller cases. If one considers the percentage in terms of monetary value of the case, the percentage for U.S. cases might be considerably larger.

The number of cases in which application of foreign law is an issue will continue to rise with the increasing number of transnational transactions, provided more of these disputes are resolved by courts rather than arbitration. In a rising number of international commercial transactions, the parties designate the applicable law, necessitating courts to determine and apply foreign law.

Cases in the United States which require the application of foreign law are not limited to those where foreign substantive law is at issue. Applying foreign law is often necessary in connection with procedural matters, such as motions for forum non conveniens, or in connection with the recognition of foreign judgments, especially when reciprocity is required.

In addition, the federal judiciary is being actively encouraged to address and use foreign law where appropriate.

- 15) Please indicate, if possible, the most common areas of foreign law applied by or invoked before the judicial authorities of your State.
- Marriage and nullity of marriage
 - Divorce and legal separations
 - Parental responsibility
 - Parent-child relationship
 - International child protection including child abduction and child adoption
 - Protection of adults
 - Maintenance (child support and other forms of family support)
 - Traffic accidents
 - Products liability
 - Other types of tort
 - Consumer protection
 - Commercial contracts
 - Sale of goods
 - Securities transactions
 - Property
 - Inheritance
 - Bankruptcy
 - Choice of court agreements
 - Other, please specify:

As indicated above, no statistics are maintained in federal or state court cases concerning this issue, and discussion regarding the use of foreign law appears in published decisions often only where there has been a dispute as to the foreign law to be applied. One area of increased concern in recent years is family law, which remains largely within the purview of state courts. However, the federal courts do not generally deal with issues of family law except in connection with international conventions when applicable.

- 16) Please identify, if possible, the States whose laws are most frequently applied by or invoked before judicial authorities in your State:

No such statistics are available, but a substantial percentage of transnational cases in U.S. courts involve Canadian parties, law, or transactions, which suggests that Canadian law would be one of the most frequently applied laws. Questions involving Mexican, UK and (more generally) European law often arise, and there have been a significant number of recent cases involving Russia. U.S. courts are also frequently called upon to decide issues under the laws of countries in Central and South America. As a practical matter, cases involving enforcement of foreign judgments against assets in the United States may present issues of foreign law.

17) In your State, a judicial authority ascertains foreign law (check more than one box if applicable):¹⁵

- a) *ex officio* without the assistance of an expert¹⁶ (e.g. law firm, specialised institute,¹⁷ university, government (i.e. specialised department or embassy), etc.)
- b) *ex officio* with the assistance of an expert
- c) by submitting, *ex officio*, a request for information under a bilateral or multilateral treaty (where applicable) n/a
- d) as the result of an (express) agreement of all parties, without the assistance of an expert
- e) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- f) as the result of an (express) agreement of all parties, with the assistance of an expert chosen (appointed) by all parties
- g) by submitting, as the result of an (express) agreement of all parties, a request for information under a bilateral or multilateral treaty (where applicable) n/a
- h) at the request of a party (without the objection of the other or another party) or all parties, without the assistance of an expert
- I) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by the judicial authority
- j) at the request of a party (without the objection of the other or another party) or all parties, with the assistance of an expert chosen (appointed) by one or all parties
- k) by submitting, at the request of a party (without the objection of the other or another party) or all parties, a request for information under a bilateral or multilateral treaty (where applicable) n/a
- l) by any other method (please specify):

In cases implicating foreign law, U.S. judges appear most likely: (1) to accept party-expert testimony at face value; (2) to analyze independently or determine a foreign legal issue, often using the context provided by party-experts; or (3) to discount the applicability of the foreign law.

Under Federal Rule of Civil Procedure 44.1, the potential methods for ascertaining foreign law are numerous, with the most frequent being by reference to treatises and testimony by experts, either chosen by parties or the court. In addition, a court may take judicial notice of the foreign law in some situations, especially when the foreign law is from another common law jurisdiction.

In addition, courts often consult reports by different U.S. federal agencies, including country specific reports, such as those prepared by the U.S. Department of State.

¹⁵ See Prel. Doc. No 21 A, *supra*, note 2, Ann. 2, paras 4-15, and Prel. Doc. No 21 B, *supra*, note 2, for a description of the status of and mechanisms to access foreign law in a sample of jurisdictions.

¹⁶ In this Questionnaire the term expert is used in its broadest sense; see also Questions Nos 21 to 23 for possible qualifications that may apply.

¹⁷ For example, the Swiss Institute of Comparative Law in Lausanne, the Max Planck Institute in Hamburg, the *Deutsches Notarinstitut* in Germany, the *Internationaal Juridisch Instituut* in The Hague, the CRIDON in France, or any relevant institute / office attached to a University.

18) Please rank in order of priority (1 being the highest) the sources consulted by judicial authorities in your State to ascertain the content of foreign law under any of the methods described in a), d) and h) of Question No 17:

- Internet (official legislation, case-law and legal publications websites)
- Internet (legislation, case-law and legal publications from private databases (as opposed to official databases))
- Local or personal library (local electronic databases)
- Local or personal library (printed legislation, case-law and legal publications)
- Other:

The major sources consulted are legal databases (such as Lexis and Westlaw) as well as some university databases and internet sources.

19) Please explain whether and, if so, how the judicial authorities in your State verify the reliability and / or authenticity of these sources and the information provided therein:

Under the federal rules of procedure, judges typically require parties to provide briefs addressing issues of foreign law and relevant supporting authorities for the court's review. The reliability and authenticity of sources is often verified by experts who are produced by the individual parties and provide affidavits or testimony.

Some federal judges on occasion appoint their own experts, although this is not the norm and probably occurs only in 5% of the cases involving Rule 44.1. In a limited number of cases, the court-appointed expert might review the conflicting testimony of party experts and produce an opinion for the court on the validity of these differing experts.

20) Where these sources and the information provided therein are not available in a language understood by the judicial authority, please describe the mechanisms used to address this difficulty. Description:

The response is purely ad hoc, depending on the judge and court. Translations are often used, and these are provided by treatises, parties, and/or experts. There is no uniform process for certification of translations.

21) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and I) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of your State? In the case of a specialised institute, does it need to meet certain requirements?

- YES
- NO

This process of judicial selection of an expert is not very common (see No. 19 above) but the expert would most likely to be a lawyer or jurist or governmental official where appropriate.

22) Where a judicial authority ascertains foreign law with the assistance of an expert (under any of the methods described in b), e) and I) of Question No 17), does this expert need to be a qualified lawyer or jurist in accordance with the law of the State whose laws are being ascertained? In the case of a specialised institute, does it need to meet certain requirements?

- YES
- NO

No such requirement exists as a matter of law, but a judge might well select a lawyer who is qualified under the relevant foreign law. Equally likely is the selection of an academic who is familiar with, and an expert in, the relevant foreign law but not necessarily qualified or licensed in the foreign jurisdiction.

23) Please specify which individuals and / or institutions may provide expertise under any of the methods described in b), e) and I) of Question No 17:

a) Local private expert (e.g. law professor, lawyer and / or jurist in private practice)

YES

NO

b) Foreign private expert (e.g. law professor, lawyer and / or jurist in private practice)

YES

NO

c) Local specialised institute

YES

NO

d) Foreign specialised institute

YES

NO

e) Local government (including embassies abroad)

YES

NO

f) Foreign government (including embassy in your State)

YES

NO

g) Member of the local judicial authority

YES

NO

h) Member of a foreign judicial authority

YES

NO

I) Other(s):

j) Which of the above is most often used?

All of the above may be possible with (a) and (b) being the most likely, and (b) having more credibility in most courts.

24) Please indicate who bears the costs of the expertise provided under any of the methods described in b), e) and I) of Question No 17:

The requesting judicial authority

The party that raised the application of foreign law

The party(ies) against whom costs will be awarded

All parties

Other:

In general, the party who has requested the application of foreign law would pay the costs of its own expert. If the opposing party presents evidence of foreign law, then each party would pay his own costs.

When the court appoints a neutral expert, either alone or in combination with the party-appointed experts, the cost is usually split between the parties.

25) Would your answers to Questions Nos 21-24 be the same for the expert referred to under f) and j) of Question No 17?

YES

NO, please explain:

In general, because of the adversarial nature of the U.S. system, the parties do not usually stipulate to the appointment of a shared expert as described in 17(f). If the court relies on one party-appointed expert, as in 17(j), that party usually pays the costs. The rest of the answers to Questions 21-24 remain the same.

26) Please describe, if possible, the common characteristics of requests for information on foreign law submitted under any of the methods described in c), g) and k) of Question No 17: The type of question asked; who most frequently asks questions (e.g., parties with too little or no resources to afford an expert); the reasons why questions are asked (e.g., no material available in a language understood by the judicial authority seized of the matter); etc.

Description: **N/A**

27) Please indicate whether judicial authorities in your State can transmit the request for information directly to a receiving agency in the State addressed under any of the methods described in c), g) and k) of Question No 17?

YES

NO, please explain:

N/A

28) If so, can the request be transmitted by regular non-secured e-mail?

YES

NO, please explain:

N/A

Part IV – Future development of an instrument and / or mechanisms to access information on the content of foreign law

29) In the light of your answers to this Questionnaire, are you of the view that the Hague Conference should develop a global instrument and / or mechanisms to access information on the content of foreign law?

YES

NO

Please explain:

The United States encourages the Hague Conference to continue its important work in exploring mechanisms to provide access to information on the content of foreign law, including consideration of a global instrument to facilitate that development. Such mechanisms should remain flexible to address both the needs of civil law and common law jurisdictions and the varied use of foreign law by these different systems.

For example, in considering the use of foreign law by a U.S. court, there might be a need in some circumstances for a general statement of the law, removed from its application to the specific facts of a case, such as with statutes of limitations. On the other hand,

often the determination for the common law system will need to be viewed within the specific context presented by the case in question. In that circumstance, a mechanism might be designed to include an opinion based on the application of the foreign law to stipulated facts, much the way that a federal court in the United States certifies a question of uncertain state law to the highest court of one of the individual states. The certification process, available in some form in over forty-four of the states, usually requires “the facts relevant to the [certified] question, showing fully the nature of the controversy out of which the question arose.” Uniform Certification of Questions of Law [Act][Rule] (1995), 12 Uniform Laws Annotated (1996). (A copy has been provided to The Hague Conference along with this response.)

Thus, we would actively encourage the Hague Conference to explore both general statements of the law and certified questions of application of law to facts as means to access foreign law.

Some scholars, lawyers and jurists have expressed concern about avoiding the potential for bias or unrepresentative opinions. To minimize this possibility, any mechanism might place the responsibility for providing information on a country’s law on (1) a judge assigned to provide responses to requests for information about that country’s law; (2) an expert or experts appointed by the country; (3) an institute modelled on, for example, the Max Planck Institute; and/or (4) an expert or experts appointed by the home court or parties.

With any of these mechanisms, there would need to be a system to funnel requests to the appropriate source. For example, in the United States, a few scholars have suggested directing all incoming requests to a neutral entity, such as the Federal Judicial Center, which could then summon a panel of experts to provide an opinion for the specific request. The Federal Judicial Center could maintain lists and databases of experts which could then be used to impanel appropriate experts. A case-tailored panel would be preferred to a set list of experts. This mechanism could provide a more balanced answer than one specific judge using a coterie of his/her favorite experts.

The United States could also see the value of creating a database of experts on particular subjects for various countries, provided that any mechanisms would address the potential for bias or distortion, as mentioned above.

In designing such mechanisms, the United States would encourage the Hague Conference to consider means to blend the civil law and common law traditions, including how such mechanisms might be used in an ongoing proceeding and at what point opinions could be meaningful. For example, would one want to wait for a determination of any issues of fact before seeking the appropriate foreign law?

Such mechanisms would need to ensure prompt and informative responses. At the same time, the responses themselves should be non-binding in the context of the specific proceeding for which the foreign law was sought (in other words, the information provided would constitute prima facie evidence subject to potential rebuttal). The

usefulness of any opinion on foreign law could depend on the persuasiveness of the reasoning in the opinion and the sources on which the opinion relies. The costs associated with such mechanisms would also need to be appropriate to the smaller litigations where party-appointed experts are both costly and time-consuming.

The United States would also encourage the Hague Conference to consider simpler mechanisms that encourage the judiciary in one state to communicate with those in another, even by informal channels.

The United States strongly supports the efforts of the Hague Conference to continue to explore the possibilities for a global instrument or mechanisms for access to information on foreign law and believes this project deserves the support of all Members. This project merits the preparation of an appropriate analytical study by the Permanent Bureau, taking into account the various responses to this Questionnaire, that could serve as the basis for the next meeting of experts.

30) If the Hague Conference were to develop a global instrument to access information on the content of foreign law:

a) Would you be in favour of a flexible instrument in particular with respect to:

I) the availability of several channels through which information on foreign law can be sought and in relation to experts from whom information can be obtained?

YES

NO

Please explain:

See No. 29 above.

ii) the use that may be made of each such channel and expert?

YES

NO

Please explain:

iii) the availability of information technologies to ensure a speedy process of the requests and to alleviate language barriers?

YES

NO

Please explain:

b) Should the information received provide an objective and general description of the law in the foreign State, including references to relevant case-law (as opposed

to a specific answer as to how the foreign law should be applied to the issue(s) at stake)?

YES

NO, please explain:

See No. 29 above.

c) Should the information received be non-binding (as opposed to binding)?

YES

NO, please explain:

d) Should this instrument and / or these mechanisms be general in order to permit access to different areas of foreign law (as opposed to being limited to certain area(s) of the law)?

YES

NO, please explain:

e) Should this instrument and / or these mechanisms contain provisions on legal assistance to accommodate individuals with little or no resources?

YES

NO, please explain:

While the United States might be able to establish agreed procedures for arriving at the costs of these information requests, it is highly unlikely that the United States at this time would participate in a mechanism that requires government funding of responses.

f) Should this instrument and / or these mechanisms be extended to notaries and other professionals who need to have access to the content of foreign law in contexts other than litigation (*e.g.* in relation to successions)?

YES

NO, please explain:

Certainly in this initial phase, the United States would encourage limiting the scope to litigation proceedings, with the possibility at some later date of extending the mechanisms to other uses.

31) If this is not yet the case for your State / REIO, are you of the opinion that it would be useful to make information on the content of the law of your State / REIO available online in a central database?

YES

NO

Please explain.

A centralized, comprehensive database of domestic law could have great utility in many situations. However, in light of the decentralized nature of the U.S. legal system (including the 50 states as well as the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, etc.), the viability of a single, central database providing comprehensive coverage of all U.S. domestic law for present purposes is questionable. At the same time, it should be emphasized that various commercial services are available, and both federal and state governments are increasingly providing databases and internet sources for significant legislation and related case law.

32) Are you of the opinion that it would be useful to have information on the content of the law of your State / REIO available online in a standard electronic format (e.g. in the form of country profiles that are based on a pre-established, harmonised structure) available in English and French (or other language(s)) in addition to its language of origin?

YES

NO

Please explain.

See the response to Question 31 above.

33) If information on the content of the law of your State were to be made available worldwide in either of the forms mentioned in Questions Nos 31 and 32, please identify for which of the following subjects it would be most valuable?

Legal order in general

Organisation of the courts of justice system

Organisation of the administrative tribunals system

Legal professions

Access to justice including legal aid

Jurisdiction of the courts / administrative tribunals

Bringing a case to a court / an administrative tribunal

Alternative dispute resolutions

Procedural time limits

Applicable law

Service of documents

Taking of evidence and modes of proof

Interim measures and precautionary measures

Enforcement of judgments

Simplified and accelerated procedures

- Marriage and nullity of marriage
- Divorce and legal separations
- Parental responsibility
- Parent-child relationship
- International child protection including child abduction and child adoption
- Protection of adults
- Maintenance (child support and other forms of family support)
- Traffic accidents
- Products liability
- Other types of tort
- Consumer protection
- Commercial contracts
- Sale of goods
- Securities transactions
- Property
- Secured interests
- Inheritance
- Bankruptcy
- Legalisation and / or certification of documents
- Notarial acts or certificates
- Other, please specify:

See the response to Question 31 above.

34) Are you of the opinion that the instrument identified under Question No 29 should be developed in combination with either of the instruments described under Questions Nos 31 and 32?

YES

NO

Please explain.

See the response to Question 31 above.

35) Other comments on the models proposed in Preliminary Document No 21 A, any other model, or on a possible future instrument in this field:¹⁸

An Addendum to this response provides the following documents:

¹⁸ See Prel. Doc. No 21 A, *supra*, note 2, for a description of the models: "Information Sheets and Country Profile Model"; "Network of Experts and Specialised Institutes Model"; "Direct Judicial Communications Model"; and, "Revision of the Co-operative Mechanisms of the London and Montevideo Conventions". See also *ibid.*, Ann. 2, paras 54-65.

- (1) Report (2006) from the Committee on International Commercial Disputes of the Association of the Bar of the City of New York; and**
- (2) Uniform Certification of Questions of Law [Act][Rule] (1995), 12 Uniform Laws Annotated (1996).**